TEXAS PUBLIC POLICY FOUNDATION
Testimony

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Center for Economic Freedom

Fixing Texas' *Kelo* Problem

Testimony before the Committee on Land and Resource Management

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The Backdrop for the *Kelo* Decision

Protection of property rights was a major issue of concern back in the 1990s. Driven by the harm caused by laws such as the Endangered Species Act, the public spoke out loudly against governmental taking of the use of their property without compensation. Though the outcry was loud, few major reforms were actually made, even in Texas. The Texas Legislature did pass the Private Real Property Protection Act of 1995. However, since cities were exempted from the provisions of the law, it had little impact on improving property rights in Texas.

By 2005, the public outcry over regulatory takings had died down. However, the United States Supreme Court was preparing to raise concerns over another area of property rights abuse—that of takings via eminent domain.

In June 2005, when the U.S. Supreme Court announced its infamous *Kelo* decision, it provided the capstone to a series of federal and state court decisions that have essentially rewritten the Takings Clauses of the U.S. and Texas Constitutions. The Court allowed the city of New London, Connecticut, to take the property of Susette Kelo and her neighbors and give it to Pfizer and other private companies to build and operate privately-owned businesses. According to a narrow majority of the Court, the mere possibility that private property might make more money when put to another use is reason enough for the government to take it away. In essence, *Kelo* says that private property is not a fundamental civil right, but a privilege granted by the state at its sole discretion. This decision set off a series of reforms throughout the country, including Texas, and is why we are here today to discuss this issue.

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. 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.

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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.

Public Use v. Public Purpose

Historically, with a few very limited exceptions, the power of eminent domain was used for things the public actually owned and used—schools, courthouses, post offices and the like. Then, beginning in the middle of the 19th century, common carriers operating railroads, telegraph lines, and—later—telephone and electricity lines, began to receive the ability to condemn property. So for the first 150 plus years of our country's existence, eminent domain was almost exclusively used for taking property that was going to be owned and/or broadly used by the public. In other words, it was going to be used for a 'public use.'

Over the past 50 years, however, the meaning of public use has expanded to include ordinary private uses like condominiums and big-box stores. The expansion of the public use doctrine began with the urban renewal movement of the 1950s. In order to remove so-called "slum" neighborhoods, cities were authorized to use the power of eminent domain. This "solution," which has been a dismal failure, was first given approval by the Supreme Court in *Berman v. Parker* in 1954. The Court ruled that the removal of blight was a public "purpose," despite the fact that the word "purpose" appears nowhere in the text of the Fifth Amendment and government already possessed the power to remove blighted properties through public nuisance law. By effectively changing the wording of the Fifth Amendment, the Court opened a Pandora's box, and now properties are routinely taken pursuant to redevelopment statutes when there's absolutely nothing wrong with them except that developers covet them and the government hopes to increase its tax revenue.

This is relevant here in Texas because the Texas Legislature and Texas courts have closely followed the national trend of blurring the distinction between public use and public purpose—even though the Texas Constitution requires a public use for a taking, just like the U.S. Constitution. 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**." (emphasis added)

Texas has had some success since 2005 in limiting takings for public purposes. One of them was the 2005 ban on takings primarily for economic development purposes, unless the economic development is a secondary purpose resulting from urban renewal activities to eliminate slum or blighted areas. Though the blight ban was a major loophole, the Legislature narrowed it with the 2009 constitutional amendment that required that each parcel of land be determined to be blighted before it could be taken.

Recommendations

The Foundation recommends four additional changes to Texas law that would bring Texas law closer to its origins of allowing eminent domain takings only for a public use and thereby fix Texas' *Kelo* problem:

- Ban the use of eminent domain if a taking is not necessary for a public use.
- Allow property owners to repurchase their property at the price paid when it was taken if the property taken is not used for the public use for which it is taken within 10 years.
- Replace all references to "public purpose" with "public use" where the law grants the power of eminent domain
- 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. ✯