TEXAS PUBLIC POLICY FOUNDATION
BillAnalysis

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Senate Bill 18: Public Use vs. Public Purpose

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Restoring the Constitutional Meaning of Public Use

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. SB 18 is the latest attempt by the Texas Legislature to protect private property rights. Most of the provisions of SB 18 are well-founded and will move eminent domain law in the right direction, including the provision than bans takings that are not for a public use.

SB 18 Status

- Contains provision banning takings not for a public use.

SB 18 Recommendations

- Alter existing SB 18 language to mirror the constitutional requirement that property cannot be taken unless it is *necessary* for a public use.

- Add a new section changing existing statutory authorizations for at least cities, counties, and school districts so that the exercise of eminent domain must be for a public use, not a public purpose.

According to the United States and Texas constitutions, eminent domain can only be used for a public use. Reflecting these constitutional provisions, SB 18 prohibits taking of private property unless the taking is for a public use.

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***." (emphasis added)
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> 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***."[1] (emphasis added)

Additionally, Section 11.155(a), Education Code, allows school districts to use eminent domain to acquire land "on which to construct school buildings or for any other ***public purpose*** necessary for the district." And Section 261.001(a), Local Government Code, allows counties to exercise the right of eminent domain "if the acquisition is necessary for the construction of a jail, courthouse, hospital, or library, or for another ***public purpose*** authorized by law."

These references show that the Legislature has in most cases 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."[2]

Recommendations

Prohibit in statute takings that are not for a public use.

> Change Sec. 2206.001 (b)(4), Government Code, in SECTION 1 of SB 18 to read as follows: "is <u>not ***necessary*** for a public use."</u>

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Authorize eminent domain only for a public use.

> Add a new SECTION to SB 18 changing existing statutory authorizations for at least cities, counties, and school districts so that eminent domain may be exercised only for a public use, not for a public purpose.

It is important to note that these changes do not add to the existing constitutional restrictions on takings. The first recommendation is nearly identical to the existing language in SB 18—the only thing it does is add the word 'necessary.' Both of these changes are 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.

Conclusion

One special and two regular legislative sessions have passed 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 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 the property should be taken for a constitutionally authorized public use.

The changes recommended here will provide greater incentives for governments to adhere to the law and reduce the need for property owners and governments to spend time and money on costly court proceedings. ✯

This is the first of the Foundation's three analyses of SB 18's treatment of Texas landowners' property rights.

[1] *Maher v. Lasater*, 354 S.W.2d 923, 924 (Tex.1962).
[2] *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d at 833 (Tex.1958).

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