

Under Attack

Think politicians have fixed the private property problem?

by Boyd Kidwell

It's been more than two years since the U.S. Supreme Court astounded property owners by confirming that a governmental entity can seize private property and sell it to a private business. In *Kelo v. City of New London*, a Connecticut city condemned a neighborhood of waterfront homes and sold them to a development corporation to build a hotel/business complex.

While the homes were modest, with some residents who had lived there 20 years or more, the neighborhood was well-kept and not blighted. However, the city cited economic development as a primary reason for condemning homes and transferring property to a private corporation.

Private property advocates around the U.S. were infuriated when the Supreme Court voted 5-4 that the government's taking of private property for "economic development" is permitted under the Fifth Amendment of the Constitution. Following the *Kelo* decision, the public uproar spurred lawmakers around the country to introduce legislation that would protect private property from government seizure for economic development. Three bills were introduced in Congress, and several states passed legislation that was written to protect private property rights.

However, the federal legislation remains stalled in Congress, and many of the state laws are too watered down to help property owners.

"Unfortunately, we haven't seen many good things happen for property rights. One thing the *Kelo* decision did was open people's eyes to the amount of government-taking that's going on," says Dan Byfield of the American Land Foundation. "This made legislators attempt to do something, but we have a do-nothing Congress that won't pass anything before the presidential election in 2008. The Texas legislature passed a law, but it had 18 exemptions, so it's not very effective."

As lawmakers struggle to pass meaningful legislation, landowners are still suffering from eroded property rights. Here are a few examples:

Trouble in Texas

The Lone Star State is home to one of the largest property rights controversies in the U.S. The Texas Department of Transportation is moving forward with the Trans Texas Corridor, a 4,000-mile toll road/transportation corridor that will consume 580,000 acres. Instead of following existing highway right-of-ways, the project will be built on a new route that requires a huge chunk of rural land.

The Trans Texas Corridor will include 10 vehicle lanes, six rail tracks, utilities, pipelines, gas stations, restaurants, motels and stores. After completion, a Spanish company (Grupo Ferrovial) will operate the toll road with a 50-year lease.

Critics say that each mile of the toll road will consume 146 acres of land, and the jumbo turnpike will become a "NAFTA (North American Free Trade Agreement) superhighway" to speed Mexican truck traffic through Texas. The road will have limited access, and the leaders of many counties oppose the turnpike because the project will actually make travel more difficult in many rural communities.

"Texas Farm Bureau is against this project in a big way. Rural people will be making most of the sacrifice. If the Trans Texas Corridor comes through your farm or ranch, you'll be heartbroken," says Gene Hall, director of public relations for the Texas Farm Bureau.

For months, the Texas Farm Bureau worked with the state's legislature to write House Bill 2006 (HB 2006) that would protect landowners from potential abuse of eminent domain as land is acquired for the project. A major concern for



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landowners is a provision in the Texas Transportation Code that gives corridor authorities the right to take possession of land (quick take) before a court rules on the condemnation. Landowners also object that the state will condemn land for the public project and turn the property over to a foreign company to operate profitable restaurants and motels in turnpike plazas.

HB 2006 would have restricted eminent domain (with limited exceptions) to situations in which property would be acquired for the benefit of the general public. The legislation would have also protected Texans from abuses during eminent domain proceedings. However, Texas Governor Rick Perry vetoed the bill.

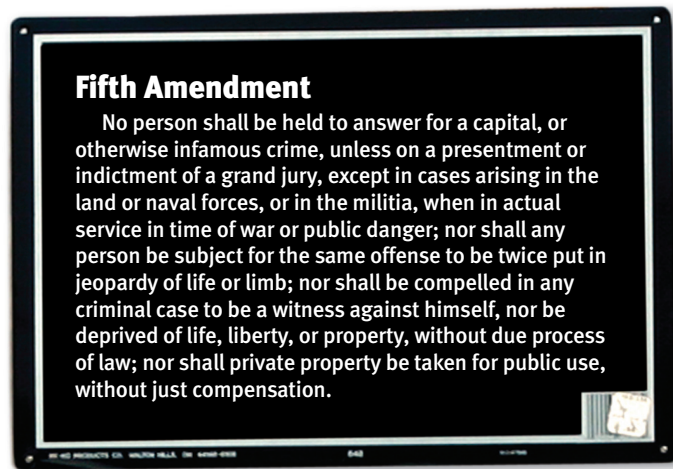
“HB 2006 would have been the strongest eminent domain law in the nation. This massive taking of private property is something that sticks in the craw of many Texans,” Hall says.

Caught in a squeeze

Rancher Mike Dauenhauer of southern Oregon is caught in a squeeze between environmental regulations and land-use restrictions. On one hand, the Bureau of Land Management (BLM) cut back Dauenhauer’s grazing allotment to protect a recently declared national monument and to improve habitat for wildlife. On the other hand, the state’s land-use regulations make it difficult for Dauenhauer’s family to sell parts of the ranch near developing residential areas.

“Oregon has some of the worst land-use laws in the country. We have 12,000 deeded acres, but you can’t build a house on less than 160 acres because of the land-use restrictions. We have some land near town, and we’d like to sell homesites of 20 to 40 acres in that area, but we can’t,” Dauenhauer says.

At one time, the ranch was permitted to manage 1,100 cow-calf



pairs on the BLM grazing allotment, but that permit has been reduced to 350 cow-calf pairs. If his grazing allotment is reduced any more, Dauenhauer says he’ll give up raising cattle.

“We have plenty of grazing on our ranch during the spring and fall, but we need the grazing allotment during the summer. If the government keeps reducing grazing allotments, you’ll see many Western ranchers get out of the cattle business,” he says.

Water woes

Chuck Leaf and his wife, JoAnn, raised Angus cattle for 30 years, but the Colorado ranchers sold their cow herd this year. Leaf says they hated to sell cows that they had bred for calving ease and good disposition, but the loss of property rights has made it impossible for them to continue ranching.

In Leaf’s case, the state restricted his traditional use of irrigation water from the South Platte River. With only a fraction of his historic water supply, Leaf couldn’t grow the 160 acres of hay he needed for winter feed. Selling his livestock was the only option. At least two “takings” cases are under way involving the water rights issue in the area.

The water controversy developed because urban growth in the Denver area has steadily consumed more water from the upstream section of the South Platte River. A three-state endangered species agreement now requires Colorado to send an increased flow of water downstream to central Nebraska for the benefit of waterfowl.

Farmers and ranchers along the middle section have received notices to restrict irrigation. As a result, approximately 2,000 of 4,000 irrigation wells have been shut down.

“In Colorado, a water right is a property right. If you interfere with my access to the river, you restrict my ability to grow crops and livestock,” Leaf says.

Think local

Since many laws and regulations are enforced by state and federal authorities, many landowners are waiting for state legislatures and Congress to provide relief for private property rights. However, working with local officials may be the most effective way of protecting property rights.

“Politics is local,” says Margaret Byfield of Stewards of the Range, an Idaho-based organization that teaches ranchers how to use existing laws to fight for property rights. “The only way we can get accountability back in government is to work from the ground up.”

Political fallout

The *Kelo v. City of New London* decision by the Supreme Court woke voters up to the amount of private property being taken by governments around the country for projects with questionable public benefits. In response to public pressure, these property rights bills have been introduced in Congress:

- ▶ H.R. 926, The STOPP Act of 2007, prohibits federal economic development assistance for any state or locality that uses the power of eminent domain to obtain property for private commercial development or that fails to pay relocation costs to persons displaced by use of the power of eminent domain for economic development purposes.
- ▶ H.R. 3053, Private Property Rights Protection Act of 2007, states that no state or political subdivision of a state shall exercise its powers of eminent domain over property to be used for economic development or is used for economic development within seven years after that exercise, if that state receives federal economic development funds during any year in which the property is so used.
- ▶ S. 48, Private Property Rights Protection Act, returns meaning to the Fifth Amendment by limiting the power of eminent domain. It makes ineligible for federal funds any condemning authority or acquiring party that participates in a taking or condemnation of any real property interest not for a public use.