TBJ ONLINE

The Erosion of Property Rights in Texas

By Edward Vassallo, Jr.

Court: "Counsel, why are you here? They have the right to condemn and are going to get the property anyway."

Granted, today's process is better than its predecessor where the king ordered a property owner to leave and presumably meted some kind of punishment (compensation to the displaced property owner). Texas property owners are no longer subjected to the whims of the government — or are they?

Protection of the property owner's rights has and should always be of paramount importance to the public. Exercise of eminent domain authority is the only sanctioned deprivation of an individual's constitutional right to property ownership and occurs even though the property owner has committed no crime or taken some action that would invoke the condemnation process. Texas condemnation practice, contemplating the egregious nature of the legal process, created a two-phase proceeding seeking to avoid the necessity for a legal proceeding (the administrative phase and the judicial phase). The evolution of the Texas condemnation practice created a scenario in which the property owner could waive rights in the legal proceeding by appearing at the administrative proceeding. However, a property owner is then faced with the dilemma of deciding: (1) whether to appear at the administrative proceeding in an effort to resolve the matter so as to avoid a legal proceeding and, therefore, lose certain rights in the legal proceeding if the matter is not resolved; or (2) not to appear at the administrative phase and lose the opportunity to avoid a legal proceeding by possibly resolving the matter at the administrative level.

The erosion of property owners' rights presently follows a dangerous path. One of the most egregious examples of property rights' erosion occurred with the advent of Texas economic-development corporations. For example, an economic-development corporation was utilized to acquire land from individual homeowners to accommodate the expansion of a shopping mall (Northeast Mall in Hurst). Many of the property owners in the path of the mall expansion agreed to sell their property and relocate. However, some of the property owners refused to sell and were required to relocate. Those homeowners who refused to sell were deprived the free market opportunity to reach a negotiated agreement with the mall developer. The mall acquisition was for economic development and was not a delegation of eminent domain authority to a developer. Of course, excess monies only exist in one facet of the proposed transaction.

Economic development and delegation of eminent domain authority to private developers have evidently occurred on numerous occasions. The Northeast Mall paradigm is the forerunner or the initial exercise of eminent domain authority by Texas economic-development corporations. The economic-development corporation is a legal scheme that has provided the development of numerous sports facilities that were presumably for public benefit.

Other exercises in Texas of eminent domain authority demonstrating the ongoing erosion includes: (1) a home-rule municipality seeking to condemn land within a second home-rule municipality for workforce housing, senior housing, and for parks; and (2) an independent school district seeking to condemn land for a 100-foot-wide right-of-way across private property to accommodate a third party who granted the school district an option to purchase property for future school sites.

The erosion of property owner rights continues with the Texas Supreme Court's recent decision in *Hubenak v. San Jacinto Gas Transmission Co.*[1] In *Hubenak*, the Texas Supreme Court held that the requirements of Section 21.012 are not jurisdictional and that a condemnation proceeding can be abated for a reasonable time until the condemning authority is able to finally satisfy the requirements of Texas Property Code section 21.012. Other relevant decisions are *State v. Gracia*,[2] *State v. PR Inv. & Specialty Realtors, Inc.*[3] and *Board of Regents v. FKM Partnership, Ltd.*[4]

The recent position taken by the U.S. Supreme Court in *Kelo v. City of New London* is yet another example.[5] In Kelo, the city council of New London approved a local development plan that had been approved by various state agencies to redevelop the downtown/waterfront area. Most of the needed property was voluntarily sold to the city but 15 landowners refused to sell and challenged the city's right to take their property claiming the taking for office and marina use was not a public use.

The issue in *Kelo* was whether the taking of property through eminent domain as part of an economic-development project is a "public use." The U.S. Supreme Court found it important that several state agencies had reviewed the city's development plan and approved it prior to the city proceeding. A majority also found it important that the trial judge and all of the members of the Supreme Court of Connecticut agreed there was no evidence of an "illegitimate purpose" in taking the properties. Using the fact the state's courts had not found an "illegitimate purpose," the Supreme Court declared the development plan was not adopted to benefit a particular class of identifiable individuals. Surprisingly, the court also stated that since the office building's tenants had not yet been determined, the taking could not be said to benefit only a certain class of individuals. No mention was made about the that fact the taking would benefit the owner of the office building as a "particular class of identifiable individuals."

The Supreme Court stated that nothing in its opinion precludes any state from restricting its own takings power, and acknowledged several states that have, in fact, done so. Such language makes it clear that although takings for economic development may not violate the federal constitution, they may violate state statutes or constitutional provisions and are, therefore, still prohibited.

Texas' Response to *Kelo*

The Texas Legislature passed Senate Bill 7, which amends various statutory provisions to limit the use of eminent domain power in Texas. Chapter 2206 was added to the Texas government code to prohibit taking private property through the use of eminent

domain if the taking: (1) confers a private benefit on a particular private party through the use of the property; (2) is for a public use that is merely a pretext to confer a private benefit to a particular private party; or (3) is for economic development purposes, *unless the 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 under the local government code or the tax code.[6]

When subsection (3) was drafted, the purpose of the entire statute was compromised. Municipalities will always argue that the economic development "effect" is a secondary purpose to community development. The reality is "economic development" and "community development" are interchangeable terms. It is a matter of semantics only. Economic development has historically been community development. There is no other purpose. For example, increased tax base, increased employment and/or housing opportunities, etc., are all elements of economic development or community development. Economic development has been initiated by cities seeking growth for their communities; it has just been termed "economic development" rather than "community development" by the press, legislature, and the courts. Although the Texas Legislature appeared to be responding to the public's understandable outrage at the *Kelo* majority opinion, the exceptions to the rule are glaring beacons of the politics considered in the drafting of this statute.

Chapter 2206 of the Texas property code does not by itself protect landowners. Trial courts must give backbone to this action by going behind a condemning authority's words of public use and necessity. It will be up to the courts to determine the true basis of a condemnation and have the courage to determine an illegal taking for what it is — theft.

Kelo's Effect in Other States

Kelo was used in a case involving the Village of Port Chester, N.Y., where the landowner alleged an extortion scheme. Bart Didden, a landowner in Port Chester, planned to allow CVS/pharmacy to build on his property; however, when the village mayor heard of Didden's plans with CVS, the mayor suggested Didden speak with the village's chosen developer. The village's chosen developer wanted Didden's land for a Walgreens and demanded Didden pay him $800,000 to "go away" or make him a 50-50 partner in the CVS development. If Didden refused either "offer," the developer would have the village condemn the land for his private use. Didden did, in fact, reject the developer's "offers," and the very next day the Village of Port Chester condemned Didden's property through eminent domain, so it could hand it over to the developer.

Didden brought an action under 42 U.S.C. §1983 alleging the condemnation of his property was for the purpose of satisfying the financial goals of a single private party and not for a public use.[7] The Southern District of New York dismissed the complaint.[8] The Second U.S. Circuit Court of Appeals affirmed, relying on the *Kelo* decision, ruling that because the taking was in a "redevelopment zone," it could not stop what the village was doing.[9] The landowner in *Didden* filed a petition for a writ of certiorari, which the U.S. Supreme Court declined to consider on Jan. 16, 2007.

City of Burien, WA v. Strobel Family Inv.[10]

The Strobel family owned a restaurant in the downtown area of Burien, Wash. The city wanted to make way for fancier condos, shops, and restaurants in the "town square" area and decided to condemn the property. The city knew it would be highly unpopular if it condemned the property and handed it over to its Los Angeles-based developer. Consequently, the city manager directed his staff to "make damn sure" the road went through the restaurant. The staff did as instructed and sited, then re-sited, the road until it went straight through the restaurant. The city then condemned it. Strobel challenged whether the condemnation was necessary and argued the city would turn around and sell a portion of it to a private developer, thus benefiting the private entity and not the city. The trial court ruled the taking was necessary and for a public purpose. On appeal, the appellate court determined that although the city initially had considered selling a portion of the property to a private developer, the city subsequently determined the Strobel property would be used only for public streets, public parks, or public parking, even though this determination was made after the Strobels would not negotiate to sell the property.[11] The appellate court affirmed the trial court's decision. Strobel asked the Washington Supreme Court to take up the case; however, on Dec. 5, 2006, the Supreme Court declined review.[12]

With property rights in Texas steadily eroding away, property owners could soon find themselves in the same predicament as the landowners mentioned above. If the erosion continues, we will have come full circle with the king wanting our property and our heads.

NOTES

1. *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172 (Tex. 2004).
2. *State v. Gracia*, 56 S.W.3d 196 (Tex. App. — Fort Worth 2001, no pet.).
3. *State v. PR Inv. & Specialty Realtors, Inc.*, 180 S.W.3d 654 (Tex. App. — Houston [14th Dist.] 2005, pet. granted).
4. *Board v. Regents v. FKM Partnership, Ltd.*, 178 S.W.3d 1 (Tex. App. — Houston [14th Dist.] 2005, pet. granted).
5. *Kelo v. City of New London*, 125 S.Ct. 2655 (2005).
6. See Tex. Gov't Code Ann. §2206.001(b) (Vernon Supp. 2006) (emphasis added).
7. See *Didden v. Village of Port Chester*, 304 F.Supp. 2d 548 (S.D.N.Y. 2004).
8. See *Didden v. Village of Port Chester*, 322 F.Supp. 2d 385 (S.D.N.Y. 2004).
9. See *Didden v. Village of Port Chester*, 173 Ed. Appx. 931 (C.A. 2 2006).
10. See 2006 Westlaw 1587655 (Wash. App. — Div. 1 2006).
11. *Id.*
12. *See* 158 Wash. 2d 1023, 149 P.3d 378 (2006).

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