TEXAS PUBLIC POLICY FOUNDATION
Testimony

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Center for Economic Freedom

Eminent Domain: Restoring Texans' Property Rights

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THE PROBLEMS EXPOSED BY KELO

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.

The Texas Municipal League understood this when it embraced the *Kelo* decision. 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."

Of course, based on the public outcry in response to *Kelo*, it seems as if the cities and five members of the U.S. Supreme Court were the only ones who understood this to be the meaning of the Fifth Amendment.

Former Texas Agriculture Commissioner Jim Hightower said, "Something downright spooky is happening to me: I find myself agreeing with Clarence Thomas. … The court's majority has now stretched [the takings] clause beyond recognition by ruling that [a] seizure is OK as long as there's a public purpose involved. In the Connecticut case, the purpose was to get more property taxes for the city by replacing the individual homes with a large-scale, ritzy development. 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 home-owners put it: "It's basically corporate theft."

U.S. Representative Maxine Waters of California called *Kelo*-style takings "the most un-American thing that can be done." Similarly, 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."

And, as it turns out, it is also unnecessary.

The outcry against *Kelo* did not stop with rhetoric, but included legislative action. The Institute for Justice reports that "by the end of 2007, 42 states had passed some sort of eminent domain reform designed to stop or at least curb the *Kelo*-style abuse."

Twenty-one states responded with reforms strong enough to earn an A or a B on the Institutes *Kelo* scorecard. Unfortunately, Texas was not one of them—earning a C- for its limited efforts.

If the cities and others that profit from *Kelo*-style takings are to be believed, reforms passed by these 21 states would harm local economies. Mayor Dave Cieslewicz called eminent domain reform, "senseless legislation that responds to a non-problem. It has a negative impact for economic development all over the state of Wisconsin."

But a study by the Institute for Justice debunks the claims that "cities will die" without the ability to forcibly take properties from their citizens for economic development.

In *Doomsday? No Way: Economic Trends and Post-Kelo Eminent Domain Reform*, IJ "examined economic indicators closely tied to reform opponents' forecasts—construction jobs, building permits and property tax revenues—before and after reform across all states and between states grouped by strength of reform."

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The findings from the study are informative for policymakers here in Texas. It found:

- There appears to be no negative economic consequences from eminent domain reform. State trends in all three key economic indicators were essentially the same after reform as before.
- More importantly, even states with the strongest reforms saw no ill economic effect 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.
- The data show that reality bears no resemblance to gloomy forecasts of economic doomsday. In fact, large-scale economic development can and does occur without eminent domain.

The IJ study proves that Texas can do the right thing in restoring the historical property rights of its citizens without doing harm to local or state economies. And there are several current cases or events that demonstrate why it is urgent that we do so.

THE EL PASO DOWNTOWN REVITALIZATION PLAN

We can find no better example of why Texas needs to act soon to improve eminent domain laws than the El Paso Downtown Revitalization Plan.

Back in 2006, the El Paso City Council adopted a moratorium on the use of eminent domain in conjunction with the El Paso Downtown Revitalization Plan. The moratorium will expire October 31, 2008. So while the power of eminent domain has not been exercised to this point, eminent domain once again becomes an option as of November.

On January 29, 2008, a proposed city ordinance was brought before the El Paso City Council by several council members. In essence, the ordinance was patterned after the reforms contained in HB 2006 and HB 3057, relating to public use and blight. The ordinance would have significantly restricted the use of eminent domain under the redevelopment plan.

The council discussed the ordinance and received public comments. The motion to adopt the ordinance failed by a 3-4 vote. By this action, the El Paso City Council clearly rejected any limitations against its authority to use eminent domain as part of the implementation of the El Paso Downtown Revitalization Plan.

El Paso's Downtown Redevelopment Plan relies heavily on amassing an inventory of tracts of various sizes—which today are filled with housing and businesses—that can be used to attract developers and retailers to the area, especially in the designated Redevelopment District. To "facilitate and accelerate the implementation of the Plan," the City adopted a Tax Increment Reinvestment Zone (TIRZ) and in partnership with "a real estate investment, management and operating company" in the form of a Real Estate Investment Trust (REIT) to acquire downtown real estate assets … either through outright purchases of property or contributions by landlords."

A TIRZ is created under the Tax Increment Financing Act, Chap. 311 of the Texas Tax Code. Under Chap. 311, a city can use the power of eminent domain to acquire property to carry out the plan developed in conjunction with the TIRZ. Of course, SB 7 prohibits a city from using eminent domain for economic development purposes even through a TIRZ (there is one exception to this ban). The problem is that Texas courts have held that the clearing of slum and blighted areas is per se a public use, both under the Texas Urban Renewal Law and the Tax Increment Financing Act, even if the specific property itself is not blighted. So El Paso—along with every other city in the state—can use clearing of slum and blighted areas as a reason to exercise eminent domain authority to take almost any property. All they have to do, according to the U. S. Supreme Court, is have a plan in place.

Properties that might be taken in El Paso include the Pablo Bay apartments, where the first novel of the Mexican Revolution was published in 1915. Or the buildings containing Starr Western Wear and the Juarez Boot store. Or apartment buildings in the historic Segundo Barrio. Unless the protections contained in HB 2006 and HB 3057 are adopted in new legislation during the 81st Texas Legislature, these buildings and others in the demolition zone will all be eligible for condemnation—even though many of them currently provide affordable housing and space for thriving businesses.

In fact, the number of properties and buildings subject to eminent domain under the plan has recently been expanded by the El Paso City Council. On December 18, 2007, only a few weeks before it rejected the eminent domain protections, the council adopted ordinances 16803 and 16804 which expanded the boundaries of the TIRZ, which is the vehicle for using eminent domain under the city's redevelopment plan. So rather than acting to protect the private property rights of its citizens, El Paso is aggressively protecting and even expanding its ability to implement its Downtown Plan using eminent domain.

HARRY WHITTINGTON V. THE CITY OF AUSTIN

Harry Whittington and his family owned a city block near the Austin Convention Center. On August 9, 2001, the Austin City Council passed a resolution that the Whittington's property "should be acquired for a public use" via eminent domain. However, the City's resolution was silent regarding what exactly that public use should be. The City later said that it wanted to use the land for the purpose of building a parking garage for the Austin Convention Center and chilling plant. However, the city had previously planned a convention center parking facility in conjunction with the adjacent Hilton Hotel project. It was only when the City agreed to let the developer not build the parking garage that the City proposed using Whittington's land for this purpose. Additionally, the City admitted in deposition testimony that it could have met all of its projected convention center parking needs at much less cost by non-renewing contract parking leases in the City's existing parking garage at Second and Brazos. The idea for the chilling plant use came even later.

The City was initially successful in its condemnation of the land—the trial judge awarded it a summary judgment—and built a parking garage on the property. However, the Whittingtons successfully appealed the summary judgment, and took the case to a full trial that began in April 9, 2007. In a separate case, a court found that the city failed to properly condemn an alley running through the property.

It wasn't until the summer of 2007 that this case finally came to a conclusion—six years after the Austin initiated condemnation proceedings. The court awarded the Whittingtons $10.5 million, more than twice what the city originally offered. While this was certainly a victory for the Whittington family, it was less so for property owners. Instead, it demonstrates how costly and time consuming it is to challenge the government in an eminent domain proceeding. Few property owners have the resources and staying power of the Whittingtons. Most property owners have to take what is offered because they don't have the ability to put up a fight.

RECOMMENDATIONS

Texas has taken some steps since *Kelo* in moving toward protecting its citizens from eminent domain abuse. SB 7 improved the situation somewhat, but served only as a starting point during a busy session on school finance. HB 1495 provided important information to landowners. HJR 30 was important, but needs enabling legislation. Clearly, there is more to be done. Here are four key areas that still need to be addressed today:

Define 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. The meaning of public use should be restored to its traditional meaning through a definition in statute.

Eliminate the Blight/Slum Loophole: SB 7 included a ban on takings for the purpose of economic development. But since no one knew how the courts would interpret economic development, a laundry list of exemptions to this ban was added into the law. While most of these exemptions are fine, the one which allows takings when "economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas" opens the door for *Kelo*-style takings right here in Texas. In fact, unless the law is changed, the city of El Paso is poised to do exactly that in Fall 2008 under its downtown redevelopment plan.

Restore the Balance on Determinations of Public Use and Necessity: While challenges to takings on the grounds of compensation occur relatively often, challenges based on determinations of public use and necessity are much less common. This is because current Texas jurisprudence requires the courts to offer great deference to governmental determinations of public use and necessity. Therefore, as long as a government entity follows proper procedures, it is very difficult for a property owner to challenge these determinations in court.

In one case where a property owner attempted to make such a challenge, a Texas appeals court said that the "condemnor's discretion to determine what and how much land to condemn for its purposes—that is, to determine public necessity—is nearly absolute. … Courts do not review the exercise of that discretion without a showing that the condemnor acted fraudulently, in bad faith, or arbitrarily and capriciously, i.e., that the condemnor clearly abused its discretion." In other words, the courts cannot look at the facts of the case absent extraordinary circumstances. The standard for examining public use determinations is better, but still weighted too heavily in favor of condemning entities.

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While SB 7 addressed this, its language regarding presumption is so narrowly tailored that it is likely to have little impact in most cases where a property owner seeks to question determinations by the condemnor. Courts will still have to defer to the condemnor in most situations. Texas property owners should be allowed to challenge the facts regarding public use and necessity in the court room.

End The Use of Eminent Domain for Land Speculation: – 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 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 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.

The case of Larry Raney in Rowlett, TX highlights this problem. Though his family's homestead of three generations was taken by the city of Rowlett over four 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. ★