



2006 EMINENT DOMAIN LEGISLATION

by Raegan Robb

Introduction

In the 2005 U.S. Supreme Court decision, *Kelo et al. v. City of New London, Connecticut*,¹ the Court held that the promotion of economic development by a municipality serves a public purpose within the meaning of the takings clause of the Fifth Amendment to the U.S. Constitution and that the condemnation of private property as part of an economic development plan adopted by the municipality is a valid "public use." The decision also noted that individual states are free to place further restrictions on the manner in which the takings power is exercised in each state as a matter of state constitutional or statutory law. As a result, the *Kelo* case prompted states to reexamine their own eminent domain laws, and most states considered bills to restrict the use of eminent domain for economic development purposes. This issue brief summarizes eminent domain bills that were considered by the Colorado General Assembly during the 2006 legislative session.

Background

Definition of "public use." Section 15 of Article II of the Colorado Constitution permits the taking of private property, with just compensation, for the ultimate transfer to another private party for public use or benefit. No exact definition for public use has been formulated in Colorado law or by the courts to serve as an infallible test.² Colorado courts have held that condemnation must be

supported by a public purpose and have broadly construed the term "public use" to mean a public benefit and advantage.³ Prior to the *Kelo* case, the Colorado General Assembly passed a series of laws to restrict the use of eminent domain for the subsequent transfer to private entities for the purpose of economic development or tax revenue enhancement. Similar laws were not in place in Connecticut to regulate the use of eminent domain.

Condemnation for urban renewal. The Colorado General Assembly significantly modified Colorado's urban renewal laws twice in the past seven years — with House Bill 99-1326 and House Bill 04-1203. House Bill 99-1326 placed more requirements on local governments and urban renewal authorities to approve urban renewal plans by adding more factors to the definition of "blight." It also required that a minimum of four factors be present for a blight designation. House Bill 04-1203 built upon these revisions by placing additional requirements on urban renewal projects when condemned property is to be transferred to a private party. In these instances, House Bill 04-1203 prohibited property from being condemned solely on the economic performance of the property and required that a determination of physical slum or blight be reached in order for municipalities and urban renewal authorities to condemn property.

Eminent Domain

In response to the *Kelo* decision, the Colorado General Assembly reexamined state eminent domain laws during the 2006 legislative session. The General Assembly adopted legislation that further restricted the use of eminent domain, tightened the qualifications of "public use," and increased state oversight over toll road projects. The General Assembly also considered legislation that

¹*Kelo v. City of New London*, 125 S. Ct. 2655 (U.S. 2005)

²*Buck v. District Court for County of Kiowa*, 199 Colo. 344 (Colo. 1980),

³*Tanner v. Treasury Tunnel, Mining & Reduction Co.*, 35 Colo. 593 (Colo. 1906)

would have addressed other restrictions on the use of eminent domain and the compensation for condemned property.

House Bill 06-1411 addresses the protection of property rights. The bill clarifies that, without the consent of the property owner, private property cannot be taken or damaged by the state or any political subdivision for a public or private use without just compensation. This bill also provides that, in any condemnation action, the burden of proof is on the condemning entity to demonstrate, by a preponderance of the evidence, that the taking of private property is for the eradication of blight. If the condemnation action involves a taking for the eradication of blight, the bill requires the condemning entity to demonstrate, by clear and convincing evidence, that the taking of the property is for a public use. This bill also precludes the taking of private property for transfer to a private entity for the purpose of economic development or tax revenue enhancement.

Proposed constitutional amendment. House Concurrent Resolution 06-1001, which was not enacted, would have referred to the Colorado voters the question of whether to amend the Colorado Constitution to require a condemner to establish, through clear and convincing evidence, that property condemnation is for a public use. This measure would have also restricted "public use" to mean situations in which a public entity or public utility will occupy the condemned property or, if the property will be disposed of, to remedy conditions that are injurious to the public health or safety. This resolution specified that condemnation for tax increases, employment increases, or general economic health does not constitute a public use.

Restrictions on the Use of Eminent Domain

Toll roads. Previously, Colorado law allowed private toll road corporations to exercise the power of eminent domain for the purpose of constructing toll roads or toll highways for public use. Both House Bill 06-1003 and Senate Bill 06-078 address property condemnation for these types of projects. These bills place several restrictions on private toll road or toll highway corporations, the most significant being a prohibition on the use of eminent domain to acquire rights-of-way for transportation projects. Instead the private corporation must enter into a public-private initiative with the Department of Transportation. The

use of eminent domain for toll roads or toll highways may only be exercised by the department for the purpose of acquiring property for a toll road or toll highway that is open to the public and is incorporated into the statewide transportation plan.

Special districts. Special districts are quasi-municipal corporations and political subdivisions that are granted the power of eminent domain for the purpose of providing services or creating facilities for district residents.

House Bill 06-1096, which lost in the House, would have limited the ability of smaller special districts to condemn property. The bill would have placed several election requirements on special districts organized by less than 100 voters in order for these districts to exercise eminent domain.

Compensation for Eminent Domain

Section 15 of Article II of the Colorado Constitution prohibits private property from being taken or damaged without just compensation. Private property owners are compensated for the loss of their property and any additional property damages according to the market value of their property. House Bill 06-1208, which was postponed indefinitely, would have required additional compensation to property owners for damages resulting from the condemnation and the violation of the owner's property rights. The bill required the additional compensation to be between 10 and 40 percent of the fair market value of the property taken, which would have been determined by a court-appointed board of commissioners or members of a jury, as applicable.