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EMINENT DOMAIN: BE CAREFUL WHAT YOU  
WISH FOR**

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# **SWIFT LEGISLATIVE (OVER) REACTION TO EMINENT DOMAIN: BE CAREFUL WHAT YOU WISH FOR**

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# Swift Legislative (Over)Reaction to Eminent Domain Be Careful What You Wish For

By Patricia E. Salkin

The media frenzy in the aftermath of *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), has led to the introduction of hundreds of pieces of legislation in approximately 40 states and to attempts by Congress to either overturn or severely curtail the effect of the U.S. Supreme Court's holding. This article examines some of the various legislative approaches that have been offered and concludes that more thoughtful consideration must be given to the short-term and long-term consequences of the various proposals. Some of these initiatives 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.

## Congressional Action Following *Kelo*

It is not unusual for Congress or the President to react to U.S. Supreme Court decisions. For example, President Ronald Reagan issued an executive order in 1988 following a trilogy of land use decisions addressing regulatory takings. Exec. Order No. 12,680, 53 Fed. Reg. 8,859 (Mar. 15, 1988). Yet, the *Kelo* decision has spurred more immediate legislative proposals than any other decision in the real property arena. The day after the decision was handed down, Georgia Rep. Phil Gingrey and 78 co-sponsors submitted House Resolution 340 condemning the decision. H.R. Res. 340, 109th Cong. (2005). 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." Although not proposing

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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. . . ." Id. Rep. Gingrey stated that the Supreme Court had "placed a for-sale sign on the doorstep of every American home or business." 151 Cong. Rec. H5370 (daily ed. June 29, 2005) (statement of Rep. Gingrey). The resolution passed the House of Representatives on June 30, 2005, by a vote of 365 to 33. GovTrack.us, [www.govtrack.us/congress/bill.xpd?bill=hr109-340](http://www.govtrack.us/congress/bill.xpd?bill=hr109-340) (last visited Mar. 19, 2006).

A number of legislative proposals have been introduced in both the House and Senate 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: prohibitions on the outright use of eminent domain for economic development purposes and restrictions on the use of federal funds for projects that involve the use of eminent domain.

## Prohibiting Eminent Domain for Economic Development

The Protection of Homes, Small Businesses, and Private Property Act of 2005, S. 1313, 109th Cong. (2005), was introduced by Sen. John Cornyn and 30 co-sponsors less than a week after the *Kelo* decision. It proposes that the term "public use" in the Fifth Amendment should not be construed to include economic development. Id. Referred to the Senate Judiciary Committee, the bill was the subject of a committee hearing on September 20, 2005. U.S. Senate Committee on the Judiciary, <http://judiciary.senate.gov/hearing.cfm?id=1612> (last visited Mar. 19, 2006).

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." H.R. 3083, H.R. 3087, 109th Cong. (2005). Both bills have been referred to the House Judiciary Committee, which held oversight hearings in September focusing on

eminent domain, as did the Senate. See U.S. House Judiciary Committee, <http://judiciary.house.gov/Oversight.aspx?ID=190> (last visited Mar. 19, 2006).

Introduced by Rep. Frank Pallone in October 2005, the Protect Our Homes Act, H.R. 4088, 109th Cong. (2005), 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.” *Id.* 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. *Id.*

### Legislation Restricting the Use of Federal Funds for Eminent Domain Projects

A majority of the proposed federal bills that advocate limiting the power of eminent domain accomplish this purpose by restricting the use of federal funds when projects involve the use of condemnation. This is a powerful legislative tactic that would wreak havoc on many state and local redevelopment projects that are dependent on funding through a variety of federal programs.

The only piece of legislation specifically referring to eminent domain that has been signed into law to date is the appropriations bill for Treasury, Transportation, Housing and Urban Development, and the Judiciary. H.R. 3058, 109th Cong. (2005). Among other things, the law prohibits the use of federal funds for certain transportation projects when condemnation is exercised for other than a “public purpose” as defined in the appropriations bill. The law also directs the GAO, with assistance from the National Academy for Public Administration, to conduct a 50-state survey of eminent domain.

The Private Property Protection Act of 2005, S. 1704, 109th Cong. (2005), introduced by Sen. Byron Dorgan, was intended to prevent the use of federal funds for eminent domain-assisted economic development projects and essentially “cut off the spigot of Federal dollars to these questionable projects . . . [which] would have the practical effect of sharply curtailing this practice.” 151 Cong. Rec. S10046 (daily ed. Sept. 29, 2005) (statement of Sen. Dorgan). This bill prohibits federal funding for property subject to a taking by eminent domain, except when the property is for a “public use or public project,” but specifies that economic development is not to be considered a public use. “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. . . .” S. 1704.

The “STOPP Act” introduced by Rep. Henry Bonilla 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. Strengthening the Ownership of Private Property Act of 2005,

H.R. 3405, 109th Cong. (2005). With 112 co-sponsors, the bill was reported from the Committee on Agriculture and placed on the Union Calendar in November 2005. Thomas (Library of Congress), <http://thomas.loc.gov> (search bills, resolutions; then search bill summary & status) (last visited Mar. 19, 2006).

The Private Property Rights Protection Act of 2005, H.R. 3135, 109th Cong. (2005), was introduced by Rep. Sensenbrenner with 136 co-sponsors in June 2005 and with 97 co-sponsors when an even stronger version, H.R. 4128, 109th Cong. (2005), was introduced in November 2005. 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.” 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 the tax base, create jobs, or for economic health. The bill creates exemptions when eminent domain is used to transfer property to a “common carrier” such as railroads; for public facilities; or for use as a right of way for public utilities, aqueducts or pipelines, roads, schools, and military bases. In addition, the Private Property Rights Protection Act of 2005 would provide consequences for noncompliance. A violation by a state or political subdivision would make it ineligible not only for funding on the violating project but also 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. Julie Ufner, *House Trims Eminent Domain Powers in Response to Kelo Case*, 37 County News No. 21 (Nov. 14, 2005), at 1, col. 1, available at [www.naco.org/CountyNewsTemplate.cfm?template=/ContentManagement/ContentDisplay.cfm&ContentID=18337](http://www.naco.org/CountyNewsTemplate.cfm?template=/ContentManagement/ContentDisplay.cfm&ContentID=18337). The bill was received in the Senate and referred to the Committee on the Judiciary. Thomas (Library of Congress), *supra*. Rep. Maxine Waters, a co-sponsor of the legislation, suggested that 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.” Ufner, *House Trims Eminent Domain Powers*, *supra*. During the floor debate in the House, 10 amendments were offered to the bill, with six passing by voice vote to, among other things, clarify that “economic development” does not include the redevelopment of brownfield sites or areas that have not been developed because of pollution or perceived pollution; clarify that governments have the burden of proof to show that the eminent domain is not for economic development; prohibit the exercise of eminent domain for property owned by religious organizations or other nonprofit agencies because of their nonprofit or tax-exempt status; and include a statement of intent that government should not attempt to take land from Hurricane Katrina survivors for economic development purposes. *Id.*

House Bill 3315 would amend an existing funding proce-

ture 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." H.R. 3315, 109th Cong. (2005).

The Eminent Domain Limitation Act, H.R. 3631, 109th Cong. (2005), proposes a withdrawal of federal funds not hinging on a specific type of project, but rather on a state's eminent domain statute. It provides that "[n]o 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 takings law 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. *Id.*; see Thomas (Library of Congress), *supra*.

### Legislation Addressing Property Rights

The "EMPOWER Act," Empowering More Property Owners with Enhanced Rights Act of 2005, S. 1883, 109th Cong. (2005), was introduced by Senators Orrin Hatch and Max Baucus on October 18, 2005. 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.

### State Legislative Reactions to *Kelo*

In the months since the *Kelo* decision, hundreds of legislative proposals have been introduced in approximately 40 states. These bills can generally be organized into the following categories: legislation condemning the *Kelo* decision; the blight issue (both the definition of blight and whether a blight finding is required when using condemnation for certain projects); prohibitions on the use of eminent domain specifically for economic development; proposals that redefine public use; procedural requirements; valuation or just compensation; state constitutional amendments; moratoria on the use of the condemnation power; further regulations on the use of eminent domain; and the creation of study commissions or task forces.

### Legislation Condemning *Kelo*

Legislation in at least five states merely expresses disapproval of the Supreme Court's decision. 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 majority opinion. H.R. Res. 49A (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. . . ." The bill asserts that historically the Takings Clause has been applied by the Supreme Court only "conditioned upon the necessity that [the use of] eminent domain must be for the public use and requires just compensation. . . ." *Id.*

Kentucky Concurrent House Resolution 24 urges the U.S. Congress to pass a constitutional amendment "to protect adequately the rights and security of citizens in their property from unjust seizure by governments for the purpose of private economic development. . . ." H.R. Con. Res. 24 (Ky. 2006). Preventing even the "promotion" of private development closes the door on any variety of eminent domain use other than government-owned public works. Rhode Island Senate Resolution 1237 also asserts that the Supreme Court erred in its interpretation of "public use," stating that the *Kelo* decision "favors rich corporations' commercial development for profit at the expense of family and privately owned property rights." S. Res. 1237 (R.I. 2005); see also H.R. Res. 6636 (R.I. 2005). The resolution asserts that 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." *Id.* The Court therefore, as opposed to granting increased power to use eminent domain, declined to place an "artificial restriction on the concept of public use" that was not warranted by the facts of this case. *Id.*

At least two states have declared a general disagreement with the *Kelo* decision and a legislative intent to revise their own eminent domain laws. Florida Senate Bill 134 expresses an intent to revise the laws. S. 134 (Fla. 2006). West Virginia Senate Concurrent Resolution 402 declares that the "legitimate role" of government is to defend the institution of private property. S. Con. Res. 402 (W. Va. 2005). As a result, it seeks to prevent the use of eminent domain for the purpose of private economic development in the state.

### Proposals Requiring Blight to Use Eminent Domain

Legislators in at least nine states (New York, California, Massachusetts, Texas, Wisconsin, Tennessee, Illinois, Indiana, 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. Each bill offers a slightly different definition of the term "blight." New York Senate Bill 5936 declares property to be "blighted" if a majority of the buildings are physically deteriorating or economically unproductive. S. 5936 (N.Y. 2005). Wisconsin Assembly Bill 657 defines blighted property more generally as "any property that, by reason of abandonment, dilapidation, deterioration," among other things, is "detrimental to

the public health, safety, or welfare.” Assemb. 657 (Wis. 2005). 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. See also H.R. 858 (Mo. 2005) (crime-rate-driven blight definition).

A recent proposal in Colorado would eliminate the need for a finding of blight as a condition permitting the establishment of an urban renewal authority or plan and require the governing body to make a determination that the property is located in a slum area or that the property itself is a slum. That determination is to be made on a parcel-by-parcel basis, rather than on an areawide basis. S. 06-169 (Colo. 2006).

### **Proposals Generally Prohibiting Eminent Domain for Economic Development**

Proposals have been introduced in more than half of the states that would effectively prohibit the use of eminent domain for economic development. Legislation proposed in Alabama, Indiana, and Pennsylvania list specific types of development that do not qualify as permissible public uses for the purpose of eminent domain. S. 76/S. 89/S. 92 Ala. 2005); H.R. 1063 (Ind. 2005); S. 881 (Pa. 2005). In Alabama, Senate Bill 68A, signed into law on August 3, 2005, provides:

Notwithstanding any other provision of law a municipality or county may not condemn property for the purposes of retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue. . . . [H]owever, the provisions of this subsection shall not apply to the use of eminent domain . . . based upon a finding of blight in an area.

S. 68A (Ala. 2005). Bills in Minnesota, Ohio, Tennessee, and Texas set out a blanket prohibition on all condemnations for the purpose of economic development. H.F. 123 (Minn. 2005); S. 180 (Ohio 2005); H.R. 2429/S. 2421 (Tenn. 2005); H.R. 15 (Tex. 2005). In application, a property seizure for office development also may be beneficial for economic development, but these designations are not identical. Unlike the concept of “retail development,” “economic development” does not end with the land itself 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. H.R. 1835, H.R. 1836 (Pa. 2005); H.R. 2428/S. 2424 (Tenn. 2005); S. 26 (Tex. 2005). 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.

Dozens 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. H.R. 5060 (Mich. 2005); H.R. 3505 (Or. 2005); S. 2419 (Tenn. 2005). Hawaii Senate Bill 411 takes a different approach, providing that a county may not condemn private property and subsequently sell that property “to a private entity [that] expressed an interest in purchasing that same property for development purposes or private use before the condemnation.” S. 411 (Haw. 2005). 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. S. 382 (Mont. 2005).

Enforcement guidelines appear in other proposals. For example, Ohio Senate Bill 180 provides consequences for non-compliance. 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.” S. 180 (Ohio 2005).

### **Proposals That Redefine “Public Use”**

A majority of states have legislative proposals that attempt to define more narrowly what constitutes a “public use” or “public purpose” for purposes of eminent domain. Proposals in Michigan, Virginia, and Tennessee would prevent the use of eminent domain to take property from one private entity for the primary benefit of another private entity. H.R. 5078/S. 693 (Mich. 2005); H.R. 1806 (Va. 2005); S. 2413, H.R. 2426/S. 2418, S. 2422 (Tenn. 2005). Proposals from Arizona, California, Georgia, Virginia, and Tennessee also would prevent the use of eminent domain for the primary purpose of economic development or improving tax revenue. S. 1110 (Ariz. 2006); Assemb. 590 (Cal. 2005); S. 86 (Ga. 2005); S. 1271 (Va. 2005); S. 2413, H.R. 2426/S. 2418, S. 2422 (Tenn. 2005). Legislation in Tennessee includes procedural guidelines for the determination of what is to be considered a “public use,” S. 2413 (Tenn. 2005), and a list of examples of permissible public uses, S. 2422 (Tenn. 2005). 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. Id.

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 about 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.

### **Proposals That Further Regulate Eminent Domain**

Bills proposed by lawmakers in California, Delaware, Kentucky, Missouri, and New York would require redevelopment agencies to have specific and comprehensive plans

for the land to be taken through eminent domain. S. 53 (Cal. 2005); S. 217 (Del. 2005); H.R. 515 (Ky. 2005); H.R. 159 (Mo. 2005); Assemb. 9043A (N.Y. 2005). New York Assembly Bill 9043A requires this only 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.

In July 2005, Delaware enacted Senate Bill 217, which requires a plan for redevelopment 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. Del. Code Ann. tit. 29, § 9505 (2005).

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."

A number of state proposals would require the political subdivision in which the property is located to evaluate and formally approve of proposed takings. For example, Maryland House Bill 881 requires that the legislative body approve of the action by resolution, H.R. 881 (Md. 2005), 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.

### Legislation Focused on Procedural Requirements

Pennsylvania and New York both have proposed bills that would enact comprehensive reform of eminent domain procedure. S. 897, H.R. 776 (Pa. 2005); Assemb. 9050 (N.Y. 2005). An Arizona proposal, H.R. 2063 (Ariz. 2005), would prohibit the use of executive sessions for the discussion, consultation, or consideration of records involving the taking of private property for economic development purposes. A Maryland proposal, H.R. 961 (Md. 2006), would allow, among other things, that on written request of any party, an action for condemnation be set for trial within 90 days after the case is at issue and that it take precedence over all other civil cases.

A number of states have introduced legislation providing for jury trials when eminent domain is used to determine, among other things, whether the taking is for a "public use." See, e.g., S. Con. Res. 1002 (Ariz. 2006); S. 1273 (Idaho 2006). A Maryland proposal, H.R. 740 (Md. 2006), would allow for reasonable legal fees when the judgment in a condemnation proceeding is for the plaintiff and the amount of the damages awarded to the defendant is at least 10% greater than the amount offered by the plaintiff. A Virginia proposal, H.R. 397 (Va. 2006), requires legal fees and costs in condemnation proceedings if the petitioner maliciously damaged the property or the court awards the property owner at least 20% more than the petitioner's offer.

Legislation also has been introduced in a number of states

that would allow the condemnee or its heirs to repurchase the condemned property under certain circumstances (for example, if the proposed underlying purpose of the condemnation is not realized). H.R. 898 (Md. 2006). Missouri House Bill 159 specifies that if the property is not used for its "specific intended use" within 10 years of the taking, the original property owner has the right of first refusal to get the land back. H.R. 159 (Mo. 2005). A Virginia proposal, H.R. 631 (Va. 2006), would require a mandatory dispute resolution evaluation session following the initiation of a condemnation proceeding.

### Legislation Addressing Valuation/Compensation

Many states have proposals focusing on issues of valuation and just compensation when property is condemned. Although fair-market value has been the standard for just compensation, many lawmakers believe that this measure does not adequately capture just compensation when condemnation occurs, specifically when a person's home is being condemned. A number of proposals would increase the compensation required for the takings or impose procedural requirements on the establishment of property value. See, e.g., H.R. 117 (Ala. 2005); H.R. 913 (Ga. 2005); H.R. 1527 (Haw. 2005); S. 1152 (Idaho 2005). Some bills would provide enhanced compensation only when property is being taken for economic development purposes but not for other condemnation purposes.

Many of the compensation-related bills concern businesses that are to be taken through eminent domain. Maine, Minnesota, Nevada, and Pennsylvania have bills that require the condemning agency to compensate the owner of a taken business for the loss of "going concern." H.P. 894/L.D. 1297 (Me. 2005); H.F. 118 (Minn. 2005); S. 326 (Nev. 2005); S. 897 (Pa. 2005). Similarly, Wisconsin Assembly Bill 656 proposes to change the state's prohibition against allowing evidence of a business's income in a just compensation proceeding. Assemb. 656 (Wis. 2005). 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 businesses by requiring that they receive a fixed relocation 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. S. 1152 (Idaho 2005).

Minnesota Senate File 1693 provides greater procedural safeguards to landowners who are subject to potential condemnation. It provides that the condemnor must fund two separate appraisals on the request of the landowner and requires that all appraisals be disclosed during negotiations. S. 1693 (Minn. 2005). Similarly, Oregon House Bill 2268 requires the parties to exchange *all* data used to determine valuation. H.R. 2268 (Or. 2005). This is echoed in the requirement of "good faith negotiations" in a Nevada bill. Assemb. 143 (Nev. 2005). 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 its rights before negotiations begin. H.R. 858 (Mo. 2005). A Kentucky proposal, H.R. 114 (Ky. 2006), would require that those commissioners appointed to value property in eminent domain cases be real estate appraisers or realtors. The legislation also provides a mechanism for selection of the commissioners.

A Virginia proposal, H.R. 1821 (Va. 2005), would amend the current takings procedure to include a variety 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." 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 also must be separately appraised and reported.

Alabama, Hawaii, and Pennsylvania each has legislation proposing that property be valued considering its "highest and best use." H.R. 117 (Ala. 2005); H.R. 1527 (Haw. 2005); S. 897 (Pa. 2005). Pennsylvania Senate Bill 897 uses a factor-based analysis of "just compensation." This bill defines "just compensation" as "the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation . . . and the fair market value of the property interest immediately after the condemnation. . . ." A factor analysis would be employed that weighs the value of the 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." S. 897 (Pa. 2005). 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. H.R. 913 (Ga. 2005).

New York Assembly Bills 9043A and 9050 take a different approach 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. Assemb. 9043A, 9050 (N.Y. 2005).

### **Moratoria on the Use of Eminent Domain**

A 120-day moratorium on the use of eminent domain for private development under the state redevelopment laws passed the Georgia Senate in February 2006. See John Kramer & Lisa Knepper, *Georgia Senate Approves State Moratorium on Eminent Domain Abuse*, [www.castlecoalition.org/media/releases/2\\_3\\_06pr.html](http://www.castlecoalition.org/media/releases/2_3_06pr.html) (last visited Mar. 20, 2006). Two proposals in New Jersey, S. 211, Assemb. 2423 (N.J. 2006), and one in Ohio, S. 167 (Ohio 2005), would place a temporary moratorium on the use of eminent domain while creating a study commission to examine the use of eminent domain across the state. Moratoria also have been introduced in Missouri and Wyoming. H.R. 1533 (Mo. 2006); S. 26 (Wyo. 2006).

### **State Constitutional Amendments**

A number of state legislatures have proposed state constitutional amendments to curtail more significantly certain aspects of the use of eminent domain. By way of example, 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." S. 5961 (N.Y. 2005). Besides common exceptions for consent and blight, the proposed constitutional 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. Assemb. Const. Amend. 22 (Cal. 2005).

### **Legislation and Executive Orders Creating Task Forces**

A number of bills and resolutions seek to establish task forces or special commissions to further study various aspects of eminent domain. See, e.g., S. 683 (Conn. 2005); Exec. Order No. 05-15 (Mo. June 28, 2005); H.R. 5116 (R.I. 2005); S. 7 (Tex. 2005).

### **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 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. More empirical research is needed and required to assess fairly and accurately the need for various types of legislative reforms and to enable lawmakers to craft appropriately tailored solutions to identified problems.

State-level study commissions, having the benefit of data and widespread community input, would be the most effective means for careful consideration of dozens of issues. States lack independent, nonpartisan research and data on dozens of relevant aspects of eminent domain. For example, states should assemble their own research on the instances and types of abuse in the context of eminent domain within their jurisdictions; the number of times state and local governments use condemnation and for what purposes; the number of times that state and local governments use eminent domain specifically for economic development; the success rate (and how to measure success) of economic development projects that involve condemnation; the percentage of times that condemnation proceedings are challenged in court and an analysis of the reasons for the challenges (for example, proper authority, compensation, and so on); and

when courts review the compensation issue, how often are petitioners awarded increased just compensation over what was offered. Social equity, compensation for displaced tenants who are not property owners, effective planning, and public input are just some of the additional issues that should be examined.

The rush to draft legislative fixes without properly and precisely identifying real problems within each state has the potential to result in long-term side effects that may cripple government's ability to carry out critical functions and responsibilities. Abuse is not acceptable, but *Kelo* did not create what can be characterized as a perceived crisis in real property law. *Kelo* did not change the law in this field, but the advocates have captured public interest and support for more far-reaching legislative proposals than what might have resulted had the decision been decided for the property owners. The message to state and local governments: be careful what you wish for. ■