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How to Fix Texas' *Kelo* Problem

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Recommendations

- Define public use.
- Ban takings not for a public use.
- Make it easier to challenge determinations of public use.
- Stop government land speculation.

The Problem with *Kelo*

The U.S. Supreme Court's infamous 2005 *Kelo* decision was the culmination of a series of federal and state court decisions that have essentially rewritten the Takings Clauses of the U.S. and Texas Constitutions. In essence, *Kelo* says that private property is not a fundamental civil right, but a privilege granted by the state at its sole discretion.

The practical problem with the *Kelo* decision is the weaknesses in Texas eminent domain law that it exposed. Before *Kelo*, the property rights of Texans were somewhat shielded from these inherent flaws in Texas law. Whatever the law might have said, there was no general understanding that the U.S. Constitution's Public Use Clause allowed the government to take any property from any person for any public purpose and give it to someone else. There were limits in place. However, post-*Kelo*, everyone's property was up for grabs.

That is still the case in Texas, which has fallen behind many other states in protecting property rights—unlike our national leadership role in tort reform and deregulation. The first attempt to fix our *Kelo* problem in 2005 missed the mark, and legislation that would have better addressed the issue didn't quite make it in 2007—one bill was vetoed and another died in conference committee.

To finally fix Texas' *Kelo* problem, we need to do three things: 1) narrowly define public use and make sure the courts and governments are paying attention to the new definition, 2) eliminate the ability of governments to use blight designations as an end run around the ban for takings for economic development purposes, and 3) end government land speculation by requiring that property not put to the public use for which it was taken within five years, be offered for sale back to the original owner at the price the government paid for it. Only with these reforms will Texans be assured that cities like El Paso, with its downtown redevelopment plan in place, won't use eminent domain to achieve the dreams of the well-connected at the expense of everyone else.

Fixing the Public Use Problem

Kelo exposed years of jurisprudence in Texas that has undermined the standard in the Texas Constitution that property be taken only for a public use. While the federal courts were busy changing the U.S. Constitution to allow property to be taken for public purposes or benefits, the Texas courts continued to require a public use. Unfortunately, as the Texas Supreme Court noted, Texas courts have "adopted a rather liberal view as to what is or is not a public use." Essentially, public use in Texas has been construed as including the concepts of public purpose and benefit.

To undo the devastating effects of years of federal and state jurisprudence in this area, three key legislative changes are vital:

- The meaning of public use should be restored to its traditional meaning through a definition in statute.
- Texas statute should contain a prohibition on takings unless they are for a public use. Since the constitution already requires this, one might think this is redundant. Unfortunately, experience shows that not to be the case.
- Governments attempting to take property via eminent domain should bear the

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burden of proving the taking is for a public use. Today, the opposite is the case, and landowners have little cause for hope when challenging a taking on these grounds. Not only is the deck stacked against, but the heavy burden of challenging a taking on public use grounds usually makes the change cost prohibitive.

Definition of Public Use

Here are two alternative definitions of public use. Either would be suitable for property owners in Texas:

Public Use: Definition 1

- *"Public use means a use of property that allows the state, a political subdivision of the state, or the general public of the state to possess, occupy, and enjoy the property."*

- From HB 2006, 80th Texas Legislature

Public Use: Definition 2

- *"Public use means that the state or a political subdivision of the state must own, or the general public of the state must have the legal right to use, any taken, damaged, or destroyed property."*

- See Clarence Thomas' *Kelo* dissent, p. 4.

The above definitions of public use include any legitimate use of eminent domain authority today, including that by private companies to acquire right-of-way for the construction of transmission facilities such as power lines, railroads, and pipelines. However, some of these private entities may not believe this to be the case, and might oppose these definitions. To overcome this opposition, the above definitions of public use could be modified as follows:

Modification of Public Use in Statute (Government Code, Chap. 2206)

- *Sec. 2206.001. DEFINITION OF PUBLIC USE. Except as otherwise provided by this chapter, "public use," with respect to the use of eminent domain authority, means a use of property, including a use described by Section 2206.051(c), that allows the state, a political subdivision of the state, or the general public of the state to possess, occupy, and enjoy the property.*

- This language is taken from HB 2006, 80th Texas Legislature.

Modification of Public Use in the Texas Constitution (amended on to the end of Article I, Section 17, Texas Constitution)

- *Public use means the possession, occupation, and enjoyment of property by the state, a political subdivision of the state, or the general public of the state, including the use of the property for the purpose of providing utility or common carrier services to the general public of the state; or*

- *Public use means a use of property that allows the state, a political subdivision of the state, or the general public of the state to possess, occupy, and enjoy the property. Public use also means ownership or possession of property for the purpose of providing utility, fuel, or transportation services to the public.*

- This language is based on existing statute, either Sec. 2206.051, Government Code, or other section of code referenced in Sec. 2206.051.

- If the state, or a subdivision of the state, is going to own the property and use it for a legitimate public use, there is no need to list those uses—which are clearly identified in case law—in the constitution. This would avoid the problem found in Sec. 2206.051 (c), which turned into a laundry list of uses by government entities looking to codify, or in some cases expand, their authority to use eminent domain.

Current Legislation: HB 402 by Rep. Beverly Woolley; HB 1483 by Rep. Jim Pitts; and SB 18 by Sen. Craig Estes all contain adequate definitions of public use.

Ban on Takings for Other than a Public Use

Sec. 2206.051 (b), Government Code, bans takings for a number of reasons. But it does not ban takings for other than a public use, even though a taking for a public use is the only allowable taking under the Texas Constitution. So regardless of whether public use is defined in statute or the constitution, the taking of land for other than a public use should be prohibited in statute.

Statutory Ban on Takings for Other than a Public Use

- *A governmental or private entity may not take private property through the use of eminent domain if the taking is not for a public use.*

- Taken from HB 2006, 80th Texas Legislature (R)

- This language may be added as Subsection (4) to Sec. 2206.051 (b), Government Code, as follows: *(4) is not for a public use.*

- Or it may be substituted in place of the three current subsections in Sec. 2206.051 (b) that ban takings for (1) conferring a private benefit on a particular private party; (2) a public use that is merely a pretext to confer a private benefit on a particular private party; and (3) for economic development purposes. With a good definition of public use, and a ban on takings that are not for a public use, the prohibitions on takings for these reasons would no longer be necessary.

Current Legislation: HB 402 by Rep. Beverly Woolley; HB 1483 by Rep. Jim Pitts; and SB 18 by Sen. Craig Estes all contain adequate bans on takings that are not for a public use.

Determination of Public Use

While challenges to takings on the grounds of compensation occur relatively often, challenges based on determinations of public use and necessity are much less common. This is because current Texas jurisprudence requires the courts to offer great deference to governmental determinations of public use and necessity. Therefore, as long as a government entity follows proper procedures, it is very difficult if not impossible for a property owner to challenge these determinations in court.

In one case where a property owner attempted to make such a challenge, a Texas appeals court said that the "condemnor's discretion to determine what and how much land to condemn for its purposes—that is, to determine public necessity—is nearly absolute. … Courts do not review the exercise of that discretion without a showing that the condemnor acted fraudulently, in bad faith, or arbitrarily and capriciously, i.e., that the condemnor clearly abused its discretion." In other words, the courts cannot even look at the facts of the case absent extraordinary circumstances. The standard for examining public use determinations is not as bad, but still weighted too heavily in favor of condemning entities.

Senate Bill 7, 79th Texas Legislature (2), tried to improve this situation. But the language is too narrowly tailored to allow adequate judicial review of determinations of public use. This issue can be addressed in statute, in the constitution, or in both. The following language shows two different approaches to improving the ability of property owners to receive proper judicial review of government determinations of public use and necessity.

Statutory Language Improving the Determination of Public Use and Necessity (amending Sec. 2206.051 (e))

- Sec. 2206.051 (e) The determination by the governmental or private entity proposing to take [~~the~~] property *for a public use* [~~that the taking is for a public use does not involve an act or circumstance prohibited by Subsection (b)~~] does not create a presumption with respect to whether the *contemplated use is truly public and necessary* [~~taking involves that act or circumstance~~].

Constitutional Language Improving the Determination of Public Use and Necessity (amended on to the end of Article I, Section 17, Texas Constitution)

- *Whenever an attempt is made to take, damage, or destroy property for a use alleged to be public, the condemnor must prove by clear and convincing evidence that the contemplated use is truly public and necessary, and it shall be a judicial question, determined as such without regard to any legislative assertion that the use is public and necessary.*

Current Legislation: No legislation currently contains adequate language on the presumption of public use and necessity.

Fixing the Blight Designation Problem

New London, Connecticut and the (former) Poletown neighborhood in Detroit, Michigan are just two examples of where governments have taken private land from one person and given it to a more politically connected person (or corporation) in the name of urban renewal and economic development.

Current Texas law generally bans the use of eminent domain for economic development purposes. However, it gives cities a huge loophole by allowing an exception to this ban which allows takings when "economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas." This exception opens the door to *Kelo*-style takings right here in Texas. In fact, the city of El Paso is poised to do just this through its downtown redevelopment plan.

El Paso's Downtown Redevelopment Plan relies heavily on amassing an inventory of tracts of various sizes—which today are filled with housing and businesses—that can be

used to attract developers and retailers to the area, especially in the designated Redevelopment District. To "facilitate and accelerate the implementation of the Plan," the City adopted a Tax Increment Reinvestment Zone (TIRZ) and in partnership with "a real estate investment, management and operating company" in the form of a Real Estate Investment Trust (REIT) to acquire downtown real estate assets … either through outright purchases of property or contributions by landlords."

A TIRZ is created under the Tax Increment Financing Act, Chap. 311 of the Texas Tax Code. Under Chap. 311, a city can use the power of eminent domain to acquire property to carry out the plan developed in conjunction with the TIRZ. Though SB 7 prohibits a city from using eminent domain for economic development purposes, Texas courts have held that the clearing of slum and blighted areas is *per se* a public use, both under the Texas Urban Renewal Law and the Tax Increment Financing Act, even if the specific property itself is not blighted. So, El Paso—along with every other city in the state—can use clearing of slum and blighted areas as a reason to exercise eminent domain authority to take almost any property. All they have to do, according to the U. S. Supreme Court, is have a plan in place.

To stop the ability of El Paso and other cities to declare and take perfectly suitable properties as blighted, three key legislative changes should be made:

- The confusing ban on takings for economic development—along with the exception for slum and blight—should be eliminated.

- Texas law should be changed that property can only be declared blighted on an individual basis based on the characteristics of each individual property.

- Criteria for designating property blighted should be stringent. Only if a property meets at least four of the following standards should it be able to be designated as blighted:
  - the property contains uninhabitable, unsafe, or abandoned structures;
  - the property has inadequate provisions for sanitation;
  - there exists on the property an imminent harm to life or other property caused by fire, flood, hurricane, tornado, earthquake, storm, or other natural catastrophe;
  - the property has been the location of substantiated and repeated illegal activity of which the property owner knew or should have known; or
  - the property is abandoned and contains a structure that is not fit for its intended use because the utilities, sewerage, plumbing, heating, or a similar service or facility of the structure has been disconnected, destroyed, removed, or rendered ineffective.

Fixing the Government Land Speculation Problem

Another problem with eminent domain law in Texas is that once a property has been condemned, it can be used for just about any purpose—the condemnor is not required to use it for the purpose it was taken. There is a provision in Texas law that allows for the repurchase of property if the public use for which it is taken is cancelled. However, that provision applies for only 10 years after the taking, and the property must be purchased back at the current market value at the time the use was cancelled, not the price paid to the former landowner.

The case of Larry Raney in Rowlett, TX highlights this problem. Though his family's homestead of three generations was taken by the city of Rowlett over four years ago for "possible expansion of city park land," it is being used today only as a vacant lot. Though a portion of the property is designated on city planning maps as a park, a nearby resident was unaware that she lived across the street from a park. Additionally, part of the land is now zoned for new residential development.

To end land speculation by local governments, the following legislative changes should be made:

- Require governments to offer for sale to the original owner any property not used for the public use it was taken within five years.

- The property should be offered for sale at the price paid by the government entity—minus any taxes paid on the original proceeds. ✯