TEXAS PUBLIC POLICY FOUNDATION

EMINENT DOMAIN

BALANCING THE SCALES OF JUSTICE

May 2010
Ryan Brannan & Bill Peacock
Center for Economic Freedom
www.texaspolicy.com

Texas Public Policy
FOUNDATION

May 2010
Ryan Brannan & Bill Peacock
Center for Economic Freedom
Texas Public Policy Foundation

Table of Contents

Executive Summary 3
Introduction 3
Previous Efforts at Reform 4
Private Property Rights & Eminent Domain in Texas Today 6
SIDEBAR: Regulatory Takings 7
Recommendations 10
Conclusion 11
Endnotes 11
Appendix I: Public Use 12
Appendix II: Buy Back 13
Appendix III: Burden of Proof 15

"All power is inherent in the people … they are entitled to freedom of person, freedom of religion, freedom of property, and freedom of press."

~Thomas Jefferson

Executive Summary

Texas began the journey of restoring the property rights of its citizens in 2005, shortly after the infamous *Kelo v. New London* decision by the U.S. Supreme Court. The starting point in the legislative effort to reform eminent domain abuse was Senate Bill (SB) 7. Because there was little time to devote to eminent domain reform during the special sessions on education, legislators sought to pass some immediate, albeit limited, protections for private property rights in order to allow time for thorough study of this issue. While SB 7 banned most takings for economic development purposes, it left a huge loophole that allowed these takings when an area is found to be blighted.

Since 2005, there have been various attempts to reform eminent domain by addressing the issues of public use, compensation, the blight loophole, repurchase of non-used property, and the presumption granted by courts to condemnors. All the bills have failed for various reasons, but two constitutional amendments passed: House Joint Resolution (HJR) 30 allows the state to sell property back to a previous buyer for the price paid for the property when it was taken, and HJR 14 defined public use and closed most of the blight loophole.

There is much yet to be done. Property owners still have an uphill battle to protect their property rights in Texas courts. Needed reforms include:

- Prohibit in Statute Takings That Are Not for a Public Use.
- Allow Previous Property Owners the Right to Repurchase Land Not Used for the Stated Public Use.
- Remove the Presumption Condemnors Receive on Questions of Public Use and Necessity.

Introduction

The protection from private property being taken except for a public use and without just compensation is an inalienable right guaranteed to citizens in both the United States and Texas constitutions. As stated in the United States Constitution:

> nor shall private property be taken for public use, without just compensation.[1]

The Texas Constitution also creates a strong emphasis on protecting property rights:

> No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made ...[2]

The inclusion of property rights into these constitutions was not by accident. The right to hold private property was believed crucial in the development of our country. As Thomas Jefferson

stated, "all power is inherent in the people … they are entitled to freedom of person, freedom of religion, freedom of property, and freedom of press."[3] In addition, Thomas Paine cited property as chief among inherent individual rights.[4]

However, over time, the application of these fundamental rights in law has been scaled back. Legislative acts and the courts' constructions of those acts have almost always been in favor of expanding the government's ability to take property.[5] This includes the benchmark *Kelo* decision, which led many states to begin looking to restore private property rights that have been guaranteed since the inception of our country and our state. Texas is one of those states.

As chronicled below, Texas began the journey of restoring the property rights of its citizens in 2005, shortly after the *Kelo* decision. However, there is much yet to be done. Property owners still have an uphill battle to protect their property rights in Texas courts.

Previous Efforts at Reform

2005

The starting point in the legislative effort to reform eminent domain abuse was Senate Bill (SB) 7. Because there was little time to devote to eminent domain reform during the special sessions on education, legislators sought to pass some immediate, albeit limited, protections for private property rights in order to allow time for thorough study of this issue and address it more fully in 2007.[6]

SB 7 included several important provisions, including:

- Prohibiting the use of eminent domain for "economic development" purposes, unless the economic development is a secondary purpose resulting from urban renewal activities to eliminate slum or blighted areas. Sec. 2206.001(b)(3), Government Code.
- Under limited circumstances, removing the deference given to an entity exercising eminent domain when it makes a determination of the legality of its taking. Sec. 2206.001(e), Government Code.
- Creating a joint interim committee "to study the use of the power of eminent domain."

2007

Two years later, more comprehensive reform was attempted with House Bills (HB) 2006 and 3057, and House Joint Resolution (HJR) 30. HJR 30 passed the Legislature and was subsequently approved by the voters. However, HB 2006 was vetoed, and HB 3057 died on a point of order.

HJR 30 allowed a government entity to re-sell an acquired property to the previous owner at the price the entity paid at the time of the acquisition if the public use for which the property was acquired is canceled, no actual progress is made toward the public use, or the property is no longer necessary for the public use.

HB 2006 addressed such issues as public use, compensation, and making the condemnation process fairer for property owners. Provisions of HB 2006 included:

- Incorporating into statute the constitutional ban on taking private property through the use of eminent domain if the taking is not for a public use. Sec. 2206.051, Government Code.
- Allowing private property owners to buy back their land at the price it was taken if the public use for which the property was taken is canceled, or if the entity fails to begin operation or construction of the project before the 10th anniversary of the taking. Sec. 21.101(a) & (b), Property Code.

HB 3057 addressed the misuse of blight designation in the eminent domain process, specifically keeping condemnors from declaring entire areas to be blighted or slums, then taking all the land within the area even if individual properties were not blighted. Its provisions included:

- Requiring that designations of blight be property specific. Sec. 373.006, Local Government Code.
- Setting up specific criteria to determine what property is blighted in lieu of the current easily manipulated language that allows for most any property to fall under the definition of slum or blight. Sec. 374.003, Local Government Code.

2009

SB 18, HB 417, and HJR 14 covered the issues from previous sessions. Only HJR 14 was passed into law.

SB 18 primarily incorporated the provisions that passed in the 80th session under HB 2006. SB 18 was an omnibus bill, whose provisions included:

- Providing a definition of public use. Sec. 2206.001, Government Code.
- Incorporating the constitutional ban on taking private property through the use of eminent domain if the taking is not for a public use. Sec. 2206.051, Government Code.
- Allowing private property owners to buy back their land if the public use for which the property was taken is canceled, or if the entity fails to begin operation or construction of the project before the 10th anniversary of the taking. Sec. 21.101(a), Property Code.
- Creating the requirement that an entity with eminent domain authority must make a bona fide offer to acquire the property from the property owner voluntarily. Sec. 21.0113, Property Code.

HB 417 was the "blight bill" of 2009, containing many of the same provisions as HB 3057 from the previous session:

- Forcing the condemning entity to identify each unit of real property in the municipality that has the characteristics of blight. Sec. 373.005, Government Code.
- Creating a list of factors that an area must meet before being considered "blighted." Sec. 374.003(3), Government Code.
- Creating a notice requirement and an opportunity for the property owner to improve his land before the condemnor can exercise its eminent domain authority. Sec. 374.018, Government Code.

HJR 14 was the only vehicle for reform that was passed by the 81st Texas Legislature. Its provisions were:

- Requiring that takings be for "the ownership, use, and enjoyment of the property." Sec. 52j, Art. III, Tex. Const.
- Requiring that taking property for the elimination of urban blight be based on the characteristics of a particular parcel of property, rather than on the general characteristics of the surrounding area. Sec. 52j, Art. III, Tex. Const.

Private Property Rights and Eminent Domain in Texas Today

While steps have been made to restore property rights that have been eroded through years of court rulings up through the *Kelo* decision, there are still problems that need to be addressed.

Absence in Statute of the Constitutional Public Use Requirement

According to the United States and Texas constitutions, eminent domain can only be used for a public use. Reflecting these constitutional provisions, HB 2006 prohibited taking of private property unless the taking is for a public use. In the following session, SB 18 contained the exact same provision. Neither of these bills became law.

Clarity in law is crucial. Yet the constitutional ban on takings not necessary for a public use is nowhere to be found in Texas statutes.

Provisions in a constitution are often incorporated in statute through related enabling legislation. Clarity in law is crucial. Yet the constitutional ban on takings not necessary for a public use is nowhere to be found in Texas statutes. This is relevant because the Texas Legislature and Texas courts have closely followed the national trend of blurring the distinction between public use and public purpose. Here are two examples:

> From the Legislature: "Sec. 251.001. RIGHT OF EMINENT DOMAIN. (a) When the governing body of a municipality considers it necessary, the municipality may exercise the right of eminent domain for a public **purpose** to acquire public or private property, whether located inside or outside the municipality, for any of the following **purposes.**" [7] (emphasis added)
>
> From the courts: "In any event, a mere declaration by the Legislature cannot change a private **use** or private **purpose** into a public **use** or public **purpose**."[8] (emphasis added)

These references show that the Legislature has simply dropped the reference to public use, while the courts tend to use the two terms interchangeably.

The Texas Supreme Court confirms this drift in the meaning of public use. As pointed out in *Housing Authority v. Higginbotham*, "this Court has adopted a rather liberal view as to what is or is not a public use."[9]

Property Taken—but Not Used—for a Public Use

Current law as written gives little protection to homeowners when their land is taken but not used. Sec. 21.101, Property Code, only allows homeowners the option of buying back their property if the public use for which the property was taken is canceled before the 10th anniversary of the date of acquisition. But it is unclear exactly how it is determined when a public use is canceled. Very rarely do entities formally cancel a public use. The law currently allows the entity to completely abandon a project but claim they might return to it after 10 years has passed. Or the project could be canceled after 10 years. In either case, since the use was not formally cancelled within 10 years there is no remedy for the original property owner to reclaim the property. The statute of limitations should be set to favor the property rights of the landowner.

Similarly, there is little protection for property owners when a condemnor changes the public use of a taken property. For example, when the

Regulatory Takings Also a Threat to Property Rights

"Property owners do not acquire a constitutionally protected vested right in property uses."
– Texas Supreme Court; *City of University Park v. Benners*, 485 SW 2d 773 (1972)

Such is the law of the land when it comes to property rights in Texas. Texans have title to the dirt or water or other minerals that make up the land they own, but do not have the right to use them without permission from the state.

As a result, Texas courts grant municipalities wide latitude in placing regulatory restrictions on land. A common practice that takes advantage of this is cities restricting development on lands because of aesthetic, economic, or environmental concerns. Local zoning ordinances are often the way these restrictions get put into place—except in Houston, which is the only major city in Texas and the U.S. that doesn't have zoning. In other cities, zoning and rezoning of property can be done with little concern for the impact on property owners. Rezoning and other city ordinances that restrict use and diminish the value of a property are generally considered a legitimate "exercise of police power" as long as they "accomplish a legitimate goal" and are "reasonable."

In other words, cities can prohibit an activity or even force a business to close through zoning without it being considered a taking, in most cases.

While the Texas Supreme Court placed some limits on this ability when it said "[A] regulation may, under some circumstances, constitute a taking requiring compensation," in the same sentence it reiterated that "all property is held subject to the valid exercise of the police power."

One expert who can testify to this is Allen Woodard.

Many of the old auto repair shops along Dallas' Ross Ave. have shuttered as a result of a Dallas City Council vote to re-zone the area, but at least one business remains: Woodard Paint and Body. Allen Woodard was not willing to simply close the doors to his family's shop, which has been in business since 1920. To address this, a Dallas City Council member recently submitted a request to the City Plan Commission for an exception to keep Woodard in business. The plan includes asking Woodard to create a new façade to "fit in" to the new neighborhood.

Assuming Woodard does comply with the demands in order to stay on Ross Ave., the fact remains that many more businesses were not offered a deal. Most of these aesthetically-challenged businesses were re-zoned into extinction to lure luxury condominiums into the area.

This is the end result of Texas Supreme Court's jurisprudence. Because property owners have no right to use their property without permission, the courts reason that a property owner simply needs to have a little time to recoup their investment, through amortization, in what are determined to be "nonconforming uses," i.e., uses that no longer comply with a new city ordinance. There is no consideration of the income, jobs, and property value that vanishes when the nonconforming use is finally terminated.

As the Houston Court of Appeals explains, "Amortization is a valid technique to allow owners of property to recoup their investment in property that becomes nonconforming as a result of the regulations. … In the Benners case, the owner had 25 years notice that the nonconforming use would have to terminate. The court determined that this was sufficient time to recoup any loss in property value caused by the zoning ordinance." (*Eller Media Co. v. City of Houston*, 101 SW 3d 668, Houston 2003)

The Private Real Property Rights Preservation Act was passed by the Texas Legislature in 1995 to address these types of regulatory takings. However, the Act does not apply to cities, so a private property owner whose land has been rezoned has little recourse.

An upcoming paper by the Texas Public Policy Foundation will further examine this issue and recommend changes to the Act. It is clear that one of those changes should be extending the protections of the Private Real Property Rights Preservation Act to property owners whose use of their property is threatened by municipal actions.★

"Property owners do not acquire a constitutionally protected vested right in property uses."
– Texas Supreme Court

government takes the land for a park and three years later decides to use it for a civic center. In this case, a property owner would have to take the government to court and attempt to prove that this is a cancellation of the public use that would trigger the buy-back provision in current law.

Even when property owners might be able to exercise the right to buy back their property, they may well be faced with a much higher price tag for the property if it has appreciated. Although through HJR 30 the 80th Legislature allows for the sale of taken land back to the original owner at the original taking price, this has not been required through enabling legislation.

A significant problem with the current law is that it allows a government entity to sit on a property for years before beginning construction of the project for which the property was taken. For example, a school board could take land from a private owner—or acquire it under the threat of eminent domain—for a school that the board intends to build 10 to 15 years in the future, as the community expands. While there is nothing wrong with a district engaging in long-term planning like this, there is a problem with the district taking land at today's prices when they will not be using it until tomorrow.

In effect, the property owner is robbed of the potential appreciation of his land between the time eminent domain proceedings are initiated and the time the school board would actually use the land. In a market transaction, a property owner can take potential appreciation into account when setting a price, but eminent domain law does not allow for that to be considered in a takings case.

Presumption: Shifting the Burden of Proof from Property Owners to Condemnors

The Texas Constitution serves as a limitation on eminent domain by requiring that property may only be taken for a "public use."[10] In order for a government to condemn private property in Texas, the taking must be for a public use *and* there must be a public necessity for taking the particular piece of property:

> There are two aspects to the 'public use' requirement. First, the condemnor must intend a use for the property that constitutes a 'public use' under Texas law. Second, the condemnation must actually be necessary to advance or achieve the ostensible public use.[11]

What happens when a question arises about whether a particular taking is for a public use and/or necessary for that use?

The Texas Supreme Court has been resolute that the determination of public use ultimately remains a judicial question. As stated by the Supreme Court, "the ultimate question of whether a particular use is a public use is a judicial question to be decided by the courts."[12]

However, although the determination of public use is a judicial question, "Texas courts traditionally afford great weight to legislative declarations that a given use of property is a public use.[13] This deference is extended to both laws passed by the Texas Legislature and to decisions of the governing bodies of local governments. As the court says in *Whittington v. City of Austin*, it applies "whether in the form of statutes generally authorizing condemnation for that purpose or in a governmental body's condemnation resolution regarding the particular property" (internal references omitted).[14]

In practice, this means that it is up to a property owner to prove that the city is doing something wrong in a condemnation proceeding, i.e., taking a property for something other than a public use.

When the City of Arlington took property from Golddust Twins Realty Corporation in connection with the construction of Arlington Stadium, a federal district court found the taking illegal because Arlington had not properly demonstrated the taking was for a public purpose. The Fifth Circuit Court of Appeals overruled the district court, finding:

> The district court held that since parking was not the true purpose of the condemnation, Arlington had the burden to state an alternative purpose. When Arlington failed to come forward with an alternative purpose, the court concluded that Arlington wrongfully condemned Golddust's interest. We must disagree .… Golddust's burden should have been to show that Arlington condemned parcel C for an unauthorized purpose.[15]

As long as a government entity follows proper procedures, it is very difficult for a property owner to challenge a determination of public use in court.

The presumption or deference granted to entities that exercise eminent domain does not end at determining public use. Once a taking is determined to be for a public use, it is almost automatically assumed that the taking is also necessary for that public use. The Texas Third Court of Appeals explains: "[N]ecessity is presumed from 'a determination by the condemnor of the necessity for acquiring certain property.'"[16] The court continues, "Once the presumption of necessity arises, the defendant can contest the fact of necessity only by establishing affirmative defenses such as fraud, bad faith, or arbitrariness."[17]

In other words, a determination by the condemnor that the taking is necessary is the final word in the absence of fraud, bad faith, or abuse. As a Texas appeals court said in one case where a property owner attempted to make a challenge on necessity, 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."[18]

The presumption provision in SB 7 did eliminate the presumption granted to government entities in several areas. Specifically, it eliminated a presumption when a government determines that a taking 1) does not confer a private benefit, 2) is not a pretext for conferring a private benefit, and 3) is not for economic development purposes. However, it did not eliminate the presumption when it comes to a governmental determination of public use or necessity.

Once a taking is determined to be for a public use, it is almost automatically assumed that the taking is also necessary for that public use.

As such, challenging a taking for public use is extremely difficult and very expensive for property owners. Not only does the courts' interpretation allow wide latitude for a taking entity to operate with respect to determinations of public use and necessity, but it is up to the property owner to make this difficult case. Each step of the way, the original owner fights the presumption and bears the heavy costs of litigation.

Thus if a property owner is successful, he may retain his land, but he is out a large amount of attorney fees and other litigation costs associated with often years of litigation. At this point, the original owner would likely be better off just settling for the original offer.

Recommendations

Through *Kelo*, the Supreme Court increased the power of government to seize property by allowing takings in the name of economic development. Though Texas has made several attempts to limit the impact of *Kelo* within its borders, progress has been slow. The following reforms will help to restore the centrality of private property rights that existed when our nation and state were founded:

Prohibit in Statute Takings that are not for a Public Use

Amend Sec. 2206.001(b), Government Code, by adding a new subsection 4 that bans takings that are not necessary for a public use.

This provision reflects the constitutional ban on takings not for a public use. It is slightly different from previous versions in HB 2006 and SB 18 in that it also incorporates the constitutional language on necessity. It is important to note that it does not add to the existing constitutional restrictions on takings. This change is simply designed to help the courts properly distinguish between the constitutional term "public use" and the later legislative/judicial creation of "public purpose," especially in light of the recent constitutional amendment intended to clarify the meaning of public use.

Allow Previous Property Owners the Right to Repurchase Land Not Used for the Stated Public Use

Amend Sec. 21.101(a), Property Code, by requiring a government entity to offer for sale back to the original property owner—at the price paid by the government—any taken property if within five years 1) the governmental entity fails to begin the operation or complete the construction of the project for which the property was acquired, or 2) the property becomes unnecessary for the public use for which the property was acquired.

Both HB 2006 and SB 18 contained provisions allowing the private property owners to buy back land that was condemned through eminent domain proceedings but not used for the purpose for which it was taken within 10 years. However, the language in SB 18 became so watered down as to become meaningless. For instance, a government entity could condemn two parcels of land and apply for federal funds to develop the parcels and meet the requirements of SB 18. Even if the property is never used, the previous owner could not repurchase the property.

Additionally, the allowance for 10 years to complete the public use denies the previous owner of any potential increase in value in property during the intervening years. This may save a school district money if, for instance, the district took—or purchased under the threat of a taking—property to build a new school in 15 years, but those savings are gained only through the use or threat of eminent domain at the expense of a property owner. Government entities should be free to purchase land far in advance of actual need to facilitate planning, but should not be able to exercise—or threaten—eminent domain if a property is not needed for five years or more.

Remove the Presumption Condemnors Receive on Questions of Public Use and Necessity

Amend Chapter 2206, Government Code, by requiring that the determination of whether a proposed use is a public use and is necessary for that use be determined without regard to any legislative assertion by a governmental or private entity that the use is public or that the taking, damage, or destruction is necessary.

In other words, if a condemnor wants to exercise its power of eminent domain and a property owner challenges that taking on the basis of public use or necessity, then it should be up to the condemnor to prove that its taking is in accordance with the law.

Specific language might read: "If a governmental or private entity attempts to take, damage, or destroy property through the entity's eminent domain authority, the entity must prove by clear and convincing evidence that: 1) the entity's proposed use for the property is a public use; and 2) the taking, damage, or destruction of the property is necessary for the proposed use. The determination of whether the proposed use is a public use and whether the taking, damage, or destruction of property for that use is necessary shall be determined without regard to any legislative assertion by a governmental or private entity that the use is public or that the taking, damage, or destruction is necessary."

Conclusion

One special and two regular legislative sessions have passed by since the 2005 *Kelo* decision. While improvements have been made, Texas law still treats property as a privilege granted by the state rather than an inalienable right.

Yet, property rights are the most fundamental of all of our rights, and are the basis of all other freedoms we enjoy. If the government is going to allow our property to be taken under the power of eminent domain, then it ought to be up to the government—not the property owner—to prove that the taking is legal. Otherwise, as in our current system, the great expense of challenging a well-funded condemnor leads property owners to abandon the fight before it starts and give up their property.

The changes recommended here will begin to balance the scales of justice by placing the burden of proof on the government and clearly restating in statute the constitutional language that the Legislature and the courts seem to have forgotten. Not only will this reduce costs to owners and encourage more challenges to takings, but it will provide a greater incentive for governments to take property only for legitimate public uses and only when the property is necessary for such a use. ✯

Endnotes

[1] U.S. Const. Amend V.
[2] Texas Const. Art. 1 § 17.
[3] Thomas Jefferson, "Letter to John Cartwright," (1824), *Thomas Jefferson on Politics and Government: Quotations from the writings of Thomas Jefferson*, University of Virginia (1995) http://etext.virginia.edu/jefferson/quotations.
[4] *The Founders' Constitution*, Volume 1, Chapter 13, Document 40, The University of Chicago Press, http://press-pubs.uchicago.edu/founders/documents/v1ch13s40.html.
[5] *City of Midlothian, Tex. v. Ecom Real Estate Management, Inc.*; not Reported in S.W.3d, 2010 WL 311433 (Tex. App.-Waco).
[6] Bill Peacock, "Private Property and Public Use: Restoring Constitutional Distinctions," Texas Public Policy Foundation (2006).
[7] Texas Local Government Code.
[8] *Maher v. Lasater*, 354 S.W.2d 923, 924 (Tex.1962).
[9] *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d at 833 (Tex.1958).
[10] *McInnis v. Brown Co. Water Improvement Dist. No. 1*, 41 S.W.2d 741, 744 (Tex. App.-Austin 1931, writ ref'd).
[11] *Whittington v. City of Austin*, 174 S.W.3d 889 (Tex. App.-Austin 2005, pet. denied).
[12] Maher, 354 S.W.2d at 925; Davis v. City of Lubbock, 160 Tex. 38, 326 S.W.2d 699, 704 (1959); Higginbotham, 143 S.W.2d at 83; also see *City of Arlington v. Golddust*, 41 F.3d 960, 963 (Tex. 1994).
[13] Whittington, (2005) 8.
[14] Ibid.
[15] *City of Arlington, Tex. v. Golddust Twins Realty Corp.*, 41 F. 3d 960 - Court of Appeals, 5th Circuit (1994).
[16] Whittington, 174 S.W.3d at 897; citing: Higginbotham, 143 S.W.2d at 88.
[17] Ibid, 898.
[18] *Malcomsom Road Utility District v. Newsom*, 171 S.W.3d 257 (Tex. App.-Houston [1st Dist.] 2005, pet. granted).

Appendix I: Model legislation incorporating into statute the constitutional ban on takings that are not for a public use

A BILL TO BE ENTITLED

AN ACT

relating to limitations on the use of eminent domain.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 2206.001(b), Government Code, is amended as follows:

(b) A governmental or private entity may not take private property through the use of eminent domain if the taking:

(1) confers a private benefit on a particular private party through the use of the property;

(2) is for a public use that is merely a pretext to confer a private benefit on a particular private party; [~~or~~]

(3) is 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 under:

(A) Chapter 373 or 374, Local Government Code, other than an activity described by Section 373.002(b)(5), Local Government Code; or

(B) Section 311.005(a)(1)(I), Tax Code; or

(4) is not necessary for a public use.

SECTION 2. EFFECTIVE DATE. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2011.

Appendix II: Model legislation allowing property owners to buy back unused properties at the original price paid by the government

A BILL TO BE ENTITLED
AN ACT

relating to the repurchase of property acquired through the use of eminent domain authority.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 21.023, Property Code, is amended to read as follows:

Sec. 21.023. DISCLOSURE OF INFORMATION REQUIRED AT TIME OF AQUISITION. A governmental entity shall disclose in writing to the property owner, at the time of acquisition of the property through eminent domain, that:

(1) the owner or the owner's heirs, successors, or assigns are entitled to repurchase the property if:

(A) the public use for which the property was acquired through eminent domain is canceled [~~before the 10th anniversary of the date of acquisition~~];

(B) the property becomes unnecessary for the public use for which the property was acquired; or

(C) the entity fails to begin the operation or construction of the project for which the property was acquired before the 5th anniversary of the date of acquisition.

(2) the repurchase price is the lesser of:

(A) the price paid to the owner by the entity at the time the entity acquired the property through eminent domain; or

(B) the fair market value of the property at the time the public use was canceled.

SECTION 2. Section 21.101(a), Property Code, is amended to read as follows:

(a) Except as provided in Subsection (b), this subchapter applies only to a real property interest acquired by a governmental entity through eminent domain for a public use. A person from whom the property interest is acquired or that person's heirs, successors, or assigns are entitled to repurchase the property as provided by this subchapter if:

(1) the [~~that~~] public use for which the property was acquired through eminent domain is [~~was~~] canceled [~~before the 10th anniversary of the date of acquisition~~];

(2) the property becomes unnecessary for the public use for which the property was acquired; or

(3) the entity fails to begin the operation or construction of the project for which the property was acquired before the 5th anniversary of the date of acquisition.

SECTION 3: Section 21.102, Property Code, is amended to read as follows:

Sec. 21.102 NOTICE TO PREVIOUS PROPERTY OWNER [~~AT TIME OF CANCELLATION OF PUBLIC USE~~]. Not later than the 180th day a property becomes eligible for repurchase under Section 21.101(a) [~~after the date of the cancellation of the public use for which real property was acquired through eminent domain from a property owner under Subchapter B~~], the governmental entity shall send by certified mail, return receipt requested, to the property owner or the owner's heirs, successors, or assigns a notice containing:

(1) an identification, which is not required to be a legal description, of the property that was acquired;

(2) an identification of the public use for which the property had been acquired and:

(A) a statement that the public use for which the property was acquired through eminent domain has been canceled;

(B) a statement that the property has become unnecessary for the public use for which the property was acquired; or

(C) a statement that the governmental entity has failed to begin the operation or construction of the project for which the property was acquired before the 5th anniversary of the date of acquisition; and

(3) a description of the person's right under this subchapter to repurchase the property.

SECTION 4: Section 21.103(b), Property Code, is amended to read as follows:

(b) As soon as practicable after receipt of a [the] notification under Subsection (a), the governmental entity shall offer to sell the property interest to the person for the lesser of the price paid to the owner by the governmental entity at the time the governmental entity acquired the property through eminent domain, or the fair market value of the property at the time the public use [was canceled] becomes eligible for repurchase under Section 21.101(a). The person's right to repurchase the property expires on the 90th day after the date on which the governmental entity makes the offer.

SECTION 5: EFFECTIVE DATE. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2011.

Appendix III: Model legislation shifting the burden of proof in eminent domain cases from property owners to condemnors

A BILL TO BE ENTITLED

AN ACT

relating to the determination of public use and necessity in the use of eminent domain authority.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 2206, Government Code, is amended by adding Section 2206.002 to read as follows:

Sec. 2206.002. DETERMINATION OF PUBLIC USE AND NECESSITY. If a governmental or private entity attempts to take, damage, or destroy property through the entity's eminent domain authority, the determination of whether the proposed use is a public use and whether the taking, damage, or destruction of property for that use is necessary shall be determined without regard to any legislative assertion by a governmental or private entity that the use is public or that the taking, damage, or destruction is necessary.

SECTION 2. EFFECTIVE DATE. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2011.

About the Authors

Ryan Brannan joined the Texas Public Policy Foundation in 2009 as a policy analyst in the Center for Economic Freedom. Ryan graduated with honors from Southern Methodist University with a Bachelor's in Political Science and minor in History. He received his Juris Doctorate at the University of Oklahoma where he was a member of the American Indian Law Review, Dean's List, Dean's Counsel, and several trial teams including the National Trial Team. He received special recognition in advocacy and public service by receiving the Dean's Award for Advocacy and the Dean's award for Service, respectively.

Bill Peacock is the vice president of research and director of the Texas Public Policy Foundation's Center for Economic Freedom. He has been with the Foundation since February 2005. Bill has extensive experience in Texas government and policy on a variety of issues including, economic and regulatory policy, natural resources, public finance, and public education. His work has focused on identifying and reducing the harmful effects of regulations on the economy, businesses, and consumers. Prior to joining the Foundation, he served as the Deputy Commissioner for Coastal Resources for Commissioner Jerry Patterson at the Texas General Land Office and as the Deputy Assistant Commissioner for Intergovernmental Affairs for then-Commissioner Rick Perry at the Texas Department of Agriculture.

Texas Public Policy Foundation

The Texas Public Policy Foundation is a 501(c)3 non-profit, non-partisan research institute guided by the core principles of individual liberty, personal responsibility, private property rights, free markets, and limited government.

The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach. Our goal is to lead the nation in public policy issues by using Texas as a model for reform.

The work of the Foundation is primarily conducted by staff analysts under the auspices of issue-based policy centers. Their work is supplemented by academics from across Texas and the nation.

Funded by hundreds of individuals, foundations, and corporations, the Foundation does not accept government funds or contributions to influence the outcomes of its research.

The public is demanding a different direction for their government, and the Texas Public Policy Foundation is providing the ideas that enable policymakers to chart that new course.

900 Congress Ave., Suite 400 | Austin, Texas 78701 | (512) 472-2700 phone | (512) 472-2728 fax | www.TexasPolicy.com