

**Use of Eminent Domain for Economic
Development:
Reaction to *Kelo* by State Legislatures**

By IREM Legislative Staff

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Use Of Eminent Domain for Economic Development

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The Controversy

Supreme Court rules in favor of private developers

In 2000, the City of New London, Connecticut, approved a development plan that was projected to create over 1,000 jobs, to increase tax and other revenues, and to revitalize the economically distressed city. The private developers of the land planned on constructing a hotel, health club, and offices on the waterfront property. In assembling the land needed for the project, the city's development agent purchased property from willing sellers of 135 properties and used the power of eminent domain to acquire the remainder of the property from unwilling owners of fifteen homes and businesses. The property owners of the fifteen condemned properties filed suit against the city.

The case of *Kelo et al v City of New London et al* reached the U.S. Supreme Court who answered the question of whether the city's proposed disposition of the property qualified as a "public use" within the meaning of the Takings Clause of the Fifth Amendment. "Public use" includes property which provides physical access to members of the general public and is owned or controlled by federal, state, or local government, including but not limited to government buildings, schools, libraries, parks, and roads. It also includes infrastructure necessities shared by the public at large, such as public utilities, water and sewer treatment plants, and airports. On June 23, 2005, the U.S. Supreme Court ruled 5 to 4 in favor of New London, deciding the city did not violate the Fifth Amendment by condemning the non-blighted properties for a private mixed-use development. Justice John Paul Stevens, who penned the decision, wrote that economic development qualifies as a "public purpose" sufficient to satisfy the Fifth Amendment's "public use" requirement.

IREM Members lobby Congress

Members of the U.S. Congress quickly reacted to the ruling. The House of Representatives adopted H.R. 340, by a super-majority vote of 365-33, deploring the Supreme Court's ruling. In addition, the House voted 231-189 for a bill prohibiting expenditure of any federal housing, transportation, or treasury funds to enforce the judgment of the Supreme Court in *Kelo*.

During the IREM Capitol Hill Visit Day on April 26, 2006, IREM Members lobbied in support of H.R. 4772 that would create the "Private Property Rights Implementation Act of 2006." The bill would ensure that property owners get their day in federal court to defend their Fifth Amendment rights under the Constitution. Similar legislation had previously passed the House, but did not become law. The legislation would clear some of the procedural hurdles that restrict access to the federal courts, even when no state or local issue is in question. That would eliminate a property owner's need to pursue an infinite cycle of appeals, and define when a government agency's decision on land use is final, so that a property owner can seek federal court review. The House passed H.R. 4772 on September 29, 2006. Unfortunately, the Senate did not pass the bill.

Several members of Congress have introduced similar legislation since 2006. None of those proposals have passed both houses.

IREM Position

In November, 2005, the Legislative and Public Policy Committee, and subsequently the Governing Council, approved the following Statement of Policy on the use of eminent domain for economic development:

The Institute of Real Estate Management supports states' rights in deciding under what conditions eminent domain may or may not be used. IREM, a strong supporter of private property rights, urges state legislatures to respect the rights of property owners by limiting the circumstances under which eminent domain is permitted.

State Legislative Actions

States may restrict the use of eminent domain for economic development if enacting more strict standards of "public use" than the federally mandated standard. All fifty state legislatures have considered changes to their eminent domain laws since the Supreme Court's decision in *Kelo*. From 2005 through 2007, thirty-nine states enacted legislation or passed ballot measures.

According to the National Conference of State Legislatures (NCSL), the laws and ballot measures generally fall into the following categories:

- Restricting the use of eminent domain for economic development, increasing tax revenue or transferring private property to another private entity.
- Defining public use.
- Establishing additional criteria for designating blighted areas subject to eminent domain.
- Strengthening public notice, public hearing, and landowner negotiation criteria. In addition, requiring local government approval before condemning property.
- Placing a moratorium on the use of eminent domain for a specified time period and establishing a task force to study the issue and report findings to the legislature.

In the year following the *Kelo* decision, a few states took the more cautious approach of implementing moratoria on the use of eminent domain for private development in order for the legislature to have time to study and reform related state laws.

At the other end of the spectrum, several states took a more aggressive approach by passing laws that provide for state constitutional amendments prohibiting eminent domain for economic development. State constitutional amendments must be approved by voters.

Ballot measures across the country

Definitions

Legislative Referendum - This is a measure that has been referred to the ballot by a state legislature. Most often, these are referred laws, constitutional amendments or bond questions.

Initiative - This is a measure that was placed on the ballot through the citizen petition process. It may either be a new law or a constitutional amendment. Only 24 states permit the initiative. Some permit both statutory and constitutional initiatives, while others permit only one or the other.

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2006 Ballot measures that passed

In November, 2006, several states placed legislative referendums and initiatives on their ballots proposing changes to their state constitutions or laws. Voters in the following ten states approved of the listed measures:

State	Measure number	Initiative or referendum	State constitutional amendment or statutory
Arizona	Prop. 27	Citizen initiative	Statute
Florida	Amendment 8	Legislative referendum	Constitutional amendment
Georgia	Amendment 1	Legislative referendum	Constitutional amendment
Louisiana	Amendment 5	Legislative referendum	Constitutional amendment
Michigan	Proposal 06-4	Legislative referendum	Constitutional amendment
Nevada	Question 2	Citizen initiative	Constitutional amendment
New Hampshire	Question 1	Legislative referendum	Constitutional amendment
North Dakota	Measure 2	Citizen initiative	Constitutional amendment
Oregon	Measure 39	Citizen initiative	Statute
South Carolina	Amendment 5	Legislative referendum	Constitutional amendment

Summaries of the approved state constitutional amendments or statutory changes are included below.

Arizona

Arizona's Proposition 207 sets forth the rights of a property owner when the state or a local government exercises the power of eminent domain. (These rights are in addition to the current statutory and constitutional rights.) In addition, it limits the use of eminent domain to situations where eminent domain is authorized by the state and the property taken is put to a public use. Proposition 207 excludes from the definition of public use the public benefits of economic development.

The Arizona constitution prohibits a government from taking private property, unless the government provides just compensation to the property owner. Proposition 207 provides that as just compensation when a person's primary residence is taken by the government, the person must be provided a comparable replacement dwelling that is decent, safe and sanitary. The property owner may choose to receive money compensation instead of the replacement dwelling.

Proposition 207 also provides that a property owner is entitled to just compensation if the value of a person's property is reduced by the enactment of a land use law. A land use law is defined as a law that regulates the use or division of land, such as municipal zoning laws, or regulates accepted farming or forestry practices. The proposition sets out seven types of land use laws that are exempt from the compensation requirement.

If a property owner were successful in an eminent domain law suit, Proposition 207 requires the government to pay the land owner's attorney fees and costs. If a property owner were successful in a law suit for reduction in the property's value, the court could award attorney fees and costs.

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Florida

Florida's constitution has been amended to prohibit the transfer of private property taken by eminent domain to a natural person or private entity. The Florida Legislature may permit exceptions allowing the transfer of such private property if a general law is passed by a three-fifths vote of the membership of each house of the Legislature. This prohibition on the transfer of private property taken by eminent domain is applicable if the petition of taking that initiated the condemnation proceeding was filed on or after January 2, 2007.

Georgia

A Georgia constitutional amendment was approved by a large percentage—82.7%—of Georgia voters who voted on the legislative referendum. The Georgia constitution was amended to require that the condemnation of property for redevelopment purposes must be approved by vote of the elected governing authority of the county or city in which the property is located. In addition, the use of eminent domain for redevelopment purposes is restricted to the elimination of harm. The use of eminent domain by counties and municipalities shall be subject to limitation by general law. Lastly, the use of eminent domain by certain nonelected local authorities is prohibited.

Louisiana

Louisiana voters approved of a state constitutional amendment that prohibits the expropriation of property by the state or a political subdivision of the state for predominant use by or transfer to a private person or entity under certain circumstances. Additionally, the amendment defines "public purposes" relative to the expropriation of property. Exceptions are provided for the operation of public ports and airports and for the expropriation of property for industrial development purposes.

Michigan

The following constitutional amendment, approved by 80% of Michigan's voters who turned out for the election, states the following:

- Prohibit government from taking private property for transfer to another private individual or business for purposes of economic development or increasing tax revenue.
- Provide that if an individual's principal residence is taken by government for public use, the individual must be paid at least 125% of property's fair market value.
- Require government that takes a private property to demonstrate that the taking is for a public use; if taken to eliminate blight, require a higher standard of proof to demonstrate that the taking of that property is for a public use.
- Preserve existing rights of property owners.

Nevada

Nevada voters approved of a new section of Article I of the state constitution. The new section states that the transfer of property taken in an eminent domain action from one private party to another private party would not be considered taken for a public use.

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New Hampshire

New Hampshire voters approved of a state constitutional amendment that prohibits the use of eminent domain if the property is to be transferred to another private entity for private development. A large percentage—85.7%—of voters who turned out voted yes.

Oregon

Oregon voters approved of changes to Oregon statutes by limiting the authority of the government to condemn residences, business establishments, and farms or forest operations if the government intends to subsequently transfer an interest in the property to another private property.

The law provides for four exceptions to the new limitation for private property that cannot be taken from one private property owner and given to another private party. The four exceptions are:

- 1) Real property that is a danger to health or safety for specified reasons;
- 2) Timber, crops, topsoil, gravel or fixtures that can be removed from the real property being condemned;
- 3) Real property to be used for transportation or utility-related projects; and
- 4) Real property acquired by a new owner after the government publishes a notice that it intends to consider condemning the real property.

Additionally, the new law authorizes the government to use the real property to secure financing for the property's acquisition and to lease portions of the property for retail uses that serve patrons of the public facility.

If a property owner believes the government's condemnation of the property violates the law, then property owner may object to the condemnation. The court must determine on its own, without deferring to the decision of the local government, whether the government's condemnation violates the new law. If the court determines the government's condemnation does not satisfy the new requirements, then the property owner is entitled to recover reasonable attorney's fees, costs, expenses and other disbursements.

South Carolina

South Carolina voters voted to amend their state constitution to prohibit the state or a local government from condemning, or taking, private property for any purpose except for a public use. Economic development in itself is not a public use. The General Assembly is permitted to pass a law that allows condemnation for a private use only if the property is blighted and is dangerous to the community's safety and health and if fair compensation is paid.

2008 Ballot measures

California considered two propositions in 2008. Proposition 99 passed, receiving 62.4% of the vote. The proposition prohibits the use of eminent domain to acquire an owner-occupied resident to convey it to a private entity.

Proposition 98 failed. It would have prohibited the taking or damaging of private property for private use. It would also prohibit rent control. Lastly, state and local governments would be

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required to offer to sell back property taken through eminent domain to the original owner if the property is put to a substantially different use than originally stated.

CHART: Enacted state laws

Beginning on the following page is a chart listing state legislation reforming eminent domain which has been signed into law by state governors.

Due to the plethora of bills that have been introduced in states across the country, the chart includes only new laws or proposed constitutional amendments. To view active legislation in one or more states, utilize the IREM State Legislative Database available through the Public Policy portion of the IREM web site.

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<u>STATE</u>	<u>BILL NO.</u>	<u>ENACTED</u>	<u>SUMMARY</u>
Alabama	SB 68	8/3/05	Prohibits municipalities from condemning property for the purposes of private development or primarily for enhancement of tax revenue. However, it does not apply to the use of eminent domain to take blighted property.
Alabama	HB 654	4/25/06	An urban renewal project may include non-blighted property, but eminent domain may not be used to acquire non-blighted property without the consent of the owner.
Connecticut	SB 167	6/25/07	Requires a two-thirds vote of the legislative body of a municipality to approve the acquisition of real property through eminent domain by a development agency. If the municipality decides not to use the property for the purpose for which it was acquired, it must offer to sell it back to the original owners or heirs at the original purchase price or fair market value, whichever is less. Increases the level of compensation for property acquired through eminent domain by a development agency to 125 percent of its average appraised value. Prohibits the acquisition of real property through eminent domain if the primary purpose is to increase tax revenue.
Delaware	SB 217	7/21/05	Restricts the use of eminent domain by the state or a municipality to a recognized public use.
Florida	HB 1567	5/11/06	Prohibits the condemnation of private property to prevent or eliminate slum or blight conditions or to abate or eliminate public nuisances, and also bans the transfer of seized private property to private parties for a period of 10 years following the condemnation.
Georgia	HB 1313	4/4/06	Comprehensive reform. Provides “public use” requirement for use of eminent domain. Limits instances it may be used. Provides economic development is not a “public use” that justifies the use of eminent domain. Makes it more difficult to deem property “blighted.”
Idaho	HB 555	3/21/06	Places limitations on eminent domain for private parties, urban renewal, or economic development purposes. Provides for review at judicial proceedings involving the use of eminent domain.
Indiana	HB 1010	3/24/06	Reforms eminent domain law, including provision for procedural changes, litigation expenses, and limitation on time with which condemner can condemn property. Establishes procedures for using eminent domain to transfer ownership or control of property between private persons for non-public uses.

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Kansas	SB 323	5/18/06	States private property must only be taken by eminent domain for public use. Authorizes the transfer of private property to a private entity in limited situations.
Kentucky	HB 508	3/28/06	Create a new act to delineate the allowable public uses (i.e. slum clearance, building of state roads) for eminent domain. Limits use of eminent domain for economic development.
Louisiana	SB 1	6/1/06	Constitutional amendment prohibiting the expropriation of property for use by or transfer to a private person and define public purposes for expropriation purposes. Louisiana voters approved of the constitutional amendment in 2006. See page 4 of this paper for details.
Maine	HB 1310	4/13/06	Government may not condemn property for the purposes of: private retail, office, commercial, industrial or residential development; primarily for the enhancement of tax revenue; or for transfer to a person or any business entity. Blighted properties excluded.
Michigan	SJR E	12/13/05	Constitutional amendment that prohibits the taking of private property by eminent domain for the primary benefit of private entities. Michigan voters approved of the constitutional amendment in 2006. See page 4 of this paper for details.
Minnesota	SF 2750	5/19/06	Relates to eminent domain; defines public use; prohibits the use of eminent domain for economic development; requires clear and convincing evidence for certain takings; provides for attorney fees and compensation.
Montana	SB 363	2007	Limits the use of eminent domain for urban renewal purposes to property in blighted areas where the property is a detriment to the public health, safety or welfare, and prohibits its use if the primary purpose is to increase tax revenue.
Nebraska	LB 924	4/13/06	Prohibits the condemnation of private property if the taking is primarily for an economic development purpose, including the subsequent use by a business or to increase tax revenue. Makes an exception for blight unless the property is agricultural land.
New Hampshire	CACR 30	4/20/06	Constitutional amendment providing that private property may not be seized through eminent domain for a private use. New Hampshire voters approved of the constitutional amendment in 2006.

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Nevada	AB 102	2007	Stipulates that public uses for which property may be acquired through eminent domain do not include transfer of the property to another private entity. Exceptions include where the private entity uses the property primarily to benefit a public purpose; the entity leases the property to a person that occupies an incidental part of a public facility; or the property taken was abandoned by the owner or the purpose was to abate a threat to the public health and safety.
Nevada	AJR 3	2007	Stipulates that public uses for which property may be acquired through eminent domain do not include transfer of the property to another private entity. Exceptions include where the private entity uses the property primarily to benefit a public purpose; the entity leases the property to a person that occupies an incidental part of a public facility; or the property taken was abandoned by the owner or the purpose was to abate a threat to the public health and safety. (Note: AJR 3 must be adopted by the legislature again in 2009 and be passed by the electorate on the 2010 ballot before becoming effective.)
New Mexico	HB 393	2007	Prohibits the use of eminent domain by municipalities for redevelopment projects under the Metropolitan Redevelopment Code.
North Dakota	SB 2214	2007	Prohibits the taking private property for use or ownership by another private entity, except for common carriers or public utilities. Stipulates that public use or public purpose does not include the public benefits of economic development, including an increase in tax base, tax revenue, employment or general economic health.
Ohio	SB 167	11/16/05	Placed a moratorium until December 31, 2006 on the use of eminent domain to take, without the owner's consent, private property that is in an unblighted area when the primary purposes for the taking is economic development that will ultimately result in ownership of the property by another private person.

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Ohio	SB 7	7/10/07	Stipulates that public use for which eminent domain may be exercised does not include conveyance of property to a private commercial enterprise, for economic development purposes or solely to increase tax revenue. Increases from a majority to 70 percent the percentage of parcels that must be blighted before an area can be designated as a blighted area, and adds a detailed definition of what constitutes a blighted parcel. Prohibits a determination that a property could generate more tax revenue as the basis for designating a parcel as blighted. Requires an agency to adopt a comprehensive plan describing the need to take property in a blighted area before exercising eminent domain and requires local legislative approval.
Pennsylvania	SB 881	5/4/06	Prohibits the condemnation of private property for private commercial development. Makes exceptions for existing blight designations in Pittsburgh, Philadelphia, and Delaware County.
Pennsylvania	HB 2054	5/4/06	Amends the Eminent Domain Code and provides for limitations on the use of eminent domain.
South Carolina	SB 155	5/9/07	Ratifies the provisions contained in Constitutional Amendment 5, passed on the 2006 ballot, that prohibits the use of eminent domain for any use, including economic development, that is not a public use, and that authorizes the legislature to enact laws allowing eminent domain to be used to remedy blight with the property put to public or private use provided just compensation is paid.
South Dakota	HB 1080	2/17/06	Restricts the use of eminent domain under certain circumstances. Provides for an offer to sell such eminent domain property within seven years back to the person or heirs who originally owned the property.
Texas	SB 7B	9/1/05	Limits the use of eminent domain for private parties or economic development purposes.
Utah	SB 117	3/21/06	Requires that the appropriate legislative body approve the taking of property by eminent domain. Also requires the governing body intending to take property by eminent domain to provide written notice to property owners of each public meeting to approve the taking and to allow property owners the right to be heard regarding the proposed taking.

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Utah	HB 365	2007	Prohibits the use of eminent domain to acquire single-family residential owner occupied property unless requested by the owners of at least 80 percent of the owner occupied property within the area representing at least 70 percent of the value of owner occupied property in the area, and two-thirds of all agency board members approve of the acquisition. For the acquisition of commercial property, the figures are 75 percent and 60 percent, respectively. Authorizes the use of eminent domain in an urban renewal project area if an agency determines the property is blighted, the urban renewal project area plan provides for the use of eminent domain and acquisition of the property begins no later than five years after the date of the plan. Requires advance written notice and good faith negotiations with property owners before exercising eminent domain.
Vermont	SB 246	4/14/06	Prohibits the use of eminent domain to confer a private benefit on a particular private party. Restricts the use of eminent domain for economic development.
Virginia	SB 781, SB 1296, HB 2954	2007	Defines public use for which eminent domain may be exercised to be, among other uses, the possession, ownership, occupation and enjoyment of property by the public or a public corporation, or for the removal of blight where the property condemned is actually blighted. Stipulates that property may only be taken where the public interest dominates any private gain and the primary purpose is not for an increase in tax base, tax revenue or employment.
West Virginia	HB 4048	4/5/06	Prohibits the use of eminent domain for economic development, provides for limited exceptions. Establishes a procedure for municipal urban renewal authorities to use eminent domain only in blighted areas. Those authorities must meet additional requirements before proceeding with condemnation of non-blighted property.
Wisconsin	AB 657	3/30/06	Prohibits the condemnation of non-blighted property if the government intends to convey or lease the acquired property to a private entity.

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Wyoming	HB 124	2007	Defines public purpose for which eminent domain may be exercised to be the possession, occupation and enjoyment of property by a public entity. Prohibits the transfer of private property to another private entity except to protect the public health and safety. Prohibits a municipality from delegating eminent domain authority to an urban renewal agency. Requires advance written notice and good faith negotiations with property owners before exercising eminent domain.
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Use of Eminent Domain For Economic Development

RESOURCES

For more information please check out:

Institute of Real Estate Management
Legislative Affairs (312) 329-6020 or (312) 329-6021
Visit the Public Policy section of the IREM web site.
www.irem.org

National Association of REALTORS®
“Field Guide to Private Property Rights” (available through the Library)
www.realtor.org

Castle Coalition
www.castlecoalition.org