

SUBJECT: Restricting eminent domain use for economic development purposes

COMMITTEE: Land and Resource Management — committee substitute recommended

VOTE: 8 ayes — Mowery, Harper-Brown, Blake, R. Cook, Escobar, Miller, Orr, Pickett

0 nays

1 absent — Leibowitz

WITNESSES: No public hearing

BACKGROUND: The Fifth Amendment to the U.S. Constitution prohibits the taking of private property for public use without just compensation, commonly referred to as the “takings clause.” Texas Constitution, Art. 1, sec. 17 — often called the “public use clause” — prohibits a person’s property from being taken, damaged, or destroyed without consent for public use without adequate compensation.

The authority of government to claim private property for public benefit is called eminent domain and is considered an inherent attribute of sovereignty. Texas has limited that power through its Constitution and has granted it to numerous other entities, including political subdivisions, special districts, and private concerns such as utilities. These specific grants of authority to other entities are found throughout the statutes. Property Code, ch. 21 establishes the procedures for exercising eminent domain authority.

In June 2005, the U.S. Supreme Court ruled in *Kelo v. City of New London*, (No. 04-108), that the proposed use of property by the city of New London, Conn. for a development project qualified as a “public use” within the meaning of the U.S. Constitution’s takings clause. In the case, the city of New London was attempting through eminent domain to acquire property from owners, including longtime residents, who refused to sell land earmarked for a development project that, by some estimates, would create more than 1,000 jobs, increase tax and other revenues, and revitalize an economically distressed city. The city invoked a state law that

specifically authorizes the use of eminent domain to promote economic development.

The Supreme Court said that the plan unquestionably served a public purpose and therefore ruled that it did not violate the U.S. Constitution's takings clause. The court ruled that promoting economic development is a traditional and long accepted government function and that there is no principled way of distinguishing it from other purposes the court has recognized. The Supreme Court said it was embracing the broader and more natural interpretation of public use as "public purpose."

The court also found that the city had determined that the area at issue was sufficiently distressed to justify a program of economic rejuvenation and that the city had developed a plan designed to benefit the community, including the generation of new jobs and increased tax revenue. While the city could not take the private land simply to confer a private benefit on a particular private party, the exercise of eminent domain in this case, according to the Supreme Court, was envisioned under a carefully considered development plan that was not adopted to benefit a particular class of identifiable individuals.

The court also emphasized that nothing in its opinion precluded a state from placing further restrictions on its exercise of the takings power. It said that many states already impose "public use" requirements that are stricter than the basic federal standards.

Local Government Code, ch. 373 regulates community development in cities, and ch. 374 regulates urban renewal in municipalities.

Through the enactment of SB 771 by West, the 79th Legislature amended Tax Code, sec. 311.005(a)(1)(I) to allow the presence of certain vacant buildings to be used as part of the criteria to have an area declared a tax reinvestment zone. The law applies, in cities with more than 100,000 inhabitants, to structures other than single family residences in which less than 10 percent of the square footage has been used for commercial, industrial, or residential purposes during the preceding 12 years.

DIGEST:

CSHB 16 would prohibit governmental or private entities from using eminent domain to take private property if the taking conferred a private benefit on a particular private party through the use of the property or was for a public use that merely was a pretext to confer a private benefit on a

particular private party. It also would prohibit the exercise of eminent domain to seize private property if the taking was for economic development purposes, unless the economic development was a secondary purpose that resulted from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas under:

- Local Government Code, chapters 373 or 374, other than a provision that addresses more rational use of land and other natural resources; or
- the Tax Code provision (added by SB 771, regular session) that allows certain vacant buildings to be used to have an area declared a tax reinvestment zone .

CSHB 16 would not affect the authority of any entity authorized to use eminent domain for:

- transportation projects, including railroads, airports, or public roads or highways;
- ports;
- water supply, wastewater, flood control, and drainage projects;
- the provision of utility services;
- a sports and community venue project approved by voters at an election held on or before December 1, 2005, under Local Government Code, chapters 334 or 335;
- pipeline operations;
- a purpose authorized by Utilities Code, ch. 181 regulating private gas and electric utilities;
- oil and gas underground storage operations subject to Natural Resources Code, ch. 91; or
- a waste disposal project.

The bill would not affect the authority of a governmental entity to condemn a leasehold estate on property owned by that entity.

Notwithstanding other laws, information collected, assembled, or maintained by non-governmental bodies authorized by law to take private property would be subject to the Public Information (Open Records) Act, if the information was related to the taking of private property.

These provisions would apply to the use of eminent domain under all state laws, including a local or special law, by any governmental or private entity including:

- a state agency, including an institution of higher education;
- a political subdivision of the state; or
- a corporation created by a governmental entity to act on behalf of the entity.

The law governing Texas Department of Transportation (TxDOT) toll roads would be amended to prohibit the agency from using eminent domain to take property for an ancillary facility necessary or convenient to a state highway to unless:

- subject to provisions in current law granting authority to the Texas Transportation Commission to take property for a right-of-way or location for a facility for the Trans-Texas Corridor, the purpose was for a gas station, convenience store, or similar facility; or
- the purpose was to provide a location between the main lanes of a highway or between a highway and a department rail facility for a gas station, convenience store, or similar facility that provided services to and directly benefited users of a toll project and was not located within 10 miles of an intersection of the toll project and a segment of an interstate highway.

CSHB 16 would create an interim legislative committee to study the use of the power of eminent domain, including its use for economic development, and to report to the 80th Legislature by December 1, 2006. The committee would be composed of five senators appointed by the lieutenant governor and five House members appointed by the speaker of the House. The lieutenant governor and speaker each would designate a co-chair from among the members each appointed.

CSHB 16 would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect 91 days after the last day of the legislative session (November 18, 2005, if the second called session lasts a full 30 days). It would apply to takings of private property by eminent domain filed on or after the bill's effective date.

SUPPORTERS
SAY:

CSHB 16 is necessary to protect property rights in Texas following the recent U.S. Supreme Court ruling that allowed a local government to seize property from private owners and transfer it to another owner simply to increase tax revenues through economic development. While the court said that the seizure did not violate the U.S. Constitution's takings clause, it also said that states can place further restrictions on the exercise of eminent domain power. CSHB 16 would do just that and place appropriate limits on the exercise of eminent domain by Texas and its political subdivisions. It would not take away the eminent domain authority of any entity or grant new eminent domain authority to any entity.

It is an abuse of power for government to seize private property and shift it to another private owner solely to generate more tax revenue or to confer a private benefit on a particular private party. Under the precedent established by *Kelo*, cities or other entities with eminent domain authority could argue that nearly any project benefited the public through economic development and could, for example, take private homes to enable the construction of a shopping mall that would generate more tax revenue than the homes. Justice Sandra Day O'Connor said in her dissent that "all private property is now vulnerable to being taken and transferred to another private owner who will use it in a way that the legislature deems more beneficial to the public." Such cases tend particularly to hurt the poor because their property often is more vulnerable to seizures for projects that will generate higher tax revenue.

It is necessary to place restrictions on the exercise of eminent domain in Texas because the Texas Constitution's public use clause is similar to the takings clause in the U.S. Constitution and because Texas statutes — e.g., the Development Corporation Act of 1979 (VTCS 5190.6), the Texas Urban Renewal Law (Local Government Code, ch. 374), and Local Government Code, ch. 335, which authorizes sports and community venue districts — could be interpreted as defining "public use" as it was defined in the *Kelo* decision.

Without CSHB 16, the state and local governments could subject Texans to the same abuse of eminent domain power that has occurred in New London, Conn. The proposed amendment is not an overreaction to the *Kelo* decision because similar cases have occurred in Texas, including in the cities of Freeport and Hurst.

Other ways of protecting private property in Texas from being seized for economic development purposes are inadequate, and legal challenges could prove ineffectual in the wake of *Kelo*. It can be difficult for voters to hold local officials accountable for eminent domain actions because in some cases local officials act through economic development corporations, making it unclear who should be held responsible.

The language in CSHB 16 is specific enough to protect private property from inappropriate takings for economic development, yet also to allow state and local governments to continue to use eminent domain in clear public-use situations. To avoid confusion, the bill specifically lists certain types of projects that clearly would not be subject to the prohibitions in the bill. For example, it would allow use of eminent domain to acquire property for transportation projects, ports, and water supply projects if authorized by law. CSHB 16 also would allow certain voter-approved sports and community venue projects, such as the new stadium for the Dallas Cowboys, to proceed through the use of eminent domain. This is only fair in cases where projects were authorized and begun under current law and financing arrangements already are underway. The bill also specifically would allow economic development to be a factor — as long as it was a secondary purpose — in certain exercises of eminent domain for projects such as urban renewal dealing with slums or blighted areas.

CSHB 16 would prevent entities from violating the spirit of the bill by specifically prohibiting taking private property under the pretext of “public use.” This would prevent entities from simply labeling economic development as a secondary purpose for a project and then proceeding to use the power inappropriately. For example, the bill would prevent a city from taking land for a park and then quickly “flipping” it to a private entity for another use.

The bill would not violate the state’s policy of encouraging economic development. It would not take away the authority that any entity currently has to use eminent domain and would not prohibit the exercise of that authority for projects with economic development ramifications as long as these projects were undertaken for legitimate public uses in which economic development was not the primary purpose. Even if done purely for economic development, such projects could proceed with government participation without the use of eminent domain to force private owners to surrender their property without their consent. Economic development in

Texas should not be based on violating individual's private property rights.

CSHB 16 also would limit TxDOT's authority to condemn property for ancillary facilities for TxDOT toll roads statewide to ensure that the department did not become involved in inappropriate economic development projects that best would be provided by the private sector. This limited authority currently is applied to the Trans-Texas Corridor, and CSHB 16 would apply it to all TxDOT toll roads by prohibiting TxDOT from using eminent domain for ancillary facilities unless, subject to other statutory requirements, the property was for a gas station, convenience store, or similar facility or the purpose was to provide a location for one of these entities in the median of a toll road and was not close to an intersection of the toll road and another highway.

CSHB 16 would not lead to a significant increase in the number of lawsuits challenging use of eminent domain because such lawsuits already occur routinely. It would not violate the principle of local control because local governments and entities would continue to have authority to use eminent domain as long as it met the broad guidelines laid out in CSHB 16. It is not uncommon for the Legislature to establish a policy framework and then allow local officials to work within that framework. Private property owners statewide need uniform protection from potential abuses by local officials.

The bill would be in line with similar policies in use or under consideration in several other states and in the U.S. Congress. In June 2005, U.S. Sen. John Cornyn of Texas introduced S. 1313, which would allow the exercise of eminent domain only for public use and would specify that public use does not include economic development. The bill would apply to the exercise of eminent domain by the federal government and by state and local governments that use federal funds.

Any questions raised by the bill could be resolved, as are questions about many laws, by the courts interpreting the law and by later amending the statutes if necessary. Texas and its citizens would be better off in the interim through the adoption of CSHB 16, which could prevent some inappropriate takings of private property that could occur during the next 18 months. The bill would require an interim study of the use of eminent domain so that the 80th Legislature had complete information to make decisions about these laws when it meets in 2007. It is best to place these

details in statute, rather than the Constitution, so that any necessary changes could be made without the time needed to hold a vote on a constitutional amendment.

Placing a requirement in statute that property owners receive something as nebulous as compensation to obtain a “comparable” property would introduce an unknown concept and undo years of case law and tradition regarding just compensation. The current standards and methods used to determine fair market value are well established, and it is unclear how comparable value would be determined. For example, there may be no way to obtain a property comparable to a building in a downtown area. It would be better to allow these issues to be decided through the traditional channels, including the courts. Language requiring this type of compensation if “a” purpose were economic development is so broad that it effectively would chill all uses of eminent domain.

It would be best to allow the courts to continue to handle lawsuits regarding eminent domain without a statutory provision concerning any presumption about the purpose of the taking. This presumption is unnecessary because during a trial involving eminent domain, the entity would have to prove the taking met the provisions of CSHB 16 along with having to demonstrate that it involved a public purpose.

CSHB 16 appropriately would apply only to condemnation petitions filed on or after the bill’s effective date. The Legislature should not retroactively apply new legal standards for use of eminent domain to cases already pending and filed under existing law.

OPPONENTS
SAY:

The laws and Constitution of Texas allow for a broad interpretation of public use to include economic development in some situations involving eminent domain, and that flexibility should not be eliminated. Economic development is an accepted role for government that in some cases has a defined public benefit and can satisfy a public purpose as much as more traditional government projects. An overly broad statewide limit on the use of eminent domain for all economic development projects could conflict with the state’s policy of encouraging state and local officials to think creatively about economic development.

The *Kelo* decision illustrates when it might be acceptable to exercise eminent domain for economic development purposes, such as when an area is distressed enough to justify an economic development program and

when the property is taken under a carefully formulated development plan to provide appreciable benefits to the entire community, rather than a particular class of identifiable individuals. For example, the exercise of eminent domain over the objections of a few property owners might be appropriate if an entire community stood to benefit from a carefully crafted economic development project, such as the development of a consumer/retail area. In its opinion, the U.S. Supreme Court rejected any literal requirement that condemned property be put to use for the public and embraced a more natural interpretation of public use as “public purpose.” Texas should follow the lead of other states that allow the use of eminent domain for economic development purposes when it is appropriate and beneficial to the public as a whole.

CSHB 16 could have the unintended consequence of restricting many legitimate uses of the power of eminent domain for public purposes. Private property owners could challenge its legitimate exercise by claiming that almost any project was being undertaken primarily for economic development reasons and could take the matter to court. Including a list of public-use projects that could proceed through the use of eminent domain and placing special restrictions on TxDOT could result in property owners challenging any use of eminent domain not specified in the bill. The hands of the state and other entities with the power of eminent domain could be tied over such endless litigation, needed projects could be delayed, and legal and financial costs of the projects could rise.

Enacting new restrictions on eminent domain use would be an overreaction to the *Kelo* decision. The state and local entities generally are reluctant to use eminent domain and normally take great pains to exercise it fairly. There have been few cases in Texas of abuse of eminent domain power, and there are ways to handle any abuses that do occur. For example, abuses of the exercise of eminent domain can be handled through the courts or by holding elected officials accountable for their actions.

CSHB 16 would conflict with the principle of local control by interfering with decisions made by local officials about when to use eminent domain for public uses and when public use should be broadly interpreted to include economic development. Local officials are in the best position to make these decisions about the greater good of local communities because these officials are closest to the projects and can be held accountable for their actions by voters.

Rather than amending the statutes in haste without a full understanding of this complex issue, it would be more prudent for the Legislature to study the use of eminent domain during this interim and for the 80th Legislature to act in 2007, if necessary.

OTHER
OPPONENTS
SAY:

It is not unusual for the Legislature to enact laws that affect pending cases, and CSHB 16 should apply to takings of private property pending on the bill's effective date. This would not be making new law or interfering in pending cases but rather would treat property owners fairly by restoring the law in Texas as it existed before the *Kelo* decision.

CSHB 16 should ensure that property owners receive actual damages or enough compensation to replace their property with something comparable in cases where property — residential or commercial — is taken through eminent domain for economic development purposes. “Fair market value” is not always sufficient to replace taken property, and property owners would be at the mercy of the taking entity to decide on the amount of compensation without such a requirement.

The bill should make it clear that any question about whether a taking of private property violated CSHB 16 would be a question of fact that could not be determined by an action of the taking entity, such as a vote of the governing body. Without this protection, for example, a city simply could approve a statement that a taking was not primarily for economic development, which it could use later to support its case in court.

In addition to amending the statutes in an attempt to prohibit the use of eminent domain for economic development, the Legislature should allow voters to decide if they want the additional protection that would be afforded by amending the Constitution. Because the Texas Constitution protects Texans' rights, it is best to protect private property in the state by amending the state's fundamental law. A constitutional amendment would strengthen and clarify Texans' rights in a way that amending the statutes would not.

NOTES:

Unlike the committee substitute, the original version of HB 16 would have exempted public infrastructure from the restrictions on eminent domain use. It also would have prohibited use of eminent domain for economic development for the purpose of raising revenue to meet the cost of a public project if the property taken was not otherwise necessary for the project's successful or safe operation, with an exemption for distribution of surplus

toll revenue. The committee substitute specifically would exempt pipelines, underground storage, and waste disposal projects as well as a governmental entity's authority to condemn a leasehold estate on property that it owned. The original would not have subjected eminent domain-related information held by a nongovernmental entity to the Open Records Act. Under the committee substitute, the interim committee appointed to study eminent domain issues would be co-chaired by members of the House and the Senate rather than a senator acting as chair and a House member as vice chair, as in the original version.

A similar bill, SB 7 by Janek, passed the Senate yesterday by 25-4 and was reported favorably, with a substitute identical to CSHB 16, by the House Land and Resource Management Committee last night. SB 7 is generally similar to the original version of HB 16. In prohibiting use of eminent domain merely as a pretext to confer a private benefit on a particular private party, it would not provide that the taking be for a public use. It also would exempt radioactive waste disposal, libraries, museums, auditoriums, public buildings, hospitals, and parks from the restrictions on use of eminent domain, limit economic development condemnation by TxDOT, and revise venue and jurisdiction for eminent domain actions.

A similar bill, SB 62 by Janek, passed the Senate and the House during the first called session, but died when the House refused to grant the Senate's request for a conference committee. The House added several amendments, including requiring as compensation for property taken for economic development purposes the greater of actual damages or the value of comparable property, requiring courts to determine as a fact question whether property was taken for economic development purposes, and applying the restrictions on eminent domain retroactively to condemnations pending 30 days after the bill took effect.

Also during the first called session, the House approved HJR 19 by Corte, et al., which would have amended the Texas Constitution to prohibit the state or its political subdivisions from using eminent domain to take private property if the primary purpose was for economic development or to benefit a particular class of identifiable individuals. HJR 19 would not have affected the authority of a political subdivision to use eminent domain for a municipal sports and community venue project and related infrastructure that were approved by voters in an election held on or before December 1, 2005. The proposed amendment would have required owners of homesteads in cities to receive the greater of the actual damages

resulting from the taking of the homestead or the value necessary to replace the homestead with comparable property in the municipality. This requirement would have applied in cases in which a purpose of the taking was for economic development.