

“The Takings Clauses: Limits on What the Government May Do on the Coast”

presented by

Michael V. Powell, Esq.¹

*Locke Liddell & Sapp
Dallas*

INTRODUCTION

The Takings Clauses of the Texas and United States Constitutions do not mince words. Article I, section 17 of the Texas Constitution states: “no person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made.” The Fifth Amendment to the United States Constitution guarantees “private property [shall not] be taken for public use, without just compensation.” The Takings Clauses were “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”²

Yet as Justice Holmes wrote over eighty years ago, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”³ The challenge for lawmakers, regulators and government attorneys, on the one hand, and private property owners and their attorneys on the other, is to determine when the Takings Clauses will require government to compensate private property owners for actions government proposes to take, or takes. Governments often dislike the Takings Clauses, viewing them as impediments to achieving necessary progress and improvements. This sentiment is especially strong when public budgets are tight, as they almost always are. But as Justice Holmes also wrote, “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”⁴

The inevitable and continuing conflict between government laws and regulations and private property owners’ rights is particularly divisive along the nation’s coastline. Several of the United States Supreme Court’s recent opinions construing the federal Takings Clause arose out of coastal regulations. For examples, *City of Monterey v. Del Monte Dunes*⁵ involved Monterey, California’s denial of applications to develop residential units on a 37-acre oceanfront tract; *Lucas v. South Carolina Coastal Council*,⁶ which probably is the most significant takings case in recent history, dealt with South Carolina’s enforcement of its Beachfront Management Act to prevent Lucas from building houses on his beachfront lots; and *Palazzolo v. Rhode Island*⁷ was based on Rhode Island’s reliance on its Coastal Resources Management Program to prevent Palazzolo from building a private beach club on his coastal marshland. These recent Supreme Court cases are part of many federal and state cases that discuss coastal regulations and takings.

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²*Armstrong v. United States*, 364 U.S. 40, 49 (1960).

³*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

⁴*Id.* at 416.

⁵526 U.S. 687 (1999).

⁶505 U.S. 1003 (1992).

⁷533 U.S. 606 (2001).

The numbers of Takings Clause conflicts on the coast no doubt will increase in future years as government becomes increasingly active in regulating, preserving, and restoring the coastal environment, more people move to live along the coastlines, and private property along the coast increases in value.

This paper is divided into two parts:

First, we review the past year's major developments in the law of eminent domain. Eminent domain is the government's power to take private property for public use, subject to compensation for the taking. "[E]minent domain is one of the most intrusive powers of government. It requires that individual owners relinquish their property without their consent."⁸

This past year brought the United States Supreme Court's controversial 5-4 decision in *Kelo v. City of New London*,⁹ which presented the issue whether government may take private property for what might be a private, rather than public use. May a city use eminent domain to take the land where Joe's Beachside Motel and Bait Shop now sits in order to deliver that land to developers of an expensive, new golf club and resort that will attract well-heeled tourists to town, increase the city's tax revenue, and provide many new jobs? This past year also brought the Texas Legislature's new statute that limits the use of eminent domain. Although enacted in reaction to the *Kelo* decision, the new statute still leaves most of the difficult questions unanswered.¹⁰

Second, we survey the current law on inverse condemnation, which includes the law of regulatory takings. Inverse condemnation is a taking for which government does not pay in advance, but for which the Takings Clauses nevertheless may require compensation.¹¹

There are likely two bright lines in this area of the law that help practitioners identify an unconstitutional taking of private property; but for the most part the lines are unusually blurred and erratic. The Texas Supreme Court borrows John Milton's phrase to characterize the law of regulatory takings as a "Serbonian Bog," into which Milton wrote that "armies whole have sunk."¹²

The law of inverse condemnation—which separates governmental actions that do require compensation from those that do not—continues to expand rapidly. The recent United States Supreme Court cases cited above—*Del Monte Dunes, Lucas*, and *Palazzolo*—fall within this area of the law. Likewise, the Texas Supreme Court frequently ventures into the Serbonian Bog.¹³ The Texas Legislature added a statutory layer to the law by enacting the Private Real Property Rights Preservation Act in 1995.¹⁴

The most we can hope to do in the second part of this paper is to present a readable outline of regulatory takings law, provide guideposts to which government officers and attorneys, and property owners and their attorneys, may refer as they must abide by and enforce the Takings Clauses, and call attention to a few current topics and lawsuits (some on the Texas coast) that present interesting takings questions.

⁸James W. Ely, Jr., *Can the "Despotic Power" Be Tamed?*, 17 PROB. & PROP. 31, 31 (Dec. 2003).

⁹125 S.Ct. 2655 (2005).

¹⁰TEX. GOV'T CODE § 2206.001.

¹¹"Inverse condemnation may occur when government, without paying compensation in advance, "physically appropriates or invades [private] property, or when it unreasonably interferes with the landowner's right to use and enjoy the property, such as by restricting access or denying a permit for development." *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992).

¹²See *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 671 (Tex. 2004).

¹³Recently, see, e.g., *Tarrant Regional Water District v. Gragg*, 151 S.W.3d 546 (Tex. 2004) (construction and operation of reservoir caused change in flooding characteristics that resulted in a taking); *City of Dallas v. Jennings*, 142 S.W.3d 310 (Tex. 2004) (flooding of plaintiffs' home with raw sewage was not a taking); *Sheffield Dev. Co.*, *supra* n. 12, 140 S.W.3d 660 (rezoning tract to reduce number of houses that could be built did not constitute a taking).

¹⁴TEX. GOV'T CODE § 2007.001 *et seq.*

**PART ONE: RENEWED INTEREST IN THE LIMITATION THAT
A TAKING MUST BE FOR A "PUBLIC USE"**

It has long been accepted that government may employ its power of eminent domain to take private property only for *public* use. Government may not take property from Citizen A for the sole purpose of transferring it to Citizen B, even if the government compensates A.¹⁵ The difficulties lie in determining: (1) which branch of government gets to decide whether a particular taking is for a "public use," and (2) what does "public use" mean? The Supreme Court's answers to those questions last year in the *Kelo* decision provoked an unusually intense and critical public debate.

A. *Kelo v. City of New London*.¹⁶ Contrary to much of the outrage aimed at the Supreme Court in the aftermath of *Kelo*, the decision is not an example of "judicial activism." Rather, it is an example of judicial deference, or as more informed critics may say, even judicial abdication. Ultimately, the Supreme Court decided that in most cases, the federal courts will not second-guess the decisions of city councils and state courts that a particular exercise of eminent domain seizes private property for a public, rather than private, use. The Supreme Court concluded that the Court's previous cases defined the concept of "public use" broadly and that the Court would adhere to its "longstanding policy of deference to legislative judgments in this field."¹⁷

Justice Kennedy, whose vote with the majority was necessary for the outcome of *Kelo*, added a concurring opinion that sounds a note of caution. Kennedy said there may be cases "in which the transfers [of private property] are so suspicious, or the procedures employed so prone to abuse, or the purported benefits so trivial or implausible, that courts should presume an impermissible private purpose" when reviewing takings to which a legislative body nevertheless had attached a "public use" label. Kennedy did not find *Kelo* to be such a case.¹⁸

Both Justices O'Connor and Thomas filed dissenting opinions. Justice O'Connor warned that as a result of the majority's decision, "all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner to use it in a way that the legislature deems more beneficial to the public—in the process."¹⁹ Justice Thomas said the Takings Clause requires that takings be for "public use," not merely for a "public purpose" as the majority opinion said.²⁰

In *Kelo*, the city council of New London, Connecticut, adopted a comprehensive plan to renew a blighted section of that city. The plan required New London to acquire, by purchase or condemnation, 115 acres of land within an old section of the city. Private homes occupied much of that land. After the city acquired the land, it planned to transfer the land to an economic development corporation that would then lease the property to private

¹⁵*Kelo*, *supra* n. 9, 125 S.Ct. at 2661; *Olcott v. The Supervisors*, 83 U.S. 678, 694 (1872) ("The right of eminent domain nowhere justifies taking private property for a private use."); *Maher v. Lasater*, 354 S.W.2d 923, 924 (Tex. 1962) (Art. I, § 17 of the Texas Constitution "prohibits the taking of property for private use").

¹⁶*Kelo*, *supra* n. 9, 125 S.Ct. 2655.

¹⁷*Id.* at 2663.

¹⁸*Id.* at 2670-71 (Kennedy, J., concurring). The concerns expressed by Justice Kennedy came to fruition in one of the few cases interpreting "public use" decided thus far since *Kelo*. In February of this year, the Supreme Court of Rhode Island voided, for lack of a proper public purpose, the condemnation by the Rhode Island Economic Dev. Corp. ("EDC") of an easement in a private company's airport parking garage. The Rhode Island court obviously was offended by the EDC's use of condemnation to obtain garage space for which it had been unable to negotiate. The court said EDC's condemnation was motivated by the public corporation's desire for more airport parking revenue, and that while it did not result in creation of any new parking spaces for public use, it did produce a "multimillion-dollar windfall" for the condemning authority. *Rhode Island Economic Dev. Corp. v. The Parking Co.*, 892 A.2d 87 (R.I. 2006).

¹⁹*Id.* at 2671 (O'Connor, J., dissenting).

²⁰*Id.* at 2677 (Thomas, J., dissenting).

developers for long terms and nominal rents.²¹ Pfizer, the pharmaceutical company, agreed to lease part of the land to build a large research facility. Other developers planned to build a hotel, conference center, high-end residences, a museum, office space, health club, and parking garage on the land. New London contemplated that its renewal plan would create a large number of new jobs and result in substantially increased tax revenue for the city and positive momentum that would inspire revitalization of adjacent areas of the city.

Some homeowners and residents sued to stop the redevelopment plan, claiming that the city proposed to take their land and demolish their homes for the purpose of conveying the land to private, for-profit developers. The city did not contend the plaintiffs' homes were blighted. Some of the plaintiffs had made extensive improvements to their homes; others had unique homes because of water views. A trial judge enjoined parts of New London's plan, but the Connecticut Supreme Court reversed, holding that all of New London's takings were valid. And in *Kelo*, the sharply divided United States Supreme Court affirmed the Connecticut Supreme Court, holding that carefully-planned and considered economic redevelopment projects such as New London's, carried out in accordance with the state's municipal development statute, serve a "public purpose." The United States Supreme Court held that New London could employ the power of eminent domain to carry out its redevelopment project without violating the Fifth Amendment's requirement that takings be for "public use."

Two Texas-based commentators have described the *Kelo* decision as establishing the following propositions: (1) the taking for "public use" limitation in the Fifth Amendment is satisfied if the taking is merely for a "public purpose," (2) courts should defer to a legislature's determination that a particular taking is for a public purpose, unless the legislature's determination is irrational, and (3) courts should defer to legislative determinations of which private property, and how much of that property, should be taken to achieve the public purpose.²²

B. The Texas Response to *Kelo*. In *Kelo*, the United States Supreme Court interpreted only the Fifth Amendment to the federal constitution. The Court stated "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."²³

It is not clear whether the Texas Supreme Court would interpret Article I, section 17 of the Texas Constitution in the same way as *Kelo*.²⁴ Late last year, the Austin Court of Appeals surveyed the Texas Supreme Court's cases construing what constitutes a "public use" under the State constitution and concluded that the State supreme court's holdings are inconsistent. The Austin Court wrote:

There is no concrete rule for determining whether a use is a public use; each case is usually decided upon the basis of its own facts and the surrounding circumstances. At times, the [Texas Supreme Court] has stated that "this court has adopted a liberal view concerning what is or is not a public use." On the other hand, throughout the twentieth century, the [Texas Supreme Court] has also steadfastly rejected "that liberal definition of the phrase 'public use' . . . which makes it mean no more than the public welfare or good, and under which almost any kind of extensive business or undertaking to which the property is devoted." Instead, Texas courts have espoused a narrower "use by the public" concept: property can only be taken when "the public be

²¹*Id.* at 2660 n.4 (negotiations with one developer contemplated a 99-year ground lease for rent of \$1 per year).

²²D. Sanders & P. Pattison, *The Aftermath of Kelo*, 34 REAL ESTATE L. J., 157, 160 (2005).

²³*Kelo*, *supra* n.9, 125 S.Ct. at 2668.

²⁴It is sometimes suggested that Art. I, § 17 of the Texas Constitution may provide more protection for private property owners than its federal counterpart, but the Texas Supreme Court has not directly addressed that question. In general, the Texas and federal courts consider the two Takings Clauses to be coextensive. *See, e.g., Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882, 888 n.4 (5th Cir. 2004) (stating that the court would evaluate the plaintiff's claims under more established federal standards, "keeping in mind that greater protection of property rights generally may be afforded under the Texas constitution."); *Sheffield Dev. Co.*, *supra* n.12, 140 S.W.3d at 669 ("[I]t could be argued that the differences in the wording of the two [Takings Clauses] are significant, but neither Sheffield nor the City makes this argument.").

entitled to share indiscriminately in the proposed use as a matter of right.”²⁵ Under these principles, the [Texas Supreme Court] has invalidated takings for private benefit even in the face of legislative declarations of public use, and despite claims that the use would confer indirect public benefits.²⁶

Enter the Texas Legislature. In August 2005, less than three months after the Supreme Court decided *Kelo*, Governor Perry opened the Second Called Session of the 79th Legislature, convened originally to deal with public school finance, to consider a bill to limit the use of eminent domain. The Legislature enacted, and the Governor signed, the legislation now codified as section 2206.001 of the TEXAS GOVERNMENT CODE.

The Legislature stated that section 2206.001 is intended to limit the use of eminent domain by Texas governmental entities, as well as private corporations having the power of eminent domain (such as public utilities and common carrier pipelines). The most important part of the statute, which became effective November 18, 2005, states:

A governmental or private entity may not take 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 on 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 harm on society from slum or blighted areas under [the Texas Community Development Act or the Texas Urban Renewal Law]*.²⁷

So does the italicized exception in subsection (3) of this new statute approve the result the United States Supreme Court reached in *Kelo*? Realistically, section 2206.001 fails to provide much additional specificity in this area of the law beyond that already available from judicial opinions. The new statute does not define “private benefit” or “pretext to confer a private benefit.”

There are several broad exceptions to the statute, including those for transportation projects (roads, highways, airports, railroads); ports and navigation districts; water, wastewater, flood, and drainage projects; public buildings, hospitals, and parks; utilities; a “sports and community venue project approved by the voters at an election on or before December 1, 2005,”²⁸ operations of a common carrier or energy transporter; public utility

²⁵In *Kelo*, the U. S. Supreme Court stated it had rejected a test very similar to this one first in 1906, and then consistently thereafter. 125 S.Ct. at 2662-63.

²⁶*Whittington v. City of Austin*, 174 S.W.3d 889, 897 n.3 (Tex. App.—Austin 2005, pet. denied) (internal citations and quotations from law review article omitted). There are other recent, but pre-*Kelo*, Texas appellate court opinions on the question whether a particular taking is for “public use.” See *Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257 (Tex. App.—Houston [1st Dist.] 2005, pet. pending as No. 05-0626) (condemnation for retention pond was for a public use even though it benefited adjacent developer’s project, but there was an issue of fact whether it was necessary to take the owner’s property); *Hardwicke v. City of Lubbock*, 150 S.W.3d 708, 714-15 (Tex. App.—Amarillo 2004, no pet.) (trial court did not abuse discretion by denying a temporary injunction to halt a condemnation within an urban renewal project even though a private developer requested the city to condemn the plaintiff’s property after negotiations for purchase failed and agreed to reimburse the city for the cost of the condemnation).

²⁷TEX. GOV’T CODE § 2206.001(b) (emphasis added).

²⁸This exception covers the City of Arlington’s use of eminent domain to acquire land for a new stadium for the Dallas Cowboys. The exception raises doubt about the fate of condemnation projects to provide similar venues for other professional sports teams in the future. If the drafters of the new statute thought it necessary to provide an exception for the new Cowboys Stadium, the implication is the statute would forbid projects not within the exception.

services; underground storage operations; waste disposal projects; and libraries, museums, and related facilities.²⁹ Although the statute does not define “public use,” one may infer that the Legislature considers the types of projects within this list of exceptions to be “public uses.”

It will be interesting to watch Texas law develop under section 2206.001.³⁰ Obviously, the statute continues to leave most questions to the courts. Does a particular taking confer a private benefit on a particular private party? Is an ostensible public use merely a pretext? If the courts find that a particular Texas entity’s use of eminent domain *violates* section 2206.001, that should be sufficient to halt the condemnation. But ultimately, the responsibility for interpreting and enforcing Article I, section 17 of the Texas Constitution belongs to the judiciary. So if the courts hold that section 2206.001 allows a particular condemnation project to go forward, the courts nevertheless might conclude that Article I, section 17 independently operates to void that condemnation.³¹

C. Pending Controversies. Controversies that are pending or forecast in the State show that government officials and private landowners will continue to wrestle with the issues discussed in *Kelo* or offshoots of those issues. Attendees at the Coastal Law Seminar may know of others, but briefly, here are two current matters and a prospective issue:

(1) ***Mr. Harry Whittington’s Fight with the City of Austin.*** The Whittington family owns a city block near the Austin Convention Center. In 2001, the Austin City Council passed a resolution that the Whittington block “should be acquired for a public use,” but the resolution did not specify what “public use.” Austin commenced proceedings to condemn the block. The Whittingtons filed a motion for summary judgment to dismiss the proceedings, alleging the city had failed to establish that the City Council condemned their land for a valid public purpose or determined that it was necessary to take their lot. By the trial date, the city’s staff had announced plans to use the Whittington block for parking and a chilling plant associated with the Convention Center. The trial judge denied the Whittingtons’ motion, and a jury awarded the Whittingtons \$7.75 million in compensation for their block.

The Whittingtons appealed, and late last year the Austin Court of Appeals reversed the trial court’s judgment, holding the city failed to establish that City Council, as the condemning authority, condemned the Whittington block for a valid public purpose or that the Council had determined that taking the block was necessary.³² As noted above, the Council had resolved only that the block should be acquired for a “public use,” but had not stated what the use was. The Austin Court’s holding makes good sense. Courts cannot review the decisions of the legislative branch to take private property unless the legislative body itself identifies the “public use” for which it employs the power of eminent domain and provides a statement of why taking a particular property is necessary for that use.³³ The Austin Court correctly refused to accept the *post hoc* statements from

²⁹TEX. GOV’T CODE § 2206.001(c).

³⁰The Texas Legislature may return to the subject of eminent domain in its 2007 session. There is an interim joint committee studying the power of eminent domain, with a report due to the Lieutenant Governor and Speaker by December 1, 2006. Rep. Beverly Woolley (Houston) is co-chair of the interim committee.

³¹The Texas Supreme Court has held Art. I, § 17 to be self-effectuating. *See, e.g., Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980) (“The Constitution itself is the authorization for compensation for the destruction of property and is a waiver of governmental immunity for the taking, damaging or destruction of property for public use.”).

³²*Whittington v. City of Austin*, *supra* n.26, 174 S.W.3d 889.

³³*But see* the opinion in *City of Arlington, Texas v. Golddust Twins Realty Corp.*, 41 F.3d 960 (5th Cir. 1994), in which the federal court, interpreting the public use requirement of Art. I, § 17 of the Texas Constitution, reversed a district court’s judgment voiding Arlington’s condemnation of a leasehold interest in property that Arlington wanted to make available to the Texas Rangers baseball club as part of the new Ballpark at Arlington stadium complex. The Arlington City Council’s resolution stated the purpose of the condemnation was to provide parking space for the existing Arlington Stadium, but a jury found the city’s true intent to be different. The Fifth Circuit concluded that since the city’s undisclosed intent was to take the private owner’s leasehold interest as part of the development of a comprehensive ballpark complex, the taking