

Eminent Domain: Take it or Leave It?

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There's little doubt that just about everyone in Texas believes in "private property rights," but the media frenzy surrounding eminent domain – fueled by certain groups – has arguably buried the truth about the use of the power in Texas, particularly by cities.

Kelo v. New London – Eminent Domain for Economic Development

The case that brought eminent domain to the limelight was decided in 2005. In the summer of that year, the United States Supreme Court issued its opinion in *Kelo v. City of New London, Connecticut*. The opinion concluded that the decision to use eminent domain authority for economic development is left to local officials, and those officials are authorized to determine whether using the authority serves a "public use."

The release of the opinion was followed by misleading and inflammatory news stories. Some articles stated or implied that the court had, with its decision, created a new municipal authority where none had previously existed. Many newspaper reports led readers to believe that Texas cities would use this "new" authority to "seize" property, "bulldoze" homes, and "grab" everything that stands in the way of increased tax revenue. News articles and popular banter regarding the case usually painted a picture of a little old woman's home being bulldozed to make way for a huge corporation's project.

The *Kelo* decision polarized many people, but it is probably fair to say that many Texans were opposed to its conclusion (at least as it was presented in the popular media). An article in a 2004 edition of the *Dallas Business Journal* summed up the popular sentiment against that type of condemnation:

When tax-hungry public officials in Texas team up with land-hungry private developers, innocent home and business owners standing in the way are likely to get mugged city hall style. Once the city declares them public outcasts, their land is forcibly purchased at a price the government deems "fair" and then passed to a developer whose plans for the property will boost tax revenue.

In reality, the *Kelo* case was about community leaders trying to save the economic viability of their city and its residents. Whether the very infrequent use of eminent domain for economic development in Texas was the "right" thing to do may still be the subject of debate, but it was authorized by law at the time it was initiated.

The Texas Legislature's Response to Kelo

The legislature was in a special session on school finance at the time of the *Kelo* decision, and bills were immediately filed on the issue. The first bills were joint resolutions proposing constitutional amendments. They were obviously hastily-filed, because there were many concerns with the way they were drafted.

Some legislators appeared to fall victim to the post-*Kelo* rhetoric. At least one spoke on the house floor about the need to stop cities from stealing people's homes and giving them to large corporations. But the fact is that eminent domain for economic development has scarcely been used in Texas. Anecdotal evidence shows that the number *Kelo*-type takings in Texas in recent years by cities can be probably be counted on two hands.

State leaders may have squelched the rhetoric somewhat when it was discovered that the governor's Trans-Texas Corridor Web site boldly stated that the primary purpose of the road is "economic development." That influence likely slowed the process down and allowed cities and others to express their concerns. Ultimately, the legislature ended up passing Senate Bill 7 in the second special session. The bill restricts eminent domain by providing that neither a governmental nor private entity may take private property through the use of eminent domain if the taking:

- confers a private benefit on a particular private party;
- is for a public use that is merely a pretext to confer a private benefit on a particular private party; or
- is for economic development purposes, unless the economic development is a secondary purpose resulting from community development or municipal urban renewal activities to eliminate blighted areas.

Public opinion in the state appeared to be in favor of the prohibitions, but city officials were concerned that reforms could limit their use of eminent domain for vital public projects. The League and others sought and obtained language that would allow the continued use of the power for the following:

- transportation projects, including but not limited to railroads, airports, or public roads or highways;
- water supply, wastewater, flood control, and drainage projects;
- public buildings, hospitals, and parks;
- the provision of utility services;
- waste disposal projects; or
- libraries, museums, and related infrastructure.

Some still refer to the public uses above as "loopholes" in the law, but they are considered more of a necessity than a victory for Texas cities. Eminent domain reformers, however, were just getting started.

Kelo's Lingering Aftermath: Reform for the Sake of Reform?

Prior to the 2007 legislative session, a joint interim legislative committee ultimately concluded that “Senate Bill 7 provided a good beginning for eminent domain reform in Texas...[and]...provided a solid foundation for comprehensive eminent domain legislation in the 80th Legislature.”

Based on that conclusion, it was a certainty that legislation would be filed in 2007. In fact, more than twenty bills and joint resolutions that would have made numerous changes to eminent domain were filed. Many of the bills contained numerous and lengthy provisions that were totally unrelated to the *Kelo* decision.

Ultimately, only two bills relating to eminent domain reform passed in 2007. H.B. 1495 is a notification bill that, among other things, required the attorney general to prepare a bill of rights for property owners whose property may be acquired through eminent domain. The statement must be sent by a city to each affected property owner prior to the city’s exercise of condemnation authority.

The bill that ultimately became the omnibus eminent domain bill was H.B. 2006. That bill, which was vetoed by the governor, would have made various changes to eminent domain laws, including among other things:

1. defining a “public use” as one that allows the state, a political subdivision, or the general public to possess, occupy, and enjoy the property, including the specifically enumerated public projects in current law;
2. providing that a governmental entity may not take private property through the use of eminent domain if the taking is not for a public use as defined by the bill;
3. requiring a record vote with specific wording to take each parcel of land through the use of eminent domain;
4. requiring an entity that wants to acquire real property for a public use to make a “bona fide offer” to acquire the property voluntarily, and to certify in the condemnation petition that the offer was made;
5. changing the evidentiary standard used for determining market value;
6. for individuals or entities displaced by eminent domain, requiring a city to provide a relocation assistance;
7. mandating higher damages only to an owner whose property is taken for a state highway or county toll project.

Governor Perry vetoed H.B. 2006 because of the modification to the way fair market value is determined and another provision that was added as a last-minute Senate floor amendment (see number 7, above). That last-minute addition would have granted additional damages to a parcel that was split by a state highway (e.g., the Trans-Texas Corridor) or county toll project. The governor also concluded that the bill could have increased the costs of municipal projects, and that number 7 would have cost the state and certain counties up to \$1 billion for future highway projects. The governor’s veto message stated that “[i]t is important to balance the rights of Texas landowners whose land is acquired through eminent domain against the needs of the greater taxpaying public. In essence, the state and local government would be over-paying to acquire

land through eminent domain in order to enrich a finite number of condemnation lawyers at the expense of Texas taxpayers.”

Private Property Rights: Take It or Leave It?

What does the term “private property rights” mean? Does it mean that a single landowner should be able to hold an entire community hostage? For example, if a new or expanded roadway is necessary because of continued deadly accidents, or a new utility line must be laid to provide adequate sewer service to an area with hundreds of residents, should one person be able to stop a city from moving forward with those projects? Certain people would say – if it means taking someone’s private property – “yes.”

But consider this: cities and city officials don’t usually create the need for the use of eminent domain for public projects. They can’t control how many people move to their area, how many cars those citizens drive, or how many times toilets are flushed. Thousands of people move to Texas each year, and almost all of them move to urban areas.

Texas is not and may never be a “progressive” state when it comes to land use planning. Some states have regional and statewide planning systems that allow for more orderly growth. In Texas, mandatory regional planning systems generally do not exist. Counties have limited land use authority, and developers often seek to build in the county to escape municipal regulations. That may bring greater profits to each developer, but it may also serve as a detriment to orderly growth. That matters for eminent domain purposes because cities eventually have to provide services to those areas. Because of insufficiently regulated utility infrastructure and lack of transportation oversight, the provision of those services sometimes requires the use of eminent domain to acquire the land necessary to maintain safe and adequate services.

In addition, as population grows, citizens demand more services. Parks, libraries, police buildings, and other public facilities are not generally considered options in cities that want to remain livable. Ten percent of mankind lived in cities a century ago; by 2050, it will be 70 percent. The use of eminent domain to acquire land for projects to accommodate all of the existing and arriving city residents is inevitable. It’s just a fact that infrastructure must sometimes be placed on or through private property. All that being said, city officials in Texas do an outstanding job of meeting their citizens’ needs, and the use of eminent domain is remarkably rare.

While this *is* Texas, growth often necessitates doing what’s best for the “greater good.” That’s a tough sell here, but providing a way in which citizens can live and work in close proximity, safely and healthfully, is the very reason cities have eminent domain authority in the first place. And that necessarily means considering the “rights” of all of the residents, rather than just one.

Finally, news reports often tell of the government “taking” land, but very rarely mention the fact that both the state and federal constitutions require that the property owner be compensated for that taking. Amidst all the posturing about the “rightness” or “wrongness” of the use of the power, the 2007 legislation showed that the amount of compensation is the real issue.

The 2009 Legislative Session: What to Expect?

Based on the passage of H.B. 2006 in 2007, and testimony at interim hearings on eminent domain in 2008, it is likely that a similar (if not identical) bill will be filed in 2009. In addition, H.B. 3057 was a bill that would have severely limited the ability of a city to use eminent domain to revitalize “blighted areas.” That bill likely would have become law if not for a legislative “bottleneck” at the end of the session.

Procedural changes that make the process more “transparent and accountable” to landowners are something that make sense. For example, H.B. 2006 would have required a record vote with specific wording to take each parcel of land. The bill also would have required an entity that wants to acquire real property for a public use to make a “bona fide offer” to acquire the property voluntarily, and to certify in the condemnation petition that the offer was made.

Substantive changes, however, deserve closer scrutiny. For example, at least three major principles emerged in reform legislation from last session:

The definition of “public use:” H.B. 2006 proposed a more restrictive definition of public use, which raises some concerns. Many would argue that the provisions of S.B. 7, passed in 2005, eliminated any concerns about the use of eminent domain to take land for economic development, but others believe that a more restrictive definition of public use is necessary to “bootstrap” current law. A major issue is that H.B. 2006 *would have modified a statute* (which could be changed in the future should the need arise), whereas other legislation *would have amended the constitution* (an action that would be practically impossible to reverse). Because no one can be sure what challenges cities—or the state for that matter—may face in the future, the adoption of any constitutional amendment is unnecessary.

Municipal authority regarding urban renewal efforts: S.B. 7 provides that a city may continue to use eminent domain if it is necessary for urban renewal activities to eliminate blighted areas. H.B. 3057 would have severely curtailed the use of urban renewal statutes. Specifically, a city is currently authorized, after complying with detailed procedures, to designate *an area* as blighted and to use eminent domain if necessary to assemble property for redevelopment. H.B. 3057 would have limited that authority by providing that a city must identify *each unit of real property* in the city that has the characteristics of blight. In almost every case, an area to be redeveloped has one or two properties that don’t meet the definition of “blighted,” but that should be acquired as part of the greater redevelopment effort. Restrictions like those in H.B. 3057 would hamper the ability of cities to revitalize deteriorated areas.

Compensation methodology: H.B. 2006 would have modified the way in which damages are awarded to a property owner by the special commissioners, arguably providing more compensation for property owners based on various factors. When a city must acquire property for a public use, the city makes a good-faith offer to purchase based on the fair market value of the property. A property owner can either accept the offer, or a city may initiate condemnation proceedings. Decades of legal precedent

govern the factors to be considered by a court when making a condemnation award. The shift in policy proposed in H.B. 2006 could provide an incentive to a property owner to reject a governmental entity's reasonable offer, resulting in unnecessary litigation. The truth is that no one can predict what would happen to condemnation awards under the language in H.B. 2006, and that is one of the reasons the governor vetoed it.

It would be easy to simply state that the League's position is that S.B. 7 adequately addressed the issue of eminent domain authority. However, Texas is referred to as a "property rights" state, and rightfully so. As such, eminent domain reform will definitely be an issue in 2009.

Final Words

The state's "Trans-Texas Corridor" project plays a large part in the continued debate on the use of eminent domain, and various rural organizations have concerns with the project. But the urban issue remains: restricting eminent domain to the point that it cannot reasonably be used for clear public projects, or changing the compensation methodology to the point that the use of the power would be cost prohibitive, is not an acceptable compromise. Further, cities – by definition – don't usually condemn rural land. That practice comes largely from state transportation projects.

The Institute for Justice (A "civil liberties law firm" that supports further eminent domain reform) printed post-*Kelo* that: "Already, the Supreme Court's ruling has emboldened tax-hungry governments and land-hungry developers seeking to condemn land for private profit." It's a stretch to call city officials in Texas "tax-hungry." City officials in Texas are decent people who, in almost every case, volunteer their time in an often thankless job to serve their communities.

Any reasonable person believes that fairness in the process and compensation methodology is appropriate, and the momentum of eminent domain reform shows that city officials will probably have to discuss certain modifications to condemnation procedures.