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Possession, Occupation, and Enjoyment: Restoring the Meaning of Public Use

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Cities and counties oppose using "possession, occupation, and enjoyment" because it would lead courts to stop the practices that the cities and counties want to continue: using eminent domain to take property from one property owner and give it to another to enhance local government tax revenue.

In the four years since *Kelo*, the debate about how to respond to the decision has taken place between two widely disparate points of view. One side finds the decision a radical break with the past:

> Today the Court abandons [a] long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.[1]

While the other side claims *Kelo* to be a mere restatement of the status quo:

> [Kelo] simply confirms what cities have known all along: under the Fifth Amendment to the U.S. Constitution, economic development can be as much a "public use" as a road, bridge, or water tower.[2]

In one sense, both sides are correct. *Kelo* completely undermines Americans' private property rights as enshrined in the U.S. Constitution's Takings Clause in the Fifth Amendment. On the other hand, many courts have been allowing *Kelo*-style takings for the last 50 years or so.

The tie breaker is two-fold. First, never before *Kelo* had the U.S. Supreme Court found, as one observer put it, that "purely hypothetical economic development is the only justification necessary to condemn property."[3] Secondly, the recent trend of the courts' interpretation of public use in no way matches the historical and original meaning.

What is Public Use?

The answer today depends on who you ask. The *Kelo* court has "embraced the broader and more natural interpretation of public use as 'public purpose.'"[4] But for most of our nation's history, the answer was very different. Here are a few citations that clearly show what public use meant in 1914:

> To constitute a "public use," the public must be concerned in the use, and it must be public in fact. *Cloth v. Chicago*, R. I. & P. R. Co., 132 S. W. 1005, 1006, 97 Ark. 86, Ann. Cas. 1912C, 1115;
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> A "public use" must be either a use by the public or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public- interest or general prosperity of the state. *Healy Lumber Co. v. Morris*, 74 Pac. 681, 685, 33 Wash. 490, 63 L. R. A. 820, 99 Am. St. Rep. 964;
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> The term "public use" … is not that use which either the Legislature or the courts may deem a public benefit or advantage, but means the same as "use by the public," and is synonymous with the employment or application by the public of the tiling taken. It means that, though property is vested in private individuals or corporations, the public yet retains certain definite rights to the use or employment of the property. *Borden v. Trespalacios Rice & Irrigation Co.* (Tex.) 82 S. W. 461, 465.[5]

Public use meant a use of property by the public, either directly by the government or indirectly through common carriers like railroads and utilities.

Possession, Occupation, Enjoyment

Over time, the courts developed a shorthand way of describing what it meant by public use, "possession, occupation, and enjoyment." This term combines three distinct but complementary terms that have their own legal meanings:

> Black's Legal Dictionary defines "possession" as "the right under which one may exercise control over something to the exclusion of all others." Black's Law Dictionary, 3d ed. 546. "Occupation" signifies "possession, control, or use of real property." *Id.* at 503. "Enjoyment" is merely a legal term of art indicating "possession and use." *Id.* at 242.[6]

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Combined, the individual terms reinforce each other and point clearly toward the intended meaning of public use.

The source of possession, occupation, and enjoyment goes back to 1883:

> Older cases, such as United States v. Dieckmann, 101 F.2d 421, 424 (7th Cir. 1939) Portage Twp Bd. of Health v. Van Hoesen, 49 N.W. 894, 896 (Mich. 1891), pick up on this phrase from a treatise on constitutional law: "The public use implies a possession, occupation and enjoyment of the land' by the public or public agencies, and it is not enough 'that the public would receive incidental benefits, such as usually spring from the improvements of lands or the establishment of prosperous private enterprises." Cooley's Constitutional Limitations (7 ed.), 766.[7]

Today this term is well understood by the courts and completely non-controversial. Here is one example of its use in a recent case:

> We have stated that: "the public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it [from] the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it."[8]

Interestingly enough, the court employed the term here in a case in which it justified the taking in question.

Defining Public Use

Despite the cities' position, the public—and it seems the Texas Legislature—believe the courts haven't gotten the meaning of public use right yet. The outrage from the public over *Kelo* was almost universal. And the Legislature has now acted twice to undo some of the damage that *Kelo* wrought. In 2005, the Legislature banned takings for economic development purposes, except in the case of blight. In 2007, it defined public use in terms of possession, occupation, and enjoyment when it passed HB 2006 (HB 2006 was vetoed).

The same definition that the Legislature passed two years ago was originally included in SB 18, but was recently removed. And HJR 14 employs the same term in its attempt to restore limits on what can be considered public use. Yet opposition to these efforts has been raised in recent public testimony.

In front of the Senate State Affairs Committee on May 21, representatives of cities and counties testified against HJR 14 because of its use of possession, occupation, and enjoyment. Yet unlike in the past where the term had been criticized because of its ambiguity, the representatives opposed it at this hearing because of its clarity. It was conceded that the term was well understood, but it was opposed because that understanding would lead courts to stop the practices that the cities and counties want to continue to engage in: using eminent domain to take property from one property owner and give it to another to enhance local government tax revenue.

Texas still has a *Kelo* problem. It hasn't been fixed. Moving forward, there are two directions to choose from, just as there have been two sides to the debate.

One way would be to accept the language suggested by the representatives of the cities and counties at the State Affairs committee meeting. They suggested several alternatives for amending HJR 14. But none of them would end *Kelo*-style takings, but would instead maintain the status quo.

To fix *Kelo*, the Texas Legislature will have to speak clearly to the Texas courts in terms they can understand. Using possession, occupation, and enjoyment in both HJR 14 and SB 18 to recapture the traditional meaning of public use will provide the clarity the courts need to start issuing opinions like this:

> "The 'public use' implies possession, occupation, and enjoyment of the land by the public at large or by public agencies, and due protection of the rights of private property will preclude the government from seizing it in the hands of the owner and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter is devoted." Riley v. Charleston Union Station Co., 51 S. E. 485, 496, 71 S. C. 457, 110 Am. St. Rep. 579 (quoting and adopting definition in Cooley, Const. Lim. 654).[9]

After a few decisions like this in Texas, the right to own and control one's property will again be considered the fundamental right that it truly is. ★

[1] *Kelo v. New London* (04-108) 545 U.S. 469 (2005), dissent by Justice Sandra O'Connor (2005).
[2] Texas Municipal League, TML Online, http://www.tml.org (July 1, 2005).
[3] Clark Neily, *Restoring Justice: Protecting Private Property Rights from Eminent Domain Abuse*, Texas Public Policy Foundation (May 2006).
[4] *Kelo v. New London* (04-108) 545 U.S. 469 (2005).
[5] *Judicial and Statutory Definitions of Words and Phrases*, West Publishing Company (1914).
[6] Jay Wiley, legal memo, Texas Public Policy Foundation (May 2009).
[7] Matt Miller, legal memo, Institute for Justice, Texas Chapter (May 2009).
[8] *Ottofaro v. City of Hampton*, 265 Va. 26 (Va. 2003).
[9] *Judicial and Statutory Definitions* (1914).

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