



Restoring Property Rights in a Post-*Kelo* Texas

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THE ISSUE

The U.S. Supreme Court's *Kelo* decision exposed significant problems with Texas eminent domain law. Before *Kelo*, the property rights of Texans were shielded in some degree from the inherent weaknesses in Texas law. Whatever the law might have said, there was no general understanding that the U.S. Constitution's Public Use Clause allowed the government to take any property from any person for any public purpose and give it to someone else. There were limits in place. However, in the post-*Kelo* world, everyone's property is up for grabs.

Former Texas Agriculture Commissioner Jim Hightower said about *Kelo*, "In plain words, government officials have just been cleared to turn over your property to companies that'll pay more in taxes. As one of the homeowners put it: 'It's basically corporate theft.'" U.S. Representative John Conyers said, "The concept of ... using private takings for private use should not be allowed. ... [T]hat is wrong. That is a misuse. That is an abuse."

Texas has taken some steps since *Kelo* in moving toward protecting its citizens from eminent domain abuse. The Legislature banned takings for economic development purposes in 2005, but left a big loophole allowing these to continue in the case of loosely-defined blight conditions.

The passage of HJR 14 in 2009, may prove to be a step in the right direction by defining public use in the Texas Constitution, and 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. However, the Legislature's failure to pass SB 18 and HB 417 left some work to be done.

THE FACTS

- ★ The Institute for Justice examined claims that eminent domain reforms would harm economic development efforts by cities, finding:
 - There appear to be no negative economic consequences from eminent domain reform. State trends in all three key economic indicators—construction jobs, building permits, and property tax revenues—were essentially the same after reform as before.
 - More importantly, even states with the strongest reforms saw no ill economic effects compared to states that failed to enact reform. Trends in all three key economic indicators remained similar across all states, regardless of the strength of reform.
 - Large-scale economic development can and does occur without eminent domain.
- ★ Major eminent domain reform legislation has failed to become law in each of the past two legislative sessions.
- ★ Texas law still doesn't distinguish between the meaning of public use and public necessity.

RECOMMENDATIONS

- ★ **Enact Statutory Enabling Language for the Public Use Definition.** HJR 14 defined public use in the Texas Constitution. However, there has not been enabling language created in the statutes. Adding a simple “not for public use” to Sec. 2206.001 of the Government Code will accomplish this small but necessary objective.
- ★ **Address Property Owners’ Rights to Buy Back Their Land.** Once a property has been condemned, it can be used for just about any purpose. The condemnor is not required to use it for the purpose for which it was taken. If a government entity doesn’t within five years use a condemned property for the public use for which it was taken, it should be offered to the original owner at the price paid him, or the current fair market value of the land, whichever is least.
- ★ **Ensure Correct Determinations of Public Use and Necessity.** Challenges by property owners to determinations of public use and necessity are uncommon because current Texas jurisprudence puts on property owners the burden of proof regarding these determinations. As long as a government entity follows proper procedures, it is very difficult for a property owner to challenge these determinations in court. The burden should be put on the condemning authority.

RESOURCES

Eminent Domain: Balancing the Scales of Justice by Ryan Brannan and Bill Peacock, Texas Public Policy Foundation (May 2010) <http://www.texaspolicy.com/pdf/2010-05-RR03-EminentDomain-rb-bp.pdf>.

Possession, Occupation, and Enjoyment: Restoring the Meaning of Public Use by Bill Peacock, Texas Public Policy Foundation (May 2009) <http://www.texaspolicy.com/pdf/2009-05-PB16-ED-bp.pdf>.

Senate Bill 18: Texas’ Kelo Problem Still Not Solved by Bill Peacock, Texas Public Policy Foundation (May 2009) <http://www.texaspolicy.com/pdf/2009-05-PP18-Kello-billanalysis-bp.pdf>.

Doomsday? No Way: Economic Trends and Post-Kelo Eminent Domain Reform, Institute for Justice (Jan. 2008). ★

