

The Buyback Provision HB 20 & SB 180

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Texas has come a long way toward restoring private property rights that had been eroded through years of unfavorable laws and court rulings up through the U.S. Supreme Court's 2005 *Kelo* decision. However, there are still problems that need to be addressed.

In 2011, the Texas Legislature passed SB 18, the latest effort to restore private property rights. Most of the provisions of SB 18 were well-founded and will move eminent domain law in the right direction. However, SB 18's "buyback" provision—while well intentioned is worse than the previous law and has set back property rights in Texas.

A major 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 public use for which it was taken.

Key Findings

- Condemnors are required to certify that a taking is necessary for the public use in question.
- If a taking is not necessary, it should not be taken in the first place, much less diverted for another use.
- Property taken by the government should always be used initially for the public use for which it was taken.

Prior to 2011, Texas law contained a "buyback" provision that allowed for the repurchase of property by the original owner if the public use for which the property was taken was cancelled. However, the provision was of little actual benefit to property owners. Practically, if the condemnor held the property for more than 10 years, then it could have been used for anything, and the previous owner never had the opportunity to purchase it back at any price. Such was the case with the Applewhite Reservoir near San Antonio. The land taken for it was never used to build the reservoir; instead, much of the land today is a Toyota truck factory. The property was never offered for sale back to the owners because the project was never officially cancelled.

Under SB 18 last session, the buyback provision was amended so that a condemnor is required to meet two of seven criteria within 10 years of the taking in order to demonstrate that the entity has made "actual progress ... toward the public use" for which the property was taken. However, the seven criteria that a condemnor must meet to keep the land are so easily achieved that any government entity will be able to keep all the land it takes in perpetuity without ever using a parcel for the use specified in the condemnation proceedings.

For instance, if a city acquires two tracts of land, then applies for state or federal funds to develop the tracts for the purported public use, the city will have met the criteria and be able to keep the land in perpetuity—even if they never use the property for the purpose for which it was taken. Another way a city can avoid the buyback provision is by passing a resolution stating that it "will not complete more than one action ... within 10 years of acquisition of the property," and then applying for a federal permit.

The buyback provision in SB 18 was not always so ineffective. The version of the bill passed by the Texas House of Representatives contained language that significantly strengthened the buyback provision. It did so by simply requiring that the initial use of a property taken by eminent domain must be the public use for which the property was taken.

For instance, if a school district takes a property for a school, then the school district must initially use that property for a school—not for commercial property development. A city taking property for a city hall must use the property for a city hall—not for condominiums. Once the land has been used for the purpose for which it was taken, however, it can be used for something else. Property first taken and used for a school could be used for something else if the school becomes unnecessary. It is the initial use which counts.

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Under the House language, initially using the property for something other than the use for which it was taken—no matter when that might be—would trigger the buyback provision and the property owner would have the right to repurchase the property. However, this language was stripped from SB 18 during the negotiations over the differences in the versions of the bill in conference committee.

HB 20 by Rep. Kolkhorst and SB 180 by Sen. Van de Putte would amend current law with the language from the House version of SB 18, and in the process, go a long way toward protecting the property rights of Texas landowners. Specifically, the legislation makes the following changes to eminent domain law:

- Adds a provision allowing property owners to repurchase their property if the acquiring entity does not initially use the property for the public use for which it was acquired. This is the same as the amendment from last session. Sec. 21.101(a)(4).
- Applies all provisions of the buyback provision to all property acquired by “an entity with the power of eminent domain,” since most property acquired by condemning entities is not taken via eminent domain, but under the threat of eminent domain. Property owners in most cases simply have no choice but to sell. But property acquired under the threat of eminent domain should still be subject to the buyback provision. This is a new addition since the amendment last session. Sec. 21.101(a).
- Removes two of the seven “actions” that allow an acquiring entity to show “actual progress” toward the public use and thus not be subject to the buyback provision. With this change, acquiring entities will have to engage in two of five actions to prove actual progress, rather than two of seven (in reality, one of six) in current law. The two actions struck by this bill are: the acquisition of another property for the same public use and the passage of a resolution by a governmental entity that it will only take one of six actions. Sec. 21.101(b)(6) and (7).
- Allows property owners to make one information request on the status of the property annually to the acquiring entity after the acquisition of a property, instead of having to wait 10 years to make the first request. Sec. 21.1021(a).

The Texas Legislature can significantly strengthen property rights protections through these provisions. While taking property under eminent domain is widely seen as necessary in the cases of public use, it is still a taking of private property. A condemnor should use the property for the public use for which it is taken. If it does not, it should sell it back to the original owners at the original price for which it was taken. ★

