

Senate Bill 18: The “Buy-back” Provision

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Property Taken—but Not Used—for a Public Use: Fixing the Government Land Speculation Problem

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’s “buy-back” provision—while well intentioned—is worse than current law and will set back property rights in Texas.

SB 18 Status

- Contains a provision that allows property owners to repurchase their condemned property if it is not used for the public use for which it was taken. However, the provision makes it easy for local governments and other condemners to avoid the requirement and use it for any purpose.

SB 18 Recommendation

- Add a fourth trigger to the buyback provision giving property owners the right to repurchase their property if the initial use of the taken property is not the public use—or a substantially similar public use—for which the property was taken.

A major problem with eminent domain law in Texas is that once a property has been condemned, it can be used for just about any purpose—the condemner is not required to use it for the purpose it was taken. There is a provision in Texas law that allows for the repurchase of property by the original owner if the public use for which the property is taken is cancelled. However, the public use must be formally cancelled (which rarely occurs), the provision applies for only 10 years after the taking, and the property must be purchased back at the current market value at the time the use was cancelled, not the price paid to the former landowner. If the condemner simply holds the property for more than 10 years, then it can be used for anything and the previous owner will never have the opportunity to purchase it back at any price.

Even if a government entity changes the use of a taken property within 10 years without a formal cancellation, there is little protection for property owners. For example, when the government takes the land for a park and three years later decides to use it for a civic center. In this case, a property owner would have to take the government to court and attempt to prove that this is a cancellation of the public use that would trigger the buy-back provision in current law.

Finally, if a property owner actually ever gets to exercise the right to buy back her property, she may well be faced with a much higher price tag for the property if it has appreciated. Although through HJR 30 the 80th Legislature allows for the sale of taken land back to the original owner at the original taking price, this has not been required through enabling legislation.

The result of these problems with current law is that it creates a situation ripe for governmental entities to use eminent domain for land speculation, where a government entity sits on a property for years before beginning construction of the project for which the property was taken. For example, a school board could take land from a private owner—or acquire it under the threat of eminent domain—for a school that the board intends to build 10 to 15 years in the future, as the community expands. While there is nothing wrong with a district engaging in long-term planning like this, there is a problem with the district taking land at today’s prices when they will not be using it until tomorrow.

In effect, the property owner is robbed of the potential appreciation of his land between the time eminent domain proceedings are initiated and the time the school board would actually use the land. In a market transaction, a property owner can take potential appreciation into account when setting a price, but eminent domain law does not allow for that to be considered in a takings case. If a school district wants to plan for the future by purchasing property far in advance of its needs, that is a matter for the district and local taxpayers to work out. However, districts or other government entities should not be allowed to avoid future increases in property values at the expense of property owners through the use—or threat—of eminent domain.

When filed last session, SB 18 contained language that would stop this problem. It was the same language contained in HB 2006, which passed the Texas Legislature in 2007. However, this language was removed in committee last session and replaced with language that fails to protect property owners any more than current statute. The current version of SB 18 contains the same ineffective language. It is ineffective because the criteria that a city must meet to keep the land are so easily achieved that governments will be able to keep all the lands they take without ever using it for the use specified in the condemnation proceedings.

For instance, if a city simply acquires two tracts of land, then waits nine years and 11 months to apply for state or federal funds to develop the tracts for the purported public use, the city will have met the criteria. Or a city can simply avoid the buy-back provision by passing a resolution stating that it “will not complete more than one action . . . within 10 years of acquisition of the property,” and then applying for a federal permit.

Recommendation

Give property owners the right to repurchase their property if the initial use of the taken property is not the public use—or a substantially similar public use—for which the property was taken, by amending SECTION 15 of SB 18 by adding the following subsection to Sec. 21.101 (a) of the Property Code:

(4) the initial use of the property is not the public use—or a substantially similar public use—for which the property was acquired.

Set a hard deadline for condemnors to notify property owners of their right to repurchase a property, by amending Sec. 21.102, Property Code, as follows:

Sec. 21.102. NOTICE TO PREVIOUS PROPERTY OWNER REQUIRED [~~AT TIME OF CANCELLATION OF PUBLIC USE~~]. Not later than the 180th day after the date that the former property owner is entitled to repurchase the property under Section 21.101 [~~of the cancellation of the public use for which real property was acquired through eminent domain from a property owner under Subchapter B~~], the [~~governmental~~] entity shall send by certified mail, return receipt requested, to the property owner of the owner’s heirs, successors, or assigns a notice containing:

Allow property owners to repurchase their property for the price at which it was taken or the current market value, whichever is less, by amending Sec. 21.103(b), Property Code, as follows:

(b) As soon as practicable after receipt of a notice of intent to repurchase [~~the notification~~] under Subsection (a), the [~~governmental~~] entity shall offer to sell the property interest to the person for the price paid to the owner by the entity at the time the entity acquired the property through eminent domain or the fair market value of the property at the time the property owner becomes entitled to repurchase the property, whichever is less [~~public use was canceled~~]. The person’s right to repurchase the property expires on the 90th day after the date on which the [~~governmental~~] entity makes the offer.

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 should ensure that the property taken is actually used for the public use for which it is taken within a reasonable time. Except perhaps in the case of reservoir projects, public uses should be in operation within at the most 10 years of a taking, and the development or construction of the project should begin within five years of the taking. If governments desire to acquire property with a longer timeline for development, then they should purchase without the use—or threat of the use—of eminent domain.

The changes recommended here will provide greater incentives for governments to take property only for legitimate public uses and only when the property is actually needed 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 second of the Foundation’s three analyses of SB 18’s treatment of Texas landowners’ property rights.

