SUBJECT: Restricting eminent domain use for economic development purposes

COMMITTEE: Land and Resource Management — committee substitute recommended

VOTE: 8 ayes — Mowery, Harper-Brown, Blake, R. Cook, Leibowitz, Miller, Orr, Pickett

0 nays

1 absent — Escobar

WITNESSES: For —John Colyandro, Texas Conservative Coalition; Patrick Dixon, Arthur DiBianca, Robert Howard, Libertarian Party of Texas; Jimmy Gaines, Texas Landowners Council, Inc.; Wright Gore, Western Seafood Co.; David K. Langford, Texas Wildlife Association; Bill Peacock, Texas Public Policy Foundation; Heidi Ullrich, Citizens Against the Trans-Texas Corridor and CorridorWatch.org; Maria Martinez; Judy Morris; David Van Os; Dan Byfield, American Land Foundation and for Charly Seale and Maria Favia del Core Borromeo - Exotic Wildlife Association; (*Registered, but did not testify:* Craig Chick, Texas Association of Realtors; Sal Costello, People for Efficient Transportation; Mary Miksa, Texas Association of Business; Scott Norman, Texas Association of Builders; Billy Phenix, Texas Land and Mineral Owners' Association; Randy A. Samuelson, Young Conservatives of Texas; Don Zimmerman, Republican Liberty Caucus of Texas)

Against — Larry Casto, City of Dallas; Scott Forbes, Port of Houston Authority; (*Registered, but did not testify:* Shanna Igo, Texas Municipal League)

BACKGROUND: The Fifth Amendment to the U.S. Constitution prohibits the taking of private property for public use without just compensation, commonly referred to as the "takings clause." Texas Constitution, Art. 1, sec. 17 — often called the "public use clause" — prohibits a person's property from being taken, damaged, or destroyed without consent for public use without adequate compensation.

The authority of government to claim private property for public benefit is called eminent domain and is considered an inherent attribute of

sovereignty. Texas has limited that power through its Constitution and has granted it to numerous other entities, including political subdivisions, special districts, and private concerns such as utilities. These specific grants of authority to other entities are found throughout the statutes. Property Code, ch. 21 establishes the procedures for exercising eminent domain authority.

In June 2005, the U.S. Supreme Court ruled in *Kelo v. City of New London,* (No. 04-108), that the proposed use of property by the city of New London, Conn. for a development project qualified as a "public use" within the meaning of the U.S. Constitution's takings clause. In the case, the city of New London was attempting through eminent domain to acquire property from owners who refused to sell land earmarked for a development project that, by some estimates, would create more than 1,000 jobs, increase tax and other revenues, and revitalize an economically distressed city. The city invoked a state law that specifically authorizes the use of eminent domain to promote economic development.

The Supreme Court said that the plan unquestionably served a public purpose and therefore ruled that it did not violate the U.S. Constitution's takings clause. The court ruled that promoting economic development is a traditional and long accepted government function and that there is no principled way of distinguishing it from other purposes the court has recognized. The Supreme Court said it was embracing the broader and more natural interpretation of public use as "public purpose."

The court also found that the city had determined that the area at issue was sufficiently distressed to justify a program of economic rejuvenation and that the city had developed a plan designed to benefit the community, including the generation of new jobs and increased tax revenue. While the city could not take the private land simply to confer a private benefit on a particular private party, the exercise of eminent domain in this case, according to the Supreme Court, was envisioned under a carefully considered development plan that was not adopted to benefit a particular class of identifiable individuals.

The court also emphasized that nothing in its opinion precluded a state from placing further restrictions on its exercise of the takings power. It said that many states already impose "public use" requirements that are stricter than the basic federal standards.

DIGEST:

CSHJR 19 would add Art. 1, sec. 17A to the Texas Constitution to prohibit the state or a political subdivision of the state from using eminent domain to take private property if the primary purpose of the taking was for economic development or to benefit a particular class of identifiable individuals.

The proposal would be presented to the voters at an election on Tuesday, November 8, 2005. The ballot proposal would read: "The constitutional amendment to prohibit the state or a political subdivision from taking private property for the primary purpose of economic development or to benefit a particular class of identifiable individuals."

SUPPORTERS SAY:

CSHJR 19 is necessary to protect property rights in Texas following the recent U.S. Supreme Court ruling that allowed a local government to seize property from private owners and transfer it to another owner simply to increase tax revenues through economic development. While the court said that the seizure did not violate the U.S. Constitution's takings clause, it also said that states can place further restrictions on the exercise of eminent domain power. CSHJR 19 would do just that and place appropriate limits on the exercise of eminent domain by Texas and its political subdivisions. Texas voters should be able to decide if they want to protect private property from seizure by the government for the primary purpose of economic development.

It is an abuse of power for government to seize private property and shift it to another private owner solely to generate more tax revenues or to benefit a particular class of individuals. Under the *Kelo* ruling, cities or other entities with eminent domain authority could argue that nearly any project benefited the public through economic development and could, for example, take private homes to enable the construction of a shopping mall that would generate more tax revenue than the homes. Justice Sandra Day O'Connor said in her dissent that "all private property is now vulnerable to being taken and transferred to another private owner who will use it in a way that the legislature deems more beneficial to the public." Such cases tend particularly to hurt the poor because their property often is vulnerable to seizures for higher tax revenue.

It is necessary to place restrictions on the exercise of eminent domain in Texas because the Texas Constitution's public use clause is similar to the takings clause in the U.S. Constitution and because Texas statutes — e.g., the Development Corporation Act of 1979 (VTCS 5190.6), the Texas

Urban Renewal Law (Local Government Code, ch. 374), and Local Government Code, ch. 335, which authorizes sports and community venue districts — could be interpreted as defining "public use" as it was defined in the *Kelo* decision.

Without CSHJR 19, the state and local governments could subject Texans to the same abuse of eminent domain power that has occurred in New London, Conn. The proposed amendment is not an overreaction to the *Kelo* decision because similar cases have occurred in Texas, including in the cities of Freeport and Hurst.

Other ways of protecting private property in Texas from being seized for economic development purposes are inadequate, and lawsuits could prove ineffectual in the wake of *Kelo*. It can be difficult for voters to hold local officials accountable for eminent domain actions because in some cases local officials act through economic development corporations on the projects, making it unclear who should be held responsible.

The language in CSHJR 19 is clear and would prohibit the use of eminent domain only if the primary purpose was for economic development or if its exercise benefited a particular class of identifiable individuals. This means that the state and local governments could continue to use eminent domain in clear public-use situations, such as the construction of roads, water and utility lines, and other public works. CSHJR 19 would not lead to a significant increase in the number of lawsuits challenging use of eminent domain because such lawsuits already occur routinely.

CSHJR 19 would not prohibit the state or political subdivisions from exercising eminent domain authority to further projects with economic development ramifications, such sports stadiums or conference centers, as long as these projects were undertaken for legitimate public uses in which economic development was not the primary purpose and no particular class of individuals received a benefit. Even if done purely for economic development, such projects could proceed with government participation without the use of eminent domain to force private owners to surrender their property without their consent.

CSHJR 19 would be in line with similar policies in use or under consideration in several other states and in the U.S. Congress. In June 2005, U.S. Sen. John Cornyn of Texas introduced S. 1313, which would allow the exercise of eminent domain only for public use and would

specify that public use does not include economic development. The bill would apply to the exercise of eminent domain by the federal government and by state and local governments that use federal funds.

Because the Texas Constitution protects Texans' rights, it is best to protect private property in the state by amending the state's fundamental law. CSHJR 19 would strengthen and clarify Texans' rights in a way that amending the statutes would not. In fact, it is Texas law that in many cases has chipped away at Texans' rights.

Any questions raised by CSHJR 19 could be resolved, as are questions about many constitutional provisions, by later amending the statutes or through court rulings. After the adoption of this proposed amendment, the Legislature and courts could deal with any situations in which governments or other entities attempted to thwart the spirit of CSHJR 19 by labeling economic development a secondary purpose when it clearly was not or by "flipping" projects to private hands.

It is prudent to amend the Constitution today because taking private property for economic development will always be wrong — now and during the next regular session of the Legislature in 2007. Texas and its citizens would be better off in the interim through the adoption of CSHJR 19, which might prevent some inappropriate takings of private property that could occur during the next 18 months. The Legislature could adopt CSHJR 19 now and still study the issue further during the interim to determine how best to implement this needed policy change.

OPPONENTS SAY:

The laws and Constitution of Texas allow for a broad interpretation of public use to include economic development in some situations involving eminent domain, and this proposed amendment unwisely would remove that flexibility. Economic development is an accepted role for government that in some cases has a defined public benefit and can satisfy a public purpose as much as more traditional government projects.

The *Kelo* decision illustrates when it might be acceptable to exercise eminent domain for economic development purposes, such as when an area is distressed enough to justify an economic development program and when the property is taken under a carefully formulated development plan to provide appreciable benefits to the entire community, rather than a particular class of identifiable individuals. For example, the exercise of eminent domain over the objections of a few property owners might be

appropriate if an entire community stood to benefit from a carefully crafted economic development project, such a stadium or expansion of a port. In its opinion, the court rejected any literal requirement that condemned property be put to use for the public and embraced a more natural interpretation of public use as "public purpose." Texas should follow the lead of other states that allow the use of eminent domain for economic development purposes when it is appropriate and beneficial to the public as a whole.

CSHJR 19 is so broad that it could restrict many legitimate uses of the power of eminent domain for public purposes. Because there is no definition of economic development, private property owners could challenge its legitimate exercise by claiming that almost any project — including roads or utilities — were undertaken primarily for economic development reasons and could take the matter to court, adding higher legal costs to almost every project. jFor example, private property owners could argue that a project undertaken to remedy blighted areas or to expand a port actually were for economic development purposes. The hands of the state and other entities with the power of eminent domain could be tied over such endless litigation.

CSHJR 19 would be an overreaction to the *Kelo* decision. The state and local entities generally are reluctant to use eminent domain and normally take great pains to exercise it fairly. There have been few cases in Texas of abuse of eminent domain power, and there are ways to handle any abuses that do occur. For example, abuses of the exercise of eminent domain can be handled through the courts or by holding elected officials accountable for their actions.

Rather than amending the Constitution in haste without a full understanding of this complex issue, it would be more prudent for the Legislature to study the use of eminent domain during this interim and for the 80th Legislature to act in 2007, if necessary.

OTHER OPPONENTS SAY:

CSHJR 19 should avoid confusion by specifically naming certain types of projects, such as roads, utilities, or stadiums, that are considered acceptable uses of the power of eminent domain.

Rather than writing in the Constitution a blanket prohibition against the use of eminent domain for economic development purposes, it would be better to amend the statutes to define public use or to prohibit seizure by

eminent domain in specific situations. More specific, statutory language would be able to establish a clear state policy and to answer numerous questions, such as how economic development and public use are defined. Statutory language also could establish high hurdles to be cleared when eminent domain was exercised.

CSHJR 19 would not sufficiently protect property rights. Under the proposed amendment, the government simply could label economic development as a secondary purpose for a project and proceed to use the power inappropriately. For example, it might be possible for a city to seize 20 acres, use 15 for a park, and then grant the remaining five to private interests. Similarly, a city might be able to thwart the intent of the amendment by taking land for a public use and then "flipping" it to a private developer a short time later

NOTES:

HJR 19 as filed would have applied only to political subdivisions of the state, while the committee substitute also would apply to the state. In the committee substitute, the prohibition on using eminent domain would apply if "the" primary purpose — rather than "a" primary purpose — was economic development. The substitute also specifies that the use of eminent domain to benefit a particular class of identifiable individuals would be prohibited.

The companion measure, SJR 10 by Deuell et al., is pending in the Senate State Affairs Committee.

SB 62 by Janek, reported favorably as substituted by the Senate State Affairs Committee on July 8, would amend the Government Code to prohibit governmental or private entities from using eminent domain to take private property if the taking:

- conferred a private benefit on a particular private party through the use of the property;
- was for a public use that was merely a pretext to confer a private benefit on a particular private party; or
- was for economic development purposes, unless the economic development was a secondary purpose resulting from municipal community development or urban renewal activities under Local Government Code, ch. 373 or ch. 374 to eliminate an existing affirmative harm on society from "slum" or "blighted areas."

SB 62 would not affect the authority of an entity authorized by law to use eminent domain for providing utility services or transportation projects, including railroads, ports, airports, or public roads and highways.

SJR 9 by Janek, pending in the Senate State Affairs Committee, would amend Art. 1 sec. 17 of the Constitution to say that public use does not include economic development.

SJR 15 by Shapleigh would ban taking of private property for economic development purposes unless the property was to be devoted to a definite public right or use, the taking was reasonably necessary for the success such a project, or the taking prevented a menace to the health, safety, morals, and welfare of citizens. It would define economic development as efforts to promote prosperity and comfort in a community, stimulate the economy, expand employment opportunities, encourage the establishment and growth of commerce and industry, or expand the property or sales tax base. It also would prohibit taking private property to raise revenue to meet the cost of a public project if the property being taken was not otherwise necessary for the success of the project. SB 78 by Shapleigh is almost identical to SJR 15 except that it would add these provisions to the Government Code rather than the Constitution. Both measures have been referred to the Senate State Affairs Committee.

Several House bills related to CSHJR 19 have been referred to the House Land and Resource Management Committee:

- HB 73 by Pena would prohibit political subdivisions of the state from using eminent domain to take private property if the primary purpose was for economic development unless the area being developed was in a "blighted" or "slum" area.
- HB 78 by Corte would prohibit political subdivisions of the state, institutions of higher education, and corporations created under the Development Corporation Act of 1979, from using eminent domain to take private property if a primary purpose of the taking was for economic development. The bill would not affect the authority of entities to take property for roads, streets, highways, utility services, or infrastructure related to these projects.
- HB 86 by Van Arsdale would prohibit governmental entities or other entities with the power of eminent domain from using that power to take private property to promote or effect economic development or rejuvenation, to create jobs, to generate tax

revenue, to create leisure or recreational opportunities, or to create aesthetic pleasure.

- HB 84 by Coleman would, among other things, limit charitable corporations' use of eminent domain under certain statutes to situations that were not undertaken solely or primarily for economic development.

The House Land and Resource Management Committee has scheduled a public hearing tomorrow on HB 73 and HB 84.