

# THE POWER OF EMINENT DOMAIN

**By: Anthony J. Barbieri**

**Published: CREST Publications Group, THE NETWORK**

**June 2014**

---

When Woody Guthrie wrote the lyrics to the classic 1940's American folk song, "This Land is Your Land", I suspect he was not referring to the government's power of eminent domain. But ask any landowner who has ever lost property via a government taking, and those lyrics probably describe their sentiment – albeit not the same sentiment Woody had in mind.

## **Kelo – 2005**

In the most famous recent eminent domain case, *Kelo v. City of New London* (Connecticut), the United States Supreme Court permitted the use of eminent domain power to transfer land from one private owner to another private owner to "further economic development." In a 5–4 decision, the Court held that the general benefits a community enjoyed from economic growth qualified private redevelopment plans as a permissible "public use" under the Takings Clause of the Fifth Amendment to the United States Constitution.

The Kelo case caused a lot of public backlash. Many people – lawmakers, businesspeople, and legal scholars – viewed the outcome as a gross violation of property rights and as a misinterpretation of the U.S. Constitution, the consequence of which would be to benefit large corporations at the expense of individual homeowners and local communities. The public outcry was so loud that even then President George W. Bush issued an executive order instructing the federal government to restrict the use of eminent domain authority. In the aftermath, many states enacted 'anti-Kelo' legislation, and currently just about every state in America has a law on the books to prohibit a Kelo-like result in their jurisdiction.

## **Eminent Domain in Texas**

By comparison, the Texas Constitution long ago established that private property may only be taken by the government for public use. This concept has its origin in the Magna Carta, and was included in the Declaration of Rights of the Republic of Texas Constitution of 1836 and has been in every subsequent version of the Texas Constitution since. Even though eminent domain cannot be used for private purposes in Texas, there are still thousands of eminent domain cases here every year. None are as high profile as the Kelo case, but they can have great impact on the lives and wellbeing of those involved.

So what is eminent domain? What is condemnation? How does it work in Texas? Generally speaking, eminent domain is the government's authority (or a private entity authorized by the government) to take private property for public use. "Condemnation" is the legal process by which the property is actually taken. (The process is governed by the Texas Property Code and the Rules of Civil Procedure.) However, the laws related to the power, and limitation, of eminent-domain authority exist in the state Constitution and various statutes. There are many statutes that grant and limit the power of eminent domain. For example, a section of the Local Government Code provides the basic statutory authority giving cities eminent domain power. Various provisions of the Texas Education Code dictate how independent school districts and universities can exercise their power of eminent domain. There's even a statute that allows a Texas school to condemn private property for a football stadium! Score! Further, the law allows for property to be taken via eminent domain for utility projects (e.g., gas pipelines, electrical

lines, water and sewer lines) and infrastructure projects (such as expanding highways, building roads and bridges). Sometimes the condemning entity seeks to take the property owner's entire parcel of land; other times, it just seeks a piece of the land or an easement – such as when a utility company wants to run pipelines underground or utility lines overhead. Regardless of the type of taking, the landowner has the right to receive “just and adequate compensation.” Although both the Texas and the United States Constitutions guarantee these rights, landowners often feel like they get the short end of the stick and that the government is only willing to pay a fraction of what the landowner might believe his property is worth.

### **This Property is Condemned!**

Once a condemning authority decides to take your property via eminent domain, it is required by law to negotiate with landowners before judicial process begins. To satisfy this legal requirement, the condemning authority has to make a *bona fide offer*, which requires it to: (1) make an initial good faith offer in writing; (2) obtain a written appraisal from a certified appraiser of the value of the property being acquired – and the damages (loss of value) if any to the remainder property after the taking; (3) make a final written offer (along with a copy of the appraisal and the proposed deed, easement, or conveyance if these have not been previously provided) at least 30 days after the initial offering – which is equal to or greater than the value contained in the appraisal; and (4) give the property owner at least 14 days to respond to this final offer. The condemning authority must also send the landowner a copy of the “Landowner’s Bill of Rights”, a document prepared by the Texas’ Attorney General’s office that explains, in general, the landowner’s rights in the condemnation proceeding.

If those negotiations are unsuccessful – either because the two parties cannot agree on the price or the landowner doesn’t want to give up its property, then authorized entities can file a lawsuit in the proper state court in the county where the property is located. Once filed, the presiding judge must appoint three (3) disinterested real-property owners who reside in the county to serve as “special commissioners”, each party can strike (i.e., reject) one of the commissioners, in which case, the judge must appoint a replacement.

### **The Determination of Value**

The special commissioners’ sole purpose is to assess the damages (appropriate compensation) to be paid to the owner for the value of the property being taken and, if applicable, the loss of value to the remaining property. The valuation must always consider the “highest and best use” of the property – both immediately and in the reasonably foreseeable future. After assessing the damages and allocating the costs, special commissioners prepare a written decision called an “Award of Special Commissioners,” which is signed, dated and filed with the court. Either side may object to the findings of the special commissioners by filing a written objection with the court. If no objections are filed the decision is final. If objections are filed, the county (or district) court would try the case *de novo*. (A trial *de novo* is a proceeding in which the entire case is reconsidered.)

After the special commissioners have made their determination, the condemning authority can take possession of the condemned property pending the results of further litigation as long as it pays to the property owner the damages and costs awarded by the special commissioners, or deposits that amount of money in escrow. If this occurs, and the court subsequently decides that the condemn authority did not have the right to condemn the property, the court will order the condemning authority to surrender possession and can also award the owner damages as a result of the temporary possession.

### **Possession Not Ownership**

That nuance (allowing the condemning entity to possess the property while the trial court decides the case) of Texas law often frustrates Texas land owners. As does this nuance: there are very few *successful* defenses to a government entity's ability to condemn a private land owner's property for public use in Texas. Defenses do exist, such as the requirement that the condemning authority's exercise of its eminent domain authority not involve any fraud, bad faith, or circumstances revealing arbitrary or capricious actions. However, the landowner's burden of proving such a defense is quite high, and in Texas there have historically been very few cases where the landowner succeeds in outright blocking the condemnation.

What is a landowner to do if faced with a condemnation? It is important to start early in the process to try and negotiate with the condemning authority and, if possible, attempt to dissuade them from taking your property. If that doesn't work (and it usually doesn't), then, (assuming of course that the condemning authority has the proper legal authority), the name of the game for the landowner will be to get the best price it can get for the land – whether in the negotiation process, at the special commissioners' court, or in the trial court. This will most certainly necessitate engaging competent legal counsel, as well as experienced expert witnesses that can testify about the value of the property and its highest and best use. If you don't properly assert your rights, not only will you be serenading the government with your version of "this land is your land", you'll likely be singing that song with little money in your pocket.

