



Research SPOTLIGHT

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PRIVATE PROPERTY VERSUS PUBLIC GOOD The Use of Eminent Domain for Economic Development

On June 23, 2005, in *Kelo, et al. v. City of New London, et al.*, the United States Supreme Court, in a five-to-four decision, ruled that a city's use of eminent domain to take private land for economic development did not violate the Fifth Amendment to the United States Constitution. The Fifth Amendment provides that private property may not be taken for public use by the federal government without just compensation (this is known as the Public Use Clause). The Fourteenth Amendment makes the Fifth Amendment applicable to state and local governments.

New London (city), Connecticut, has long suffered from economic decline. City government officials had approved an economic development plan for a waterfront area that would include public and private uses. Nine property owners in the targeted area refused to sell to the New London Development Corporation (NLDC), a private nonprofit entity, and NLDC instituted condemnation proceedings. The property owners (petitioners) asserted that the taking of their properties for the redevelopment plan would violate the "public use" restriction in the Fifth Amendment, because their property was being taken for private development. The city asserted that the takings served a public use because the redevelopment plan would create jobs, increase tax and other

revenues, revitalize the economically distressed city, and create leisure and recreational opportunities.

The Supreme Court majority in *Kelo* upheld the takings, on the grounds that they qualified as a public use within the meaning of the Public Use Clause. The court has long rejected any literal requirement that condemned property must be put into use for the general public, because a strict public use test would be difficult to administer. Instead, the court has embraced the broader and more natural interpretation of public use as "public purpose." The majority also ruled that the city's determination that the area was sufficiently distressed to justify a program of economic rejuvenation was entitled to deference by the court.

The petitioners had urged the court to rule that economic development does not qualify as a public use, contending that using eminent domain for economic development blurs the boundary between public and private takings and benefits private developers. The majority rejected this argument, stating that promoting economic development is a traditional function of government. Often, the majority noted, a government's pursuit of a public purpose will benefit individual private parties, and, at times, the public purpose may be better served through an agency of private enterprise than through a department of government. The majority also rejected the argument that the court should require a "reasonable certainty" that the expected public benefits will actually accrue, stating that such a rule would require postponement of every condemnation until the likelihood of success of the plan had been assured and would impose a significant impediment to the successful consummation of many such plans.

... nor shall private property be taken for public use, without just compensation.

—Fifth Amendment,
United States Constitution

The majority declared that states may place further restrictions on the exercise of eminent domain, noting that many states already impose “public use” requirements that are stricter than those in the federal constitution.

The majority opinion and the concurrence by Justice Kennedy emphasized the specific facts of this case in concluding that the takings were not intended to benefit any private parties. The majority pointed to evidence that the city was in a depressed economic condition, that the state had committed substantial funds to the redevelopment project before any private beneficiaries were known, that several redevelopment plans were considered and the private developer for the project was selected from a group of applicants, and that other private beneficiaries of the plan are still unknown. Both the majority and concurrence asserted that a court could strike down an eminent domain action when the action was intended to favor a particular party, with only incidental public benefits.

The four dissenting justices argued that the taking of private property for mere economic development is unconstitutional. Justice O’Connor, in a dissent joined by the other three justices, asserted that the majority’s reasoning that the incidental public benefits resulting from the subsequent ordinary use of private property qualify as “public use” blurs any distinction between private and public use of property and effectively diminishes the Public Use Clause. She warned that under the majority decision all private property is now vulnerable to being taken and transferred to another private owner under the banner of economic development, so long as the new owner will use it in a way that the legislature deems more beneficial to the public.

Justice O’Connor also noted that in prior cases in which the court applied the public use test, the condemnations sought to address harmful property use (for example, eliminating urban blight). In these earlier cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm, and the public purpose was realized when the harmful use was eliminated. However, she noted, the well-maintained properties at issue in this case are not claimed to be the source of any social harm.

Justice Thomas, in a separate dissent, echoed Justice O’Connor’s objections. He also argued that the majority ignored the original meaning of the Public Use Clause, which, he stated, only permits a government to

take private property if the government takes ownership of the property or the public will have the legal right to use it. The majority’s expansion of the term public use to include public purpose, he asserted, undermines the original meaning and purpose of the Public Use Clause.

Both Justices O’Connor and Thomas challenged the majority’s assertion that courts must grant considerable deference to legislatures’ determinations about what governmental activities will be advantageous to the public, and they emphasized the need for an external judicial check on government power. They also expressed concern that expanding the concept of public purpose to include any economically beneficial goal will disproportionately affect poor and minority communities and benefit those citizens who have disproportionate influence and power in the political process, including large corporations and development firms.

PRE-KELO LAWS

Texas

Although the Texas Constitution and state statutes bar the taking of private property except for a public use, there is no statutory definition of public use. Texas case law has interpreted public use quite broadly, holding that if the public has some substantial interest or right in the property, the property is considered to have been taken for a public use, even if some private entity may control or profit from the use of the property. The Texas Supreme Court has ruled that the public interest in eliminating and preventing slums validated a city’s condemnation of private property as part of an urban renewal plan, even if that property might later be sold to a private party. In another case, the federal Fifth Circuit Court of Appeals interpreted Texas law to uphold the taking of a private leasehold interest as part of a project to build a new baseball stadium, ruling that because the public had a substantial interest and right in the completion and use of the stadium, the condemnation of the property was for a public use, even though the private baseball team would profit from the venture.

Constitution and Statutes

Section 17, Article 1, Texas Constitution, provides:

“No person’s property shall be taken, damaged or destroyed for or applied to public use without adequate

compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.”

The general statutes regarding eminent domain are found in Chapter 21 of the Texas Property Code. Briefly, under this chapter, if the party seeking to condemn the property for public use (condemnor) and the property owner are unable to reach an agreement on the amount the condemnor is to pay in compensation to the owner for the property, the condemnor files a petition for a condemnation hearing. The chapter sets out the jurisdiction and venue over such petitions and the procedures to be followed, but does not define public use.

Scattered through the Texas statutes are provisions granting various state and local political entities the right to use the power of eminent domain to acquire property, but generally for specified public purposes. For example, the Local Government Code sets out the powers of eminent domain of various political subdivisions. For the most part, these grants concern the acquisition of property for a public purpose, such as for a park, for flood control, for the provision of utilities, or for the acquisition of venues to which the public will have access, such as sports arenas.

Texas also specifically grants the use of eminent domain in certain circumstances to eliminate slums or revitalize areas. The Texas Urban Renewal Law (TURL), Chapter 374, Local Government Code, authorizes municipalities to prevent and eliminate slum and blighted areas through urban renewal plans, including the use of the power of eminent domain. TURL sets out legislative findings that slum and blighted areas in municipalities present a threat to public health and safety and constitute an economic and social liability. These findings also declare that the public acquisition of real property, the demolition of buildings and other improvements as necessary to eliminate slum or blight conditions or to prevent their spread, and the disposition of property acquired in affected areas are public purposes for which public money may be spent and the power of eminent domain exercised.

TURL also contains some limits on the exercise of emi-

nent domain for urban renewal. First, the governing body of the municipality must declare the area to be a slum area, a blighted area, or both, and then prepare an urban renewal plan. Under TURL, if a building in a good state of repair is located in an urban renewal area and may be incorporated into an urban renewal project plan, the building may not be acquired without the owner’s consent. If the owner agrees to use the property in a manner that is consistent with the plan and the property does not constitute a fire or health hazard, that property is not subject to the exercise of eminent domain. TURL also authorizes a property owner to contest any exercise of eminent domain authority.

Further, TURL provides that a municipality may not use condemnation to acquire property for slum clearance as part of an urban renewal project if the municipality proposes to use the property for purposes other than public use, unless the municipality determines by resolution that the rehabilitation of that property without clearance would be impractical and ineffective. The determination must be based on a finding that at least 50 percent of the structures in the area are dilapidated beyond the point of feasible rehabilitation or are otherwise unfit for rehabilitation and that there exist other blighting characteristics, such as overcrowding of structures, mixed uses of structures, deficient streets, or deficiencies in public utilities or recreational and community facilities.

Under the Tax Increment Financing Act, Chapter 311, Tax Code, a municipality may designate an area as a reinvestment zone to promote development or redevelopment of the area if the governing body determines that development or redevelopment would not occur solely through private investment in the reasonably foreseeable future. Before adopting such an ordinance, the municipality must prepare a preliminary reinvestment zone financing plan and hold a public hearing. A municipality may exercise any power necessary and convenient to carry out the purposes of this chapter. To be designated as a reinvestment zone, an area must substantially arrest or impair the sound growth of the municipality, retard the provision of housing accommodations, or constitute an economic or social liability and be a menace to the public health, safety, morals, or welfare in its present condition. However, a municipality may not create a reinvestment zone if more than 10 percent of the property in the proposed area, excluding property that is publicly owned, is used for residential purposes.

Case Law

The Texas Supreme Court, in *Davis, et al. v. the City of Lubbock, et al.*, 326 S.W.2d 699 (Tex. 1959), ruled that the taking of private property through eminent domain pursuant to a validly enacted urban renewal plan was a public use and therefore constitutional. Under the predecessor to TURL, the city had declared a section of the city to be a slum area. The action was brought by three plaintiffs who owned property in the area that was subject to condemnation, alleging that the act violated the Texas Constitution. The plaintiffs argued that the condemnation of their properties was not for a public use, because after their properties were taken by the city, the city could sell the properties to private citizens.

The Texas Supreme Court began by noting that the United States Supreme Court had upheld an urban renewal act by the District of Columbia, and the validity of similar acts in other states had been upheld by the majority of their high courts. The court stated that the Texas Legislature, in enacting the urban renewal provisions, had declared that the clearing of slum and blighted areas is a public use for which public money could be expended and the power of eminent domain exercised. In support of this declaration, the legislature had found that slum and blighted areas in Texas cities were a serious and growing menace that threatened public health, safety, and welfare. Although the court stated it would give great deference to the legislature's findings, the issue regarding whether the taking of the property was a "public use" was a judicial question.

The court noted that "public use" has not been given a precise definition. Some states have interpreted this phrase broadly to include a public benefit, welfare, or advantage, while others have restricted it to mean actual use by the public. The Texas Legislature, in enacting the urban renewal measure, had sought to ensure that the public would have substantial rights to any land resold by providing that such property must be subject to restrictions and covenants designed to ensure that the urban renewal plan would be carried out and slum conditions would not reoccur. The court concluded that the requirement that the land must be resold subject to certain restrictions essentially placed on that property a public right or use that supported such taking.

The United States Fifth Circuit Court of Appeals considered public use as interpreted by Texas law in *City of Arlington v. Golddust Twins Realty Corporation*, 41

F.3d 960 (5th Cir. 1995). This case concerned the condemnation of private land in conjunction with the development of a ballpark complex. The property was part of a land swap required for the stadium development and was used to provide parking for the old and new stadiums. The Fifth Circuit concluded that because the public had a substantial interest and right in the completion and use of the stadium, the land was taken for public use, even though a private entity, in this case the baseball team, would profit from the property.

Arlington owned the property, which it leased to the realty company. The city condemned the leasehold interest and took the property to include it in a land swap as part of the new stadium project and for use as parking for the current sports stadium. The Rangers baseball team operated the parking lot and received all revenue, paying the city \$1.00 annually for its use. When the new stadium was completed, the city leased the stadium to the Rangers, and, as part of this lease, the Rangers were permitted to use the parcel at issue for the development of parking or other facilities. The realty company alleged that the Rangers intended to build offices on the property and that therefore the taking of the property by the city did not serve any public use.

Citing the Texas Supreme Court, the Fifth Circuit declared that the Texas courts have ruled that public use means that the public has some definite right or use in the business or undertaking to which the property is devoted. One of the tests for public use is whether the property being condemned is essential to the completion of the project. In this case, the Fifth Circuit held that providing parking for the stadium was a valid public use and that, in addition, the condemnation of the property was part of a land swap that was necessary for the completion of the new stadium complex. The public, stated the Fifth Circuit, had a direct, tangible, and substantial interest and right in the completion and use of the stadium, and the fact that the Rangers might profit from the venture did not make the use private rather than public.

Other States

Like Texas, other states mirror the federal constitution and permit the taking of private property by eminent domain only for a public use and with just compensation. However, there is disagreement regarding what constitutes public use. Some states have interpreted this phrase narrowly, requiring that the public has some

right to enjoyment or control of the condemned property, even if the property is subsequently transferred into private hands. In these states, economic development is not considered a legitimate public use. In other states, public use is considered synonymous with a public benefit or purpose, permitting the taking of private property by eminent domain when there is some subsequent benefit to the community as a whole, even if private parties also profit from the condemnation. In these states, economic development is deemed a public use.

For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.

—Justice O'Connor,
Kelo, et al. v. New London, et al.

States Holding that Economic Development Is Not a Public Use

A number of state supreme courts have barred the taking of private property by public entities for economic purposes. Perhaps the most significant of these decisions was *County of Wayne v. Hathcock, et al.*, 684 N.W.2d 765 (Mich. 2004), in which the Michigan Supreme Court expressly overturned *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), in which the lower court had upheld the taking of private property for the site of a new General Motors assembly plant on the grounds that the taking served a public purpose by alleviating unemployment and revitalizing the community's economic base. The *Poletown* decision had been cited in a number of cases permitting the use of eminent domain for economic purposes. (See *City of Jamestown v. Leever's Supermarkets, et al.*, 522 N.W.2d 365 (N.D. 1996), below.) In the 2004 case, Wayne County sought to create a 1,300-acre business and technology park, asserting that the project would create jobs and broaden the county's tax base. After acquiring over 1,000 acres, the county sought to condemn the remaining parcels by eminent domain under the Michigan Uniform Condemnation Procedures Act. Although the court found that the county was empowered by the Act to condemn the property, it held that the takings in this case violated the Michigan Constitu-

tion, which bars the taking of private property except for public use and with just compensation. Overturning *Poletown*, the court ruled that use of eminent domain that results in the transfer of property to a private entity serves a public use in the following three circumstances:

- ▶ the use of eminent domain to transfer property to a private entity generating public benefits whose very existence depends on the collective and coordinated acquisition of land, such as a railroad, gas line, highway, or other instrumentality of commerce;
- ▶ the private entity will remain accountable to the public for the use of the property; or
- ▶ the selection of the land to be condemned is based on a public concern rather than on the subsequent use of the property. The court gave as an example clearing blighted or slum property, when the controlling purpose is to advance public health and safety, and any subsequent sale of the land is incidental to this goal.

The court found that the proposed project did not meet any of these tests.

Other state supreme court decisions finding that economic development is not a public purpose include:

- ◆ **Arkansas:** *City of Little Rock v. Raines*, 411 S.W.2d 486 (Ark. 1967), barred taking of private property establishing an industrial park and related facilities that would be leased or sold to private companies. Private property, declared the court, may only be taken for public use. In this case, the land would be used to establish industrial sites to be sold or leased to private entities, and this is not a public use.
- ◆ **Florida:** *Baycol, Inc. v. Downtown Development Authority of the City of Fort Lauderdale*, 315 So. 2d 451 (Fla. 1975), prohibited a development authority from condemning private property to construct a parking facility. Eminent domain, the court held, cannot be employed to take private property for a predominantly private purpose, and any taking must be a necessary public use. In this case, the court found that the taking was primarily for the private development of a shopping mall and that the alleged public purpose was only incidental to the predominately private use. Public benefit, the court declared, is not the same as a public purpose.

- ◆ **Illinois:** *Southwestern Illinois Development Authority v. National City Environmental, et al.*, 763 N.E.2d 1 (Ill. 2002), held that a development authority could not use eminent domain to take a metal recycling center adjacent to a racetrack so that the racetrack could use the land for a parking area. The court held that the right to condemn private property under both the federal and Illinois constitutions is limited to takings for public use. The court rejected the argument that the taking would serve public purpose because the expanded parking would shorten lines of cars and allow pedestrians to access the racetrack more safely. Something more than a mere benefit to the public must, stated the court, flow from the contemplated improvement.
- ◆ **Kentucky:** *City of Owensboro v. McCormick*, 581 S.W.2d 3 (Ky. 1979), held that the Kentucky Local Industrial Authority Act, which was enacted to aid the development of land for industrial and commercial purposes, was unconstitutional. Under the act, a city or county was authorized to establish a nonprofit corporation for the construction or operation of industrial or commercial facilities and to use its power of eminent domain to condemn property for the authority's benefit. The court found that the state constitution bars the taking of private land for a public use without just compensation. A public benefit or public purpose, the court declared, is not equivalent to public use. Otherwise, the court stated, there would be no limit to the right to take private property, because it could always be shown that the proposed private use might result in some public benefit.
- ◆ **Maine:** In *Craig v. Kennebec Regional Authority*, 2001 Me. Super. LEXIS 51 (Maine Super. Ct. 2001), the court barred the use of eminent domain to take private lands for an industrial park to enhance regional economic development on the grounds that this did not qualify as a public use as required in the state's constitution.
- ◆ **South Carolina:** *Karesh v. City Council of the City of Charleston*, 247 S.E.2d 342 (S.C. 1978), barred the City of Charleston from using its power of eminent domain to acquire land for a convention center and parking garage, which it would lease under a long-term lease to a private developer. South Carolina courts, the court declared, have adhered to a strict interpretation of public use, holding that the public must have an

enforceable right to a fixed and definite use of the property, although other jurisdictions have permitted the use of eminent domain to condemn land for a public purpose, benefit, or welfare. The project in this case, the court found, would primarily benefit the developer, with no more than a negligible advantage to the general public. The proposed lease granted the developer almost full control over the center and garage, with no guarantee that the public would enjoy the use of the facilities necessary to the concept of public use.

- ◆ **Washington:** *In re the Westlake Project*, 638 P.2d 549 (Wash. 1981), barred the City of Seattle from using its power of eminent domain to take private property and transfer it to a development authority for the creation of a retail shopping center that would include some museum space. The court found that retail shops were to be a substantial part of the project. The primary purpose of the project was to promote private retail, declared the court, and this did not constitute a public use.

In addition, several states have statutorily defined public use regarding the exercise of eminent domain. Generally, the specified uses involve either a situation in which the public will have actual use or interest in the property, such as a public building, or a use by a common carrier, utility, or other industry that needs to acquire contiguous property for the construction of a conduit for its services.

- ◆ **Idaho** (Section 7-701, Idaho Code): Public use includes roads, tunnels, ditches, flumes, pipes, and dumping places for working mines, as well as outlets for the flow or deposit of main tailings or refuse. Also, the statute includes a broad statement permitting the exercise of eminent domain "for all other public uses for the benefit of the state or of any county, incorporated city or the inhabitants thereof."
- ◆ **Montana** (Section 70-30-102, Montana Code): Public use includes urban renewal and the exercise of mineral rights located under property where the title to the surface vests in others. However, in the latter case, the use of strip mining or open-pit mining of coal is declared not to be a public use, and eminent domain may not be exercised for this purpose.

- ◆ **Nevada** (Section 37.010, Nevada Statutes): Public use includes redevelopment of blighted areas, as well as mining, smelting, and related activities.
- ◆ **Utah** (Section 78-34-1, Utah Code): Utah permits the use of eminent domain for mills, smelters, or other works for the reduction of ores, including lands for the discharge of smoke, fumes, and dust. However, there are limitations barring the use of eminent domain for this purpose, for example where the population exceeds a certain level or within a certain distance of a city or town.
- ◆ **West Virginia** (Section 54-1-2, West Virginia Code): This statute authorizes the state to exercise the power of eminent domain for any and every other public use, object, and purpose not specifically mentioned.

States Permitting the Use of Eminent Domain for Economic Development

Other states have upheld the constitutionality of the use of eminent domain for economic development:

- ◆ **Kansas**: *General Building Contractors v. Board of Shawnee County Commissioners*, 66 P.3d 873 (Kan. 2003), concerned the use of eminent domain by Shawnee County to acquire property to establish an industrial park. The stated purpose of the development was to attract economic development to the county. The Kansas Supreme Court ruled that facilitating economic development in partnership with private enterprise is a legitimate public purpose.
- ◆ **Louisiana**: The United States Fifth Circuit Court of Appeals, in *City of Shreveport v. Shreve Town Corporation*, 314 F.3d 229 (5th Cir. 2002), upheld the authority of Shreveport to use eminent domain to condemn private property for use as a parking garage adjacent to the convention center under Section 19:102, Louisiana Revised Statutes, which authorizes a municipality to expropriate property whenever such a course is determined to be necessary for the public interest. The court stated that under Louisiana law, a public purpose is any use resulting in advantages to the public at large and includes economic development.
- ◆ **Maryland**: *Prince George's County v. Collington Crossroads, Inc.*, 339 A.2d 278 (Md. 1975) concerned the use of eminent domain by the county to establish an industrial park. In 1998, the general assembly had authorized the county to issue bonds to acquire property for this purpose and issued findings that there was an existing need for industrial development to create employment and increase the tax base. The county asserted that industrial development was essential to the county's well-being and that it was too costly for private developers to carry out. In upholding the authority of the county to condemn the property, the Maryland Supreme Court noted that even though the land would be sold to private developers, the county would maintain substantial control over the property through covenants and zoning. Public use, the court declared, is not synonymous with physical access or use by the public, and the character of the condemnation is not changed because the property will be owned by a private entity. The project, the court held, was constitutional because it was reasonably designed to benefit the general public by significantly enhancing economic growth.
- ◆ **Minnesota**: The Minnesota Supreme Court, in *The Housing and Redevelopment Authority v. Walser Auto Sales, Inc.*, 641 N.W.2d 885 (Minn. 2002), upheld the taking of private property by eminent domain for the corporate headquarters of a private company. In Minnesota, the court stated, revitalization of urban areas and the alleviation of unemployment are public goals, and as long as the predominant purpose being furthered is a public one, the use of eminent domain is constitutional, even if the taking also benefits private interests.
- ◆ **New Jersey**: In *Township of Orange v. 769 Associates, L.L.C., et al.*, 800 A.2d 86 (N.J. 2002), the New Jersey Supreme Court declared that New Jersey courts have broadly defined public use as anything that tends to enlarge resources, increase industrial energies, and manifestly contributes to the general welfare and prosperity of the whole community. It is not essential that the entire community, or even any considerable proportion of the public enjoy or participate in the condemned property for the taking to constitute a public use.

- ◆ **New York:** The court, in *Vitucci v. New York City School Construction Authority*, 735 N.Y.S.2d 560 (app. Div. 2001), summarized the state's law as broadly defining public use or purpose as encompassing any project that may further public benefit, notwithstanding that private entities may directly benefit. Economic development, stated the court, is a legitimate public purpose.
- ◆ **North Dakota:** The state supreme court, in *City of Jamestown v. Leever's Supermarkets, et al.*, 522 N.W.2d 365 (N.D. 1996), upheld state law permitting municipal governments to use eminent domain to develop underutilized industrial or commercial property within the municipality, even if the property is not in a blighted or slum area (Section 40-58-02, North Dakota Code). The court declared that the stimulation of commercial growth is a public use.
- ◆ **Ohio:** The courts in this state have broadly defined public use as synonymous with public welfare. If the primary purpose of the exercise of eminent domain is to acquire property for the public welfare, the taking is constitutional, even when there may be an incidental nonpublic use of the property or benefit from the taking. This can include takings for urban renewal and economic development. See *City of Norwood v. Horney, et al.*, 830 N.E.2d 381 (Ohio App. 2005); *Bruestle v. Rich*, 110 N.E.2d. 778 (Ohio 1953).



FEDERAL AND STATE LEGISLATIVE RESPONSES TO *KELO*

On June 30, 2005, just one week after the Supreme Court issued its *Kelo* opinion, the United States House of Representatives voted 231 to 189 to amend the appropriations bill for the departments of Transportation, Treasury, and Housing and Urban Development to deny federal funds to any city or state project that used eminent domain to force people to sell their property to make way for a profit-making project.

In September, 2005, Susette Kelo testified before the United States Senate Committee on the Judiciary in support of congressional action to limit the effects of the *Kelo* ruling. Senator John Cornyn, R-Texas, a member of the Judiciary Committee, has introduced S. 1313, entitled The Protection of Homes, Small Businesses, and Private Property Act of 2005, to ban the use of federal funds in any construction utilizing the *Kelo* decision. S. 1313 has garnered 31 cosponsors and is pending in the Committee on the Judiciary.

On November 3, 2005, the United States House of Representatives approved H.R. 4128, The Private Property Rights Protection Act of 2005, which would cut off for two years all federal economic development funds to states and localities that use economic development as a rationale for taking private property. The legislation, which also bars the federal government from using eminent domain powers for economic development, is currently pending in the Senate Committee on the Judiciary.

In Texas, the 79th Legislature, Second Called Session, 2005, enacted S.B. 7, which limited the use of eminent domain in the state. This bill bars any state agency, institution of higher education, political subdivision, or corporate entity created by a governmental body to act on its behalf from taking private property through eminent domain if:

- ▶ the taking confers a private benefit on a particular private party through the use of the property;
- ▶ the public use is merely a pretext to confer a private benefit on a particular private party; or
- ▶ the taking is primarily for economic development purposes. A taking is permitted if economic development is a secondary purpose resulting from municipal community develop-

ment or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas as authorized under certain chapters of the Local Government Code or the Tax Code.

Governmental entities are expressly authorized to take private property through the use of eminent domain for:

- ▶ transportation projects such as railroads, airports, and highways;
- ▶ entities authorized under Section 59, Article XVI, Texas Constitution, including port authorities and conservation or reclamation districts that act as ports;
- ▶ water supply, wastewater, flood control, and drainage projects;
- ▶ public buildings, hospitals, and parks;
- ▶ the provision of utility services;
- ▶ certain sports and community venue projects;
- ▶ the operation of certain common carriers and energy transporters;
- ▶ a purpose authorized by Chapter 181, Utilities Code;
- ▶ certain underground storage operations;
- ▶ waste disposal projects; or
- ▶ libraries, museums, or related facilities and infrastructures related to such facilities.

There are also specific limits on the use of eminent domain by certain entities:

- ▶ The taking of private property by eminent domain under the Transportation Code for the location of an ancillary facility (such as a gas station or hotel) for a toll project or the Trans-Texas Corridor by providing that the taking must be part of a comprehensive development plan approved by the county commissioners court of each county in which the property is located.
- ▶ Institutions of higher education are barred from using eminent domain to acquire land for a lodging facility or for parking or a parking structure to be used in connection with a lodging facility; “lodging facility” does not include

a dormitory or other student housing facility.

- ▶ The types of notices a certain nonprofit charitable corporations affiliated with a medical center must provide when seeking to acquire private property by condemnation are set out.

The bill also creates an interim committee consisting of five members of the Senate and five members of the House of Representatives to study the use of the power of eminent domain, including for economic development purposes. The committee must prepare a report for the 80th Legislature, to be filed not later than December 1, 2006.

Other States

Within weeks after the *Kelo* decision, lawmakers in 28 states had introduced legislation in response to the ruling. By the end of 2005, legislators in Alabama, Delaware, Ohio, and Texas had enacted measures, and Michigan solons had approved a constitutional amendment that will go before the voters in 2006.

Nearly two dozen proposals were pending in seven states at year’s end, while 19 other bills had failed to advance.

Many states had already completed their 2005 regular sessions before the Supreme Court announced its decision, but some of those states may address the issue of eminent domain in their upcoming sessions.

◆ **Alabama:** Less than five weeks after the *Kelo* decision was announced, Alabama legislators meeting in special session gave final approval to S.B. 68, which prohibits the state, counties, and municipalities from condemning private property for private, retail, office, commercial, residential, or industrial development. The legislation contains exceptions for blight and utilities and provides for property to be offered for resale to the persons from whom the property was condemned under certain circumstances.

◆ **Delaware:** The Delaware General Assembly enacted S.B. 217, which requires that any acquisition of real property through the exercise of eminent domain be undertaken, and the property used, only for the purposes of a recognized public use. The Act requires that the acquiring agency describe, at least six months in advance of the in-

stitution of condemnation proceedings, the public use to be served by the acquisition. The Act further provides that, in the event that a condemnation proceeding is abandoned or a final judgment determines that property cannot be acquired by eminent domain, the court is to determine the amount to be paid to the property owner for reasonable attorney, appraisal, and engineering fees. Prior to the passage of S.B. 217 such a determination was to be made by the condemning agency.

S.B. 217 applies to all political subdivisions of the state, including counties and municipalities, and to all departments, agencies, and instrumentalities of the state.

- ◆ **Michigan:** In December, 2005, the Michigan Legislature approved a proposed ballot measure to amend the state's constitution to restrict the power of state or local government to take private property by eminent domain for private purposes.

Senate Joint Resolution E proposes to amend Article X of the Michigan Constitution to allow the taking of private property only for public use by establishing that "public use does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues."

The amendment further states that, in a condemnation proceeding, the burden of proof is on the condemning authority to demonstrate, by the preponderance of the evidence, that the taking of private property is for a public use. If the taking is for the eradication of blight, the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking is a public use.

The proposed amendment will appear on the next general election ballot.

- ◆ **Ohio:** The General Assembly of Ohio enacted S.B. 167, which establishes a moratorium on the use of eminent domain for economic development in certain instances and creates a task force to study eminent domain.

S.B. 167 provides that until December 31, 2006, no entity of the state government and no political subdivision of the state may "use eminent domain to take, without the consent of the owner, private property that is not within a blighted area . . . when the primary purpose for the taking is economic development that will ultimately result in ownership

of that property being vested in another private person."

The legislation further prohibits the Ohio Public Works Commission, the Department of Development, and the General Assembly from awarding or distributing, until December 31, 2006, any funding to a public body that violates the moratorium.

S.B. 167 creates the 25-member Legislative Task Force to Study Eminent Domain and Its Use and Application in the State. The task force is comprised of legislators, representatives of home building, commercial real estate, and small business interests, and attorneys with a variety of expertise, including experts on eminent domain. The task force is also required to include a "state-wide advocate on the issues raised in *Kelo v. City of New London*, insofar as they affect eminent domain."

The task force is to study the use of eminent domain and its impact on the state; how the *Kelo* decision affects state law governing the use of eminent domain in Ohio; and the overall impact of state laws governing the use of eminent domain on economic development, residents, and local governments in Ohio.

The task force is required to issue a report by April 1, 2006, detailing the findings of its study and recommendations concerning the use of eminent domain and to issue a report by August 1, 2006, including recommendations for updating state law governing eminent domain.

- ◆ **Wisconsin:** On January 26, 2006, the Wisconsin Legislature approved A.B. 657, which prohibits the use of eminent domain to condemn non-blighted property if the property is to be transferred to another private entity.

[P]etitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. Putting aside the unpersuasive suggestion that the City's plan will provide only purely economic benefits, neither precedent nor logic supports petitioners' proposal. Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized.

—Justice Stevens,
Kelo, et al. v. New London, et al.

Pending Legislation

- ◆ **California:** Assembly Bill (A.B.) 1162 places a moratorium until January 1, 2008, on the use of eminent domain to acquire owner-occupied residential property for a private use. A.B. 1162 has passed the California Assembly and is awaiting action by the full Senate after winning approval from the Senate Judiciary Committee.

S.B. 1210, among other provisions, prohibits the use of eminent domain to transfer private property to a nongovernmental agency for the purposes of economic development or increasing tax revenue, except when the area is blighted as provided under the Community Redevelopment Law.

S.C.A. (Senate Constitutional Amendment) 12 stipulates that “public use” does not include taking owner-occupied residential property for a private use. S.C.A. 12 is pending in the Senate Judiciary Committee.

- ◆ **Connecticut:** H.B. 5038 amends the process by which municipalities may take real property for redevelopment and economic development by excluding residential properties from takings for economic development. The bill, which received a public hearing in the Joint Committee on Planning and Development on February 15, 2006, also increases compensation to owners whose property is taken, requires two-thirds approval of the legislative body for a taking for economic development, and creates a grant program to compensate persons for the costs of contesting an eminent domain proceeding. H.B. 5038 also establishes the position of property rights ombudsman and prohibits the discussion of the acquisition of real property by eminent domain at executive session meetings.

S.B. 34, which received a public hearing in the Joint Committee on Planning and Development on February 15, 2006, requires a municipal determination in an economic development plan that a taking of real property is for a public use or for economic development; requires a two-thirds vote if the taking is for economic development; and authorizes the owner of condemned real property to challenge all aspects of the taking.

- ◆ **Michigan:** S.B. 693, which has passed the Senate and is pending in the House Committee on Government Operations, prohibits the use of eminent

domain to transfer private property to another private entity unless the property is blighted or qualifies as a public use. The bill further specifies that “public use” does not include taking for general economic development or generating additional tax revenue.

H.B. 5060 and H.B. 5078 both prohibit the use of eminent domain to transfer private property to another private entity for the primary benefit of the private entity. Both bills are pending in the House Committee on Government Operations.

- ◆ **New Jersey:** While most states operate legislative terms on an odd year–even year schedule (e.g., 2005–2006), New Jersey is even–odd. Several bills related to eminent domain failed adoption at the end of the 2004–2005 session, but new legislation has been introduced with the convening of the 2006–2007 session. Among them are:

S.B. 211, which places a temporary moratorium on the use of eminent domain and creates the Eminent Domain Study Commission to examine its use statewide. The bill was introduced on January 10, 2006, and referred to the Senate Committee on Community and Urban Affairs. A companion bill, A.B. 4552, was introduced on February 6, 2006, and referred to the Assembly Commerce and Economic Development Committee.

S.C.R. 40, which proposes a constitutional amendment to limit the exercise of eminent domain to the acquisition of land for essential public purposes. The bill was introduced on January 10, 2006, and referred to the Senate Committee on Community and Urban Affairs. Companion legislation, A.C.R. 138, was introduced on February 6, 2006, and referred to the Assembly Commerce and Economic Development Committee.

A.B. 582, which establishes minimum amounts for eminent domain relocation assistance and additional homeowner payments. The bill was introduced on January 10, 2006, and is pending in the Assembly Commerce and Economic Development Committee.

A.B. 1873, which authorizes the state, with prior approval by the State House Commission, to use eminent domain to acquire lands for recreation and conservation purposes provided the lands protect drinking water sources. The bill was introduced on January 10, 2006, and referred to the Assembly Committee on Agriculture and Natural Resources.

- ◆ **New York:** A.B. 8865, A.B. 9051, and S.B. 5949 all require a local government to vote to approve the proposed use of eminent domain to condemn private property for another private use. A.B. 8865 and A.B. 9051 are pending in the Assembly Judiciary Committee; S.B. 5949 is pending in the Senate Committee on Corporations, Authorities, and Commissions.

A.B. 9043, A.B. 9050, and S.B. 5946 require that an economic development plan approved by a local government be prepared when eminent domain is used for economic development purposes; that a public hearing be held, with additional public notice requirements; and that the amount of compensation paid to a property owner when eminent domain is used for economic development purposes be greater than 100 percent of fair market value. A.B. 9043 and A.B. 9050 are pending in the Assembly Judiciary Committee; S.B. 5946 is pending in the Senate Finance Committee.

S.B. 5936, pending in the Senate Judiciary Committee, stipulates that eminent domain can be used for economic development only if the area is blighted.

S.B. 5938 stipulates that eminent domain can only be used for specified public projects and requires approval of the county legislature or city council if an industrial development agency decides to use eminent domain. S.B. 5938 is pending in the Judiciary Committee.

- ◆ **Ohio:** S.J.R. 6 proposes a constitutional amendment to remove from municipalities the authority to use eminent domain unless the power is specifically granted to them by the legislature. S.J.R. 6 is pending in the Senate State and Local Government Committee.
- ◆ **Pennsylvania:** H.B. 2054 prohibits the use of eminent domain for private commercial enterprise, with certain exceptions (including for blighted

areas or those properties that meet the criteria contained in the state's redevelopment law). H.B. 2054 has passed the House and is pending in the Senate State Government Committee.

H.B. 1835 and H.B. 1836 prohibit the use of eminent domain to turn private property into a non-public interest or for the purpose of increasing the local government's tax base. Both bills are pending in the House State Government Committee.

H.B. 2029 prohibits the use of eminent domain to condemn non-blighted property for retail, commercial, residential or apartment development; for purposes of generating tax revenue; or for the transfer of private property to another private party. H.B. 2029 is pending in the House State Government Committee.

Failed Legislation

More than a dozen bills relating to eminent domain failed to gain legislative approval, including measures introduced in Alabama, Minnesota, and Oregon.

Conclusion

The justices in the majority in *Kelo* noted in their opinion that, "In affirming the city's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. We emphasize that nothing in our opinion precludes any state from placing further restrictions on its exercise of the takings power." In response to *Kelo*, legislators in more than half the states have taken action to restrict the exercise of the takings power.

—by Sharon Weintraub and David Mauzy, SRC