

Public Purpose v. Public Use SB 655 & HB 2586

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Findings

- According to the constitutions of Texas and the United States, eminent domain can only be used for a public use.
- The blurring of the distinction between public use and public purpose has led to the taking of property for “economic development” purposes.
- The Texas Legislature should continue to eliminate the term “public purpose” in law when associated with eminent domain.

According to the constitutions of Texas and the United States, eminent domain can only be used for a public use:

Texas Constitution: “No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made ...”¹

U.S. Constitution: “nor shall private property be taken for public use, without just compensation.”²

However, the important limitation on takings of private property provided by the public use doctrine has been watered down by years of legislative and judicial action.

Provisions in a constitution are often incorporated in statute through related enabling legislation. Clarity in law is crucial. This is relevant because the Texas Legislature and Texas courts have through the years followed the national trend of blurring the distinction between public use and public purpose. Here are two examples:

From the Legislature: “Sec. 251.001. RIGHT OF EMINENT DOMAIN. (a) When the governing body of a municipality considers it necessary, the municipality may exercise the right of eminent domain for a public **purpose** to acquire public or private property, whether located inside or outside the municipality, for any of the following **purposes**.” (emphasis added)

From the courts: “In any event, a mere declaration by the Legislature cannot change a private **use** or private **purpose** into a public **use** or public **purpose**.”³ (emphasis added)

The blurring of the distinction between public use and public purpose was what led to the U.S. Supreme Court’s infamous *Kelo* decision, where the city of New London, Connecticut was allowed to take the land of Suzette Kelo and her neighbors for the public purpose of economic development. It was after the *Kelo* case that Texans began to discover that Texas had similar problems.

Fortunately, the Legislature last session began to remedy this problem in SB 18. This legislation prohibited in statute the use of eminent domain unless it is for a public use.⁴ Additionally, it eliminated the term “public purpose” in the authorizing language for cities (see above), counties, and school districts. Yet there are still many places in statute where the focus on public use is not sufficient.

For instance, here is the statute granting eminent domain authority to the University of Texas System:

Sec. 65.33. EMINENT DOMAIN. (a) The board has the power of eminent domain to acquire for the use of the university system any land that may be necessary and proper for carrying out its **purposes** in the manner prescribed by Chapter 21, Property Code.⁵

Then in subsection (c), the Legislature declares the purposes of the University of Texas System to be for the use of the state:

(c) The taking of the property is declared to be for the use of the state.⁶

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In other words, the Legislature declares that whatever purposes the University of Texas System may have for a piece of property it takes from an owner becomes a public use simply through the exercise of eminent domain. The courts need not worry about the facts.

Here are some other examples:

SPECIAL DISTRICT LOCAL LAWS CODE CHAPTER 3828. LAKE VIEW MANAGEMENT AND DEVELOPMENT DISTRICT

Sec. 3828.106. EMINENT DOMAIN. (a) The district may exercise the power of eminent domain inside district boundaries *for any public purpose*.

WATER CODE CHAPTER 49. PROVISIONS APPLICABLE TO ALL DISTRICTS

Sec. 49.222. EMINENT DOMAIN. (a) A district or water supply corporation may acquire by condemnation any land, easements, or other property inside or outside the district boundaries, or the boundaries of the certificated service area for a water supply corporation, necessary for water, sanitary sewer, storm drainage, or flood drainage or control purposes or *for any other of its projects or purposes*, and may elect to condemn either the fee simple title or a lesser property interest.

SPECIAL DISTRICT LOCAL LAWS CODE CHAPTER 8179. CYPRESS CREEK UTILITY DISTRICT

Sec. 8179.103. EMINENT DOMAIN. The district may exercise the power of eminent domain only: (1) in a county in which the district is located; and (2) when necessary to *carry out the purposes* for which the district was created.

SPECIAL DISTRICT LOCAL LAWS CODE CHAPTER 1061. MIDLAND COUNTY HOSPITAL DISTRICT

Sec. 1061.109. EMINENT DOMAIN. (a) The district may exercise the power of eminent domain to acquire a fee simple or other interest in any type of property located in district territory if the interest is necessary *or convenient* for the district to exercise a power, right, or privilege conferred by this chapter.

This last example does not actually mention public purposes, but does add confusion by allowing a condemnation that is merely convenient rather than necessary, which is the general standard for takings across the law.

SB 655 and HB 2586 seek to further strengthen the public use requirement by adding language in the Special District Local Laws Code and the Water Code that point directly to the requirement in the Texas Constitution. They take this approach because of the difficulty of amending the authorizing language in each district where public purpose or purpose is currently used.

There is no doubt that the Texas Constitution prohibits takings that are not for a public use. Some might claim that this makes SB 655 and HB 2586 unnecessary. However, until the Texas Legislature put a specific ban on takings primarily for economic development in statute in 2005, Texas courts had allowed such takings, including the taking of property from Western Seafood by the Freeport Economic Development Corporation that was to be transferred to Western Seafood's next door neighbor for the construction and operation of a private marina along the Texas Gulf Coast. ★

¹ Texas Constitution, art. 1, sec. 17(a).

² U.S. Constitution, amend. 5.

³ *Maher v. Lasater*, 354 S.W.2d 923, 924 (Tex.1962).

⁴ Texas Government Code, sec. 2206.001 (b)(4).

⁵ Texas Education Code, sec. 65.33.

⁶ *Ibid*.

