

PRIVATE EMINENT DOMAIN IN GEORGIA: JUST PEACHY OR THE PITS?

Research Notes, February 2006, Number 4.

Railroad, electric transmission, and petroleum and gas pipeline companies have long enjoyed various degrees of eminent domain powers in the U.S. As common carriers, these firms serve the public interest by servicing all users at regulated prices. The process of obtaining the land corridors necessary for long-distance electric transmission systems or petroleum pipelines resembles the land assembly problem confronted by a government acquiring the land needed for a public highway. Reducing the transactions cost of acquiring essential land routes lowers common carriers' prices so that eminent domain powers can translate into more efficient provision of these important goods and services.

Georgia is one of a handful of states granting private firms extensive eminent domain powers. Nonetheless, these powers are controversial. Some of the public concern over private eminent domain in Georgia and other states is doubtlessly motivated by the troubling reminder to individuals that it is not necessary to give consent to lose title to property. But this source of popular dissatisfaction is not unique to eminent domain by private firms; it also pertains to government eminent domain. Like jury duty for citizens, eminent domain is a fact of life. Given the necessity of such powers, the U.S. and individual state constitutions define restrictions on the uses for which property can be taken as well as how the owner must be compensated. Concerns about private eminent domain, however, do not appear to touch on either of these two issues. Instead, this debate is really over procedure, that is, defining "who" has the power to initiate condemnation—and whether or not it matters.

Private eminent domain has always existed in the U.S. but began to generate controversy by the late nineteenth century. The 1877 Michigan Supreme Court decision *Ryerson v. Brown* represents a landmark in this regard. This decision struck down legislation giving eminent domain powers to any firm constructing a mill-pond to generate water power. The court based its decision on two factors, the public use doctrine and changing technology. First, the court decided that the law violated the public use doctrine since it gave eminent domain power to firms engaged in manufacturing purposes other than grist mills or similar common carriers of the time. The second reason the Michigan Supreme Court struck down private eminent domain powers in *Ryerson* was that by 1877 it was no longer essential to use mill-ponds to generate water power because steam power had become a viable alternative. This technology meant that the public would suffer no loss of essential common carriers by denying them eminent domain powers for constructing mill-ponds.

The *Ryerson* decision provides background for understanding the rationale underlying private eminent domain in the U.S. Eminent domain allows common carriers to more easily obtain an essential resource—land—needed to fulfill their special roles in the economy. Thus, common carriers have long satisfied the public use doctrine for eminent

domain. Even Justice O'Connor's opinion in *Kelo v. City of New London* points to eminent domain exercised by common carriers as a noncontroversial illustration of narrowly defined public use—in contrast with the controversial local government eminent domain condemnations that are the focus of that recent decision.

Currently, natural gas and oil products interstate pipeline operators draw eminent domain powers from the federal government. Eleven states grant eminent domain powers to industries ranging from electric power to oil pipelines. These powers vary across states, but Georgia, Oklahoma, and Texas stand out as the least restrictive—and perhaps the most controversial. Cobb, Dawson, Forsyth, Hall, Lumpkin, and Rabun Counties in Georgia each tried to use their own regulatory powers to control power transmission line routes in recent years. These attempts have been unsuccessful so far; the Georgia Supreme Court reaffirmed that the eminent domain powers of the private firm preempt local zoning and land development laws in *Cobb County v. Georgia Transmission Corp.* The relevant question is whether the preeminence of private eminent domain over local governments' zoning and other regulatory powers makes economic sense.

Efforts to stem private eminent domain appear to be motivated by concern that regulated utilities with eminent domain powers do not carefully consider the costs of their decisions. Does allowing these firms to freely choose their land routes create incentives to choose inefficiently long routes or to use more valuable land when less valuable land is available?

Rate-of-return regulation has a side-effect; there is an incentive to use relatively more plant and equipment than is efficient because increasing these inputs increases both the company's rate base—hence allowed total profit—as well as its ability to generate the higher revenues needed to increase profit. This is relevant to private eminent domain because transmission line or pipeline corridor width and route decisions appear to resemble plant and equipment decisions; using more land or more valuable land increases the rate base and the allowed profit of the regulated common carrier. But the study by Turnbull (2006) shows that land route selection fundamentally differs from the choice of other inputs included in the rate base. This is because, unlike plant and equipment, increasing the rate base by choosing an unnecessarily indirect route or more valuable land does not increase the ability to raise revenue, hence does not allow the firm to attain the greater allowed profit. Thus, somewhat surprisingly, the private firm does not have an incentive to use either more or more costly land than it must because doing so needlessly sacrifices profitability. This analysis shows why empowering the regulated firm with eminent domain does not by itself lead to inefficient route selection.

The only alternative to private eminent domain is government eminent domain. While the debate over private eminent domain in Georgia rests on the premise that state or local government eminent domain will function better, this need not be true. The question of relative efficiency revolves around how the political process balances the innate NIMBYism of local property owners in a jurisdiction against the interests of the distant consumers and industries outside the jurisdiction served by the transmission system capacity. These considerations suggest no convincing rationale for why a government

would necessarily to choose a more efficient land route than a regulated common carrier. It is true that some local governments have incentives to voluntarily take in undesirable economic activities like landfills and similar activities when they bring in local jobs and increase local tax revenues (Fischel, 2001). The direct benefits of transmission or pipeline corridors to the locale's economic well-being, on the other hand, are usually negligible. The reluctance of a community to allow these transmission corridors within its jurisdiction is exacerbated by the fact that the economic benefits of these systems—like delivered electric power—typically accrue to distant communities. With no local economic payoff and distant beneficiaries, we expect local governments to restrict these land uses when their residents object to them even when the restrictions lead to inefficient outcomes.

Another argument raised in the debate over private eminent domain is that private firms ignore the negative effects of their route decisions on the surrounding property. But do private firms neglect these negative externalities more than governments would?

Consider first a private firm's land route choice. When higher value land suffers greater incremental losses of value from proximity to high tension transmission lines or gas pipelines than does lower value land, then a private firm's tendency to avoid higher value property means that it also avoids the most costly external effects. The firm does not intend to minimize effects on surrounding property owners; instead, this result arises as a consequence of decisions motivated by its profit concerns. The strength of this conclusion, though, hinges upon how pervasive the value-reduction pattern is across different types of property. Ongoing empirical research will answer this question.

Now consider how an elected government might or might not incorporate these externalities into its route decision. The discussion above explains why there is no reason to expect the political process surrounding government route choices to efficiently balance the transmission system benefits against its costs to constituent property owners. In fact, the more responsive the government is to its constituents, the greater the expectation that local constituent interests will dominate, leading to routing decisions driven more by constituents' NIMBYism than by any motives to efficiently allocate land among competing uses.

Finally, equitable compensation is another concern raised in almost all discussions of eminent domain. Here, too, any complaints apply equally to governments and private firms, since both are constrained to compensate owners at fair market value. The equity or "fairness" problem arises in takings cases because most property owners are not willing to sell their property at current market prices. These individuals are enjoying some level of owner's surplus or subjective value above market value (the subjective value perhaps arising from an individual's long personal attachment to a particular property or from a business's long term efforts to build a customer base centered on its location). While courts interpret the "just compensation" in the Constitution as market value, it has been long recognized that compensation based on market value neglects the owner's forgone surplus or subjective value and in that sense does not fully compensate the owner for the entire loss. But full compensation is difficult to accomplish because the

surplus or subjective additional value cannot be independently observed. In sum, questions about appropriate compensation are endemic to takings in general and therefore do not reflect an inherent weakness of private eminent domain over government eminent domain.

Geoffrey K. Turnbull
Professor of Economics
Georgia State University

REFERENCES

- Cobb County v. Georgia Transmission Corp.* 2003 Ga. LEXIS 285 (2003).
Fischel, W.A. (2001) *The Homevoter Hypothesis*, Cambridge: Harvard University Press.
Kelo v. City of New London 2005 U.S. LEXIS 5011 (2005).
Ryerson v. Brown 35 Mich. S.C. 333 (1877).
Turnbull, G.K. (2006) “Delegating Eminent Domain Powers to Private Firms: Land Use and Efficiency Implications,” *URAG Working Paper* 06-02, Georgia State University.

About the author. Geoffrey K. Turnbull is currently Professor of Economics in the Andrew Young School of Policy Studies at Georgia State University. His research interests include urban land and housing markets, real estate brokerage, and tax and land use regulation issues. Professor Turnbull is a widely recognized scholar in urban and real estate economics. He has over 90 papers published in academic journals and serves on the editorial boards of the *Journal of Urban Economics*, *Journal of Real Estate Finance and Economics*, *Real Estate Economics*, and *Journal of Housing Economics*. Professor Turnbull also advises governments and companies in the energy, hospitality, and real estate industries on a variety of economic questions.

Research Notes is a periodic publication of the Urban and Regional Analysis Group in the Andrew Young School of Policy Studies at Georgia State University. This series reports the results and policy implications of research on urban and regional economics topics in order to provide a basis for informed debate on a variety of policy issues. Conclusions and opinions expressed in this publication are not necessarily those of URAG, the Andrew Young School of Policy Studies, or Georgia State University. *Research Notes* is edited by Geoffrey K. Turnbull.