

# Keeping Texas Competitive

## A Legislator's Guide to the Issues 2013-2014



### Public Use vs. Public Purpose

#### The Issue

According to the United States and Texas constitutions, eminent domain can only be used for a public use. Specifically, Article 1, Sec. 17 of the Texas Constitution says, “No person’s property shall be taken, damaged, or destroyed for or applied to public use...”

However, in most cases, Texas statutes refer to “public purpose” or simply “purpose” when authorizing the use of eminent domain. For instance, here is the statute granting eminent domain authority to the University of Texas System:

Sec. 65.33. EMINENT DOMAIN. (a) The board has the power of eminent domain to acquire for the use of the university system any land that may be necessary and proper for carrying out its *purposes* in the manner prescribed by Chapter 21, Property Code.

Then in subsection (c), the Legislature declares the purposes of the University of Texas System to be for the use of the state:

(c) The taking of the property is declared to be for the use of the state.

In other words, the Legislature declares that whatever purpose the University of Texas System may have for a piece of property it takes from an owner becomes a public use simply through the exercise of eminent domain. The courts need not worry about the facts.

Texas courts also have fallen into using purpose when referring to property takings. Here is language from one Texas Supreme Court opinion:

In any event, a mere declaration by the Legislature cannot change a private *use* or private *purpose* into a public *use* or public *purpose*.

The good news here is that the Supreme Court’s decision stands opposed to the Legislature’s declaration about the University of Texas System’s exercise of eminent domain. The bad news, though, is that the Court also confuses use and purpose.

Until 2011, all grants of eminent domain authority revolved around purpose rather than use. The 82nd Texas Legislature recognized the problem with this language and began to address it in SB 18 by changing the language in the authorizing statutes for cities, counties, and school districts from public purpose to public use.

Some have questioned the need to make such changes. However, clarity in law is crucial, as can be seen in cases like *Kelo* where the U.S. Supreme Court said that “public purpose” can include such things as economic development and increased tax revenue. Because the Texas Legislature and Texas courts have closely followed the national trend of blurring the distinction between public use and public purpose, it is important to restore clarity in Texas law by restoring constitutional language in Texas statute.

The next step is to finish the process by making the purpose to use change in all places in statute where eminent domain is authorized for use. This includes authorizations for entities such as universities, state agencies, municipal utility districts, hospital districts, common carriers, etc. With these changes made, it will be clear that all subdivisions of the state and all private entities are granted the power of eminent domain to take property only for a public use.

### The Facts

- Both the United States and Texas constitutions authorize the use of eminent domain only for a “public use.”
- Most grants of eminent domain authority by the Texas Legislature, however, allow takings for “public purposes.”
- Last session, the Texas Legislature began to reverse this in SB 18 by authorizing the use of eminent domain for cities, counties, and school districts only for a public use.

### Recommendation

- Change all references to in statute to “public purposes,” “public purpose,” or simply “purpose” when authorizing the use of eminent domain to “public uses” or “public use.”

### Resources

*Property Rights in Texas: Heading in the Right Direction* by Bill Peacock, Texas Public Policy Foundation (Oct. 2011).

*Senate Bill 18: Public Use vs. Public Purpose* by Ryan Brannan and Bill Peacock, Texas Public Policy Foundation (Feb. 2011).

*Eminent Domain: Balancing the Scales of Justice* by Ryan Brannan and Bill Peacock, Texas Public Policy Foundation (May 2010).

