



LIFT Perspective

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In Austin, we're all renters now.

The nexus of the *Kelo* decision, exorbitant property taxes, existing zoning restrictions and a recently adopted ordinance in the City of Austin have turned Austinites into renters from the state. The Legislature must act to restore commonly understood and properly respected property rights by limiting the ability of all local governments, especially in Austin, to abscond property without just compensation or just cause.

Property rights have taken a series of damaging hits, particularly in the wake of the *Kelo* decision by the US Supreme Court in June 2005. In *Kelo*, the Court held that government entities with eminent domain powers can transfer land from one private owner to another, in order to further economic development. The Court found that the “public use” clause in the Fifth Amendment, which governs the transfer of property, could be met if the new use to which a property would be put yields increased tax revenues.

Former Justice Sandra Day O'Connor wrote in her refreshingly direct *Kelo* dissent:

“...who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”

This means that if your home could bring in more tax revenue as a restaurant, hotel, or even a mall, then the government will take it off your hands and turn it into a restaurant, hotel, or a mall. And it has happened across the country.

The most high-profile case in Texas is in Freeport, where city officials have used eminent domain powers to acquire around 3,000 feet of mostly private riverfront property from Wright Gore, an individual, to construct a marina by Walker Royall, a private developer who has been given a \$6 million loan from the city to finance the project.

The threat of eminent domain has also reared its head in South Padre Island, where Willacy County officials targeted a 1,500 acre nature preserve as the perfect place to build a ferry landing, and in Austin, when the University of Texas attempted (eventually

unsuccessfully) to use its eminent domain powers to turn the privately owned Players Restaurant into a parking garage.

A more recent abuse of private property rights is brewing in El Paso. The city council is debating a plan, headed by the private, 350-member Paso Del Norte Group, to revitalize downtown El Paso, including the historic Segundo Barrio. Their downtown revitalization plan, which will include the use of eminent domain to alleviate alleged “slum and blight”, is partially funded by a \$250,000 grant from the City of El Paso. However private development has been stymied in the Segundo Barrio by a City zoning restriction limiting land use to low-income housing, precluding any purely private solutions to remedy whatever “slum and blight” may exist.

The flip-side of the eminent domain excesses is that zoning laws prevent a homeowner from turning their home into a hotel, restaurant, or other commercial operation in order to increase its revenue producing value. The government prevents property owners from maximizing the use of their property, then takes property to generate more tax revenue through “higher and better use.”

Section 211.001 of the Local Government Code permits municipalities to zone for “the purpose of promoting the public health, safety, morals, or general welfare and protecting and preserving places and areas of historical, cultural, or architectural importance and significance.” In the post-*Kelo* world, the homeowner is punished because his home is not a strip mall, but is at the same prevented from operating an oil change service in the garage.

Therein lies an inherent hypocrisy at the heart of this new interpretation of eminent domain laws. Government entities can take your property on the pretext of generating increased tax revenues which can be put to the “public use”, but the individual homeowner is restricted from doing precisely the same thing by a range of locally enforced regulations.

Cities have to the power to zone areas for residential, business, industrial, and other purposes, which limits any development in an area to the type for which it is zoned. In Texas, municipalities are usually also able regulate the height, number of stories, size of buildings, and the percentage of a lot that may be built upon. Indeed, the Austin City Council recently enacted an ordinance to amend Title 25 of the City Code, which limits most residential properties to a total size of no more than the greater of 2,300 square feet, or 40% of the square footage of the lot.

The reasoning behind the City ordinance is a bizarre brew of statism and interventionism that can only be understood in the context of *Kelo*. Austin City Council member Brewster McCracken, who was once considered a reasonable voice on the Austin City Council, argued for the next ordinance because "there has been a huge influx of California investment fund money going into speculative duplex development in Austin". The City ordinance, therefore, not only tramples property rights but also the free market. The new ordinance is especially pernicious after homeowners in Travis County were

greeted with a 16% appraisal increase in 2006. In addition to property owners being stuck in a purgatory between zoning restrictions, ordinances, and the threat of eminent domain, they also must suffer increasing deleterious taxes on their property.

Revisions to the Austin City Code have restricted the freedom of homeowners and real estate developers to build and remodel, and go far beyond the existing code. These kinds of sweeping restrictions to residential development are often too broad to reflect the developmental requirements of individual neighborhoods. Excessive regulation will hinder opportunities for growth, and regulations that ignore the differences between urban and suburban, new and old neighborhoods, will satisfy the requirements of neither.

Homeowners are becoming little more than renters from the state. Sure, a person can buy and own a house, but his ability to expand his home is limited by municipal codes and regulations. Government can take a person's home if it deems that there is a perceived need to put the property to commercial use, yet that same person could not put that home or land to a commercial use, constrained by government regulations.

Both the *Kelo* decision and over-officious municipal restrictions on construction and development infringe upon what should be the inviolable right of private property.

The Texas Legislature must take steps to redress the imbalance and restore meaningful property rights to land and homeowners. It could do this in a myriad of ways starting with strengthening the Private Real Property Rights Preservation Act (Chapter 2007 Government Code) to end cities' exemption from its application.

The Legislature should also close many of the loopholes included in Senate Bill 7 (79S2), codified in Chapter 2206, Government Code, and tighten the definition of "Blighted Area" found in Chapter 373, Local Government Code which adversely impacts low-income Texans.

Some 80 entities are granted the power of eminent domain; the list ranges from the predictable (cities, counties, and the state) to the absurd (non-profit charitable corporations and sports authorities). Paring back which entities may exercise eminent domain is also necessary to protect property rights.

Kelo, city ordinances, high property taxes and zoning restrictions amalgamate to make the state a sometimes-malignant landlord over property "owners". Without change, we're all just renters from the state.

For more information about participating in TCCRI's Property Rights and Land Use Task Force (chaired by Rep. Bill Callegari), please contact Brent Connett at 512-474-6042.