

HB

318

HFIN

FILE

HOUSE COMMITTEE REPORT

(11)

Date Referred to Committee: February 6, 2006

FURTHER REFERRALS:

Date of Committee Action: 2/9/06

The FINANCE Committee considered:

HB 318

HOUSE BILL NO. 318

LIMITATION ON EMINENT DOMAIN

"An Act limiting the exercise of eminent domain."

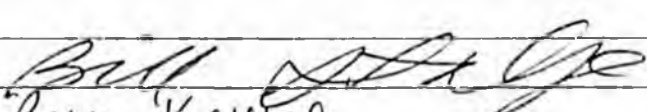
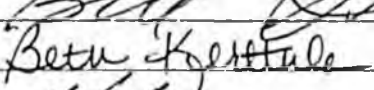
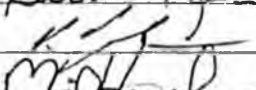
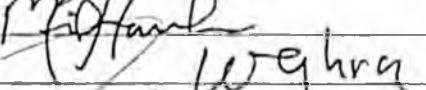
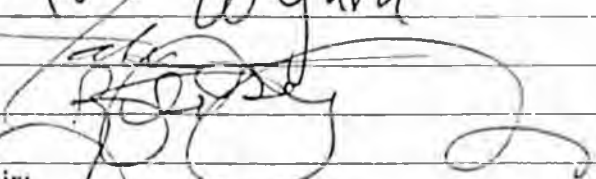
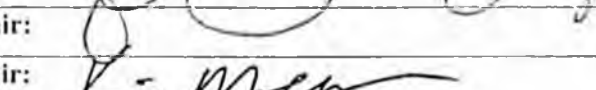
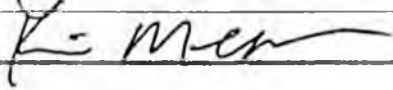
Recommends it be replaced with HCS or CS for HB 318 (FIN)
 For Senate Bills with new title: Technical Title New Title: HCR _____ Same Title New Title

- attach amendments
- add new referral to _____ Committee
- Letter of Intent _____ Committee

List of Abbrev Depts.:
 ADM
 CED
 COR
 CRT
 EED
 DEC
 DFG
 GOV
 HSS
 LEG
 LAW
 LWF
 MVA
 DNR
 DPS
 REV
 DOT
 UA

<u>NEW FISCAL NOTES</u>				
*Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

<u>PREVIOUS FISCAL NOTES</u>				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
CED	#1	✓		
DEC	#2	✓		
LAW	#3		✓	
DNR	#4		✓	
DDT	#5		✓	

<u>Signing with recommendations</u>	Printed Last Name	DP	DNP	NR	AM
	Stortz				X
	Kerttula			X	
	Julie Hawken			X	
	Weyhra	X			
	Kerttula			X	
	Kerttula				X
Chair: 	Kerttula	X			

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 318(JUD)
(H) Publish Date: 2/6/06

Revision Date/Time (Note if correction): _____ Dept. Affected: Commerce
Title: Limitations on Eminent Domain RDU: Comm Assist & Ec Dev (405)
Sponsor: McGuire et al. Component: Community Advocacy
Requester: Judiciary Component No.: 2703

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This legislation limits the powers of eminent domain established in Title 9 and Title 29 for both the State and municipalities. Eminent Domain could not be exercised for purpose of promoting economic development, or to acquire land as part of a economic development project. In addition, eminent domain could not be exercised for purpose of developing a recreational facility or project if the land in question is the primary residence of the owner.

This legislation does not create a fiscal impact on the operations of the department.

Prepared by: Michael Black, Director
Division: Community Advocacy
Approved by: William C. Noll, Commissioner
Agency: Commerce, Community, and Economic Development

Phone: 269-4535
Date/Time: 1/11/06 9:54 AM
Date: 01/11/06

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 318(JUD)
(H) Publish Date: 2/6/06

Revision Date/Time (Note if correction): _____ Dept. Affected: Dept of Environmental Cons
Title: Limitation on Eminent Domain . . . RDU: Multi
Sponsor: McGuire, Holm, Hawker Component: Various
Requester: House Judiciary Component No.: 633

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact anticipated.

Prepared by: Tim Barry
Division: Office of the Commissioner
Approved by: Kurt Fredriksson
Agency: Department of Environmental Conservation

Phone: 465-5290
Date/Time: 1/11/06 10:30 AM
Date: 1/11/06 11:31 AM

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: CSHB 318(JUD)
(H) Publish Date: 2/6/06

Revision Date/Time (Note if correction): _____ Dept. Affected: LAW
Title "An Act limiting the exercise of eminent domain." RDU Civil
Component Transportation
Sponsor Representative McGuire
Requester House Judiciary Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*****	*****	*****	*****	*****	*****

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	*****	*****	*****	*****	*****	*****

Estimate of any current year (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill excludes from the exercise of the right of eminent domain, any purpose that would promote economic development or acquire land as part of an economic development. Additionally when the subject of the action is the primary residence of the owner of the property, the right of eminent domain may not be exercised for the purpose of developing a recreational facility or project.

Passage of this legislation may have a fiscal impact on the Department of Law, but it is not possible to estimate it at this time.

Prepared by: Kathryn Daughhete, Director
Division: Administrative Services Division
Approved by: Kathryn Daughhete for David Márquez, Attorney General
Agency: Department of Law

Phone 465-3673
Date/Time 1/10/06 3:58 PM
Date 1/10/2006

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 4
Bill Version: CSHB 318(JUD)
(H) Publish Date: 2/6/06

Revision Date/Time (Note if correction): _____ Dept. Affected: Natural Resources
Title Limitation on Eminent Domain RDU Resource Development
Component Commissioner's Office
Sponsor Rep. McGuire
Requester (H) JUD Component No. 423

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*** INDETERMINATE ****					

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()	*** INDETERMINATE ****					
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	*** INDETERMINATE ****					

Estimate of any current year (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Nico Bus, Acting Admin Service Director
Division: Commissioner's Office
Approved by: Mike Menge, Commissioner
Agency: Natural Resources

Phone 269-8532
Date/Time 1/11/2006
Date 1/11/2006

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number. 5
Bill Version: CSHB 318(JUD)
(H) Publish Date: 2/6/06

Title Limiting Exercise of Eminent Domain Dept. Affected: DOT&PF
RDU Administration and Support
Component Commissioner's Office
Sponsor Rep. McGuire
Requester _____ Component No. 530

Expenditures/Revenues (Thousands of Dollars)

Note. Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2006) cost: 00

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Based upon currently available information, DOT is unable to determine what fiscal impact, if any, the bill would have on its operating or capital projects budgets.

Prepared by: John Manly Phone 465-3904
Division Communications, DOT&PF Date/Time 1/11/06 8:00 AM
Approved by: Mike Barton Date 1/11/2006
Agency Commissioner, DOT&PF

change pg 4
lines 10-14

24-LS1033AS

CS FOR HOUSE BILL NO. 318(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered: 2/6/06
Referred: Finance

Sponsor(s): REPRESENTATIVES MCGUIRE, HOLM AND HAWKER, Stoltze, Gatto, Wilson, Kohring,
LeDoux, Dahlstrom, Kelly, Anderson, Olson, Lynn, Elkins

A BILL

FOR AN ACT ENTITLED

1 "An Act limiting the exercise of eminent domain; and providing for an effective date."

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 * Section 1. The uncodified law of the State of Alaska is amended by adding a new section
4 to read:

5 **LEGISLATIVE INTENT AND FINDINGS.** (a) The legislature finds that

6 (1) the United States Supreme Court decision in *Kelo v. City of New London*,
7 545 U.S. ___, 125 S.Ct. 2655, 162 L. Ed. 2d 439 (2005) demonstrates that an overly
8 expansive application of eminent domain powers can be a threat to the property rights of all
9 private property owners;

10 (2) it is necessary to provide clarification regarding the exercise of eminent
11 domain in the following two situations:

12 (A) the taking of private property if the purpose is to transfer the
13 property to another private person for economic development;

14 (B) the taking of a landowner's primary residence to develop an indoor
15 or outdoor recreational facility or project.

1 (b) In recognizing that many public projects will have economic effects, the
2 legislature intends by this Act not to

3 (1) restrict those public uses already recognized in state law merely because
4 the project may have an associated economic effect; or

5 (2) provide an absolute bar on transfers of land to private entities, but to place
6 restrictions on when such transfers occur.

7 (c) In this section, "economic development" means development of property for a
8 commercial enterprise carried on for profit or to increase tax revenue, tax base, or
9 employment.

10 * Sec. 2. AS 09.55.240(a) is amended to read:

11 (a) Except as provided in (d), (e), and (f) of this section, the [THE] right of
12 eminent domain may be exercised for the following public uses:

13 (1) all public uses authorized by the government of the United States;

14 (2) public buildings and grounds for the use of the state and all other
15 public uses authorized by the legislature of the state;

16 (3) public buildings and grounds for the use of an organized or
17 unorganized borough, city, town, village, school district, or other municipal division,
18 whether incorporated or unincorporated; canals, aqueducts, flumes, ditches, or pipes
19 conducting water, heat, or gas for the use of the inhabitants of an organized or
20 unorganized borough, city, town, or other municipal division, whether incorporated or
21 unincorporated; raising the banks of streams, removing obstructions from them, and
22 widening, deepening, or straightening their channels; and roads, streets, and alleys,
23 and all other public uses for the benefit of an organized or unorganized borough, city,
24 town, or other municipal division whether incorporated or unincorporated, or its
25 inhabitants, which may be authorized by the legislature;

26 (4) wharves, docks, piers, chutes, booms, ferries, bridges of all kinds,
27 private roads, plant and turnpike roads, railroads, canals, ditches, flumes, aqueducts,
28 and pipes for public transportation, supplying mines and farming neighborhoods with
29 water, and draining and reclaiming land, and for floating logs and lumber on streams
30 not navigable, and sites for reservoirs necessary for collecting and storing water;

31 (5) roads, tunnels, ditches, flumes, pipes, and dumping places for

1 working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of
 2 tailings or refuse matter from mines; also an occupancy in common by the owners or
 3 possessors of different mines of any place for the flow, deposit, or conduct of tailings
 4 or refuse matter from their several mines, and sites for reservoirs necessary for
 5 collecting and storing water;

6 (6) private roads leading from highways to residences, mines, or farms;

7 (7) telephone lines;

8 (8) fiberoptic lines;

9 (9) [(8)] telegraph lines;

10 (10) [(9)] sewerage of an organized or unorganized borough, city,
 11 town, village, or other municipal division, whether incorporated or unincorporated, or
 12 a subdivision of it, or of a settlement consisting of not less than 10 families, or of
 13 public buildings belonging to the state or to a college or university;

14 (11) [(10)] tramway lines;

15 (12) [(11)] electric power lines;

16 (13) [(12)] for the location of pipelines for gathering, transmitting,
 17 transporting, storing, or delivering natural or artificial gas or oil or any liquid or
 18 gaseous hydrocarbons, including, but not limited to, pumping stations, terminals,
 19 storage tanks, or reservoirs, and related installations.

20 * Sec. 3. AS 09.55.240 is amended by adding new subsections to read:

21 (d) The power of eminent domain may not be exercised to acquire private
 22 property from a private person for the purpose of transferring title to the property to
 23 another private person for economic development purposes. This subsection does not
 24 apply to transfers of private property to another private person if one or more of the
 25 following apply:

26 (1) the landowner consents, either before or after a condemnation
 27 proceeding has been filed, to the use of the property for a private commercial
 28 enterprise or other economic development;

29 (2) the private person has been expressly authorized by statute either to
 30 exercise the power of eminent domain, or to receive an interest in land acquired by the
 31 exercise of eminent domain;

1 (3) the transferred property is used for a private way of necessity to
2 permit essential access for extraction or use of resources;

3 (4) the acquisition is used, in part, for leasing property to a private
4 person that occupies a portion of public property or a public facility, including a
5 private business that occupies a portion of an airport, port, or public building;

6 (5) the property is transferred to a person by oil and gas lease under
7 AS 38.05.180;

8 (6) the property is transferred to a common carrier;

9 (7) the legislature has approved by law the transfer of the property.

10 (c) The power of eminent domain may not be exercised for the purpose of
11 developing a recreational facility or project if the property to be acquired includes an
12 individual landowner's primary personal residence or that portion of an individual's
13 property attached to and within 250 linear feet of an individual landowner's personal
14 residence. *unless the person otherwise agrees.*

15 (d) In this section,

16 (1) "common carrier" has the meaning given in AS 04.16.125;

17 (2) "economic development" means development of property for a
18 commercial enterprise carried on for profit or to increase tax revenue, tax base, or
19 employment;

20 (3) "personal residence" means a structure that is the dwelling place of
21 an individual that

22 (A) must be used by the owner as a dwelling unit, as opposed
23 to a rental, storage, or other commercial space;

24 (B) must be inhabited by the owner for at least 90 days during
25 the 12-month period immediately before the date an action for the exercise of
26 the power of eminent domain is filed;

27 (C) must constitute an ordinary home for general living
28 purposes, as opposed to a dwelling used only for seasonal recreational or
29 temporary purposes; and

30 (D) may not have been constructed, placed, or occupied for the
31 purpose of avoiding eminent domain proceedings;

1 (4) "private person" means a person that is not a public corporation as
2 defined in AS 45.77.020 or a government as defined in AS 11.81.900;

3 (5) "recreational facility or project"

4 (A) means a facility or project, the primary purpose of which is
5 recreational;

6 (B) includes a park, natural resources area, trail or pedestrian
7 pathway, greenbelt, access to a wilderness area, amusement park, small boat
8 facility, personal use fishery, sports facility, playground, infrastructure, or
9 other facility related to or in support of an indoor or outdoor recreational
10 facility or project;

11 (C) does not include

12 (i) a highway, sidewalk, or path within the right-of-way
13 of a highway;

14 (ii) a path, trail, or lane used as a safe route to a school
15 program;

16 (iii) a wayside or rest stop;

17 (iv) a development, the primary purpose of which is not
18 recreational, such as a path, trail, or lane developed to reduce
19 congestion, or to encourage use of an alternate, gas-saving mode of
20 transportation;

21 (v) a path or trail to or between villages or from a
22 village to a facility or resource;

23 (vi) a stormwater retention or treatment facility or
24 wetland, habitat, or other acquisition required to obtain a permit for a
25 highway, airport, or other public project;

26 (vii) a taking under AS 19.05.110, 19.05.120;
27 AS 19.22.020; AS 27.21.300; AS 35.20.040, 35.20.050; or
28 AS 41.35.060; and

29 (viii) a taking not prohibited by law before January 1,
30 2007, under AS 41.21.

31 * Sec. 4. AS 29.35.030(a) is amended to read:

1 (a) Except as provided in (c) of this section, a [A] municipality may, only
2 within its boundaries, exercise the powers of eminent domain and declaration of taking
3 in the performance of a power or function of the municipality under the procedures set
4 out in AS 09.55.250 - 09.55.460. In the case of a second class city, the exercise of the
5 power of eminent domain or declaration of taking must be by ordinance that is
6 submitted to the voters at the next general election or at a special election called for
7 that purpose. A majority of the votes on the question is required for approval of the
8 ordinance.

9 * Sec. 5. AS 29.35.030 is amended by adding new subsections to read:

10 (c) The power of eminent domain may not be exercised to acquire private
11 property from a private person for the purpose of transferring title to the property to
12 another private person for economic development, except as provided by
13 AS 09.55.240(d)(1) - (6), and may not be exercised for purposes expressed in
14 AS 09.55.240(c).

15 (d) In this section,

16 (1) "economic development" has the meaning given in AS 09.55.240;

17 (2) "private person" has the meaning given in AS 09.55.240.

18 * Sec. 6. The uncodified law of the State of Alaska is amended by adding a new section to
19 read:

20 APPLICABILITY. This Act applies only to condemnation actions filed on or after the
21 effective date of this Act.

22 * Sec. 7. This Act takes effect January 1, 2007.

Alaska State Legislature

Session:
State Capitol
Juneau, AK 99801
Phone: (907) 465-2995
Fax: (907) 465-6592



Interim:
716 W 4th Avenue, Suite 430
Anchorage, AK 99501-2133
Phone: (907) 269-0250
Fax: (907) 269-0249

Representative Lesil McGuire
Chair, Judiciary Committee

Sponsor Statement HB 318

"An Act limiting the exercise of eminent domain."

HB 318 calls for two very clear policy decisions. The first is whether or not it is appropriate to take a person's private property for economic development and the second is whether it is appropriate to take all or part of one's primary residence for recreational opportunities of another. This legislation is not intended to prohibit the legitimate use of eminent domain; it merely limits its use in these two narrow policy areas.

A recent United States Supreme Court ruling that the eminent domain powers of a government could be used to seize private land for economic development purposes has struck a vital blow to private property rights in this country. Although *Kelo v. New London* is a Connecticut case, its implications are broad. HB 318 will clarify the property rights of Alaskans and prevent a repeat of what transpired in Connecticut.

It is important to note the Supreme Court recognized the right of a state to set their own guidelines for defining eminent domain. I find very little fault with that approach. While I believe the Alaska Constitution protects Alaskans from such an egregious attack on personal property. I fully intend to ensure that our state statutes afford the same protection of property.

HB 318 will prohibit the use of eminent domain for economic gain and clarify that the government be prohibited from taking all or part of a primary residence through eminent domain so that others may have a recreational opportunity. Alaska has thousands of acres of land and it is unacceptable to seize someone's home for recreational purposes.

Eminent domain has a legitimate place in land development, but its use must be controlled within a narrow definition to protect private property rights. If it becomes necessary to seize someone's property, the standards applied should be very high.

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

*adopted
2/8/06*

New New A M E N D M E N T 1

OFFERED IN THE HOUSE

BY REPRESENTATIVE HOLM

TO: CSHB 318(JUD)

1 Page 5, line 6:

2 Delete "natural resources area,"

3

4 Page 5, line 7:

5 Delete "access to a wilderness area,"

6

7 Page 5, line 8:

8 Delete "facility, personal use fishery"

9 Insert "harbor"

10

11 Page 5, line 28:

12 Delete "and"

13

14 Page 5, line 30, following "AS 41.21":

15 Insert "; and

16

17

18

19

20

(ix) a path, trail, road, or site for which no reasonable alternative exists and, which is necessary to preserve or establish public access to publicly owned land or water, if the use of the path, trail, road, or site itself is for transportation to or to facilitate use of publicly owned land or water rather than primarily for recreation."

*adopted
2/8/06*

24-LS1083\S..
Bullock
2/8/06

AMENDMENT 2

OFFERED IN THE HOUSE
TO: CSHB 318(JUD)

BY REPRESENTATIVE HOLM

- 1 Page 1, line 14:
- 2 Delete "primary"
- 3 Insert "personal"
- 4
- 5 Page 2, line 11:
- 6 Delete "(d), (e), and (f)"
- 7 Insert "(d) and (e)"
- 8
- 9 Page 4, line 12:
- 10 Delete "primary"

withdrawn 2-9-06

24-LS1083S.1
Bullock
2/8/06

AMENDMENT

3

OFFERED IN THE HOUSE
TO: CSHB 318(JUD)

BY REPRESENTATIVE HOLM

1 Page 5, following line 30:

2 Insert a new bill section to read:

3 * Sec. 4. AS 09.55.270 is amended to read:

4 Sec. 09.55.270. Prerequisites. Before property can be taken, it shall appear
5 that

6 (1) the use to which it is to be applied is a use authorized by statute

7 [LAW];

8 (2) the taking is necessary to the use;

9 (3) if already appropriated to a public use, the public use to which it is
10 to be applied is a more necessary public use.

11

12 Renumber the following bill sections accordingly.

withdrawn
2-9-06

24-LS1083\S.4
Bullock
2/9/06

AMENDMENT

4

OFFERED IN THE HOUSE

BY REPRESENTATIVE HOLM

TO: CSHB 318(JUD)

1 Page 1, line 14, following "residence":

2 Insert "or a landowner's small business"

3

4 Page 4, line 12, following "residence":

5 Insert ", the landowner's small business, "

6

7 Page 4, line 14, following "residence":

8 Insert "or a landowner's small business"

9

10 Page 5, line 30, following "AS 41.21":

11 Insert ";

12 (6) "small business" means a structure that is the primary location of a
13 business that

14 (A) employs fewer than 26 individuals;

15 (B) has been located on the land that is the subject of the
16 eminent domain proceeding for not less than one year; and

17 (C) may not have been constructed, placed, or occupied for the
18 purpose of avoiding eminent domain proceedings"

AMENDMENT New #1

OFFERED IN THE HOUSE

BY REPRESENTATIVE HOLM

TO: CSHB 318(JUD)

1 Page 5, line 6:

2 Delete "natural resources area,"

3

4 Page 5, line 7:

5 Delete "access to a wilderness area,"

6

7 Page 5, line 8:

8 Delete "facility, personal use fishery"

9 Insert "harbor"

10

11 Page 5, line 28:

12 Delete "and"

13

14 Page 5, line 30, following "AS 41.21":

15 Insert "; and

16

(ix) a path, trail, road, or site for which no reasonable

17

alternative exists and that is necessary to preserve or establish public

18

access to publicly owned land or water if the primary use of the path,

19

trail, road, or site is for transportation or to facilitate the use of publicly

20

owned land or water and recreational use is secondary"



Widener University

*D. Benjamin Barros
Associate Professor of Law*

Testimony of D. Benjamin Barros Before
the House of Representatives State
Government Committee

Hearing on House Bills 1835 and 1836
Concerning Eminent Domain

August 31, 2005

Mr. Chairman, members of the Committee, thank you for the opportunity to be here today. My name is Ben Barros, and I am an Associate Professor of Law at Widener Law School in Harrisburg. I both teach and write on eminent domain issues. I am familiar with the issues raised in the Supreme Court's decision in *Kelo v. New London* and with the response to that decision in legislatures around the country.

Kelo sparked a tremendous amount of public outrage over the potential for government abuse of the power of eminent domain. I believe that the legislature should respond to this public outrage and enact measures to protect private property from eminent domain abuse. House Bills 1835 and 1836 are an encouraging step in the right direction. Eminent domain, however, is an important tool for local governments, and the legislature must be careful not to overly restrict local governments' ability to take property for legitimate reasons. Your very difficult task is to determine where to strike the right balance.

My testimony today has two parts. First, I will suggest that you consider giving homes additional protection from being taken by eminent domain. Second, I will address some issues raised by the language of House Bills 1835 and 1836 about striking the right balance between protecting private property owners and maintaining local governments' ability to act in the legitimate public interest.

Protecting Homes

Like most of the bills proposed around the country in response to *Kelo*, House Bills 1835 and 1836 apply equally to all kinds of property. *Kelo* involved New London's

attempt to use the power of eminent domain to transfer private property, including people's homes, to a private developer. New London's justification for taking the property was to spur economic development, and the Court concluded that this type of "economic development taking" satisfied the public use requirement of the Constitution's Just Compensation Clause.

Unsurprisingly, the legislative response around the country to *Kelo* has focused on preventing economic development takings by restricting the scope of the type of public use sufficient to justify an exercise of eminent domain. House Bills 1835 and 1836 fit this mold.

I want to suggest that this broad approach misses a key component of the public's outrage over *Kelo*. My sense from reading reactions to *Kelo* and from talking with many people about the issue is that most people are not particularly worked up about economic development takings in a generic sense. Rather, what seems to be at the core of most people's concern is the possibility that their local governments might take their *homes* to clear land for a private developer, as the town of New London did in the project that gave rise to the *Kelo* litigation.

Focusing on homes would be consistent with the common-sense notion that homes are different from other types of property. People become personally attached to their homes. Homes tie people to their communities. Displacement of people from their homes can separate them from family, friends, schools and jobs.

I therefore suggest that you consider giving additional protection to homes in the eminent domain context. While restricting economic development takings is at the forefront of people's minds after *Kelo*, you also should consider protecting homes from

more traditional exercises of eminent domain. People unhappy about their homes being taken for a shopping mall are likely to be only marginally less unhappy if their homes are taken for something that fits the classic picture of a public use, like a highway.

Many other areas of law treat homes differently than other types of property. Most relevant here, the legal system already gives special protection to people's possession of their homes in a number of contexts, such as making it harder for a lender to foreclose on a home than to repossess another type of property. The law also gives special treatment to homes when interests other than possession are at stake. For example, the government is held to a higher standard when it searches a home than when it searches other types of property, like cars or undeveloped land.

Recognizing that homes are special does not mean that local governments should be prohibited in all circumstances from taking homes. There are times when taking homes is vital to the public interest. But there are a number of approaches that you could take to give homes additional protection and encourage government entities to take homes only as a last resort. For example:

- Responding directly to *Kelo*, you could prohibit the taking of homes for economic development, but allow economic development taking of some other types of property.
- You could permit the taking of a home for *any* type of public use only after a finding, reviewable by a court, that there is no alternative course of action that would serve the same public goal at a reasonable cost.
- You could require governments to pay a premium (say 10% or 15%) over fair market value for a taken home, which would both provide an

economic disincentive to take homes when other types of property are available and compensate the homeowners for some of the personal value they placed in their homes.

These approaches – alone or in concert – would help protect homes while maintaining flexibility for local governments to take other types of property. Common sense tells us that homes are different, and deserve special legal treatment in many contexts. Constituent outrage over *Kelo* is tied in large part to concern about the vulnerability of homes, and it therefore would be appropriate for you to consider including special protection of homes in your legislative response to *Kelo*.

Comments on the Proposed Language

I will now turn to the proposed language of House Bills 1835 and 1836. Because the proposed language of two bills is similar, I will direct my comments to House Bill 1835.

At the outset, I note that the proposed bills apply only to local governments, and do not restrict takings by the State of Pennsylvania. There may be good reasons to apply restrictions on eminent domain on the local level, but not the state level. Many commentators, for example, argue that local governments are more subject to special interest influence than state governments. But to give property owners the maximum amount of protection, it may be worth considering applying the same restrictions to the state. This, of course, would require the input of the state agencies that exercise the power of eminent domain.

Subparagraph (i) of House Bill 1835 prohibits the use of eminent domain to “turn [the taken property] over to a nonpublic interest.” My first observation is that while I understand the intent of the language, the litigator in me sees ambiguities in the phrase “nonpublic interest.” “Private person or entity” might be preferable language.

More broadly, however, there are many circumstances where the use of eminent domain to transfer property to a private person or entity may be appropriate, and the proposed language therefore may be too restrictive. Using eminent domain to transfer property to a private developer to spur economic development may be objectionable, but what about the use of eminent domain to transfer the property to a privately-owned utility? To a private university to expand its campus? To a not-for-profit museum or symphony? To a privately-owned hospital that is greatly needed by the community? To a sports team for a new stadium? I do not mean to suggest that using eminent domain in all of these contexts would be appropriate – I’m particularly suspicious of sports stadium projects myself – but they are all circumstances that you should consider. In some areas, particularly urban areas, it may not be practical to obtain suitable property for these types of projects without using eminent domain.

You should also consider the use of eminent domain to take blighted property and turn it over to a private developer. This type of taking would be barred by House Bill 1835 as it is currently drafted – it would be impractical to expect local governments to put all blighted property that is taken to public use in the classic sense. That may not be a bad thing. The concept of blight has been abused by local governments to justify what are really economic development takings. Clearing blight was also the justification for urban renewal projects that in hindsight destroyed vibrant, if poor, neighborhoods and

replaced them with what many planners now consider to be sterile redevelopment project. (I should note in this context that when I was talking about giving additional protection to homes, I generally meant homes of all sorts, including rented apartments. Except in the context of compensation for taken homes, people in owned and rented homes have similar interests in avoiding displacement.)

On the other hand, local governments should have the power to take truly blighted property. The difficult task is to come up with a definition that separates blighted property from merely economically depressed property. Blighted housing, for example, could be defined to be unfit for human habitation or defined as housing that violates certain housing code provisions. Blighted commercial property could be defined as property that has been vacant for a certain amount of time and has no real prospect of being occupied in the near future. Care also must be given to the treatment of non-blighted property in an otherwise blighted area. The Supreme Court started down the slippery slope towards *Kelo* in the 1954 case *Berman v. Parker*, where the Court permitted the taking of a non-blighted department store as part of a larger clearance of a blighted area.

Defining the circumstances where it is permissible for property taken by eminent domain to end up in private hands is a difficult task, but not an insurmountable one. Beyond tightening up the definition of permissible public use, however, there are a number of other steps that you can take to protect private property owners from abusive uses of eminent domain by making the eminent domain process fairer.

The examples I mentioned before of requiring certain findings to be made or certain premiums to be paid would fall in this category. You also could require some

exercises of eminent domain to be put to a vote by the residents of the municipality. Or you could require a municipality to make a bone fide offer (including a price) to purchase the property before using eminent domain. If the property owner later contests the value of the property, and a court finds that the value is higher than the price initially offered by the municipality, you could allow the property owner to recover attorney's fees or a premium above the court-set value from the municipality. Allowing this type of fee shifting would encourage municipalities to show good faith in their initial offer for the property.

You could also require a reverter clause, as proposed in subparagraph (iii) of House Bill 1835. As drafted, however, the reverter clause has two potential problems. First, it does not account for the fact that the condemnee has already been paid fair market value as compensation for the taken property. Second, it is unlimited in duration, which presents the possibility of the reverter being exercised two hundred years after the property is initially taken. Based in part on a bill that is pending in California, language along the following lines may be preferable: "if the property ceases to be used for a public purpose within five years of the property's condemnation, the condemnee or its heirs or assigns shall have the right to reacquire the property for the compensated amount plus interest or its current fair market value, whichever is less."

This concludes my prepared remarks, and I'm happy to take your questions.

This memorandum describes how state legislatures are responding to the U.S. Supreme Court decision delivered on June 23, 2005, in *Kelo v. New London* (04-108). In that case, the court determined that the "public use" provision of the takings clause of the 5th Amendment to the U.S. Constitution permits eminent domain for economic development purposes that provide a "public benefit" pursuant to a Connecticut statute. At the same time, the court acknowledged that nothing in its decision precludes a state from placing further restrictions on the use of eminent domain. This memorandum will discuss the categories of legislation that the National Conference of State Legislatures (NCSL) has observed, and present summaries and links to bills considered since the decision came down.

Categories of Legislation

NCSL has been tracking five types of legislation that state legislatures have either considered or are still considering since the decision in *Kelo* was reported. Each category restricts the use of eminent domain for economic development purposes to some degree, while providing certain exceptions. The limitations may apply to economic development agencies created by local governments, or to municipalities and counties themselves. A broad range of approaches have been employed, from reiterating that eminent domain may be exercised solely for a public use, to prohibiting it for specified purposes.

Authorization for a Public Use. Stipulates that eminent domain may be used only for a "stated public purpose" or a "recognized public use." The legislation may not define what constitutes such purposes or uses. (Delaware enacted this type of approach at the end of its 2005 regular session; see attached summary of "*Post-Kelo v. New London State Eminent Domain Legislation.*")

Restriction of Use to Blighted Properties. Limits the use of eminent domain for economic development purposes to blighted properties only, or to areas where the majority of properties are blighted and the remaining parcels are necessary to complete a redevelopment plan. This approach establishes additional criteria defining what constitutes blight that a local government must satisfy before condemning private property for economic development purposes.

Enhanced Public Notice, Hearing and Negotiation Criteria. Requires local governments to hold public hearings before condemning property for economic

development purposes; notify affected property owners in advance of a hearing; and negotiate in good faith with property owners before condemning land.

Local Government Approval. Requires a vote of the locally elected legislative body before a redevelopment agency may initiate eminent domain for economic development purposes. The vote may have to meet a super-majority threshold. In some instances, the use of eminent domain by a local government may require approval by the state legislature.

Prohibiting Eminent Domain for Specified Purposes. Prohibits the use of eminent domain for economic development (e.g., residential, retail, commercial or industrial); for the primary purpose of generating additional tax revenue; or to transfer private property to another private use. This legislation normally includes exceptions, most frequently for blighted properties. (Alabama enacted this type of approach during its 2005 special session; Texas enacted this type of approach during its second special session; see attached summary.)

Other approaches designed to provide additional time to assess policy options include placing a moratorium on the use of eminent domain for economic development purposes until a specified date, and establishing special legislative committees or task forces to study the issues and report back to the legislature with findings and recommendations. (Ohio enacted both these approaches during its 2005 session; see attached summary.)

A summary of legislation considered by states that were either in session at the time the *Kelo* decision was delivered or convened a special session after the decision came down is attached to this memorandum.

Post-Kelo v. New London State Eminent Domain Legislation

Alabama 2005 Special Session

SB 68

Prohibits the use of eminent domain for retail, commercial, residential or apartment development; for purposes of generating tax revenue; or for the transfer of private property to another private party. Contains a blight exception.

(Enacted.)

HB 14

Prohibits the use of eminent domain for retail, commercial, residential or apartment development; for purposes of generating tax revenue; or for the transfer of private property to another private party.

(Passed House; failed in Senate.)

SB 81, SB 89, SB 92

Prohibits the use of eminent domain for retail, commercial, residential or apartment development.

(Failed in Senate.)

HB 102, SB 91

Prohibits the use of eminent domain for an economic development purpose and stipulates that its application may only be used for a public use.

(HB 102 failed in House. SB 91 failed in Senate.)

California

2005 Session

AB 1162

Places a moratorium on the use of eminent domain to acquire owner-occupied residential property for a private use until January 1, 2008.

(Passed Assembly; in Senate committee.)

SCA 12

Stipulates that public use does not include taking owner-occupied residential property for a private use.

(In Senate committee.)

ACA 22, SCA 15, AB 590

ACA 22 and SCA 15 stipulate that private property may only be taken for a stated public use. AB 590 stipulates that "public use" does not include taking non-blighted

property for another private use.

(ACA 22 introduced. SCA 15 introduced. AB 590 in Assembly committee.)

Delaware

2005 Session

SB 217 (with House Amendment 1)

Restricts the use of eminent domain by the state or a political subdivision to a recognized public use.

(Enacted.)

Illinois

2005 Session

HB 4091

Stipulates that the use of eminent domain may only be for a "qualified public use," meaning for public ownership and control. Prohibits eminent domain for private ownership or control, including economic development, unless approved by the state legislature.

(Introduced.)

Michigan

2005 Session

SB 693

Prohibits the use of eminent domain to transfer private property to another private entity unless the property is blighted or qualifies as a public use; public use does not include taking for general economic development or generating additional tax revenue.

(Passed Senate; in House Committee.)

SJR E

Stipulates that if a person's principal residence is taken for public use, the amount of just compensation shall not be less than 125 percent of the property's fair market value; public use does not include taking for general economic development or generating additional tax revenue.

(Passed Senate; in House Committee.)

HB 5060, HB 5078

Prohibits the use of eminent domain to transfer private property to another private entity for the primary benefit of the private entity.

(HB 5060 in House committee. HB 5078 in House Committee.)

Minnesota

2005 Special Session

HF 117, HF 132

Prohibits the use of eminent domain to transfer private property to another private party.

(HF 117 failed to pass. HF 132 failed to pass.)

HF 123

Prohibits the use of eminent domain for economic development purposes.

(Failed to pass.)

New Jersey

2005 Session

SB 2739, AB 4392

Prohibits the use of eminent domain to condemn legally occupied residential property that meets applicable housing codes as part of a redevelopment project.

(In Senate Committee.)

New York

2005 Session

AB 8865, AB 9051, SB 5949

Requires a local government to vote to approve the proposed use of eminent domain to condemn private property for another private use.

(AB 8865 and AB 9051 in Assembly committee. SB 5949 in Senate committee.)

AB 9043, AB 9050, SB 5946

Requires that an economic development plan approved by a local government be prepared when eminent domain is used for economic development purposes.

Requires a public hearing to be held and includes additional public notice requirements. Requires the amount of compensation paid to a property owner when eminent domain is used for economic development purposes be greater than 100 percent of fair market value.

(AB 9043 and AB 9050 in Assembly committee. SB 5946 in Senate Committee.)

SB 5936

Stipulates that eminent domain can be used for economic development purposes only if the area is blighted.

(In Senate committee.)

SB 5938

Stipulates that eminent domain can only be used for specified public projects.

Requires approval of the county legislature or city council if an industrial development agency decides to use eminent domain.

(In Senate committee.)

Ohio

2005 Session

SB 167

Places a moratorium on the use of eminent domain for economic development purposes that would ultimately result in the property being transferred to another private party in an area that is not blighted until December 31, 2006. Creates a task

force to study eminent domain issues.

(Enacted.)

SJR 6

Removes from municipalities the constitutional authority to use eminent domain unless the power is specifically granted to them by the state legislature.

(In Senate committee.)

HB 331

Places a moratorium on the use of eminent domain to condemn non-blighted property for economic development purposes where the property would be transferred to another private use. Creates a legislative task force to study eminent domain issues.

(Introduced.)

HJR 10

Prohibits the use of eminent domain for economic development where the primary purpose is to transfer private property to another private use.

(Introduced.)

Oregon

2005 Session

HB 3505

Authorizes a public body to use eminent domain only if the primary purpose is to allow the public to own or use the property; such property may not be transferred to another private entity.

(Passed House; failed in Senate.)

Pennsylvania

2005 Session

HB 2054

Prohibits the use of eminent domain for private commercial enterprise, with certain exceptions (including for blighted areas or those properties that meet the criteria contained in the state's redevelopment law).

(Passed House; in Senate Committee.)

HB 1835, HB 1836

Prohibits the use of eminent domain to turn private property into a nonpublic interest, or for the purpose of increasing the local government's tax base.

(In House committee.)

HB 2029

Prohibits the use of eminent domain to condemn non-blighted property for retail, commercial, residential or apartment development; for purposes of generating tax revenue; or for the transfer of private property to another private party.

(In House Committee.)

SB 881

Prohibits the use of eminent domain for private commercial enterprise, with certain exceptions (including for blighted areas or those properties that meet the criteria contained in the state's redevelopment law).

(In Senate Committee.)

Texas

2005 Second Special Session

SB 7

Prohibits the use of eminent domain to confer a private benefit on a private party or for economic development purposes, with certain exceptions.

(Enacted.)

HB 12, HB 16

Prohibits the use of eminent domain to confer a private benefit on a private party or for economic development purposes, with certain exceptions.

(Failed in House.)

HJR 11, SJR 5

Prohibits the use of eminent domain for economic development purposes or to confer a private benefit on a private party, with certain exceptions.

(HJR 11 failed in House. SJR 5 failed in Senate.)

2005 First Special Session

HJR 19, SJR 10, SB 62

Prohibits the use of eminent domain for economic development purposes in most instances.

(HJR 19 passed House; failed in Senate. SJR 10 failed in Senate. SB 62 passed both houses; failed in conference committee.)

Wisconsin

2005 Session

AB 657

Prohibits the use of eminent domain to condemn non-blighted property if the property is to be transferred to another private entity.

(Passed Assembly; in Senate committee.)

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**Protection of Homes, Small Businesses, and Private Property Act of 2005
(Introduced in Senate)**

S 1313 IS

109th CONGRESS

1st Session

S. 1313

To protect homes, small businesses, and other private property rights, by limiting the power of eminent domain.

IN THE SENATE OF THE UNITED STATES

June 27, 2005

Mr. CORNYN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To protect homes, small businesses, and other private property rights, by limiting the power of eminent domain.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Protection of Homes, Small Businesses, and Private Property Act of 2005'.

SEC. 2. FINDINGS.

Congress finds the following:

(1) The protection of homes, small businesses, and other private property rights against government seizures and other unreasonable government interference is a fundamental principle and core commitment of our Nation's Founders.

(2) As Thomas Jefferson wrote on April 6, 1816, the protection of such rights is 'the first principle of association, the guarantee to every one of a free exercise of his industry, and the fruits acquired by it'.

(3) The Fifth Amendment of the United States Constitution specifically provides that 'private property' shall not 'be taken for public use without just compensation'.

(4) The Fifth Amendment thus provides an essential guarantee of liberty against the abuse of the power of eminent domain, by permitting government to seize private property only 'for public use'.

(5) On June 23, 2005, the United States Supreme Court issued its decision in *Kelo v. City of New London*, No. 04-108.

(6) As the Court acknowledged, 'it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B', and that under the Fifth Amendment, the power of eminent domain may be used only 'for public use'.

(7) The Court nevertheless held, by a 5-4 vote, that government may seize the home, small business, or other private property of one owner, and transfer that same property to another private owner, simply by concluding that such a transfer would benefit the community through increased economic development.

(8) The Court's decision in *Kelo* is alarming because, as Justice O'Connor accurately noted in her dissenting opinion, joined by the Chief Justice and Justices Scalia and Thomas, the Court has 'effectively . . . delete[d] the words 'for public use' from the Takings Clause of the Fifth Amendment' and thereby 'refus[ed] to enforce properly the Federal Constitution'.

(9) Under the Court's decision in *Kelo*, Justice O'Connor warns, '[t]he specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory'.

(10) Justice O'Connor further warns that, under the Court's decision in *Kelo*, '[a]ny property may now be taken for the benefit of another private party', and 'the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the

political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result'.

(11) As an amicus brief filed by the National Association for the Advancement of Colored People, AARP, and other organizations noted, '[a]bsent a true public use requirement the takings power will be employed more frequently. The takings that result will disproportionately affect and harm the economically disadvantaged and, in particular, racial and ethnic minorities and the elderly'.

(12) It is appropriate for Congress to take action, consistent with its limited powers under the Constitution, to restore the vital protections of the Fifth Amendment and to protect homes, small businesses, and other private property rights against unreasonable government use of the power of eminent domain.

(13) It would also be appropriate for States to take action to voluntarily limit their own power of eminent domain. As the Court in Kelo noted, 'nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power'.

SEC. 3. PROTECTION OF HOMES, SMALL BUSINESSES, AND OTHER PRIVATE PROPERTY RIGHTS.

(a) In General- The power of eminent domain shall be available only for public use.

(b) Public Use- In this Act, the term 'public use' shall not be construed to include economic development.

(c) Application- This Act shall apply to--

(1) all exercises of eminent domain power by the Federal Government; and

(2) all exercises of eminent domain power by State and local government through the use of Federal funds.

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ALASKA

National Federation of Independent Business

Statement of Support for HB 318

Private Property Rights – Eminent Domain

January 10, 2006

The Alaska Chapter of the National Federation of Independent Business has 2,500 members, making it the largest small-business advocacy group in the state. The legislative agenda of NFIB is determined by ballot. Following are the ballot results for the question regarding the government's power of eminent domain.

Should the government's power of eminent domain be restricted to prevent private property from being seized for private commercial enterprises for the purposes of economic development?

90 % YES

4% NO

6% Undecided

The use of eminent domain to take private property for public purposes can be a valuable tool for public uses such as transportation and utility corridors. However, the courts have steadily expanded the definition of "public purpose" to include economic development projects where private developers and large businesses benefit from eminent domain, in exchange for which the government expects higher tax revenues. Using eminent domain in this way gives rise to abuse and is generally unfair to those who lose their property. Small businesses and small property owners are disproportionately affected, and the benefits only go to a few people. If government can seize property because another owner could generate more taxes, then nobody's property is safe.

Vote YES on House Bill 318

Submitted by Thyes Shaub on behalf of NFIB/Alaska.

The Washington Times

www.washingtontimes.com

Alabama limits eminent domain

By Donald Lambro

THE WASHINGTON TIMES

Published August 4, 2005

Alabama yesterday became the first state to enact new protections against local-government seizure of property allowed under a Supreme Court ruling that has triggered an explosive grass-roots counteroffensive across the country.

Republican Gov. Bob Riley signed a bill that was passed unanimously by a special session of the Alabama Legislature, which would prohibit governments from using their eminent-domain authority to take privately owned properties for the purpose of turning them over to retail, industrial, office or residential developers.

Calling the high court's June 23 ruling "misguided" and a "threat to all property owners," Mr. Riley said, "A property rights revolt is sweeping the nation, and Alabama is leading it."

The backlash against the judicial ruling has not received much attention in the national press, although legislative leaders in more than two dozen states have proposed statutes and/or state constitutional amendments to restrict local governments' eminent-domain powers.

Besides Alabama, legislation to ban or restrict the use of eminent domain for private development has been introduced in 16 states: California, Connecticut, Delaware, Florida, Illinois, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Tennessee and Texas.

Legislators have announced plans to introduce eminent-domain bills in seven more states: Alaska, Louisiana, Oklahoma, Ohio, South Dakota, South Carolina and Wisconsin, and lawmakers in Colorado, Georgia and Virginia plan to act on previously introduced bills.

In addition, public support is being sought for state constitutional prohibitions in several states -- Alabama, California, Florida, Michigan, New Jersey and Texas.

In an elaborate signing ceremony in the State Capitol's historic Old House Chamber, Mr. Riley said, "Alabamians can rest assured that their homes, farms, business and other private property are safe from being seized by government for a shopping center, or a factory, an office building or new residential development."

The signing immediately won praise from leading property rights advocates who had condemned the ruling and have lobbied state legislatures to block such practices.

"Kudos to Alabama political leaders for taking the first step toward protecting their citizens from eminent-domain abuse," said Dana Berliner, a senior attorney at the Institute for Justice, a public policy organization that conducted the first nationwide study of abusive property seizures.

The law came in response to a 5-4 decision by the high court that ruled that the Fifth Amendment's takings clause -- "nor shall private property be taken for public use, without just compensation" -- did not prevent the city of New London, Conn., from taking Susette Kelo's property for the expressed purpose of private development in order to gain higher tax revenue.

Although the Alabama law that the governor signed yesterday would prohibit such

CONGRESSMAN
JOEL HEFLEY

For Immediate Release

2372 RAYBURN HOB
WASHINGTON, D.C. 20515
(202) 225-4422

Aug. 1, 2005

Hefley authors bill to protect private property rights

(Washington, D.C.) — U.S. Rep. Joel Hefley, R-Colo., introduced legislation last Friday that would work to protect the private property rights of American citizens.

Hefley introduced the Eminent Domain Limitation Act of 2005, which would prohibit a state from receiving federal funds for economic development projects if it has not enacted legislation to limit the use of eminent domain.

States must prohibit the use of eminent domain for economic development, and require an entity engaged in a "taking" to show the necessity of the property in question and that no other reasonable alternatives exist. States must also limit the uses for eminent domain to public health and safety, rights-of-way for public utilities and public highways and parks.

"This legislation is strong medicine, I know, but the Supreme Court's decision is the worst thing I have seen from that court in years. It allows local governments to use the lure of future revenues from private economic development projects to run roughshod over private property rights.

"If the court's decision is allowed to stand nobody's property will be safe.

"This bill is not a cure all. However, a basic constitutional right is at stake, and I believe such a strong threat necessitates a strong response."

In June, the U.S. Supreme Court ruled in 5-4 decision that economic development can be considered a public use, allowing local governments to take private property for the purpose of generating income.

— end —

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House bill counters eminent domain ruling

WASHINGTON (AP) -- Contending that the Supreme Court has undermined a pillar of American society -- the sanctity of the home -- the House overwhelmingly approved a bill Thursday to block the court-approved seizure of private property for use by developers.

The bill, passed 376-38, would withhold federal money from state and local governments that use powers of eminent domain to force businesses and homeowners to give up their property for commercial uses.

The Supreme Court, in a 5-4 ruling in June, recognized the power of local governments to seize property needed for private development projects that generate tax revenue. The decision drew criticism from private property, civil rights, farm and religious groups that said it was an abuse of the Fifth Amendment's "takings clause." That language provides for the taking of private property, with fair compensation, for public use.

The court's June decision, said House Judiciary Committee Chairman James Sensenbrenner, R-Wisconsin, changed established constitutional principles by holding that "any property may now be taken for the benefit of another private party."

The ruling in *Kelo v. City of New London* allowed the Connecticut city to exercise state eminent domain law to require several homeowners to cede their property for commercial use.

With this "infamous" decision, said Rep. Phil Gingrey, R-Georgia, "homes and small businesses across the country have been placed in grave jeopardy and threatened by the government wrecking ball."

The bill, said Chip Mellor, president of the Institute for Justice, which represented the *Kelo* homeowners before the Supreme Court, "highlights the fact that this nation's eminent domain and urban renewal laws need serious and substantial changes."

But opponents argued that the federal government should not be interceding in what should be a local issue. "We should not change federal law every time members of Congress disagree with the judgment of a locality when it uses eminent domain for the purpose of economic development," said Rep. Bobby Scott, D-Virginia.

The legislation is the latest, and most far-reaching, of several congressional responses to the court ruling. The House previously passed a measure to bar federal transportation money from going for improvements on land seized for private development. The Senate approved an amendment to a transportation spending bill applying similar restrictions. The bill now moves to the Senate, where Sen. John Cornyn, R-Texas, has introduced companion legislation.

About half the states are also considering changes in their laws to prevent takings for private use.

The Bush administration, backing the House bill, said in a statement that "private property rights are the bedrock of the nation's economy and enjoy constitutionally protected status. They should also receive an appropriate level of protection by the federal government."

The House bill would cut off for two years all federal economic development funds to states and localities that use economic development as a rationale for property seizures. It also would bar the federal government from using eminent domain powers for economic development.

"By subjecting all projects to penalties, we are removing a loophole that localities can exploit by playing a 'shell game' with projects," said Rep. Henry Bonilla, R-Texas, a chief sponsor.

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Eminent domain is in the spotlight now

Here I was, about to submit my hotel proposal to local officials in Weare, N.H., when a wealthy East Coast developer beat me to it. Either project required condemnation of a luxurious home on acreage we needed for hotel parking. The home, unfortunately (for him), belongs to Supreme Court Justice David Souter.

Logan Clements, the other project sponsor, said he needs only three out of five votes for the town's Board of Selectmen to condemn Justice Souter's property using eminent domain powers. Then they'll make him "an offer he can't refuse." The talks, condemnation proceedings begin. The Clements proposal for The Lost Liberty Hotel includes a fine restaurant, the Just Desserts Cafe. Since he's so politically connected, I don't stand a chance. Oh, well, that's life.

Most news watchers know of the Supreme Court's 5-4 ruling that local governments could seize a person's home or business and use the property for more lucrative purposes — namely jobs and tax revenues. For many Americans, the Kelo v. City of New London eminent domain ruling was a shocker. Even more shocking is the intense negative reaction from both rural and urban property owners.

Just as Oregonians overwhelmingly passed a property rights ballot measure limiting government powers last November, the Kelo decision has motivated citizens from coast to coast to explore legislative options that would restrict government's ability to take their property.

These are not knee-jerk reactions to one unpopular Supreme Court decision. The Institute for Justice, which represented homeowner Susette Kelo in the case, says it has documented more than 10,000 instances over a five-year period involving threatened or actual property condemnations that benefited other private parties. It's sad that so many people have been harmed before

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COMMENT



the issue struck home.

Readers of Malcolm Gladwell's intriguing book "The Tipping Point" will recognize the eminent domain/property rights cause as one that has long bubbled under the surface but couldn't quite make it to the level of a national movement. Gladwell defines the tipping point as that magic moment when an idea, trend or social behavior crosses a threshold, then tips and spreads like wildfire. In a single decision, five Supreme Court lawyers just vaulted the issue of property ownership threats well over the tipping point.

On June 23, after reporting the court's decision, CNN's Lou Dobbs conducted an electronic poll asking under what circumstances local governments should seize homes and businesses. A minuscule 1 percent of respondents said they would approve such actions for private economic development. Call-ins and e-mails to two Washington, D.C., radio shows reflected unanimous opposition to the Supreme Court's ruling. Not one response in favor. I can't recall a single controversial public policy issue resulting in such an overwhelmingly one-sided response.

The Supreme Court majority opinion suggested language in state constitutions and laws could be enacted to protect citizens from overzealous property takings; if local citizens want to stop the practice, they have the power to do so. If they don't

act, government and developers will have free rein to advance projects on any property, not just that of the nonwhite and non-wealthy, as has occurred through urban renewal projects over the last 50 years.

Despite the outcry of home and business owners over the Kelo decision, some local government entities are right in the middle of razing working-class and poor neighborhoods to bring in revenues, create jobs and beautify their communities. They are delighted with the case's outcome.

So, what should communities do if they want to revitalize rundown areas? They can adopt procedures that assure respect for the rights of property owners as was done in redeveloping downtown Seattle and elsewhere. Seattle's strategy can be reviewed in a study, "Condemning Condemnation: Alternatives to Eminent Domain," at www.goldwaterinstitute.org/article.php/451.html.

They can support using condemnations only as a last resort. They can require a two-thirds vote of governing bodies to authorize it. State legislatures can impose restrictions on eminent domain use by local governments, as Arizona's legislature did recently.

Possibly the most common-sense response would be for communities to enact remedial measures that would narrowly confine the use of eminent domain powers to the central functions of local government: public buildings, roads, bridges, etc., and let the private sector spearhead the "nice to haves" and redevelopment projects. If eminent domain powers must be exercised, it should be done at home, where local officials have to look the dispossessed straight in the eye.

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