TEXAS PUBLIC POLICY FOUNDATION
BillAnalysis

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Eminent Domain: SJR 42 & HJR 14

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SJR 42

SJR 42 takes the negative approach to defining public use. It says, "'public use' does not include the taking of property by the state or a political subdivision of the state for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues."

The problem with this language is that it does nothing to eliminate the loophole in current law that bans takings "for economic development purposes, unless the 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." (Sec. 2206.051 (b) (3), Government Code.)

This allows cities to take essentially any property they want by declaring an area—not specific properties, but entire blocks—blighted and placing it within a Tax Increment Reinvestment Zone (TIRZ). At that point, cities can then take any property in the area using eminent domain for "secondary" economic development purposes such as increasing tax revenues, replacing low-income housing with high-end condos, and swapping out the old retail establishments that catered to the previous residents with a fashion mall catering to the new residents of the area. El Paso already has all this in place and will be able to use this power anytime if the Legislature leaves Austin in May without changing the law. Other cities can avail themselves of this ability too.

Though this statute appears to prohibit a city from engaging in *Kelo*-style takings, 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. SJR 42 does change this, and will not stop *Kelo*-style takings in Texas.

HJR 14

Unlike SJR 42, HJR 14 doesn't attempt to define public use positively or negatively. Instead, it simply limits what property taken for a public use can be used for.

HJR 14 says that property may be taken for a public use "only if the taking, damage, or destruction is necessary for the elimination of urban blight on a particular parcel of property or the possession, occupation, and enjoyment of the property by a common carrier, by an entity providing utility service, by an entity that provides telecommunications service, video service, or cable service to which the law grants eminent domain authority, by the public at large, by the State, or by a political subdivision of the State."

The essence of this legalese is that—in most cases—the entity that takes a property via eminent domain is the entity that is going to have to put the property to the public use. Cities will no longer be able to take large parcels of property and sell or lease them to a private developer to build new developments that are supposed to bring in higher tax revenues for the local government.

The one exception to transfers is for blight. The exception for blight in HJR 14 might still allow a city to take and transfer a blighted property to another owner. However, by limiting this exception to "a particular parcel of property," the ability of local governments to declare vast areas blighted even if particular properties are not is eliminated. HJR 14 goes a long way toward solving Texas' *Kelo* problem.