CURRENT ISSUES NOTICE

LEGISLATIVE RESPONSES TO *Kelo v. City of New London* AND SUBSEQUENT COURT DECISIONS —ONE YEAR LATER

NICHOLS ON EMINENT DOMAIN®

Analysis by
MARY MASSARON ROSS
and
KRISTEN TOLAN
of
PLUNKETT & COONEY, P.C.

0001 XPP 7.3C.1 Patch #3 Thu Aug 24 13:23:31 2006
SPEC: FM000150: nonLLP: 460: XPP-PROD[ST: 1] [ED: m] [REL: 83] (Beg Group)
VER: [FM000150-Master:15 Aug 06 14:54**][MX-SECNDARY:** 16 Aug 06 19:23**][TT-TT000001:** 07 Aug 06 20:04**]**
0

QUESTIONS ABOUT THIS PUBLICATION?
For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:
Robert M. Lopatin, J.D. at ..... 1-800-252-9257 Ext. 2582
Email: ..... robert.m.lopatin@lexisnexis.com
Nancy Greening, J.D. at ..... 1-800-252-9257 Ext. 2593
Email: ..... nancy.h.greening@lexisnexis.com
For assistance with replacement pages, shipments, billing or other customer service matters, please call:
Customer Services Department at.....(800)833-9844
Outside the United States and Canada, please call .....(518)487-3000
Fax Number .....(518)487-3584
Customer Service Website .....http://www.lexisnexis.com/custserv/
For information on other Matthew Bender publications, please call
Your account manager or .....(800)223-1940
Outside the United States and Canada, please call .....(518)487-3000
Library of Congress Card Number: 50–11264
ISBN: 0–8205–1460–8

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.
LexisNexis, the knowledge burst logo, and Michie are trademarks of Reed Elsevier Properties Inc, used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.
Copyright © 2006 Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All Rights Reserved.
No copyright is claimed in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material exceeding fair use, 17 U.S.C. § 107, may be licensed for a fee of 25¢ per page per copy from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Offices
744 Broad Street, Newark, NJ 07102 (973) 820-2000
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexisnexis.com
(Rel.83–10/2006 Pub.460)
0002 XPP 7.3C.1 Patch #3 Thu Aug 24 13:23:31 2006
SPEC: [ST: 1] [ED: m] [REL: 83]
VER: [FM000150-Master:15 Aug 06 14:54**][MX-SECNDARY:** 16 Aug 06 19:23**][TT-TT000001:** 07 Aug 06 20:04**]**
38

CONTINUING ISSUES NOTICE

§ I. INTRODUCTION

The federal government's eminent domain power stems from the takings clause of the U.S. Constitution's Fifth Amendment, which provides, "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[1] The Fifth Amendment conditions the federal government's eminent domain power on the taking being for a "public use."

The definition of the phrase "public use" in the context of eminent domain is not black and white. The chief debate is over the proper interpretation of the phrase "public use," questioning whether it (1) mandates a broad interpretation, i.e., a use is public where it creates a public purpose or benefit, or (2) requires a narrow interpretation, i.e., a use is public if the public actually uses, owns, or controls the land.

The U.S. Supreme Court recently addressed the proper interpretation of "public use" as used in the Fifth Amendment to the U.S. Constitution in *Kelo v. City of New London.*[2] In *Kelo*, the City of New London proposed to condemn private property in a non-blighted neighborhood for the purpose of transferring the property to private developers for economic revitalization. The Supreme Court had to decide whether the proposed taking for economic revitalization was a valid public use under the Fifth Amendment. In a narrow majority, the Supreme Court validated the City's proposed economic redevelopment plan, embracing the broad interpretation of "public use." The Supreme Court explained that it had "'long ago rejected any literal requirement that condemned property be put into use for the general public.'"[3] The Supreme Court denounced the narrow interpretation of "public use," noting that the narrow interpretation had "steadily eroded over time" and was "impractical given the diverse and always evolving needs of society."[4] In an interesting twist, however, the Supreme Court expressly invited the state courts and legislatures to discern local public needs and, if necessary, implement a stricter definition of "public use" than what it had announced as the "federal

[1] U.S. Const. amend. V.
[2] *Kelo v. City of New London*, 545 U.S. , 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).
[3] 125 S. Ct. at 2662, quoting *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984).
[4] *Kelo,* 125 S. Ct. at 2662.

0001 XPP 7.3C.1 Patch #3 Thu Aug 24 12:33:04 2006
SPEC: SC_00461: LLP: 460: XPP-PROD[ST: 1] [ED: 10000] [REL: 83] (Beg Group)
VER: [SC_00461-Local:24 Aug 06 12:32**][MX-SECNDARY:** 16 Aug 06 19:23**][TT-TT000001:** 07 Aug 06 20:04**]** 0

baseline."[5]

In her dissent, Justice O'Connor chastised the majority opinion, noting that its endorsement of incidental public benefits resulting from ordinary use of private property as a "public use" renders the phrase nugatory.[6] Justice O'Connor also opined that the majority opinion effectively limits eminent domain use to

upgrading, not downgrading, property.[7] "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."[8]

Justice Thomas raised similar concerns in his dissent and expanded on Justice O'Connor's view that the majority opinion effectively limited eminent domain use to upgrading property. Justice Thomas opined that the majority's validation of economic benefit as a "public use" to justify eminent domain "guarantees that these losses will fall disproportionately on poor communities."[9]

One year has passed since the U.S. Supreme Court issued its highly publicized *Kelo v. City of New London* decision. During this time, local governments have taken advantage of the *Kelo* opinion's broad definition of "public use" in the context of economic redevelopment. For example, the Institute of Justice, which represented the *Kelo* petitioners, recently reported that local governments have threatened or condemned more than 5,783 properties for private projects.[10]

In response, many states have accepted the *Kelo* Court's invitation to impose stricter definitions of "public use" on their local governments' eminent domain power by either proposing or enacting statutory reform measures and constitutional amendments.

This current issues notice discusses the varied state and federal responses to the *Kelo v. City of New London* opinion in 2005-2006.

§ II. 2005 STATE STATUTORY AND CONSTITUTIONAL REFORM

In 2005, four states, Alabama, Delaware, Ohio, and Texas, enacted eminent domain legislation. One state, Michigan, passed a constitutional amendment that will be on the November 2006 ballot for voter approval.

[5] *Kelo,* 125 S. Ct. at 2668.

[6] *Kelo,* 125 S. Ct. at 2671 (O'Connor, J., dissenting). Then-Chief Justice Rehnquist and Justices Thomas and Scalia joined Justice O'Connor's dissenting opinion.

[7] *Kelo,* 125 S. Ct. at 2676.

[8] *Kelo,* 125 S. Ct. at 2676.

[9] *Kelo,* 125 S. Ct. at 2686–2687 (Thomas, J., dissenting).

[10] Dana Berlinger, *Opening The Floodgates: Eminent Domain Abuses In The Post-Kelo World,* p. 2, http://www.castlecoalition.org/pdf/publications/floodgates-report.pdf (June 2006).

0002 XPP 7.3C.1 Patch #3 Thu Aug 24 12:33:05 2006
SPEC: SC_00461: LLP: 460: XPP-PROD[ST: 1] [ED: 10000] [REL: 83]
VER: [SC_00461-Local:24 Aug 06 12:32**][MX-SECNDARY:** 16 Aug 06 19:23**][TT-TT000001:** 07 Aug 06 20:04**]** 0

The 2005 eminent domain reform legislation generally falls into five categories:

- Prohibiting eminent domain for economic development, including generation of tax revenues, or for transferring private property to another private party;
- Limiting eminent domain to a "stated public purpose" or a "recognized public use";
- Restricting eminent domain to blighted properties or where area as a whole is considered blighted;
- Imposing a moratorium on eminent domain use for economic development purposes for a specified period and creating special legislative committees or task forces to study eminent domain issues; and
- Increasing the compensation amount for condemned property where it is a person's principal residence.[11]

Alabama

Alabama was the first state to enact statutory protection against local government use of eminent domain for private development in the wake of the *Kelo* decision.[12] Senate Bill 68, now enacted as Alabama Code §§ 11-14-170(b), 11-80-1(b) (2005), prohibits eminent domain use for private retail, office, commercial, industrial, or residential development, and tax revenue enhancement, or for the transfer of private property to another private party. Senate Bill 68 does, however, allow local governments to use eminent domain to seize "blighted" properties and turn them over to private interests. This permits local governments to take an otherwise non-blighted property in a blighted area as part of a blight redevelopment project.[13]

In 2006, Alabama enacted its second eminent domain legislative reform, as discussed in § III below.

Delaware

On July 21, 2005, the governor signed Senate Bill 217 into law.[14] Senate Bill 217 makes procedural changes, requiring that eminent domain be exercised only

[11] *Eminent Domain — 2005 State Legislation*, http://www.ncsl.org/programs/natres/post-keloleg.htm (April 26, 2006).

[12] John Kramer & Lisa Knepper, *With Governor's Signature Today, Alabama Will Become First State To Curb Eminent Domain Abuse After Kelo*, http://www.ij.org/private_property/castle/8_3_05pr.html (Aug. 3, 2005).

[13] David Barron, *Eminent domain is dead! (Long live eminent domain!)*, The Boston Globe, April 16, 2006.

[14] S.B. 217, 143rd Gen. Assem. (Del. 2005); 29 Del. Code Ann. tit. 29, § 9505 (2005).

0003 XPP 7.3C.1 Patch #3 Thu Aug 24 12:33:05 2006
SPEC: SC_00461: LLP: 460: XPP-PROD[ST: 1] [ED: 10000] [REL: 83]
VER: [SC_00461-Local:24 Aug 06 12:32**][MX-SECNDARY:** 16 Aug 06 19:23**][TT-TT000001:** 07 Aug 06 20:04**]** 0

for purposes of a recognized public use described at least six months before the proposed taking in a certified planning document, at a public hearing held specifically to address the taking, or in a published report of the acquiring agency. The law also requires that the state agency that sought condemnation reimburse the owner for reasonable attorney, appraisal, and engineering fees incurred because of the proceeding if condemnation proceedings begin but are abandoned or the court determines the property cannot be taken by eminent domain.

Michigan

In December 2005, Michigan's Legislature was the first to pass a proposed amendment to Article X, § 2 of Michigan's Constitution of 1963, Senate Joint Resolution E.[15] The proposed amendment prohibits taking private property for transfer to a private entity for economic development or tax revenue enhancement. It also requires that the taking party establish "public use" by a preponderance of the evidence, unless the taking involves eradication of blight, in which the taking party's burden of proof is heightened to clear and convincing evidence. The Michigan Supreme Court's decision in County of *Wayne v. Hathcock*[16] embraced the narrow view of public use rejecting the use of eminent domain for economic development. Given this interpretation, it is questionable whether the proposed amendment would change existing law under the current constitutional text.

Ohio

On November 16, 2005, the Ohio governor signed Senate Bill 167 into law.[17] Senate Bill 167 is strong eminent domain reform, expressly denouncing the *Kelo* decision by stating that its application could expand the Ohio's eminent domain law to allow private property takings that violate Ohio's Constitution. In response, the enacted law declared an emergency and imposed a moratorium until

December 31, 2006 on eminent domain use to take private property in an unblighted area for the purpose of economic development that will ultimately result in private person ownership.

The law also created the "Legislative Task Force to Study Eminent Domain and Its Use and Application in the State." The task force consists of 25 members appointed either jointly by the President of the Senate and Speaker of the House, or by the attorney general, the governor, and the director of the Department of

15 S.J.R. E, 93rd Leg., Reg. Sess. (Mich. 2005); John Kramer & Lisa Knepper, *Michigan Legislature Approves Nation's First State Constitutional Amendment To Curb Eminent Domain Abuse: Amendment to Go Before Voters Next Year*, http://www.ij.org/private_property/castle/12_14_05pr.html (Dec. 14, 2005).

16 471 Mich. 445, 684; N.W.2d 765 (2004).

17 S.B. 167, 126th Gen. Assem., Reg. Sess. (Ohio 2005).

0004 XPP 7.3C.1 Patch #3 Thu Aug 24 12:33:05 2006
SPEC: SC_00461: LLP: 460: XPP-PROD[ST: 1] [ED: 10000] [REL: 83]
VER: [SC_00461-Local:24 Aug 06 12:32**][MX-SECNDARY:** 16 Aug 06 19:23**][TT-TT000001:** 07 Aug 06 20:04**]** 0

Development or the director of the Department of Transportation.18 The task force's first meeting occurred on February 16, 2006 and it met six times before submitting its initial report to the legislature.19 This initial report indicates that the task force is unlikely to reach unanimous conclusions on eminent domain use due to the varying members' opinions on economic development and protecting private property rights.20

Texas

On November 18, 2005, Texas enacted Senate Bill 7 into law.21 Senate Bill 7 prohibits eminent domain use if the taking: (1) confers a private benefit on a particular private party through the property's use; (2) is for a public use that is a pretext to confer a private benefit on a particular private party; or (3) is for economic development purposes, unless the purpose is to eliminate the harmful effects of slum or blighted areas. The law specifies that a governmental or private entity's determination that its proposed taking does not violate these provisions will not create a presumption that this is so in a Texas court of law. The law does not apply to takings for numerous purposes, including public buildings, transportation projects, utility services, and a sports and community venue project voted on before December 1, 2005 (i.e., the new Dallas Cowboys stadium).

The law also established an interim study committee, which has to submit its first report on December 1, 2006.

The Texas Legislature is not in session in 2006.

§ III. 2006 STATE STATUTORY AND CONSTITUTIONAL REFORM

In 2006, twenty-one states, Alabama, Alaska, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Missouri, Nebraska, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin, enacted eminent domain legislation. Five states, Florida, Georgia, Louisiana, New Hampshire, and South Carolina, passed constitutional amendments that will be on the ballot for voter approval in fall 2006. Illinois passed eminent domain legislation that awaits gubernatorial approval. Two states, Arizona and New Mexico, passed eminent domain legislation that the governor vetoed.

The 2006 eminent domain legislative reforms fall into the 2005 statutory reform categories plus an additional two categories:

18 *See* http://www.greaterohio.org/documents/ohio-ed-tf-initial-findings.pdf.

19 *Id.* at 1.

[20] *Id.* at 10.
[21] S.B. 7, 79th Leg. (Tex. 2006).

- Imposing greater procedural requirements on eminent domain use, i.e., greater public notice, more public hearings, good faith negotiation, and elected governing body approval; and

- Redefining "public use" as possession, occupation, or enjoyment of the property by the public at large, public agencies, or public utilities.[22]

A. STATES THAT ENACTED EMINENT DOMAIN LEGISLATION

On April 18, 2006, the Alabama Legislature enacted House Bill 654, which amended Alabama Code §§ 24-2-2 and 24-3-2. [23] The amendments prohibit eminent domain use to acquire non-blighted property for a redevelopment project without the owner's consent. The amendments define "blighted property" as property that contains detailed characteristics, i.e., is detrimental to public health and safety. House Bill 654 tied up the loophole in Alabama's 2005 eminent domain legislation, discussed in § II above, that allowed a non-blighted property within a blighted area to be taken as part of a blight redevelopment project.

Alaska

On July 5, 2006, Alaska's governor signed House Bill 318, which amended Alaska Statutes § 09.55.240.[24] House Bill 318 adds language to the statute that expresses the legislature's concern that *Kelo* may threaten private property owners' rights. It conditions eminent domain use to transfer private property to another private entity for economic development purposes on legislative authorization. The bill also requires legislative authorization to take residential property for "recreational facilities or projects." House Bill 318 is effective October 3, 2006.

Colorado

On June 6, 2006, Colorado's governor signed House Bill 1411, which amended Colorado General Statutes § 38-1-101.[25] The bill redefines "public use" to exclude transferring private property to another private entity for economic development or tax revenue enhancement purposes. The burden of proof is on the condemning party to prove "public use" by a preponderance of the evidence. The bill includes the elimination of blight as a valid "public use." Like Michigan's proposed constitutional amendment, Colorado's new law increases the burden of proof on the condemning party to clear and convincing evidence when the elimination of blight is the proposed purpose for eminent domain.

[22] *Eminent Domain — 2006 State Legislation*, http://www.ncsl.org/programs/natres/emindomainleg06.htm (June 15, 2006).
[23] H.B. 654, 2006 Leg., Reg. Sess. (Ala. 2006).
[24] H.B. 318, 2006 Leg., 24th Sess. (Alaska 2006).
[25] H.B. 06-1411, 65th Gen. Assem., Sec. Reg. Sess. (Colo. 2006).

Florida

On May 11, 2006, Florida's governor signed House Bill 1567, which the Institute of Justice referred to as "some of the best protection in the nation."[26]

House Bill 1567 prohibits eminent domain use to transfer private property to another private entity. The new law does provide some exceptions to the rule, including common carrier use, public transportation use, public utility use, or where the private use is incidental to a public project.

Under Florida's new law, local governments must offer to sell the land back to the previous owner if the government does not use it for the specified purpose. If the previous owner chooses to not buy the property back, the government must wait ten years before it can sell it through a competitive bidding process.

House Bill 1567 also forbids eminent domain use to eliminate blight, instead requiring local governments to use their police powers to address properties that actually pose a danger to public health or safety. The bill further prohibits takings for abating or eliminating a public nuisance.

Florida's Legislature also passed a constitutional amendment, House Joint Resolution 1569, discussed in § IIIB below, that will go to the voters in November 2006.

Georgia

On April 4, 2006, Georgia's governor signed House Bill 1313, "The Landowner's Bill of Rights and Private Property Protection Act."[27] House Bill 1313 provides six definitions of "public use": (1) the possession, occupation, or land use by the general public or by state or local governmental entities; (2) land use for public utility creation or function; (3) road openings, defense construction, or providing trade or travel channels; (4) acquiring property where title is clouded due to the inability to identify or locate all property owners; (5) acquiring property where each person with an identified or found legal claim gives unanimous consent; or (6) remedy of blight. The law redefines "blight" and "blighted properties" as properties with characteristics that are detrimental to public health and safety. The individual parcel, not merely its area, must be designated as "blighted" to be subject to condemnation for private development. The bill excludes economic development from its definition of "public use."

The new law allows former owners an opportunity to reacquire, or obtain additional compensation for, their condemned property if, after five years, the

[26] H.B. 1567, 19th Leg., Sec. Reg. Sess. (Fla. 2006); *Legislative Action Since Kelo*, http://www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf (June 20, 2006).

[27] H.B. 1313, 2006 Leg. (Ga. 2006). This bill amended Titles 8, 22, 23, and 36 of the Official Code of Georgia Annotated.

property has not been put to a defined "public use."

Like Florida, Georgia's Legislature also passed a constitutional amendment, House Resolution 1306, discussed in § IIIB below, that will go to the voters in November 2006.

Idaho

On July 7, 2006, House Bill 555, providing for "Limitations on Eminent Domain for Private Parties, Urban Renewal or Economic Development Purposes," went into effect.[28] House Bill 555 prohibits eminent domain use for a public use that is a pretext for transferring property to a private party or for promoting or effectuating economic development. The new law allows takings of urban renewal and deteriorating area properties if the taking party proves the need with clear and convincing evidence. The new law also addresses judicial review,

providing that a government's rationale for a proposed taking is "freely reviewable" in a judicial proceeding that involves the exercise of eminent domain.

Indiana

On March 24, 2006, Indiana's governor signed House Bill 1010, which contains many protections for property owners.[29] First, House Bill 1010 defines "public use" as the possession, occupation, and enjoyment of property by the public, public agencies, or public utilities and does not include economic development, increase in a tax base, tax revenues, employment, or general economic health. Second, the bill mandates that when a property owner refuses a taking entity's written acquisition offer, the taking entity must initiate condemnation proceedings within two years of the offer date.[30]

Third, the bill provides for increased procedural protections, requiring those with taking powers to provide property owners with an appraisal or other evidence used to create the purchase price and to conduct good faith negotiations before using eminent domain.

House Bill 1010 allows eminent domain use if the targeted property is a public nuisance, fire hazard, is unfit for human habitation, is neglected or abandoned, is environmentally contaminated, or has tax delinquencies that exceed the property's value.

The bill also established a legislative study commission to study eminent

[28] H.B. 555, 58th Leg., Sec. Reg. Sess. (Idaho 2006); Idaho Code § 7-701A.

[29] H.B. 1010, 2006 Leg., Reg. Sess. (Ind. 2006). On July 1, 2005, Indiana established an eminent domain study committee. H.B. 1063, 2005 Leg. (Ind. 2005).

[30] Indiana's transportation department, if the taking entity, has three years and a public utility has six years. H.B. 1010, 2006 Leg., Reg. Sess. (Ind. 2006).

domain and report its findings to the legislature no later than November 1, 2007.

Iowa

On May 3, 2006, the Iowa Legislature sent House File 2351 to Governor Vilsack for signature. He vetoed it on June 2, 2006.[31] On July 14, 2006, however, the Iowa Legislature reconvened for a special session, overriding the veto with a 90-8 vote in the House and a 41-8 vote in the Senate.[32]

House File 2351 provides three definitions of "public use" in the context of the valid exercise of eminent domain: (1) possession, occupation, and enjoyment of the property by the general public or a public utility; (2) private use that is incidental to the public use of the property; or (3) redevelopment of blighted areas where at least 75 percent of the properties in the area are blighted. The bill states that public use does not include economic development activities that generate additional tax revenue or employment or result in private, residential, commercial, or industrial development.

The law also increases procedural burdens on eminent domain use by requiring public notice before condemnation proceedings may begin. Also, like Georgia's new law, it implements a buy-back provision, allowing the original owner of condemned property to buy the property back if the property is not put to a public years within five years.

Kansas

On May 18, 2006, Kansas' governor signed Senate Bill 323, which goes into effect July 1, 2007.[33] The new law forbids eminent domain use for selling, leasing, or transferring property to a private entity. The exceptions to this rule are for

transportation, public improvements, and utilities, property with defective title, unsafe buildings, property owner consent, or when the state legislature expressly authorizes the taking by enacting a law that identifies the tract or tracts to be taken. The new law's restrictions do not apply to property in a redevelopment district created before the law's enactment.

Kentucky

On March 28, 2006, Kentucky's governor signed House Bill 508.[34] House Bill 508 amends its current eminent domain legislation to allow taking private property for "public use" instead of "public purpose." The bill defines "public use" as: ownership, possession, occupation or enjoyment of the property by a governmental entity; public utility use; or the acquisition or transfer of property to eliminate blighted, slum, or substandard and insanitary areas. The bill bans takings solely for economic development.

Maine

On April 13, 2006, Maine's governor signed L.D. 1870 (a.k.a. H.P. 1310).[35] The bill prohibits eminent domain use to condemn land improved with residential, commercial, or industrial buildings or land used for agriculture, fishing, or forestry for: (1) private retail, office, commercial, industrial, or residential purposes; (2) generating tax revenue; or (3) transferring private property to another private entity. These restrictions do not apply to eminent domain use by a municipality, housing authority, or other public entity based on a finding of blight in an area covered by a redevelopment or urban renewal plan.

Minnesota

On May 20, 2006, Minnesota's governor signed Senate File 2750, which the Institute of Justice has called, "very strong reform that significantly protects Minnesotans."[36] Senate File 2750 expressly prohibits local governments from using eminent domain to transfer property from one owner to another for private commercial development. Instead, it limits eminent domain use to a "public use" or a "public purpose," defined as: (1) possession, occupation, ownership, or enjoyment of the property by the general public or public agency; (2) creation or functioning of a public service corporation; or (2) for blight mitigation. The public benefit of economic development, including increases in tax base, tax revenues, employment, or general economic health, are not, alone, a "public use" or a "public purpose."

For property to be condemned for private development under the blight exception, Senate File 2750 requires that blighted properties be an actual danger to public health and safety. Non-blighted properties may only be condemned under this exception if they are in an area where the majority of properties (greater than 50 percent) are blighted and there is no "feasible alternative" to taking them to alleviate blight.

Senate File 2750 also increases procedural protections for property owners by requiring condemning authorities to provide clear and convincing evidence for certain takings, good faith negotiations with property owners, and increased

[31] H.F. 2351, 2006 Leg., Gen. Assem. (Iowa 2006).
[32] John Kramer & Lisa Knepper, *Iowa Legislature Overrides Eminent Domain Reform Veto*, http://www.castlecoalition.org/media/releases/7_14_06pr.html?actionID=270 (July 14, 2006).
[33] S.B. 323, 2006 Leg. (Kan. 2006).
[34] H.B. 508, 2006 Leg., Reg. Sess. (Ky. 2006).

public notice and public hearing requirements.

[35] L.D. 1870, 122nd Leg., Reg. Sess. (Me. 2006).

[36] S.F. 2750, 84th Leg. Sess. (Minn. 2006); *Legislative Action Since Kelo*, http://www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf (June 20, 2006).

0010 XPP 7.3C.1 Patch #3 Thu Aug 24 12:33:05 2006
SPEC: SC_00461: LLP: 460: XPP-PROD[ST: 1] [ED: 10000] [REL: 83]
VER: [SC_00461-Local:24 Aug 06 12:32**][MX-SECNDARY:** 16 Aug 06 19:23**][TT-TT000001:** 07 Aug 06 20:04**]** 0

Missouri

On July 13, 2006, Missouri's governor signed House Bill 1944, which went into effect on August 28, 2006.[37] House Bill 1944 prohibits eminent domain use solely for an economic development purpose, which is defined as a tax base, tax revenue, or employment increase. The bill provides that only elected bodies have condemnation authority. Also, the bill establishes an Office of Ombudsman for property rights in the Office of Public Counsel in the Department of Economic Development to help property owners get information about eminent domain. There is a blight exception, allowing eminent domain use to take property in blighted areas. The bill relies on Missouri's current definition of blight, which includes factors like inadequate street layout, unsafe conditions, and obsolete platting. Blight determinations are made on a property-by-property basis, excluding farmland.

Nebraska

On April 13, 2006, Nebraska's governor signed Legislative Bill 924.[38] Legislative Bill 924 forbids eminent domain use primarily for economic development. The bill defines economic development as commercial entity use, or to increase tax revenue, tax base, employment, or general economic conditions. The bill provides exceptions for public utility use, blighted areas (agricultural property cannot be designated as blighted), public rights-of way, removal of harmful uses, acquisition of abandoned property, clearing defective title, and leasing to a private person who occupies an incidental part of public property or a public facility.

New Hampshire

On June 23, 2006, New Hampshire's governor signed Senate Bill 287, which will be effective July 1, 2007.[39] Senate Bill 287 defines "public use" for eminent domain purposes as: (1) general public or government entity possession, occupation, and enjoyment of real property; (2) public or private utility or common carrier use; (3) the removal of structures that are public nuisances (i.e., the blight exception), beyond repair, unfit for human habitation or use, or abandoned when such structures are a menace to health and safety; or (4) private use that occupies an incidental area within a public use. "Public use" under the new law does not include taking property solely for facilitating incidental private use or for public benefit from private economic development, including increased tax revenue and employment opportunities.

[37] H.B. 1944, 93rd Gen. Assem., Sec. Reg. Sess. (Mo. 2006); John Kramer & Lisa Knepper, *Missouri Eminent Domain Reform Small Step In Right Direction*, http://www.castlecoalition.org/media/releases/7_13_06pr.html?actionID=270 (July 13, 2006).

[38] L.B. 924, 99th Leg., Sec. Sess. (Neb. 2006).

[39] S.B. 287, 159th Leg. (N.H. 2006).

0011 XPP 7.3C.1 Patch #3 Thu Aug 24 12:33:06 2006
SPEC: SC_00461: LLP: 460: XPP-PROD[ST: 1] [ED: 10000] [REL: 83]
VER: [SC_00461-Local:24 Aug 06 12:32**][MX-SECNDARY:** 16 Aug 06 19:23**][TT-TT000001:** 07 Aug 06 20:04**]** 0

Like Florida and Georgia, New Hampshire's Legislature also passed a proposed

constitutional amendment, Constitutional Amendment Concurrent Resolution 30, discussed in § IIIB below, that will go to the voters in November 2006.

Pennsylvania

On May 4, 2006, Pennsylvania's governor signed two bills, Senate Bill 881 and its companion, House Bill 2054, creating the "Property Rights Protection Act."[40] The Act went into effect on September 1, 2006.

Senate Bill 881 prohibits eminent domain use to take private property for the benefit of private enterprise. This general prohibition does not apply to property taken for a common carrier, public utility or railroad, property taken because it poses a threat to public health or safety, property taken under the urban redevelopment law, abandoned or blighted property, or property that is acquired to develop low-income and mixed-income housing projects.

The blight exception includes properties that: have defective or unusual conditions rendering their title unmarketable; pose environmentally hazardous conditions; and present multiple conditions of blight, i.e., fire code violations, or unsafe access ways. The declaration of a blighted area expires after 20 years. Also, the blight exception imposes time limitations on data used to make a blight designation, prohibiting the use of blight studies that date back indefinitely.

House Bill 2054 outlines land condemnation procedures, including the proper court filing of a taking declaration, the taking authorization, the condemnation's purpose, a property description, the just compensation made or secured, and a statement indicating where a plan showing the condemned property may be inspected. House Bill 2054 also provides for increased notice and taking challenge provisions.[41]

South Dakota

On February 16, 2006, South Dakota's governor signed House Bill 1080, which the Institute of Justice referred to as "an excellent example of strong eminent domain reform."[42] House Bill 1080 prohibits any governmental entity, or housing and redevelopment commission, from using eminent domain: (1) to acquire private property for transfer to a private person, non-governmental agency, or other public-private business entity; or (2) primarily for tax revenue enhance-

[40] S.B. 881, 190 Leg., Reg. Sess. (Pa. 2006); H.B. 2054, 190 Leg., Reg. Sess. (Pa. 2006).

[41] See *Governor Rendell Signs Eminent Domain Bills Protecting Property Owners Rights*, http://www.state.pa.us/papower/cwp/view.asp?A=11&Q=452448 (May 4, 2006).

[42] H.B. 1080, 81st Leg. Assem. (S.D. 2006); *Legislative Action Since Kelo*, http://www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf (June 20, 2006).

ment.[43] The new law also includes a seven-year buy-back option to the original property owner (or heirs) before the taking entity may transfer any fee interest in the property acquired through the use or threat of eminent domain.

Tennessee

On June 5, 2006, Tennessee's governor signed Senate Bill 3296 and its companion, House Bill 3450, both of which went into effect July 1, 2006.[44] Senate Bill 3296 articulates the Tennessee Legislature's intent that eminent domain be used sparingly. The new laws specify that "public use" does not include private use or benefit or indirect public benefit resulting from private economic development and private commercial enterprise, including increased tax revenue and employment opportunity. "Public use" does include transportation projects, public or private utility use, common carrier use, blight removal (like Nebraska,

agricultural land cannot be designated as blighted), incidental private uses, and industrial parks.

The new laws also provide for greater procedural protections, requiring good faith negotiations before a taking.

Utah

On March 21, 2006, Utah's governor signed Senate Bill 117.[45] Senate Bill 117 expands Utah's already-existing definition of "public use" (in Utah Code Annotated § 78-34-1) to include bike paths and sidewalks adjacent to paved roads but excludes trails, paths, or other ways for walking, hiking, biking, equestrian use, or other recreational uses. Senate Bill 117 mandates approval by the governing body of a local government before it may exercise eminent domain for a "public use."

Senate Bill 117 expands procedural protections for property owners by requiring a written notice be sent to the affected homeowner at least 10 days before the public hearing where the proposed taking will be considered.

Vermont

On April 14, 2006, Vermont's governor signed S.0246.[46] The bill only prohibits eminent domain use where the taking is primarily for economic development purposes, except in accordance with the state's urban renewal law. Further

[43] South Dakota is the only state that has a new law limiting eminent domain to governmentowned development projects. David Barron, *Eminent domain is dead! (Long live eminent domain!)*, The Boston Globe, April 16, 2006.

[44] S.B. 3296, 104th Gen. Assem. (Tenn. 2006); H.B. 3450, 104th Gen. Assem. (Tenn. 2006).

[45] S.B. 117, 2006 Leg., Gen. Sess. (Utah 2006).

[46] S.B. 246, 2006 Leg., Gen. Sess. (Vt. 2006).

exceptions to this general rule include uses for transportation, public utilities, public property and water projects.

The new law narrows Vermont's definition of blight, stating that no area is blighted solely or primarily because its condition and value for tax purposes are less than the condition and value projected as the result of implementing a redevelopment plan.

Further, the new law prevents a court from giving weight to a projected increase in the property's economic value solely or primarily because its condition and value for tax purposes are less than the condition and value projected as the result of implementing a redevelopment plan.

West Virginia

On April 5, 2006, West Virginia's governor signed Bill 4048, which went into effect on June 9, 2006.[47] Bill 4048 prohibits eminent domain use primarily for private economic development. The new law contains a blight exception, allowing a municipal urban renewal authority to exercise eminent domain over property within a designated slum or blighted area, defined as detrimental to the public health, safety, or welfare.

Under the new law, a municipal urban renewal authority must consider alternatives to condemnation and to follow new requirements before taking nonblighted properties in slum or blighted areas. The municipality has the burden of establishing blight.

The new law strengthens procedural protections for property owners by requiring notice of public hearing and the property owner's rights related to a

property's proposed condemnation. It further requires a good faith offer before condemnation, and establishes a right for the property owner to appeal the condemnation.

Wisconsin

On March 29, 2006, Wisconsin's governor signed Assembly Bill 657.[48] The new law prohibits eminent domain use for non-blighted, private property for private use. The new law defines "blighted property" as property that, for varied enumerated reasons including abandonment and deterioration, is detrimental to the public health, safety, or welfare. For residential property to be considered blighted, it must be abandoned or converted from single to multiple units and be in a high-crime area. The new law also requires that the taking party make a written finding that the property is blighted before commencing condemnation proceedings.

[47] B. 4048, 2006 Leg., Reg. Sess. (W. Va. 2006).

[48] A.B. 657, 2006 Leg. (Wis. 2006). This bill created Wis. Stat. § 32.03(6) (2006).

0014 XPP 7.3C.1 Patch #3 Thu Aug 24 12:33:06 2006
SPEC: SC_00461: LLP: 460: XPP-PROD[ST: 1] [ED: 10000] [REL: 83]
VER: [SC_00461-Local:24 Aug 06 12:32**][MX-SECNDARY:** 16 Aug 06 19:23**][TT-TT000001:** 07 Aug 06 20:04**]** 0

B. STATES THAT PASSED CONSTITUTIONAL AMENDMENTS FOR THE 2006 BALLOT

Florida

In addition to enacting statutory reform, Florida's Legislature passed House Joint Resolution 1569, a proposed constitutional amendment to Article X, § 6 of the Florida Constitution.[49] The amendment requires a three-fifths majority in both legislative houses to approve using eminent domain to transfer private property to another private entity. If Florida's citizens vote for the amendment in November 2006, the amendment will take effect January 2, 2007.

Georgia

Like Florida, in addition to enacting statutory reform, Georgia's Legislature passed House Resolution 1306, which proposes a constitutional amendment to the Georgia Constitution.[50] Specifically, the proposed constitutional amendment would require the governing body of a city or county to approve eminent domain actions for redevelopment purposes. Also, the amendment would require greater public notice before proceeding with the taking. House Resolution 1306 will be on the ballot in November 2006.

Louisiana

In September 2006, the citizens of Louisiana will vote on Senate Bill 1, which will add language to Article I, § 4(B) of the Louisiana Constitution.[51] The proposed language prohibits local governments from condemning private property for economic development, enhancement of tax revenue, or any incidental public benefit. The bill provides three definitions of "public purpose" justifying eminent domain: (1) general public right to a definite property use; (2) continuous public ownership of property dedicated to certain public objectives, i.e., roads, public buildings, public parks; and (3) removing a threat to public health or safety caused by the existing use or disuse of the property. This last definition reforms the state's current blight laws by ensuring that eminent domain be used only for removing a threat to public health and safety caused by a particular property. The bill requires that Louisiana's current economic development and urban renewal laws conform to its limitations.

New Hampshire

Like Florida and Georgia, in addition to enacting statutory reform, New Hampshire's Legislature passed a concurrent resolution proposing a constitutional

[49] H.J.R. 1569, 108 Leg., Reg. Sess. (Fla. 2006).
[50] H.R. 1306, 2006 Leg. (Ga. 2006).
[51] S.B. 1, 2006 Leg., Reg. Sess. (La. 2006).

amendment, CACR 30, which will go to the voters in November 2006.[52] The proposed amendment prohibits eminent domain use if the property is to be transferred to another private entity for private development.

South Carolina

South Carolina's Legislature passed a joint resolution proposing an amendment to Article I, § 13 of the South Carolina Constitution, House Bill 1031, which the Institute of Justice referred to as "meaningful protection against eminent domain abuse." [53] The proposed constitutional amendment prohibits eminent domain use for any use, including economic development, that is not a "public use." The amendment also defines blighted property as a danger to public health and safety. House Bill 1031 will go to the voters in November 2006.

C. STATE THAT PASSED STATUTORY REFORM AWAITING GUBERNATORIAL APPROVAL

Illinois

On June 1, 2006, the Illinois Legislature sent Senate Bill 3086, which proposes enactment of the "Equity in Eminent Domain Act," to the governor for signature.[54] The bill prohibits eminent domain use for the benefit of a private party. An exception allows eminent domain use for private development in a blighted area as long as one of the following conditions exist: (1) the proposed use is consistent with a regional plan adopted within the past five years; or (2) the state or local government has entered an agreement with a private entity to undertake the redevelopment project. The burden of proving blight is on the government. Like Texas law, the bill specifies that a state or local government determination that a proposed taking is permissible does not create a presumption.

D. STATES THAT PASSED STATUTORY REFORM THAT THE GOVERNOR VETOED

Arizona

In January 2006, the House introduced House Bill 2675, which the Institute of Justice has referred to as "strong blight reform legislation."[55] House Bill 2675 limits eminent domain use for purposes of clearing and removing slum conditions by requiring a determination by a two-thirds vote of the city council that the

[52] C.A.C.R. 30, 2006 Leg. (N.H. 2006).
[53] H.B. 1031, 2006 Leg. (S.C. 2006); *Legislative Action Since Kelo*, http//:www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf (June 20, 2006).
[54] S.B. 3086, 94th Gen. Assem. (Ill. 2006).
[55] *Legislative Action Since Kelo*, http//:www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf (June 20, 2006).

property is located in a slum area based on clear and convincing evidence.[56] On June 6, 2006, the governor vetoed House Bill 2675.

New Mexico

The New Mexico Legislature passed House Bill 746 but the governor vetoed the bill.[57] House Bill 746 would have prohibited the use of eminent domain if the taking is to promote private or commercial development and the title of the property taken would be transferred to a private entity. The bill also appropriated $25,000 to the government division of the finance and administration department for statewide meetings to educate local public bodies about the proper use of eminent domain.

E. STATES THAT INTRODUCED STATUTORY AND/OR CONSTITUTIONAL REFORM THAT IS STILL PENDING

California

Senate Bill 1206, currently pending, authorizes the establishment of redevelopment agencies to assess blight effects. The bill defines a blighted area as one that is predominantly urbanized and characterized by specified conditions. The bill prohibits inclusion of non-blighted parcels in a redevelopment project area for the purpose of obtaining property tax revenue. Substantial justification for their inclusion, however, is an offered exception to this rule. Senate Bill 1206 has passed the Senate and is currently sitting in the Assembly Appropriations Committee.[58]

Massachusetts

The proposed constitutional amendment, House Bill 4604, echoes House Bill 4605, and would amend Article X of the Massachusetts Constitution to exclude economic development as a "public use," unless it is for eliminating a blighted area.[59] House Bill 4604 has been recessed until November 9, 2006, indicating the legislature's desire to send this issue to the voters.[60]

New Jersey

New Jersey has several bills moving through the House and Senate that propose eminent domain reform. Senate Bill 1975 was introduced June 12, 2006 and is currently in the Senate Community and Urban Affairs Committee.[61] If passed, this bill would allow eminent domain for redevelopment of blighted areas. Assembly Bill 3178 was introduced June 1, 2006 and is currently in the Assembly Commerce and Economic Development Committee.[62] If passed, this bill, as a response to the *Kelo* decision, would impose a one-year moratorium on taking private property when the primary purpose is economic development that will ultimately result in a private person owning the property.

North Carolina

North Carolina's House Select Committee on Eminent Domain Powers introduced House Bill 1965, which prohibits takings for economic development.[63] On July 19, 2006, the bill passed the Senate. The legislative session ends July 26, 2006.

North Carolina's Legislature introduced many other eminent domain reform measures, which will likely die before the legislative session ends. These

56 H.B. 2675, 47th Leg., Sec. Reg. Sess. (Ariz. 2006).
57 H.B. 746, 47th Leg., Sec. Sess. (N.M. 2006).
58 *See* http://www.leginfo.ca.gov/pub/bill/sen/sb_1201-1250/sb_1206_bill_20060706_status.html.
59 H.B. 4604, 2006 Leg. (Mass. 2006).
60 *See* http://www.mass.gov/legis/184history/h04604.htm.

measures repeal authorization of condemnation for urban development and also contain a House Resolution expressing the House's disagreement with the *Kelo* decision.[64] The proposed constitutional amendments would amend Article 1 of the North Carolina Constitution and prohibit eminent domain use for economic development purposes, including increased tax revenues.[65]

F. STATES THAT INTRODUCED STATUTORY AND/OR CONSTITUTIONAL REFORM THAT FAILED TO PASS

Alabama

On January 19, 2006, Senate Bill 297, a proposed constitutional amendment, was introduced. The Alabama Legislature ended its 2006 session on April 18, 2006 without taking any further action on Senate Bill 297.[66]

Senate Bill 297 would have amended the constitution to provide that eminent domain use is prohibited for private economic activity that would generate tax revenue, create jobs, or other economic benefits if the property was given, sold, or leased to a private party.[67]

61 S.B. 1975, 212th Leg. (N.J. 2006); http://www.njleg.state.nj.us/bills/BillView.asp.
62 A.B. 3178, 212th Leg. (N.J. 2006); http://www.njleg.state.nj.us/bills/BillView.asp.
63 H.B. 1965, 2006 Leg., (N.C. 2006).
64 *See* S.B. 1321, 2006 Leg. (N.C. 2006), H.B. 1855, 2006 Leg. (N.C. 2006).
65 *See* S.B. 1324, 2006 Leg. (N.C. 2006), H.B. 2213, 2006 Leg. (N.C. 2006), S.B. 1222, 2006 Leg. (N.C. 2006), H.B. 1229, 2006 Leg. (N.C. 2006).
66 *See* http://alisdb.legislature.state.al.us/acas/ACASLogin.asp.
67 S.B. 297, 2006 Leg., Reg. Sess. (Ala. 2006).

0018 XPP 7.3C.1 Patch #3 Thu Aug 24 12:33:09 2006
SPEC: SC_00461: LLP: 460: XPP-PROD[ST: 1] [ED: 10000] [REL: 83]
VER: [SC_00461-Local:24 Aug 06 12:32**][MX-SECNDARY:** 16 Aug 06 19:23**][TT-TT000001:** 07 Aug 06 20:04**]** 0

California

In addition to the currently pending eminent domain legislation reform, California's Legislature introduced a proposed constitutional amendment, Assembly Constitutional Amendment 22, which died in committee.[68] The proposed amendment would have amended Article I, § 19 of California's Constitution to prohibit eminent domain use for economic development, increased tax revenue, or any private use, without the owner's consent.

California citizens, however, obtained enough votes to place a constitutional amendment initiative, Proposition 90, on the November 2006 ballot. The initiative proposes numerous amendments: bars state and local governments from condemning or damaging private property to promote other private uses; limits government's authority to adopt certain land use, housing, consumer, environmental and workplace laws and regulations, except when necessary to preserve public health or safety; and voids unpublished eminent domain court decisions.[69]

Connecticut

The Connecticut Legislature introduced three bills reforming eminent domain law, none of which passed the 2006 legislative session.[70] Senate Bill 34 specifically addressed the taking of property for redevelopment and economic development. Senate Bill 34 would have required a determination that a taking plan is for public use or economic development, a two-thirds vote if the taking is for economic development, and allowed the owner of the condemned property to challenge the taking.

Hawaii

Hawaii's legislature introduced several eminent domain reform measures, none of which passed during its 2006 session. The measures proposed the following

changes to eminent domain law: establish a task force to examine eminent domain issues; prohibit eminent domain use for economic development that would result in a private use; exclude non-governmental retail, office, commercial residential, or industrial development use from the definition of "public use"; and prohibit eminent domain use for tax revenue or economic purposes, except for blight mitigation.[71]

[68] A.C.A. 22, 2006 Leg. (Cal. 2006); http://www.leginfo.ca.gov/pub/bill/asm/ab_0001-0050/aca_22_bill_20060612_status.html.

[69] *See* 2006 Initiative Update, http://www.ss.ca.gov/elections/elections_j.htm.

[70] S.B. 34, 2006 Leg., Gen. Assem. (Conn. 2006); S.B. 665 2006 Leg., Gen. Assem. (Conn. 2006); H.B. 5810 2006 Leg., Gen. Assem. (Conn. 2006); *see also* http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=34&which_year=2006.

[71] *See* S.B. 2986, 23rd Leg. (Haw. 2006), S.B. 2735, 23rd Leg. (Haw. 2006), H.B. 2233, 23rd Leg.

Massachusetts

In addition to introducing a still-pending proposed constitutional amendment, discussed in § III E above, the Massachusetts Legislature introduced a legislative reform measure, House Bill 4605. House Bill 4605 renounces economic development as a "public use," unless it is for eliminating a blighted area.[72] Unlike the constitutional amendment, House Bill 4605 died in the 2006 session.[73]

Mississippi

Mississippi's Legislature introduced numerous eminent domain reform bills, including House Bill 100 and a proposed constitutional amendment, House Concurrent Resolution 10. House Bill 100 prohibited eminent domain use to transfer property to a private entity; or for the purposes of private retail, office, commercial, industrial, or residential development; or to increase tax revenue.[74] Also, House Bill 100 required the taking party to offer the condemned property for sale to its previous owner (or heirs) if not used for its claimed public purpose. House Concurrent Resolution 10 proposed an amendment to Section 17 of the Mississippi Constitution of 1890 to prohibit eminent domain use to take private property primarily for private economic development or for a purpose that denies the general public the right to use the property.[75] The proposed amendment also stated that the question whether a use was public was for the judiciary to determine. Both measures died.[76]

New York

New York's Legislature introduced numerous eminent domain reform bills, as well as a proposed constitutional amendment, none of which passed during the 2005-2006 legislative session.

The legislative bills proposed the following changes to eminent domain law: require a public hearing for changes made to a proposed taking; require local

(Haw. 2006), H.B. 2458, 23rd Leg. (Haw. 2006), H.B. 2891, 23rd Leg. (Haw. 2006); *see also* http://www.capitol.hawaii.gov/site1/docs/getstatus2.asp?.

[72] H.B. 4605, 2006 Leg. (Mass. 2006); http://www.mass.gov/legis/184history/h04605.htm.

[73] *See* http://www.mass.gov/legis/184history/h04605.htm.

[74] H.B. 100, 84th Leg., Reg. Sess. (Miss. 2006).

[75] H.C.R. 10, 84th Leg., Reg. Sess. (Miss. 2006). The Mississippi Legislature introduced three other constitutional amendments, all of which stated that private property cannot be taken for "solely" (as opposed to "primarily" in H.C.R. 10) private economic development. *See* H.C.R. 12, 84th Leg., Reg. Sess. (Miss. 2006); H.C.R. 23, 84th Leg., Reg. Sess. (Miss. 2006); S.C.R. 534, 84th Leg., Reg. Sess. (Miss. 2006).

[76] *See* http://billstatus.ls.state.ms.us/2006/pdf/history/HB/HB0100.htm; http://billstatus.ls.state.ms.us/2006/pdf/history/HC/HC0010.htm.

government to vote when considering taking property; require a comprehensive economic development plan to use eminent domain where the primary purpose is economic development; establish a state eminent domain ombudsman; and limit eminent domain use for economic development to when the area is blighted.[77] The proposed constitutional amendment limited "public use" to possession, occupation, and enjoyment of land by the public at large or public agencies.[78] The proposal prohibited takings for private use, including economic development, unless the owner consents, and made "public use" a determination for the judiciary.

Oklahoma

Oklahoma's Legislature introduced several eminent domain reform bills, as well as a proposed constitutional amendment, none of which passed the 2006 legislative session.[79] This is likely due to the Oklahoma Supreme Court's recent decision in *Board of County Commissioners of Muskogee County v. Lowery*,[80] discussed in greater detail in § V.A. below. In *Lowery*, the Oklahoma Supreme Court established precedent that private economic development cannot constitute sole justification for governmental exercise of eminent domain. Although not passed, Oklahoma's Senate introduced a concurrent resolution, S.C.R. 59,[81] recognizing the significance of *Lowery*. S.C.R. 59 stated that any pending legislation related to eminent domain is unnecessary because the *Lowery* decision confirmed that the *Kelo* result "cannot happen under Oklahoma law."

Rhode Island

Senate Bill 2155 would have enacted the "Rhode Island Home and Business Protection Act of 2006," which limited eminent domain use for: (1) public ownership and use; (2) transportation and public utility use; and (3) the

[77] *See* A.B. 2226, 2006 Leg. (N.Y. 2006), A.B. 9015, 2006 Leg. (N.Y. 2006), A.B. 9043, 2006 Leg. (N.Y. 2006), A.B. 9079, 2006 Leg. (N.Y. 2006), A.B. 9144, 2006 Leg. (N.Y. 2006), A.B. 9152, 2006 Leg. (N.Y. 2006), S. 5936, 2006 Leg. (N.Y. 2006), S. 5938, 2006 Leg. (N.Y. 2006), S. 5946, 2006 Leg. (N.Y. 2006).

[78] S. 5961, 2006 Leg. (N.Y. 2006).

[79] *See, e.g.,* H.B. 2092, 50th Leg., Reg. Sess. (Okla. 2006), H.B. 2354, 50th Leg., Reg. Sess. (Okla. 2006), H.B. 2837, 50th Leg., Reg. Sess. (Okla. 2006), H.B. 3062, 50th Leg., Reg. Sess. (Okla. 2006), H.B. 3134, 50th Leg., Reg. Sess. (Okla. 2006), S.B. 1036, 50th Leg., Reg. Sess. (Okla. 2006), S.B. 1066, 50th Leg., Reg. Sess. (Okla. 2006), S.B. 1315, 50th Leg., Reg. Sess. (Okla. 2006), S.B. 1347, 50th Leg., Reg. Sess. (Okla. 2006), S.B. 1408, 50th Leg., Reg. Sess. (Okla. 2006), S.B. 1442, 50th Leg., Reg. Sess. (Okla. 2006), S.B. 1443, 50th Leg., Reg. Sess. (Okla. 2006), S.B. 1768, 50th Leg., Reg. Sess. (Okla. 2006), S.B. 1772, 50th Leg., Reg. Sess. (Okla. 2006), S.B. 1849, 50th Leg., Reg. Sess. (Okla. 2006).

[80] 136 P.3d 639 (Okla. 2006).

[81] S.C.R. 59, 50th Leg., Sec. Sess. (Okla. 2006).

elimination of blight.[82] Senate Bill 2155 also would have restricted eminent domain use for economic development to situations where the taking party had "explicit authority" and complied with certain procedural requirements. The bill

died with the end of the session on June 23, 2006.[83]

Tennessee

Tennessee's Legislature introduced a proposed constitutional amendment, Senate Joint Resolution 516, which would have amended Article I, § 21 of the Tennessee Constitution.[84] The amendment provided that taking private property to sell or lease to a non-governmental person, corporation, or partnership is not a "public use." The proposed amendment did not pass the 2006 session.[85]

Virginia

Virginia's Legislature introduced but failed to pass many eminent domain reform bills, including House Bill 94, House Bill 746, and House Bill 902, as well as a proposed constitutional amendment, Senate Joint Resolution 139. House Bill 94 would have limited eminent domain use to governmental ownership and occupation of the property.[86] House Bill 746 would have prevented using state funds to condemn property for economic development, including blight, unless the legislature and the governor approved.[87] House Bill 902 excluded from the definition of "public use" tax-revenue enhancement as a primary purpose. Similarly, Senate Joint Resolution 139 stated that "public use" does not include economic or private development, or an increase in the tax base or tax revenue.[88] Virginia's legislators failed to reach an agreement on these proposed reforms before the legislature closed its session on March 11, 2006.[89] However, Virginia carried over Senate Joint Resolution 139 to its 2007 session.[90]

Washington

Washington's Legislature introduced two eminent domain reform bills, House

82 S.B. 2155, 2006 Leg. (R.I. 2006).

83 *See* http://dirac.rilin.state.ri.us/BillStatus/WebClass1.ASP?WCI=BillStatus&WCE=ifrmBillStatus&WCU.

84 S.J.R. 516, 104th Leg., Sec. Reg. Sess. (Tenn. 2006).

85 *See* http://www.legislature.state.tn.us/.

86 H.B. 94, 2006 Leg., Reg. Sess. (Va. 2006).

87 H.B. 746, 2006 Leg., Reg. Sess. (Va. 2006).

88 S.J.R. 139, 2006 Leg., Reg. Sess. (Va. 2006).

89 *See* http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=hb94; http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=hb746.

90 *See* http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=sj139.

0022 XPP 7.3C.1 Patch #3 Thu Aug 24 12:33:10 2006
SPEC: SC_00461: LLP: 460: XPP-PROD[ST: 1] [ED: 10000] [REL: 83]
VER: [SC_00461-Local:24 Aug 06 12:32**][MX-SECNDARY:** 16 Aug 06 19:23**][TT-TT000001:** 07 Aug 06 20:04**]** 0

Bill 3017 and Senate Bill 6807, and a proposed constitutional amendment, House Joint Resolution 4217, all of which died in the 2006 legislative session.[91]

House Bill 3017 expressly noted that members of the public are concerned about the *Kelo* decision. In response, the bill would have prohibited government from using eminent domain for the primary purpose of economic development without property owner consent. The bill defined economic development as increased tax revenue, tax base, employment, or economic health. It allowed the property owner the right to buy back the property if the property is no longer used for a "public purpose."

Senate Bill 6807 would have prohibited taking a non-blighted private property located within a designated blighted area. The bill defined blighted property as that which endangers public health and safety, endangers life or property by fire, or otherwise "contributes substantially" to ill health, disease transmission, infant mortality, juvenile delinquency, or crime.

House Joint Resolution 4217 would have amended Article I, § 16 of the Washington Constitution to exclude economic development; increased jobs, tax base, or tax revenue; an upgrading of private retail, commercial, industrial, or residential establishments; or incidental private use from the definition of "public use."

Wyoming

In February 2006, Senate File 26 was introduced, which would have placed a moratorium on eminent domain actions that resulted in the property being owned or controlled by a private party, with certain enumerated exceptions.[92] No further action occurred on Senate File 26 during the 2006 session.[93]

G. STATES THAT DID NOT HAVE A 2006 LEGISLATIVE SESSION

Arkansas, Montana, Nevada, North Dakota, Oregon, and Texas did not have a legislative session.

§ IV FEDERAL RESPONSE TO *KELO*

Congress has reacted to the *Kelo* decision as well. On November 3, 2005, by a margin of 376 to 38, the U.S. House of Representatives passed HR 4128, which prohibits state and local governments from using eminent domain for economic development. The bill defines economic development as "conveying or leasing such property from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health."[94] The exceptions to that definition include removing harmful land uses, acquiring abandoned property, and redeveloping a brownfield site. The bill also contains a penalty provision, which makes any state or local government that violates its provisions ineligible for federal economic development funds for two fiscal years.

HR 4128 is currently stalled in the Senate Judiciary Committee.[95]

On June 23, 2006, the one-year anniversary of the *Kelo* decision, President George W. Bush signed an Executive Order on eminent domain.[96] The order requires any federal agency to exercise its eminent domain power for public use; it does not affect state or local government eminent domain use for projects involving federal funds. The American Planning Association has called the order "largely symbolic" because of the federal government's limited direct use of eminent domain.[97]

§ V COURT RESPONSE TO *KELO*

The state and federal judiciary has also addressed the interpretation and application of *Kelo*. Two states, Oklahoma and Ohio, have expressly rejected the *Kelo* decision. The remaining case law generally falls into one of the following categories:

- Citing *Kelo* to support applying a broad interpretation of "public use";

[91] H.B. 3017, 95th Leg., Reg. Sess. (Wash. 2006), http://apps.leg.wa.gov/billinfo/summary.aspx?bill=3017; S.B. 6807, 95th Leg. Sess., Reg. Sess. (Wash. 2006), http://apps.leg.wa.gov/billinfo/summary.aspx?bill=6807.

[92] S.F. 26, 58th Leg. (Wyo. 2006).

[93] *See* http://legisweb.state.wy.us/2006/status/STATUS.pdf. The House attempted but failed to introduce House Bill 26, which stated that "public use" did not include economic or industrial development, nor an increase in tax base, tax revenue, employment or general economic health. H.B. 26, 58th Leg. (Wyo. 2006). House Bill 26 failed to pass introduction. *See* http://legisweb.state.wy.us/2006/status/STATUS.pdf.

- Distinguishing *Kelo* by the underlying state eminent domain statute at issue;
- Citing *Kelo* for its invitation to the states to enact more restrictive condemnation laws; and
- Citing *Kelo* for its reaffirmance of the longstanding policy of giving deference to the legislative determination of "public use."

94 H.R. Res. 4128, 109th Cong. (2005).
95 *See* http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.04128:.
96 Exec. Order No. 13406, 71 Fed. Reg. 36,973 (June 28, 2006).
97 *Eminent Domain Legislation Across America*, http://www.planning.org/legislation/eminentdomain/index.htm (2006).

0024 XPP 7.3C.1 Patch #3 Thu Aug 24 12:33:10 2006
SPEC: SC_00461: LLP: 460: XPP-PROD[ST: 1] [ED: 10000] [REL: 83]
VER: [SC_00461-Local:24 Aug 06 12:32**][MX-SECNDARY:** 16 Aug 06 19:23**][TT-TT000001:** 07 Aug 06 20:04**]** 0

A. State Court Responses

California

Syngenta Crop Protection, Inc. v. Helliker, 138 Cal. App. 4th 1135, 42 Cal. Rptr. 3d 191 (2006).

In *Syngenta*, Syngenta Crop Protection, Inc. (Syngenta) developed a substance, oryzalin, used as an active ingredient in pesticides. Syngenta submitted the health effects and environmental impact data concerning oryzalin to the California Department of Pesticide Regulation (Department). The Department gave Syngenta registration certifications for products containing oryzalin. Gustafson L.L.C., a pesticide manufacturer, later obtained registrations from the Department for pesticides containing oryzalin. Syngenta challenged the Gustafson registrations arguing, among other things, that the Department's use of its trade secret data to provide Gustafson its registrations constituted an unconstitutional taking.98 One of the Department's arguments in support of its actions was that its consideration of Syngenta's data was not "for a public purpose." The California Court of Appeal rejected that argument, noting that in *Ruckelshaus v. Monsanto Co.*,99 the United States Supreme Court held that the Environmental Protection Agency's consideration of similar data was for a "public purpose" because it promotes competition. The California Court of Appeal cited *Kelo* as additional support for its conclusion, noting that *Kelo* quoted the *Ruckelshaus* opinion with approval in concluding that the Supreme Court has rejected the notion that a use is "public" only if the property is taken for general public use.100

Inland Valley Development Agency v. Patel, No. Eo34937, 2005 Cal. App. Unpub. LEXIS 6368 (Cal. Ct. App. 4th Dist., Div. 2, July 21, 2005).

In *Inland Valley*, the defendant was the lessee of motel property that the plaintiff wanted to condemn for redevelopment purposes. The defendant argued that the proposed condemnation violated his constitutional rights because he neither received notice nor an opportunity to be heard on the adoption of the "necessity" resolution. The California Court of Appeal rejected the plaintiff's argument, noting that nothing in *Kelo* established a federal constitutional right to notice and opportunity to be heard on the "necessity" prong of a condemnation for redevelopment purposes.101

98 Syngenta Crop Protection, Inc. v. Helliker, 138 Cal. App. 4th 1135, 42 Cal. Rptr. 3d 191, 197 (2006).
99 467 U.S. 986, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984).
100 *Syngenta*, 42 Cal. Rptr. 3d at 218, citing *Kelo*, 125 S. Ct. at 2655, 2663, n. 10.
101 Inland Valley Development Agency v. Patel, No. Eo34937, 2005 Cal. App. Unpub. LEXIS

6368, at *29 (Cal. Ct. App. 4th Dist., Div. 2, July 21, 2005), citing *Kelo*, *supra*.

Connecticut

Town of Wallingford v Werbiski, 274 Conn. 483, 877 A.2d 749 (2005).

In *Werbiski*, the plaintiff municipality applied for a permanent injunction to allow it access to the defendant's property to conduct a land and wetlands survey. The defendant argued that Connecticut law, Conn. Gen. Stat. § 7-148(c)(6)(A)(iii), required a municipality to first resort to condemnation proceedings before entering his land to perform a survey. The Connecticut Supreme Court rejected the defendant's statutory interpretation because it would encourage municipalities to use eminent domain without requiring the municipality to establish that the takings are truly necessary. In support of this holding, the Connecticut Supreme Court noted that the United States Supreme Court's *Kelo* decision had affirmed the Connecticut Supreme Court's holding that stated that a municipality's determination that land taken by eminent domain is "reasonably necessary" for a project is subject to judicial review.[102]

Commissioner of Transportation v. Larobina, 92 Conn. App. 15, 882 A.2d 1265 (2005).

In *Larobina,* the Commissioner of Transportation filed a notice of condemnation and assessment of damages against the defendant's property to acquire an easement for constructing a sidewalk in connection with a road widening project. The defendant argued that the condemnation was invalid under Connecticut eminent domain law because the chances that the sidewalk would actually be constructed were "extremely remote." The defendant argued that this speculative chance for public use was not enough to establish the public "necessity" required in an eminent domain case. The Appellate Court of Connecticut did not consider the issue directly because the defendant did not properly raise this issue on appeal. The court did, however, agree that under Connecticut state law and the *Kelo* decision, a taking for a prospective activity that is purely speculative is not reasonably "necessary," as eminent domain requires.[103]

Cornfield Point Association v. Town of Old Saybrook, 91 Conn. App. 539, 882 A.2d 117 (2005).

In *Cornfield Point*, the plaintiff property owners' association brought a quiet title action against the town concerning road ends that abutted a beach. The plaintiff argued that even though the deeds conveyed fee simple title to the town

[102] Town of Wallingford v. Werbiski, 274 Conn. 483, 492, 877 A.2d 749, 755 (2005), citing Kelo v. City of New London, 268 Conn. 1, 87-89, 843 A.2d 500 (2004), *aff'd*, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).

[103] Commissioner of Transportation v. Larobina, 92 Conn. App. 15, 28, n.10, 882 A.2d 1265, 1274, n. 10 (2005), citing Kelo v. City of New London, 268 Conn. 1, 96, 843 A.2d 500 (2004), *aff'd*, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005). (The case also cited Nichols on Eminent Domain®.)

in the road ends, the town failed to continually hold them for a "public use." The Connecticut Court of Appeals rejected plaintiff's claim as a question of fact. In so doing, the court noted that the United States Supreme Court's *Kelo* decision had affirmed the Connecticut Supreme Court's holding that whether a municipality

had abandoned its proposed public use was a question of fact.[104]

Florida

Fulmore v. Charlotte County, 928 So. 2d 1281 (Fla. 2d Dist. Ct. App. 2006).

In *Fulmore*, plaintiff landowners brought a declaratory judgment action, challenging the constitutionality of the Community Redevelopment Act (Act), Fla. Stat. § 163.330, *et seq*., which allowed the taking of their property under eminent domain. Under the Act, local government may use eminent domain to eliminate slums and blight by acquiring areas it has designated as "community redevelopment areas." Before doing so, the law mandates that the local governing body adopt a resolution, supported by data and analysis, that makes a legislative finding that slum or blight conditions exist and that redevelopment is in the public's interest. In analyzing this Florida statute, the Florida Court of Appeals noted that the *Kelo* decision did not require the government to prove that an area meets the blight or slum definition. Rather, the court explained that the *Kelo* decision upheld Connecticut's statute that merely expressed a legislative determination that taking land as part of an economic development project is a public use and in the public interest. The court upheld the Act's constitutionality.

Georgia

Talley v. Housing Authority of Columbus, Georgia, 279 Ga. App. 94, 630 S.E.2d 550 (2006).

In *Talley*, the defendant, a city housing authority, condemned the plaintiff's property as a slum area under Georgia's urban redevelopment law, Ga. Code Ann. § 36-61-1, *et seq*. The plaintiff argued that the defendant illegally condemned his property in 1994 and has since abandoned any alleged "public use" of the property by selling it to a private citizen. The Georgia Court of Appeals rejected the plaintiff's challenge to the condemnation's legality under *res judicata* principles. The court also rejected the plaintiff's abandonment of public use argument because Georgia's urban redevelopment law allows housing authorities to take slum area property for redevelopment and sell the property to a private person. In so doing, the court noted that although *Kelo* "has ignited a national debate on the subject of government use," the decision left it to the states to enact more restrictive condemnation laws if they so choose.[105] Because Georgia's urban redevelopment law "and its underlying constitutional authorization remain in place," the court held that the housing authority acted properly.[106]

[104] Cornfield Point Association v. Town of Old Saybrook, 91 Conn. App. 15, 882 A.2d 117, 135 (2005), citing Kelo v. City of New London, 268 Conn. 1, 67, 843 A.2d 500 (2004), *aff'd*, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).

Massachusetts

Aaron v. Boston Redevelopment Authority, No. 05-P-1115, 2006 Mass. App. LEXIS 792 (Mass. App. Ct. July 21, 2006).

In *Aaron*, the defendant redevelopment agency acquired numerous properties for economic redevelopment. When the agency acquired the property, it vacated a certain section that remained vacated for nearly 40 years. During that time, the plaintiff, an adjacent landowner, used the vacant strip of land as a driveway to access the back of his property. The plaintiff brought an adverse possession claim against the defendant-redevelopment agency, seeking a declaration that his adverse use established a prescriptive easement over the vacant strip of land. Under Massachusetts law, Mass. Gen. Laws ch. 260, § 31, if the development

agency held the land for a "public purpose," its claim to the land is superior to the plaintiff's claim.[107] Thus, the plaintiff argued that the defendant's holding of the land for urban renewal purposes was not a "public purpose." The Appeals Court of Massachusetts disagreed with the plaintiff because its state legislative determination and judicial precedents established that urban renewal and development do constitute a "public purpose."[108] The court cited *Kelo* in rejecting the plaintiff's argument that selling the property to a private developer in an urban renewal project negates the "public purpose."[109]

Minnesota

Housing and Redevelopment Authority of the City of Saint Paul v. ExxonMobil Oil Corporation, No. A05-511, 2006 Minn. App. Unpub. LEXIS 393 (Minn. Ct. App. Apr. 18, 2006).

In *ExxonMobil*, the plaintiff housing authority brought condemnation proceedings against the defendant landowner, an oil company, after it refused to voluntarily give up the property for a residential development project. The defendant argued that the taking was for a speculative "public use" because the

[105] Talley v. Housing Authority of Columbus, Georgia, 279 Ga. App. 94, 96, 630 S.E.2d 550, 552 (Ga. 2006), citing Kelo v. City of New London, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).

[106] *Talley*, 279 Ga. App. at 96.

[107] Aaron v. Boston Redevelopment Authority, No. 05-P-1115, 2006 Mass. App. LEXIS 792 (Mass. App. Ct. 2006).

[108] *Aaron*, 2006 Mass. App. LEXIS 792, at *10, citing Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Bd. of Lawrence, 403 Mass. 531, 539–540, 531 N.E.2d 1233 (Mass. 1988).

[109] *Aaron*, 2006 Mass. App. LEXIS 792, at *10, n. 9.

0028 XPP 7.3C.1 Patch #3 Thu Aug 24 12:33:11 2006
SPEC: SC_00461: LLP: 460: XPP-PROD[ST: 1] [ED: 10000] [REL: 83]
VER: [SC_00461-Local:24 Aug 06 12:32**][MX-SECNDARY:** 16 Aug 06 19:23**][TT-TT000001:** 07 Aug 06 20:04**]** 0

record showed it was uncertain whether its contaminated land could be successfully remedied. In upholding the condemnation proceedings, the Minnesota Court of Appeals relied on the language in *Kelo* that rejected a requirement that the judiciary postpone condemnation proceedings until the likelihood of success of a redevelopment plan is ensured.[110] Although the *Kelo* decision dealt with takings under the U.S. Constitution, the Minnesota Court of Appeals noted that its reluctance to engage in "predictive judgments" regarding condemnation projects was also present in Minnesota case law.[111]

Nevada

McCarran International Airport v. Sisolak, No. 41646, 2006 Nev. LEXIS 80 (Nev. July 13, 2006).

In *McCarran*, the defendant owned property adjacent to the airport. He brought an inverse condemnation action against the airport and the county, alleging that the county's height restriction ordinances constituted a regulatory taking of the airspace above his land, entitling him to just compensation. The Nevada Supreme Court, interpreting its state constitution, agreed with the plaintiff because the county ordinance allowed airplanes to make a permanent, physical invasion of the defendant's airspace. The Nevada Supreme Court noted that the *Kelo* decision supported Nevada's law that provides the states may expand their citizens' individual rights under state law beyond those provided in the U.S. Constitution.[112]

New Jersey

City of Long Branch v. Brower, No. MON-L-4987-05 (N.J. Super. Ct. Law Div. June 26, 2006).

In *Long Branch*, the plaintiff city sought to condemn the defendants' residential

properties as part of a redevelopment plan. The defendants challenged the city's proposed condemnation under New Jersey's eminent domain law and the U.S. Constitution's Takings Clause.[113] The New Jersey court affirmed the condemnation proceedings, noting that under both New Jersey and federal law, including *Kelo*, taking private property for economic rejuvenation is permissible, and the

[110] Housing and Redevelopment Authority of the City of Saint Paul v. ExxonMobil Oil Corporation, No. A05-511, 2006 Minn. App. Unpub. LEXIS 393 (Minn. Ct. App. Apr. 18, 2006), citing Kelo v. City of New London, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).

[111] *ExxonMobil*, 2006 Minn. App. Unpub. LEXIS 393, at *12, citing Itasca Co. v. Carpenter, 602 N.W.2d 887, 890–891 (Minn. Ct. App. 1999) and *In re* Condemnation by Minneapolis Community Dev. Agency, 582 N.W.2d 596, 600 (Minn. Ct. App. 1998).

[112] McCarran International Airport v. Sisolak, No. 41646, 2006 Nev. LEXIS 80, at *49 (Nev. July 13, 2006), citing *Kelo*, 125 S. Ct. at 2668.

[113] N.J. Stat. Ann. § 40A:12A-1, *et seq.*

judiciary should give great deference to a municipality's public use determinations.[114]

Mount Laurel Township v. Mipro Homes, L.L.C., 379 N.J. Super. 358, 878 A.2d 38 (App. Div. 2005).

In *Mount Laurel*, the township brought condemnation proceedings against property owned by the defendant, a residential development company, under an "open space acquisition program" to slow down residential development. The defendant argued that this was not a proper use of the municipality's eminent domain power. The New Jersey Court of Appeals affirmed the condemnation proceedings under New Jersey law, which expressly authorizes a municipality's authority to use eminent domain to acquire land for open space.[115] These statutes, the court explained, authorize a municipality to obtain title to land for use as open space through either voluntary acquisition or condemnation. From a policy perspective, the court also noted that the same public purposes that justify using public funds to acquire land for open space by voluntary acquisition also justify implementing eminent domain for the same purpose. In making this policy statement, the New Jersey Court of Appeals cited language from *Kelo* that equated "public use" under the federal constitution's takings clause with "public purpose."[116]

New York

12th Avenue LLC v. City of New York, 815 N.Y.S.2d 516 (N.Y. App. Div. 1st Dept. 2006).

In *12th Avenue*, the city approved the acquisition of and easements on the plaintiffs' properties for the "No. 7 Subway Extension-Hudson Yards Rezoning and Redevelopment Program."[117] The plaintiffs petitioned the court to reject, annul, and set aside the approval under New York's State Environmental Quality Review Act.[118] The court denied the plaintiffs' petitions, finding that the proposed project constituted a "public use." In so doing, the court explained that "public

[114] City of Long Branch v. Brower, No. MON-L-4987-05 (N.J. Super. Ct. Law Div. June 26, 2006), citing *Kelo, supra*. The New Jersey court also relied on Justice Kennedy's concurring opinion in *Kelo*, which addressed the judiciary's role in dealing with "a plausible accusation of impermissible favoritism to private parties," because the landowners raised a conflict of interest argument. *City of Long Branch* at 14, quoting *Kelo,* 125 S. Ct. at 2669–2670 (Kennedy, J. concurring).

[115] Mount Laurel Township v. Mipro Homes, L.L.C., 379 N.J. Super. 358, 878 A.2d 38 (App. Div. 2005), citing N.J. Stat. Ann. §§ 40:12-15.1 to 40:12-15.9, 40:12-15.7(a)(1)(a), 40:12-15.1, 13:8C-1 to 13:8C-42.

[116] *Mount Laurel*, 379 N.J. Super. at 374, 878 A.2d at 48, citing *Kelo*, 125 S. Ct. at 2657.

[117] 12th Avenue LLC v. City of New York, 815 N.Y.S.2d 516, 520 (N.Y. App. Div. 2006).
[118] *Id.*, citing N.Y. Em. Dom. Pro. Law § 207.

use," under New York law, broadly encompasses any use, including urban renewal, which contributes to the public's health, safety, and welfare.[119] In further support of its "public use" finding, the court cited *Kelo* for the proposition that a court should be reluctant to interfere with a condemning authority's determination that a particular site is needed for a public purpose.[120]

Ohio

Norwood v. Horney, No. 2005-0227, 2006 Ohio 3799, 2006 Ohio LEXIS 2170 (Ohio July 26, 2006).

In *Norwood*, the City of Norwood sought to condemn the defendants' residential properties as part of the "Norwood Exchange Project," a redevelopment project that would construct chain stores, condominiums, and office space in the area. The city claimed that the project satisfied the "public use" requirement of Ohio's Constitution, Article I, § 19, because it would alleviate a "deteriorating area," under the city code. The defendants challenged the proposed taking as unconstitutional under the Ohio Constitution, arguing that the city did not have the right to take private property and transfer it to a private entity for economic redevelopment purposes.

The Ohio Supreme Court unanimously agreed with the defendants. In so doing, the Ohio Supreme Court laid out a series of important legal opinions. First, the court, noting it was not bound by the United States Supreme Court's interpretation of the federal constitution's "public use" requirement, expressly rejected *Kelo*, instead choosing to adopt the dissenting opinions from Justices O'Connor and Thomas.[121] Second, the court clarified its role in reviewing a local government's "public use" determination. The court explained that it is not limited to rubber-stamping such decisions.[122] Rather, the court held, although the court must provide "deference to legislative pronouncements," it is "independent of them."[123] This is because, the court explained, it is still required to ensure that the local government's use of the eminent domain power is not beyond the scope of its constitutional authority, not abused by irregular or oppressive use, nor used in bad faith.[124] Third, the court held that the city's reliance on the proposed taking

[119] *12th Avenue*, 815 N.Y.S.2d at 525, citing Matter of New York City Hous. Auth. v. Muller, 270 N.Y. 333, 340, 1 N.E.2d 153 (N.Y. 1936).
[120] *12th Avenue*, 815 N.Y.S.2d at 525, citing *Kelo*, 125 S. Ct. at 2661.
[121] *Norwood v. Horney*, No. 2005-0227, slip op. at 37, 2006 Ohio 3799, at *73, 2006 Ohio LEXIS 2170, at *63 (Ohio July 26, 2006), citing *Kelo,* 125 S. Ct. at 2676–2677, 162 L. Ed. 2d 439.
[122] *Norwood*, slip op. at 37.
[123] *Norwood*, slip op. at 31, citing *Wayne Co. v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004).
[124] *Norwood.*, slip op. at 31, citing *Pontiac Improvement Co. v. Bd. of Commrs. of Cleveland*

area as being a "deteriorating area," meaning it may become a slum or blighted area in the future, was not sufficient because the term was unconstitutional under the void for vagueness doctrine.[125] As a result, the court held that the only remaining "public use" for the city's proposed taking was for economic benefit,

which, standing alone was not a "public use" under its state constitution.[126] Lastly, the court addressed a state statute, Ohio Rev. Code Ann. § 163.19, which allowed a taking to proceed, after just compensation has been paid, before an appellate court has ruled on the taking's legality. Because the statute proscribes the court's power to impose a stay or injunction pending appellate review, the court held that it was an unconstitutional encroachment of the judiciary's power under the separation of powers doctrine.[127]

Oklahoma

Board of County Commissioners of Muskogee County v. Lowery, 136 P.3d 639 (Okla. 2006).

In *Lowery*, the plaintiff county brought condemnation proceedings against the defendant landowners to acquire right-of-way easements for placing three water pipelines, two of which would solely service a private plant proposed for construction and operation in the county. The defendants challenged the proposed taking as unconstitutional under the state's eminent domain law, which allows taking property for a "public purpose."[128] The defendants argued that the county's exercise of eminent domain to take property for economic development is not a valid "public purpose."

The Oklahoma Supreme Court analyzed its eminent domain law to determine whether economic development alone constitutes a "public purpose." The court first noted that similar to the *Kelo* decision, Oklahoma uses the terms "public use" and "public purpose" interchangeably.[129] However, that is the only part of the *Kelo* majority that the Oklahoma Supreme Court followed. Instead, as the court proceeded through its takings analysis, it repeatedly cited Justice O'Connor's dissenting opinion in *Kelo* to support its narrow interpretation of the phrase "public purpose."[130] For example, the court started its analysis by quoting Justice O'Connor's reliance on Alexander Hamilton's statement that one of the "great

Metro. Park Dist., 104 Ohio St. 447, 458, 135 N.E. 635 (Ohio 1922).

125 *Norwood,* slip op. at 38, 44.

126 *Norwood*, slip op. at 37.

127 *Norwood.*, slip op. at 49, 51.

128 Board of County Commissioners of Muskogee County v. Lowery, 136 P.3d 639, 642, 645 (Okla. 2006).

129 *Lowery*, 136 P.3d at 645–646.

130 *Lowery*, 136 P.3d at 646, 647.

object[s] of government" is to protect the security of property.[131] From there, the court continued to follow Justice O'Connor's dissent and construed the phrase "public purpose" narrowly, excluding economic development from its definition. The court concluded that neither its state statutes nor its constitution supported a contrary finding.

The court distanced itself from the majority *Kelo* opinion, noting that it was binding only on takings pursued under the federal takings clause.[132] The court also noted that the Connecticut statute at issue in *Kelo* contained an express authorization to use eminent domain for economic development; no such language appears in Oklahoma's takings statutes.[133] Consequently, the Oklahoma Supreme Court took the *Kelo* opinion's invitation to interpret its state's takings law more strictly than the federal law and concluded that economic development was not a "public purpose" justifying the exercise of eminent domain under

Oklahoma law.[134]

Rhode Island

Rhode Island Economic Development Corporation v. The Parking Company, L.P., 892 A.2d 87 (R.I. 2006).

In *Parking Company*, the plaintiff Rhode Island Economic Development Corporation and defendant private parking company were parties in interest to a concession and lease agreement, which provided that the defendant would build a parking garage (Garage B) to service the airport and, in return, be granted the exclusive right to operate the garage and all other parking facilities at the airport for twenty years. A later amendment to the agreement granted the defendant exclusive use of Garage B for valet parking. After September 11, 2001, however, the need for valet parking decreased, costing both parties significant revenue, given the number of unused spaces in Garage B. The plaintiff, after failed attempts to get consent, initiated *ex parte* condemnation proceedings to obtain a temporary easement in Garage B under Rhode Island's "quick take" statute, R.I. Gen. Laws § 42-64-9 (2005). This statute gives the taking authority the ability to take property by filing a declaration of condemnation and satisfying the court that its estimate of compensation is just.

The defendant challenged the condemnation proceedings, arguing that Rhode Island's "quick take" statute was unconstitutional because it impermissibly vested the condemning authority with the exclusive power to "deem" that a taking is for

[131] *Lowery*, 136 P.3d at 646, quoting *Kelo*, 125 S. Ct. at 2671 (O'Connor, J., dissenting).
[132] *Lowery*, 136 P.3d at 647, n. 11, 649–650.
[133] *Lowery*, 136 P.3d at 650.
[134] *Lowery*, 136 P.3d at 651.

0033 XPP 7.3C.1 Patch #3 Thu Aug 24 12:33:12 2006
SPEC: SC_00461: LLP: 460: XPP-PROD[ST: 1] [ED: 10000] [REL: 83]
VER: [SC_00461-Local:24 Aug 06 12:32**][MX-SECNDARY:** 16 Aug 06 19:23**][TT-TT000001:** 07 Aug 06 20:04**]** 0

a "public purpose."[135] The Rhode Island Supreme Court disagreed, noting that the statute's plain language did not make the condemning authority's public use determination conclusive or unreviewable, nor invaded the judiciary's authority to answer the public use question in condemnation proceedings.[136] However, the court agreed with the defendant that the proposed purpose, increased revenue, was not a valid "public purpose" under Rhode Island law.[137] In further support of its conclusion, the Rhode Island Supreme Court noted that the *Kelo* decision stressed the condemning authority's duty of good faith and due diligence before it may "begin its condemnation engine."[138] In *Kelo*, the Rhode Island Supreme Court noted, this duty was satisfied through the City of New London's "deliberative and methodical approach to formulating its economic development plan."[139] The Rhode Island Supreme Court distinguished *Kelo*, because the instant plaintiff's approach to the proposed taking stood "in stark contrast" to the City of New London's "exhaustive preparatory efforts" that preceded the takings in *Kelo*.[140]

South Dakota

Benson v. State, 710 N.W.2d 131 (S.D. 2006).

In *Benson*, the plaintiff landowners sought declaratory and injunctive relief against the state, arguing that South Dakota's statute addressing shooting small game from a public right-of-way, S.D. Codified Laws § 41-9-1.1, constituted a taking of private property without just compensation in violation of the state and federal constitutions. In analyzing the takings clause of both constitutions, the South Dakota Supreme Court concluded that its state constitution provided its landowners more protection against a taking of their property than the United

States Constitution. This is because, the *Benson* court noted, South Dakota case law rejects the "public benefit" rule for the more rigid "use by the public test," mandating there be "a use or right of use on the part of the public or some limited portion of it."[141] The *Benson* court cited *Kelo*'s invitation to the states to impose stricter takings requirements than that found in the federal constitution as support for its conclusion.[142]

[135] Rhode Island Economic Dev. Corp. v. The Parking Co., L.P., 892 A.2d 87, 100 (R.I. 2006).
[136] *Parking Co*., 892 A.2d at 101.
[137] *Parking Co*., 892 A.2d at 104.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] Benson v. State, 710 N.W.2d 131, 146 (S.D. 2006), citing Illinois Central R.R. Co. v. East Sioux Falls Quarry Co., 144 N.W. 724 (S.D. 1913).
[142] *Benson,* 710 N.W.2d at 146.

0034 XPP 7.3C.1 Patch #3 Thu Aug 24 12:33:12 2006
SPEC: SC_00461: LLP: 460: XPP-PROD[ST: 1] [ED: 10000] [REL: 83]
VER: [SC_00461-Local:24 Aug 06 12:32**][MX-SECNDARY:** 16 Aug 06 19:23**][TT-TT000001:** 07 Aug 06 20:04**]** 0

B. Federal Court Responses

Matsuda v. Honolulu, 378 F. Supp. 2d 1249 (D. Haw. 2005).

In *Matsuda*, the plaintiffs owned leasehold interests in a residential condominium complex. The plaintiffs entered leased fee interest purchase contracts with the defendant city, under which the city agreed to convey its interest in all the condominium units and all "common elements" appurtenant to the condominium complex to the plaintiffs. The city was to perform its obligations under the purchase contracts after it condemned the property through eminent domain under Chapter 38 of the Revised Ordinances of Honolulu. The city repealed Chapter 38. The plaintiffs brought an action under 42 U.S.C. § 1983, arguing that the repeal deprived them of their constitutional rights under, *inter alia*, the U.S. Constitution's Contracts Clause.

The district court rejected plaintiffs' Contract Clause argument because the Contracts Clause cannot be used to bind a state to a contract that restricts its power of eminent domain.[143] In further support of its conclusion, the district court relied on *Kelo*'s reaffirmance of the longstanding policy of deference to legislative judgments in takings actions[144] and its invitation to the states to place tighter restrictions on its eminent domain laws.[145]

Brody v. Village of Port Chester, 434 F.3d 121 (2d Cir. 2005).

In *Brody*, the defendant village brought condemnation proceedings against the plaintiff landowner to use his property in a large-scale municipal redevelopment project. The plaintiff challenged the condemnation, arguing that the defendant's actions, brought under New York's eminent domain law, violated his rights under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.[146] The plaintiff argued that he was denied due process because the defendant failed to provide adequate notice of his statutory right to challenge the village's "public use" determination and adequate judicial review. The Second Circuit agreed that the notice given was inadequate under the Due Process Clause but disagreed that the judicial review procedure was inadequate. In reaching this latter conclusion, the Second Circuit, citing *Kelo*, rejected a "more robust" judicial review procedure in light of a court's narrow role in ensuring that condemnation is for a

[143] *Matsuda v. Honolulu*, 378 F. Supp. 2d 1249, 1255 (D. Haw. 2005), citing *West River Bridge Co. v. Dix*, 47 U.S. 507 (1848).
[144] *Matsuda*, 378 F. Supp. 2d at 1256-1257, citing *Kelo,* 125 S. Ct. at 2663.

[145] *Matsuda*, 378 F. Supp. 2d at 1256, citing *Kelo*, 125 S. Ct. at 2668. *See also* Hsiung v. Honolulu, 378 F. Supp. 2d 1258 (D. Haw. 2005).
[146] Brody v. Village of Port Chester, 434 F.3d 121 (2d Cir. 2005), citing N.Y. Em. Dom. Proc. Law §§ 101-709.

"public use."[147]

Buffalo Southern Railroad Inc. v. Village of Croton-On-Hudson, No. 06 Civ. 3755 (CM), 2006 U.S. Dist. LEXIS 42725 (S.D.N.Y. 2006).

In *Buffalo*, the plaintiff railroad sought to enjoin the defendant village from beginning condemnation proceedings against an industrial yard that the railroad had subleased. The railroad sought the injunction on the ground that the Interstate Commerce Commission Termination Act of 1995 preempted state and local regulation of a site while in use by a rail carrier. The United States District Court for the Southern District of New York agreed and found that equity weighed in favor of an injunction, because otherwise the land would "almost certainly" be condemned in an eminent domain action. This is because, the court explained, the village's proposed use, a new department of public works, is "certainly intended" for a valid "public use" under *Kelo*.[148]

Tal v. Hogan, No. 03-6293, 2006 U.S. App. LEXIS 16437 (10th Cir. 2006)

In *Tal*, Oklahoma City brought a condemnation action against the plaintiff developer, seeking to condemn two parcels of the developer's property for public parking, public recreation, and parks. The plaintiff objected to the proposed condemnation, challenging the public necessity of the taking. The plaintiff alleged, *inter alia*, that the defendant violated RICO by engaging in a conspiracy to condemn its property through fraud.[149] The lower court dismissed this argument under the *Rooker-Feldman* doctrine,[150] which prohibits a lower federal court from considering claims actually decided by a state court and claims inextricably intertwined with a prior state-court judgment.[151] On appeal, the plaintiff tried to avoid the *Rooker-Feldman* doctrine by raising new fraud allegations on appeal. The Tenth Circuit rejected the plaintiff's attempts because such an appeal belongs in the state courts and plaintiff did not specifically raise new fraud allegations.[152] As an additional reason for rejecting the plaintiff's fraud argument, the Tenth Circuit noted that the state courts' determination that "public use" includes economic development does not constitute fraud, citing *Kelo*'s

[147] *Brody*, 434 F.3d at 134, citing *Kelo,* 125 S. Ct. at 2664.
[148] Buffalo Southern Railroad Inc. v. Village of Croton-On-Hudson, No. 06 Civ. 3755 (CM), 2006 U.S. Dist. LEXIS 42725, at *35 (S.D.N.Y. 2006), citing *Kelo,* 125 S. Ct. at 2663.
[149] Tal v. Hogan, No. 03-6293, slip op. at 6, 2006 U.S. App. LEXIS 16437, at *10 (10th Cir. 2006).
[150] *See* Rooker v. Fidelity Trust Company, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 2d 362 (1923).
[151] *Tal,* slip op. at. 6, 2006 U.S. App. LEXIS 16437, at *22–23, quoting Kenmen Eng'g v. City of Union, 314 F.3d 468, 473 (10th Cir. 2002).
[152] *Tal*, slip op. at 7, 2006 U.S. App. LEXIS 16437, at *24.

endorsement of such "public use."[153]

§ VI. USING EMINENT DOMAIN AS A SWORD AGAINST ECONOMIC DEVELOPMENT — THE CITY OF HERCULES, CALIFORNIA USES

EMINENT DOMAIN TO BLOCK A WAL-MART STORE.

Historically, municipalities have used the power of eminent domain to condemn residential properties or properties owned by small businesses for the purposes of bringing larger retail developments into their localities. In a twist on this typical eminent domain scenario, the City of Hercules, California, recently used its eminent domain power to condemn property owned by Wal-Mart to prevent it from building a store.

In November 2005, Wal-Mart purchased 17.27 acres of land in the City of Hercules, a small, waterfront suburb of San Francisco.[154] Wal-Mart presented three proposals, each with a Wal-Mart store that exceeded what the city had approved for the property. The most recent proposal, submitted in March 2006, was for a 100,000-square-foot store, even though the city only approved a 64,000-square-foot store.[155]

On May 23, 2006, the Hercules' City Council held a public meeting, at which over 300 Hercules residents attended.[156] After a 90-minute public comment period, the city council unanimously voted to use its eminent domain power to condemn Wal-Mart's 17.27 acres to avoid "urban blight."[157] The next day, Wal-Mart vowed to fight the city in court if it follows through on its eminent domain plans.[158]

Although Hercules' residents are thrilled with the result, many others, including private interest groups fighting eminent domain abuse, are not. The Castle Coalition, a private interest group created by the Institute of Justice to protect home and small business owners from eminent domain abuse,[159] criticized the

[153] *Tal*, slip op. at 7, 2006 U.S. App. LEXIS 16437, at *25, citing *Kelo,* 125 S. Ct. at 2665–66.

[154] Patrick Hoge, *Wal-mart pledges to fight eminent domain action in court*, http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/05/25/BAGLSJ20UL1.DTL (May 25, 2006).

[155] *Id.*

[156] *Id*.

[157] *Id.* The city will have to pay Wal-Mart just compensation, which will be determined by a jury. *See* Dale Kasler, *Hercules flexes its muscle to block Wal-Mart*, http://www.sacbee.com/content/business/v-print/story/14271575p-15082151c.html (June 25, 2006).

[158] Patrick Hoge, *Wal-mart pledges to fight eminent domain action in court*, http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/05/25/BAGLSJ20UL1.DTL (May 25, 2006).

[159] *See* http://www.castlecoalition.org/profile/index.html.

City of Hercules' actions stating, "Eminent domain abuse is wrong regardless of whom it victimizes. And, if the most powerful among us is not safe from abusive condemnations, the situation is much graver for those with fewer resources."[160]

Mary Massaron Ross is head of Plunkett & Cooney, P.C.'s appellate practice group. She has handled appeals in state and federal courts throughout the country, including Michigan, Ohio, Indiana, and California. After graduating summa cum laude from Wayne State University Law School, she served as law clerk to Associate Justice Patricia J. Boyle of the Michigan Supreme Court. Mary has won numerous victories before that court, including in County of Wayne v. Hathcock, for which she participated in briefing and oral argument on behalf of the property owners. In 2005, Mary was a recipient of the Cooley Law Review's Distinguished Brief Award for the amicus brief she authored in *Gilbert v. DaimlerChrysler*. Mary served as chair of theABASection of State and Local Government Law, and

is currently chair of theABATIPS Appellate Advocacy Committee. She chairs the ABA Standing Committee on Amicus Curiae Briefs, the five-member committee that oversees preparation of ABA briefs for filing in the United States Supreme Court.

Kristen M. Tolan is a member of Plunkett & Cooney, P.C.'s appellate practice group in Bloomfield Hills, Michigan. Before joining Plunkett & Cooney, P.C., Ms. Tolan worked as a law clerk for the Honorable Michael F. Cavanagh of the Michigan Supreme Court. Ms. Tolan graduated,*magna cum laude* , from University of Detroit Mercy School of Law in 2000, where she served as an associate editor of the University of Detroit Mercy Law Review. Ms. Tolan has represented local governments and other clients in Michigan appellate courts and the Sixth Circuit Court of Appeals.

160 *Wal-mart Becomes Latest Victim of Eminent Domain Abuse*, http://www.castlecoalition.org/castlewatch/articles/6_26_06.html (June 26, 2006).

0038 XPP 7.3C.1 Patch #3 Thu Aug 24 12:33:13 2006
SPEC: SC_00461: LLP: 460: XPP-PROD[ST: 1] [ED: 10000] [REL: 83]
VER: [SC_00461-Local:24 Aug 06 12:32**][MX-SECNDARY:** 16 Aug 06 19:23**][TT-TT000001:** 07 Aug 06 20:04**]** 0