PUBLIC USE:
THE *KELO* RULE IN TEXAS

presented by

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I. Introduction

It is fundamental constitutional law that private property cannot be taken, regardless of the amount of compensation paid, for other than a *public use*.

The Fifth Amendment to the United States Constitution provides: ". . . nor shall private property be taken for *public use*, without just compensation."

Similarly, Article I, Section 17, of the Texas Constitution provides: "No person's property shall be taken, damaged or destroyed for or applied to *public use* without adequate compensation being made. . ."

The issue of what constitutes a "public use" is very timely and has reached the consciousness of the general public. Within the last year, the United States Supreme Court has interpreted the federal Public Use Clause, the Texas Legislature has attempted statutorily to define public use, and the Texas Supreme Court has asked for full briefing on a case which seeks to have the Court construe the meaning of "public use" as used in the Texas Constitution.

As public resources become more stretched and the cost of public projects increases, states and cities will become more and more creative to find ways to raise revenue and to recoup the cost of public investment.

This paper will present and discuss the recent public use case before the United States Supreme Court, *Kelo v. City of New London, Connecticut*, and then will discuss public use jurisprudence in the State of Texas. Against this backdrop, this paper will discuss Senate Bill 7, the Texas Legislature's recent response to the *Kelo* opinion intended to define public use statutorily. Finally, brief mention will be made of two public use cases that ultimately may have the Texas Supreme Court writing on the phrase "public use" as used in the Texas Constitution.

II. The *Kelo* Decision

On June 23, 2005, a five to four bare majority of the United States Supreme Court held that a taking for economic development purposes is an allowed "public use" under the Public Use Clause of the Fifth Amendment to the United States Constitution. *Kelo v. City of New London, Connecticut*, ___ U.S. ___, 125 S.Ct. 2655 (2005).

The following is an outline of the four opinions in this case: the majority opinion delivered by Justice Stevens, Justice Kennedy's concurring opinion, and the dissenting opinions by both Justice O'Connor and Justice Thomas.

A. Factual Background

In 2000, the City of New London, Connecticut, approved a development plan that was projected to generate new jobs, increase the tax revenues, and revitalize an economically distressed city. The area of the development plan included the City's waterfront and was believed to have greater potential beyond the then existing uses of the property. The City's acquisition agent purchased in open market transactions some of the property needed. However, some property owners did not wish to sell and statutory eminent domain actions followed.

The City of New London had been in an economic decline for decades and had been declared a "distressed municipality" by a state agency in 1990. The City's problems were exacerbated in 1996 when the United States closed a naval warfare center that had employed more than 1,500 people. Just prior to the adoption of the development plan, New London's unemployment rate was double that of the State and its population continued to dwindle and was at the lowest point since 1920.

The government began to invest in the Fort Trumbull area of New London in an effort to revitalize it. The City floated bond issues for redevelopment purposes and towards the creation of a state park. Pfizer, Inc. announced that it would build a $300,000,000 research facility in area. The City approved comprehensive development plan consisted of a waterfront conference hotel and a small urban village with restaurants, shopping, a marina, recreational and commercial uses; a residential area and museum; research and office space; parking and retail service for visitors and to support the marina project; retail space; and, parking and water dependent commercial uses. The plan was designed to revitalize New London, create jobs, generate tax revenue, and to make the City more attractive with leisure and recreational activities on the waterfront and in the park.

The City was able to purchase most of the 90-acre redevelopment area through open market transactions but was required to file eminent domain proceedings against some of the property owners. One such property owner was Susette Kelo, who had lived in that area for several years. She had made extensive improvements to her home which enjoyed a water view. Eight other landowners were involved and none of their 15 properties was in poor condition or needed to be condemned for any other reason than that it was in the redevelopment area. These property owners challenged the validity of the condemnation actions.

The issue before the United States Supreme Court was whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Public Use Clause of the Fifth Amendment to the United States Constitution.

B. The Majority Opinion

The majority opinion recognizes two general rules. *Kelo,* 125 S.Ct. at 2661. First, it is forbidden to take property from one property owner to confer a private benefit on another. Thus, a City is not allowed to take property under the "pretext" of public purpose when its actual purpose is to bestow a private benefit. On the other hand, the State may take property from one private party to transfer to another if there is an intended "use by the public."

In analyzing the issue before it, the United States Supreme Court recognized that the federal public use requirement does not involve a "literal" requirement that property condemned be put into "use for the general public." *Kelo,* 125 S.Ct. at 2662. The Court recognized that many state courts in the mid-1800's

interpreted the public use clauses of their Constitutions to require a "use by the public." *Id.* However, the Court recognized that this narrow view had steadily eroded over time. The Court indicated that the "use by the public" test was difficult to administer and proved to be impractical given evolving needs of society. The Court recognized that it had been applying the Fifth Amendment for the last 100 years as construing "public use" to be the same as "public purpose." *Id.* Since its test does not require actual public use, the majority analysis focused on whether or not the condemnations in this case provided for a "public purpose." *Kelo,* 125 S.Ct. at 2663.

The United States Supreme Court relied principally on three cases.

In *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98 (1954), acquisitions for urban renewal of a blighted area of Washington, DC, were upheld where most of the housing in the area was beyond repair. After condemnation, part of the land was to be leased or sold to private parties for redevelopment, including the construction of low cost housing. One property owner whose land was condemned was the owner of a department store whose property was not itself blighted. The Court held that this property could be taken along with the others because a project like this needed to be "planned as a whole" in order for the plan to be successful. *Id.,* 348 U.S. at 34.

The Supreme Court upheld a Hawaii statute which allowed property to be taken from landlords and transferred to the landlords' tenants in order to reduce the concentration of land ownership, in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321 (1984). Here, the Supreme Court held that there is a valid public use in Hawaii's attempt to eliminate the "social and economic evils of land oligopoly." *Id.,* 467 U.S. at 241-242.

In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862 (1984), the Supreme Court upheld a statute dealing with intellectual property that allowed one company to make use of another company's testing data (including trade secrets) in furthering its inventions so long as the second company paid compensation for the data that it used. The Court allowed the taking of this property interest because of Congress' belief that avoiding time consuming research to recreate data already in existence (albeit secret) enhanced competition and eliminated a significant barrier to entry into the pesticide market.

The majority of the United States Supreme Court in *Kelo* found these decisions went beyond allowing condemnations for actual public use and were precedent whereby the Court had given legislatures broad latitude in determining what public needs constituted public uses and justified the taking of private property.

Following the precedent cited, the *Kelo* majority opinion allowed the condemnations by the City of New London, done for the purpose of creating new jobs and increasing tax revenue because:

1. the area was distressed, justifying economic rejuvenation, even though there was no blight condition;

2. there was an overall economic development plan;

3. there was a state statute that specifically authorized condemnation to promote economic development; and

4. the project must be executed as a whole and not on a piecemeal basis in order for the plan to be successful.

Kelo, 125 S.Ct. at 2665.

The United States Supreme Court found that promoting economic development was a traditional function of government and that there was no real distinction between the economic development that followed from the three cases which served as primary precedent discussed above and what was happening in New London. Each was felt to have the same "public character." *Id.*

Importantly, the Supreme Court recognized that there was no real danger of this project being done for a specific private benefit because it was not being done on an individual or piecemeal basis, but rather was a part of an overall and integrated development plan. The Supreme Court hinted that its analysis might be different if this were just a single taking of one property owner's interest in order to transfer his property to another. *Kelo,* 125 S.Ct. at 2666-2667.

Finally, the United States Supreme Court recognized that the various state Constitutions had their own "public use" clauses. The Court recognized that each state could interpret its Constitution differently and could provide for further restrictions and greater protections for its property owners by more narrowly defining the term "public use" in the state Constitution. *Kelo,* 125 S.Ct. at 2668.

C. Concurring Opinion of Justice Kennedy

Justice Kennedy seemed concerned that the opinion of the Supreme Court might end up allowing certain transfers of property from one individual to another more favored private entity with only incidental or "pretextual" public benefits. Such, he recognized, would be forbidden by the Public Use Clause of the federal Constitution. Therefore, this Justice opined that there might be some more demanding standard which might need to be met when property was taken from one entity and transferred to another single entity, the situation with the most potential for abuse. *Kelo,* 125 S.Ct. at 2669 (J. Kennedy, concurring).

In the case before the Supreme Court, however, Justice Kennedy indicated that a heightened standard of review was not necessary because there was nothing in the record to indicate that there was any motivation to aid a particular private entity, noting:

1. the taking occurred in the context of a comprehensive development plan;
2. it was meant to address a serious *city wide* depression;
3. the economic benefits were not "*de minimus*;"
4. the identity of most of the private beneficiaries were unknown at the time the City formulated its plan; and,
5. the City complied with elaborate procedural requirements.

Kelo, 125 S.Ct. at 2669-2670 (J. Kennedy, concurring). These indicia of why these takings constitute a "public use" are similar to those of the majority's opinion, including the requirement that there be an overall comprehensive plan and overall community benefit. But Justice Kennedy's list also included factors that addressed elements that would make it more unlikely that a government could prevail on a public use that was merely pretextual.

D. Dissenting Opinion of Justice O'Connor (joined by three other Justices)

Justice O'Connor wrote that the majority opinion abandoned a "long held, basic limitation on government power." *Kelo,* 125 S.Ct. at 2671 (J. O'Connor, dissenting). She wrote that allowing the condemnation of private property for mere economic development "washed out" any difference between what was a private and a public use of property. *Id.*

Justice O'Connor recognized that the takings clause contained two guarantees for its citizens. *Kelo,* 125 S.Ct. at 2672 (J. O'Connor, dissenting). First, that property would not be taken without the payment of just compensation. Second, that property would not be taken at all except for a public use. These are two different guarantees and no matter how much compensation is paid for the taking of property, if it is taken for other than a public use, the property owner's constitutional protection has been thwarted.

This Justice recognized that legislative determinations about what constitutes a public use are to be given great deference. However, she wrote that "were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff." *Kelo,* 125 S.Ct. at 2673 (J. O'Connor, dissenting).

Justice O'Connor identified three categories of takings which comply with the public use requirement. *Id.* First is the transfer of private property to public ownership as with a highway. Second is the transfer of private property to a private party who makes the property available for the public's use as with a railroad, an electric utility company or other common carrier. Finally, there are situations where private property is taken away in order to satisfy certain exigencies or a situation requiring immediate aid or action. Justice O'Connor would hold that the takings for economic development by the City of New London fell into none of these three classifications. *Id.*

This Justice found that the taking in *Berman* did fall within the three classifications, being one that was necessary to prevent injury to the public arising from a blighted condition. While Mr. Berman's department store was not blighted, its taking was necessary in order for the overall plan to eliminate blight and its evil consequences. *Id.*

Similarly, Justice O'Connor felt that the Supreme Court, in its holding in *Midkiff,* was deferring to a legislative determination that the fact that land ownership was so concentrated (96% of property ownership in Hawaii was in the hands of either the government or one of only 72 private landowners) was so dramatic that it skewed the market, inflated land prices and injured the public tranquillity and welfare. *Kelo,* 125 S.Ct. at 2674 (J. O'Connor, dissenting).

Justice O'Connor warned that the majority holding which allowed condemnations for increased tax revenue, more jobs, and maybe even aesthetic pleasure, would allow any property to be condemned because any taking could be said to generate some incidental benefit to the public. *Kelo,* 125 S.Ct. at 2675 (J. O'Connor, dissenting). She argued for a very clear black line test that would allow a condemnation as in *Kelo* only where there was a harmful property use being taken in order for there to be an actual public use. *Kelo,* 125 S.Ct. at 2676 (J. O'Connor, dissenting). This Justice argued that any other test would be difficult to apply because distinctions would be blurred, merged and mutually reinforcing. *Id.* Finally, Justice O'Connor warned that the beneficiaries under the majority holding would be those with "disproportionate influence and power in the political process." *Kelo,* 125 S.Ct. at 2677 (J. O'Connor, dissenting).

E. Dissenting Opinion of Justice Thomas

Justice Thomas would hold that a taking for economic development, new jobs and increased tax revenue is not a taking for a "public use." He would hold that the takings clause authorizes the taking of property only if the public has a right to use it, rather than just merely having a benefit from the taking. Thus, he joined in Justice O'Connor's dissent. However, Justice Thomas would go even further. This Justice believes there is a significant difference between "public use" as contained in the Fifth Amendment and the phrase, which the majority uses interchangeably, of "public purpose." *Kelo,* 125 S.Ct. at 2678, 2680 (J. Thomas, dissenting). To clear up any ambiguity, Justice Thomas tacitly invites the Court to revisit and overturn the Court's holding in both *Berman* and *Midkiff. Kelo,* 125 S.Ct. at 2685-2686 (J. Thomas, dissenting).

The dissent of Justice Thomas contains an in depth historical review of the development of the Public Use Clause and the line of cases leading up to the three main precedents cited by the majority opinion. *Kelo,* 125 S.Ct. at 2677-2686 (J. Thomas, dissenting).

Finally, Justice Thomas warns that the evils of the Court's holding would fall disproportionately on poor communities that are less likely to put their land to the highest and best social use and are also the least politically powerful. *Kelo,* 125 S.Ct. at 2687 (J. Thomas, dissenting).

III. Public Use in Texas

Private property may only be taken by the government for a *public use.* TEX. CONST. Art. I, § 17.[1] It is fundamental that a person's property cannot be taken for an individual's private use and benefit. *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 833 (Tex. 1958); *Marrs v. Railroad Commission*, 177 S.W.2d 941, 949 (Tex. 1944).

In Texas, public use requires that "there result[] to the public some definite right or use in a business or undertaking to which the property is devoted." *Davis v. City of Lubbock*, 326 S.W.2d 699, 704 (Tex. 1959); *Borden v. Trespalacios Rice & Irrigation Co.*, 86 S.W. 11, 14 (Tex. 1905). Whether a condemnation is for a public use is a question of law. *Maher v. Lasater*, 354 S.W.2d 923, 925 (Tex. 1962).

In requiring the public have "some definite right or use," Texas eminent domain jurisprudence *rejects* as public uses those projects which merely create a generalized public benefit such as economic welfare, economic development, or increasing the tax base. Texas defines public use more narrowly:

> [W]e are not inclined to accept that *liberal* definition of the phrase 'public use' adopted by some authorities, which makes it mean no more than the public welfare or good, and under which almost any kind of extensive business which promotes the prosperity and comfort of the country might be aided by the power of eminent domain.

Borden v. Trespalacios Rice & Irrigation Co., 86 S.W. 11, 14 (Tex. 1905) (emphasis added); *see also, Housing Auth. of City of Dallas v. Higginbotham*, 143 S.W.2d 79, 85 (Tex. 1940); *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 833 (Tex. 1958); *Davis v. City of Lubbock,* 326 S.W.2d 699, 707 (Tex. 1959); *Whittington v. City of Austin,* 174 S.W.3d 889, 897 (Tex.App.–Austin 2005, writ ref'd n.r.e.);

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[1]The concept that private property can be taken only for a public use was included in the Declaration of Rights of the Republic of Texas Constitution of 1836 and it has been in every subsequent version of the Texas Constitution. This concept, which protects the most fundamental of private property rights, has it origin in the Magna Carta.

City of Arlington v. Golddust Twins Realty, Corp, 41 F3d 960, 965-966 (5th Cir. 1994). Thus, for one hundred years, this Court repeatedly has held the Texas Constitution provides Texas property owners more protection than is provided landowners in the United States Constitution.

Because they lack a public use, Texas courts have rejected condemnations of property for the sole benefit of a private entity or individual. In *Maher v. Lasater*, 354 S.W.2d 923 (Tex. 1962), the government was attempting to declare as public a private road over one person's property which was the only means of access to another's section of land. Similarly, in *Phillips v. Naumann*, 275 S.W.2d 464 (Tex. 1955), the government was attempting to open a roadway across land owned by Phillips to lake-front land owned by Naumann. The Texas Supreme Court, in both cases, denied the taking of the roads. This Court in *Maher* recited quoted its opinion in *Naumann*:

> The undisputed evidence discloses that the only persons who could be benefitted by the opening of this road are the Naumanns and persons who might desire to visit them. The principle that private property cannot be taken for a private use is too elementary to call for a citation of authorities in support thereof. What this record discloses is the taking of private property of petitioners for the use of Naumann, and for no other use, and that, too, when there is no necessity for doing so.

Maher, 354 S.W.2d at 925-926, quoting *Naumann*, 275 S.W.2d at 467. This Court recognized that in both *Maher* and *Naumann* there was an arguable public use present. In *Maher*, the road would serve to put the products of the soil and range of the landlocked tract into the economy of the community. *Maher*, 354 S.W.2d at 926. In *Naumann*, it was suggested that by opening up the road, Naumann would be enabled to establish a fishing camp or some other commercial development on his property. *Naumann*, 275 S.W.2d at 467. Nonetheless, this Court rejected the "generalized public benefit" argument in each case.

It must be noted, however, that even though the Texas Supreme Court rejected in *Borden* the "liberal" definition of the phrase "public use," the Supreme Court also has written that it has adopted a "liberal" view of what is or is not a public use. *Housing Auth. of City of Dallas v. Higginbotham*, 143 S.W.2d 79, 85 (Tex. 1940). An analysis of the Supreme Court's public use cases demonstrates, however, that there is no conflict and that the protection from takings for mere generalized community benefit or economic development has stood strong over the last one hundred years. The decisions of the Supreme Court on "public use" have never strayed from the original *Borden* requirement that there must be some definite public right or use for there to be a public use.

In *West v. Whitehead*, 238 S.W. 976, 978, (Tex.Civ.App.–San Antonio 1922, writ ref'd, w.o.m.), the Supreme Court refused writ and thus upheld the appellate court holding that a condemnation for a main line to a private asphalt mine was a public use. The opinion stated that public use depends upon the "extent of the right the public has to such use, not upon the extent to which the public may exercise that right." Importantly, the finding of public use was based on the common carrier status of the railroad. *Id.*, 238 S.W. at 977-978. It was not legally significant that as a practical matter, the line probably would serve only a particular user (at least for the time being). The line was a public line, was open for use to the public, and the public had a right to make full use of the line. The *Whitehead* court noted, however, that if the "purposes or usefulness were restricted to that one particular use," a different question might be presented. *Id.*, 238 S.W. at 979. The rail line was not deemed to be a public use in disregard of *Borden*, or because it increased the tax base, or because of a generalized community benefit. Rather, the rail line was a public use because

it was being provided by a common carrier and could be traveled upon and used by the public (which had a right to do so), just as could the mining company.[2]

Another case in which the Texas Supreme Court found a "public use" to exist is *Coastal States Gas Producing Company v. Pate*, 309 S.W.2d 828 (1958), a case in which an oil and gas lessee of the State of Texas was allowed to condemn property necessary for the lessee to be able to reach producing sands owned by the State of Texas and under lease. The Supreme Court reasoned that just as property condemned by the State would be put to a public use if it was condemned to allow the State to access its own mineral resources, so then would property condemned by a lessee of the State also be put to a public use if done for the same purpose of enabling the State to make beneficial use of its resources. The Supreme Court found that the public had a "direct, tangible and substantial interest and right in the undertaking." *Id.*, 309 S.W.2d at 833.

Condemnation of property in proximity to a port to lease as industrial sites to private parties was deemed to be a public use in *Atwood v. Willacy County Navigation District*, 271 S.W.2d 137, 142 (Tex.Civ.App.–San Antonio 1954, writ ref'd n.r.e.), another example of how the "public use" clause of the Texas Constitution has been applied. The rationale of the appellate court, however, was not tied to a general benefit to the community or to the increase in the area's tax base. Rather, this condemnation was for a public use because such industrial sites are necessary for the successful operation of a port. *Id.*, 271 S.W.2d at 142. Clearly a port is a public use and it would make no sense to allow a governmental entity to condemn for such a public use and not be able to provide the essentials necessary for the port to succeed. Again, the public had a direct and tangible interest in the existence and success of the port.

In *Housing Auth. of City of Dallas v. Higginbotham*, 143 S.W.2d 79, 85 (Tex. 1940), the Texas Supreme Court found a direct and specific public use in being protected from the disease and crime that arose from insanitary and unsafe, overcrowded dwelling accommodations. *Id.*, 143 S.W.2d at 85. Similarly, in *Davis v. City of Lubbock*, 326 S.W.2d 699, 705-708 (Tex. 1959), this Court held an urban renewal program to be a public use justifying condemnation where restrictions and covenants were put in place to insure that the plans for renewal would be carried out and the slum conditions would not recur. *Id.*, 326 S.W.2d at 706-707. In neither of these cases was a public use justified on the basis of some generalized community benefit or the increasing of the tax base. Rather, there were specific and tangible threats to the public health, safety and welfare which were being addressed and it was determined that the public had a public right or use in being protected.

In each of these Texas cases, the Texas Supreme Court and other courts have required more than a generalized benefit to establish a public use. In each case, the public was found to have a specific and tangible right or use in the undertaking. Even if the general public would not make use of the project as a practical matter, each public use was open and available to the public.

In the *Kelo* opinion discussed above, the majority found the phrase "public use" to mean the same thing as "public purpose." Are they the same under Texas constitutional law? Each of these phrases are used in the Texas Constitution, but not for the same thing.

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[2] *In accord, see, Tenngasco Gas Gathering Co. v. Fischer,* 653 S.W.2d 469, 475-476 (Tex. App.–Corpus Christi 1983, writ ref'd. n.r.e.), where a pipeline that presently served only one customer was deemed to be a public use because it was part of a non-discriminatory pipeline system open to all that chose to avail themselves of it.

Article I, Section 17 of the Texas Constitution, provides for the taking of property only for a public *use*. In a different context, the phrase "public purpose" is used in Article 8, Section 3 of the Texas Constitution, to be "only" those purposes for which "[t]axes shall be levied and collected." It is important to note that the limitation that property may be condemned only for a public use is in the Bill of Rights Article of the Texas Constitution. But the allowance that monies can be raised (and presumably spent) for public purposes is found in the Taxation and Revenue Article of the Texas Constitution.

There is no indication in the Texas Constitution that public use and public purpose are the same thing. If each word was intended to have the same meaning, the constitutional framers could have used the same word twice, once in each of the two different contexts set out above. There is nothing inherently necessary about allowing a government to spend money to do things or for certain purposes for which it could not force someone to sell their property. Only the forced sale of property implicates a fundamental liberty and right.

The Texas Supreme Court addressed but did not decide if "public use" and "public purpose" were the same thing in *Davis v. City of Lubbock*, 326 S.W.2d 699, 709 (Tex. 1959). In this case, the Court held that an urban renewal project was a public use under Article I, Section 17 of the Texas Constitution. Thus, property needed for the project could be condemned.

But the landowner in *Davis* also challenged the urban renewal project as not being for a public purpose and thus not being a proper constitutional use of public funds. The Texas Supreme Court in *Davis* held:

> The words "public purposes" are no narrower than the words "public use . . ." Since we have held property is taken for public use, it follows that the expenditure of funds on the same project would be for a public purposes....

Id.

Thus, under Texas constitutional jurisprudence, public purpose is not more restrictive than public use, but it has not been directly decided whether or not public use is more restrictive than public purpose. That public use is more restrictive than public purpose is the obvious inference of the *Borden* case.

IV. Texas Senate Bill 7

There was an immediate public outcry in Texas in the wake of the *Kelo* opinion. Since that holding, many states have begun to consider legislation which would limit *Kelo's* reach and protect property owners from condemnations for economic development. But nowhere in the United States was the reaction more immediate than in Texas.

Within two weeks of the *Kelo* opinion, Texas Governor Rick Perry expanded the call of the First Called Special Session, 79th Legislature, to include consideration of legislation and a constitutional amendment to outlaw condemnations for economic development. In announcing the expansion of the call beyond the school finance issue that had been the original reason for the special session, the Governor said:

> The Supreme Court's ruling would allow government to condemn your family's home, bulldoze it and build a new shopping mall or some other kind of economic development project simply to generate more tax revenue. I stand with an overwhelming majority of law

makers and citizens who believe that this starts us down a slippery slope that will lead to the erosion of Texans' rights.

TexasInsider.Org, July 8, 2005.

The eventual result of this legislative effort, which finally occurred in the 2nd Called Special Session, 79th Legislature, was the passage and signing into law in September 2005 of Senate Bill 7. This Act added § 2206.001 to the Texas Government Code to provide at sub-section (b):

> (b) A government or private entity may not take private property through the use of eminent domain if the taking:
>
> (1) confers a private benefit on a particular private party through the use of the property;
> (2) is for a public use that is merely a pretext to confer a private benefit on a particular private party; or
> (3) is for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas . . .

It is apparent that the holding in *Kelo* and the associated public reaction sensitized a Texas Legislature to an issue that did not resonate in the same way before the *Kelo* decision was issued. Just several months prior to the consideration and adoption of Senate Bill 7, the Texas Legislature had considered condemnations of private property for economic development purposes in the context of takings for the state highway system and the Trans-Texas Corridor project in particular. In House Bill 2702, passed in the 79th Regular Session, the Legislature amended § 203.052, Texas Transportation Code, to allow the taking of private property to:

> provide a location for an ancillary facility that is anticipated to generate revenue for use in the design, development, financing, construction, maintenance, or operation of a toll project, including a gas station, garage, store, hotel, restaurant, or other commercial facility.

Texas Transportation Code, § 203.052 (b)(9). As part of that same House Bill 2702, the Legislature authorized condemnations associated with the Trans-Texas Corridor: "providing a location for a gas station, convenience store, or similar facility." Texas Transportation Code, § 227.041 (b)(5).

Thus, only months before public outcry directed at the *Kelo* opinion and the Legislature's ultimate passage of Senate Bill 7, that same Legislature had considered and specifically allowed condemnations for economic development and to raise money to help finance highway projects ("recoupment"). In Senate Bill 7, the Legislature revisited its amendments to the Transportation Code passed only months earlier. It amended Texas Transportation Code, § 203.052 (b)(9), to require the Highway Commission to obtain approval by the local county commissioner court of a comprehensive development plan before any property could be acquired for an "ancillary facility" through the exercise of eminent domain. The same requirement for local county commissioner court approval also was added to Texas Transportation Code § 227.041 (b)(5).

But the language of Senate Bill 7 created what might have been considered to be an ambiguity by including language, immediately following the above language that outlawed the exercise of the power of

eminent domain for economic development and conferring a private benefit on a private party, which provided that:

> this section does not affect the authority of an entity authorized by law to take private property through the use of eminent domain for:
>
> (1) transportation projects . . .;
> (2) port authorities and navigation districts . . .;
> (3) water supply, wastewater, flood control . . .;
> (4) public buildings, hospitals and parks . . .;
> (5) utility services;
> (6) a specific sports and community venue project;
> (7) common carriers in certain situation;
> (8) utilities;
> (9) underground storage operations;
> (10) waste disposal projects; or
> (11) libraries and museums.

Some argue that this list of "exceptions" guts Senate Bill 7 by tacitly suggesting that condemnations for economic development purposes or to confer private benefit on private individuals are thus affirmatively allowed or sanctioned in each of the eleven enumerated areas.

However, these exceptions do not expand or allow condemnations for economic development purposes for two reasons. First, the clear legislative intent of the bill was not to expand or allow condemnations for economic development purposes in any context. Senate Bill 7 was a response to the *Kelo* opinion and was intended to restrict the power of condemnation. The "exceptions" listed in Senate Bill 7 are merely a list of those projects which the Legislature believed had both a traditional public use under the *Borden* standard, but which also had positive economic development impact. The Legislature wanted to make sure that Senate Bill 7 would not preclude traditional and customary condemnations from continuing to move forward. There was no intent that condemnations for any of the eleven enumerated areas could move forward without showing a specific use by the public being involved. This is made clear in the following exchange between two senators during final passage:

REMARKS ORDERED PRINTED

> On motion of Senator Shapleigh and by unanimous consent, the remarks between Senators Shapleigh and Janek regarding SB 7 were ordered reduced to writing and printed in the *Senate Journal* as follows:
>
> **Senator Shapleigh:** Senator, you and I have had a running conversation about intent and proof of public use. And, so I've got some questions on your bill. Is the intent of this bill to limit condemnations for economic development purposes?
>
> **Senator Janek:** Yes, it is. And I'm not sure, you understand that the, the discussion we had yesterday is already on the record.
>
> **Senator Shapleigh:** Well, I don't think we had –

Senator Janek: Think it's been –

Senator Shapleigh: It recorded in the Journal.

Senator Janek: We didn't reduce that to writing? OK.

Senator Shapleigh: No. I think –

Senator Janek: The answer is, yes it is.

Senator Shapleigh: OK. In a Supreme Court case, in the *Kelo* opinion, that court adopted what is in eminent domain circles called a liberal view of what is meant by the phrase of public use, as it pertains to the United States Constitution. In this state, we've always adopted the *Borden* definition, which is the conservative view of what constitutes public use. Is it your intent that the public use definition in *Borden* be adopted and used as a test under this bill?

Senator Janek: It is my intent that we adopt the more conservative approach to what constitutes public use under the Constitution.

Senator Shapleigh: Is it your intent under Senate Bill 7 that when a litigant comes in and claims one of the exceptions, that they still have to prove public use?

Senator Janek: Yes, it is.

Senator Shapleigh: Thank you.

Senate Journal, 2nd Called Special Session, 79th Legislature, August 16, 2005.

The second reason the eleven enumerated "exceptions" cannot expand the definition of public use to include takings for economic development purposes is because Senate Bill 7 is a statute and not a constitutional amendment. The Legislature may not by statute limit constitutional protections for landowners which protect them from having their property taken for other than a public use.

Another key provision in Senate Bill 7 was the new § 2206.001(e), Texas Government Code, which addressed and removed the historical deference given to legislative determinations of public use. It had long been Texas jurisprudence that a legislative determination of public use was afforded great deference and a presumption that the determination was proper. *Davis v. City of Lubbock* 326 S.W.2d 699, 704 and fn. 11 (Tex. 1959). But this new subsection 2206.001(e) of the Government Code provides that:

> (e) The determination by the governmental or private entity proposing to take the property that the taking does not involve an act or circumstance prohibited by Subsection (b) [set out in this paper, above] does not create a presumption with respect to whether the taking involves that act or circumstance.

Since this law was recently passed, there are not cases applying this significant change in law.

V. *Newsom v. Malcomson Road Utility District*

In ***Malcomson Road Utility District v. Newsom***, 171 S.W.3d 257 (Tex.App.–Houston [1st Dist] 2005, pet. pending), certain developers unsuccessfully tried to purchase property from their neighbor (Newsom) in private market transactions in order to facilitate developments they wanted to put on their tracts of land. They wanted to put a detention pond and a widened drainage ditch on Newsom's land. Newsom did not want to put his property to the developers' use and would not sell his land. The developers thereafter induced a municipal utility district (District) to condemn what they had been unable to buy from Newsom.

The primary public use issue in this case concerned the condemnation for the detention pond. Was this condemnation for a public use? [3] The pond was sized to serve only that one developer's single family residential project. The condemnation enabled the developer to build another half dozen lots in his development since he did not have to put his pond on his own property. The District condemned the detention pond in order to increase the tax base in the district.

A. <u>Newsom's Position (the author of this paper represents Newsom)</u>

Like all similarly situated properties in Harris County, the Santasiero tract was required to provide a detention pond associated with its development. Development of properties with impervious cover increases the amount of storm water runoff that comes off the tracts. To avoid flooding, this runoff must be captured and detained for a period of time allowing for rains to slow so that this additional runoff does not cause a flooding of the downstream drainage facilities. A detention pond provides an empty volume of space ready to hold, for a period of time, increased storm water which runs off a developed tract in a storm. A detention pond can be built either on-site or off-site so long as it is downstream and sized to provide capacity for the development served.

The condemnation of the detention pond on Newsom's property only benefits Santasiero's property; there is no public use. The Newsom tract is not able to enjoy the benefit from the increased storm water *capacity* provided by this detention pond and neither are any other properties in the District or in the area. It is true that storm water that goes into the detention pond on Newsom's property may be from the Santasiero tract or it may be from different properties. But the reason this pond only benefits the Santasiero tract is because the storm runoff from all the other properties is detained elsewhere (in detention ponds for those tracts) and none of the increased storm water detention capacity provided by this pond is available to accommodate storm water detention from any other tract. This pond will either store water from the Santasiero property, or it will store water which would otherwise be stored somewhere else in the storm water drainage system but which has been displaced by water from the Santasiero tract.

Some public uses are still public no matter if only one person uses it, so long as it is "open to all who choose to avail themselves of it." *Malcolmson Rd. Utility Dist., v. Newsom*, 171 S.W.3d at 268, quoting from *Tenngasco Gas Gathering Co., v. Fischer*, 653 S.W.2d 469, 475 (Tex.App.–Corpus Christi 1983, writ ref'd n.r.e.). However, as discussed immediately above, the added detention capacity in the system provided by the pond on Newsom's property benefits only one property and no other property in the area has access to, can avail itself of, or can make any beneficial use of that added detention capacity.

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[3]The other public use issues included the taking of more land than was needed or which was for an use authorized by the District board of directors, and the taking of a greater estate in land that was needed by condemning the detention pond and a drainage ditch in fee title rather than in easement.

Since the claim of actual use by the public is merely pretextual, the case really is about whether the District may condemn the pond to increase its tax base. Newsom's position is that this condemnation is not for a public use. Many of the indicia of what constitutes a taking for a private use as outlined by the various opinions in *Kelo* set out above (e.g., no master plan, only one tract benefitting, etc), are present here.

B. The District's Position

Retention ponds are needed and required to offset any adverse impact downstream caused by a development. A retention pond can be a regional facility, onsite, or offsite.

The Harris County Flood Control District ("HCFCD") indicated that before it would allow development of the Santasiero property, it would be necessary to establish a pond for the retention of storm water. The pond was necessary to offset impacts of the development of the proposed subdivision on Faulkey Gully and Cypress Creek.

The pond was situated so that any rainfall north of it – including that falling upon the development, Newsom's property, and other upstream properties and developments – could find its way to the pond. The capacity provided by the pond allows excess storm water that would otherwise flow downstream in Faulkey Gully to be retained, then released as flow in the Gully subsides. The witnesses in the case recognized that such ponds were required for development in order to "prevent flooding of the downstream drainage facilities."

The District argues that the legislation that created the District gave it a mandate to address potential flooding. The District believes its statutory public purpose provides the public use required by the Texas Constitution.

Ultimately, the Board decided that the tax base of the District was better served by placement of the pond on Newsom's undeveloped property than within the proposed development. The Board of Directors independently determined that the greatest benefit to the District was to place the pond on undeveloped, and difficult to develop, land near Faulkey Gully.

C. Summary and Outlook

In this case, there are two public use issues that are being joined.

The first is the District's claim that the public does in fact have an actual right to use the detention pond because water from many tracts runs through it and thus the taking qualifies as a public use under the strict standard of the *Borden* case. Newsom's position is that a detention pond's purpose is to provide storm water detention to catch the increased storm water volume and velocity that occurs during a storm and that the subject pond provides that benefit and that benefit is only available to one developer. Newsom argues there is no right to use in the public and that the District's claim otherwise is merely pretextual.

The second public use issue, if the Supreme Court finds that there is no direct public right to use, is whether the District's admitted motivation (to increase the tax base) is sufficient standing alone to find a public use under the Texas Constitution, Article 1, Section 17.

VI. *Whittington*

In *Whittington v. City of Austin*, 174 S.W.3d 889 (Tex.App.–Austin, writ denied), the City of Austin claimed it was attempting to condemn Mr. Whittington's property for the public uses of providing a parking lot to support its convention center and providing a location for a cooling station that would be available as a utility to many downtown properties. Mr. Whittington challenged the condemnations on public use grounds claiming that these uses were merely pretextual and that the real purpose for the taking was to benefit a hotel developer by releasing him from the obligation to provide parking for the convention center. Further, Mr. Whittington claimed that the taking of his property was not necessary for the putative public use since other parking in the area was already owned by the City and was being underutilized.

These public use issues were not reached by the court of appeals which instead ruled that there had been insufficient proof at summary judgment to demonstrate that the City Council had indicated or authorized any specific public use or necessity to justify the taking. Thus, the case has been remanded so as to require the City to make the showing that the City Council had, in fact, authorized condemnation for a specific use and need.

But the question of public use will undoubtedly arise upon remand in the trial court.

VII. Conclusion and Summary

In wake of the United States Supreme Court holding in *Kelo* that general economic development constitutes a public use under the federal Constitution, each state now has to interpret the public use clause of its state constitution to determine whether greater or lesser protections are afforded property owners in that state. In Texas, the Legislature has clearly indicated that the citizens' will is that public use in Texas should be narrowly and restrictively applied. This is consistent with the Texas Supreme Court holding on this issue over 100 years ago in *Borden*. But the trend in Texas over the last 100 years has created some ambiguity as to whether the standard for public use has become more liberal. In the very near future, we can expect the Texas Supreme Court to revisit the issue of public use in Texas and to determine whether Texas maintains a more conservative approach or whether it joins with the interpretation of the federal Constitution in a liberal construction of the words "public use."