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Senate Bill 18: Presumption

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

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. However, SB 18 does not contain a provision explicitly shifting the burden of proof in a condemnation proceeding from the landowner to the condemnor.

SB 18 Status

- Does not address the problem of landowners bearing the burden of proof when a government entity claims that it is taking property that is necessary for a public use.

SB 18 Recommendation

- Require condemnors to bear the burden of proof that they are taking land for a public use, and that the taking of the land is necessary for that purpose.

The Texas Constitution serves as a limitation on eminent domain by requiring that property may only be taken for a "public use."[1] 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.[2]

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."[3]

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.[4] 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).[5]

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.[6]

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.'"[7] 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."[8]

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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."[9]

The presumption provision in SB 7 passed in 2005 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.

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.

Recommendation

Remove the presumption condemnors receive on questions of public use and necessity.

> In SECTION 1 of SB 18, amend Sec. 2206.001, Government Code, by adding a new subsection (f) to read as follows: "If a governmental or private entity attempts to take, damage, or destroy property through the entity's eminent domain authority, the deter-mination 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."

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.

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 it ought to be up to the government—not the property owner—to prove that the taking is legal.

The changes recommended here will provide greater incentives for governments to take property only for legitimate public uses and only when the property is necessary for such a use, and therefore reduce the need for property owners and governments to spend time and money on costly court proceedings. ✯

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

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[1] *McInnis v. Brown Co. Water Improvement Dist. No. 1*, 41 S.W.2d 741, 744 (Tex. App.-Austin 1931, writ ref'd).
[2] *Whittington v. City of Austin*, 174 S.W.3d 889 (Tex. App.-Austin 2005, pet. Denied).
[3] *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).
[4] *Whittington*, (2005) 8.
[5] Ibid.
[6] *City of Arlington, Tex. V. Golddust Twins Realty Corp.*, 41 F. 3d 960 – Court of Appeals, 5th Circuit (1994).
[7] *Whittington*, 174 S.W.3d at 897; citing: *Higginbotham*, 143 S.W.2d at 88.
[8] Ibid, 898.
[9] *Malcomsom Road Utility District v. Newsom*, 171 S.W.3d 257 (Tex. App-Houtson [1st Dist.] 2005, pet. granted).

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