

# **TACDC White Paper: Eminent Domain**

**By Karen Juckett**

In the wake of the 2005 Supreme Court decision in the *Kelo vs. City of New London* case, state governments and property rights advocates have paid increased attention to the power of eminent domain. Many interpreted the decision as expanding the power of eminent domain to allow governments to take private property and transfer it to a private party to promote economic development, and the ruling emphasized that the Supreme Court would show deference to the decisions of state legislatures regarding permissible uses of eminent domain. In response, state legislatures have moved to reform their eminent domain laws. Many states have addressed the issue by limiting eminent domain transfers of property to projects in which the goal is redevelopment of a slum or blighted area. In Texas, a similar bill passed the legislature, but was vetoed by the governor. Such policies might result in the impacts of eminent domain falling disproportionately on low-income populations.

In addition, concerns over the permissible uses of eminent domain continue to garner attention in Texas. Proposition 7, a Constitutional amendment on the ballot for the November 6 election lays the groundwork for allowing people whose property was taken by eminent domain but not used by the government within 10 years to buy their property back at the price they received. The amendment passed with 80 percent of voters in favor. TACDC expects to see continued activity on the topic of eminent domain in the next legislative session and wants to be prepared to support policies that reflect the interests of its members. How can TACDC protect low-income residents without restricting development opportunities?

## **Issue**

The power of eminent domain is based in the Fifth Amendment to the Constitution, which states, "[N]or shall private property be taken for public use, without just compensation." Eminent domain applies only to seizure of private property, and land taken by the government must be for public use, a requirement originally intended to prevent public officials from confiscating land for personal benefit. The Fifth Amendment also requires that the government justly compensate the owner for the property that it takes. However, in recent years, land taken under eminent domain has been handed over to a private parties for economic development or urban renewal projects. The definition of 'public use' is a key issue in the current debate over eminent domain.

## **Background**

Courts have interpreted the 'public use' requirement to have two distinct meanings, 'public use' and 'public purpose'. 'Public use' means that the government may take land if the land will be utilized by or will benefit the public in the future, such as a highway or a railway that has common-carrier duties. Courts have also ruled that the government may take land and transfer it to a private party if the taking serves a 'public purpose'. However, the Courts have made clear that the definition of 'public purpose' should be

determined by state legislatures and that they would not overturn a legislature's definition of public purpose.<sup>1</sup>

The debate over using eminent domain to take land for a public purpose began with the *Berman vs. Parker* case in 1954. This case involved redevelopment of a neighborhood in Washington, DC. A department store owner challenged the law that allowed the District of Columbia Land Redevelopment Agency to condemn and redevelop blighted areas. He argued that it was unconstitutional for the government to take land merely to make the area more attractive, and also that his store was not blighted and thus should not be taken under the broader redevelopment plan. The Court disagreed with Berman on both counts, ruling that authorizing the redevelopment project was within the power of the legislature, and that the condemnation could be done on an area-wide basis.<sup>2</sup> *Berman* is also an important precedent supporting the seizure of private property to serve a public purpose under the Fifth Amendment definition, even though the land would be transferred to private hands and not have wide public use.

A second important ruling regarding the interpretation of public use and public purpose is *Hawaii Housing Authority vs. Midkiff*. The state of Hawaii was concerned that most of the privately owned land on the islands was held by a few landowners. In the interest of creating a properly functioning land market the state confiscated some of the property and allocated it to others. The ruling states that "...Where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."<sup>3</sup>

Another way of interpreting previous decisions is weighing public gain against private gain. If public outweighs private gain, or private gain is determined to be negligible, the taking is permissible. In cases of private-private transfers of title between businesses, courts have used the 'rational basis test' to examine whether the public or the private benefit is dominant. For instance, in the *Bailey vs. Meyers* case in Arizona, the state court held that condemning a brake shop to make way for the construction of a hardware store to improve economic development did not serve a public purpose.<sup>4</sup>

### ***Kelo vs. New London***

In 1997, the city of New London, Connecticut initiated a development project aimed at revitalizing a city that in economic decline. The plan involved redeveloping a waterfront area that would eventually include a hotel, museum, a commercial area and a research facility for the pharmaceutical company Pfizer, Inc. The city hoped the project would

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<sup>1</sup> Goodin, Amanda W. "Rejecting the Return to Blight in Post-*Kelo* State Legislation." *New York University Law Review* 82, No. 1 (2007). <http://www.law.nyu.edu/JOURNALS/LAWREVIEW/ISSUES/vol82/no1/NYU104.pdf> 180-81.

<sup>2</sup> *Ibid.*, 181.

<sup>3</sup> *Hawaii Housing Authority vs. Midkiff* quoted in Amanda W. Goodin, "Rejecting the Return to Blight in Post-*Kelo* State Legislation," *New York University Law Review*. 82 no. 177 (2007): 181.

<sup>4</sup> John R. Nolon, "*Property Rights and Eminent Domain: The Mighty Myths of the Kelo Case.*" *Pace Law School Land Use Law Center*, in *Government Law and Policy Journal of the New York State Bar Assoc.* Winter 2006. 3-4.

bring in jobs and businesses, and increase the city's tax base. The New London Development Corporation, a nonprofit organization created by the city to manage such projects, was able to assemble most of the land necessary through purchase, but several homeowners refused to sell. When the city began condemnation procedures some of the remaining homeowners decided to sue, arguing that the project did not serve a public purpose.<sup>5</sup>

In the five to four decision, the Supreme Court upheld New London's actions, arguing that promoting economic development has long been an accepted purpose of government. It also asserted that there is no systematic way of distinguishing between economic development and other public purpose justifications for the use of eminent domain.<sup>6</sup> Dissenting opinions expressed concern that this decision would disadvantage low-income communities. Justice Thomas wrote, "Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful."<sup>7</sup>

### **The Debate over *Kelo***

After the Supreme Court ruling in *Kelo* there was a strong reaction from all sides of the eminent domain debate. The case has been interpreted in a variety of ways by different audiences.

#### *Kelo Restricts the Use of Eminent Domain*

Some have argued that rather than expanding local power to exercise eminent domain, *Kelo* actually narrowed that power. This is because the ruling states that eminent domain should only be used when a locality has a comprehensive plan based on public consultation, the approval of the highest political authority and contractual commitments from the redeveloper to achieve the public's objectives.<sup>8</sup> Others assert that the ruling does not change the Court's position on local government's power to use eminent domain, seeing it as reaffirming the deference shown to state law and constitutions in previous cases.<sup>9</sup>

#### *Kelo Expands the Use of Eminent Domain*

Still others believe that the ruling loosened restrictions on use of eminent domain by allowing local governments to take homes and small businesses for private use if the resulting use is more profitable or brings in more taxes. It thus gives legal approval to a

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<sup>5</sup> Goodin 182.

<sup>6</sup> Ibid., 182.

<sup>7</sup> Supreme Court of the United States, *Kelo versus the City of New London, Connecticut*, Washington DC: 2004, <http://www.supremecourtus.gov/opinions/04pdf/04-108.pdf>.

<sup>8</sup> John D. Echeverria, "Some Thoughts on *Kelo* and the Public Debate over Eminent Domain," July 22, 2005. [http://www.usmayors.org/executivedirector/echeverriaproperty\\_072205.pdf](http://www.usmayors.org/executivedirector/echeverriaproperty_072205.pdf), 2.

<sup>9</sup> National League of Cities, *2005 Advocacy Issue: Eminent Domain for Economic Development*, [http://www.nlc.org/issues/more\\_issues/6235.aspx](http://www.nlc.org/issues/more_issues/6235.aspx).

use of eminent domain that was in legal doubt.<sup>10</sup> In the eyes of these analysts, while the court has maintained its deference to local legislative decisions regarding appropriate use of eminent domain, it has still expanded the purposes for which a government may take private property. They argue that previous court doctrine had only allowed takings that involved transferring property from one private owner to another when the property was transferred to a common carrier or when the transfer and redevelopment would eliminate an identifiable public harm. The *Kelo* case does not meet these tests, and in upholding the lower court decision the Court therefore expanded the allowable use of eminent domain power.<sup>11</sup>

### **In Texas**

Texas courts have required two conditions for governments to use eminent domain to take private property.

- Prove that there would be a public use under state law.
- Prove that achieving the public use requires the exercise of eminent domain.

However, over the years Texas courts have broadened the definition of public use by allowing the use of eminent domain to promote public welfare. Courts have also narrowed the factors considered in calculating just compensation at fair market value. The *State vs. Carpenter* case of 1936 ruled that all factors impacting present market value should be considered in determining compensation, while *State vs. Schmidt* case of 1993 ruled that business owners “are not entitled to compensation for diminution in value of remainder due to diversion of traffic, increased circuitry of travel to property, lessened visibility to passerby or inconvenience of construction activities.”<sup>12</sup>

### *Proposed Solutions*

There are two types of reforms commonly proposed by state legislatures in response to the *Kelo* ruling.

1. Increased length of notice to property owners, increased public involvement and transparency, improved planning or justification of public benefits.
2. Restricts the use of eminent domain by limiting it to public works or utility projects, or allowing its use only in blighted areas which are narrowly defined.<sup>13</sup>

### Protecting Low-Income Neighborhoods

As with many states, Texas has adopted limitations on the use of eminent domain since the *Kelo* ruling. Senate Bill 7 passed in 79<sup>th</sup> Texas legislature restricted use of eminent domain for economic development in Texas, but also included an exemption that allows

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<sup>10</sup> Institute of Justice, “*Kelo v. City of New London: What it Means and the Need for Real Eminent Domain Reform*,” September 2005, [http://www.castlecoalition.org/pdf/Kelo-White\\_Paper.pdf](http://www.castlecoalition.org/pdf/Kelo-White_Paper.pdf), 1.

<sup>11</sup> *Ibid.*, 3.

<sup>12</sup> “*Protecting Private Property Rights: Reforming Eminent Domain in Texas*,” Texas Conservative Coalition Research Institute Property Rights and Land Use Task Force Report, November 2006, [www.txccri.org](http://www.txccri.org), 25.

<sup>13</sup> Nolon, 5.

the use of eminent domain where economic development is a result of urban renewal programs intended to cure slums or blighted areas. However, current definitions of slum and blight are relatively broad, allowing property to be condemned based on a variety of problems, so there is a potential for broad use of eminent domain for redevelopment. To remedy this blight loophole, some groups advocate for Texas to narrowly redefine slum and blight under Texas law in order to further restrict the use of eminent domain under this exception.<sup>14</sup> During the 80<sup>th</sup> Texas Legislature House Bill 3057 would have done just that, but it did not pass.

House Bill 2006 would have made it more difficult to condemn entire neighborhoods using the blight designation, and laid out stricter rules regarding adequate compensation to property owners. This bill would have made it much more difficult for Texas cities to assemble large areas of land by requiring that each parcel be declared blighted separately. Such regulations would restrict the use of eminent domain for economic development purposes because such projects often require large areas of land. HB 2006 was passed by both houses of the legislature but was vetoed by the governor.

#### *Why remedying the blight loophole may hurt low-income Texans*

Statutes restricting the use of eminent domain for economic development purposes to areas of slum or blight will likely disproportionately disadvantage low-income populations. Factors commonly thought to constitute blight are more often found in low-income areas, and land is less expensive there, making it less costly for governments to assemble land than in wealthier areas. Finally, to the extent that such restrictions are understood to allow taking for development only in low-income areas, it narrows the constituency interested in advocating for fair compensation and transparent condemnation procedures to a small group of property owners. These low-income, often minority groups tend to be less politically powerful than other groups and thus will have fewer resources with which to fight condemnation of their land.<sup>15</sup> Thus laws that allow the use of eminent domain only to clear slums and blight could have problematic impacts for low-income neighborhoods, causing displacement, and the destruction of affordable housing and small businesses.

#### *Texas Case Study*

The case of the El Paso's downtown redevelopment plan provides an important example of how the exception for slums and blight in SB 7 could be used to condemn large portions of land in low income areas for economic development<sup>16</sup>. Segundo Barrio is one of the oldest Mexican-American neighborhoods in U.S., and is home to small businesses and affordable housing.<sup>17</sup> The redevelopment plan, initiated in 2004 and known as 'The Downtown Plan' would redevelop about 325 acres of downtown El Paso near the Mexican border. About half of the barrio would be torn down to allow for new residential and retail space and a refurbished convention center and sports stadium. The

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<sup>14</sup> "Protecting Private Property Rights," 31, 33

<sup>15</sup> Goodin 201-02.

<sup>16</sup> Bill Peacock, "Private Property and Public Use: Restoring Constitutional Distinctions," Center for Economic Freedom, Texas Public Policy Foundation. 2006, 11.

<sup>17</sup> Smith, Amy, "Eminent Domain Fight Moves to Perry's Desk," *The Austin Chronicle*, June 15, 2007.

other half would be eligible for tax incentives as a designated historical zone. The plan is legal under SB 7, which allows cities to amass large areas of land for redevelopment by declaring an area blighted. Many believed that HB 2006 would have prevented the Downtown Plan from going forward in its current form. However the redevelopment plan is likely to displace many low-income people and eliminate affordable housing that will be replaced with new, upscale residential areas, shopping and entertainment facilities.<sup>18</sup>

### **TACDC Policy Position**

There is likely to be continued activity on the topic of eminent domain in the next legislative session and TACDC members have expressed interest in how the exercise of eminent domain might impact their clients. TACDC opposes any legislative action on eminent domain that would result in displacement of low-income people or destruction of affordable housing, and will continue to investigate ways to close the blight loophole that will not disadvantage low-income residents. Over the next year TACDC will explore the following potential solutions:

- requiring the government to compensate displaced low-income residents based on the replacement cost of the unit, which is often higher than its market value;
- requiring the government to provide relocation assistance in the form of help in locating an affordable unit and reimbursement of moving costs;
- support alternatives to eminent domain that help retain low-income residents rights to property;
- and explore best practices for remedying blighted properties.

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<sup>18</sup> Peacock, 14.

## Useful Resources

Echeverria, John D. "Some Thoughts on *Kelo* and the Public Debate over Eminent Domain." July 22, 2005.

[http://www.usmayors.org/executivedirector/echeverriaproperty\\_072205.pdf](http://www.usmayors.org/executivedirector/echeverriaproperty_072205.pdf)

"Eminent Domain: Taking Property for Public Use" *FindLaw for the Public*.

<http://realestate.findlaw.com/homeownership/home-land-use-zoning/home-land-use-zoning-eminent-domain.html>

Goodin, Amanda W. "Rejecting the Return to Blight in Post-*Kelo* State Legislation." *New York University Law Review* 82, No. 1 (2007).

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"Select U.S. Eminent Domain Laws and Court Rulings." *Federal Reserve Bank of St. Louis*. Spring 2007, Inside the Vault Lesson Plan Handout 1.2.

Smith, Amy. "Eminent Domain Fight Moves to Perry's Desk." *The Austin Chronicle*, June 15, 2007.

Welsome, Eileen. "Eminent Disaster: A Cabal of Politicians and Profiteers Targets and El Paso Barrio." *The Texas Observer*, May 4, 2007.

<http://www.texasobserver.org/article.php?aid=2483>