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**EMINENT DOMAIN LEGISLATION POST  
*KELO: A STATE OF THE STATES***

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# **EMINENT DOMAIN LEGISLATION POST**

## ***KELO: A STATE OF THE STATES***

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**2006**

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## Eminent Domain Legislation Post-*Kelo*: A State of the States

by Patricia E. Salkin

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*Editors' Summary: In Kelo v. City of New London, the U.S. Supreme Court ruled that the use of eminent domain for economic development is a permissible "public use" under the Takings Clause of the Fifth Amendment. The decision proved controversial, as many feared that it would benefit large corporations at the expense of individual homeowners and local communities. Shortly thereafter, numerous states introduced legislation limiting the use of eminent domain. Below, Prof. Patricia Salkin surveys those state initiatives that have been signed into law following the Court's decision in Kelo.*

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### I. Introduction

In the aftermath of the 2005 U.S. Supreme Court's decision in *Kelo v. City of New London*,<sup>1</sup> which held that economic development is a valid public purpose to satisfy the Fifth Amendment requirement that when government condemns private property it be for a public use, the U.S. Congress and state legislatures across the country quickly began to introduce legislative reforms to address the seemingly negative public response to the opinion.<sup>2</sup> Approximately 600 bills were introduced in 43 states, although less than 100 bills actually made it to a vote in at least one chamber of a statehouse. Legislatures in 23 states passed 35 pieces of legislation that have been signed into law by their state governors, with governors in three states vetoing proposals perceived to be unduly restrictive.<sup>3</sup> The new laws, or amendments to existing condemnation laws, include constitutional amendments, which in two states—Louisiana and South Carolina—will go before the voters in November. Also on the ballot for November 2006 are proposed eminent domain laws in Florida,<sup>4</sup> Geor-

gia,<sup>5</sup> and South Carolina.<sup>6</sup> In addition, three states passed proposals that simply condemn the *Kelo* decision out-

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permit exceptions allowing the transfer of such private property; and providing that this prohibition on the transfer of private property taken by eminent domain is applicable if the petition of taking that initiated the condemnation proceeding was filed on or after January 2, 2007.

5. H.R. Res. 1306, Act 445, 148th Gen. Assem., 2005 to 2006 Reg. Sess., (Ga. 2005). This bill proposes an amendment to the constitution requiring that condemnation of property for redevelopment purposes be approved by vote of the elected governing authority of the county or city in which the property is located. The bill also restricts the use of eminent domain for redevelopment purposes to the elimination of affirmative harm, provides that the use of eminent domain by counties and municipalities be subject to limitation by general law, and prohibits the use of eminent domain by certain nonelected local authorities. For the full text of the bill, see Georgia General Assembly, [http://www.legis.state.ga.us/legis/2005\\_06/sum/hr1306.htm](http://www.legis.state.ga.us/legis/2005_06/sum/hr1306.htm) (last visited Aug. 31, 2006).
6. S.J. Res. 1031, R453, 2005 to 2006 Gen. Assem., 116th Sess. (S.C. 2006). The language of the ballot initiative reads:

Must Section 13, Article I of the Constitution of this State be amended so as to provide that except as otherwise provided in the Constitution, private property shall not be condemned by eminent domain for any purpose or benefit, including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use; and to further provide that for the limited purpose of the remedy of blight, the General Assembly may provide by law that private property, if it meets certain conditions, may be condemned by eminent domain without the consent of the owner and put to a public use or private use if just compensation is first made for the property; and must Section 17, Article I of the Constitution of this State be amended to delete undesignated paragraphs that give slum clearance and redevelopment power to municipalities and housing or redevelopment authorities in Sumter and Cherokee Counties; and must the Constitution of this State be amended to delete Section 5, Article XIV, which provides slum clearance and redevelopment power over blighted properties to municipalities and housing or redevelopment authorities in Spartanburg, York, Florence, Greenville, Charleston, Richland, and Laurens Counties?

For the full text of the bill, see South Carolina General Assembly [http://www.scstatehouse.net/sess116\\_2005-2006/bills/1031.htm](http://www.scstatehouse.net/sess116_2005-2006/bills/1031.htm) (last visited Sep. 29, 2006).

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1. 125 S. Ct. 2655, 35 ELR 20134 (2005).
2. See, e.g., Patricia E. Salkin, *Swift Legislative [Over]Reaction to Eminent Domain: Be Careful What You Wish For*, 20 PROP. & PROB. 44 (July/Aug. 2006).
3. Governors in Arizona, Iowa, and New Mexico vetoed legislation, but the Iowa Legislature overrode Gov. Tom Vilsack's veto.
4. H.R.J. Res. 1569, ch. 2006-11, 2006 Leg., 108th Reg. Sess. (Fla. 2006), available at [http://www.myfloridahouse.gov/Sections/Documents/loadoc.aspx?FileName=\\_h1569er.doc&DocumentType=Bill&BillNumber=1569&Session=2006](http://www.myfloridahouse.gov/Sections/Documents/loadoc.aspx?FileName=_h1569er.doc&DocumentType=Bill&BillNumber=1569&Session=2006). The bill proposed an amendment to the Florida Constitution to prohibit the transfer of private property taken by eminent domain to a natural person or private entity; providing that the Legislature may, by general law, passed by a three-fifths vote of the membership of each house of the legislature

right.<sup>7</sup> Task forces and study commissions were at work during the 2005 to 2006 legislative season, some appointed by governors and some established by legislation. Some of these task forces have already issued reports, and others are still at work.

This Article provides an overview of the state legislative activity post-*Kelo*<sup>8</sup> with a limited focus on those initiatives that have been signed into law, rather than the more voluminous proposals that failed to garner significant legislative support to date.

## II. Legislative Changes to Eminent Domain Laws 2005 to 2006

A review of the newly enacted laws can generally be organized into seven major categories<sup>9</sup>:

- Proposals that prohibit the use of eminent domain for economic development purposes, including for the purpose of generating tax revenue, and legislation that prohibits the transfer of private property to another public entity;
- Proposals that define the phrase “public use”<sup>10</sup>;
- Efforts to restrict the exercise of eminent domain to blighted properties, including defining or redefining what constitutes blight<sup>11</sup>;
- Laws to strengthen the procedural aspects of condemnation proceedings including the provision of greater public notice, more public hearings, requirements for good-faith negotiations with property owners and approval by elected legislative bodies of all proposed condemnations<sup>12</sup>;
- Efforts to define “just compensation” as something greater than fair market value particularly where the property to be condemned is a principal residence<sup>13</sup>;
- Enactment of moratoria on the use of eminent domain for economic development purposes; and

7. H.B. 318, ch. 84, 124th Leg., 1st Sess. (Ark. 2005); S.J. Res. E, 93d Leg., 2005 Reg. Sess. (Mich. 2005); S. Res. 8738, 59th Leg., 1st Reg. Sess. (Wash. 2005).

8. For information on legislative activity in Congress, see Salkin, *supra* note 2.

9. See National Conference of State Legislatures, *Eminent Domain: 2006 State Legislation*, (updated Aug. 7, 2006), <http://www.ncsl.org/programs/natres/emindomainleg06.htm> (last visited Aug. 31, 2006).

10. The phrase “public use” was at the core of the *Kelo* decision. The Fifth Amendment to the U.S. Constitution states in part, “nor shall private property be taken for public use without just compensation.” Whether economic development constitutes a valid “public use” or, a “public purpose” as the words have been interpreted to mean, continues to be the subject of public debate; while the Supreme Court determined that absent legislation otherwise, economic development purposes can satisfy the “public use” requirement.

11. In *Kelo*, the U.S. Supreme Court did not hold, as property rights advocates argued, that property must be found to be blighted before government could exercise its power of eminent domain.

12. Some of these issues were themes in the amicus curiae briefs submitted to the Supreme Court in the *Kelo* case.

13. Although a number of the amicus curiae briefs urged the Court to address the issue of just compensation, the Court declined to do so because the issue was not before it on appeal. Although the legislation that was enacted restricts additional compensation to situations involving primary residences, many other proposals that did not pass urged increased compensation whenever property was condemned for economic development.

- Establishment of legislative study commissions or task forces to study and report back to the legislature with findings and/or recommendations.

Even within each of these seven broad categories, states have enacted legislative initiatives designed to address unique issues and concerns of various interest groups in their respective jurisdictions. For example, states that are dependant upon agricultural production have passed new laws to add certain protections from the exercise of eminent domain involving farmland. In the area of just compensation, a number of new approaches are now offered, including increased compensation depending upon, in certain states, the underlying purpose of the condemnation, whether a house is involved in the condemnation, and how long the property has been in possession by the same family. Another policy area attracting legislative attention is the ability of landowners whose property has been condemned to repurchase it from the government at a later date if the government never used the land for the intended purpose when it was condemned. With roughly three dozen new laws on the books, lawmakers and advocates in other states already have a wide range of options to evaluate when considering appropriate reforms in this arena.

### *A. Prohibitions on the Use of Eminent Domain for Economic Development*

As a direct result of the *Kelo* decision,<sup>14</sup> a number of states have enacted laws that, while continuing to allow governments to exercise the power of eminent domain, prohibit governments from using it to accomplish economic development goals. This is not surprising since Justice John Paul Stevens practically invited legislation when he noted:

We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose “public use” requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. As the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate.<sup>15</sup>

And public debate is certainly what has been occurring in legislatures across the country ever since.

A new law in Florida provides, in part, “that the prevention or elimination of a ‘slum area’ or ‘blighted area’ . . . and the preservation or enhancement of the tax base are not pub-

14. In *Kelo*, Justice Stevens wrote:

[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.

*Kelo v. City of New London*, 125 S. Ct. 2655, 2668, 35 ELR 20134 (2005).

15. *Id.* (citations omitted).

lic uses or purposes for which private property may be taken by eminent domain.”<sup>16</sup> Where property is located in a community redevelopment area, and after a redevelopment plan is adopted, a parcel may only be condemned where the current condition of the property poses an existing threat to the public health or safety and the threat is likely to continue absent the exercise of eminent domain.<sup>17</sup> The Florida law now provides, in part, that where property is acquired by condemnation, it “may not be conveyed by the condemning authority or any other entity to a natural person or private entity,” except for use by a common carrier, for a road or other right-of-way, for public or private utilities, for public infrastructure, or where the use is incidental to the use as public property or facility for the purpose of providing goods or services to the public.<sup>18</sup>

In Idaho, recent changes to the state’s eminent domain law include a new section limiting eminent domain for private parties, urban renewal, or economic development purposes. The amended law specifically provides that eminent domain may not be used to acquire private property “for any alleged public use which is merely a pretext for the transfer of the condemned property or any interest in that property to a private party; or . . . for the purpose of promoting or effectuating economic development . . .” except where the property is dilapidated or poses a public health or safety risk.<sup>19</sup>

The Nebraska Legislature also adopted language prohibiting the use of eminent domain for economic development purposes. It defines “economic development purpose” as “taking property for subsequent use by a commercial for-profit enterprise or to increase tax revenue, tax base, employment, or general economic conditions.”<sup>20</sup> Exempted from this restriction are projects for rights-of-ways, aqueducts, pipelines, utilities, railroads, removal of uses that cause an immediate threat to public health and safety, the leasing of property to a private person where the use is incidental to the public property or public facility, acquisition of abandoned property, clearing defective title, or a finding of blight under the community development law.<sup>21</sup>

In Kentucky, a new law prohibits the “condemnation of private property for transfer to a private owner for the purpose of economic development that benefits the general public only indirectly, such as by increasing the tax base, tax revenues, employment, or by promoting the general economic health of the community.”<sup>22</sup> The law defines “public use” to include the ownership or possession of the property by a governmental entity; acquisition and transfer of property for purposes of eliminating blighted, slum, or substandard areas; and uses by public utilities or common carriers.<sup>23</sup>

In Kansas, effective July 1, 2007, condemnation for the purpose of “selling, leasing, or otherwise transferring such property to any private entity is prohibited . . .” unless the

property is needed by the state or a municipality for rights-of-way for public roads, bridges, or public improvement projects, which includes public buildings, parks, recreation facilities, water supply projects, wastewater and waste disposal projects, stormwater projects, and flood control and drainage projects.<sup>24</sup>

Similarly, the law in Alaska was amended to prohibit the use of eminent domain “to acquire private property from a private person for the purpose of transferring title to the property to another private person for economic development purposes.”<sup>25</sup> Furthermore, the law restricts the use of eminent domain for developing a recreational facility or project if the property to be acquired includes a personal residence or is within 250 linear feet of a personal residence.<sup>26</sup> However, the Alaska law does allow a municipality to exercise eminent domain and to transfer title to the property to a private person for economic development where:

(1) the municipality does not delegate the power of eminent domain to another person;

(2) before issuing notice in (3) of this subsection, the municipality makes a good faith effort to negotiate the purchase of the property;

(3) written notice is provided at least 90 days before the public hearing to each owner of land that may be affected by the exercise of eminent domain;

(4) the municipality holds a public hearing on the exercise of eminent domain after adequate public notice; [and]

(5) the governing body of the municipality approves the exercise of eminent domain by a two-thirds majority vote . . . .<sup>27</sup>

A new law in Tennessee provides that the “power of eminent domain shall be used sparingly and that laws permitting the use of eminent domain shall be narrowly construed so as not to enlarge by inference or inadvertently the power of eminent domain.”<sup>28</sup> The statute provides that the definition of public use “shall not include either private use or benefit or the indirect public benefits resulting from private economic development and private commercial enterprise, including increased tax revenue and increased employment opportunity,” except where an acquisition is needed by a public or private utility or common carrier, a housing authority or community development agency specifically to remove blight, where the private use is “merely incidental to a public use, so long as no land use condemned or taken solely for the purpose of conveying or permitting such incidental private use,” or where the acquisition is by a municipality for an industrial park.<sup>29</sup> Similarly, a new Pennsylvania law prohibits

16. H.B. 1567, ch. 2006-11, 2006 Leg., 108th Reg. Sess. (Fla. 2006).

17. *Id.*

18. *Id.*

19. H.B. 555, ch. 96, 59th Leg., 1st Reg. Sess. (Idaho 2006).

20. Legis. B. 924, 99th Leg., 1st Reg. Sess. (Neb. 2005) (signed Apr. 14, 2006).

21. *Id.*

22. H.B. 508, ch. 73, 2006 Leg., Reg. Sess. (Ky. 2006). Similar to new laws in other states, the statute exempts situations where the private entity occupies an incidental area within a public project or building, so long as this was not the primary purpose for the condemnation.

23. *Id.*

24. S.B. 323, 81st Leg., 2005 Reg. Sess. (Kan. 2005) (signed May 18, 2006).

25. H.B. 318, ch. 84, 24th Leg., 1st Sess. (Alaska 2005). A number of exceptions to the prohibition are included in the law, including, among other things: where the landowner consents to the use of the property for a private commercial enterprise or other economic development; where the transfer is used for a private way of necessity to permit essential extraction or use of resources; where the property is transferred to a common carrier; or where the property is transferred to a person by an oil and gas lease.

26. *Id.*

27. *Id.*

28. S.B. 3296, ch. 863, 104th Gen. Assem., 2005 Sess. (Tenn. 2005).

29. *Id.* With respect to industrial parks, and with very limited exception, the new law requires municipalities to obtain a certificate of public purpose and necessity, even where no funds will be borrowed.

eminent domain for private enterprises unless it occupies an incidental area within the public project, “such as retail space, office space, restaurant and food service facility or similar incidental area.”<sup>30</sup>

In Vermont, the statutes were amended to prohibit the use of eminent domain where the taking “confers a private benefit on a particular private party; or is primarily for the purposes of economic development. . . .”<sup>31</sup> In West Virginia, eminent domain may not be used to condemn property for “[p]rivate retail, office, commercial, industrial or residential development, or for enhancement of tax revenue.” Nor may the state “purchase property for a purpose that results in a transfer in fee of the property to a person, nongovernmental entity, corporation or other business entity to fulfill the purpose of the use of the eminent domain.”<sup>32</sup> The new South Dakota law prohibits the acquisition of property by use of eminent domain “for transfer to any private person, nongovernmental entity, or other public-private business entity”; or for the primary purpose of enhancing tax revenue.<sup>33</sup> A similar provision was enacted in Colorado.<sup>34</sup>

Under a new law in Missouri, private property may not be acquired through the process of eminent domain solely for economic development purposes.<sup>35</sup> The law restricts the use of eminent domain to governmental bodies or agencies whose governing body is elected or appointed by elected officials or for urban redevelopment corporations operating pursuant to an agreement with a municipality.<sup>36</sup> Private utilities and common carriers are exempted from this restriction.<sup>37</sup> And in Maine, eminent domain may not be used to condemn agricultural, fishing, or forest land or land improved with homes or buildings “[f]or the purposes of private retail, office, commercial, industrial or residential development; . . . for the enhancement of tax revenue; or . . . [f]or transfer to an individual or a for-profit entity.”<sup>38</sup>

These states that have voluntarily restricted themselves and other governmental entities in their jurisdictions from exercising eminent domain for economic purposes may find that while they “won” short-term public approval following the media frenzy about the *Kelo* decision, these states may experience longer-term difficulties competing for economic development projects in neighboring states. Furthermore, a

number of the definitions offered for economic development are so detailed that it is possible that courts will interpret them to be so broad-sweeping to effectively eliminate the exercise of eminent domain for purposes perhaps not contemplated by the new laws. For example, where property is condemned to widen roads and/or install sidewalks adjacent to business or retail areas, it is possible that displeased property owners could argue an underlying economic development benefit or purpose motivated such action. While this is likely not the intended result of these new laws, it may be the future effect.

### B. Definitions of Public Use

A new Georgia law provides that “public use” includes land that is owned, occupied, or used by the general public or by the state or a local government entity; is needed for the creation or functioning of public utilities; is necessary for roads for trade or travel; is needed to clear clouded title; is needed to clear blight; or where the acquisition is based upon unanimous consent of all persons with a legal claim.<sup>39</sup> The newly enacted law also provides that “[t]he public benefit of economic development shall not constitute a public use.”<sup>40</sup>

A newly enacted New Hampshire law defines “public use” as:

- (a)(1) The possession, occupation, and enjoyment of real property by the general public or governmental entities;
- (2) The acquisition of any interest in real property necessary to the function of a public or private utility or common carrier either through deed of sale or lease;
- (3) The acquisition of real property to remove “blight” . . . ;
- (4) Private use that is incidental to public use. . . .<sup>41</sup>

As in Georgia, the New Hampshire law specifically does not include “the public benefits resulting from private economic development and private commercial enterprise, including increased tax revenues and increased employment opportunities” as a “public use.”<sup>42</sup> A new Indiana law contains similar language.<sup>43</sup>

The term “public use” is defined now in Indiana law to mean the:

- (1) possession, occupation, and enjoyment of a parcel of real property by the general public or a public agency for the purpose of providing the general public with fundamental services, including the construction, maintenance, and reconstruction of highways, bridges, airports, ports, certified technology parks, intermodal facilities, and parks;
- (2) leasing of highway, bridge, airport, port certified technology park, intermodal facility, or park by a public agency that retains ownership of the parcel by written lease with right of forfeiture; or

30. S.B. 881, Act 35, 189th Gen. Assem., 2005-2006 Reg. Sess. (Pa. 2005).

31. S.B. 246, Act 111, 2005 Leg., 68th Biennial Sess. (Vt. 2005). However, the new law specifically exempts the exercise of eminent domain for the purposes of “constructing, maintaining or operating: transportation projects, including highways, airports, and railroads; public utilities. . . public property, buildings or hospitals, and parks; or waste, wastewater, flood control, drainage, or waste disposal projects.” *Id.*

32. H.B. 4048, ch. 96, 80th Leg., Reg. Sess. (W. Va. 2006).

33. H.B. 1080, 81st Leg. Assem., 2006 Reg. Sess. (S.D. 2006) (signed by the governor February 2006).

34. H.B. 1411, 2006 Leg., Reg. Sess. (Colo. 2006). (Signed by the Governor June 6, 2006.) For commentary on the legislation, see Citizens Fighting Eminent Domain Abuse, *Colorado Enacts Eminent Domain Reform: Property Owners Provided With Increased Protection From Abuse*, [http://castlecoalition.org/media/releases/6\\_7\\_06pr-b.html](http://castlecoalition.org/media/releases/6_7_06pr-b.html) (last visited Sept. 1, 2006).

35. H.B. 1944, 93th Gen. Assem., 2d Reg. Sess. (Mo. 2006) (approved by the governor July 13, 2006).

36. *Id.*

37. *Id.*

38. Legis. Doc. 1870, ch. 579, 122d Leg., 2d Reg. Sess. (Me. 2006).

39. H.R. Res. 1313, Act 444, 148th Gen. Assem., 2005-2006 Reg. Sess. (Ga. 2005).

40. *Id.*

41. S.B. 287, ch. 324 of the Laws of 2006, 2005 Gen. Ct., 159th Sess. (N.H. 2005).

42. *Id.*

43. H.B. 1010, Pub. L. No. 163 of 2006, 115th Gen. Assem., 1st Reg. Sess. (Ind. 2006). The law provides that public use “does not include the public benefit of economic development, including an increase in a tax base, tax revenues, employment or general economic health.”

(3) use of a parcel of real property to create or operate a public utility, an energy utility . . . or a pipeline company.<sup>44</sup>

In Minnesota, a new law provides that the public benefits of economic development do not “by themselves” constitute a public use or public purpose,<sup>45</sup> leaving the door open that condemnation would not be outright prohibited if other public benefits in addition to economic prosperity result from a project.

### C. Factoring in Blight

The controversial issue of whether a finding of blight is required prior to exercising eminent domain for redevelopment projects, absent a statutory mandate, was also resolved in *Kelo*, with Justice Stevens noting that blight was not a consideration in New London and that regardless, the city’s determination that the area was sufficiently distressed to justify the condemnations was entitled to judicial deference.<sup>46</sup> Since then, public debate has centered on whether it is reasonable for governments to condemn entire parcels of property for any, or certain types of projects, absent a finding of blight. It also follows that absent a clear definition of “blight,” what seems blighted to one person may be perfectly acceptable to another.

In Alabama, a new law prohibits the use of eminent domain to take non-blighted properties in a redevelopment project unless the property owner consents.<sup>47</sup> The law adds a detailed definition of “blighted property,” which includes:

(1) The presence of structures, buildings, or improvements, which, because of dilapidation, deterioration, or unsanitary or unsafe conditions, vacancy or abandonment, neglect or lack of maintenance, inadequate provision for ventilation, light, air, sanitation, vermin infestation, or lack of necessary facilities and equipment, are unfit for human habitation or occupancy.

(2) The existence of high density of population and overcrowding or the existence of structures which are fire hazards or are otherwise dangerous to the safety of persons or property or any combination of the factors.

(3) The presence of a substantial number of properties having defective or unusual conditions of title which make the free transfer or alienation of the properties unlikely or impossible.

(4) The presence of structures from which the utilities, plumbing, heating, sewerage, or other facilities have been disconnected, destroyed, removed, or rendered ineffective so that the property is unfit for its intended use.

(5) The presence of excessive vacant land on which structures were previously located which, by reason of neglect or lack of maintenance, has become overgrown with noxious weeds, is a place for accumulation of trash and debris, or a haven for mosquitoes, rodents, or other vermin where the owner refuses to remedy the problem after notice by the appropriate governing body.

(6) The presence of property which, because of physical condition, use, or occupancy, constitutes a public nuisance or attractive nuisance where the owner refuses to remedy the problem after notice by the appropriate governing body.

(7) The presence of property with code violations affecting health or safety that has not been substantially rehabilitated within the time periods required by the applicable codes.

(8) The presence of property that has tax delinquencies exceeding the value of the property.

(9) The presence of property which, by reason of environmental contamination, poses a threat to public health or safety in its present condition.<sup>48</sup>

Blight is defined in a recently enacted New Hampshire law as “structures beyond repair, public nuisances, structures unfit for human habitation or use, and abandoned property.”<sup>49</sup> In Minnesota, a “blighted area” is one that is zoned for and used for urban use and where more than 50% of its buildings are dilapidated.<sup>50</sup>

In Georgia, a new law requires that blighted property must contain two or more of the following conditions: uninhabitable, unsafe, or abandoned structures; property that has inadequate ventilation, light, air, or sanitation; property that causes imminent harm to life or other property caused by natural disaster (where the governor has declared a state of emergency); Superfund sites; the occurrence of repeated illegal activity on the site; or property that is maintained below code standards for more than one year after the owner was given notice of the violations.<sup>51</sup>

A new law in Florida takes a somewhat different approach, providing that a parcel of real property may be condemned only where “the current condition of the property poses an existing threat to public health or public safety and the existing threat to public health or public safety is likely to continue absent the exercise of eminent domain.”<sup>52</sup> In Idaho, instead of the term “blight,” the law refers to deteriorated or deteriorating properties in competitively disadvantaged areas. A property will be deemed as such if:

1. The property, due to general dilapidation, compromised structural integrity, or failed mechanical systems, endangers life or endangers property by fire or by other perils that pose an actual identifiable threat to building occupants; and

2. The property contains specifically identifiable conditions that pose an actual risk to human health, transmission of disease, juvenile delinquency or criminal content; and

3. The property presents an actual risk of harm to the public health, safety, morals or general welfare.<sup>53</sup>

Similarly, the new law in Indiana does not use the term “blight.” Instead, it limits the ability of governments to exercise eminent domain powers unless the parcel is a public nuisance; unfit for human habitation; is structurally unfit or unsound for its intended use; is located in a substantially developed neighborhood and is vacant or unimproved or presents problems due to neglect or lack of maintenance; is subject to tax delinquencies; contains environmental contami-

44. *Id.*

45. S. File 2750, ch. 214 of the Laws of 2006, 2005 Leg., 84th Reg. Sess. (Minn. 2005).

46. *Kelo v. City of New London*, 125 S. Ct. 2655, 35 ELR 20134 (2005).

47. H.B. 654, Act 2006-584, 2006 Leg., Reg. Sess. (Ala. 2006).

48. *Id.*

49. S.B. 287, ch. 324, 2005 Gen. Ct., 159th Sess. (N.H. 2005).

50. S. File 2750, ch. 214 of the Laws of 2006, 2005 Leg., 84th Reg. Sess. (Minn. 2005). The law also contains a definition of “dilapidated building” which requires an inspection where building code violations have been cited and not remedied and where the building is unsafe or structurally unsound.

51. H.R. Res. 1313, Act 444, 148th Gen. Assem., 2005-2006 Reg. Sess., (Ga. 2005).

52. H.B. 1567, ch. 2006-11, 2006 Leg., 108th Reg. Sess. (Fla. 2006).

53. H.B. 555, ch. 96, 59th Leg., 1st Reg. Sess. (Idaho 2006).

nation; or has been abandoned.<sup>54</sup> In addition, the condemnation must do more than just increase the property tax base of the governing entity.<sup>55</sup>

A new law in Pennsylvania offers detailed definitions of blighted property for single units and multiple units of property, focusing on characteristics that are typically detrimental to public health, safety, and welfare, such as public nuisances; attractive nuisances; vacant, abandoned, and tax delinquent properties; and properties in violation of building codes.<sup>56</sup>

A Wisconsin initiative added the following definition of “blighted property” to its statute:

[A]ny property that, by reason of abandonment, dilapidation, deterioration, age or obsolescence, inadequate provisions for ventilation, light, air, or sanitation, high density of population and overcrowding, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, or the existence of conditions that endanger life or property by fire or other causes, or any combination of such factors, is detrimental to the public health, safety, or welfare. Property that consists of only one dwelling unit is not blighted property unless, in addition, at least one of the following applies:

1. The property is not occupied by the owner of the property, his or her spouse, or an individual related to the owner by blood, marriage, or adoption within the 4th degree of kinship . . .
2. The crime rate in, on, or adjacent to the property is at least 3 times the crime rate in the remainder of the municipality in which the property is located.<sup>57</sup>

In addition, as state legislatures began to examine the issue of blight, the agricultural lobby expressed concerns and fears that older farm buildings and structures could be considered blighted, providing an opening for governments to condemn agricultural lands that might be put to a higher economic use. As a result, a number of initiatives contain language that specifically exempt certain agricultural lands from the definition of blight. For example, Idaho revised its definition of deteriorated or deteriorating area, described above, to ensure that an agricultural operation will not be deemed as such. The state law also provides that a viable agricultural operational will not be taken by eminent domain unless the operation has not been in use for three consecutive years.<sup>58</sup> Similarly, the new Tennessee law provides that “under no circumstances shall land used predominantly in the production of agriculture . . . be considered a blighted area.”<sup>59</sup> Nebraska law contains a similar caveat,<sup>60</sup> as does Missouri’s.<sup>61</sup>

54. H.B. 1010, Pub. L. No. 163 of 2006, 115th Gen. Assem., 1st Reg. Sess. (Ind. 2006).

55. *Id.*

56. S.B. 881, Act 35, 189th Gen. Assem., 2005-2006 Reg. Sess. (Pa. 2005).

57. Assemb. B. 657, 2005 Wisc. Act 233, 2005 Leg., Reg. Sess. (Wisc. 2005).

58. H.B. 735, ch. 310 of the Laws of 2006, 59th Leg., 1st Reg. Sess (Idaho 2006).

59. S.B. 3296, ch. 863, 104th Gen. Assem., 2005 Sess. (Tenn. 2005).

60. Legis. B. 924, 99th Leg., 1st Reg. Sess. (Neb. 2005). The law allows for a taking of property based upon a finding of blight or substandard conditions, “if the private property is not agricultural land or horticultural land.”

#### *D. Other Restrictions on the Use of Eminent Domain*

A number of restrictions or limitations on the exercise of eminent domain have also been the subject of legislative change. These range from temporary measures, such as moratoria, to prohibitions on the ability of private interests to pressure governments to use their powers to condemn property for the purpose of transferring title or a lease interest to the private entity.

##### 1. Moratorium on the Use of Eminent Domain

In California, a moratorium has been enacted until January 1, 2008, to prohibit the exercise of eminent domain to acquire owner-occupied residential real property where the owner would be displaced if the ownership is transferred to a private party or entity.<sup>62</sup> A moratorium was also enacted in Ohio preventing the state and its political subdivisions from using eminent domain powers to take, “without the owner’s consent, private property that is in an unblighted area when the primary purpose for the taking is economic development that will ultimately result in ownership of the property being vested in another private person . . .” until December 31, 2006.<sup>63</sup> During both the moratoria periods in California and Ohio, legislative study commissions are examining myriad eminent domain issues.

##### 2. No Pass-Through

“Pass-through” refers to governments that use their eminent domain powers to obtain property and then sell it to a private entity. To curtail this phenomenon, the Montana legislature attempted to pass a law that would have required a municipality to wait 10 years before it could sell or provide property that it obtained through eminent domain to a private entity.<sup>64</sup>

##### 3. Notice to Property Owners

In Wisconsin, prior to commencing an authorized condemnation where the condemnor intends to convey or lease the property to a private entity, written findings that require the following must be made and presented to the owner of the property:

1. The scope of the redevelopment project encompassing the owner’s property.
2. A legal description of the redevelopment area that includes the owner’s property.
3. The purpose of the condemnation.
4. A finding that the owner’s property is blighted and the reasons for that finding.<sup>65</sup>

Before condemnation may take place within a redevelopment area, Florida law requires 30-day advance notice of a

61. H.B. 1944, 93th Gen. Assem., 2d Reg. Sess. (Mo. 2006) (approved by the governor July 13, 2006). The law provides: “No condemning authority shall declare farmland blighted for the purposes of exercising eminent domain.”

62. S.B. 1026, ch. 1 of 2006, 2005-2006 Leg., Reg. Sess. (Cal. 2005).

63. S.B. 167, 126th Gen. Assem., 2005-2006 Reg. Sess. (Ohio 2005) (signed 2005).

64. S.B. 382, 2005 Leg., 59th Reg. Sess. (Mont. 2005). This bill died in committee.

65. Assemb. B. 657, 2005 Wisc. Act 233, 2005 Leg., Reg. Sess. (Wisc. 2005).

public hearing, via first class mail, to each real property owner whose property may be included in the condemned area, including business owners and lessees who operate businesses in the proposed redevelopment area.<sup>66</sup> The law also lays out the content of the notice, including the fact that private-to-private transfers may occur; a geographic location map of the area; dates, times, and locations of public hearings where the resolution of a finding of blight may be considered; how parties may receive more information; and how parties may appear at the hearings.<sup>67</sup>

For condemnations in redevelopment areas, the new Missouri law requires the proper and timely notice to all displaced persons and raises the dollar thresholds for relocation payments for both individuals and for businesses.<sup>68</sup> In addition, the law requires the written notice to include: an identification of the property; the purpose for which is it being condemned; and a statement that the property owner has a right to seek legal counsel, engage in negotiations, have “just compensation determined preliminarily by court-appointed condemnation commissioners and, ultimately, by a jury,” contest the condemnation, and “[e]xercise the rights to request vacation of an easement under the procedures and circumstances provided for. . . .”<sup>69</sup> The law also creates an office of ombudsman for property rights to assist citizens, and property owners must be notified that they may seek their assistance.<sup>70</sup>

Utah’s eminent domain statute was amended to provide that prior to the exercise of eminent domain by a municipality, the legislative body must approve the taking.<sup>71</sup> Furthermore, prior to taking a final vote by the legislative body, each owner of property subject to condemnation must be given written notice of the public meeting of the legislative body at which a vote on the proposed taking is expected to occur, and the legislative body must allow the property owner an opportunity to be heard.<sup>72</sup>

In Oregon, the condemner must make an initial written offer to the owner of the property at least 40 days before the filing of any action. This offer must also contain a written appraisal that can only be altered if there was a mistake in material fact.<sup>73</sup>

#### 4. Return of Property to Owners at Time of Condemnation

In West Virginia, if the condemning party does not use condemned property for the purposes for which it was condemned or for some other public use within 10 years, the property must be offered for resale to the person from whom it was condemned at the price that was originally paid at the time of the condemnation.<sup>74</sup>

The Georgia law provides that condemnations shall not be converted to a use other than a public use for a period of 20 years from the initial condemnation, and where the condemned property is not put to public use within five years, the former property owner may seek a reconveyance of the property, a quitclaim of the property, or additional compensation.<sup>75</sup>

Similarly, the Iowa law provides that if the condemning agency seeks to dispose of real property within five years of its acquisition, it must first offer the property for sale to the prior owner at the current fair market value or at the fair market value of the property at the time it was acquired plus any incurred cleanup costs, whichever is less.<sup>76</sup> The prior owner then has 180 days to purchase back the property.<sup>77</sup> And while there is no reverter clause in the new Florida law, the law prohibits a condemning entity or other governmental entity from conveying the condemned property to a natural person or private entity for at least five years after acquiring title to the property.<sup>78</sup>

#### E. Compensation

Exactly what constitutes “just compensation” under the Fifth Amendment of the U.S. Constitution is another hot-button issue under active debate and study. While a number of amicus curiae briefs to the Supreme Court in the *Kelo* case asked the Court to address this issue, the Court understandably chose not to do so since this issue was not clearly before the Court.<sup>79</sup> State legislatures have not been shy about venturing into the compensation debate; however, caution is appropriate as some of the new laws may not withstand future constitutional challenge as they may be seen as violating gifting prohibitions in state constitutions.

The new Tennessee law provides that governmental entities who seek to dispose of, sell, lease, or otherwise transfer condemned property to another public or quasi-public entity or to a private person, corporation, or other person must receive “at least fair market value for such land.”<sup>80</sup> The Kansas law provides that, “[i]f the legislature authorizes eminent domain for private economic development purposes, the legislature shall consider requiring compensation of at least 200% of fair market value to property owners.”<sup>81</sup> A new Minnesota law requires that owners of a business or trade must be compensated for the loss of a going concern where the business or trade has been destroyed as a result of the condemnation, the loss cannot be reasonably prevented by relocating or taking other similar steps to minimize such costs, and where the compensation for the loss of going con-

66. H.B. 1567, ch. 2006-11, 2006 Leg., 108th Reg. Sess. (Fla. 2006).

67. *Id.* In addition, the law provides that the public hearings must be generally advertised at least twice, that at least one hearing must be held after 5 P.M. on a weekday (unless changed by a supermajority vote of the governing body), the minimum size of the type is also prescribed for the public notice.

68. H.B. 1944, 93th Gen. Assem., 2d Reg. Sess. (Mo. 2006).

69. *Id.*

70. *Id.*

71. S.B. 117, 57th Leg., 2006 Gen. Sess. (Utah 2006).

72. *Id.*

73. H.B. 2268, ch. 433, 73d Leg. Assem., 2005 Sess. (Or. 2005).

74. H.B. 4048, ch. 96, 80th Leg., Reg. Sess. (W. Va. 2006). The law further provides that the right of repurchase shall expire in 90 days following receipt of notice of the right to repurchase.

75. H.R. Res. 1313, Act 444, 148th Gen. Assem., 2005 to 2006 Reg. Sess., (Ga. 2005). The law contains a detailed process to effectuate a reconveyance.

76. H. File 2351, 81st Gen. Assem., 1st Sess. (Iowa 2005). For the full text of the bill, see <http://www.legis.state.ia.us/asp/Cool-ICE/Enrolled.htm> (last visited Sept. 1, 2006).

77. *Id.*

78. H.B. 1567, ch. 2006-11, 2006 Leg., 108th Reg. Sess. (Fla. 2006).

79. See Patricia E. Salkin et al., *The Friends of the Court: The Role of Amicus Curiae in Kelo v. City of New London*, in DWIGHT H. MERRIAM AND MARY MASSARON ROSS, *EMINENT DOMAIN USE AND ABUSE: Kelo IN CONTEXT* 165 (ABA Press 2006).

80. S.B. 3296, ch. 863, 104th Gen. Assem., 2005 Sess. (Tenn. 2005).

81. S.B. 323, 81st Leg., 2005 Reg. Sess. (Kan. 2005) (signed May 18, 2006).

cern is not duplicated in the compensation otherwise awarded to the owner.<sup>82</sup>

In Indiana, the new law provides that where agricultural land is condemned, the owner is entitled to either 125% of fair market value or, upon the request of the owner and where the owner and the condemnor agree, a transfer of an ownership interest in agricultural land that is equal in acreage to the condemned parcel.<sup>83</sup> In addition, the owner is entitled to payment for any other damages or losses incurred in trade or business attributable to the condemnation and for any relocation costs.<sup>84</sup> Where the property to be condemned is a residence, the Indiana law provides that compensation is to be 150% of the fair market value, plus any additional damages and losses incurred attributable to the condemnation and any relocation costs.<sup>85</sup>

A newly enacted law in Missouri offers three alternative methods for computing just compensation. The method yielding the highest compensation, as applicable to the particular type of property, is the one that should be used.<sup>86</sup> The options are: (1) fair market value; (2) where a homestead is to be condemned, an amount equal to 125% of fair market value; and (3) where the condemnation involves property that has been in the same family for 50 or more years, fair market value plus heritage value, which is defined as 50% of fair market value.<sup>87</sup> Where the property owner is dissatisfied with an award determination made by appointed commissioners, the owner is entitled to a jury trial.<sup>88</sup>

In Iowa, offers of compensation must be at least for fair market value, and the acquiring agency is authorized to offer an amount equal to 130% of a fair market value appraisal plus expenses.<sup>89</sup> But once an owner has accepted an offer for 130% of fair market value, they are barred from claiming payment for other expenses.

The Georgia law authorizes the appointment of a special master to determine issues of compensation. Where the property owner is still dissatisfied with the condemnation award, they will have a right to a jury trial.<sup>90</sup> An Indiana law requires, among other things, good-faith negotiations with the property owner, including providing the property owner with an appraisal or other evidence used to establish the proposed purchase price.<sup>91</sup> The Missouri law also requires good-faith negotiations and contains a statutory description of what constitutes "good-faith negotiations."<sup>92</sup>

#### F. Other Procedural Safeguards

Several state laws provide property owners with additional procedural safeguards during the condemnation proceedings. In Minnesota, for example, appraisals must be made available to the property owner at least five days before the hearing, and prior to the commencement of an eminent domain proceeding, the local government must hold a public hearing upon written notice to each property owner whose property may be taken.<sup>93</sup> In addition, public notice must be made at least 30 but no more than 60 days in advance, and interested persons must be allowed "reasonable time to present relevant testimony" at the hearing.<sup>94</sup> Following the public hearing, and after at least 30 days, the local government is required to vote on whether to authorize the local government or agency to use eminent domain to acquire the property.<sup>95</sup> Where a court determines that the condemnation was not for a public purpose or was unlawful, the court must award the property owner reasonable attorney fees and other related expenses.<sup>96</sup> Attorneys fees are also available under the Missouri law<sup>97</sup> as well as under the new Indiana law.<sup>98</sup>

In Indiana, a mediation process has been put into effect requiring the court to appoint a mediator within 10 days of a property owner's mediation request.<sup>99</sup> The mediation must explore reasonable alternatives to the exercise of eminent domain, must take place within 90 days of the appointment of the mediator, and the condemnor is responsible for paying the costs of the mediator.<sup>100</sup> In addition, the Indiana law contains provisions for settlement offers and, where there is a trial, the condemnor must pay for the owner's litigation expenses, including reasonable attorneys fees, up to 25% of the cost of the acquisition.<sup>101</sup>

The Florida Legislature has left it to the circuit courts to determine whether the public purpose of the condemnation is valid, i.e., whether an existing threat to public health or safety is likely to continue absent the use of eminent domain, and whether such condemnation is necessary to eliminate it.<sup>102</sup> In addition, the court must make this determination without attaching the typical deference afforded to decisions of legislative bodies.<sup>103</sup>

82. S. File 2750, ch. 214 of the Laws of 2006, 2005 Leg., 84th Reg. Sess. (Minn. 2005). The law also provides a procedure for when such compensation is sought.

83. H.B. 1010, Pub. L. No. 163 of 2006, 115th Gen. Assem., 1st Reg. Sess. (Ind. 2006).

84. *Id.*

85. *Id.*

86. H.B. 1944, 93th Gen. Assem., 2d Reg. Sess. (Mo. 2006) (approved by the governor July 17, 2006).

87. *Id.*

88. *Id.*

89. H. File 2351, 81st Gen. Assem., 1st Sess. (Iowa 2005). For full text of the bill, see The Iowa Legislature General Assembly, *2006 Enrolled Bills*, <http://www.legis.state.ia.us/asp/Cool-ICE/Enrolled.htm> (last visited Sept. 1, 2006).

90. H.R. Res. 1313, Act 444, 148th Gen. Assem., 2005-2006 Reg. Sess., (Ga. 2005).

91. H.B. 1010, Pub. L. No. 163 of 2006, 115th Gen. Assem., 1st Reg. Sess. (Ind. 2006).

92. H.B. 1944, 93th Gen. Assem., 2d Reg. Sess. (Mo. 2006) (approved by Governor Matt Blunt July 13, 2006). Under the new law, the fol-

lowing is evidence of good-faith negotiations under the law where the condemning authority: (1) all required notices were properly and timely given; (2) offer was no lower than the amount reflected in an appraisal by a state-licensed or certified appraiser; (3) the owner had an opportunity to secure their own appraisal for a licensed or certified appraiser of their choice; and (4) where applicable, the condemnor considered an alternate location suggested by the owner.

93. S. File 2750, ch. 214 of the Laws of 2006, 2005 Leg., 84th Reg. Sess. (Minn. 2005).

94. *Id.*

95. *Id.*

96. *Id.*

97. H.B. 1944, 93th Gen. Assem., 2d Reg. Sess. (Mo. 2006).

98. H.B. 1010, Pub. L. No. 163 of 2006, 115th Gen. Assem., 1st Reg. Sess. (Ind. 2006).

99. *Id.*

100. *Id.*

101. *Id.*

102. H.B. 1567, ch. 2006-11, 2006 Leg., 108th Reg. Sess. (Fla. 2006).

103. *Id.*

### G. Study Commissions/Task Forces

A number of states have opted to create study commissions or task forces to examine more closely the types of eminent domain reforms that may be appropriate in their jurisdiction. Perhaps the New York State Bar Association's Task Force on Eminent Domain best articulated the need for reasoned study when, upon evaluating the various legislative proposals in New York (of which there were close to 20), the Task Force realized that little state-specific research and data exists to accurately assess both the need for, and impact of, many of the proposed reforms.<sup>104</sup> The Task Force urged, among other things, that the state legislature begin the collection and analysis of this data before deciding on appropriate substantive modifications to the law. What follows is a list of questions that the Task Force suggested should be answered through empirical research:

- How is eminent domain used in the State?
- How many times each month or each year is a condemnation proceeding instituted?
- How many times is eminent domain used for roads, highways, bridges, sidewalks, schools, government buildings and sewers (among other things)?
- How many times does the use of eminent domain result in the loss of a home?
- How many times does the use of eminent domain result in the loss of a business?
- How many times is eminent domain used for economic development?
- Of the number of times eminent domain is used for economic development in New York, what are the results of the proposed projects? Are they successful? How is success to be benchmarked?
- Is the use of eminent domain more prevalent in upstate or downstate? Is it used more often in urban, suburban or rural areas?
- How often is eminent domain used in New York by the federal government, the state government, local governments, other public benefit corporations? Is it used by agencies with land use and planning oversight or agencies whose portfolio is only economic development?
- Has the use of [e]minent [d]omain increased dramatically, as is implied by some? If so, what is responsible for that increase?
- How often do we use public-private partnerships to effectuate eminent domain for redevelopment projects in New York?
- To what extent are the so-labeled "private" transfers for matters such as industrial development that are essentially public/private partnerships?
- How many times is eminent domain not needed because there were willing sellers to enable projects to be completed?
- What efforts are made by government and developers to reach private agreements with property owners?
- Are there financial differences between property owners who settle quickly and those who do not?
- How many times are condemnations challenged based on the final compensation offer? What is the outcome of these court cases? How many times does a court award increased compensation to property owners?
- What compensation is being paid, and how does that compensation relate to market value, to costs such as re-

location costs, and to subjective values, such as the nature of the planned projects?

- How many instances of abuse exist in New York State over a defined period of time (and how should "abuse" be defined)?
- Is there any information about redevelopment projects that involved the use of eminent domain and those that did not to determine whether they were equally successful? What have been the social costs and benefits of such efforts?<sup>105</sup>

While not a legislative task force, the Task Force also recommended the following:

- The use of eminent domain should not be restricted to specified public projects.
- Local governments should not have a veto over exercises of eminent domain by public authorities of larger entities within their borders.
- Agencies exercising eminent domain for economic development purposes should be required to prepare a comprehensive economic development plan and a property owner impact assessment.
- The present 30-day statute of limitations in [Eminent Domain Procedure Law (EDPL)] §207 for judicial review of the condemnor's determination and findings should be expanded.
- A new public hearing under EDPL §201 should be required where there has been substantial change in the scope of a proposed economic development project involving the exercise of eminent domain.
- No exceptions to the EDPL are necessary for acquiring property for public utility purposes.
- Acquisitions should not be exempted from the EDPL's eminent domain procedures simply because other statutes provide for land-use review.
- A Temporary State Commission on Eminent Domain should be established.<sup>106</sup>

The California Legislature directed the California Law Revision Commission to study the appraisal and valuation process in eminent domain proceedings with respect to fairness of compensation and the role of legal counsel for the condemnee and to report its findings to the legislature, including recommendations for change, by January 1, 2008.<sup>107</sup> In addition, on or before January 1, 2007, the California Research Bureau must submit a report to the legislature that includes, but is not limited to the following:

- (1) All exercises of the power of eminent domain by public entities to acquire residential property for private use completed between January 1, 1998, and January 1, 2003, or later if the information is available. This information shall be separable according to whether residential property is owner-occupied or not owner occupied.
- (2) The declared purposes for each of those acquisitions.
- (3) The initial offer of just compensation for each of those acquisitions.
- (4) The final offer of just compensation for each of those acquisitions.
- (5) The total compensation paid for each of those acquisitions, including the acquisition price and relocation payments.
- (6) The current owners of those real properties.
- (7) The current uses of those real properties.<sup>108</sup>

104. NEW YORK STATE BAR ASSOCIATION, SPECIAL TASK FORCE ON EMINENT DOMAIN, REPORT 35 (March 2006), available at [http://www.nysba.org/Content/ContentGroups/Reports3/Task\\_Force\\_on\\_Eminent\\_Domain/EDTaskForcerevised.pdf](http://www.nysba.org/Content/ContentGroups/Reports3/Task_Force_on_Eminent_Domain/EDTaskForcerevised.pdf).

105. *Id.*

106. *Id.*

107. S.B. 1026, ch. 1 of 2006, 2005-2006 Leg., Reg. Sess. (Cal. 2005).

108. *Id.*

In New Hampshire, a Special House Committee to Study Eminent Domain Issues recommended, among other things, that a Joint Legislative Committee be created to study in depth:

- What guidelines must a taking authority follow before a taking is appropriate?
- Should a public hearing be required in all instances of a contemplated eminent domain taking? If so, where in the statutes should a hearing requirement be codified?
- What should the criteria be to establish the proper balance between the probable benefit of an economic development project to a community through the eminent domain process, and the probable harm to the concept of the sanctity of private property?
- Do state statutes relating to eminent domain need to be consolidated [ . . . ]?
- Should we consider the award of enhanced compensation; that is, payment in excess of fair market value, for property taken by eminent domain?
- Should the terms “public good” and “incidental benefit to the public,” which have increasingly appeared in feasibility studies and court decisions in which the exercise of the power of eminent domain has been considered, be precisely defined by statute?
- Should the term “blighted,” and derivative and related terms, be explicitly defined by statute in the context of eminent domain when dealing with so-called “urban renewal” and “redevelopment” projects?
- Should the proposed [language of §498-A:2 of the Revised Statutes Annotated,] “*the acquisition of land to cure a concrete harmful effect of its present use, including the removal of public nuisances or structures that are beyond repair or that are unfit for human habitation or use; or the acquisition of abandoned property,*” be included when defining “blight?” should, and if so, how should appraisals and other similar measures be used to determine “blight?”
- Should land taken by eminent domain always be offered for resale first to the owner from whom it was taken, if the purpose for the taking is not fulfilled within a set timeframe? [ . . . ]
- Should attorney’s fees be awarded to property owners who either successfully challenge an eminent domain taking, or who secure a damages award higher than the initial offer made by the taking authority?
- Should a permanent legislative commission be established whose sole purpose and function would be to review and make recommendations to the full [U.S.] Senate and [U.S.] House of Representatives concerning any proposed eminent domain taking whose objective is economic development or enhancement of the tax base, or where it is contemplated that the property taken, or any portion of it, would be transferred, whether or not for value, to a private person or entity? If so, what criteria should this commission apply in its consideration of such a proposed taking, and how should it interface with the Board of Tax and Land Appeals in order to avoid duplication of effort?
- Does the limited scope of our proposed definition of public use in any way unduly burden communities in greatest need of economic development?

- Should legislation authorizing and establishing the scope of the exercise of the power of eminent domain by a Housing Authority be passed?<sup>109</sup>

Study commissions are still at work in Ohio<sup>110</sup> and Tennessee.<sup>111</sup> Other reports have been issued by the New Jersey Department of the Public Advocate,<sup>112</sup> the Missouri Eminent Domain Task Force,<sup>113</sup> and the Indiana Interim Study Committee on Eminent Domain.<sup>114</sup> Meanwhile, legislators in North Carolina and Oklahoma have formed internal study committees to explore eminent domain issues.

### III. Conclusion

While a number of new laws were enacted in 2005 to 2006 in the aftermath of the *Kelo* decision, more legislative reforms are likely in 2007 with more task forces reporting and more courts applying the holding in *Kelo* to situations in communities across the country. Advocates on all sides of the issue need to engage in serious dialogue about how to best ensure fairness in the process and about the appropriate and desired roles of government in the area of economic development. The bottom line: states that have been quick to ban the use of eminent domain for economic development purposes will need to come up with creative economic development tools; otherwise, states that have resisted pressures for legislative reform will benefit from greater economic development activity. This, of course, is not the only issue, nor perhaps the most important issue to consider, when debating eminent domain reform. Process issues and the relationship between government and the people should remain the focus of future reform initiatives.

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109. SPECIAL HOUSE COMMITTEE TO STUDY EMINENT DOMAIN ISSUES, FINAL COMMITTEE REPORT 3 (Sept. 6, 2005), available at <http://nhhousegop.com/Reports/050906-EDFinalReport%20official.pdf>.
  110. S.B. 167, 126th Gen. Assem., 2005 to 2006 Reg. Sess. (Ohio 2005), created the Task Force to Study Eminent Domain. A First Report was issued on March 31, 2006, simply reporting on their work to date. A second report with recommendations was released on August 1, 2006. See [http://www.greaterohio.org/documents/final\\_tf\\_report.pdf](http://www.greaterohio.org/documents/final_tf_report.pdf) (last visited Sept. 2006).
  111. H.R.J. Res. 990, 104th Gen. Assem., 2005 Sess. (Tenn. 2005).
  112. See DEPARTMENT OF THE PUBLIC ADVOCATE, REFORMING THE USE OF EMINENT DOMAIN FOR PRIVATE REDEVELOPMENT IN NEW JERSEY (2006), available at <http://www.state.nj.us/publicadvocate/reports/pdfs/PAREportOnEminentDomainForPrivateRedevelopment.pdf>.
  113. Created by Executive Order No. 05-15, the Task Force issued a preliminary report on September 30, 2005 and a final report on December 30, 2005. See *Missouri Task Force on Eminent Domain*, <http://www.mo.gov/mo/eminentdomain/index.htm> (last visited Sept. 1, 2006).
  114. INDIANA LEGISLATIVE SERVICES AGENCY, FINAL REPORT OF THE INTERIM STUDY COMMITTEE ON EMINENT DOMAIN (2005). See <http://www.state.in.us/legislative/inerim/committee/2005/committees> (last visited Sept. 2006).