

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, the “buy-back” provision in SB 18 is at least as bad as current law, and will harm rather than improve property rights in Texas.

SB 18 Status

- Contains a provision that makes it easy for local governments and other condemnors to easily avoid the requirement to use condemned property for the purpose for which it is taken.

SB 18 Recommendation

- Change the language in SB 18 to allow property owners to repurchase their property if the development of the property for the public use for which it is taken has not begun within five years or if the public use for which the property is taken is not in operation within 10 years of the taking.

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 condemnor 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 condemnor 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

Require entities to start developing a property taken for a public use within five years and to begin to use the property for the public use it was taken for within 10 years.

Change Sec. 21.101(a), Property Code, in SECTION 14 of SB 18 to read as follows:

(a) A person from whom [~~Except as provided in Subsection (b), this subchapter applies only to~~] a real property interest is acquired by an [~~a governmental~~] entity through eminent domain for a public use, or that person’s heirs, successors, or assigns, is entitled to repurchase the property as provided by this subchapter if:

(1) the public use for which the property was acquired through eminent domain is [~~that was~~] canceled before the property is used for that public use;

(2) the governmental entity fails to perform a significant amount of labor or provide a significant amount of materials to develop the property toward the public use for which the property was acquired between the date of acquisition and the 5th anniversary of that date;

(3) the governmental entity fails to use the property for the public use for which the property was acquired before the 10th anniversary of the date of acquisition; or

(3) the property becomes unnecessary for the public use for which the property was acquired, or a substantially similar public use, before the 10th anniversary of the date of acquisition.

Additionally, current references in SB 18 to “actual progress” (such Sec. 21.101 (b) in SECTION 14) should be deleted and the text modified to match with these changes.

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.

