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Texas Says "No" to Kelo

HB 2006 Restores Texans' Property Rights

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PROTECTING PRIVATE PROPERTY

The U.S. Supreme Court's infamous 2005 *Kelo* decision was the culmination of a series of federal and state court decisions that have essentially rewritten the Takings Clauses of the U.S. and Texas Constitutions. In essence, *Kelo* said that private property is not a fundamental civil right, but a privilege granted by the state at its sole discretion.

In HB 2006, Texas has taken a determined stand against the U.S. Supreme Court's abandonment of the most fundamental of our rights. Without HB 2006, cities will continue to be able to take property for almost any reason simply by crafting their plans to skirt the limited protections put into law by SB 7 (2005). HB 2006 is essential to restoring Texans' property rights.

El Paso is a perfect example of the need for HB 2006. Under its downtown redevelopment plan currently in place, it will be able to begin taking property via eminent domain in 2008, before the Legislature returns to session in 2009.

The following is a summary of the need for several important provisions in HB 2006.

PUBLIC USE

While the federal courts were busy changing the U.S. Constitution to allow property to be taken for public purposes or benefits, the Texas courts continued to require a public use. Unfortunately, as the Texas Supreme Court noted, Texas courts have "adopted a rather liberal view as to what is or is not a public use." Essentially, public use in Texas has been construed as including the concepts of public purpose and benefit.

HB 2006 defines public use as meaning a "use of property, including a use described by Section 2206.051(c), that allows the state, a political subdivision of the state, or the general public of the state to possess, occupy, and enjoy the property." HB 2006 also bans takings that are not for a public use. Given that takings for other than a public use are already prohibited in the U.S. and Texas constitutions, this may seem redundant. Unfortunately, federal and state court decisions make it necessary for the Legislature to speak clearly on this. Restoring the definition of public use to its traditional meaning and banning takings not for a public use are vitally important to correcting the abuse of eminent domain seen in *Kelo* and similar takings right here in Texas.

DETERMINATIONS OF PUBLIC USE

While defining public use is important, it is not enough. This is because current Texas jurisprudence requires courts to offer great deference to determinations of public use by condemning authorities. As long as a government entity follows proper procedures, it is very difficult for a property owner to challenge these determinations in court.

This can be seen in a $10.5 million jury award to Harry Whittington in May 2007. Mr. Whittington had been battling the city of Austin's attempt to take his property since 2000. It was only in this trial, after six years, that the courts allowed a full hearing of the facts to proceed. Most citizens do not have

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the resources to sustain such a protracted battle against the government.

HB 2006 levels the playing field for property owners by removing the presumption or deference given to condemning entities on all determinations of public use. This will force cities and other entities seeking to condemn property to make sure their takings meet the new definition of public use before beginning the process. In the long run, it will reduce takings and litigation.

SPECULATIVE TAKINGS

Another 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 government entity 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 if the public use for which it is taken is cancelled. However, that 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 government entity holds on to the property for 10 years, or the price of the property increases too much, landowners are out of luck.

The case of Larry Raney highlights this problem. Though his family's homestead of three generations was taken by the city of Rowlett over two years ago for "possible expansion of city park land," it is being used today only as a vacant lot. Though a portion of the property is designated on city planning maps as a park, a nearby resident was unaware that she lived across the street from a park. Additionally, part of the land is now zoned for new residential development.

Quick*Fact*:

HB 3057 sets up specific criteria in the Texas Urban Renewal Law 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.

HB 2006 requires government entities to offer to sell back a property to the previous owner if the entity has not used the property for the public use for which it was taken. Ten years is more than enough lead time for a local government to plan, construct or implement the public use for which a property was acquired. Additionally, the owners would be able to buy it back at the price for which they were paid for it, not at the increased value most properties would have after 10 years.

PROCEDURES & EVIDENTIARY STANDARDS

Over the years, Texas courts have restricted the ability of property owners to get their day in court. They have relaxed the procedures that entities must follow in condemning property and restricted the evidence that property owners may present when challenging offers of compensation.

Because of these restrictions, condemnors routinely make offers below market value. While courts quite often award compensation at much higher levels—as in the case of Harry Whittington, who was initially offered half of what the jury awarded him—these cases can take years and cost property owners a significant portion of the award.

HB 2006 makes substantial changes to the procedures and evidentiary standards. It 1) requires local governments to take record votes before initiating condemnation proceedings, 2) requires a bonafide offer of compensation to be made to property owners, 3) allows property owners to recover reasonable attorney fees for frivolous lawsuits, and 4) defines market value and sets evidentiary standards for determinations of market value.

DIMINISHED ACCESS

A senate amendment to HB 2006 requires "special commissioners [to] consider any diminished access to the highway and to or from the remaining property to the extent that it affects the present market value of the real property…" The purpose of the amendment, originally found in SB 1711, is to allow for consideration of evidence relating to damages caused by condemnations that reduce access to public roads.

Concerns have been raised that this amendment would substantially raise the cost of condemning property along public rights-of-way. A variety of figures as to the increased costs have been discussed. However, in the fiscal note to SB 1711, the Texas Department of Transportation was not able estimate the increased cost.

It is important to note that TxDOT also found that SB 1711 "would require the state to make payment for damages that are not compensable under current law." To the extent that property owners are not being compensated for damages they sustain as their property is condemned, this amendment is an improvement over current law.

In addition, the cost of paying these damages—which will be substantially less than has been alleged—pales in comparison to the costs to property owners and society if HB 2006 fails to become law.

EMINENT DOMAIN REFORM NOT COMPLETE

The practical problem with the *Kelo* decision was not so much what it said, but the problems with Texas eminent domain law that it exposed. Before *Kelo*, the property rights of Texans were somewhat shielded 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, post-*Kelo*, everyone's property was up for grabs.

SB 7 (2005) was a good start in addressing these problems, but left many things unfinished. The Institute for Justice, the public interest law that represent Susette Kelo, noted that SB 7 contained "bad loopholes." And it did not address any of the problems with Texas eminent law identified during the interim study process that are being addressed in HB 2006.

The Texas Municipal League embraced the *Kelo* decision when it said that *Kelo* "simply confirms what cities have known all along: under the Fifth Amendment to the U.S. Constitution, economic development can be as much a 'public use' as a road, bridge, or water tower." This incredible statement witnesses to the substantial erosion of private property in the last 50 years. HB 2006 is essential to reversing this trend and restoring the property rights of all Texans.