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Zoning and Land Use Planning

PATRICIA E. SALKIN and
MARGARET LAVERY*

Irresponsible Legislating: Reeling in the Aftermath of *Kelo*

I. Introduction

The U.S. Supreme Court's
decision last term in *Kelo v.*

City of New London continues to attract unusual media attention and has captured the emotion of many Americans because the case reminded people, with an example that hit close to home, literally, the powers enjoyed by federal, state and local governments pursuant to the Fifth Amendment of the U.S. Constitution.¹ This media frenzy has caused, in many instances, an unfortunate hysteria based largely on misunderstandings of law and fact. Congress, as well as state legislatures across the United States, has been quick to introduce a wide range of legislative

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¹Well before the headlines and newscasts alerted the public to the Court's decision in late June 2005, there was considerable interest by public, private and non-profit advocates with varying points of view as to how the Justices might interpret the Public Use Clause of the Constitution. Fifty years after *Berman v. Parker* and more than twenty years after *Hawaii Housing Authority v. Midkiff* this was the first opportunity for the Justices to decide whether to retain a rather expansive notion of "public use," deferring to the interpretations given by state and local governments, or to strike a new course in eminent domain jurisprudence. As a result, this case attracted an unusually high number of amicus curiae, or "friend of the court" briefs. In fact, between November 2004 and January 2005, thirty-seven amicus curiae briefs were filed in the U.S. Supreme Court in the case of *Kelo v. City of New London*, twenty-five in support of Petitioner and twelve in support of Respondent. In total, more than 100 organizations signed onto these thirty-seven briefs, with approximately 25 the briefs submitted in support of the City and 12 submitted in support of the property owners. See Salkin, Lucero and Phillips, "The Friends of the Court: The Role of Amicus Curiae in *Kelo v. City of New London*," in EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT (forthcoming, ABA Press 2006).

approaches to, in essence, either overturn or severely curtail the effect of the holding by the U.S. Supreme Court in *Kelo*.² Lawmakers in more than half of the states have introduced more than 100 bills offering various responses to the use of eminent domain.³ In addition, Missouri Governor Matt Blunt introduced an executive order creating a task force to study the subject.⁴

While lawmakers are quick to act in an attempt to grab headlines, more thoughtful consideration must be given to the short-term and long-term effects of the various legislative proposals awaiting, in some cases, certain action. A number of the legislative proposals discussed below would have broad-sweeping and devastating effects on the traditional power of state and local governments to exercise eminent domain to serve a variety of legitimate public purpose goals.

This is not to suggest, however, that even pre-*Kelo*, eminent domain laws in various states have been ripe for re-examination, not for authority – as suggested by critics of the *Kelo* decision – but for process or procedural aspects. For example, notice provisions for property owners, statute of limitations for appeals, alternate methods of determining just compensation, public participation and defining blight are just some areas where careful study and thoughtful consideration could yield positive changes in some jurisdictions.

II. Congressional Action Following *Kelo*

While it is not unusual from time to time for Congress or the President to react to decisions from the U.S. Supreme Court, it seems as though the *Kelo* decision has spurred more immediate legislative proposals than

²The Castle Coalition of the Institute for Justice posts the federal proposals with status reports at <http://www.castlecoalition.org/legislation/federal/index.asp> (site visited November 2005).

³Legislative proposals that have been introduced to date are linked at Dean Salkin's land use law website at http://www2.als.edu/faculty/psalkin/lul_ eminent.html (site visited November 2005).

⁴Executive Order 05-15 (Missouri Task Force on Eminent Domain), Governor Matt Blunt, State of Missouri (June 28, 2005) available at: <http://www.mo.gov/mo/eminentdomain/execorder.htm> (site visited November 2005).

any other decision in the real property arena.⁵

A. Resolutions Condemning Decision

The United States Supreme Court handed down its decision in *Kelo v. City of New London* on June 23, 2005.⁶ By the next day, Georgia Representative Phil Gingrey (R-GA) and 78 co-sponsors submitted House Resolution 340 condemning the decision.⁷ The resolution “disagrees with the majority opinion in *Kelo* . . . and its holdings that effectively negate the public use requirement of the takings clause; and agrees with the dissenting opinion . . . in its upholding of the historical interpretation of the takings clause and its deference to the rights of individuals and their property.”⁸ While not proposing any specific steps to

be taken, this resolution states the sense of the House of Representatives “that Congress maintains the prerogative and reserves the right to address through legislation any abuses of eminent domain by State and local government”⁹ Rep. Gingrey stated that the Supreme Court had “placed a for-sale sign on the doorstep of every American home or business.”¹⁰ The bills passed the House of Representatives on June 30, 2005 by a vote of 365 to 33.¹¹

Just a few weeks later,¹² Representative Robert Aderholt (R-AL) introduced House Joint Resolution 60 proposing to amend the United States Constitution.¹³ The proposed amendment would read, “Neither a State nor the United States may take private prop-

⁵For example, President Ronald Reagan issued an Executive Order (Exec. Order No. 12630) in 1988 following a trilogy of land use decisions addressing regulatory takings. See 53 FR 8859, 1998 WL 311191 (Pres.). For a historical summary of bills in Congress on takings, see <http://www.law.georgetown.edu/gelipi/takings/congress/index.htm> (site visited November 2005).

⁶125 S. Ct. 2655 (June 23, 2005).

⁷H.R. Res. 340 IH, 109th Cong. (2005).

⁸H.R. Res. 340, 109th Cong. (2005) (enacted).

⁹*Id.*

¹⁰151 CONG. REC. H5370 (daily ed. June 29, 2005) (statement of Rep. Gingrey).

¹¹See <http://www.govtrack.us/congress/bill.xpd?bill=hr109-340> (site visited November 2005).

¹²July 14, 2005.

¹³H.J. Res. 60, 109th Cong. (2005).

erty for the purpose of transferring possession of, or control over, that property to another private person, except for a public conveyance or transportation project.” The resolution was referred to the House Committee on the Judiciary in July, and to date there has been no further action.

B. Legislative Proposals

A number of legislative proposals in both the House and Senate have been introduced in an effort to curtail the ability of state and local governments to exercise the power of eminent domain. The proposals can be organized into two major categories: those that would prohibit outright the use of eminent domain for economic development purposes; and those that would restrict the use of federal funds for projects that involve the use of eminent domain.

a. Prohibiting Eminent Domain for Economic Development

The “Protection of Homes, Small Businesses, and Private Property Act of 2005” was introduced in the Senate by Sen. John Cornyn (R-TX) and 30 co-sponsors less than a week after the *Kelo* decision.¹⁴ It proposes that the term “public use” in the Fifth Amendment should not be construed to include economic development.¹⁵ The bill was referred to the Senate Judiciary Committee and was the subject of a Committee hearing on September 20, 2005.¹⁶

In the House of Representatives, two similar bills have been introduced to “[p]rotect homes, small businesses, and other private property rights, by limiting the power of eminent domain.”¹⁷ Like the Senate, the House Judiciary Committee held oversight hearings in September focusing on eminent domain.¹⁸

Introduced by Rep. Frank Pallone (D-NJ) in October 2005, the “Protect Our Homes

¹⁴S. 1313, 109th Cong. (2005).

¹⁵*Id.*

¹⁶See <http://judiciary.senate.gov/hearing.cfm?id=1612> (site visited November 2005). The testimony from the hearing is posted to this Committee website.

¹⁷See H.R. 3083 (Rep. Dennis Rehberg) and H.R. 3087 (Rep. Phil Gingrey), 109th Cong. (2005). Both bills have been referred to the House Judiciary Committee.

¹⁸See <http://judiciary.house.gov/Oversight.aspx?ID=190> (site visited November 2005).

Act”¹⁹ provides that no governmental entity “may use the power of eminent domain to take private property for economic development purposes,” with an exception for property that the government has demonstrated is a “significant public health or safety risk.”²⁰ Furthermore, the bill requires that even blighted property cannot be taken unless there is no reasonable alternative, all condemned residential property is replaced by equally affordable housing, and the entity has provided just compensation.²¹

b. Legislation Restricting the Use of Federal Funds for Projects that Use Eminent Domain

The majority of the federal bills proposed that advocate limiting the power of eminent domain do so by restricting the use of federal funds where projects involve the use of condemnation. This is a powerful legislative tactic that would

wreck havoc on many state and local redevelopment projects that are dependent upon funding through a variety of federal programs.

For example, the “Private Property Protection Act of 2005,” introduced by Senator Byron Dorgan (D-ND) on September 14, 2005²² was intended to prevent the use of federal funds for eminent domain-assisted economic development projects and to essentially “cut off the spigot of Federal dollars to these questionable projects . . . [which] would have the practical effect of sharply curtailing this practice.”²³ This bill prohibits federal funding for property subject to a taking by eminent domain, except where the property is for a “public use or public project” but specifies that economic development is not to be considered a public use.²⁴

House Bill 3405, the “Strengthening the Ownership of Private Property Act of

¹⁹H.R. 4088, 109th Cong. (2005).

²⁰*Id.*

²¹*Id.*

²²S. 1704, 109th Cong. (2005). This bill is currently in the Senate Judiciary Committee.

²³151 CONG. REC. S10046 (daily ed. Sept. 29, 2005) (statement of Sen. Dorgan).

²⁴S. 1704 (“Public Use or Public Purpose – Economic development, including an increase in the tax base, tax revenues, or employment, may not be the primary basis for establishing a public use or purpose . . .”).

2005” or “STOPP Act,” introduced by Rep. Henry Bonilla (R-TX) would deny federal economic development assistance to any state or locality that uses eminent domain to obtain property for private commercial development or fails to pay for the relocation of people displaced by viable eminent domain use. With 112 co-sponsors, the bill was reported from the Committee on Agriculture²⁵ and placed on the Union Calendar in November 2005.

The “Private Property Rights Protection Act of 2005” was introduced by Rep. Sensenbrenner (R-WI) with 136 co-sponsors in June 2005²⁶ and with 97 co-sponsors when an even stronger version was introduced in November

2005.²⁷ The bill provides that no state or political subdivision may exercise the power of eminent domain for economic development purposes “if that State or political subdivision receives Federal economic development funds during any fiscal year in which it does so.”²⁸ Additionally, this bill provides consequences for noncompliance. A violation by a state or political subdivision will not only make it ineligible for funding on the violating project but also will make it ineligible for federal economic development funds for the next two fiscal years. In a bipartisan show of support, the bill passed the house on November 3, 2005 by a vote of 376-38, and it now rests with the Senate.²⁹ During the floor debate in the House, ten amendments were offered

²⁵See http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp109&sid=cp109f1cFY&refer=&r_n=hr261p1.109&item=&sel=TOC_0& (site visited November 2005).

²⁶H.R. 3135, 109th Cong. (2005).

²⁷H.R. 4128, 109th Cong. (2005).

²⁸*Id.* The bill defines “economic development” as the taking of private property without permission of the owner and using the land for private, for-profit projects or those intended to raise tax revenue, increase tax base, create jobs or for economic health. The bill creates exemptions where eminent domain is used to transfer property to a “common carrier” such as railroads, public facilities or use as a right of way, public utilities, aqueducts or pipelines, roads, schools and military bases.

²⁹See Julie Ufner, “House trims eminent domain powers in response to Kelo case,” *County News*, Vol. 37 No. 21 (Nov. 14, 2005) p. 1, col. 1. (Rep. Maxine Waters, a co-sponsor of the legislation, said, “Local governments cannot be trusted. ‘Many of them are lying with these developers. They have relationships. Money is changing hands. They are in bed with them.’ ”)

to the bill, with six passing by voice vote providing for, among other things, clarification that “economic development” does not include the redevelopment of brownfield sites or areas that have not been developed because of pollution or perceived pollution; clarification that governments have the burden of proof to show that the eminent domain is not for economic development; a prohibition on the exercise of eminent domain for property owned by religious organizations or other nonprofit agencies because of their nonprofit or tax-exempt status; and a statement of intent that government should not attempt to take land from Hurricane Katrina survivors for economic development purposes.³⁰

House Bill 3058 is the appropriations bill for Treasury, Transportation, and Housing and Urban Development, the Judiciary, District of Columbia and independent agencies. With specific reference to eminent domain, the bill provides that “[n]one of the funds made available in this Act may be

used to enforce the judgment of the United States Supreme Court in the case of *Kelo v. New London*.”³¹ This bill is awaiting Senate consideration.

House Bill 3315 would also amend an existing funding procedure to exclude the use of eminent domain by amending Title I of the Housing and Community Development Act of 1974 to withhold community development block grant funds from states and political subdivisions “that do not prohibit the use of the power of eminent domain that involves the taking of the property from private persons for commercial or economic development purposes and transfer of the property to other private persons.”³²

These two amending bills eliminate discreet funding sources for local-level economic redevelopment, but this approach may seem moderate when viewed in light of the “Eminent Domain Limitation Act.”³³ This bill proposes a withdrawal of federal funds that hinges not on a specific type project, but rather on a state’s eminent domain statute.

³⁰*Id.*

³¹See <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.3058>: (site visited November 2005).

³²See <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.3315>: (site visited November 2005).

³³H.R. 3631, 109th Cong. (2005).

It proposes, “No State shall be eligible to receive any Federal assistance for any economic development unless that State has in effect a law relating to takings meeting [specified] criteria.” These criteria require that the state’s law relating to takings must limit the use of eminent domain to only traditional public works and public health and safety, and that even for those purposes, there must be a showing of necessity.³⁴

c. Legislation Addressing Property Rights

The “Empowering More Property Owners With Enhanced Rights Act of 2005,” or the “EMPOWER Act,” was introduced by Senators Orrin Hatch (R-UT) and Max Baucus (D-MT) on October 18, 2005.³⁵ Modeled after Utah’s property rights system, it creates a program to support the rights of private property and business owners affected by federal programs by establishing a “property rights ombudsperson” authorized to advise citizens whose property rights may be affected by a federal action and to order arbitration proceedings when negotiations between condemnor and condemnee break down.

III. State Legislative Reactions to *Kelo*

As noted in the introduction, in the months since the *Kelo* decision over one hundred pieces of legislation have been proposed and/or passed by legislatures in more than half of the states. These proposals, like those advanced by Congress, take the form of proposed [state] constitutional amendments, resolutions condemning the Supreme Court ruling, and various limitations on the use of eminent domain.

A. Legislation Condemning *Kelo*

Legislation in at least five states merely expresses disapproval of the Supreme Court’s decision or a general legislative intent to rectify the situation. The language used in these bills and resolutions demonstrates the level of emotion and fear arising from the perceived consequences of the *Kelo* decision.

For example, Alabama’s House Resolution 49A compares and contrasts the opinion in *Kelo* with the history of the Takings Clause of the Fifth Amendment, “expressing grave disapproval” of the ma-

³⁴*Id.* See <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.3631.IH>: (site visited November 2005).

³⁵S. 1883, 109th Cong. (2005).

jority opinion.³⁶ The bill asserts that the Takings Clause has historically only been applied by the Supreme Court “conditioned upon the necessity that [the use of] eminent domain must be for the public use and requires just compensation.”³⁷ Since it is this language that is the essence of the debate surrounding the *Kelo* decision, it is unclear what interpretation of the Takings Clause this bill is seeking. This bill does, however, take the comparatively moderate position that the taking of one person’s property for the “sole benefit” of another is constitutionally unjustifiable.

Kentucky’s prefiled Concurrent Resolution 134 urges the United States Congress to pass a constitutional amendment “to protect the rights and security of citizens in their private property from government tak-

ings for the promotion of private development.”³⁸ Preventing even the “promotion” of private development closes the door on any variety of eminent domain use other than government owned public works. The drafters of this bill did not contest the Supreme Court’s interpretation of “public use” in the Takings Clause but claimed that the *Kelo* decision effectively deleted the requirement entirely. Rhode Island’s Senate Resolution 1237³⁹ also asserts that the Supreme Court erred in its interpretation of “public use.” This bill states that the *Kelo* decision “favors rich corporation’s commercial development for profit at the expense of family and privately owned property rights.”⁴⁰

Two states have declared a general disagreement with the *Kelo* decision and a legislative intent to revise their own emi-

³⁶H.R. 49A, 2005 Leg., 1st Spec. Sess. (Ala. 2005); also H.J.R. 54, 2005 Leg., Reg. Sess. (Ala. 2005). This bill uses some of the most sweeping language of any legislation in this category, including declaring private ownership of property to be an “essential element of a free, independent, and sovereign society.”

³⁷H.R. 49A, 2005 Leg., 1st Spec. Sess. (Ala. 2005).

³⁸B.R. 134, 2006 Leg., Reg. Sess. (Ky. 2005) (prefiled).

³⁹See also H.R. 6636, 2005 Gen. Assem., Reg. Sess. (R.I. 2005).

⁴⁰S.R. 1237, 2005 Gen. Assem., Reg. Sess. (R.I. 2005). The majority opinion in *Kelo* admitted that “the government’s pursuit of a public purpose will often benefit individual private parties” but insisted that in this case, there was no “suspicion that a private purpose was afoot.” The court therefore, as opposed to granting increased power to utilize eminent domain, declined to place an “artificial restriction on the concept of public use” that was not warranted by the facts of this case.

ment domain laws. Florida's Senate Bill 134 is only two lines long and simply expresses an intent to revise the laws. West Virginia's Senate Concurrent Resolution 402 is more extensive, declaring that the "legitimate role" of government is to defend the institution of private property.⁴¹ As a result it seeks to prevent the utilization of eminent domain for the purpose of private economic development in the state.

B. Proposals Requiring A Finding of Blight to Use Eminent Domain

Blight remediation is a long-standing concept in eminent domain jurisprudence. Approved of by the Supreme Court in *Berman v. Parker*,⁴² the use of eminent domain to redevelop blighted communities has long been accepted. Accordingly, much of the recently proposed legislation to severely limit the use of eminent domain includes this exception. However, the Supreme Court explicitly rejected

the notion that blight is the only exception to the prohibition on the use eminent domain for redevelopment. The Court explained, "It is a misreading of *Berman* to suggest that the only public use upheld in that case was the initial removal of blight. The public use described in *Berman* extended beyond that to encompass the purpose of *developing* that area to create conditions that would prevent a reversion to blight in the future."⁴³ Thus, the subject of blight has now found its way into proposed legislation.

Legislators in New York, California, Massachusetts, Texas, Wisconsin, Tennessee, and Alabama have proposed bills that state a general prohibition on the use of eminent domain to take private property for economic development but explicitly leave open the possibility for the redevelopment of blighted property.⁴⁴ Each bill offers slightly different definitions of the term "blight." New York Senate Bill 59 de-

⁴¹S.C.R. 402, 77th Leg., 4th Spec. Sess. (W. Va. 2005).

⁴²348 U.S. 26 (1954).

⁴³*Kelo* at 2665, citing *Berman v. Parker*, 348 U.S. 26, 34-35 (1954).

⁴⁴S.B. 5936, 228th Ann. Leg. Sess. (N.Y. 2005); A.C.A. 15, 2005-06 Leg., Reg. Sess. (Cal. 2005); A.B. 590, 2005-06 Leg., Reg. Sess. (Cal. 2005); H.D.R. 4634, 184th Gen. Ct., Reg. Sess. (Mass. 2005); H.D.R. 4663, 184th Gen. Ct., Reg. Sess. (Mass. 2005); H.B. 16, 79th Leg., Reg. Sess. (Tex. 2005); S.B. 26, 79th Leg., 2nd Sess. (Tex. 2005); A.B. 656, 2005 Leg., Reg. Sess. (Wis. 2005); S.B. 2413, 104th Gen. Assem., Reg. Sess. (Tenn. 2005); S.B. 68/H.B. 14, 2005 Leg., 1st Spec. Sess. (Ala. 2005).

clares property to be “blighted” if a majority of the buildings are physically deteriorating or economically unproductive.⁴⁵ Wisconsin Assembly Bill 657 defines blighted property more generally as “any property that, by reason of abandonment, dilapidation, deterioration,” etc. is “detrimental to the public health, safety, or welfare.”⁴⁶ This approach makes it more difficult to condemn multiple-unit dwellings by requiring that they be abandoned or subject to higher crime rates than surrounding property.⁴⁷

An examination of all of the applicable definitions of blight in the recently proposed legislation finds various permutations of two factors: economic unproductiveness and physical deterioration leading to a risk to public health, safety, or welfare. This is consistent with the Supreme Court’s suggestion in *Hawaii Housing Authority v. Midkiff* that the use of eminent domain is “cotermi-

nous with the scope of a sovereign’s police powers.”⁴⁸

C. Proposals that Generally Prohibit the Use of Eminent Domain for Economic Development

This type of proposal, with or without an exception for blight, is by far the largest category of post-*Kelo* state legislation. However, while these proposals reject the holding in *Kelo v. New London*,⁴⁹ they demonstrate a misperception of what the holding actually means. By attempting to prohibit the use of eminent domain when the sole or primary purpose of the taking is to benefit a private party, these bills and resolutions mirror Justice Stevens’ sentiment in the *Kelo* opinion that New London should not be able to “take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.”⁵⁰ The taking in the Connecticut case was finally approved only when this possibility was excluded. However, many bills have been proposed to amend existing state

⁴⁵S.B. 5936, 228th Ann. Leg. Sess. (N.Y. 2005).

⁴⁶A.B. 657, 2005 Leg., Reg. Sess. (Wis. 2005).

⁴⁷See also H.B. 858, 2005 Leg., Basic Sess. (Mo. 2005) for crime-rate driven blight definition.

⁴⁸*Midkiff*, 467 U.S. 229, 240 (1984).

⁴⁹*Kelo*, 125 S. Ct. 2655.

⁵⁰*Id.* at 2661.

eminent domain statutes to specify that the powers they grant may not be used except in very limited circumstances.

Proposals have been introduced in over twenty states that would effectively prohibit the use of eminent domain for economic development; and it is clear that this issue is not one that can be classified from a "red state or blue state" perspective.⁵¹

These bills and resolutions generally have two key parts. First, they specify which governmental or nongovernmental entities are granted the power of eminent domain, and then

the specifics of that power are explained. Nearly all of the proposals amend the aspect of the existing statute that applies to how eminent domain may be used, but Wisconsin Assembly Bill 457 left that aspect virtually untouched. Instead, this bill proposes the elimination of the condemnation authority of all nongovernmental entities by deleting each instance of the word "corporation" in the existing eminent domain statute.⁵²

Disagreements over how eminent domain, and the property acquired by it, may be used are the source of inspiration for the rest of the bills in this

⁵¹S.B. 76, 2005 Leg., 1st Spec. Sess. (Ala. 2005); S.B. 89/S.B. 92, 2005 Leg., 1st Spec. Sess. (Ala. 2005); A.B. 1162, 2005-06 Leg., Reg. Sess. (Cal. 2005); H.B. 5062, 2005 Gen. Assem., Jan. Sess. (Conn. 2005); P.B. 6170, 2005 Gen. Assem., Jan. Sess. (Conn. 2005); S.B. 411, 23rd Leg., Reg. Sess. (Haw. 2005); H.B. 4091, 94th Gen. Assem., Reg. Sess. (Ill. 2005); H.B. 1063, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005); H.D.R. 4634, 184th Gen. Ct., Reg. Sess. (Mass. 2005); H.B. 5060, 2005 Leg., Reg. Sess. (Mich. 2005); H.F. 123, 2005 Leg., 1st Spec. Sess. (Minn. 2005); H.F. 132/H.F. 117, 2005 Leg., 1st Spec. Sess. (Minn. 2005); S.B. 382, 2005 Leg., Reg. Sess. (Mont. 2005); S.B. 326, 73rd Leg., 2005 Sess. (Nev. 2005); S.B. 5938, 228th Ann. Leg. Sess. (N.Y. 2005); H.J.R. 10, 126th Gen. Assem., Reg. Sess. (Ohio 2005); S.B. 180, 126th Gen. Assem., Reg. Sess. (Ohio 2005); H.B. 3505, 73rd Leg. Assem., Reg. Sess. (Or. 2005); S.B. 881, 2005-06 Leg., Reg. Sess. (Penn. 2005); H.B. 1835, 2005-06 Leg., Reg. Sess. (Penn. 2005); H.B. 1836, 2005-06 Leg., Reg. Sess. (Penn. 2005); S.B. 88/H.B. 5242, 2005 Gen. Assem., Jan. Sess. (R.I. 2005); S.B. 2419, 104th Gen. Assem., Reg. Sess. (Tenn. 2005); H.B. 2428/S.B. 2424, 104th Gen. Assem., Reg. Sess. (Tenn. 2005); H.B. 2429/S.B. 2421, 104th Gen. Assem., Reg. Sess. (Tenn. 2005); S.B. 2420, 104th Gen. Assem., Reg. Sess. (Tenn. 2005); H.B. 15, 79th Leg., 2nd Sess. (Tex. 2005); S.B. 26, 79th Leg., 2nd Sess. (Tex. 2005); H.B. 12, 79th Leg., 2nd Sess. (Tex. 2005); H.B. 65, 79th Leg., 2nd Sess. (Tex. 2005); H.B. 66, 79th Leg., 2nd Sess. (Tex. 2005); S.B. 184, 2005 Leg., Gen. Sess. (Utah 2005); H.B. 256, 2005 Leg., Gen. Sess. (Utah 2005); A.B. 457, 2005 Leg., Reg. Sess. (Wis. 2005).

⁵²A.B. 457, 2005 Leg., Reg. Sess. (Wis. 2005).

category. Legislation proposed in Alabama, Indiana, and Pennsylvania list specific types of development that do not qualify as permissible public uses for the utilization of eminent domain.⁵³ For example, Alabama Senate Bill 89 specifies that a “municipality or county may not condemn property for retail, office, commercial or residential development.” Bills in Minnesota, Ohio, Tennessee, and Texas set out a blanket prohibition on all condemnations for the purpose of economic development.⁵⁴ In application, a property seizure for office development may also be beneficial for economic development, but these designations are not identical. “Economic development” does not end with the land itself, as “retail development” does, but with what can be gained from the land. Proposals in Pennsylvania, Tennessee, and Texas

would prevent the use of eminent domain to increase the tax base of the community.⁵⁵ Texas Senate Bill 26 and Tennessee House Bill 2428 include the expansion of the property and sales tax base as part of “economic development” in their definitions sections.

A number of bills focus on the action of transfer from one private entity to another rather than on the end result of commercial or economic development. For example, California Assembly Bill 1162 prohibits the use of eminent domain “to acquire owner-occupied residential real property for private use . . . if ownership of the property will be transferred to a private party or private entity.” Bills from Michigan, Oregon, and Tennessee are much the same.⁵⁶ Hawaii Senate Bill 411 takes a different approach, providing that a county may not condemn private property and subse-

⁵³S.B. 76, 2005 Leg., 1st Spec. Sess. (Ala. 2005); S.B. 89/S.B. 92, 2005 Leg., 1st Spec. Sess. (Ala. 2005); H.B. 1063, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005); S.B. 881, 2005-06 Leg., Reg. Sess. (Penn. 2005).

⁵⁴H.F. 123, 2005 Leg., 1st Spec. Sess. (Minn. 2005); S.B. 180, 126th Gen. Assem., Reg. Sess. (Ohio 2005); H.B. 2429/S.B. 2421, 104th Gen. Assem., Reg. Sess. (Tenn. 2005); H.B. 15, 79th Leg., 2nd Sess. (Tex. 2005).

⁵⁵H.B. 1835, 2005-06 Leg., Reg. Sess. (Penn. 2005); H.B. 1836, 2005-06 Leg., Reg. Sess. (Penn. 2005); H.B. 2428/S.B. 2424, 104th Gen. Assem., Reg. Sess. (Tenn. 2005); S.B. 26, 79th Leg., 2nd Sess. (Tex. 2005).

⁵⁶H.B. 5060, 2005 Leg., Reg. Sess. (Mich. 2005); H.B. 3505, 73rd Leg. Assem., Reg. Sess. (Or. 2005); S.B. 2419, 104th Gen. Assem., Reg. Sess. (Tenn. 2005).

quently sell that property “to a private entity who expressed an interest in purchasing that same property for development purposes or private use before the condemnation.”⁵⁷ Similarly, Montana Senate Bill 382 would prevent a city from serving as a “pass-through entity” by obtaining property through eminent domain and then selling it to a private entity within ten years.

With so much focus on private ownership, it is surprising that there are few bills like Illinois House Bill 4091 that go into great detail about what exactly constitutes “private ownership or control.” This bill states that the term “shall be liberally construed to prevent the use of long-term leases, options to purchase, and other mechanisms intended to defeat the purpose . . . which is to limit the acquisition of property by eminent domain when it is primarily for the benefit and use of private entities.”⁵⁸

Enforcement guidelines appear in other proposals. For example, Ohio Senate Bill 180

provides consequences for noncompliance. If a political subdivision that is eligible to receive funding from Ohio’s local government or library support funds “appropriates real property [when the primary purpose is economic development], the political subdivision shall not receive funding from any of those funds for the remainder of the biennium in which the taking occurs.”⁵⁹

D. Proposals that Redefine “Public Use”

Many states have opted for targeted legislation aimed directly for the two words at the heart of this debate: “public use.”⁶⁰ These bills achieve the goal of restricting the use of eminent domain by limiting the potential breadth of the category of what is or is not a public use under the Fifth Amendment.

Tennessee has been particularly focused on this approach, and the proposals from this state involve extensive planning concerns and specificities not found in the largely similar bills from other states. Proposals from Michigan, Virginia,

⁵⁷S.B. 411, 23rd Leg., Reg. Sess. (Haw. 2005).

⁵⁸H.B. 4091, 94th Gen. Assem., Reg. Sess. (Ill. 2005).

⁵⁹S.B. 180, 126th Gen. Assem., Reg. Sess. (Ohio 2005).

⁶⁰Appearing in the Takings Clause of the Fifth Amendment: “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

and Tennessee all would prevent the use of eminent domain to take property from one private entity for the primary benefit of another private entity.⁶¹ Proposals from California, Georgia, Virginia, and Tennessee would also prevent the use of eminent domain for the primary purpose of economic development or improving tax revenue.⁶² However, legislators from Tennessee also included procedural guidelines for the determination of what is to be considered a “public use”⁶³ and a list of examples of permissible public uses.⁶⁴

Tennessee Senate Bill 2413 creates a cause of action for individuals who own land that will be taken by eminent domain to determine if the taking is a permissible one. A determination will then be made as to whether the proposed taking is for the primary purpose of improving tax revenue or for economic development, with the provisions of the bill being

construed narrowly in favor of the property owner. The burden of proof is placed on the entity attempting to exercise the power of eminent domain to prove that the use is legitimate.

For guidance, Tennessee Senate Bill 2422 includes a lengthy list of possible legitimate public uses. This list includes all of the traditional publicly owned or operated facilities such as docks, bridges, reservoirs, roads, telephone and electric lines, cemeteries and parks. The list is extensive but not exhaustive, as it includes “any other purpose which benefits the public welfare.” This leaves room for potential redevelopment that has private benefit as only a side effect and not a primary driving force.

E. Proposals that Further Regulate the Use of Eminent Domain

Many of the bills that prohibit the use of eminent domain do so if economic development

⁶¹H.B. 5078/S.B. 693, 2005 Leg., Reg. Sess. (Mich. 2005); H.B. 1806, 2005 Leg., Reg. Sess. (Va. 2005); S.B. 2413, 104th Gen. Assem., Reg. Sess. (Tenn. 2005); H.B. 2426/S.B. 2418, 104th Gen. Assem., Reg. Sess. (Tenn. 2005); S.B. 2422, 104th Gen. Assem., Reg. Sess. (Tenn. 2005).

⁶²A.B. 590, 2005-06 Leg., Reg. Sess. (Cal. 2005); S.B. 86, 148th Gen. Assem., Reg. Sess. (Ga. 2005); S.B. 1271, 2005 Leg., Reg. Sess. (Va. 2005); S.B. 2413, 104th Gen. Assem., Reg. Sess. (Tenn. 2005); H.B. 2426/S.B. 2418, 104th Gen. Assem., Reg. Sess. (Tenn. 2005); S.B. 2422, 104th Gen. Assem., Reg. Sess. (Tenn. 2005).

⁶³S.B. 2413, 104th Gen. Assem., Reg. Sess. (Tenn. 2005).

⁶⁴S.B. 2422, 104th Gen. Assem., Reg. Sess. (Tenn. 2005).

or transfer to a private party is a primary driving force of the taking. This wording implies a planning step to determine what exactly the primary purpose of the taking will be prior to commencement of proceedings. Lawmakers in California, Delaware, Kentucky, Missouri, and New York have proposed bills that would require redevelopment agencies to have specific and comprehensive plans for the land to be taken through eminent domain.⁶⁵ New York Assembly Bill 9043A only requires this when the primary purpose of the taking is economic development, but California Senate Bill 53 would require a plan for any taking of real property by eminent domain.

Delaware has already signed a bill into law that requires advance planning for redevelopment.⁶⁶ Senate Bill 217 requires the plan be in place at least six months in advance of the institution of condemnation proceedings and that the plan be addressed at a public hearing and be published in a report of the acquiring agency.

One reason to require such a plan is to avoid the risk of having the land sit unused because of delays in the commencement of development. For this reason, Missouri House Bill 159 specifies that if the property is not used for its "specific intended use" within ten years of the taking, the original property owner has the right of first refusal to get the land back. Another reason to require planning is so the plan may be evaluated and approved or disapproved of. To help local governments properly evaluate proposed developments, Kentucky House Bill 515 would provide them a "guidance document summarizing state and federal constitutional law principles concerning takings and provide a framework to assist state and local government agencies in evaluating proposed regulatory or administrative actions."

Two states have current proposals that would require the political subdivision in which the property is located to evaluate and formally approve of proposed takings. Maryland House Bill 881 requires that the

⁶⁵California S.B. 53, 2005-06 Leg., Reg. Sess. (Cal. 2005); S.B. 217, 143rd Gen. Assem., Reg. Sess. (Del. 2005); H.B. 515, 2005 Leg., Reg. Sess. (Ky. 2005); H.B. 159, 2005 Leg., Basic Sess. (Mo. 2005); A.B. 9043A, 228th Ann. Leg. Sess. (N.Y. 2005).

⁶⁶July 21, 2005.

legislative body approve of the action by resolution, while New York Assembly Bills 8865 and 9015 and Senate Bill 5938 require that the local government vote to approve condemnation by a private developer.

F. Legislation Focused on Procedural Requirements

Imposing increased procedural requirements on governments attempting to exercise this power has the potential to control its use. Pennsylvania and New York both have proposed bills that would enact comprehensive reform of eminent domain procedure in their state.⁶⁷ These bills attempt to “afford homeowners additional protection if homes are to be acquired for economic development”⁶⁸ through small changes in procedures that previously seemed mundane but now are a source of great opportunity for states who disagree with the *Kelo* decision.

G. Legislation Addressing Valuation/Compensation

A number of states have used the opportunity to focus on the issues of valuation and just

compensation when property is condemned. In 1972, Justice Stewart, writing for the majority in *Altamont Farmers v. United States*, identified “just compensation” as “what a willing buyer would pay in cash to a willing seller.”⁶⁹

Courts have long held to this fair market value standard for determining what is just compensation in condemnation proceedings and have been reluctant to move beyond it. Unfortunately, while this simple approach is procedurally efficient, it may not necessarily be good public policy. There are other factors, such as the development potential of the land and the extrinsic value and relocation costs to the owner, that may legitimately play a role in the true value of a particular piece of property.

While it is difficult to quantify what would truly be “just compensation” in any given situation, many lawmakers believe that fair market valuation does not adequately capture it. While most of the recently proposed eminent domain legislation would decrease the power

⁶⁷A.B. 9050, 228th Ann. Leg. Sess. (N.Y. 2005); S.B. 897, 2005-06 Leg., Reg. Sess. (Pa. 2005); H.B. 776, 2005-06 Leg., Reg. Sess. (Pa. 2005).

⁶⁸A.B. 9050, 228th Ann. Leg. Sess. (N.Y. 2005).

⁶⁹*Altamont Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973), citing *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 633 (1961).

of governmental agencies to condemn, others would increase the compensation required for the takings or impose procedural requirements on the establishment of property value.⁷⁰ Some of the bills would provide enhanced compensation only where property is being taken for economic development purposes but not for other condemnation purposes. This approach may present an Equal Protection problem. In addition, without a carefully crafted rationale for compensating beyond fair market value, state constitutional provisions prohibiting the use of government funds as a “gift” to benefit private individuals could be violated.

Many of the compensation related bills concern businesses that are to be taken through eminent domain. Maine, Minnesota, Pennsylvania and Nevada have bills that require the

condemning agency to compensate the owner of a taken business for the loss of “going concern.”⁷¹ “Going concern” is described by Minnesota House File 118 as the benefit that “accrues to a business as a result of its location, reputation for dependability, skill or quality, customer base or any other circumstances resulting in probable retention of old or acquisition of new patronage.” Similarly, Wisconsin Assembly Bill 656 proposes to change the state’s prohibition against allowing evidence of a business’ income in a just compensation proceeding. Property to be taken by eminent domain could then be appraised based on an income approach, which would be advantageous to business owners. Idaho Senate Bill 1152 attempts to provide similar increased compensation for businesses⁷² by requiring that they receive a fixed relocation

⁷⁰H.B. 117, 2005 Leg., Reg. Sess. (Ala. 2005); H.B. 913, 148th Gen. Assem., Reg. Sess. (Ga. 2005); H.B. 1527, 23rd Leg., Reg. Sess. (Haw. 2005); S.B. 1152, 58th Leg., 1st Reg. Sess. (Idaho 2005); H.P. 894/L.D. 1297, 122nd Leg., 1st Reg. Sess. (Me. 2005); H.F. 118, 2005-06 Leg., Reg. Sess. (Minn. 2005); H.F. 2201/S.F. 1693, 2005-06 Leg., Reg. Sess. (Minn. 2005); H.B. 858, 2005 Leg., Basic Sess. (Mo. 2005); S.B. 326, 73rd Leg., 2005 Sess. (Nev. 2005); New Jersey A.B. 4331/S.B. 2815, 2004-05 Leg., Reg. Sess. (N.J. 2005); A.B. 9043, 228th Ann. Leg. Sess. (N.Y. 2005); H.B. 2268, 2005 Leg. Reg. Sess. (Or. 2005); S.B. 897, 2005-06 Leg., Reg. Sess. (Pa. 2005); A.B. 656, 2005 Leg., Reg. Sess. (Wis. 2005).

⁷¹H.P. 894/L.D. 1297, 122nd Leg., 1st Reg. Sess. (Me. 2005); H.F. 118, 2005-06 Leg., Reg. Sess. (Minn. 2005); S.B. 897, 2005-06 Leg., Reg. Sess. (Pa. 2005); S.B. 326, 73rd Leg., 2005 Sess. (Nev. 2005).

⁷²Also farms.

payment between \$2,500 and \$10,000 depending on previous net earnings. This payment is higher than that provided to displaced individuals and families through the bill.

Property appraisal affects all participants in a condemnation. Minnesota Senate File 1693⁷³ was designed to provide greater procedural safeguards to landowners who are subject to potential condemnation. It provides that the condemnor must fund two separate appraisals upon the request of the landowner and requires that all appraisals be disclosed during negotiations. Similarly, Oregon House Bill 2268 requires the parties to exchange *all* data used to determine valuation. This is echoed in the requirement of “good faith negotiations” in Nevada Assembly Bill 143. To encourage good faith in valuation negotiations, Missouri House Bill 858 requires the condemning authority to provide the property owner with a written summary of their rights before negotiations begin.

Virginia has a proposal that would amend the current takings procedure to include a va-

riety of very specific requirements regarding appraisals. It provides that any decrease in the fair market value of the property caused by the likelihood that the property will be acquired for redevelopment “shall be disregarded in determining the compensation for the property.”⁷⁴ Also, the bill distinguishes between the amount of compensation required for the property and the amount required for damages to any property remaining to the landowner. These amounts must also be separately appraised and reported.

Alabama, Hawaii and Pennsylvania each have legislation proposing that property be valued considering its “highest and best use.”⁷⁵ Pennsylvania Senate Bill 897 does this as part of a factor-based analysis of “just compensation.” This bill defines “just compensation” as “the difference between the fair-market value of the condemnee’s interest before the condemnation and the fair-market value of the property after the condemnation.” To determine this, a factor analysis would be employed that weighs the value of the

⁷³H.F. 2201/S.F. 1693, 2005-06 Leg., Reg. Sess. (Minn. 2005).

⁷⁴H.B. 1821, 2005 Leg., Reg. Sess. (Va. 2005).

⁷⁵H.B. 117, 2005 Leg., Reg. Sess. (Ala. 2005); H.B. 1527, 23rd Leg., Reg. Sess. (Haw. 2005); S.B. 897, 2005-06 Leg., Reg. Sess. (Pa. 2005).

present use of the property with the “highest and best reasonably available use of the property” along with any “machinery, equipment, and fixtures forming part of the real estate taken.” Georgia House Bill 913 also takes into account physical “features” of the property that affect value. It requires that compensation be extended to encompass access rights to the property and increased traffic.

New York Assembly Bills 9043-A and 9050 take a different approach in the effort to provide “just compensation.” They simply require that compensation must be at least 150% or 125%, respectively, of the fair market value of the property.

H. State Constitutional Amendments

A number of state legislatures have proposed state con-

stitutional amendments to more significantly curtail certain aspects of the use of eminent domain. For example, such initiatives have been introduced in Alabama, California, Florida, Georgia, Massachusetts, Michigan, New Jersey, New York, Ohio, and Texas,⁷⁶ and representatives from a number of other states have declared their intent to propose similar bills.⁷⁷ All of these bills generally prohibit the use of eminent domain for economic development.

New York Senate Bill 5961 provides for an amendment that would read: “Private property shall not be taken for use by private commercial enterprise, for economic development, or for any other private use, except with the consent of the owner.” Besides common exceptions for consent and blight, the proposed constitutional

⁷⁶H.B. 102, 2005 Leg., Reg. Sess. (Ala. 2005); H.B. 117, 2005 Leg., Reg. Sess. (Ala. 2005); S.C.A. 12, 2005-06 Leg., Reg. Sess. (Cal. 2005); S.C.A. 15, 2005-06 Leg., Reg. Sess. (Cal. 2005); A.C.A. 22, 2005-06 Leg., Reg. Sess. (Cal. 2005); S.J.R. 20, 109th Cong., 1st Sess. (Fl. 2005); H.R. 87, 148th Gen. Assem., Reg. Sess. (Ga. 2005); H.D.R. 4663, 184th Gen. Ct., Reg. Sess. (Mass. 2005); H.J.R. N/H.J.R. P/S.J.R. E, 2005-06 Leg., Reg. Sess. (Mich. 2005); S.B. 5961, 228th Ann. Leg. Sess. (N.Y. 2005); S.J.R. 6, 126th Gen. Assem., Reg. Sess. (Ohio 2005); H.J.R. 10, 126th Gen. Assem., Reg. Sess. (Ohio 2005); A.C.R. 255/S.C.R. 139, 2004-05 Leg., Reg. Sess. (N.J. 2005); A.C.R. 256, 2004-05 Leg., Reg. Sess. (N.J. 2005); S.C.R. 140, 2004-05 Leg., Reg. Sess. (N.J. 2005); H.J.R. 11, 79th Leg., 2nd Sess. (Tex. 2005); S.J.R. 5, 79th Leg., 2nd Sess. (Tex. 2005); S.J.R. 10, 79th Leg., 2nd Sess. (Tex. 2005); H.J.R. 19, 79th Leg., 2nd Sess. (Tex. 2005).

⁷⁷Colorado Representative Al White, Kansas Representative Frank Miller, Louisiana Representative Joe McPherson, and Oklahoma Representative Mark Liotta. See <http://www.castlecoalition.org/legislation/states/index.asp>.

amendments, if signed into law, would foreclose the possibility of nearly all redevelopment. California Assembly Constitutional Amendment 22 states that takings must be for a stated public use but additionally requires a judicial determination of no reasonable alternative to condemnation and full reacquisition rights for the former owners if the property is ever used in a nonpublic capacity.

I. Legislation (and Executive Orders) Creating Task Forces on Eminent Domain

The *Kelo* decision brought to the forefront ambiguities in eminent domain law that have existed since the drafting of the Fifth Amendment but had not come up on a national scale in decades. A few of the bills and resolutions introduced would create task forces or special commissions to further study various aspects of eminent domain in the state.⁷⁸ This is by far the most sensible approach in determining the best pos-

sible and most appropriate legislative response in the individual states.

Texas was the first to establish such a task force. In October, Governor Rick Perry ceremonially signed Senate Bill 7 establishing an interim ten member committee of legislators to study the use of eminent domain for economic development. However, this bill also prohibits the taking of land for economic development purposes and to confer a private benefit on a particular private party. As mentioned in the introduction, the Missouri task force, established by gubernatorial executive order, has already submitted their preliminary report.

Ohio Senate Bill 167⁷⁹ would establish a moratorium on the use of eminent domain in the state until after the task force completes its study of eminent domain and land use planning in the state. The remainder of the bills and resolutions in this category only provide for the

⁷⁸S.B. 683, 2005 Gen. Assem., Jan. Sess. (Conn. 2005); Delaware H.R. 44/H.C.R. 38, 143rd Gen. Assem., Reg. Sess. (Del. 2005); S.R. 457 2005-06 Leg., Reg. Sess. (Ga. 2005); H.C.R. 57, 2005 Leg., Reg. Sess. (Ky. 2005); Exec. Order No. 05-15, (Mo. June 28, 2005); S.B. 5946, 228th Ann. Leg. Sess. (N.Y. 2005); A.B. 9060, 228th Ann. Leg. Sess. (N.Y. 2005); S.B. 167/H.B. 331, 126th Gen. Assem., Reg. Sess. (Ohio 2005); H.B. 5116, 2005 Leg., Reg. Sess. (R.I. 2005); H.B. 2428/S.B. 2424, 104th Gen. Assem., Reg. Sess. (Tenn. 2005); H.B. 16/S.B. 41, 79th Leg., 2nd Sess. (Tex. 2005); S.B. 7, 79th Leg., 2nd Sess. (Tex. 2005).

⁷⁹See also H.B. 331, 126th Gen. Assem., Reg. Sess. (Ohio 2005).

creation of task forces to study eminent domain law and make no current substantive changes to the existing law.⁸⁰

IV. Conclusion

Legislators and advocates are rushing to stake a claim to eminent domain reform for purposes of telling their constituents that they will be protected from government condemning their home for uses not believed to be in the public interest. Although the *Kelo* decision did not change the law of eminent domain in the country, it did provide a platform for advocates to garner widespread media attention focusing a country looking for distraction from a war overseas to an issue manipulated to recast the property rights debate at home. While certain procedural protections in the area of condemnation may be warranted, and even long overdue, many of the legislative proposals represent a quick overreaction and have the potential, absent careful study and analysis, to cause long-term harmful societal effects. The notion of creating

national and/or statewide study commissions to more carefully assess dozens of issues with the benefit of data and widespread community input is the most prudent course. Issues including, but not limited to, social equity, compensation for displaced tenants who are not property owners, and citizen input are just some of the additional issues, not the clear focus of current proposals, that warrant attention should there be the political will for comprehensive reform.

⁸⁰S.B. 683, 2005 Gen. Assem., Jan. Sess. (Conn. 2005); Delaware H.R. 44/H.C.R. 38, 143rd Gen. Assem., Reg. Sess. (Del. 2005); S.R. 457, 2005-06 Leg., Reg. Sess. (Ga. 2005); H.C.R. 57, 2005 Leg., Reg. Sess. (Ky. 2005); S.B. 5946, 228th Ann. Leg. Sess. (N.Y. 2005), A.B. 9060, 228th Ann. Leg. Sess. (N.Y. 2005); H.B. 5116, 2005 Leg., Reg. Sess. (R.I. 2005); H.B. 2428/S.B. 2424, 104th Gen. Assem., Reg. Sess. (Tenn. 2005).