spotlight

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Seize Property As a Last Resort

Eminent domain bill should protect humans, not just natural habitats

KEY FACTS: **• In North Carolina, the government can invoke eminent domain and seize private property even if reasonable alternatives exist to using this power.**

• A recent Senate bill (SB 600) would allow conservation easement holders to challenge takings in court by requiring the government to prove that no prudent and feasible alternatives exist to condemnation of properties encumbered by conservation easements.

• The primary problem with the legislation is that it does not provide the same protection to all other private property or to all property owners.

• The bill would lead to absurd results if not expanded to all property owners, including homeowners, businesses, churches, farms, etc.:

1) **It would provide greater protection to conservation easement holders than to the very people that own the land. A homeowner would have less protection than someone with an easement.**

2) **It can fairly be said that this bill provides greater protections for mushrooms than it does for homeowners. As harsh as that statement sounds, it is accurate. The language of the bill clearly shows that the legislation exists to protect natural habitats, not a human's interest in that habitat.**

Recommendation: **The government should be required to prove that no prudent and feasible alternative exists to condemnation of *all* properties, not just those encumbered by conservation easements.**

In North Carolina, the government can invoke eminent domain and seize private property even if reasonable alternatives exist to using this power. For example, if a city wanted to seize a house for a future rail station, it may do so even if the city could acquire another adequate (or even better) site without using eminent domain.

A very simple and modest eminent domain reform would be to require the

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government to demonstrate that no reasonable alternative exists to seizing private property.[1] A recently passed Senate bill (SB 600[2]) would in fact require the government to prove that "no prudent and feasible alternative exists to condemnation of the property."[3] That bill has nothing to do, however, with the kind of property rights that typically are considered to be protected by constitutional provisions concerning eminent domain.

Instead of requiring that the government prove that no alternatives exist when seizing any private property, the Senate bill adds this protection only for property encumbered by conservation easements.[4] This *Spotlight* explains how this bill provides greater protection for someone trying to protect "open space" than someone trying to protect his home. It will explain how the bill is more concerned about protecting the "interests" of trees and dirt than the interests of human property owners.

What Is a Conservation Easement?

A conservation easement is a restriction on property that limits development. Like a sewer easement, the landowner continues to own the land under the easement. The easement restricts what the landowner can do with the land. For a conservation easement, the landowner may not disturb the natural habitat of the land covered by the easement.

A conservation easement holder has what is referred to as a non-possessory interest in the land—in other words, the conservation easement holder (often the government or a private land trust) has no right to possess the land but has a right to prohibit the landowner from disturbing the natural habitat, by, for example, building a garage. This restriction on development "runs with the land" and is imposed on all future property owners.[5]

The Key Provisions of SB 600

Under SB 600, the government would not be able to seize private property encumbered by a conservation easement unless it could show that "no prudent and feasible alternative exists to condemnation of the property."[6] The conservation easement holder, not the landowner, would be able to require the government to show that alternatives existed.[7]

If a landowner, such as a homeowner, wanted the government to take his property through eminent domain, he would be in for a surprise. Under SB 600, the conservation easement holder would be able to trump the property rights of the landowner by challenging the taking in court.

The legislation that passed the Senate also includes a provision that would require a jury to determine if alternatives exist to using eminent domain.[8] The House, which is now considering this bill, removed this provision in its version of SB 600.[9]

The Absurdity of SB 600

The government *should* be required to prove that no alternatives exist from seizing private property encumbered by conservation easements. The primary problem with the legislation is that it does not provide the same protection to all other private property or to all property owners.

If passed without this common-sense change, the legislature would be providing greater protection to conservation easement holders than to the very people that own the land. Quite simply, a homeowner would have less protection than someone with an easement.

Mushrooms and Dirt Would Trump Homeowners

It can fairly be said that this bill provides greater protections for dirt than it does for homeowners. As harsh as that statement sounds, it is accurate.

By its own language, SB 600 exists to protect land and its ecological features. In no version of the bill (or the House companion bill) does it suggest that the purpose of the legislation is to protect the rights of conservation easement holders.[10]

As can be seen from the language of the Senate-passed version of SB 600 (see below), this legislation does not exist because of some concern for easement holders—it exists to protect the subject matter of the easement: open space, land, etc.

When property rights advocates get concerned about the seizure of an individual's home, they are not concerned with the house itself. Instead, they are concerned with the individual's loss of property rights in the house. The concern is about the individual, not the brick and mortar that make up a house.

Proponents of SB 600 are concerned with the trees, the dirt, and everything that exists on the protected land. There is nothing wrong with being concerned with nature—in fact, we need to be concerned with nature. There is, however, something very wrong with being more concerned with protecting a mushroom than protecting a North Carolinian from losing his family home, farm, or business.

Protecting the Land, Not the Human Interest in Land

Below is the language from the preamble to the Senate version of SB 600. It is quite clear from this preamble that the legislation is concerned with protecting only physical attributes of certain parcels of land, and not with protecting any human rights to that land.

Whereas, North Carolina is losing natural areas, historic sites, and agricultural and forestry lands at a rate of over 100,000 acres per year; and

Whereas, concurrent with this rapid pace of development within the State, the public is investing substantial resources in conservation easements; and

Whereas, conservation easements are frequently used by land trusts and government agencies to restrict the development and use of land in order to preserve the land's natural, open, scenic, historic, or ecological features; and

Whereas, North Carolina's waters, open lands, and historic properties are critical to our State's economic future and quality of life; and

Whereas, as stated in Section 5 of Article XIV of the Constitution of North Carolina, it is the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry; and

Whereas, G.S. 113A-241(a) provides, "The State of North Carolina shall encourage, facilitate, plan, coordinate, and support appropriate federal, State, local, and private land protection efforts so that an additional one million acres of farmland, open space, and conservation lands in the State are permanently protected by December 31, 2009"; and

Whereas, federal and State tax policies encourage grants of conservation easements …

What Needs to be Done?

A Few Simple Questions

Legislators should ask themselves a few simple questions:

1) Should the government be able to seize an individual's home or any private property even if reasonable alternatives exist?

2) Should conservation easement holders have more protection than landowners (e.g., homeowners, businesses, churches, etc.)?

3) Should trees and plants have more protections than individuals who own private property?

One hopes that the legislators' answers would be a resounding *no* to these questions.

Primary Recommendation

There is a constant mantra (by government officials) that eminent domain is used only as a last resort. If that really were the case, then there could be no excuse for anyone not to support the following very simple change to SB 600:

> ***Protect All Properties:*** *The government should be required to prove that no prudent and feasible alternative exists to condemnation of* all *properties, not just those encumbered by conservation easements.*

Conclusion

When the government seizes a house, it is taking more than a building. It is taking a home—a home that may have existed in a family for generations. When the government seizes a business, it often takes away the financial lifeblood of a family. It takes away the good will established in a community that may not be duplicated anywhere else.

Eminent domain is an awesome governmental power. In one single act, the government can take away the most important assets that people possess. It is not too much to ask for the government to seek alternatives to harming its citizens through the use of eminent domain. SB 600 would protect trees from being harmed, but not fellow citizens from being harmed. Legislators can make a simple change to the bill and protect fellow citizens and the open space that the bill's proponents are so concerned about.

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End Notes

1. I recommended this reform several years ago. This reform and other much-needed eminent domain reforms can be found in Daren Bakst, "Eminent Domain in N.C.: The Case for Real Reform," John Locke Foundation *Policy Report,* May 2007, www.johnlocke.org/policy_reports/display_story.html?id=85.
2. General Assembly of North Carolina, Session 2009, Senate Bill 600, (version 2), www.ncga.state.nc.us/Sessions/2009/Bills/Senate/HTML/S600v2.html. The latest House version of this bill, General Assembly of North Carolina, Session 2009, Senate Bill 600, (version 3), can be found at www.ncga.state.nc.us/Sessions/2009/Bills/Senate/HTML/S600v3.html. To see all the versions of SB 600, please visit www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2009&BillID=sb+600&submitButton=Go. There also is a House companion bill, HB 1080, but the House has been working off SB 600. HB 1080 can be found at www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2009&BillID=H1080.
3. *Ibid.*
4. *Ibid.*
5. See, e.g., Stephen C. Gregory, "Easements for Dummies," Virginia State Bar: The Fee Simple, Vol. XXIV, Number 2, May 2004, www.vsb.org/sections/rp/articles/gregory.html, and The Nature Conservancy's Conservation Easements web page, www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/about/allabout.html.
6. *Op. cit.,* note 2.
7. *Ibid.*
8. General Assembly of North Carolina, Session 2009, Senate Bill 600, (version 2), www.ncga.state.nc.us/Sessions/2009/Bills/Senate/HTML/S600v2.html.
9. General Assembly of North Carolina, Session 2009, Senate Bill 600, (version 3), www.ncga.state.nc.us/Sessions/2009/Bills/Senate/HTML/S600v3.html.
10. *Op. cit.,* note 2.