TEXAS PUBLIC POLICY FOUNDATION
BillAnalysis

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Eminent Domain: SJR 42

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What Public Use Isn't

SJR 42 takes the negative approach to defining public use. It says, "'public use' does not include the taking of property by the state or a political subdivision of the state for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues."

The problem with this language is that it does nothing to eliminate the loophole in current law that bans takings "for economic development purposes, unless the 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." (Sec. 2206.051 (b) (3), Government Code.)

This allows cities to take essentially any property they want by declaring an area—not specific properties, but entire blocks—blighted and placing it within a Tax Increment Reinvestment Zone (TIRZ). At that point, cities can then take any property in the area using eminent domain for "secondary" economic development purposes such as increasing tax revenues, replacing low-income housing with high-end condos, and swapping out the old retail establishments that catered to the previous residents with a fashion mall catering to the new residents of the area. El Paso already has all this in place and will be able to use this power anytime if the Legislature leaves Austin in May without changing the law. Other cities can avail themselves of this ability too.

Though this statute appears to prohibit a city from engaging in *Kelo*-style takings, 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. SJR 42 does change this, and will not stop *Kelo*-style takings in Texas.

Banning Takings for "Primarily" Economic Development Purposes

There are several problems with the approach of banning takings in the Texas Constitution only when the takings are for the "primary" purpose of economic development.

First, it isn't an outright ban on transfers. It is not obvious that there is ever any reason for an entity to take land via eminent domain then transfer it to a third party. Given the thousands of entities that have eminent domain authority in Texas, it is likely that the third party—be it public or private—doesn't have the power of eminent domain itself because the Texas Legislature has not seen a need to confer that authority upon it. If an entity needs that authority, it should come to the Texas Legislature rather than seeking an entity with eminent domain authority to do it for them.

Second, today a property owner could argue that the statute allowing takings for secondary economic development purposes is unconstitutional. But if the language of SJR 42 is added to the constitution, it would make it much more difficult to convince a court with this argument.

Similarly, if Texas adopts a positive definition of public use in statute, it would add another criterion that would have to be met before a taking could proceed. A landowner could then argue that, even if a blight taking passes the test of being secondarily for economic development purposes, it doesn't meet the standard under the positive definition of public use. The language of SJR 42 could undermine this argument.

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Given these reasons, the Texas Public Policy Foundation has concluded that SJR 42 does nothing to advance property rights in Texas.

A Positive Definition of Public Use

The best way to improve SJR 42 would be to eliminate the current language and add a positive definition of public use. A positive definition tells the courts exactly what the state means when it says "public use" and will go a long way toward eliminating the ability of government to engage in *Kelo*-style takings in Texas. The courts need this plain talk because for years they have been undermining the commonly understood meaning of "public use" in place when the Texas Constitution was established in the 1870s. Here is an example:

> 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.

Eliminating with the Transfer of Taken Lands to a Third Party

While the positive definition is the best approach for securing protecting property rights, another approach is to address the symptom, i.e., the taking of lands by a government entity from one property owner and transferring them to another property owner to use in a way that the government believes benefits the public. This is the same approach taken in SJR 42.

Several states have done this by taking various approaches to banning the transfer of land taken by eminent domain. The difference in these states from SJR 42 is that they do not refer to the "primary" purpose of economic development and so do not create the challenges addressed above. Here are three examples:

Florida (HJR 1569 in 2006)

"Private property taken by eminent domain pursuant to a petition to initiate condemnation proceedings filed on or after January 2, 2007, may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature."

Michigan (Senate Joint Resolution E, 2005)

"'Public use' does not include the taking of property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues.... In a condemnation action, the burden of proof is on the condemning authority to demonstrate, by a preponderance of the evidence, that the taking of private property is for a public use, unless the condemnation involves a taking for the eradication of blight, in which case the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use."

New Hampshire (CACR 30, 2006)

"No part of a person's property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property."

Similar language can be added to the Texas Constitution that would eliminate *Kelo*-style takings in Texas once and for all. It would look something like this:

> (b) Private property taken by eminent domain may not be conveyed or leased to a natural person or private entity for 15 years, except to a natural person or private entity:
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> (1) that occupies, pursuant to a lease, an incidental area of a public property or a public facility; or
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> (2) for use as a road or other right-of-way, pursuant to a lease, that is open to the public for transportation, whether at no charge or by toll. ✯

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