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A Report from the Bureau of Governmental Research
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An Expanded Discussion of Expropriation: Constitutional Amendment No. 5

INTRODUCTION

ON SEPTEMBER 30, voters will consider constitutional amendments to Article 1, Section 4 of the Louisiana Constitution, which defines the right to property and sets the parameters for expropriations. Currently, Article 1, Section 4 limits the expropriation power of the State and its political subdivisions to takings of private property for public purposes and requires the payment of just compensation. Subject to limited exceptions, the expropriating entity must compensate the owner "to the full extent" of his loss.

The most significant, in terms of potential impact, is Amendment No. 5. Amendment No. 5 would:

- Prohibit the State or its political subdivisions from taking property for "predominant use" by, or transfer to, any private person or entity, except for certain industrial and port projects.
- Define with specificity the purposes for which property can be taken
- Prohibit takings for economic development or tax enhancement purposes.
- Expand the compensation payable in most takings.

BACKGROUND

The Fifth Amendment to the U.S. Constitution imposes limits on the government's power to take private property. It provides that no person shall be deprived of property "without due process of law; nor shall private property be taken for public use, without just compensation." The amendment is made applicable to the states through the Fourteenth Amendment to the U.S. Constitution. State constitutions sometimes impose additional limits on the state's ability to take property.

The meaning of "just compensation" in the Fifth Amendment is well settled, having been interpreted by the U.S. Supreme Court as the fair market value of the expropriated property. However, the phrase "public use" has been at the center of a national controversy – a controversy that has led to the amendment that is about to go before Louisiana voters.

Uses of Eminent Domain

The Supreme Court has taken a broad view of the concept of public use. Recognized public uses include the following:

Property taken for use by the public. Even the most limited, literal reading allows that eminent domain can be used to obtain property for direct use and ownership by the public. Public uses, in this sense, include highways, roads, public parks, and other facilities available to and for the benefit of the general public.

Property taken for use by the government. An example of this would be land taken by the government for a military base. It is deemed a public use because the government uses the land to carry out its functions in serving the general public, though it may not be open for use by the general public.

Property taken for use by common carriers. Government may authorize use of eminent domain to obtain property necessary for certain private enterprises, known as "common carriers." Typical examples include railroads, utility companies, telephone compa-

nies, or cable television providers. Common carriers are generally required to provide service to any member of the general public at a reasonable price, without discrimination. The justification for eminent domain to support common carriers is that, without it, the infrastructure needed to support these carriers would face insurmountable obstacles, and therefore the public would not have access to their services and the benefits those services provide.

Property taken to remediate blight. Here, eminent domain has been used for so-called "slum clearance," justified because blighted property endangered public health or welfare. However, non-blighted property can be taken under this approach, as determined by the U.S. Supreme Court in *Berman v. Parker*[1] in 1954. To serve a public purpose — the execution of a blight remediation plan — the Supreme Court deemed the taking of a non-blighted department store in the footprint of the plan necessary and justifiable.

Property taken to address land reform. This use of eminent domain continued the evolution of the jurisprudence. In *Hawaii Housing Authority v. Midkiff* (1984) at issue was the constitutionality of a transfer of private property from a small group of landowners to a larger group to reduce the concentration of ownership.[2] Its most controversial element was the intentional transfer of property from one set of private landowners to another. The court justified this by pointing out that this action was pursuant to a reform plan, and was not meant to benefit a particular collection of identifiable individuals.

Property taken for purposes of economic development. In a controversial 5-4 decision, *Kelo v. City of New London*, the U.S. Supreme Court in 2005 affirmed the use of eminent domain to execute an economic development plan. The opinion in that case inspired the proposed constitutional amendment before Louisiana voters.

The Kelo Decision and its Impact

In 2000, the City of New London, Conn., approved a development plan to revitalize the downtown and waterfront area of the economically distressed city. The plan called for a waterfront conference hotel, a small urban village, new residences, a museum, and office, retail, parking and waterfront use. The plan called for the transfer of much of the property to private entities. The City designated the New London Development Corp. as the development agent and authorized it to purchase property from willing buyers and to exercise the power of eminent domain. The development corporation exercised the power of eminent domain after a number of property owners refused to sell, and the owners challenged the takings.

The Supreme Court took the case to determine whether a city's decision to take property for the purpose of economic development satisfied the public use requirement of the Fifth Amendment. The Court noted that since the 19th century it had interpreted "public use" as synonymous with "public purpose." Noting that economic development is a traditional function of government and that there is no way of distinguishing it from other public purposes, the court refused to adopt a bright line rule that economic development does not qualify as a public use. Citing a number of factors – the comprehensive nature of the City's plan, the thorough deliberation that preceded its adoption, the limited scope of the court's review – the court found that the takings before the Court satisfied the public use requirement of the Fifth Amendment.

In its opinion, the Court also addressed whether the transfer of property to private parties as contemplated by the redevelopment plan precluded a finding of a public purpose. The Court stated that it was perfectly clear that the government cannot take the property of A for the sole purpose of transferring to private party B, even if A is compensated. Nor would the government be allowed to take property under the mere pretext of a public purpose, when the actual purpose was to bestow a private benefit. However, the fact that a third party may directly benefit (by, for example, gaining the use of property transferred for a legitimate public purpose) would not transform a taking into an impermissible private one. In fact, the court asserted, a public purpose might be more effectively achieved

through the private enterprise than through a governmental body.

The Nation and Louisiana React

Naturally, some welcomed the *Kelo* decision. Others, including property rights groups, raised a rallying cry, saying *Kelo* represented an unprecedented assault on Fifth Amendment property rights. Nationwide, a number of state legislatures reacted to *Kelo* by passing legislation limiting the uses of eminent domain, and such efforts are ongoing as of this writing. Some have endeavored to repeal liberal eminent domain policies specifically allowing economic development takings; others have added specific exclusions for economic development. Some have added specific provisions to ban the transfer of property from one private party to another, regardless of the circumstances. So far, 28 states have passed legislation in response to *Kelo*; five states, including Louisiana, are submitting constitutional amendments to voters.

ANALYSIS AND IMPACT

Proponents of Louisiana's proposed constitutional amendment argue that the *Kelo* decision changed the ground rules, making Louisiana property owners vulnerable to expropriation for private purposes. Therefore, they argue, a constitutional amendment is needed.

As the Supreme Court noted in *Kelo*, the necessity and wisdom of using eminent domain to promote economic development is a legitimate subject of debate. Supporters of the concept argue that it is an essential tool for redevelopment, particularly in older, impoverished cities burdened by fixed municipal boundaries and highly subdivided land – i.e., impediments to modern, large-scale development. Without it, cities will languish, unable to improve the situation of the community as a whole.

Opponents argue that allowing the exercise of eminent domain for economic development purposes would give local governments carte blanche to take property. Justice O'Connor articulated the concern in her dissenting opinion:

> [T]he Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasures. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, the words 'for public use' do not realistically exclude any takings and thus do not exert any constraint on the eminent domain power.[3]

Opponents also argue that the beneficiaries of the *Kelo* decision are likely to be the wealthy and well connected, such as large corporations and developers, and those hurt are likely to be small property owners.

The Louisiana Legislature could have dealt with situations similar to *Kelo* by prohibiting the transfer of expropriated property to private persons for economic development purposes. One of the many bills submitted in the last session would have done just that. Instead, the Legislature took a broader, multi-prong approach that would:

- Prohibit takings, except takings for industrial plants and port projects, by the State and its political subdivisions for "predominant use" by a private party or for transfer of ownership to a private party.

- Define the term "public purposes" for takings by the State or its political subdivisions, limiting it to the following:

  - A general public right to a definite use

of the property

□ Continuous public ownership" dedicated to the following uses:

- Public buildings in which publicly funded services are administered or provided
- Roads, bridges, waterways, access to public waters or lands, and other public transportation, access, and navigational systems available to the general public
- Drainage, flood control, levees, coastal and navigational protection and "reclamation for the public generally"
- Parks, convention centers, museums, historical buildings, and recreational facilities open to the public
- Public utilities for the benefit of the general public
- Public ports and airports

□ Removal of a "threat to public health or safety caused by the existing use or disuse of the property."

■ Prohibit consideration of "economic development, enhancement of tax revenue, or any incidental benefit to the public" in determining whether the taking or damaging of property constitutes a public purpose.

■ Expand compensable damages by stating that, except as otherwise provided in the Constitution, the "full extent of his loss" includes, but is not limited to, the appraised value of the property and "all costs of relocation, inconvenience, and any other damages actually incurred by the owner because of the expropriation."

■ Amend Article VI, Section 21 to prohibit the taking of homesteads (a primary residence on up to 160 acres of land) for industrial development or port businesses.

The proposed amendment goes far beyond prohibiting takings for economic development purposes. It rolls back the clock to hinder effective, large scale blight remediation plans. It increases the costs of taking for necessary and traditional government purposes and may inadvertently preclude takings for purposes that would fall into that category. It creates ambiguities and anomalies.

Defining Public Purposes

For two centuries, the courts have struggled to define the phrase "public use" — the phrase used in the U.S. Constitution to limit the taking power. The Legislature proposes to boil the equivalent phrase from the Louisiana Constitution, "public purpose," down to a list of acceptable purposes.

Defining a general and fluid legal concept such as public purpose is fraught with peril. It is difficult to anticipate the future situations that a society will encounter and the role that government might be expected to play. In addition, when the list is very specific in its detail, there is a risk of inadvertent, or at least inexplicable, omissions. For example, under the proposed amendment, a publicly owned performance hall would not be a public purpose. Meanwhile, museums and convention centers would be. It is unclear whether a stadium or other arena for professional sports is a permitted use. Finally, while specific uses such as parks and historical buildings would be considered public purposes for expropriation, broad purposes such as redevelopment, job creation, and the provision of housing would not be.

Limiting Blight Remediation

The definition of public purpose also includes as a public purpose the "removal of a threat to public health or safety caused by the existing use or disuse of the property." A threat to the general welfare, a common justification for blight remediation, is not sufficient to justify a taking of blighted property. This, in effect, creates a higher burden for declaring blight: the prop-

erty must pose an actual threat to public health or safety, not just be empty and dilapidated or otherwise pose a threat to general welfare. Supporters of the amendment state that the change was made because the concept of general welfare was too broad and susceptible to abuse.

The amendment would also prevent *Berman*-like[4] expropriation, in which a non-blighted property can be taken as part of a plan to remediate blight in the surrounding area. Therefore, if a single property is a non-blighted parcel surrounded by 50 or 1,000 blighted properties, it cannot be expropriated, even if the expropriation is necessary to execute a blight remediation plan.

This could create serious problems even in normal circumstances, by preventing effective remediation when the area as a whole poses a threat to the public health or safety. The ramifications are more serious in the extraordinary circumstances facing many communities in Southeast Louisiana.

Prior to Katrina, New Orleans contained more than 20,000 blighted properties, an alarming number in itself. The storm and levee breaks led to the damage of 134,000 housing units, with 107,000 of those flood-damaged. Coupled with the departure of many residents, these numbers will lead ineluctably to a blight problem likely never before seen in an American city. Similar problems can be expected in St. Bernard Parish and other areas. In light of this, expropriation will become a critical tool for redevelopment.

Private Use

The proposed amendment states in part that "Except as specifically authorized by Article VI, Section 21 of this Constitution property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity." Article VI, Section 21 allows expropriation by political subdivisions and ports for industrial plants and deep water port facilities.

The provision takes square aim at the Supreme Court's position in *Kelo* that property taken for a public purpose need not remain in public ownership. It does so in a way that creates interpretive and substantive problems.

First, the "predominant use" phrase is vague, and its relationship to the public purpose test is unclear. What does predominant use mean? Is it measured, by time or space? What's the relevant percentage? Could property be expropriated by a school board and leased to a charter school under contract with it? Could it be expropriated for a government owned stadium if the facility would be used predominantly by one team?

Second, the prohibition on transferring property could force the government to go into businesses beyond its core competencies. Take, for example, the case of blighted property that poses a threat to health and safety. The government could expropriate such property. It could not, however, transfer it to a private entity, even in an arm's length sale to a nonprofit entity, an urban homesteader, or any other private person. The government would have to become a landlord or transfer the property to another government entity. The property would remain out of commerce and, by virtue of its ownership by the government entity, off the tax rolls.

Third, the exception for industrial plants and port facilities seems somewhat arbitrary and focused on the old economy. What makes an industrial plant worthy of an exception, whereas, say, a biomedical research facility would not be? What makes a commercial maritime operation a worthy exception, whereas, say, a film studio would not be?

The Economic Development Prohibition

The amendment specifically states that economic development or enhancement of tax revenue "or any other incidental benefit to the public shall not be considered in determining whether the taking or damaging of property is for a public purpose" pursuant to the foregoing provisions. This could effectively remove the expropriation power of economic development and

redevelopment corporations, since their raison d'etre is economic development. It could nullify existing law that justifies expropriation for slum clearance and redevelopment in terms of economic development.

It is unclear what effect it would have even for the declared public purposes. Does it impose an additional burden? If not, why include the language, since all potential public purposes have already been whittled down to a list? By removing economic development, tax revenue enhancement, and "incidental benefits" (a phrase whose meaning is unclear) as possible considerations in whether a taking constitutes a public purpose, the amendment may create a great array of other unforeseen consequences.

Muddying the Powers of Common Carriers

The proposed amendment creates new ambiguities and issues in areas that were previously settled. One such area of uncertainty is the ability of common carriers to expropriate property needed for the delivery of their services.

Article I, Section 4 provides: "Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner." Pursuant to that provision, the Legislature has authorized common carriers, such as railroads and utilities, to expropriate property for that purpose.

The proposed amendment does not change the language addressing expropriations by authorized private entities, and it does not redefine "public purpose" as used in that provision. The parties involved in the drafting process claim that there was no intent to limit the expropriation power of common carriers.

However, the portions of the amendment circumscribing the state's expropriation power may inadvertently limit private expropriations. Under the proposed version, the State would no longer have the power to expropriate for many purposes currently allowed, including for a pipeline or a privately owned utility. If the State itself would no longer have the power to expropriate property for such purposes, it is difficult to see how it could delegate the power to a private entity. This is particularly true in light of the prohibition on transferring property to private parties.

There are arguments on both sides of the issue. Unfortunately, the poorly drafted amendment is an invitation for litigation.

Ratcheting Up Just Compensation

The proposed amendment would expand the compensation standard applicable in takings, unless the Constitution provides otherwise. The new standard would pick up inconvenience, and any other damages incurred by the because of the expropriation.

Louisiana courts have interpreted Louisiana's current compensation standard, which requires compensation "to the full extent of his loss," as entitling the owner of the expropriated property to the fair market value of the property plus other provable damages, such as lost rental revenues or business profits. This standard already outstrips the federal one, which limits compensation to the fair market value of the property taken. (Interestingly, Louisiana followed the federal standard until 1974.)

The proposed amendment would increase the cost of property acquisition by government and heighten the disincentive for an owner to willingly sell for a fair price.

Circumscribing the Industrial Exemption

Article VI, Section 21 of the Constitution currently allows any political subdivision to expropriate for industrial development or port businesses. As discussed above, the proposed constitutional amendment would continue to allow governments to transfer expropriated property to private entities for that purpose. It would, however, prohibit the taking of homesteads (a primary residence on up to 160 acres of land)

for industrial development or port businesses. The State could still take them for other public purposes.

BGR POSITION:

AGAINST. The proposed constitutional amendment is clumsily drafted and is likely to create an array of difficulties in an arena in which Louisiana has no history of problems. While other states might have the luxury of experimenting with their eminent domain guidelines, Louisiana does not. This State faces daunting post-Katrina redevelopment challenges, and it would ill-serve citizens to tamper with some of Louisiana's basic redevelopment powers. It would particularly ill-serve Louisiana to emboss those tamperings on the pages of the State Constitution, where any new malfunctions would be hard to fix, and where any new wrongs would be hard to right.

Notes

[1] In that case, the owner of a department store protested the taking of his non-blighted property as part of a plan to remediate blight in the adjacent area. The court found in favor of the blight remediation plan. It also asserted that the phrase "public use" was coterminous with the police power of the state; in other words, the taking of property could be justified in terms of promoting the health, good order, and welfare of the jurisdiction. Under *Berman*, the taking was justified in terms the benefits it brought to the public; it served a public "purpose" rather than providing for direct use by the public or its government.

[2] The Hawaii Land Reform Act of 1967 sought to transfer residential lots from landowners to their lessees; the state legislature felt the law necessary to address the historical concentration of land in the hands of a few landowners, a result of Hawaii's feudal past. The court found that the taking served a public purpose, to reduce "the perceived social and economic evils of a land oligopoly traceable to their monarchs." (466 U.S. 229, 242)

[3] Kelo vs. City of New London, Connecticut, 125 S. Ct. 2655, 162 L. Ed 2d 439 (2005).

[4] See the earlier discussion on the evolution of uses of eminent domain.

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