TEXAS PUBLIC POLICY FOUNDATION
BillAnalysis

May 2009
Center for Economic Freedom

Senate Bill 18: Texas' *Kelo* Problem Still Not Solved

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SB 18 allows cities to carry on their eminent domain business as usual.

The *Kelo* Problem

It has been nearly four years since the U.S. Supreme Court's infamous *Kelo* decision, which essentially changed private property ownership from a fundamental civil right to a privilege granted by the state at its sole discretion. Yet Texas has failed to adequately respond to this decision. The first attempt in 2005 missed the mark. In 2007, the Legislature passed strong property rights protections in HB 2006. But the bill was subsequently vetoed over concerns about compensation. Another important bill during that same legislative session that would have reformed blight laws died in conference committee.

If these bills that had nearly become law had passed this session with only minor modifications, Texans would have been well served. However, that is not proving to be the case. SB 18 is the current version of HB 2006. However, the bill was significantly changed in committee and stripped of two key reforms. HB 417, almost identical to the 2007 legislation addressing blight reform, is a good bill, but it is mired in the legislative process. As it stands today, there is a good chance after the Legislature adjourns that Texas property owners will still be subject to the same takings that outraged the nation in the *Kelo* case.

The cities that exercise the power of eminent domain—and have consistently opposed reform—are generally of the same opinion. One analysis of SB 18 concluded:

> The Committee Substitute for S.B. 18 ... may emerge as the session's primary eminent domain bill. It attempts to strike a reasonable balance between the needs of condemnors and the property rights of landowners. …
>
> This session, more than 20 bills and joint resolutions proposing constitutional amendments, most of which would be extremely harmful to municipal authority, have been filed. Unlike those bills and unlike H.B. 2006 (2007 session), S.B. 18 appears to make more subtle changes in an effort to promote fairness for property owners. …
>
> The provisions of S.B. 18, in its current form, might make the use of eminent domain more complicated, and nominally more expensive. But the bill is not nearly as bad as virtually every other alternative.[1]

In other words, SB 18 allows cities to carry on their eminent domain business as usual.

To fix Texas' *Kelo* problem, we need to do three things: 1) eliminate the ability of governments to transfer taken property from one private owner to another, 2) eliminate the ability of governments to use blight designations as an end run around the ban for takings for economic development purposes, and 3) end government land speculation by requiring that property not put to the public use for which it was taken within five years, be offered for sale back to the original owner at the price the government paid for it. Only with these reforms will Texans be assured that cities like El Paso, with its downtown redevelopment plan in place, won't use eminent domain to achieve the dreams of the well-connected at the expense of everyone else.

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PP18-2009

Fixing the Public Use Problem

The justification offered in support of the removal of the definition of public use from SB 18 in the Senate State Affairs Committee was that "public use is already defined in case law." While it is true that the courts have determined over the years what constitutes a public use, this is a cause for action—not inaction—by the Texas Legislature.

Kelo exposed years of jurisprudence in Texas that has undermined the standard in the Texas Constitution that property be taken only for a public use. As the Texas Supreme Court has noted, Texas courts have "adopted a rather liberal view as to what is or is not a public use."[2] It is this liberal view that allows property to be taken from one property owner and given to another in order to increase tax revenues for local governments. SB 18 defers to the judicial blessing on these takings and does nothing to stop them.

There are at least two ways to remedy this situation. One way is to use the definition stripped out of SB 18, the same definition already passed by the Texas Legislature in HB 2006. It reads, "Public use means the possession, occupation, and enjoyment of property by the state, a political subdivision of the state, or the general public of the state, including the use of the property for the purpose of providing utility or common carrier services to the general public of the state."

However, since this definition is being challenged, another approach would be to simply ban the transfer of lands taken via eminent domain. While not as comprehensive, this will still take care of the vast majority of abuses under the current definition of public use. This is the approach that Florida took in a constitutional amendment adopted by the voters. A strong ban would look something like this:

> Private property taken by eminent domain may not be conveyed or leased to a natural person or private entity for 15 years, except to a natural person or private entity, pursuant to a lease:
>
> (1) that occupies an incidental area of a public property or a public facility; or
>
> (2) for use as a road or other right-of-way that is open to the public for transportation, whether at no charge or by toll.

The exceptions allow for what are generally recognized as legitimate public uses, such as an airport that just happens to contain a sandwich shop or a toll road owned by the state but operated by a third party. Other than these situations, it is not obvious that there is any reason for an entity to take land via eminent domain then transfer it to a third party. Given the thousands of entities that have eminent domain authority in Texas, it is likely that the third party—be it public or private—doesn't have the power of eminent domain itself because the Texas Legislature has not seen a need to confer that authority upon it. If an entity needs that authority, it should come to the Texas Legislature rather than seeking an entity with eminent domain authority to do it for them.

Fixing the Blight Designation Problem

Current Texas law generally bans the use of eminent domain for economic development purposes. However, it gives cities a large loophole by allowing 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."[3]

This exception opens the door to *Kelo*-style takings right here in Texas. In fact, the city of El Paso is poised to do just this through its downtown redevelopment 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" formed 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. Though SB 7 prohibits a city from using eminent domain for economic development purposes, 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 emi-

nent 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.

To stop the ability of Texas cities to declare and take perfectly suitable properties as blighted, three key legislative changes should be made:

- The confusing slum and blight exception to the ban on takings for economic development should be modified.
- Texas law should be changed so that property can only be declared blighted on an individual basis based on the characteristics of each individual property.
- Criteria for designating property blighted should be stringent. Only if a property meets at least four of the following standards should it be able to be designated as blighted:
    - the property contains uninhabitable, unsafe, or abandoned structures;
    - the property has inadequate provisions for sanitation;
    - there exists on the property an imminent harm to life or other property caused by fire, flood, hurricane, tornado, earthquake, storm, or other natural catastrophe;
    - the property has been the location of substantiated and repeated illegal activity of which the property owner knew or should have known; or
    - the property is abandoned and contains a structure that is not fit for its intended use because the utilities, sewerage, plumbing, heating, or a similar service or facility of the structure has been disconnected, destroyed, removed, or rendered ineffective.

SB 18 doesn't currently address the blight problem. That was to be handled in HB 417. But many of the needed changes are germane to SB 18 and could be easily included.

Fixing the Government Land Speculation Problem

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. If the condemnor simply holds the property for more than ten years, then it can be used for anything and the previous owner will never have the opportunity to purchase it back at any price.

SB 18 once contained language that would effectively stop this practice, the same language contained in HB 2006. However, this language was removed in committee and replaced with language that fails to provide any protection to property owners from government land speculation. It fails because the criteria that a city must meet to keep the land are so easy to achieve that governments will be able to keep all the lands they take without ever using it for the purpose specified in the condemnation proceedings. For instance, if a city simply acquires two tracts of land, then waits nine years and eleven months to apply for state or federal funds to develop the tracts for the purported public use, the city will never have to return the properties to the original owners. Or a city can simply avoid the buyback 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 acquiring two properties or applying for federal funds.

To end land speculation by local governments, the language originally in SB 18, with minor modifications, should be restored: "A person from whom a real property interest is acquired by an 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 the governmental entity fails to begin the operation or complete the construction of the project for which the property was acquired before the 5th anniversary of that date." ✯

[1] Texas Municipal League, "Eminent Domain: Senate Bill 18 May Be The Omnibus 'Reform' Bill," http://www.tml.org/leg_updates/legis_update043009b_reform.html.
[2] Texas Supreme Court, *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d at 833.
[3] Texas Government Code, Sec. 2206.001(b)(3).

About the Author

Bill Peacock is the vice president of administration and research and director of the Texas Public Policy Foundation's Center for Economic Freedom. He has been with the Foundation since February 2005.

Bill has extensive experience in Texas government and policy on a variety of issues including, economic and regulatory policy, natural resources, public finance, and public education. His work has focused on identifying and reducing the harmful effects of regulations on the economy, businesses, and consumers.

Prior to joining the Foundation, Bill served as the Deputy Commissioner for Coastal Resources for Commissioner Jerry Patterson at the Texas General Land Office. Before he worked at the GLO, Bill was a legislative and media consultant. He has also served as the Deputy Assistant Commissioner for Intergovernmental Affairs for then-Commissioner Rick Perry at the Texas Department of Agriculture and as a legislative aide to then-State Rep. John Culberson.

Bill has a B.A. in History from the University of Northern Colorado and a M.B.A. with an emphasis in public finance from the University of Houston.

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