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SUPREME COURT'S KELO DECISION AND POTENTIAL CONGRESSIONAL RESPONSES

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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SUPREME COURT'S KELO DECISION AND POTENTIAL CONGRESSIONAL RESPONSES

THURSDAY, SEPTEMBER 22, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 11:07 a.m., in Room 2141, Rayburn House Office Building, the Honorable Steve Chabot (Chairman of the Subcommittee) presiding.

Mr. CHABOT. The Committee will come to order.

We appreciate everyone's attendance here. We'll be having more Members joining us here shortly.

The Constitution Subcommittee convenes today to discuss the Supreme Court's recent decision in *Kelo v. New London* and potential congressional responses.

The fifth amendment to the Constitution provides, in part, that "nor shall private property be taken for public use without just compensation."

On June 23, 2005, the Supreme Court issued a 5 to 4 decision in *Kelo v. New London* in which it held that economic development can be a public use under the fifth amendment's Takings Clause.

Essentially, the Court held that private property can be taken from homeowners through a process called eminent domain and put to public use by a private business.

The small property owners, including private homes and small businesses, must be compensated for their loss, of course, but that is often small comfort to those who do not want to sell in the first place.

Few would question that there's a legitimate role for eminent domain. It is allowed by the Constitution, provided the condemnation is for a public use, and it is a vital and necessary tool for local governments that must find land for public uses, such as roads, schools, and public utilities.

Without this vital tool, the government would be unable to assemble land for public uses when property owners refused to sell their land for just compensation.

Prudently used, eminent domain helps communities.

We should also not lose sight of the fact that local governments have many different kinds of incentive—zoning and code enforcement tools—to promote economic development without having to resort to the taking of private property through eminent domain.

However, the question presented by the *Kelo* case is what properly constitutes a public use that justifies the government's taking of private property.

The dissenting Justices in *Kelo* wrote that "to reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property under economic development takings for public use is to wash out any distinction between private and public use of property; and, thereby, effectively to delete the words for public use from the Takings Clause of the fifth amendment."

"The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6—and no offense to Motel 6—with a Ritz Carlton, any home with a shopping mall, or any farm with a factory."

"As for the victims, the Government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result."

And that was, of course, the dissenting Justices' view.

The NAACP and AARP predicted in their brief to the Supreme Court that, "absent a true public use requirement, the takings power will be employed more frequently. The takings that result will disproportionately affect and harm the economically disadvantaged, and in particular racial and ethnic minorities and the elderly."

Houses of worship and other religious institutions are also, by their very nature, non-profit and almost universally tax exempt. These fundamental characteristics of religious institutions render their property particularly vulnerable to being taken under the rationale approved by the Supreme Court in favor of for-profit, tax generating businesses.

The Supreme Court's majority decision approving the Government's taking of private property for commercial development has been met with strong disapproval by many of the American people.

According to a *Wall Street Journal-NBC News* poll, "in the wake of the Court's eminent domain decision, Americans overall cite private property rights as the current legal issue they care most about."

In Connecticut, where the Supreme Court case originated, Quinnipiac—we went over this earlier, because it's one word I always have difficulty with, and I thought I had it right, but I screwed it up—University poll shows that by an 11 to 1 margin, those surveyed said they opposed the taking of private property for private uses, even if it is for the public economic good.

The director of that poll said he has never seen such a lopsided margin on any issue. And according to an American Survey poll, conducted in July among 800 registered voters nationwide, "public support for limiting the power of eminent domain is robust, and cuts across demographic and partisan groups. Sixty-two percent of self identified Democrats, seventy-four percent of Independents, and seventy percent of Republicans support limits."

The House of Representatives has also condemned the Supreme Court's decision in the form of H. Res. 340, which expresses grave disapproval of the *Kelo* decision. That resolution passed the House of Representatives by a vote of 365 to 33.

Even Justice John Paul Stevens, who wrote the *Kelo* decision for the five-Justice majority has said publicly he has concerns about the results of that decision, if not the legal reasoning behind it.

Justice Stevens recently told the Clark County, Nevada, Bar Association if he were a legislator instead of a judge, he would have opposed the results of his own ruling by working to change current law.

This hearing today will explore the following questions and perhaps others.

How could the Supreme Court's *Kelo* decision affect the lives of Americans?

Is congressional legislation responding to the decision in order? If so, what should be the method and scope of that response?

And I'm sure we'll have many other questions as well.

So we look forward to exploring these issues and others today with the witnesses, and we have a very distinguished panel here this morning before us.

And at this time, I'd like to turn to my good friend and colleague, the Ranking Member of this Committee, Mr. Nadler of New York.

Mr. NADLER. Well, thank you, Mr. Chairman. I want to commend you for scheduling this hearing and for the deliberative manner in which we are approaching this issue.

Although there has been a great deal of discussion about the *Kelo* decision, the precise meaning and limits of the Court's ruling need close examination. We should not take—we should never take for granted the dissent's characterization of what the majority ruling in any Court decision does. So just precisely how far does this decision, in fact, go?

We also need to examine whether there is an appropriate Federal role, and, if so, what it is.

This is a novel enterprise for our Subcommittee. Normally, our hearings examine Court rulings that restrict the power of legislators to take certain actions. In this case, the Court—the unelected judges as some like to call them—deferred to the judgment of local elected officials.

Elected officials at all levels of government have a duty to examine a power the Supreme Court has said we have, and to determine how best and most responsibly, or if at all, to exercise that power.

The power of eminent domain is an extraordinary power. Regardless of the purpose, the taking of a person's property is always a burden on that person. The Constitution recognizes that there may be public interests that would justify the exercise of that power, but limits that power and requires just compensation.

Within the scope of that rule, government has often limited its exercise of that power to less than the constitutionally granted authority and has provided compensation in excess of what is constitutionally required to include, for example, relocation costs.

Our history demonstrates that the power of eminent domain has often been abused, most often at the expense of communities least able to defend themselves: the politically powerless, the poor, and minority communities.

The abuse of eminent domain has not been limited to economic development, but it has also extended to public works such as highways, power lines, dumps, and similar facilities.

No one has suggested that we eliminate the power to take property for public works, even if the property goes to private corporations. Just recently, the President signed into law an energy bill that provides broad new powers to take private property for power lines, which are owned by private entities. I think a majority of the Members of this Committee voted for that legislation.

Whole communities have been obliterated in the name of "blight removal" or "slum clearance" or whatever the euphemism of the day happens to be, and obviously we want to guard against repetition.

Anyone who is interested in seeing the impact on communities of certain highways or slum clearance need only visit communities like Red Hook in Brooklyn, or the South Bronx in New York.

When someone's home is taken, or their neighborhood razed, the impact on them is still the same. For renters, it can be even worse, because they often receive no compensation, but still lose their homes and businesses and are displaced.

So how do we most responsibly go about using the power that the Constitution gives us, that the Court has held the Constitution gives us? To what extent, if at all, should we limit that power to local governments by legislation? Perhaps we should leave to local governments the power to exercise their judgment in limiting their power by legislation, and, as we know, legislation has been introduced in many State legislatures to do precisely that. Whether Congress should, in effect, dictate to them is an interesting question.

All politics is local, and we Members of Congress certainly know that. We are constantly involved in local land use planning, attracting economic development, and balancing the competing concerns of the communities we represent.

Not long ago, this Subcommittee examined the Supreme Court's ruling in the *Cuno* case which restricted the ability of State and local governments to offer tax incentives to attract businesses. That is another challenge to our communities trying to survive in a very competitive economic environment.

Crafting a general rule, if the Members decide that a national rule is the best approach, should not get bogged down in our last land use battle. I don't think we should be in the position of deciding for communities the wisdom of certain projects, of a certain sports stadium on the West Side of Manhattan, for example. That is a very different matter from allowing the government to take a small business for the benefit of a larger business. So I want to join the Chairman in welcoming the witnesses, and I look forward with eagerness to their testimony. And I thank you again for holding this hearing.

Mr. CHABOT. Thank you very much. Mr. Hostettler, are you interested in making an opening statement?

Mr. HOSTETTLER. Yes, I would, Mr. Chairman.

Mr. CHABOT. The gentleman is recognized.

Mr. HOSTETTLER. Thank you, Mr. Chairman. I also would like to commend the Chairman for scheduling this very important hearing.

I manage to say I find it intriguing that the individuals who, when the Supreme Court says a thing, conclude, and recommend

to Congress and most vociferously admonishes Congress that the Supreme Court has said a thing; and, therefore that thing is "supreme law of the land."

But now, we may suggest that it's not the supreme law of the land, and that, in fact, Congress can in its constitutional authority go against the will of the United States Supreme Court with regard to in this particular case takings.

The reason that in the past we have suggested that the Congress can be involved in these local issues and that, in fact, the Federal Government can be involved in these local issues, whether it's voting in elections or the placement of the Ten Commandments on the courthouse lawn or whatever is because the Constitution contains the 14th amendment. And it has been the policy of the United States Supreme Court for decades now to, in their own power and capacity, incorporate the provisions of the Bill of Rights into the 14th amendment and apply them against the States.

Well, if you subscribe to the notion of the incorporation doctrine, then, in fact, you not only subscribe to the notion on a substantive basis, meaning that in fact the Court does find that the 14th amendment is a *de facto* incorporation of the Bill of Rights applied to the States, then you must also procedurally accept what the Court has done with the incorporation doctrine as well. And that is procedurally saying that it is the Court that has the power to apply the Bill of Rights against the States to the capacity and in the reason and the manner that the Court so desires.

In this case, in the *Kelo* case, the Court does not apply the fifth amendment Takings Clause against the States. In effect, it says essentially that if someone on the State or local level can make some reason for coming up with a public use, then that State or local government can give the property to whomever they want—in this case a private entity—in order to benefit the public.

Well, if you, once again, subscribe to the notion of the incorporation doctrine, then you have to say once again, not only substantively, but procedurally, the Court has said a thing, and the Congress is powerless to do that. In fact, in the past rulings the Court has said that the Congress in certain matters with regard to the incorporation doctrine cannot exercise policy making authority. And that is why you've seen in the last several years, especially recently with this *Kelo* decision, the fact that the Congress wishes to attach the powers of the purse to the policy making, meaning that no Federal dollars will go for the expenditure on a particular project if Congress deems that a takings has taken place without the provisions of the fifth amendment being exercised and being utilized.

But to subscribe to the notion that Congress can only exercise its authority on the 14th amendment by the power of the purse is to deny, for example, what Alexander Hamilton said in Federalist Number 78, when he said that "the legislature not only commands the power of the purse, one power, but prescribes the rules by which the duties and rights of every citizen are to be regulated."

So there are two distinct powers that Hamilton talks about, the power of the purse and the power essentially of policy making. So there are those that would believe that the Court—that the Congress can only exercise its authority to regulate rights and to, in

this particular case, protect rights if it exercises the power of the purse.

In conclusion, Mr. Chairman, I'd just simply like to reiterate the simple wording of the 14th amendment. It says this in section five: "the Congress shall have power to enforce by appropriate legislation the provisions of this Article."

So it is the jurisdiction of the Congress and not the Court. There is nothing in the 14th amendment that empowers the Court to enforce the provisions of this article of the 14th amendment. But, in fact, it is the Congress that does that, and we do not have to do that only, Mr. Chairman as a result of our article I, section 9 power and that is the power of the purse. We can, by appropriate means, make the—give the power to local private landowners, whether they are homeowners or small business owners or whomever the right to keep their land and not for it to be taken by the use of a private entity or a private individual regardless of their ability to persuade local or State politicians that the use of that property will be in the public interest.

And I yield back the balance of my time, and I thank the Chairman.

Mr. CHABOT. Thank you. The gentleman's time has expired. Mr. Feeney, are you interested in making an opening statement?

Mr. FEENEY. Just briefly, because I happened to practice eminent domain before I became—I'm now a recovering lawyer, now that I'm in Congress full time.

But I was fascinated by the *Kelo* decision. Aside from the fact that the Court simply read out of the fifth amendment the public use requirement before Government takes property, in my view, this is just indicative of the larger trend in the Court to substitute their own prejudices and biases for the constitutional language itself. It's a very disturbing trend. This is just one of the many things.

And the bottom line is this is a battle about the approach to jurisprudence. *Kelo* is a case that has really inspired a lot of American outrage, but there are lot of other instances when the Court has, because of theories about living and breathing documents, allowed the language of the Constitution as originally framed to morph into whatever the biases of a majority of the Court likes at any given time. It's one of the reasons we have these often ugly confirmation processes in the Senate these days, because in a time and day when all we expected was umpires from the bench to enforce the original meaning and intent of the Constitution, it was not much of a political battle. It was all about qualifications and capability.

Nowadays, if you really believe that the Court ought to be a super legislature, it becomes very important what the religious faiths, the political background and other biases of any given potential nominee.

So I see the *Kelo* decision as just the most recent outrageous move. The bottom line is I would tell you that unless we are going to have Justices that will try to discern the original meaning and the original intent of the Framers, then our Constitution will morph into whatever it is that the biases of a majority want it to mean at any time, an Orwellian court, where up means down,

black means white, yes means no. And I'm here in part to help find a way to rectify this individual decision, but to remind Americans that the proper role of the Court is to interpret the original meaning that—of the great document that our Founders gave to us and that all 13 colonies ratified after a debate between the Federalists and the anti-Federalists and others; and that every State that has been admitted to the Union since then has ratified.

The language that the Founders gave us is a gift, and we are often turning our backs on the gift that we were given.

I yield back, Mr. Chairman.

Mr. CHABOT. I thank you, and the gentleman, Mr. Franks is recognized for 5 minutes, if he chooses to make a statement.

Mr. FRANKS. Thank you, Mr. Chairman. Well, thank you, Mr. Chairman. And I, you know, after Mr. Feeney speaks, sometimes there's not much reason for any of us to say anything else. But I would like to mirror his comments.

You know this Committee is often times given the charge to try to respond to court decisions, and, in some cases, it's to enact, and in some cases, it's to try to remedy.

And, like Mr. Feeney, one of my great concerns over the years, one of the foundations for my involvement in this body, has been a concern that the Federal judiciary has begun to usurp the legislative function to a profound degree. The 14th amendment that we're discussing today essentially embodies three rights: the right to life, liberty, and property. No person shall be deprived of life, liberty, or property. No State shall deprive any person of life, liberty, or property.

And I've seen the courts in past years, going all the way back to the *Dred Scott* decision, which is often quoted where they told the world that the black man was not a person, but it was property. And it took a Civil War, a little constitutional convention called the Civil War, to reverse that obscenity.

And it seems that since then, we've not learned a great deal.

In 1973, the Supreme Court, just by judicial fiat, said that the unborn child was not a person. We can find life it seems maybe on Mars, but not in the womb. It's astonishing to me that we miss the big elements of the Constitution. Without life, none of the others have any meaning at all.

We've seen the courts diminish our liberty to a great extent and now, with the *Kelo* decision, we've seen the courts make a frontal assault on the right to property. And in and of itself, it's a significant issue, but especially in America, because our entire economy, our entire process, our entire system is based on the right to property. Sometimes we suggest that it's all about competition. But ultimately, it's about trust. It's about a framework where people have the right to have property and put their property either at risk or their capital at risk to try to further enhance or gain in the process.

And when we undermine those foundational constitutional rights, we essentially vitiate everything that the Founding Fathers gave, everything they had to give us. And if a republic is anything, it is the rule of law. And when we find ourselves overarching by a judicial oligarchy that simply ignores the law and writes it as they choose, it then becomes time for those of us on this bench to

board up the windows and go home, because there's no purpose in writing the law any further. The judges then write it for us.

And I think it is the greatest challenge that this Republic faces, and I hope at least some of the dialogue today will go toward that remedy. Thank you.

Mr. CHABOT. Thank you, and the Ranking Member, who's outnumbered here right now, has asked for a little additional time, an additional minute to respond. And we——

Mr. NADLER. Thank you, Mr. Chairman. I just want to point out that with all this rhetoric about the Court being a super legislature and usurping power from the elected branches, I don't agree with that obviously, but that's a different discussion. The issue—the decision that calls us here today is the exact opposite. It's the Court granting power to legislative bodies, saying it's okay for you to do this, this being the use of eminent domain for an alleged public purpose—for a public purpose that involves private activity.

But the point is regardless of the merits, it's not the Court saying we determine, it's the Court saying the legislatures determine. So all this rhetoric may be fine for other cases, but that's not what we're talking about here this morning.

I yield back. Thank you.

Mr. CHABOT. Okay. The gentleman yields back. We have a vote, but we can move on here and get a few things done.

First of all, I'd like to introduce our very distinguished panel here this morning. We'll do that at this time. Our first witness is Dana Berliner. Ms. Berliner is a Senior Attorney at the Institute for Justice, where she has worked as an attorney since 1994. Along with co-counsel, Scott Bullock, she represented the homeowners in New London, Connecticut, in the *Kelo* case, which we are discussing here today.

In 2003, Ms. Berliner authored "Public Power, Private Gain," the first ever nationwide study on the use of eminent domain to further private development.

Ms. Berliner received her law and undergraduate degrees from Yale University, where she was a member of the Yale Law Review. We welcome you here this morning.

Our second witness will be Michael—is it Cristofaro? Cristofaro. Okay. His family lives in one of the Fort Trumbull, Connecticut, homes that are the subject of the development project that was at issue in the Supreme Court's *Kelo* decision. The Fort Trumbull Project constitutes the second time someone from his family may have to move because the government wants to take their home.

In the 1970's, the government took their home so a seawall could be built. However, that seawall was never built, but a private development was. Mr. Cristofaro, thank you very much for traveling to Washington, D.C. to tell us your story today. We appreciate it very much.

And our third witness is Hilary O. Shelton, the Director to the NAACP's Washington Bureau, the public policy division of the oldest, largest, and most widely recognized national civil rights organization.

Mr. Shelton also serves on a number of national boards of directors, including those for the Leadership Conference on Civil Rights, the Center for Democratic Renewal, the Coalition to Stop Gun Vio-

lence, and the Congressional Black Caucus Institute, among many others. And we welcome you here, as you've testified many times before Congress before, Mr. Shelton.

And our fourth witness is Mayor Bart Peterson, the 47th mayor of a great city, Indianapolis, Indiana, the capital of Indiana, and Mr. Hostettler I'm sure appreciates that very much and the nation's 12th largest city.

Mayor Peterson is also the Second Vice President of the National League of Cities, the country's largest and oldest organization serving municipal government, and he's speaking on their behalf today.

The mission of the National League of Cities is to strengthen and promote cities as centers of opportunity. We thank all of our witnesses today for taking the time out of their very busy schedules to give us their thoughts. And without objection, all Members will have five legislative days within which to submit additional materials for the record.

And it's the practice of this Committee to swear in all witnesses before appearing before it, so if you would, we'd ask you all please to stand and raise your right hand.

[Witnesses sworn.]

Mr. CHABOT. And all witnesses have indicated in the affirmative and we thank you again, and you can all be seated. We probably have time to move forward with one of the witnesses before we have to go over for a vote, so Ms. Berliner, you're recognized for 5 minutes. We actually have a lighting system, as you might have noticed, and when the yellow light comes on, that means that you have 1 minute to wrap up. The green light stays on 4 minutes; the yellow light, for 1 minute. And then when the red light comes on, we won't gavel you down immediately, but we'd hope you'd try to wrap it up by that time, if at all possible. Ms. Berliner, you're recognized for 5 minutes, and if you could turn that mike on there. Thank you.

TESTIMONY OF DANA BERLINER, SENIOR ATTORNEY, INSTITUTE FOR JUSTICE

Ms. BERLINER. Thank you very much, Chairman Chabot and Members of the Committee.

I'm very happy that the Committee has decided to consider the issue of eminent domain today.

Since the founding of our country, eminent domain has been called the despotic power, and that's because it is the power to remove someone from their home, to destroy their business.

It is one of the most significant things that a government can do to an individual person. And our Founders chose to limit eminent domain to public uses. That's in the U.S. Constitution. It's in the Constitution of every State.

For many years, eminent domain was used for what you would think would be a public use for most of our nation's history—things like roads, like schools, parks, public utilities—things that anyone would think of as public—owned by the public, used by the public.

But starting in the 1950s, eminent domain began to be used for private ownership and private use. That started with urban renewal, but it's something that has been steadily increasing, and becoming even more and more egregious over the years.

In the 5-year period of 1988 through 2002, there were more than 10,000 properties either taken or threatened with condemnation for private development in this country.

And that's really just the tip of the iceberg because that's what we got from counting from news articles. If you look at the actual numbers, they are many, many times that large. And what is happening is that eminent domain is being used to take prime real estate around the country and transfer it to private parties in the name of economic growth.

In June of this year, the United States decided the case of *Kelo v. New London.* And what the Court found was that 15 homes could be taken because offices produce more taxes and more jobs than homes do. And having an office park instead of these homes would somehow help the community more than having the homes there, according to the Court.

What makes this case even more disturbing is that they actually don't have anything to do with the homes. The homes are—some of them are being taken for something or another. No one knows what. Some of the homes are being taken for an office the developers already said it's not going to build.

Nonetheless, the Court found that the plan was good enough and somehow or another it might work out or the city thought that it might work out to cause economic growth. And that now is a public use.

This decision was met with a firestorm of outrage throughout the country. And everyone knew that property could be taken for a road or for school, but most people did not realize that they could lose their homes because someone else with more money and more political connections wanted to use their land to make a greater profit there.

When people learned about this, they were understandably horrified. Homeownership and small businesses have always been the backbone of our country and the road to prosperity for many families. And people realized correctly that if this could happen in New London, it could happen to them.

The Supreme Court left many ordinary citizens in shock, but not local governments, who have immediately begun implementing projects, condemning property for private development. The decision threw open the floodgates and local governments have been taking advantage of that and giving every indication that they will continue to do so.

What makes this situation even worse is that Federal money is being used to support this kind of abuse of power. Federal funds were used in New London; $2 million of Federal funds went to that project. In New York, a church, a small urban church was taken for private development using Federal money. Small businesses are being taken from our upscale ones in Pennsylvania, using Federal money. Affordable housing is taken for upscale housing, again using Federal money, in Missouri.

Congress should not be giving its funds and lending its approval to this travesty of justice. I do not believe that this should be left to local governments, because that's how we got where we are today. And at least, Congress can refuse to support this with Federal funding.

I realize that this Committee and that the House is considering many different proposals, each of which addresses this problem in some way. As you work toward language, I would make two recommendations: that whatever the legislation is that it cut off—that it cut off not just funding for the particular project, but economic development funding to any agency or city that uses eminent domain for private development, and also to have a clear definition of what activity and what use of eminent domain is going to violate people's rights.

It is within the power of Congress to remove or substantially diminish the specter of condemnation for private development. Thousands of citizens are looking to you to address this problem, and it's been really inspiring to see both Houses of Congress and both parties working together on this. Thank you for your leadership and your efforts.

[The prepared statement of Ms. Berliner follows:]

PREPARED STATEMENT OF DANA BERLINER

Thank you for the opportunity to testify regarding eminent domain abuse, an issue that's finally getting significant national attention as a result of the U.S. Supreme Court's dreadful decision in *Kelo v. City of New London.* This subcommittee is to be commended for responding to the American people by examining this misuse of government power.

My name is Dana Berliner, and I am a senior attorney at the Institute for Justice, a nonprofit public interest law firm in Washington D.C. that represents people whose rights are being violated by government. One of the main areas in which we litigate is property rights, particularly in cases where homes or small businesses are taken by government through the power of eminent domain and transferred to another private party. I have represented property owners across the country fighting eminent domain for private use, and I am one of the lawyers at the Institute who represents the homeowners in the *Kelo v. City of New London* case, in which the U.S. Supreme Court decided that eminent domain could be used to transfer property to a private developer simply to generate higher taxes, as long as the project is pursuant to a plan. I also authored a report about the use of eminent domain for private development throughout the United States (available at www.castlecoalition.org/report).

In *Kelo,* a narrow majority of the Court decided that, under the U.S. Constitution, property could indeed be taken for another use that would potentially generate more taxes and more jobs, as long as the project was pursuant to a development plan. The *Kelo* case was the final signal that, according to the Court, the U.S. Constitution simply provides no protection for the private property rights of Americans. Indeed, the Court ruled that it's okay to use the power of eminent domain when there's the mere *possibility* that something else could make more money than the homes or small businesses that currently occupy the land. It's no wonder, then, that the decision caused Justice O'Connor to remark in her dissent: "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping center, or any farm with a factory."

Because of this threat, there has been a considerable public outcry against this closely divided decision. Overwhelming majorities in every major poll taken after the *Kelo* decision have condemned the result. Several bills have been introduced in both the House and Senate to combat the abuse of eminent domain, with significant bipartisan support.

The use of eminent domain for private development has become a nationwide problem, and the Court's decision is already encouraging further abuse

Eminent domain, called the "despotic power" in the early days of this country, is the power to force citizens from their homes and small businesses. Because the Founders were conscious of the possibility of abuse, the Fifth Amendment provides a very simple restriction: "[N]or shall private property be taken for public use without just compensation."

Historically, with very few limited exceptions, the power of eminent domain was used for things the public actually owned and used—schools, courthouses, post offices and the like. Over the past 50 years, however, the meaning of public use has

expanded to include ordinary private uses like condominiums and big-box stores. The expansion of the public use doctrine began with the urban renewal movement of the 1950s. In order to remove so-called "slum" neighborhoods, cities were authorized to use the power of eminent domain. This "solution," which critics and proponents alike consider a dismal failure, was given ultimate approval by the Supreme Court in *Berman v. Parker*. The Court ruled that the removal of blight was a public "purpose," despite the fact that the word "purpose" appears nowhere in the text of the Constitution and government already possessed the power to remove blighted properties through public nuisance law. By effectively changing the wording of the Fifth Amendment, the Court opened a Pandora's box, and now properties are routinely taken pursuant to redevelopment statutes when there's absolutely nothing wrong with them, except that some well-heeled developer covets them and the government hopes to increase its tax revenue.

The use of eminent domain for private development is widespread. We documented more than 10,000 properties either seized or threatened with condemnation for private development in the five-year period between 1998 and 2002. Because this number was reached by counting properties listed in news articles and cases, it grossly underestimates the number of condemnations and threatened condemnations. Indeed, in Connecticut, the only state that actually keeps separate track of redevelopment condemnations, we found 31, while the true number of condemnations was 543. Now that the Supreme Court has actually sanctioned this abuse in *Kelo*, the floodgates to further abuse have been thrown open. Home and business owners have every reason to be very, very worried.

Despite the fact that so many abuses were already occurring, since the *Kelo* decision, local governments have become further emboldened to take property for private development. For example:

- *Freeport, Texas* Hours after the *Kelo* decision, officials in Freeport began legal filings to seize some waterfront businesses (two seafood companies) to make way for others (an $8 million private boat marina).
- *Sunset Hills, Mo.* On July 12, less than three weeks after the *Kelo* ruling, Sunset Hills officials voted to allow the condemnation of 85 homes and small businesses for a shopping center and office complex.
- *Oakland, Calif.* A week after the Supreme Court's ruling, Oakland city officials used eminent domain to evict John Revelli from the downtown tire shop his family has owned since 1949. Revelli and a neighboring business owner had refused to sell their property to make way for a new housing development. Said Revelli of his fight with the City, "We thought we'd win, but the Supreme Court took away my last chance."
- *Ridgefield, Conn.* The city of Ridgefield is proceeding with a plan to take 154 acres of vacant land through eminent domain. The property owner plans to build apartments on the land, but the city has decided it prefers corporate office space. The case is currently before a federal court, where the property owner has asked for an injunction to halt the eminent domain proceedings. Ridgefield officials directly cite the *Kelo* decision in support of their actions.
- *Hollywood, Fla.* For the second time in a month, Hollywood officials have used eminent domain to take private property and give it to a developer for private gain. Empowered by the *Kelo* ruling, City commissioners took a bank parking lot to make way for an exclusive condo tower. When asked what the public purpose of the taking was, City Attorney Dan Abbott didn't hesitate before answering, "Economic development, which is a legitimate public purpose according to the United States Supreme Court."
- *Arnold, Mo.* The St. Louis Post-Dispatch reported that Arnold Mayor Mark Powell "applauded the decision." The City of Arnold wants to raze 30 homes and 15 small businesses, including the Arnold VFW, for a Lowe's Home Improvement store and a strip mall—a $55 million project for which developer THF Realty will receive $21 million in tax-increment financing. Powell said that for "cash-strapped" cities like Arnold, enticing commercial development is just as important as other public improvements.

Courts are already using the decision to reject challenges by owners to the taking of their property for other private parties. On July 26, 2005, a court in Missouri relied on *Kelo* in reluctantly upholding the taking of a home for a shopping mall. As the judge commented, "The United States Supreme Court has denied the Alamo reinforcements. Perhaps the people will clip the wings of eminent domain in Missouri, but today in Missouri it soars and devours." On August 19, 2005, a court in Florida, without similar reluctance, relied on *Kelo* in upholding the condemnation of several boardwalk businesses for a newer, more expensive boardwalk development.

FEDERAL FUNDS CURRENTLY SUPPORT EMINENT DOMAIN FOR PRIVATE USE

Of course, federal agencies take property for public uses, like military installations, federal parks, and federal buildings, which is legitimate under the requirements of the Fifth Amendment. While these agencies themselves generally do not take property and transfer it to private parties, in the states many projects using eminent domain for economic development receive some federal funding. Thus, federal money does currently support the use of eminent domain for private commercial development. A few recent examples include:

- *New London, Conn.* This was the case that was the subject of the Supreme Court's *Kelo* decision. Fifteen homes are being taken for a private development project that is planned to include a hotel, upscale condominiums, and office space. The project received $2 million in funds from the federal Economic Development Authority.
- *St. Louis, Mo.* In 2003 and 2004, the Garden District Commission and the McRee Town Redevelopment Corp. demolished six square blocks of buildings, including approximately 200 units of housing, some run by local non-profits. The older housing will be replaced by luxury housing. The project received at least $3 million in Housing and Urban Development (HUD) funds, and may have received another $3 million in block grant funds as well.
- *New Cassel, New York* St. Luke's Pentecostal Church had been saving for more than a decade to purchase property and move out of the rented basement where it held services. It bought a piece of property to build a permanent home for the congregation. The property was condemned by the North Hempstead Community Development Agency, which administers funding from HUD, for the purpose of private retail development. As of 2005, nothing has been built on the property, and St. Luke's is still operating out of a rented basement.
- *Toledo, Ohio* In 1999, Toledo condemned 83 homes and 16 businesses to make room for expansion of a DaimlerChrysler Jeep manufacturing plant. Even though the homes were well maintained, Toledo declared the area to be "blighted." A $28.8 million loan from HUD was secured to pay for some parts of the project. The plant ultimately employed far fewer people than the number Toledo expected.
- *Ardmore, Pa.* The Ardmore Transit Center Project has some actual transportation purposes. However, Lower Merion Township officials are also planning to remove several historic local businesses, many with apartments on the upper floors, so that it can be replaced with mall stores and upscale apartments. The project receives $6 million in federal funding, which went to the Southeastern Pennsylvania Transit Authority. This is an ongoing project in 2005.

CONGRESS CAN AND SHOULD TAKE STEPS TO ENSURE THAT FEDERAL FUNDS DO NOT SUPPORT THE ABUSE OF EMINENT DOMAIN

The *Kelo* decision cries out for Congressional action. Even Justice Stevens, the author of the opinion, stated in a recent speech that he believes eminent domain for economic development is bad policy and hopes that the country will find a political solution. Congress and this committee are all to be commended for their efforts to provide protections that the Court itself has denied.

Congress has the power to deny federal funding to projects that use eminent domain for private commercial development and to deny federal economic development funding to government entities that abuse eminent domain in this way. Clearly, Congress may restrict federal funding under the Spending Clause. The Supreme Court has laid out the test for any conditions that Congress places on the receipt of federal money in *South Dakota v. Dole.* The most important requirements are that there be a relationship between the federal interest and the funded program and that Congress be clear about the conditions under which federal funds will be restricted. The purpose of the federal funds is to aid states and cities in various development projects. If Congress chooses to only fund projects or agencies that conduct development without using eminent domain to transfer property to private developers, it may certainly do so.

Currently, federal money is being used in projects that take property from one person and give it to another. Or it is being used in a way that gives a locality more money to spend on projects that take people's homes and businesses for economic development. If Congress wishes to ensure that federal money will not support the misuse of eminent domain, terminating economic development funds is necessary.

And the best approach is to terminate *all* economic development funding—not just those funds related to a specific project—if a state or local government takes someone's home or business for private commercial development. Since appropriate definitions are so essential when drafting any eminent domain reform, especially to make sure that any restriction does not run afoul of the requirements of *South Dakota v. Dole,* specificity and clarity are the most important requirements of any law that potentially restricts federal funding. In order to be as unambiguous as possible, any bill must preclude funding where eminent domain is used to facilitate private use or ownership of new commercial development. States and local governments must know precisely what they can and cannot do, as well as what they stand to lose, so a bill's restrictions must be spelled out explicitly.

Funding restrictions will only be effective if there exists a procedure for enforcement, so any reform must also include a mechanism by which the economic development funding for the state or local government can be stopped. Part of this procedure should be a private method of enforcement, whether through an agency or court, so that the home and small business owners that are affected by the abuse of eminent domain or any other interested party like local taxpayers can alert the proper entity and funding can be cut off as appropriate. The diligence of ordinary citizens in the communities where governments are using eminent domain for private commercial development, together with the potential sanction of lost federal funding, will most certainly serve to return some sense to state and local eminent domain policy.

Given the climate in the states as a result of *Kelo,* congressional action will encourage much needed reform by state legislatures. Many states are presently studying the issue and considering legislative language, and they will most certainly look to any bill passed by Congress as an example. Reform at the federal level would be a strong statement to the country that this awesome government power should not be abused. It would restore the faith of the American people in their ability to build, own and keep their homes and small businesses, which is itself a commendable goal.

It should also be noted that development is not the problem—it occurs every day across the country without eminent domain and will continue to do so should this committee act on this issue, which I recommend. Public works projects like flood control will not be affected by any legislation that properly restricts eminent domain to its traditional uses since those projects are plainly public uses. But commercial developers everywhere need to be told that they can only obtain property through private negotiation, not public force, and that the federal government will not be a party to private-to-private transfers of property. Congressional action will not stop progress.

CONCLUSION

Eminent domain sounds like an abstract issue, but it affects real people. Real people lose the homes they love and watch as they are replaced with condominiums. Real people lose the businesses they count on to put food on the table and watch as they are replaced with shopping malls. And all this happens because localities find condos and malls preferable to modest homes and small businesses. Federal law currently allows expending federal funds to support condemnations for the benefit of private developers. By doing so, it encourages this abuse nationwide. Using eminent domain so that another, richer, better-connected person may live or work on the land you used to own tells Americans that their hopes, dreams and hard work do not matter as much as money and political influence. The use of eminent domain for private development has no place in a country built on traditions of independence, hard work, and the protection of property rights.

Again, thank you for the opportunity to testify before this subcommittee.

ATTACHMENT

Kelo v. City of New London: What it Means and the Need for Real Eminent Domain Reform

In *Kelo v. City of New London*, the U.S. Supreme Court held that the Constitution allows governments to take homes and businesses for potentially more profitable, higher-tax uses. In the aftermath of that decision, the defenders of eminent domain abuse have already begun desperate attempts to keep the power to take homes and businesses and turn them over to private developers. And they are struggling to convince outraged Americans that ordinary citizens shouldn't care. The beneficiaries of the virtually unrestricted use of eminent domain – local governments, developers, and planners – will frantically lobby to prevent any attempt to diminish their power.

Their main message is that nothing has changed and there's nothing to worry about, because local officials always have the best interests of their citizenry at heart. Nothing could be further from the truth. The *Kelo v. City of New London* decision represents a severe threat to the security of all home and business owners in the country. Not only does it give legal sanction to a whole category of condemnations that were previously in legal doubt, but it actually encourages the replacement of lower income residents and businesses with richer homeowners and fancier businesses. The vast majority of Americans understand what is at stake, even if many so-called experts do not.

What the Supreme Court Actually Said in *Kelo*

The Court ruled that 15 homes in the Fort Trumbull waterfront neighborhood of New London, Connecticut, could be condemned for "economic development." There was no claim that the area was blighted. The project called for a luxury hotel, upscale condominiums, and office buildings to replace the homes and small businesses that had been there. The new development project would supposedly bring more tax revenue, jobs, and general economic wealth to the city. Connecticut's statutes allow eminent domain for projects devoted to "any commercial, financial, or retail enterprise." Conn. Gen. Stat. § 8-187.

The Fifth Amendment to the U.S. Constitution states, "[N]or shall private property be taken for public use, without just compensation." Yet in the *Kelo* decision, Justice Stevens explains that the fact that property is taken from one person and immediately given to another does not "diminish[] the public character of the taking." The fact that the area where the homes sit will be leased to a private developer at $1 per year for 99 years thus, according to the Court, has no relevance to whether the taking was for "public use." Instead, the *Kelo* decision imposes an essentially subjective test for whether a particular condemnation is for a public or private use: Courts are to examine whether the governing body was motivated by a desire to benefit a private party or concern for the public. Thus, because the New London city officials <u>intended</u> that the plan would benefit the city in the form of higher taxes and more jobs, the homes could be taken.

The Court's decision allows cities to take homes or businesses and transfer them to developers if they think the developers *might* generate more economic gains with the property. The Court also rejected any requirement that there be controls in place to ensure that the project live up to its promises. According to the majority, requiring any kind of controls would be "second-guess[ing]" the wisdom of the project.

Worse yet, cities do not need to have any use for the property in the foreseeable future in order to take it. In fact, the opinion encourages cities to condemn first and find developers later; the Court claims that it is "difficult to accuse the government of having taken *A*'s property to benefit the private interests of *B* when the identity of *B* was unknown." In the future, then, cities can negotiate a sweetheart deal but wait until after the condemnation to actually sign it. Or they can simply take property first and market it to developers later. Some of the homes in Connecticut were being taken for some unidentified use and others for an office building that the developer had stated it would not build in the foreseeable future.

So, according to the Supreme Court, cities can take property to give to a private developer with no idea what will go there and no guarantee of any public benefit.

If the majority thinks they offered any meaningful protection to home and business owners, they are completely disconnected from reality. The decision suggests some extremely minor limits to the use of eminent domain for private development. Those few condemnors in cities that don't bother to do a plan, fail to follow their own procedures, or actually engage in corruption may still find some hope in federal court. But there is almost always a plan; cities are quite adept at following their own procedures; and most cases of eminent domain abuse do not involve outright and blatant corruption, such as bribes. Consequently, the vast majority of individuals are left entirely without federal constitutional protection.

The Supreme Court's *Kelo* Decision Changes the Law and Threatens All Home and Business Owners.

Some commentators are claiming that *Kelo* didn't change anything and therefore no one needs to worry about it. This statement is wrong on two levels: *Kelo* did change the law, and to the extent that governments were already taking homes and businesses for private commercial development, that's cause for greater concern, not less. *Kelo* threw a spotlight on an already-existing practice that an overwhelming majority of people find outrageous and un-American. More importantly, by declaring that there are virtually no constitutional limitations on the ability of cities to take property from A and give it to B, the Court invited more abuse and thus made the problem of eminent domain abuse much worse.

The law before *Kelo* did sometimes allow condemnation of property that would result in private ownership, but each of these situations was extremely limited.[1] None

[1] *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992) (railroad track transferred to another common carrier); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (land ownership transferred to lessees as part of program to break up remnants of feudal land system dating from Hawaii's pre-state monarchy); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (pesticide research results available to later pesticide producers; obviously related to public health); *Berman v. Parker*, 348 U.S. 26 (1954) (single unblighted building in severely blighted area taken as part of large project to clear slum and redevelop); *Strickley v. Highland Bay Mining Co.*, 200 U.S. 527 (1906) (aerial bucket line for mining ore, available to any user); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1905) (condemnation for construction of irrigation ditch as part of statewide irrigation infrastructure program); *Head v. Amoskeag*, 113 U.S.

necessitated the decision of the majority in *Kelo*.

Indeed, four members of the Court agreed that its prior decisions did not dictate the result in *Kelo*. Justice Sandra Day O'Connor broke those previous cases into three categories: (1) transfers of property from private ownership to public ownership; (2) transfer of property to a privately owned common carrier or similar public infrastructure; (3) transfer of property to eliminate an identifiable public harm. But, as pointed out by Justice O'Connor, "economic development" fits into none of these categories. Now, government may condemn property as long as there is a plan to put something more expensive there.

The text of the Constitution does not change, so the question in any constitutional case is how the Court will apply that law to the facts. How far will it go in either enforcing or ignoring constitutional rights? For example, we know that the First Amendment protects free speech. But how far will the Court go in enforcing that right? The Court has applied free speech protections to everything from advertising and the internet to criticism of the government and Nazi marches. In one sense, of course, the "law" did not change; the Constitution reads the same, and the Court still says that free speech is important. But in fact, each of these decisions did change the law, because they applied it to a new situation. In the same way, in *Kelo*, the Court applied the Fifth Amendment to a different and far more extreme type of use of eminent domain and upheld it. In *Kelo*, the Court went to extraordinary lengths to ignore the constitutional mandate that property only be taken for "public use," and thus went much further than it ever had before.

So when some law professors say that nothing has changed, what they mean is that the Court's general statements about public use have not changed. The Court has said for a number of years that it applies great deference to government decisions that a condemnation served a public use. At the same time, the Court had always said that there was a limit, that government could not take property from A in order to give it to B for B's private use. But in constitutional law, it's the application of general statements to facts that tells how seriously the Court takes constitutional rights. The question in every case, therefore, was whether the particular use of eminent domain fell into the category of deference or whether it went too far and would be held unconstitutional. Before *Kelo*, we knew that government could take property in deeply troubled, almost uninhabitable areas and transfer it to private developers. Now we know that government can take **any** property and transfer it to private developers. Only a lawyer would be unable to tell the difference.

Commentators are right that local governments, as a matter of practice, have been using eminent domain to assist private developers on a regular basis for years. That fact should be a cause for deep concern, not comfort that nothing has changed. More than 10,000 properties were either taken or threatened with condemnation for private development in a five-year period.[2] Because this number was reached by counting properties listed in news articles and cases, it grossly underestimates the number of condemnations and threatened condemnations. In Connecticut, the only state that keeps separate track of redevelopment condemnations, we found 31, while the true

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9 (1885) (riparian rights for private mill; Court explicitly refused to hold that economic benefits justified condemnation).

[2] Dana Berliner, *Public Power, Private Gain: A Five Year, State-By-State Report Examining the Abuse of Eminent Domain* (2003) (available at http://www.castlecoalition.org/report/).

number was 543. Now that the Supreme Court has actually sanctioned this abuse in *Kelo* and refused to provide any meaningful limits, the floodgates to further abuse have been thrown open. Home and business owners have every reason to be very, very worried now. As Justice O'Connor noted in her dissent, "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping center, or any farm with a factory."

So while there may be no change to the general idea of deference to legislative determinations of public use, there has been a different, more far-reaching application of it. That new application will change property ownership as we know it. That is not an overstatement. There had been many condemnations for private use going on before this decision. But cities still knew that there was no case upholding eminent domain for economic development. That provided some restraint or caution. Now, there is no reason to show any restraint.

Eminent Domain Is Not Necessary for Economic Development.

City officials often claim that without the power of eminent domain, they will be unable to do worthwhile projects and their cities will fall into decline.

These claims are at best disingenuous, and at worst outright dishonest. There are many, many ways to encourage economic growth that do not involve taking someone else's property. These include, for example, economic development districts, tax incentives, bonding, tax increment financing, Main Street programs, infrastructure improvements, relaxed or expedited permitting, and small grants and loans for façade improvements.[3] Will a developer be able to put condos and a superstore on whatever piece of prime real estate it selects without using eminent domain? Maybe, maybe not. Will the city be able to have economic development? Absolutely.

Development happens every day, all across the country, without the use of eminent domain. At the same time, projects that do use eminent domain often fail to live up to their promises, and they also impose tremendous costs – both economic and social – in the form of lost communities, uprooted families, and destroyed small businesses. Urban renewal is now widely recognized as one of the worst policy initiatives ever undertaken in our cities, destroying inner cities and displacing thousands of minorities and elderly citizens.[4] But at the time, of course, it was touted as a brilliant tool of revitalization. The condemnation of the Poletown neighborhood in Detroit for a General Motors manufacturing plant in 1981, one of the most infamous economic development condemnations, failed to bring prosperity to the city. Indeed, it cost the city millions of

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[3] *See* Brief *Amicus Curiae* of John Norquist on behalf of Petitioners in *Kelo v. City of New London* (John Norquist is the former mayor of Milwaukee and President of the Center for New Urbanism); Brief *Amicus Curiae* of Goldwater Institute, *et al.* on behalf of Petitioners in *Kelo v. City of New London*. (All of the amicus briefs cited in this paper are available at http://www.ij.org/kelo.)

[4] *See* Mindy Thompson Fullilove, *Root Shock: How Tearing Up City Neighborhoods Hurts America, And What We Can Do About It* (One World 2005); Wendell Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003); Brief *Amicus Curiae* of Jane Jacobs on behalf of Petitioners in *Kelo v. City of New London*; Brief *Amicus Curiae* of NAACP, AARP, *et al.* on behalf of Petitioners in *Kelo v. City of New London*; Brief *Amicus Curiae* of Better Government Assoc., et al. on behalf of Petitioners in *Kelo v. City of New London.*

dollars and may well have destroyed more jobs than it created.[5] Defenders of eminent domain for private development present a false choice between protecting people's rights and economic development. In fact, we can have both.

Eminent Domain Is Not Used as a "Last Resort."

Many municipal officials claim that they use eminent domain responsibly and only as a "last resort." This is simply not true. In most cases, the threat of eminent domain plays an important role from the very beginning of negotiations. Cities know that most home and business owners will be unable to afford the tremendous legal costs associated with fighting eminent domain; this fact gives cities a strong incentive to threaten property owners with condemnation. People are told that if they do not sell, their home or business will be taken from them and they will get even less money. Cities plan projects on the assumption that there is no need to incorporate existing homes or businesses, because they can simply be taken. After cities design and pursue such projects, current owners are told to sell. If they do not, then eminent domain becomes a "last resort." In practice, the power of eminent domain often makes voluntary sales less likely, because owners who would have sold if treated with respect will refuse to once they have been threatened.

Changes to Planning and Hearing Procedures Will Not Stem the Tide of Eminent Domain Abuse.

Various commentators are suggesting that legislators can take a "moderate," "sensible" approach to the *Kelo* decision and just require a process with more public input and better planning. These measures will do nothing to protect the rights of home and business owners. The City of New London had a lengthy process, with studies, plans and public hearings. None of this lengthy process made any difference, however, because a deal had been cut before the process even began. Local legislators typically know the outcome they want and then follow the procedures necessary to get it. City councilors and planning officials don't even need to listen at public hearings, because they already know how they are going to vote.

Better planning is also no solution and will do nothing to protect home and business owners from losing their property to private developers. Planners call for even more of the kind of planning that, if implemented, necessitates forcing some people out of their homes and businesses to make way for other, supposedly better-planned uses. Thus, we hear calls for comprehensive plans that outline every future use of property in the city and integrated redevelopment plans that implement the comprehensive plans for replacing current owners with other ones. While all of this additional planning will no doubt bring lots of money to planners, it will not prevent the use of eminent domain for private commercial development and in practice will probably encourage more abuse.

The Floodgates Are Opening and the Situation Will Only Get Worse If No Legislative Action Is Taken.

In the wake of the U.S. Supreme Court's decision in *Kelo v. City of New London* upholding the use of eminent domain for private development, the floodgates are

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[5] *See* Brief *Amicus Curiae* of Jane Jacobs on behalf of Petitioners in *Kelo v. City of New London*.

opening to abuse. Already, the ruling has emboldened governments and developers seeking to take property from home and small business owners. Despite claims that eminent domain will be used sparingly, there have been a flood of new condemnations and new proposals of eminent domain for private commercial development after the *Kelo* ruling. In the first two months after the decision, more than 30 municipalities began condemnation proceedings for private development or took action to authorize them in the near future. Thousands of properties are now threatened with eminent domain for private commercial development, and those numbers will continue to swell unless state legislatures and Congress listen to their constituents and end the abuse of eminent domain.

Creating an Effective Statutory Protection Against Eminent Domain Abuse

Basic elements of a good law:

The outline below sets forth the basic elements of a law that will genuinely protect citizens from losing their land to other private parties for private development.

- Remove statutory authorizations for eminent domain for private commercial development.
- Explicitly forbid eminent domain for private commercial development and/or require that condemned property be owned and used by government or a common carrier.
- Prohibit "ownership or control" by private interests. In many cases, a government entity will technically own the property but lease it for $1 per year to a private party.
- Ensure that the statute or constitutional amendment applies to all entities that engage in eminent domain, using a term like "all political subdivisions."
- Clearly state any exceptions, i.e., any circumstances where property can be taken for private commercial entities. The main exception that should be made is private entities that are "common carriers" – these include railroads and utilities.
- If blight is an exception, revise blight definitions to clearly define the type of blight required to justify the use of eminent domain and require that the property has serious, objective problems before it can be taken for private development.
- Disentangle the designation of a redevelopment area for funding purposes and an area where property may be taken for private development. This allows cities to still get funding and acquire property voluntarily but prevents the use of eminent domain for private development.
- Require government to bear the burden of showing public use or blight, or at least put the parties on equal footing, with no presumption either way. The current rule typically means that the government's finding of public use or blight is conclusive, unless the owner can prove fraud, arbitrariness, or abuse of discretion.
- If allowing condemnation of unblighted property in blighted areas, require that the property be essential for the project.

Additional useful provisions

- Have blight designations expire after a certain number of years.
- Give owners the opportunity to rehabilitate property before it can be condemned.
- Return property to former owners if it is not used for the purpose for which it was condemned.

Common pitfalls in proposed reform legislation:

- Giving a complete exemption for any property taken under urban development laws and failing to change the definition of blight.
- Forbidding eminent domain for economic development without defining economic development.
- Forbidding condemnation for "solely" or "primarily" for economic development or private benefit. Whether a particular condemnation is solely or primarily for a particular purpose requires a judge to look at the intent of the governmental decision-makers. The legality of eminent domain should not depend on the subjective motivations of city officials, and proving intent as a factual matter is extremely difficult.
- Creating specific exemptions for pet projects. This will set a bad precedent for the future.
- Forbidding only ownership by private parties but not control. This leaves open the common practice of sweetheart lease arrangements.
- Making loopholes or accidentally omitting some of the political entities that engage in condemnation for private development.

Mr. CHABOT. Thank you very much for your testimony this morning. We appreciate that very much. We don't have time to get to another witness at this time, so we're going to be in recess. We have two votes on the floor. So we should be back here within 20 minutes to a half hour or so. As soon as we get back, we'll get to the next witness. So we are in recess here. Thank you.

[Recess.]

Mr. CHABOT. The Committee will come back to order.

We'll now hear from our second witness, Mr. Cristofaro. You're recognized for 5 minutes

TESTIMONY OF MICHAEL CRISTOFARO, RESIDENT, NEW LONDON, CONNECTICUT

Mr. CRISTOFARO. Well, first of all, I would like to thank Chairman Chabot and the rest of the Subcommittee on the Constitution of the House Judiciary Committee for the opportunity to testify about legislation to cut off Federal funding for the governments that abuse eminent domain, you know, for private profit.

I live in New London, Connecticut, and my family is one of the groups of homeowners in the now infamous U.S. Supreme Court case of *Kelo v. the City of New London.* I am here to tell you a little about my family's struggle against the use of eminent domain for private economic development.

The City of New London and the New London Development Corporation are trying to kick us out of our homes, not for a public use like a road or reservoir or even a school, but to make way for a luxury hotel, up-scale condominiums, and other private developments similar to like a fitness club, which is one of the options that they were talking about at one time for my parent's property. And this is supposedly just to bring in more taxes to the city and possibly to create more jobs.

On the date that the U.S. Supreme Court had made their ruling against us, I had a hard time telling my father that we had lost the house that his family has lived in for the last 35 years. It took me almost another 10 hours before I had to break the news to him. And when I broke the news to him, you know, he said, what do you mean. I had told him that the city had won in court, and he told me, in his Italian accent, that he didn't sign a contract. And, you know, to him, sitting down with someone and signing a contract to buy a house is how you obtain it. So he said he was refusing to let them take his property from him.

My parents came from Italy in 1962, you know, to pursue the American dream. They were farmers in Italy, and they wanted to come to America to have a better life.

Within the first year, they had worked very hard, and they had saved enough money to, you know, buy their first home, and to them, they were probably figuring they were going to stay in that home forever. They had raised their children in that home, and my father nurtured his gardens and, you know, his shrubs and flowers, and he also has his vineyards that he made his wine every year.

My father actually worked for the City of New London. At one point, he almost lost his life working the incinerator. When the incinerator room caught on fire, he was trapped.

The city approached my parents in 1971 and took their first home by eminent domain. They said it was for a sea wall to protect the residents of the city. My parents, coming from a country where you didn't question the government—and also they wanted to do the right thing, you know, being new to the country—they gave up the home that they loved, understanding that a sea wall was going to be the benefit of, you know, everyone in town, and they wanted to do right. Unfortunately, that sea wall was never built.

Instead, an office park now stands where our house stands now. That's hardly a public use. I drive by that property every day, and I look over and wonder where my house once stood, and it's really hard to, you know, allow them to take that property just for that.

Thirty years later this story, you know, repeats itself all over again in Fort Trumbull.

By that time, my father had retired from the city after 27 years of loyal service. Nevertheless, when the Fort Trumbull development was proposed, no one from the city even bothered to come and talk to him. Now, he's from the old country. He just wants to be treated like an individual, with some human dignity. Instead, they came with harassments, intimidations, and just outright threats. And many of the older neighbors sold out to the city because they didn't, you know, they thought there was no recourse, and they figured the best thing for them to do was just to move.

One of my neighbors was 93 years old. And just hours before he passed away, his final words to his son was that what about his house. It was the only house that he has ever lived in for 93 years.

The poor and the elderly are usually the individuals that municipalities target. Agents hired by the NLDC harassed my parents at all hours of the day. They would show up even on our Sunday dinner and ruin our, you know, Italian dinner at the tables. Just showing up at the door and telling them, you know, you must sign this contract, and if you don't sign this contract, you're not going to get what we're offering you today, 'cause we're going to take it by eminent domain. We were no longer able to enjoy our home, you know, in peace.

The sad day came in November of 2000, and it was during the week of Thanksgiving. I actually believe it was even the day before Thanksgiving. The sheriffs came to our parent's door and they served my parents with condemnation papers. And they basically, my mom said, you know, what was this all about, and they basically told them that you had to be out of the house within 90 days.

At that time, my brother Tony, who had just retired from the Air Force after 20 years of service, moved his wife and sons into the home, 'cause he wanted to be closer to his parents. My mom started crying and wanted to know where her family was going to move. I always looked up to my mom for strength and to be sitting there and seeing her cry—it just broke my heart. My mom became so distraught that we had to call an ambulance, and we had to actually bring her to the hospital, and we were worried, you know, worried that she was having a heart attack, but she was only having heart palpitations. But this was the start of trying to save our home and our neighbors' homes.

We contacted attorneys, and we were told that, yeah, you could fight this, but there wasn't any chance you were going to win. They

said they could charge us, you know, large retainer fees and that, even if we did win, that we wouldn't be able to recoup those fees from the city. So basically, we were going to be penalized just for fighting for what we believe in, and that's just not right.

Mr. CHABOT. Mr. Cristofaro, I hate to interrupt you, but your 5 minutes has lapsed, and if you could wrap up your testimony at this point, we'd appreciate it.

Mr. CRISTOFARO. The City of New London says that there is nothing wrong with the laws as they currently stand. But my family's struggle and the struggle of the other homeowners in New London demonstrates that the law is desperate and needs of change. New London needs to stop tearing down its past and build its future on its wonderful history. Developers should try and incorporate new projects with the existing homes.

We never objected to the development. We just want to be part of that development, and we even told them that. We were willing to compromise and have the properties moved, and they just do not want us in that neighborhood. Someone else could live in that neighborhood, but we cannot.

Congress needs to send a message to the municipalities that are tearing down working class neighborhoods to replace them with office buildings or a big-box retailer: if you do, you will not receive Federal tax dollars for economic development. By doing this, you will protect families like mine who simply want to keep the homes that they love.

Thank you very much for asking me to testify today and for your consideration of legislation that would go a long way toward stopping government's ability to take property from Peter and give to Paul. Thank you.

[The prepared statement of Mr. Cristofaro follows:]

PREPARED STATEMENT OF MICHAEL CRISTOFARO

I would like to thank Chairman Chabot and the rest of the Subcommittee on the Constitution of the House Judiciary Committee for the opportunity to testify about legislation to cut off federal funding to governments that abuse eminent domain for private profit.

My name is Michael Cristofaro and I live in New London, Connecticut. My family is one of the groups of homeowners in the now infamous U.S. Supreme Court case of *Kelo v. City of New London.* I am here to tell you a little about my family's struggle against the use of eminent domain for private economic development. The City of New London and the New London Development Corporation are trying to kick us out of our homes not for a public use like a road or reservoir but to make way for a luxury hotel, up-scale condominiums, and other private developments that supposedly are going to bring in more taxes to the City and possibly create more jobs.

The day the U.S. Supreme Court ruled against us, I had the unpleasant task of telling my father he may lose the house that his family has lived in for over 35 years. He said: "What do you mean?" I told him the city had won in court. He then told me, in his heavy Italian accent, that he did not sign a contract to sell the house and he was refusing to let them take it from him.

My parents came from Italy in 1962 to pursue the American Dream. Within the first year, they worked hard and saved enough money to buy their first home. They raised 5 children in that home and my father nurtured his garden and numerous flowers and shrubs. My father actually worked for the City of New London. At one point, he almost lost his life when the control room of the incinerator caught on fire and he was trapped in the room.

The city approached my parents in 1971 and took their first home by eminent domain. They said it was for a sea wall to protect the residents of the city. My parents, having come from a country where you didn't question the government—and wanting to do the right thing—gave up the home they loved, understanding that a

sea wall was a public use. Unfortunately, that sea wall was never built. Instead, an office park now stands where our first home stood. That's hardly a public use.

Thirty years later this story repeated itself in Fort Trumbull.

By that time, my father had retired from his job with the City after 27 years of loyal service. Nevertheless, when the Fort Trumbull development was proposed, no one from the City treated him like a gentleman. Instead, there was harassment, intimidation and outright threats to take his property. Many of our elderly neighbors sold out to the City because they thought there was nothing else that could be done. One of my neighbors was 93 years old. Just hours before he passed away, his final words were "What about my house?"

The poor and the elderly are usually the individuals that municipalities target. Agents hired by the NLDC harassed my parents all hours of the day, showing up at their door and telling them to "Sign the contract! If you don't, we will take your property by eminent domain and you will not get what we are offering now." We constantly told them to leave us alone. We were no longer able to enjoy the peace and sanctuary of our own home.

The sad day came in November of 2000, during the week of Thanksgiving, when the sheriff came to my parent's home and served them with condemnation papers. At that time, my brother Tony, who had just retired from over 20 years of service in the US Air Force, was living in the Fort Trumbull home with his wife and sons. My mom started crying and wanted to know where her family was going to move. My mom became so distraught that we had to call an ambulance and bring her to the hospital. She was having heart palpitations.

This was the start of our fight to save our home.

We contacted attorneys and were told it would be a fight that couldn't be won. They charged large retainer fees that, even if we won in court, we would not be able to recoup from the city. We would be penalized for fighting for what we believed in.

In the end, it's not about the money—it is the loss of choice. With economic development in a free market, the property owner chooses whether or not to sell. In a free market, the price is determined by what the market will bear. Choice belongs to both the one selling—and the one buying. By keeping the threat of eminent domain in the municipal "toolbox" of economic development, government takes away a fundamental right of its citizens to choose.

The City of New London says that there is nothing wrong with the laws as they currently stand. But my family's struggle and the struggle of the other homeowners in New London demonstrates that the law is in desperate need of change. New London needs to stop tearing down its past and build its future on its wonderful history. Developers should try and incorporate new projects with existing homes and allow owners who want to stay to remain. The City of New London can build all that they want and still incorporate the disputed properties in the plan. The property owners never objected to the development but only want to be part of it and remain in their homes. Today, even with the loss in the Supreme Court, we are fighting to keep our homes.

Congress needs to send a strong message to municipalities that tear down working class neighborhoods to replace them with office buildings or a big-box retailer: if you do so, you will not receive federal tax dollars for economic development. By doing this, you will protect families like mine who simply want to keep the homes they love.

Thank you very much for asking me to testify today and for your consideration of legislation that would go a long way toward stopping government's ability to take property from Peter to give to Paul.

Mr. CHABOT. Thank you very much.

Mr. Shelton, you're recognized for 5 minutes.

TESTIMONY OF HILARY O. SHELTON, DIRECTOR, NAACP WASHINGTON BUREAU

Mr. SHELTON. Thank you, Chairman Chabot, Ranking Member Nadler, and ladies and gentlemen of the panel for inviting me here today to talk about property rights in a post-*Kelo* world.

As you mentioned, my name is Hilary Shelton, and I am the Director of the NAACP's Washington Bureau, the Federal legislative and national public policy arm of the Nation's oldest, largest, most widely recognized grassroots-based civil rights organization.

Given our Nation's sorry history of racism, bigotry, and a basic disregard on the part of too many elected and appointed officials to the concerns and rights of racial and ethnic minority Americans, it should come as no surprise that the NAACP was deeply disappointed with the *Kelo* decision.

Racial and ethnic minorities are not just affected more often by the exercise of eminent domain power, but we are also always affected differently and more profoundly. The expansion of eminent domain to all the government or its designees to take property simply by asserting that it can put the property to a higher use will systemically sanction transfers from those with less resources to those with more.

The history of eminent domain is rife with abuses specifically targeting racial and ethnic minority and poor neighborhoods. Indeed, the displacement of African Americans and urban renewal projects are so intertwined that urban renewal was often referred to as Black removal.

The vast disparities of African Americans or other racial or ethnic minorities that have been removed from their homes due to eminent domain actions are well documented, for your information. I have also included examples of these documents, disparities, in my written testimony.

The motives behind the disparities are varied. Many studies contend that the goals of many of these displacements is to segregate and maintain the isolation of poor, minority, and otherwise outcast populations.

Furthermore, condemnation in low-income or predominantly minority neighborhoods are often easier to accomplish because these groups are less likely, or often unable, to contest the action either politically or in our Nation's courts.

Lastly, municipalities often look for areas with low property values when deciding where to pursue redevelopment projects, because it costs the condemning authority less and thus the State or local governments gain more financially when they replace areas of low property values with those with higher property values. Thus, even if you dismiss all other motives, allowing municipalities to pursue eminent domain for private development, as was upheld by the U.S. Supreme Court in *Kelo*, it will clearly have a disparate impact on African Americans and other racial and ethnic minorities in our country.

Not only are African Americans and other racial and ethnic minorities more likely to be subject to eminent domain, but the negative impact of these takings on these men, women and families is much greater.

First, the term just compensation, when used in eminent domain cases, is almost always a misnomer. The fact that a particular property is identified and designated for economic development almost certainly means that the market is currently undervaluing that property or that the property has some trapped value that the market is not yet recognizing.

Moreover, when an area is taken for "economic development," low-income families are driven out of their communities and find that they cannot afford to live in their "revitalized" neighborhoods;

the remaining affordable housing in the area is almost certain to become less so.

In fact, one study from the mid-1980's showed that 86 percent of those relocated by an exercise of eminent domain power were paying more rent in their new residences, with a median rent almost doubling.

Furthermore, to the extent that such exercise of the takings power is more likely to occur in areas with significant racial and ethnic minority populations, and even assuming a property motive on the part of the government, the effect will likely be to upset organized minority communities. This dispersion both eliminates established community support mechanisms and has a deleterious effect on these groups' ability to exercise what little political power they may have established.

The incentive to invest in one's community, financially and otherwise, directly correlates with the confidence in one's ability to realize the fruits of such efforts.

By broadening the permissible uses of eminent domain in a way that is not limited to specific criteria, many minority neighborhoods will be at the increased risk of having property taken, and there will be even less incentive to engage in community-building and improvement.

In conclusion, allow me to reiterate that by allowing pure economic development motives to constitute public uses for eminent domain purposes, State and local governments will now infringe on property rights of those with less economic and political power with more regularity.

And, as I have testified today, these groups, low-income Americans, and a disparate number of African Americans and other racial and ethnic minority Americans, are the least able to bear this burden.

Thank you again, Chairman Chabot, Ranking Member Nadler and Members of the Subcommittee, for allowing me to testify before you today about the NAACP's position on eminent domain and the post-*Kelo* landscape.

The NAACP stands ready to work with the Congress and State and local municipalities to develop legislation to end eminent domain abuse while focusing on real community development concerns like building safe, clean and affordable housing in established communities with good schools, and an effective health care system, small business development, and a significant availability of living wage job pools.

Thank you very much for the opportunity.

[The prepared statement of Mr. Shelton follows:]

PREPARED STATEMENT OF HILARY O. SHELTON

Thank you, Chairman Chabot, Ranking Member Nadler and ladies and gentlemen of the panel for inviting me here today to talk about property rights in a post-Kelo world.

My name is Hilary Shelton and I am the Director of the Washington Bureau for the National Association for the Advancement of Colored People, our Nation's oldest, largest and most widely recognized civil rights organization. We currently have more than 2,200 units in every state in our country.

Given our Nation's sorry history of racism, bigotry, and a basic disregard on the part of too many elected and appointed officials to the concerns and rights of racial and ethnic minority Americans, it should come as no surprise that the NAACP was

very disappointed by the Kelo decision. In fact, we were one of several groups to file an Amicus Brief with the Supreme Court in support of the New London, Connecticut homeowners.[1]

Racial and ethnic minorities are not just affected more often by the exercise of eminent domain power, but we are almost always affected differently and more profoundly. The expansion of eminent domain to allow the government or its designee to take property simply by asserting that it can put the property to a higher use will systemically sanction transfers from those with less resources to those with more.

The history of eminent domain is rife with abuse specifically targeting racial and ethnic minority and poor neighborhoods. Indeed, the displacement of African Americans and urban renewal projects are so intertwined that "urban renewal" was often referred to as "Black Removal." The vast disparities of African Americans or other racial or ethnic minorities that have been removed from their homes due to eminent domain actions are well documented.

A 2004 study estimated that 1,600 African American neighborhoods were destroyed by municipal projects in Los Angeles.[2] In San Jose, California, 95% of the properties targeted for economic redevelopment are Hispanic or Asian-owned, despite the fact that only 30% of businesses in that area are owned by racial or ethnic minorities.[3] In Mt. Holly Township, New Jersey, officials have targeted for economic redevelopment a neighborhood in which the percentage of African American residents, 44%, is twice that of the entire township and nearly triple that of Burlington County. Lastly, according to a 1989 study 90% of the 10,000 families displaced by highway projects in Baltimore were African Americans.[4] For the committee's information, I am attaching to this testimony a document that outlines some of the higher-profile current eminent domain cases involving African Americans.

The motives behind the disparities are varied. Many of the studies I mentioned in the previous paragraph contend that the goal of many of these displacements is to segregate and maintain the isolation of poor, minority and otherwise outcast populations. Furthermore, condemnations in low-income or predominantly minority neighborhoods are often easier to accomplish because these groups are less likely, or often unable, to contest the action either politically or in our Nation's courts.

Lastly, municipalities often look for areas with low property values when deciding where to pursue redevelopment projects because it costs the condemning authority less and thus the state or local government gains more, financially, when they replace areas of low property values with those with higher property values. Thus, even if you dismiss all other motivations, allowing municipalities to pursue eminent domain for private development as was upheld by the US Supreme Court in Kelo will clearly have a disparate impact on African Americans and other racial and ethnic minorities in our country.

As I said at the beginning of my testimony, not only are African Americans and other racial and ethnic minorities more likely to be subject to eminent domain, but the negative impact of these takings on these men, women and families is much greater.

First, the term "just compensation," when used in eminent domain cases, is almost always a misnomer. The fact that a particular property is identified and designated for "economic development" almost certainly means that the market is currently undervaluing that property or that the property has some "trapped" value that the market is not yet recognizing.

Moreover, when an area is taken for "economic development," low-income families are driven out of their communities and find that they cannot afford to live in the "revitalized" neighborhoods; the remaining "affordable" housing in the area is almost certain to become less so. When the goal is to increase the area's tax base, it only makes sense that the previous low-income residents will not be able to remain in the area. This is borne out not only by common sense, but also by statistics: one study for the mid-1980's showed that 86% of those relocated by an exercise of the eminent domain power were paying more rent at their new residences, with the median rent almost doubling.[5]

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[1] The NAACP would like to offer our sincere gratitude and appreciation to the law firm of Bondurant, Mixson & Elmore, LLP, of Atlanta, Georgia, for their invaluable assistance in preparing the brief.

[2] Mindy Thompson Fullilove, Root Shock: How Tearing Up City Neighborhoods Hurts America, and What We Can Do About It, p.17

[3] Derek Werner: Note: The Public Use Clause, Common Sense and Takings, pp 335–350), 2001

[4] Bernard J. Frieden & Lynn B. Sagalyn, Downtown, Inc.: How America Rebuilds Cities, p.29

[5] Herbert J. Gans, The Urban Villagers: Group and Class in the life of Italian Americans, p.380

Furthermore, to the extent that such exercise of the takings power is more likely to occur in areas with significant racial and ethnic minority populations, and even assuming a proper motive on the part of the government, the effect will likely be to upset organized minority communities. This dispersion both eliminates, or at the very least drastically undermines, established community support mechanisms and has a deleterious effect on these groups' ability to exercise what little political power they may have established. In fact, the very threat of such takings will also hinder the development of stronger ethnic and racial minority communities. The incentive to invest in one's community, financially and otherwise, directly correlates with confidence in one's ability to realize the fruits of such efforts. By broadening the permissible uses of eminent domain in a way that is not limited by specific criteria, many minority neighborhoods will be at increased risk of having property taken. Individuals in those areas will thus have even less incentive to engage in community-building and improvement for fear that such efforts will be wasted.

In conclusion, allow me to reiterate the concerns of the NAACP that the Kelo decision will prove to be especially harmful to African Americans and other racial and ethnic minority Americans. By allowing pure economic development motives to constitute public use for eminent domain purposes, state and local governments will now infringe on the property rights of those with less economic and political power with more regularity. And, as I have testified today, these groups, low-income Americans, and a disparate number of African Americans and other racial and ethnic minority Americans, are the least able to bear this burden.

Thank you again, Chairman Chabot, Ranking Member Nadler and members of the subcommittee, for allowing me to testify before you today about the NAACP position on eminent domain and the post-Kelo landscape. The NAACP stands ready to work with the Congress and state and local municipalities to develop legislation to end eminent domain abuse while focusing on real community development concerns like building safe, clean and affordable housing in established communities with good schools, an effective health care system, small business development and a significant available living wage job pool.

ATTACHMENT

AFRICAN-AMERICANS THREATENED BY EMINENT DOMAIN

Boynton Beach, Florida—The Heart of Boynton plan is the second stage of the city's five-part redevelopment, and involves clearing out long-time businesses, homes, and churches in a mostly-black, low-income neighborhood in order to replace them with unsurprisingly—different businesses and other residences, but no churches.

On February 20, 2003, the Community Redevelopment Agency decided to hire a contractor to start buying out stores and churches in the area. The city and the CRA wanted to raze the 4.7-acre area surrounding the intersection of Seacrest and Martin Luther King Jr. boulevards to build new houses, stores, and expand a park. They targeted at least 26 commercial properties, two churches, and a 5.3-acre area of 42 homes west of Seacrest Boulevard. The director of the CRA told the city council that the reason he supported condemning the largely black neighborhood was "to compensate for the loss of one of the city's major taxpayers. Our property tax values are meager compared to other cities and this redevelopment is our attempt to enhance property values within this City."

Jackson, Mississippi—In order to revitalize the area around its campus, historically black Jackson State University decided in January 2004 to seize 15 surrounding properties through eminent domain. The area in which the condemnations took place has traditionally been one of the most vibrant African-American communities in the south, in terms of both economic might and strength in the civil rights movement. The new development, which will displace all of this, will include retail stores and restaurants. One of the property owners, Milton Chambliss, vigorously protested the taking of his property, but was soon appointed thereafter as the chair of the JSU e-City Historic Preservation Committee.

Camden, New Jersey—The majority black and Hispanic residents of the Cramer Hill neighborhood were granted a reprieve in May 2005 by a Superior Court judge from plans to replace 1,100 families with more expensive housing for wealthier buyers. Cherokee Investment Partners, in collusion with city officials, intends to build 6,000 homes and a golf course, and has drawn the ire of community residents and businesspeople. Equally unacceptable to the community, another private group, Michaels Development Co., had planned to build 162 "affordable housing" units in the neighborhood for residents displaced by Cherokee's proposed construction. In August

2005, an Appellate Division judge denied Michaels permission to move forward despite litigation on behalf of Camden residents.

Lawnside, New Jersey—On May 9, 2005, the Lawnside planning board voted to recommend to the city council a redevelopment plan for 120 acres on the borough's northeast side. The plan, which could affect up to 20 families, still needs the approval of the city council at its next meeting. Most ofthe residents learned about the plan only two weeks before the planning board decided to recommend it, and are not pleased with the lack of notification. "We're pretty happy with the lives we've carved out for ourselves," said Willa Coletrane of Everett Avenue. "We of the community had no input." Lawnside has been the site of a distinct African-American community since the late 1700s, and was

a stop on the Underground Railroad. Many of the residents who have lived in Lawnside their entire lives feel betrayed by the government's rush tQ redevelop the neighborhood they hold so close to their hearts.

Mount Holly, New Jersey—The original redevelopment plan in Mount Holly called for the demolition of all 379 houses in the largely black and Latino neighborhood. The area would be cleared as part of the proposed commercial component of the larger West Rancocas Redevelopment Plan that also calls for 228 new residential units. Citizens in Action—a group of affected residents in the area—filed a racial discrimination lawsuit against the township in an effort to halt demolition of their homes. A Superior Court judge recently ruled against the suit that the plan discriminates against the minority population.

Albany, New York—Residents of the majority African-American Park South neighborhood are awaiting the possible condemnation of their properties for one of the most excessive redevelopment plans in Albany since the 1960s. Park South is a nineblock, 26-acre neighborhood in Albany between Washington Park and Albany Medical Center. In March 2005, the city council voted to designate Park South as an urban renewal area, paving the way for the use of eminent domain to acquire properties for a future redevelopment project. The city wants to replace approximately 1,900 residents with a mix of office and retail space, apartments, homes, and housing for up to 400 students, but exact plans will not be nailed down until city officials pick a developer which they did in June 2005. Morris Street resident Velma McCargo considered the city's redevelopment aspirations a "cheap trick" by city officials to get properties that have suffered from blight at particularly low costs. And some African-American activists like Aaron Mair believe that the Park South plan is just a pretext to relocate poor minority residents and gentrify the area into a place for middle-class whites.

New York City, New York—In April 2004, Columbia University announced plans to expand into Manhattanville and develop a campus on an 18-acre area between 125th and 133rd streets, from Broadway to 12th Avenue. While Columbia insists that the $5 billion expansion plan would spur economic development in West Harlem, property owners fear the imminent bulldozing of their homes and businesses. Since the school only owns 42% of the property in the proposed expansion area, Columbia and the Empire State Development Corporation entered into an agreement—that they did not publicize providing for the potential condemnations of properties in the project path, with the University putting $300,006 into an interest-bearing account that the city may withdraw from to cover the acquisition of properties. The public eventually discovered that the agreement existed, and was emaged. As for the possibility of considering the Manhattanville properties blighted, Community Board 9 chairman J ordi ReyesMontblanc said that the only property in Manhattanville that could be considered blighted is Columbia-owned property, which "has been vacant and decaying for years."

Washington, D.C.—The city is using eminent domain to replace the Skyland Shopping Center, a fully leased and thriving 1940s-era shopping center serving the working class residents of Southeast D.C., with an upscale shopping center anchored by a Target store. Yet Target has yet to express any interest in locating a store there. The National Capital Revitalization Corp. plans to condemn the 16 property owners for the private development.

One of the shopping center owners is an African-American couple whose business in northeastern D.C. was burned down in the 1968 riots; they moved to Skyland a short time later, worked hard, and prospered. Another family bought their share of the shopping center in the 1940's and poured millions into their property. But to the D.C. Council, Skyland is just a "slum" that must be seized, razed, and handed over to the highest bidder.

Beloit, Wisconsin—At the turn of the twentieth century, a large contingent of AfricanAmerican workers migrated to Beloit from Mississippi. Working at the FairbanksMorse factory, these laborers exclusively settled into Fairbanks Flats, a low-income housing project built on a nine-block swath ofland. Now, it seems that

the flats might have to make way for a planned development project undertaken by the Beloit City Council and National Trust consultants. Beloit plans to raze the apartments ifits tenants cannot come up with a plan within a few months. The proposed redevelopment would include boutiques, restaurants, and other businesses.

Mr. CHABOT. Thank you very much, Mr. Shelton. We appreciate your testimony. And our final witness this morning will be not the least witness, but one of the ones that we certainly respect, being a community that's very close to my own, and that's Mayor Peterson of Indianapolis. Mayor.

TESTIMONY OF BART PETERSON, MAYOR, CITY OF INDIANAPOLIS, INDIANA

Mr. PETERSON. Thank you very much, Mr. Chairman, and Members of the Committee. I am Bart Peterson, Mayor of the City of Indianapolis, and I'm here on behalf of the National League of Cities.

NLC is the Nation's largest and oldest organization serving municipal government, representing more than 18,000 communities.

Thank you for the opportunity to be here with you today. Since the release of the *Kelo* decision, most of the rhetoric about the use of eminent domain for economic development has been one-sided.

NLC is happy for the opportunity to speak to the position that, but for the prudent use of eminent domain, many people in our Nation's cities would have few reasons to anticipate a better future.

We would urge a careful examination of the underlying premise of proposals in Congress that would severely restrict or eliminate the ability of cities to use eminent domain for economic development.

We also urge Congress not to use the appropriations process to legislate on eminent domain.

As you well know, the *Kelo* decision has sparked new found interest in the use of eminent domain across the country. In my home State of Indiana, the legislature considered a bill last year that would restrict the use of eminent domain. It did not pass, but instead the legislature is currently examining the issue in a study committee.

Cities in Indiana are working closely with that study committee, and I expect the issue to get a lot of attention when the legislature convenes in January.

It is only right that the Supreme Court's decision would spark such debate, because private property rights are among the most sacred rights we have as U.S. citizens. No one disputes that.

It should be the rare case indeed that the government uses it, but I am here to urge you that in balancing the important interests involved, you simply keep in mind that the availability of eminent domain has probably led to more job creation and home ownership opportunities than any other tool that there is at the local level.

In fact, I believe that if cities were to lose that tool, the successful development projects that we have seen in recent years would literally come to a complete halt.

The anxiety surrounding the issue of eminent domain is real. The history of how government uses eminent domain is mixed. But more often, it has been good.

Cities use eminent domain most often as a negotiating tool with property owners or to clear title where the property owner is absent. With any economic development project, a city usually starts by trying to assemble the land. Cities approach landowners and offer to buy. Most people agree to sell, often for more than the market value. And there is no need for eminent domain.

But without it, there might be, for example, one parcel out of 120 that makes the economic development impossible.

Cities use economic development sparingly and for good reason. It is unpopular. No elected official wants to take someone's land because the landowner will always be sympathetic to the public.

This unpopularity is one important check and balance on its use, and there are others. The government must pay full compensation. Many States—and many States have laws that restrict the use of eminent domain.

Indiana, for example, requires a finding of blight. In the *Kelo* case, Connecticut did not have a more restrictive requirement. But it could have.

In this respect, the *Kelo* decision was a fine example of federalism. It affirmed that these decisions are best made State by State, by officials who are accountable for their decisions. Indiana, for example, may decide to impose even more restrictions on its use. But the case affirmed that cities, in fact, do have this power under the Constitution and how it's carried out is left to the States.

If cities did not have this tool, it would be impossible to do large economic development or redevelopment projects. And it's not because it's used often, but because having the tool available makes it possible to negotiate with landowners, often resulting in paying, as I said, even more than fair market value.

And eminent domain is equally important in smaller towns in suburban areas, where economic development projects bring jobs and significantly increase the quality of life.

Each of you has a success story I'm sure in your district. In Indianapolis, a neighborhood just north of downtown is our success story.

The area now called Fall Creek Place was blighted and known for its violence and drugs. The private sector was unable to change these conditions, as it could not do anything about the abandoned homes and poorly maintained vacant lots, of which about 80 percent were vacant.

The city acquired 250 properties. Of those, 28 were eminent domain cases. We used eminent domain never once against anyone's will, but only when the property owners could not be located.

Today, Fall Creek Place is a beautiful neighborhood with homeowners of all backgrounds, including a majority of low-income residents who purchase their first home. If eminent domain is unavailable to us, we simply could not do any other project like it.

The need to prohibit the use of eminent domain solely to provide for private gain is universally agreed upon. However, it clouds the issue when the longstanding legal principle that economic development is a public use is linked with the clearly illegal tactic of taking real property from A and giving it to B for B's sole private benefit.

Philosophically, all of us instinctively feel that property rights should be held inviolate; that government should not be allowed to interfere with the free use of our land.

But in reality, we all can appreciate that would prohibit local zoning regulations, which are crucial to good city planning.

Complete, unfettered freedom of property rights would make it impossible, for example, to prevent an adult bookstore from locating in a residential neighborhood.

Eminent domain should be used sparingly, as it is. I appreciate your concern that private property rights are protected. I shared them.

But it is so crucial a tool that drastic restrictions on the use of eminent domain will greatly harm the building of America's cities. And any restrictions should not be nationalized or federalized, but should be left to the States.

Thank you for your time, and at the appropriate time, I'd be happy to answer any questions. Thank you, Mr. Chairman.

[The prepared statement of Mr. Peterson follows:]

PREPARED STATEMENT OF BART PETERSON

Good morning, Mr. Chairman, and members of the Committee. I am Mayor Bart Peterson of Indianapolis, Indiana, and I am testifying this morning on behalf of the National League of Cities ("NLC"), where I serve as its Second Vice President.

NLC is the country's largest and oldest organization serving municipal government, with more than 1,800 direct member cities and 49 state municipal leagues, which collectively represents more than 18,000 United States communities. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, and to serve as a national resource and advocate for the municipal governments it represents.

NLC appreciates the opportunity to present a municipal perspective on the Supreme Court's decision in *Kelo v. City of New London.* As Congress considers legislative responses, NLC urges a careful examination of the underlying premise of proposals in Congress that would severely restrict or eliminate the ability of cities to use eminent domain for economic development. NLC also urges Congress not to use the appropriations process to legislate on eminent domain. In the wake of Hurricane Katrina, proposed limits to the use of eminent domain should be studied carefully to insure that we do no harm to the efforts to revitalize our cities and regions.

I. THE *KELO* DECISION HIGHLIGHTS THE NATURAL TENSION PUBLIC OFFICIALS CONFRONT DAILY BETWEEN INDIVIDUAL RIGHTS AND COMMUNITY NEEDS

The anxiety some people have with eminent domain is real. The history of how government use eminent domain is mixed, but most of it is good. Cities use eminent domain most often as a negotiating tool with property owners or to clear title where the property owner is absent. Since the release of the *Kelo* decision, the rhetoric about the use of eminent domain for economic development purposes has been one-sided. NLC is pleased to have the opportunity to speak to the position that, but for the prudent use of eminent domain, many people in our nation's cities would have few reasons to anticipate a better future.

One of the most important responsibilities of any municipal government is to provide for the economic and cultural growth of the community while safeguarding the rights of the individuals that make up that community. The prudent use of eminent domain, when exercised in the sunshine of public scrutiny, helps achieve a greater public good that benefits the entire community. Used carefully, it helps create hope and opportunity for people and communities that have little of both.

II. THE *KELO* DECISION DOES NOT EXPAND MUNICIPAL POWER

As a legal matter, the *Kelo* decision does not expand the use or powers of eminent domain by states or municipalities. Nor does the Court's decision overturn existing restrictions imposed at the state or local levels. In fact, the Court does not preclude "any state from placing further restrictions on its exercise of the Takings power." The *Kelo* decision, as applied to the specific set of facts in New London, reaffirmed years of precedent that economic development is a "public use" under the Takings

Clause. The Takings Clause, moreover, retains its constitutional requirement that property owners receive just compensation for their property.

Some legal scholars note that the *Kelo* Court refined the eminent domain power, as applied to economic development. The majority opinion and concurrence by Justice Kennedy outline that eminent domain should only be exercised to implement a comprehensive plan for community redevelopment: (1) based on wide public consultation and input; (2) that contains identifiable public benefits; (3) with reasonable promise of results that meet an evident public need, captured in a contract like a development agreement; and, (4) with the approval of the highest political authority in the jurisdiction.

The *Kelo* majority declared that eminent domain, a power derived from state law, is one best governed by the states and their political subdivisions. The *Kelo* Court affirmed federalism and the Tenth Amendment. Since the opinion's release, more than half of the states—including Indiana—have taken the Court at its word. In my home state of Indiana, which already requires a blight finding, the legislature considered a bill last year that would further restrict the use of eminent domain. It did not pass, but instead the legislature is currently examining the issue in a study committee, and I expect it to get a lot of attention when the legislative session convenes in January 2006. Regardless of the individual state outcomes, the Court correctly concluded that eminent domain is not a one-size-fits-all power, and that states are better suited than Congress to govern its use.

III. THE *KELO* DECISION DOES NOT ENCOURAGE CITIES TO USE EMINENT DOMAIN VORACIOUSLY

Eminent domain is used sparingly by cities because it often extracts a significant cost in financial, political, and human terms. With any economic development project, a city usually starts by trying to assemble the land. Cities approach landowners and offer to buy. A majority of the time, most people agree to sell, often for more than market value. Generally, just having the tool available makes it possible to negotiate with landowners. Local governments strive to avoid litigation because it costs enormous amounts of money and time. Sometimes, however, cities face property owner holdouts who make the strategic decision to wait out the process. There are also absentee property owners for whom eminent domain is necessary to clear title.

If cities did not have the tool of eminent domain, it would be impractical to undertake large economic development projects. I know that there is a success story in each of your home states, of a project that transformed an area and created jobs and home ownership opportunities, that occurred because of eminent domain. In Indianapolis, a neighborhood just north of downtown is our success story. The area, now called *Fall Creek Place,* was blighted and known for its violence and drugs. The private sector was unable to change these conditions, as it could not do anything about the abandoned homes and poorly maintained vacant lots. The city acquired 250 properties. Of those, 28 were eminent domain cases. We did not use eminent domain against any property owner's will, but only when the property owners could not be located. Today Fall Creek Place is a beautiful mixed-income neighborhood with homeowners of all backgrounds, including a majority of low-income residents, and 71 percent that are first-time homeowners. The project has spurred private development in the area, and construction will begin shortly on live-work units that feature retail stores on the first floor and residential space above. It has increased property values in every direction surrounding it. If eminent domain is unavailable to us, we simply could not do any other project like it.

Another example of the importance of eminent domain is in the case of environmental remediation. Factories in the past often located on waterfronts, for instance, where they dumped materials into the water. Today those factories have moved, leaving the property abandoned. The City of Thomson, Georgia, offers an example of how cities address this challenge. The City is using eminent domain to acquire an abandoned industrial site so that the property can be cleaned up and reused. The site, formerly the "Old Thomson Company," was a carpet recycling factory on two adjacent parcels divided by a road. A local bank foreclosed on one parcel, but could not foreclose on the adjacent 10-acre parcel because of numerous environmental problems including 2,771 tons of old used carpet. On that site are five large warehouse sites and four smaller buildings ancillary to the site with two abandoned underground tanks and one above-ground tank. The City determined that both parcels are needed to create a vital economically viable area and is in the process of initiating action to condemn the property so that it can be stabilized and put back on the market. The total project cost for cleanup, remediation, stabilizing the buildings, and putting it back into use, is more than $1.15 million dollars.

Eminent domain is also a critical tool for cities in confronting urban sprawl—the further development of cities away from the city core. Sprawl leads to abandoned property in center cities and inner-ring suburbs. Without eminent domain, that very desirable property would be off limits for redevelopment.

Philosophically, all of us instinctively feel that property rights should be preeminent—that government should not interfere with the free use of our land. Complete, unfettered freedom of property rights, however, would make it impossible, for example, to prevent an adult bookstore from locating in a residential neighborhood.

In balancing the important interests involved, please remember that the availability of eminent domain has probably led to more job creation and home ownership opportunities than any other economic development tool. If that tool vanishes, the redevelopment experienced in many communities in recent years would literally come to a complete halt. Absent redevelopment, I believe that we would have fewer people becoming homeowners, which means fewer participants in what the Bush Administration calls an "ownership society."

IV. CONCLUSION

Municipal officials know from experience what the Supreme Court has affirmed—that economic development is a public use. Legislation that prohibits the use of eminent domain solely to provide for private gain is understandable. However, it clouds the issue for the public when the long-standing legal principle that economic development is a public use is linked with the inappropriate tactic of taking real property from A and giving it to B, for B's sole, private benefit.

Projects that have used eminent domain ranging from Texas Ranger stadium, to Lincoln Center, to Baltimore's Inner Harbor, have all provided real public benefits to their communities. The limited use of eminent domain for economic projects designed to improve community well-being and increase new housing stock should also help increase the potential for more residents to realize their dream of homeownership.

By subjecting development projects to public debate and by planning these projects with the public welfare in mind, eminent domain allows cities and their citizens to develop the community in a way that is transparent and beneficial for all. NLC again urges Congress to avoid taking any hasty action that would undermine state and local authority with eminent domain.

Municipal leaders have a responsibility to engage in public conversation about eminent domain that can help dispel inaccuracies and stereotypes. There is, however, a delicate balance between minimizing the burdens on individuals and maximizing benefits to the community. The art of compromise is essential going forward.

Thank you for your time. I would be happy to answer any questions.

ATTACHMENT

EMINENT DOMAIN EXAMPLES

Indianapolis, Indiana

Eminent domain was used to transform an area once nicknamed Dodge City into a beautiful neighborhood with residents of mixed income and race. Officially called Fall Creek Place, it was designated as a Citizens Redevelopment Area because of the neighborhood's blight and deterioration. The neighborhood, a 10-minute drive from downtown Indianapolis, was known for its violence and drugs. Private enterprise was unable to correct these conditions due to the extent of the blight and deterioration and its lack of influence over adjacent and neighborhood substandard and abandoned housing units and poorly maintained vacant lots. Designating the neighborhood as a redevelopment area allowed the City to use the threat of eminent domain to stimulate economic development. The City only uses its powers of eminent domain in designated "redevelopment areas," and includes an exemption of eminent domain for all owner occupied structures.

Of the more than 250 properties acquired in Fall Creek Place, 28 cases of eminent domain were filed. Eminent domain was only used when the owners of the property could not be found. The properties acquired through eminent domain have resulted in 13 affordable homes and two new sites for commercial development. Six abandoned and deteriorating structures have been demolished to make way for new home construction.

Contact: Jennifer Green, City Project Manager, 317–327–5861

St. Johnsbury, Vermont

The people of St. Johnsbury, Vermont, unanimously approved the declaration of a portion of Bay Street a "blighted area" under the Vermont Urban Renewal Statutes to generate new economic opportunities. Vermont's Urban Renewal statutes provide for the use of eminent domain, under very comprehensive provisions and restrictions, to eliminate blighted conditions in a community. Members of the St. Johnsbury Select Board have not made any determinations about taking property by eminent domain for these purposes; however, Town officials say that the authority should be available in order to protect the overall benefits to the community associated with the elimination of blight. The Board plans to negotiate with private property owners in good faith to provide fair compensation and achievable public benefit, but will also weigh the best interests of the people of their entire community.

Contact: Michael A. Welch, Town Manager, 802–748–3926

Newport, Kentucky

The City of Newport voted to condemn several properties to develop Newport on the Levee, a signature mall and entertainment complex which opened in 2001. In 1996 when the process began, the area was blighted with vacant buildings spread over 10 acres that belonged to more than 70 different property owners. In 1998, the city began in earnest to acquire the various properties using eminent domain.

Today that blighted area is has been transformed to a shopping and entertainment complex that attracts more than three million visitors a year. The riverfront complex has attracted tourists to the Northern Kentucky area and was named by Zagat Surveys in 2004 the "#1 Mall/Shopping Attraction for Families" in the United States. Just across the river from Cincinnati, Ohio, Newport on the Levee includes not only dozens of shops, but a top-rated aquarium, movie theater complex and restaurants creating hundreds of jobs to what was once a blighted area full of irregular streets, old car dealerships and vacant buildings.

Contact: Phil Ciafardini, City Manager, 859–292–3666

Louisville-Jefferson County Metro Government

The Louisville-Jefferson County Metro Government used the power of eminent domain to condemn the Big Four Bridge, a railroad bridge that connects Kentucky with Southern Indiana that had been officially abandoned in 1969. The bridge is the last part of a master plan of the Waterfront Development Corporation (WDC) responsible for the development of the award-winning, 85-acre Waterfront Park. The park, which averages more than 1.5 million visitors a year, includes a children's play area, Adventure Playground, a café plaza, an amphitheater, docks for boaters and an area for a new rowing facility for the university of Louisville Women's Rowing Team, school and community rowing groups.

The owners of the bridge originally agreed to donate the bridge to the WDC, but changed their mind and asked for what the WDC thought was an unreasonable amount of money and a percentage of any events that may take place on the bridge. The WDC already owned the land on both sides of the river. After several years of legal battles in state and federal court, the WDC was given title to the bridge and the WDC's plan for a pedestrian/bicycle walkway across the Ohio River will be realized. In addition to the walkway, the last phase of the park will include additional lawn areas, tree groves, picnic areas and walking paths. The Waterfront Park has dramatically changed Louisville's downtown landscape and the park was recently elected America's "Top Lawn for Family Fun."

Contact: Dave Karem, President Louisville Waterfront Development Corporation, 502–574–3768

Unified Government of Wyandotte County/Kansas City, Kansas

Local government used eminent domain to acquire non-blighted property to build a NASCAR racetrack in 1998. Wyandotte County/Kansas City Unified Government acquired 160 properties on 1,200 acres to make way for the speedway. State law required the local government to pay property owners 150 percent of the fair market value as just compensation.

The area had been described as older, poor and urban and had been steadily losing population. There was little new development, and people had to drive to the next county or across the river to Missouri to shop or find entertainment. The racetrack has proven to be an economic boom for the Unified Government and has resulted in Village West, new a retail development; an increase in property values, and new residents locating to the area. In 2004, Village West generated $5 million in property taxes alone. A new mall and more restaurants are planned for the fu-

ture. Overall, the economic benefits from the racetrack revived the city and the county.

Contact: Mike Taylor, Public Information Officer, Unified Government, 913–573–5565

Eugene, Oregon

In the early 2000s, the city used eminent domain to clear the way for a new federal courthouse. While part of the property contained an old cannery, there were also several businesses on the site including a body repair shop. The site in downtown Eugene was selected with input from the General Services Administration. The courthouse is currently under construction and will be named after former US Senator Wayne Morse.

Contact: Richie Weinman, Urban Services Manager, 541–682–5533

Arlington, Texas

The City of Arlington has used eminent domain and the threat of economic domain for several economic development projects. In 1991, the City used eminent domain to obtain the land needed to build a stadium for the Texas Rangers. Now, the City is in the process of acquiring the land needed for a new stadium for the Dallas Cowboys. The city is acquiring 168 properties on 158 acres of land for the stadium and related infrastructure.

The Dallas Cowboy stadium will round out the entertainment district that includes Ameriquest Field (the baseball stadium for the Texas Rangers), Six Flags Over Texas and Hurricane Harbor, a water park. City officials are planning to attract new commercial and residential development to this area in addition to the entertainment venues. Because of its location between Dallas and Forth Worth, the area attracts millions of visitors each year.

Under consideration are plans for the City to use eminent domain for a blighted business corridor in east Arlington where a General Motors supplier would like to build a facility.

Contact: Roger Venables, Real Estate Manager, 814–459–6613

Denver, Colorado

Examples:

- In the early 1980s, Montgomery Ward closed its store just south of Denver's central business district, leaving an 850,000 square-foot building vacant for nearly a decade. The area also contained substandard housing and an aging power substation. The Denver Urban Renewal Authority went to the City Council and asked them to create an urban renewal area in October 1992. A developer who owned more than half the properties was chosen to redevelop the site. Condemnation was used to assemble the rest of the properties needed to implement the plan. Today, the site is a 42-acre retail center with 40,000 square feet of retail space and 2,185 parking spaces. Broadway Market Place tenants include Albertson's (grocery store), Sam's Club, Kmart, Office Max and Pep Boys as well as four restaurants. The Broadway Market Place is credited with rejuvenating the South Broadway retail area.
- The Colorado Business Bank is another example where eminent domain helped revive a business area. The elegant Ideal Cement building in downtown Denver declined into a dilapidated state because of deferred maintenance and delayed capital investment since it has been built on leased land and the remaining lease term did not justify capital investment. The redeveloper successfully negotiated settlements with all but two owners of the underlying property (ground leases) to secure 67 percent of the site. After exhausting every possible avenue for negotiation, the Denver Urban Renewal Authority used eminent domain to secure the remaining property and allow the owner of the building to proceed with the project. Today, the beautifully refurbished building is a historic landmark and central element of downtown Denver's busy 17th Street business corridor.

Contact: Tracy Huggins, Executive Director, Denver Urban Renewal Authority, 303–534–3872

Aurora, Colorado

The Aurora Mall was built in 1970, but the land surrounding the mall had seen little additional development by the early 1980's when the City of Aurora established an urban renewal area. The area nicknamed "dog patch" had no roads or sewer lines and consisted of abandoned or under-utilized properties, including an

old stable. Eminent domain helped to revitalize the city and provide retail services where there had previously been none.

The Urban Renewal Authority used eminent domain and tax increment financing for public improvements including drainage, streets and the Alameda and I-225 interchange that set the stage for major commercial and public developments in the early 2000s. Eminent domain was used to help assemble the 21 parcels of land necessary for the project. City Center includes over 500,000 square-feet of retail space organized around a "village street" that has quickly become a social gathering venue.

Contact: Diane Truwe, Director of Developmental Services, 303–739–7338

Lakewood, Colorado

Eminent domain and the threat of eminent domain helped the City of Lakewood build Belmar, a new town center. Villa Italia Mall was built in the 1960s, had a 75 percent vacancy rate and was in a marginal state of repair. Plans to redevelop the area were complicated by multiple layers of ownership of the land, building and ground leases. One entity owned the buildings, while another entity owned the land.

The City began its blight study in 1988 and met all the conditions required by the state. The City then moved ahead on its urban renewal process. A comprehensive plan was developed and the city was able to purchase all the buildings in the mall and surrounding area using the threat of eminent domain. The city was not as successful in negotiating with the owner of the ground leases, and used eminent domain to purchase the ground leases.

Today, Belmar, Lakewood's new town center, is designed on a street-grid model with mixed-use space. Phase One of the project provides 600,000 square feet of retail space, 350,000 square feet of office space and 300 dwelling units.

Contact: Becky Clark, Lakewood Reinvestment Authority, 303–987–7725 or Tom Gougeon, Continuum Development Company, 303–573–0050

Estes Park, Colorado

A devastating flood in 1982 wiped out almost all of downtown Estes Park, requiring the community to redevelop their downtown district from the ground up. The Riverside Plaza was one of the many downtown projects that used condemnation and tax increment financing to rebuild the downtown area. Today, Riverside Plaza, an urban river walk, serves as a pedestrian connection between local businesses. The award-winning Estes Park Performance Pavilion anchors the west corridor of the Riverside Plaza Project.

Contact: Wil Smith, Executive Director, 970–586–5331

Savannah, Georgia

The City of Savannah uses the Georgia Urban Redevelopment Law to revitalize severely blighted neighborhoods. The Cuyler-Brownsville neighborhood revitalization project used eminent domain to redevelop vacant lots and dilapidated structures into affordable housing for low and moderate income households, reversing the decline of an inner-City neighborhood.

The Cuyler-Brownsville properties were abandoned, dilapidated and overgrown, and were contributing to blight, disinvestment, criminal behavior and crime. Neighborhood residents complained about the physical deterioration as well as the gang activity and property owners in adjoining areas were concerned about the lost of their property values.

About 124 properties were acquired in the Cuyler-Brownsville neighborhood—119 were vacant lots and vacant dilapidated structures. Eighty of these had to be acquired by the use of eminent domain, 56 for residential development and 24 for public purpose. Five were contested by property owners in court. Most acquisitions were "friendly" even when acquired via eminent domain. Of 124 properties acquired in Cuyler-Brownsville, five households were displaced and all received relocation assistance. Of the five displaced households, two were owner-occupied, two were tenant occupied and one was occupied by squatters. Many of those properties acquired via eminent domain were heir properties with willing sellers unable to provide clear title. Without eminent domain, there were no buyers for the property and little or no chance to obtain financing to develop the property.

Several new businesses, including a Laundromat, have opened or upgraded in the neighborhood as a result of the redevelopment. Ten new jobs have been created in neighborhood-based businesses as a result of this redevelopment initiative. All of the 30 infill houses that have been built on vacant lots have been built by minority contractors and minority developers.

Contact: Israel Small, Asst. City Manager, 912–651–6529

Valdosta, Georgia

Valdosta has successfully used eminent domain to eliminate blight, revitalize its downtown, and encourage economic development and private investment.

Examples:

- The City has spent over $10 million on a Streetscape Improvements Program in its downtown to revitalize the area and encourage economic development and private investment. During the revitalization effort, eminent domain had to be used for a building in a prominent area of downtown that was owned 2/3 by a local owner and 1/3 by an absentee owner. The local owner was willing to donate his part to the City if the City could gain title to the remainder. Despite repeated contacts, the owner refused to sell even when offered market value backed up by an appraisal. As a last resort, the downtown development authority condemned the building to gain ownership of it for the purpose of eliminating a blight, to assist neighboring properties who had made sizeable investments in their property only to have a vacant, blighted structure next to them and to try to get this building back on the tax rolls as a contributing piece of property. The owner was treated fairly by having an expert determine the value, which the authority gladly and willingly paid. The authority then received the donation of the remainder of the building and has recently sold the entire building to an investor who is putting three storefronts in the building, resulting in three new businesses opening. This project could not have happened without the ability to condemn.
- Also in Valdosta, a property adjacent to a church in a predominately low-income area was owned by out-of-state absentee owners who allowed the house to become substandard and a neighborhood nuisance. There were reports of prostitution and drug activity in the house, which had no utilities. The City made a case against the owner for the substandard condition but there was still no response or effort to comply. The church also attempted to buy the property. As a last resort, the City received an abatement order to tear the house down and a lien was placed on the property for the costs of the demolition. Finally, the City is planning to condemn the property solely to eliminate an ongoing nuisance complicated by an absentee owner. Once ownership is received, Valdosta will donate the property to the Landbank Authority, a tool used by the city to forgive taxes. The Authority can then sell it to the church for fair market value and make good use of a present neighborhood nuisance.

Contact: Larry Hanson, City Manager, 229–259–3500

Fitzgerald, Georgia

Examples:

- Through the use of condemnation or the threat of condemnation, the City of Fitzgerald has been able to increase the number of affordable housing units in the City. Only houses that are uninhabited and dilapidated are targeted. The power of condemnation is critical in this case, because one absentee landlord cannot condemn an entire neighborhood to live with blight. Since this program begun, 95 units of housing have been reestablished on target lots and at least twenty more are in planning stages. Two hundred twenty additional units of affordable housing have been attracted as a direct result of procedures and programs brought on line to support redevelopment. Approximately 945 people are living in affordable housing today because of Fitzgerald's program; 285 of them on redevelopment lots. Out of 170 total properties, only 12 properties were condemned, most through friendly condemnation.

  Under the City's redevelopment program several new businesses have moved into the downtown area including: four new restaurants, four new retail businesses and a "French Market; a Farmer's Market; an "Opry House featuring free entertainment and an open venue for local artists; a new park; landscaped and screened parking; 26 blocks of new streetscape; a new bank; over 25 building restorations; and literally millions in private investment.

  At least 20 new jobs have been created or retained due to downtown improvement as well as 53 construction and building jobs paying $30,000 annually. The City also estimates that here has been a substantial increase in secondary jobs as a result of spending on real estate, payroll, and legal services.
- The city also used eminent domain to an historic landmark, the oldest wood frame church in Fitzgerald, dating to around 1910. During the mid-nineties, the congregation died out, leaving an essentially abandoned building which began to deteriorate quickly. A reversionary clause in the deed returned the property to the original donation families upon cessation of an active con-

gregation. While the surviving member of one family wanted to see the church preserved, she had no legal standing to convey it to anyone for that purpose. Using the power of condemnation, the City paid appraised valued for the property and has since utilized it as an incubator for start-up churches. Without the power of condemnation, the City would have lost an historic structure and the neighborhood would have lost a church. The title is now clear and the church is available for sale to the current congregation.

- The City used eminent domain to secure a home for a developmentally challenged young man who works as an assistant to the Fitzgerald High School football coach. Using eminent domain on a parcel whose owner could not be located, the city had the lot appraised, condemned the home, cleared it for construction and cleared the title. The realty company who held the property received their money from the court, the neighborhood was rid of blight and most importantly, the young man was able to have a home near his place of employment.

Contact: Cam Jordan, Community Development Director, 229–426–5060 or *camjordan@mchsi.com*

Thomson, Georgia

In 2005, Thomson is initiating eminent domain proceedings action to condemn an abandoned industrial site so that the property can be cleaned up and reused. The site, formerly the "Old Thomson Company", was a carpet recycling factory on two adjacent parcels divided by a road. A local bank foreclosed on one parcel which was developed by the Pelzer company, creating 15 to 20 jobs. It could not foreclose on the adjacent 10-acre parcel because of numerous environmental problems including 2,771 tons of old used carpet. On that site are five large warehouse sites and four smaller buildings ancillary to the site with two abandoned underground tanks and one above-ground tank that must be remediated before use. The City determined that both parcels would be needed to create a vital economically viable area and is in the process of initiating action to condemn the property so that it can be stabilized and put back on the market. The total project cost for cleanup, remediation, stabilizing the buildings, and putting it back into use, is $1,152,569. The City is trying to get the funds to do this right now. Without the condemnation process, this project will go nowhere.

Contact: Robert Flanders, City Administrator, 706–595–1781

Smyrna, Georgia

The City of Smyrna has used eminent domain several times in recent years to help accomplish its downtown revitalization and to acquire park land. The City anticipated its use will be critical as it redevelops aging retail centers and apartments using Tax Allocation District incentives.

In the City's downtown revitalization project spanning 13 years, the City acquired around 60 parcels and had to condemn about 15 of these. Without the power of eminent domain, Smyrna's downtown redevelopment could not have taken place. In February 2005, the City filed a "friendly condemnation" on a 10-acre parcel adjacent to a City park owned by the local American Legion chapter. Because of a question regarding ownership, condemnation by the City was the only way to clear the title to the property so the City could expand its park.

In 2003, the City created a Tax Allocation District (TAD) that contains a 50-year-old shopping center and several hundred dilapidated apartments. In negotiations with the property owners in the TAD, it became clear to city officials that it will likely need the threat of eminent domain to ensure that redeveloping property in the TAD sells for market value. There have been indications that some of the property owners may be inflating the price of their land to consume the value of the TAD incentive. Without at least the threat of condemnation, the TAD incentive will be used up by higher-than market land prices instead of additional infrastructure to encourage higher-end development.

Contact: Wayne Wright, City Administrator or Pete Wood, City Councilmember, 770–434–6600

Duluth, Georgia

The City Council tries every way possible in acquiring property before considering eminent domain; in fact, the power of being able to use eminent domain is a significant negotiating tool to bring property owners to the table.

Duluth used the threat of condemnation to deal with a property owner with a 10-unit mobile home park along the Buford Highway in which all but two of the mobile homes were rentals. The City paid $5000 to each owner in relocation compensation. After lengthy negotiations with the property owner, the City was finally able to use

the property as part of its redevelopment plans to locate a site for the city's $11.5 million police and court facility. The area is already seeing new investment and redevelopment as a result of the plan and sewer lines are being run into the area in preparation for the new development.

The City has a downtown revitalization project underway that has received State and National Awards. The downtown project has required the City to purchase more than a dozen different properties and in every case the City paid more than appraisal rather than use eminent domain. By offering a clause in the purchase contracts that the property was being acquired under "threat of condemnation", it allowed the property owner several years in which to reinvest their funds without tax consequences. The city also allowed property owners to "gift" the land to the City as a tax write-off for the property owner.

The redevelopment of downtown Duluth has already created $25 million of reinvestment. The new development includes retail, restaurants, offices, condos, town homes, and mixed use development.

Contact: Phil McLemore, City Administrator, 770–476–3434

Atlanta, Georgia

The Atlanta Development Authority (ADA) entered into a contract with Alanta in February of 2001 to implement portions of the Southside Redevelopment Plan related to the old Lakewood Village. The agency would not have been able to execute the Southside Redevelopment Plan, to include the demolition of the old Lakewood Village on Pryor Road and redevelop it into a 38-acre master plan community, without the power of eminent domain. Condemnation was only used after extensive negotiations did not result in the owners' agreement to sell. In some instances, ADA could not even find the owner of record.

ADA also used eminent domain in the Historic Westside Village and Northyards Business Park redevelopment, part of Atlanta's Westside Tax Allocation District (TAD). Much of the land on which the Turner Field complex sits was obtained by eminent domain for a quasi-economic development purpose (Centennial Olympic Development Authority).

Contact: Greg Giorenelli, President, Atlanta Development Authority, 404–880–4100

Mr. CHABOT. Thank you very much, Mayor Peterson.

And now the panel will have 5 minutes each, and we'll probably go on a second round, because a number of the other Members of the Committee had other commitments that they—but I'm sure they will all review the testimony here today.

Ms. Berliner, I'll begin with you, if I can, and the Institute for Justice, and I'd be interested in any of the panel members that might like to comment on this as well.

Some of the legislation that's been proposed would block Federal expenditures that have used eminent domain for economic development projects, of course, as you had mentioned in your testimony.

Some concern has been expressed to me that Federal tax credits, bonds, or the local use of tax increment financing could be considered a Federal expenditure, either specifically in legislation or at a later time by the courts.

Do you believe that these types of financing, these vehicles, should be specifically either included or excluded from legislation that Congress might consider?

Ms. BERLINER. Well, tax increment financing, my general understanding is that most of these projects don't—the bonding is local or State, but usually local and not—the funds don't actually come from the Federal Government. I think the only involvement is really the approval of the tax rating, so I doubt that that would be affected by any kind of spending restriction. And I think the legislation can be limited to giving Federal funds to support a project or a city that uses eminent domain for economic development without affecting the local bonding.

Mr. CHABOT. Okay. Any other witnesses like to weigh in on that one?

If not, I'll go—Mayor, did you want? Okay. I'll go to my next question if you like.

Let me ask you, Mr. Cristofaro. Some people have never experienced the government's taking of their home, but your family has, as you indicated, twice.

I know that you mentioned in your testimony this took quite a toll on your family, and could you tell us the current status of that situation—and again, if you could be brief, because I've got some other questions.

Mr. CRISTOFARO. Well, my father is 80 years old, and it's taken a toll on him because, you know, this is his house, and he feels that no one should be able to take it away from him, especially if it's just going to be given to another developer.

At one point, we even tried to compromise with the city, because they were going to build townhouses and condos. And we just said, and listen if we could just stay in the neighborhood one way or another. And we were told basically that they couldn't give us one of the condos or the townhouses.

So that was just another example that, you know, someone else could live in this neighborhood, but we weren't able to.

Mr. CHABOT. Okay. Thank you.

Mr. Shelton, let me turn to you, if I can. You generally describe why that protection of property rights and certainly someone's right to their own home is so important to maintaining stability in communities, and especially in low-income communities.

Could you elaborate on that somewhat? What effect could this have on communities that you referred to in your testimony?

Mr. SHELTON. Absolutely, Mr. Chairman.

Because you have fewer resources, it means you depend on each other a little bit more than a lot of us that fall into a middle-class, upper middle-class categories.

We don't think twice about paying for things like babysitters for those who have families. We don't think twice about having to drive across town, because we have cars and so forth.

But when you have a restricted income, when you're poor, it means that you are more dependent on your neighbors to a great extent. If you want to take that trip on the bus to the supermarket, you ask your neighbor across the street, as an example, to watch the kids for you so that you can run, and you trade that favor off with them in other circumstances.

If you're unable to be home at a time when someone needs to get in to check the plumbing, or whatever the case might be, again you count on your neighbors. It's a greater level of dependency because you don't have the resources to be able to pay for many of the services that we have a tendency to take for granted.

As a result, when you begin to break up communities, that means you're breaking up those—that level of dependency. You're breaking up the community that's been created to provide that service and support for each other.

Mr. CHABOT. Thank you very much. I'm going to try to squeeze one more question in if I can here.

Mayor Peterson, I'll address this to you. Could you please describe examples of Federal funding that cities like yours use when they revitalize urban areas and how would municipalities be affected if they could potentially lose Federal funding?

Mr. PETERSON. Well, I'll give you a great example. Our Fall Creek Place neighborhood, which I mentioned, which is a model for urban redevelopment across the country, because it's not a gentrified neighborhood. It is a mixed-income neighborhood. It is a neighborhood that is racially mixed. It provides home ownership opportunities. Most of the homeowners are homeowners for the first time as a result of the development of Fall Creek Place, and it replaced a neighborhood that was deemed to be the single most dangerous neighborhood in Indianapolis. It was called Dodge City informally. Eighty percent of the housing stock was gone. It was—if ever there was an example of a failed neighborhood, this was it.

What began the process of turning Fall Creek Place around was a Federal home ownership grant through the Department of Housing and Urban Development. The initial $4 million grant, which was leveraged by many, many times investment by the local government and by the private sector, that $4 million was leveraged many times over to produce the neighborhood of 400 new or rehabilitated homes that we have there today. It would not have been possible because we did use eminent domain in 28 cases where the property owner could not be located. We would not have been able to get the Federal money as a result of using eminent domain to acquire some of the property for Fall Creek Place.

Mr. CHABOT. Okay. Thank you very much. My time has expired. The gentleman from New York, Mr. Nadler, is recognized for 5 minutes.

Mr. NADLER. Thank you. I have some questions, first for Ms. Berliner.

I'm somewhat confused about what exactly is new in *Kelo*. I mean the—what we hear is new in *Kelo* is that you can use eminent domain for private projects that serve supposedly a public purpose.

But it seems to me we've always done this. We had a renewal, which used eminent domain, to build Lincoln Center, to build Fordham University. So what exactly is new here in *Kelo* that we have to be worried about—that we didn't have to be worried about prior to that?

Ms. BERLINER. Well, certainly, as you're aware, the use of eminent domain for private development has been going on since the time of urban renewal, and it has been increasing.

Mr. NADLER. What legally is new?

Ms. BERLINER. What legally is new is that in, for example, *Berman v. Parker,* the Court allowed eminent domain to be used in an area that was very, very troubled. More than half of the buildings were beyond repair. There was no plumbing. There was no heat. And using eminent domain in an area like that was——

Mr. NADLER. So in other words, you're saying that it removes the so-called blight factor?

Ms. BERLINER. It removes what was virtually a public nuisance. In this case, they applied the economic development rationale and said essentially——

Mr. NADLER. So prior to this, if you wanted to do economic development, and you called Fordham University or Lincoln Center economic development, you had to be in an area which could be characterized as blighted or a public nuisance or something like that; is that what you're saying?

Ms. BERLINER. They applied it in a much broader context. That's right.

Mr. NADLER. Okay. Thank you. Now, Mr. Shelton, I have a question for you.

Most projects these days for housing, economic development, infrastructure are no longer strictly government projects. They tend to be private-public partnerships of the government that would bring in a private entity to do the project.

And I'm wondering where you think we should draw the line here. In my own area—I got involved in politics originally in the West Side urban renewal area. The West Side urban renewal area, which you probably know about, is a controversy for 30 or so years in New York.

But in the West Side urban renewal area, they condemned a large area, not everything in it, but large parts of it, by eminent domain. Some parcels were then used for low-income public housing, which was government constructed. Some were used for mixed middle- and low-income, and that was privately constructed but government subsidized and some for other stuff. Do you see a distinction? I mean would you think that it was okay to build the public housing there because it was government, but not the middle-, low-income housing because it was private, albeit aided by government?

Mr. SHELTON. No, the real issue is whether the people that are being removed have the power to actually negotiate their removal. That is very well—not making sure that those who would like to——

Mr. NADLER. Yeah, but—excuse me. But——

Mr. SHELTON. Yes.

Mr. NADLER. —they had no more power where they were putting the public low-income housing than they had where they were putting the private middle-income housing.

Mr. SHELTON. But the question I would put before you is what was the process in going through the eminent domain process? That is——

Mr. NADLER. Yeah, but that's not the issue here. I think it was done terribly. And as a political matter, I think it was done terribly. You know, 30 years ago, I was engaged in those fights. But from a legal point of view, which is what we're trying to deal here, do we—if we're going to pass legislation to limit the power of eminent domain somehow, should we have said that the use of eminent domain, assume used then properly, was okay where you were going to build public housing, but not okay where you were going to build State-aided, as opposed to State-owned housing?

Mr. SHELTON. I think it's with crafting legislation. We need to take both of those issues into consideration.

Again, our major push is to see to it that whatever legislation is crafted and very well there should be some legislation crafted toward this issue. We have too many local municipalities and other

government entities that are very clearly abusing the poor, racial and ethnic minorities and others.

Mr. NADLER. So you're really saying we should stop the abuse and make sure there's participation in the process?

Mr. SHELTON. Absolutely. And empowerment.

Mr. NADLER. Okay. And empowerment. That's what I meant. Thank you.

I want to ask Ms. Berliner. There's legislation introduced here that says we should use the spending power—and I think you're advocating that—we should use the spending power to limit the ability of State and local government to use eminent domain in certain cases, or maybe in all cases.

Given the seminal decision of the Supreme Court, in which the Court held that an individual citizen of a State could not sue in the Federal courts to protect his or her Federal rights against the State, because of State sovereign immunity, how would you enforce such a law?

If we passed a law that said New York loses all its Federal funds or some of its Federal funds if they do these things we don't want them to do, given the fact that no one can sue New York in a Federal court on that basis, how would you make this—how could we enforce such a statute?

Ms. BERLINER. Well, there are a couple ways. For one thing, there could be a mechanism whereby people could, for example, say, as a defense to condemnation, because this project has accepted Federal funds, condemnation can't be used in this way. You could also have a mechanism——

Mr. NADLER. In a Federal court?

Ms. BERLINER. You could grant that in a Federal court. You could grant it—I guess it would be in a Federal court actually.

Mr. NADLER. But the seminal decision would seem to bar that defense?

Mr. CHABOT. The gentleman's time has expired, but you can answer the question. Go ahead.

Ms. BERLINER. There are other kind——

Mr. NADLER. And in any event, the condemnation procedure is in the State court, not a Federal court.

Ms. BERLINER. There are other kinds of agency procedures that could also be used, and, for that matter, it's usually not States that are doing the condemnations. It's local agencies.

Mr. NADLER. But local agencies are agents of the State from a legal point of view, so it doesn't matter.

Ms. BERLINER. Not under section 1983.

Mr. CHABOT. Okay. The gentleman's time has expired. The gentleman from Arizona, Mr. Franks, is recognized for 5 minutes. And we're going to go to a second round, if we have any additional questions.

Mr. FRANKS. Well, thank you, Mr. Chairman. And, Ms. Berliner, I've been troubled by some of the application of eminent domain for a long time, and I know that some of the people with your organization have too. And one of the things that I think Mr. Nadler was trying to get at, and it seems to be a key issue is the actual difference the *Kelo* decision has made in how we define the appro-

priate definition of the world public use or the words public use in the fifth amendment of the Constitution.

And first of all, let me ask you what do you think the appropriate definition of that word should be and how does *Kelo* step from that in layman's terms?

Ms. BERLINER. Well, I think the appropriate definition of public use is ownership or control by the public—ownership and control by the public. And *Kelo*—it's hard to say how it even begins to huge that definition. It abandons it completely and just says if there is a possible incidental public benefit of some kind, it's a public use. And those are diametrically opposed.

Mr. FRANKS. In reality, doesn't that just leave us in the middle of space? I mean doesn't it just leave us without any real defense of property in the long run if a majority of that municipality says that this has some public use that tries to make the case under the definition of *Kelo* or some of the definitions outlined in *Kelo*? Doesn't that just almost give us no firm ground to stand on or even understand?

Ms. BERLINER. Well, I think that was the intention. I mean the Court said this is now going to be completely defined by local governments and legislatures, and we're not going to impose any kind of definition of public use as a matter of Federal constitutional law. That's certainly how local governments have been taking it. They have been assuming there's no longer any Federal restriction and going forward and only really paying attention to any State or local restriction.

Mr. FRANKS. Well, I mean it seems to me not only does that turn the traditional understanding on its head and completely makes some of the people involved have to retool all of their strategies, but do you not agree that that is also a misconstrual [sic] of the original meaning and original understanding of that word, that phrase, in the Constitution itself?

Ms. BERLINER. Oh, absolutely. Public use is—most people find it to be fairly clear, and to mean use and ownership by the public as opposed to some sort of possible public benefit. Absolutely.

Mr. FRANKS. Thank you. And, Mr. Chairman, it just occurs to me, you know, that often times this happens. Whether it's the legislature or the judiciary, sometimes they step back from a clearly understood provision of the law, and it throws the whole public into complete disarray.

Mr. Shelton, I was very impressed by what I thought was compelling testimony on your part, but I was particularly impressed by the case you made that sometimes people who are poor or don't have the ability to pay for their own services are especially interdependent with their neighbors and with the people that are around them and the places that they grew up. And it just really hit me in a big way. And I understand that—and if you look at a study that showed people displaced by urban renewal from 1949 through 1963 that of those who they knew what their race was, that it was designated and they knew, about 63 percent of them were non-whites at that time.

And, of course, I think that's—there's a tremendous story in that all by itself.

But do you have any idea if that is reflected today? I mean if there is some clear—do we have any solid studies that we could point to?

Mr. SHELTON. Absolutely. There have been studies done in 2004 and a number of other studies that show that, for instance, in Los Angeles, about 1,600 African American neighborhoods were destroyed by municipal projects. L.A. alone. So you're talking about a very heavily racial and ethnic minority area in that particular case.

In San Jose, California, 95 percent of the properties targeted for economic development were Hispanic and Asian owned. So again, we're seeing it in other places. Racial and ethnic minorities seem to experience the brunt of what happens here. Unfortunately, we still live in a country today in which we are disproportionately seeing that racial and ethnic minorities are the poorest of the poor.

They talk about the African American community, about 60 percent of all African American children are being raised in families that live at or below the poverty line. So again, we're talking about the effects of race and class in our society as an overarching issue and then more specifically as we talk about how it applies to eminent domain, you can see where we're victimized the most often.

We also don't have the resources, of course, to fight the eminent domain issues that are moving through our communities.

Mr. FRANKS. Thank you, Mr. Shelton. My time is up. Thank you, Mr. Chairman.

Mr. CHABOT. Thank you very much. And we'll go into a second round at this time, and I'll begin with myself again.

Ms. Berliner, I'll turn to you again first here. If Congress were to pass legislation, how can communities still revitalize urban areas that are truly blighted and pose a threat to public health and safety. And I know you talked a bit about, you know, public use and the term blighted itself.

Do you have any thoughts about that?

Ms. BERLINER. Oh, absolutely. Local governments and communities have many different tools available to them that they can use to do economic revitalization as include, for example, tax increment financing, Main Street Programs, the taking of abandoned property which would not and certainly does not need to be limited by this Congress or really by State law either. I don't think anyone has a problem with taking abandoned property; changing the use permitting for local development, tax incentive programs, small loans, homesteading programs. There are a wide variety of other kinds of incentives and mechanisms that can be used. But what happens now is that planning—plans are made without regard to the idea that some of the people may actually want to stay. And plans are made to just sort of wipe out areas and start over, and that should not be happening.

Mr. CHABOT. Thank you. Let me ask you also, is it your experience with takings cases that eminent domain is used generally as a last resort or not? And, if not, what has been your experience in that area?

Ms. BERLINER. Eminent domain is used as a last resort in the sense that people are approached and told we want this property.

Are you going to sell it to us? No, I guess we're going to have to use eminent domain as a last resort.

So they are technically asked to sell first, but it's a last resort in name only, and it is something threatened from the very, very beginning.

Mr. CHABOT. Okay. Thank you.

Mayor Peterson, let me turn to you, if I can. Did you have any comments on any of those questions first of all?

Mr. PETERSON. If you would mind, commenting on the issue of how we will go forward with redevelopment if the use of eminent domain for economic development were, in effect, outlawed. I will tell you we would try to go forward and many of the things that Ms. Berliner mentioned are certainly tools that would be available to local government, but the people who we'll be dealing with will be land speculators. They will have purchased their land from individuals and they will have done so without all the protections that individuals have under eminent domain law today.

So when land speculators go to people and tell them they would like to purchase their land from them, sure. The individuals are not compelled to sell, but they may very well sell for less than the fair market value, as speculators try to put together the land, being aware that the city might have a plan to redevelop an area that the individuals are not aware of. The land speculators can accumulate the land without any regulation whatsoever, without any public hearings, without any media paying attention, all of which apply to eminent domain acquisitions and then local government will be dealing with the land speculators who will offer whatever price they think they can ultimately get—one, two, five, 10 times what the value of the property is.

That's the real risk here. The exploitation of those at the low end of the economic spectrum will not be ended if legislation were passed along these lines. It would, in my view, be accelerated.

Mr. CHABOT. Thank you. Let me follow up. Do you believe that the Supreme Court's decision in *Kelo* and the public's reaction to it has led some States and localities to consider more carefully perhaps the appropriate reasons for taking of private property.

Mr. PETERSON. I absolutely do, and that's why I think the appropriate place for reform, if you will, in the area of economic—or excuse me—of eminent domain really is with the States, and that's what's going on. If you look across the country, there are approaching 30 States now that are considering changing their eminent domain laws, some before, but many as a result of the *Kelo* decision.

I think it's certainly gotten the attention of local government officials. It's gotten the attention of the media. It's gotten the State-attention of State legislators, and I think that that's good. And I believe that we will see some of those situations that I think we all would agree are abusive situations curbed as we look at reforming eminent domain on a State-by-State basis. And I think that's the most appropriate way to do it.

Mr. CHABOT. Thank you. In the brief time that I have left, either of the gentleman here that I haven't had a chance to address any questions, do you have any comments on those or anything that you would have liked us to have asked that you didn't get asked yet?

Mr. SHELTON. Just an exception to the Mayor's comments about private speculators. Quite frankly, I think people in our society take a very different posture when a speculator comes to your door talking about buying your property than when the government comes to your door saying that eminent domain is being imposed and you should take what we're going to give you or you may not get anything at all.

I mean it's a very different posture. And I take some exception to that. Quite frankly, if someone came to my door as a speculator to say that I'd very much like to buy your property, I would think I might be able to negotiate a better price than what happens when the local government shows up to do just the same.

Mr. CHABOT. Thank you. Mr. Cristofaro, anything that you wished we would have asked you that we didn't ask?

Mr. CRISTOFARO. Well, I mean it was never about just compensation, with our family, but what actually has happened is when they had that power of eminent domain, they're the ones that come up with what they call fair market value. For what we were going to get if we did take the offer was basically 70 percent of the value of the property. We couldn't even become whole with what they were going to give us by taking the property by eminent domain. So, you know, it's not a free market.

Mr. CHABOT. Okay. Thank you very much. My time has expired. The gentleman from New York, Mr. Nadler, is recognized.

Mr. NADLER. Thank you. Mr. Peterson, have you read Plunkett of Tammany Hall?

Mr. PETERSON. I'm familiar with it. I have not.

Mr. NADLER. Because what you just described is what George Washington Plunkett, the great sage, called honest graft. I've seen my opportunities, and I took them. In other words, I know where they're going to build the roads, so I buy the property and then the property appreciates. In any event, that's a century ago, and I'm sure that some things haven't changed.

Mr. Shelton, from your testimony, are you more concerned about taking property for economic development as opposed to removing so-called blight or for a highway or for a subway or is your concern more than the manner in which politically less powerful communities tend to bear the brunt of these decisions in either case?

Mr. SHELTON. I am more concerned about the brunt of communities that do not have the power or resources to be able to control their own destinies.

Mr. NADLER. Whether it's for private economic development or for a new subway line or public purpose?

Mr. SHELTON. Exactly.

Mr. NADLER. Either way?

Mr. SHELTON. Yes.

Mr. NADLER. So the solution that you would look for would be one that would deal with both situations?

Mr. SHELTON. Yes.

Mr. NADLER. And might be more a process solution?

Mr. SHELTON. Yes, sir. Much more process oriented.

Mr. NADLER. So I take it if we were to prevent takings from most economic development, but allowed government to take property to eliminate blight, you would still be concerned about that?

Mr. SHELTON. We would be concerned about it. But, as you know, we've seen the exploitation in those areas as well. Blight has a very—the definitions of blight can vary significantly.

Mr. NADLER. Okay. Let me ask—I am very torn on this right now, because I'm very well aware of the—of the abuses that have occurred in the past and could occur in the—and presumably will occur in the future. On the other hand, there is a necessity in many cases to deal with development. And the expansion for purely private economic development bothers me, but on the other hand, I'm not so sure how different that is from allowing the use of this power for Fordham University 30 years ago or for Lincoln Center 40 years ago. Or how it's any different for the people who are relocated from there and who didn't get any great relocation benefits, at least—outside of the urban renewal area, we tried to do that for them somewhat.

How would you deal, Ms. Berliner, Mr. Shelton—let's assume there was some major project that was—that it was a consensus was a necessary project for economic development, for whatever. Forget the question of whether it's really necessary. Let's assume it is. And government is willing to pay a lot of money, but there is that one or two—there are others—one or two holdouts who are just stubborn and can stop the whole thing. How do you deal with that in the absence of eminent domain power?

Ms. BERLINER. And you're saying this is a public project or this is an economic development project?

Mr. NADLER. Either one. Either one, because sometimes—well, the question I asked before. In the West Side urban renewal area of 30 years ago, I don't see the great distinction as a practical matter whether you had the government build it and that was a public use, which they did for low-income housing or whether you had a private builder build it with State subsidy in order for moderate-income housing. And we needed both the moderate and low-income housing, and one is technically private. One is technically public. I'm not sure that there should be a great difference here.

Ms. BERLINER. There actually is a huge difference. And the difference is that there is a limit on public projects. There just aren't going to be an infinite number of roads, but when you allow eminent domain——

Mr. NADLER. Well, some people in this building might differ with you. But go ahead.

Ms. BERLINER. —when you allow eminent domain in private development, you have a constant incentive on the part of local governments and the part of private developers to take property from people who have small businesses——

Mr. NADLER. Yeah. But how do you draft a rule? In other words, let's talk about that—the middle-income, the moderate-income housing moment. There's not a need for an infinite amount of moderate-income housing and no more than there's a need for an infinite amount of low-income housing or market-rate housing.

Government has—you could argue more or less—but government has most people think that government has a legitimate role in assuring that there's housing for moderate-income people who cannot afford it on the open market, and there's housing for low-income people who cannot afford it on the open market. Government chose,

maybe wisely, maybe not wisely, that the low-income housing would be built purely by government and that the middle-income or the moderate-income housing would be a public-private partnership.

Would you—do you think there's a real distinction there for eminent domain purposes or should there be?

Ms. BERLINER. I think there probably could be. I think that the main point is that eminent domain does not need to be used to build moderate-income housing. There's abandoned property that can be purchased. There's a million other ways of doing it besides throwing someone else out of their home in order to build it.

Mr. CHABOT. The gentleman's time has expired. But again, you can complete your thought if you'd like to.

Ms. BERLINER. My overall point is that the incentives once you allow eminent domain for private parties are going to cause infinitely more abuse of eminent domain than if it is just limited to public ownership.

Mr. CHABOT. Thank you. The gentleman's time has expired. The gentleman from Arizona, Mr. Franks, is recognized for 5 minutes.

Mr. FRANKS. Well, thank you, Mr. Chairman, and, you know, just picking up on Ms. Berliner's last point, I think the thing that has troubled me the most about this is all of a sudden we've gone from public use to and defined it to mean economic development, which means almost anything that we can talk about.

And, Mr. Peterson, I know you're in a rather unique situation here. You're having to defend the cities' point of view and some of those kinds of things. But I have to put you on the spot here. Do you honestly believe that public use as written in the Constitution should include economic development?

Mr. PETERSON. Well, I think where we stand is—the question before us is not what the term public use actually means because the United States Supreme Court has said what it means, but it's rather, the question is, what's Congress' response going to be and what it the response of the various State legislatures. And what the Supreme Court decision in making that definition of public use that you disagree with is they said to the legislative branches of government, both at the Federal level and at the State level, it is now open to you to decide how you're going to restrict this to protect the rights of people. If you chose to restrict it aggressively, which many States have done—I don't think it's been mentioned yet, but many States require that you pay 150 percent of the fair market value if it is—if eminent domain is used for economic development purposes and only 100 percent of the fair market value if it's used for a road or some other traditional public ownership sense.

So I think the Supreme Court has spoken and the question is not what does public use mean, but how is the legislature of the United States and of the various States going to respond to that, and I think it's—that response best comes on a State-by-State basis, and we're already seeing that response coming.

Mr. FRANKS. Mr. Chairman, Mr. Peterson, I have to respectfully take great issue with your first statement is that the Supreme Court has spoken and told us what that means. They may have said what they thought it means. But fortunately, there is just still a few of us that recognize that some of the Founding Fathers knew

too well the importance of all three branches of government protecting the meaning of the Constitution. And, you know, there have been Supreme Court Justices that say the Constitution is what the Supreme Court says the Constitution says. But that I would take strong issue with that.

The Constitution is what the Constitution says it is, and it's incumbent upon all three branches of this government to protect its original meaning. And I think that's really one of the challenges that we have before us here.

Just shifting gears. You know, I was aware of one particular instance and where a dam was being built. And there was one holdout, and they continued to send person after person to talk to this man to say please sell us this property, and he continued to refuse. Finally, the head of the entire project went to see him, and he says, you know, everyone—we've offered you money. We've done everything. He says I want to find out why it is that you're unwilling to sell it to us. And he says, well, you see, son, it's like this. He said my mother was born in that back room. He says my grandfather homesteaded this property, and I was born there, and my grandfather, when he built this place and built that hearth, he lit the fire, and it hasn't gone out since. And it's not going out on my watch.

Sometimes we fail to remember that there's more than just economic considerations in people's concern for their property.

Now, I understand the way that they resolved that was that they paid him for the house, and they picked the entire thing up and left the fire burning and moved it to a place that was acceptable to him.

So, you know, the bottom line of that illustration is that there are usually ways to work with people, if, as Mr. Shelton says that the homeowner or the owner of the property is sufficiently empowered. And I believe that one the most important rights in our Constitution is the right to property, and if we casually let the Supreme Court dismiss that, then that we've done great disservice to the people and to the country. And with that—I'm about out of time, but, Ms. Berliner, I might ask you one last question.

Related to just compensation, as outlined in the fifth amendment, what do you think for public, for true traditional public projects should be the compensation criteria? What do you think that that should be that protects the owner's rights and yet still is able to deal with the truly critical public projects that have to be done for the sake of maybe protecting the community?

Ms. BERLINER. Well, just compensation is not our main area. In general, it's important that people be left in a position that's not worse than the one they started in.

But beyond that, the technicalities of how to put that together is something we could discuss. It's a complicated issue.

Mr. FRANKS. I understand. Thank you.

Mr. CHABOT. Thank you very much. The gentleman's time has expired. The gentleman from New York is recognized for a minute.

Mr. NADLER. Yes, I want to pursue a point with Ms. Berliner, as I've been thinking about her last answer and my last question.

Forget the public housing and the middle-income housing or the moderate-income housing.

Let's talk about railroads and subways. That's—one would think it's a public purpose, but in New York at least, two of the three subway lines, which are now municipally owned, were built by private companies. The railroads that crisscross this country were built by private companies. All of them used eminent domain power—used land grants also—but eminent domain power for private companies for what the government considered a public purpose—build the Transcontinental Railroad.

Is something wrong with that or should we limit eminent domain to build future private highways or private railroads? And if not, why not, and how do you draw the line?

Ms. BERLINER. I don't think that that's necessary to limit eminent domain in that way, and most of the discussions that are going on about it would still permit eminent domain for what are called common carriers, which are basically things that are, in fact, used by the public, open to the public as a right, meaning everyone has a public right to use them. They're also usually very heavily regulated——

Mr. NADLER. Anything that's open to the public as of right.

Ms. BERLINER. As of right, and that's——

Mr. NADLER. Like Wal-Mart?

Ms. BERLINER. Wal-Mart actually not—the public as of right. Not in the way that a public utility or a common carrier is. It's actually different. And I think that the kinds of things that eminent domain could be used for would be actual public ownership, public utilities, common carriers and to deal with things like abandoned property or public nuisances, but not for private commercial development beyond that.

Mr. NADLER. But the thing that bothers me, private commercial development is an extreme case. But how do you draw a line—and, you know, common carrier. We all recognize we need common carriers. We also recognize we need universities. So why is a Fordham or a Columbia or wherever different than the Norfolk Southern?

Ms. BERLINER. Because—well, if you're talking about a private university——

Mr. NADLER. Yeah.

Ms. BERLINER. —because it is indeed a private university. There actually used to be a whole cases before the courts adopted this interpretation where you could condemn for public universities, but not for private ones.

Mr. NADLER. Thank you.

Mr. CHABOT. The gentleman's time has expired.

I want to thank the panel for really excellent testimony here this morning, and now this afternoon. Just a final comment myself.

I was on the City Council in Cincinnati for 5 years, and I was a county commissioner for 5 years and so we were involved in many eminent domain cases. And so I know that there is a justified use of it in some, in fact, many instances.

But I also had great concern about the most recent interpretation of eminent domain as voiced by the U.S. Supreme Court in the *Kelo* case, and especially its expansion of what public use actually means.

And so this is something that's an important issue. That's why it's before the Constitution Subcommittee, and you all have helped

us in going through this process. And this is something that the Congress I think will be dealing with in the near future, and you all have made an important contribution in that effort. So thank you very much for coming here and giving us your wisdom on this issue this morning.

And I would remind Members that there is a 1 o'clock briefing, Members-only briefing on Hurricane Katrina by the Red Cross in Canon 311, and so the timeliness of this has been good this afternoon as well.

So if there's no further business to come before the Committee, we're adjourned. Thank you.

[Whereupon, at 12:04 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JERROLD NADLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK, AND RANKING MEMBER, SUBCOMMITTEE ON THE CONSTITUTION

Thank you, Mr. Chairman. I want to commend you for scheduling this hearing, and for the deliberative manner in which we are approaching this issue. Although there has been a great deal of discussion about the *Kelo* decision, the precise meaning and limits of the Court's ruling, need close examination. We also need to examine whether there is an appropriate federal role, and if so, what it is.

This is a novel enterprise for our Subcommittee. Normally our hearings examine court rulings that restrict the power of the legislature to take certain actions. In this case, the Court—the "unelected judges" as some like to call them, deferred to the judgement of the local elected officials.

Elected officials at all levels of government have a duty to examine a power the Supreme Court has said we have, and determine how best, and most responsibly, to exercise that power.

The power of eminent domain is an extraordinary power. Regardless of the purpose, the taking of a person's property is always a burden on that person. The Constitution recognizes that there may be public interests that would justify the exercise of that power, but limits that power and requires just compensation.

Within the scope of that rule, government has often limited its exercise of that power, and has provided compensation in excess of what is constitutionally required to include, for example, relocation costs.

Our history demonstrates that the power of eminent domain has been abused, most often at the expense of the communities least able to defend themselves: the politically powerless, the poor, and minority communities.

The abuse of eminent domain has not been limited to economic development, but also to tool public works such as highways, power lines, dumps, and similar facilities. No one has suggested that we eliminate the power to take property for public works, even if the property goes to private corporations.

Just recently, the President signed into law an energy bill that provides broad new powers to take private property for power lines. I think a majority of the members of this committee voted for that.

Whole communities have been obliterated in the name of "blight removal" or "slum clearance" or whatever the euphemism of the day happens to be.

Anyone who is interested in seeing the impact on communities of highways or slum clearance need only visit communities like Red Hook in Brooklyn, or the South Bronx.

When someone's home is taken, or their neighborhood razed, the impact on them is still the same. For renters, it can be even worse, because they often receive no compensation, but they lose their homes and businesses and are displaced nonetheless.

So how do we most responsibly go about using the power that the Constitution gives us? That is the question before us.

All politics is local, and we members of Congress certainly know that. We are constantly involved in local land use planning, attracting economic development, and balancing the competing concerns of the communities we represent.

Not long ago, this Subcommittee examined the Supreme Court's ruling in the *Cuno* case which restricted the ability of state and local governments to offer tax incentives to attract businesses. That is another challenge to our communities trying to survive in a very competitive economic environment.

Crafting a general rule, if the members decide that a national rule is the best approach, should not get bogged down in our last land use battle. I don't think we

should be in the position of deciding for our communities the wisdom of certain project, a sports stadium for example. That is a very different matter from allowing the government to take a small business for the benefit of a larger business.

So I want to join the Chairman in welcoming the witnesses, and I look forward to their testimony.

Thank you, Mr. Chairman.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION

In June 2005, the Supreme Court reached a decision in *Kelo v. City of New London* (545 U.S._____(2005)) that shocked and outraged most Americans. If state and local governments can transfer property from one private owner to another based on their judgment of which uses will produce the most taxes and jobs, no one's property is safe.

Today, I look forward to working with my colleagues on both sides of the aisle to achieve a proper response to *Kelo.* I would also like to thank our witnesses (1) Indianapolis Mayor and Second Vice President of the National League of Cities, Bart Peterson, (2) Senior Attorney at the Institute for Justice, Dana Berliner, (3) New London homeowner, Michael Cristofaro, and (4) Director of the NAACP Washington Bureau, Hilary Shelton.

As we explore this issue today, I raise three primary concerns: (1) First, I would like to discus the disparate impact *Kelo* will have on our minority, elderly, and poor communities. (2) Second, we must identify ways to define "public use" so that we protect property interests, as well as meet contemporary challenges. (3) Third, given the complexity of this issue, I caution us to be thoughtful and prudent as we proceed.

More than two dozen individuals and organizations filed briefs with the U.S. Supreme Court in support of the homeowners in *Kelo v. City of New London.* These "friends of the court," including the NAACP and the Southern Christian Leadership Conference, ured the justices to use the case of *Kelo* to end eminent domain abuse.

As the NAACP articulated in its brief, eminent domain has historically been used to target the poor, the elderly, and people of color. In this current era of gentrification and urban renewal efforts, these populations continue to suffer disproportionately. Even well cared for properties owned by minority and elderly residents are replaced with superstores, casinos, hotels, and office parks.

The financial gain that comes with replacing low property tax value areas with high property tax value commercial districts is too attractive for may state and local governments to resist. Such condemnations in predominantly minority and elderly neighborhoods are often easier to accomplish than they are elsewhere because such communities often lack the political and economic clout necessary to contest these development plans.

Absent a more narrowly defined public use requirement, the takings power will continue to be abused and our most vulnerable citizens—racial and ethnic minorities, the elderly, and the economically disadvantaged—will disproportionately be affected and harmed.

As we work to better define "public use," we must also consider what "economic development" should mean in this context.

Increasingly, governments across this country are taking private property for public use in the name of "economic development." Under the guise of economic development, private property is being taken and transferred to *another private owner,* so long as the new owner will use the property in a way that the government deems more beneficial to the public.

In my district of Detroit, Michigan, we have faced the same kinds of issues that rose in this case: the taking, through eminent domain, of private property for the so-called higher economic purpose of casino development.

Perhaps, Justice O'Connor articulated it best when she wrote in her dissent: "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."

Most of us share Justice O'Connor's sentiment and feel like *Kelo* tramples the Constitutional guarantees provided by the Takings Clause of the Fifth Amendment—that "private property shall not be taken for *public use, without just compensation.*" However, we must be thoughtful and prudent as we take on this issue. We must also obtain a better sense of how states and cities will address *Kelo.*

It is important to point out that the Majority admitted that state courts are free to interpret their own provisions in a manner that's more protective of property

rights. Thankfully, every state Constitution has prohibitions against private takings and a requirement that takings be for public use. Six states have held that economic development condemnations are Constitutional and nine have held that they are not. Obviously, most states have not addressed it.

I look forward to exploring the issues I have just identified at today's hearing. Thank you.

ADDITIONAL STATEMENT OF BART PETERSON, MAYOR, CITY OF INDIANAPOLIS, INDIANA

To strengthen and promote cities as centers of opportunity, leadership, and governance.

National League of Cities

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Additional Statement of

The Honorable Bart Peterson, Mayor, Indianapolis, Indiana

On behalf of the National League of Cities
Before the House Judiciary Subcommittee on the Constitution
on
Oversight of the Kelo Decision and Potential Congressional Responses
Thursday, September 22, 2005

1. At page 50 of the hearing transcript, Subcommittee Chair Chabot (R-OH), asked Mayor Peterson for examples of federal funding that cities use for redevelopment projects, and the possible effects if Congress ended that funding through eminent domain restrictions. The Mayor responded by describing Fall Creek Place and explaining that federal grant funds helped leverage additional private capital. Please expand the Mayor's answer, as follows:

There are numerous federal programs and funding streams that help municipalities undertake economic development projects including, for instance, credit enhancements and funding associated with the Empowerment Zone/Enterprise Communities program, low-income housing tax credits, Community Development Block Grant funds, USDA rural development grants and loans, brownfields remediation funding, Economic Development Administration grants and programs, transportation infrastructure funding, and Small Business Administration loans.

If Congress were to enact eminent domain restrictions that penalized cities by shutting off federal funds, in addition to limiting the ability of cities to leverage additional private capital with those federal dollars, it could force cities to scale back the scope of critical redevelopment projects. Reduced scope could limit the overall benefits to a community by affecting, for instance, the number of jobs created and, in the case of mixed-use developments, the number of housing units built. Congressional funding restrictions would also increase investor risk and subsequent municipal cost to borrow money, which could threaten completion of these projects and damage investor interest in municipal bonds.

2. At page 70 of the hearing transcript, NLC cannot corroborate the Mayor's comment that "[m]any states require that you pay 150 percent of the fair market value...if eminent domain is used for economic development". Please substitute it with the following:

For many states, just compensation is the primary issue driving the debate over eminent domain. Some state legislatures and study commissions are likely to consider formula adjustments that would provide landowners additional compensation, for instance, up to 150 percent of fair market value.

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ADDITIONAL SUBMISSIONS FOR THE HEARING RECORD

PREPARED STATEMENT OF THE AMERICAN FARM BUREAU FEDERATION

The American Farm Bureau Federation appreciates being able to offer this statement for the hearing record. We commend the subcommittee for holding hearings on this important matter.

The *Kelo* decision has struck a raw nerve around the country. There has been a swift response in Congress to this decision through the introduction of bills to restrict the use of federal funds when eminent domain for private economic development is used. We are gratified by the number of cosponsors that have signed on to these bills in such a short time. We fully support the efforts that have been taken thus far and we will work diligently to assure passage of legislation to encourage states to limit their use of eminent domain to truly public uses.

Farmers and ranchers can appreciate circumstances that can require private land used for legitimate public uses. We cannot, however, understand our land being taken for the profit of private corporations. The difference between legitimate uses of eminent domain and what is so objectionable in *Kelo* is the difference between building firehouses or factories, between building courthouses or condominiums.

After *Kelo*, no property is secure. Any property can be seized and transferred to the highest bidder. As Justice O'Connor said in her stinging dissent: "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz Carlton, any home with a shopping center, or any farm with a factory."

Agricultural lands are particularly vulnerable to these types of actions. The fair market value of agricultural land is less than residential or commercial property, making a condemnation of agricultural land less costly. While agricultural lands are vital to the nation because they feed our people, they do not generate as much property tax revenue as homes or offices or nearly any other use, and therefore become very susceptible to being taken for any of these other uses. Finally, municipalities generally grow outward, into farms and rural areas. There is nothing to stop farms that have been in families for generations from being taken for industrial developments, shopping malls or housing developments.

It is already happening. In one such case, Bristol, Connecticut, condemned a Christmas tree farm and two homes for a future industrial park.

We are understandably concerned about the possible impacts of *Kelo* on farm and ranchlands across the country. Reaction from our members has been swift and overwhelming. Farmers and ranchers from across the country are asking us to help them keep their property.

American Farm Bureau Federation has initiated a Stop Taking Our Property (STOP) Campaign designed to educate the public about the impacts of the *Kelo* decision and to provide materials to help state Farm Bureaus address the issue. As part of the campaign we have developed an educational brochure and web page for those interested in the issue.

There are several components to our campaign. One element focuses on encouraging state Farm Bureaus to seek changes to state laws to prohibit the use of eminent domain for private economic development. We have developed model state legislation and supporting documents to help effectuate those changes.

Another key element to our campaign is to encourage and promote passage of H.R. 3405 or similar legislation. Since eminent domain is a creature of state law, substantive statutory change must be made at that level. Getting multiple state legislatures to act, however, is an uncertain and lengthy process. In addition, states interested in maximizing revenues may be reluctant to take action that might deny their municipalities the opportunity for increased property taxes. Increased property taxes provide no excuse for taking one person's property and giving it to another.

That is why federal legislation is necessary. Eminent domain is defined by state law, not Congress. But Congress has the authority and the responsibility to determine how our federal tax dollars are spent and not spent. Using federal funds to help municipalities take from the poor and give to the rich adds insult to injury to those who work hard for themselves and their families. As elected officials, you can heed the outrage of your constituents to the *Kelo* decision by ensuring that state and local governments cannot use a person's own tax dollars to dispossess them for the benefit of another private entity.

All of the federal bills introduced thus far take this approach. The difference among them is the degree to which such funding is withheld. H.R. 3083 introduced by Mr. Rehberg and H.R. 3087 from Mr. Gingrey prohibit any exercise of eminent domain for economic development that uses federal funds. H.R. 3135 from Mr. Sen-

senbrenner prohibits a state or municipality from using eminent domain for economic development if federal funds would in any way be used for the project. H.R. 3405 from Mr. Bonilla and Ms. Herseth would deny all federal economic development assistance to a state if there were any use of eminent domain for economic development that transferred private property from one private entity to another.

We support the approach taken by all of these bills. By withholding all federal economic development funding from states where *Kelo*-type eminent domain is being used, regardless of whether it is used in a project that uses those funds or not, H.R. 3405 appears to offer the greatest disincentive for states to continue using eminent domain for private economic development. By not tying the funds to any particular project, H.R. 3405 also avoids the fiscal shell game of moving federal funds away from projects that use eminent domain for private economic development. But any of the bills that have been introduced would provide an improved deterrent to eminent domain for private economic development.

The fact that the Supreme Court upheld the Connecticut law does not necessarily mean all the justices endorsed it as good policy. Even Justice Stevens, who wrote the majority opinion in *Kelo*, seems to disagree with the law he upheld. In a recent address to the Clark County (Nevada) Bar Association discussing the case, he said, "I was convinced that the law compelled a result that I would have opposed if I were a legislator."

We urge swift passage of legislation that would withhold federal funding to states and local governments that use eminent domain to take property from one private entity and transfer it to another for economic develop purposes.

We look forward to working with the committee to pass such legislation.

PREPARED STATEMENT OF CARLA J. ZAMBELLI, HAVERFORD, PA

This isn't my story per se, rather the story of a group of ordinary people I find to be extraordinary for their beliefs and courage of their conviction. Who are they? They are the merchants of Ardmore, PA, in my township of Lower Merion. Lower Merion is in Montgomery County, PA. I am also a member of The Save Ardmore Coalition. The Save Ardmore Coalition is composed of residents and business owners who are everyday people. We aren't radicals. We are folks who aren't against change, just eminent domain abuse. We believe as small communities move forward into the future their history can be preserved. This is the battle in Ardmore, Pennsylvania.

You are undoubtedly thinking, why is this person writing? It's not her building targeted. Yes, maybe not today, but maybe it will be some day unless you do something. The story here is one you are already familiar with: a group of residents and business owners fighting against eminent domain abuse, and fighting to preserve their lives, livelihoods, their town. Fighting in a David versus Goliath situation that is almost always the way of eminent domain battles. Eminent Domain is legal stealing, and it can affect any urban, suburban, or rural community. I am here for my friends. Friends like Scott Mahan, who runs his family business, Suburban Office. Scott's grandfather started the business in the 1920's. They have been serving Ardmore all this time. Friends like Dr. E Ni and Betty Foo, owners of Hu Nan Restaurant. These cultured, educated, honorable people opened their Ardmore restaurant thirty years ago as immigrants to our country, seeking to fulfill their American dreams. I have known the Foos since I was a girl of 12. I am now a woman of 41.

Ardmore is located in Lower Merion Township, PA, which is in Montgomery County. Ardmore is but minutes from Philadelphia, PA. For the past two years, Lower Merion has been moving forward with their plans to seize a block of businesses that have remained viable for decades and in some cases, generations. These businesses complied with historic preservation requests, and while Lower Merion and the Commonwealth of Pennsylvania have declared these buildings historic, they have declared this block blighted so they can implement eminent domain. The land is to be turned over to a private developer for private gain. But that is not all.

Congressman James Gerlach (R-PA 6th District) was forced this week in the local paper to address once again, the issue of the federal funding he has appropriated through omnibus for Ardmore; in essence, a six million dollar "coupon" that the railroad has to apply for to rebuild the Ardmore train station. I do take pleasure in having been absolutely correct that his appropriation of this six million would forever and irrevocably align the Congressman to the Ardmore Revitalization Project, A/K/A, eminent domain. I told the Congressman this would happen at his spring 2005 Town Hall Meeting at Harcum College in Bryn Mawr.

Since the funding was announced, there has been much confusion regarding the transit center project. A lot of that can be laid at the feet of certain members of the Lower Merion Township Board of Commissioners. They confused the public for months initially by insinuating that the funding was Lower Merion Township's. That was the first need for clarification: the funds are to be used for the Ardmore train station IN Lower Merion , BUT the perennially disorganized, fiscally bereft railroad is the actual intended recipient of the six million dollar allocation.

The second point of confusion still exists. Contrary to what the Congressman says in his editorial, one of the local commissioners keeps saying that the township "needs" eminent domain to complete the transit center project, i.e. that is one reason why they "need" to take my friends historic buildings and small businesses. Which is it? Is it as the Congressman recounts, or is it as the Commissioner recounts? Please note that this Commissioner has even stated this on television in an interview (to reporter Janet Zappala on CN8 to be precise). Who are you supposed to trust here? Who can you trust here?

Yes, the Ardmore train station needs attention and a face-lift. No one objects to that. However, the Congressman, like Governor Ed Rendell, is ignoring still the elephant in the room around here: bogus blight designations and eminent domain. The last time we got a comment out if the Congressman he smiled and said eminent domain was a "local issue". That was prior to the U.S. Supreme Court Kelo decision.

Since the U.S. Supreme Court decision, we have been waiting and asking for the Congressman to weigh in, along with the other elected officials who supposedly represent all of us. Scott Mahan and Ken Haskin, two of our members even hand delivered information to the Congressman in Washington, D.C. The rest of the Congress appears to be moving forward on the issue of eminent domain, yet our own Congressman is almost mute. I must admit, that when you call his office on a topic that is not politically uncomfortable, his offices are swift to respond. But on this politically uncomfortable topic, they no longer remember your name. Say eminent domain and you are an instant political pariah.

I genuinely like Congressman Gerlach, but am sorely disappointed by the way he continues to avoid that eminent domain elephant in the room. But hey, it is his political future, not mine. He should pay attention to what is already happening locally in the political arena. It is like we are in a political twilight zone: issues get addressed in OTHER states, just not Pennsylvania. In Pennsylvania they hope we'll get tired and just go away.

Eminent domain is a new scourge on the face and geography of America. It is not a "local issue", it is a national tragedy. It is economic segregation and class warfare. Small towns and communities should be able to preserve their characteristics without being bulldozed into the future. Eminent domain never discriminates: it takes what it wants, when it wants, where it wants.

At a town hall meeting for the Save Ardmore Coalition, I met a wonderful 93 year old African American woman and her sisters from Ardmore. All elderly, but they came not only because they feel our town of Ardmore should be revitalized utilizing the existing, certified historic buildings which are subject to eminent domain taking, but because they wanted to let us know that they KNEW eminent domain first hand. They lost a family house to eminent domain by the same municipality years ago. They know what it's like. And know it's wrong. They still felt taken advantage of after all these years.

The United States of America was founded by the brave men and women who were fleeing not only religious persecution, but countries that didn't allow many of them the everyday freedoms we sometimes take for granted. Among those freedoms? Freedom of speech and the right to own property. Within the past week, the Supreme Court of the United States threatened the very core of the values of what our forefathers fought and struggled for. If our forefathers were magically transported from the annals of history to present day America, what would they think? Would they find us progressive and building upon their labors of the past? Or would they instead, find us regressing to a point that they wondered what they fought for? Would they worry it had all been for naught?

Eminent domain is something every citizen in this country should rally against. Why? The most basic premise is that you are fighting to maintain your basic rights as defined by our forefathers. That is what the Fifth Amendment is all about. Is it a moral issue? Yes. The Fifth Amendment is part of the Bill of Rights for a reason. A reason officials in this country seem to conveniently overlook when it doesn't suit their needs. Those who govern us have a deeper obligation. Stop talking about morally reprehensible issues like eminent domain and do something. Help my friends. Help the people like them all over this country. Stop making us feel like we are working on a plantation here.

E-MAIL FROM JOHN SERAVALLI, DAYTONA BEACH, FL,
TO THE HONORABLE F. JAMES SENSENBRENNER, JR.

Dear Chairman Sensenbrenner: The purpose of this email is to provide written testimony before the House Judiciary Committee on eminent domain abuse. In 1996 my brother and I purchased the ground under three 29 story buildings in downtown St. Louis, the buildings are two apartment buildings and one hotel. The buildings are owned by three seperate parties, who pay us ground rent. All three parties have expressed an interest in buying the ground under their buildings, but we are not motivated sellers. On Dec.12, 2000, the owner of one apartment building sent us a letter which stated that the law will allow him to take our land by condemnation. We did not take his threat seriosly because we did not think such a thing would be possible in the United States. The City of St. Louis has blighted all three buildings because there are only 19% two bedroom apartments and because two buildings have vinyl asbestos floor tile, and one building has nonfriable asbestos in the plaster ceilings. The building owners have refused to correct the blight, because if they did, the property would no longer be blighted, and they could not take our ground by eminent domain after the city transfers eminent domain power to them. The building owners approached the city with this scheme to take our ground from us by force, and the city is cooperating with our tenants, and has accepted redevelopment proposals from two of them already. The hotel's plan talks about renovations such as a pool and a banquet facility but not much more, the hotel completed a renovation in 2004. We have asked the city to inform us of all meetings concerning our property, but they have intentionally kept all meeting dates from us, and have advised us that the statues do not require them to notify us of anything. Please stop cities from concocting bogus blight findings to transfer wealth or real estate from one private party to another private party. Why is the City of St. Louis using eminent domain authority to disrupt the commercial expectations of private parties? We also own ground leases in Canada, and our Canadian Attorney tells us Canada would never buy into such a scheme. I never dreamed many years ago when we bought eight ground leases in Canada, that those would be our safest and best investments. Please pass legislation that is meaningful. There are no Federal funds being used to steal our ground from us, so any legislation that is limited to eminent domain projects that receive federal funds is worthless. State and cities that abuse eminent domain should lose all Federal funds period. I would be happy to provide any documentation you want to prove that everything I have stated is truthful, and would be happy to answer any questions that my email has not answered. Sincerely, John Seravalli, Daytona Beach, FL, 386–788–8831.

E-MAIL FROM ROSA SUTTON HOLMES, RIVIERA, FL,
TO THE HONORABLE F. JAMES SENSENBRENNER, JR.

Chairman Sensenbrenner,

I have a close family friend whose property was taken away in West Palm Beach, Florida. She is in her seventies and this property was income property. The property was taken away from her and shared with other private property owners. CSX Transportation was one of the benefactors and the State of Florida. They used federal funds from the Federal Railroad Administration. There was plenty of funds to pay her and they have just flat out refuse to pay for the property. Her name is Rosa Sutton Holmes and we have been on TV about property but nothing was ever done. We are one of the best kept secrets here in West Palm Beach.

There is so much more tell but I will reserve it for another time.

E-MAIL FROM "LESANDA"
TO THE HONORABLE F. JAMES SENSENBRENNER, JR.

I refer you to a news story published in the Aug 7th edition of the Burlington County times, captioned Mall Owners fight Cinnaminson over property. The gist of the item was that the municipality declared the property abandoned and was endeavoring to purchase same or acquire it through eminent domain so that they could acquire the property for development. The taxes, water and sewer were current and was partially leased out to various tenants. The mall attorney was suing the township in superior court. The judge was John A. Sweeney.

E-MAIL FROM JIM CAMPANO, PUBLISHER, THE WEST ENDER NEWSLETTER, SOMERVILLE, MA, TO THE HONORABLE F. JAMES SENSENBRENNER, JR.

My name is Jim Campano I publish The West Ender. It is a quarterly newspaper devoted to keeping the memory of the West End of Boston alive. The West End was destroyed by eminent domain in 1958. Herbert Gans wrote his landmark sociology book Urban Villagers about the West End. We are the original Urban Villagers the term was coined for us. Gans stated that the area was not a slum but an area of low cost housing and should have been preserved. But money talked and we lost our homes. Every objective study says that it should never have been torn down. In fact the federal government used it as an example of how not to conduct urban renewal. Taking a man's home and giving to someone else is un-American and whoever has a hand in this shady business should hang their heads in shame. Eminent domain is akin to going back to the days of kings and royalty when they could just come in and throw you out on the street. I hope you can reverse this insidious law as it now stands.

E-MAIL FROM LARRY FAFARMAN, LOS ANGELES, CA, TO THE HONORABLE F. JAMES SENSENBRENNER, JR.

I propose a federal law that would deny all federal urban renewal funds to states that do not have laws against eminent domain abuse.

There are plenty of precedents for such a heavy-handed federal law—one of my favorites (not) is the law denying federal child-support funds to states that do not have laws suspending the professional and driver's licenses of deadbeat dads who fall behind in their child-support payments (LOL).

I think that a law denying federal funds just to specific projects involving eminent domain abuse would be largely ineffective because—(1) many of these projects do not involve government funding, and (2) any federal funds involved might be indirectly channeled through state and/or local governments. It is like Israel getting $2 billion per year in US aid and pledging not to use any of the money for constructing illegal settlements in occupied territories (LOL).

If we are just going to have a toothless token federal law against eminent domain abuse, we might as well not bother.

PREPARED STATEMENT OF DR. ENI FOO, RESTAURANT OWNER, ARDMORE, PA

Mr. Chairman and committee members, Good morning! Thank you give me the opportunity to speak in front of your committee.

My name is Eni Foo. I am the owner of Hunan Restaurant in Ardmore, Pennsylvania, which is under the threat of eminent domain by the Lower Merion Township. I was born in China in 1940 and grew up in Taiwan. In 1963, I was accepted by Princeton University as a graduate student. I studied extremely hard, and graduated in 1967 with a PhD degree in physics. After my graduation, I taught physics at several universities.

In 1963, my parents came to the States to live with my wife Betty and I after their retirement. In order to keep my parents occupied, we helped them to open a Chinese restaurant called Hunan in Wayne. It was an instant success and customs loved my mother's home styled cooking. We realized that the restaurant needed a larger and permanent home. In 1976 we found a very nice old bank building in Ardmore. It was built in 1925 for Lower Merion Savings and Loan. The restaurant opened at the current location in September 1976.

In February 2004, we received a letter from the Lower Merion Township informing us, that it will send an appraiser to apprise our restaurant property and summons us to meet with Township official, to read our rights. They are planning to build a transit center with huge garage in the back. The plan will demolish the Hunan Restaurant to make way for large parking lot, larger stores, and many plush apartments on the top floors. They will take over our property using eminent domain and handed it over to a private developer. We were devastated by the news. We rely on the restaurant for our retirement The threat of eminent domain on Hunan has shattered all of our plan and dream. The uncertainty hanging over our head had caused my wife Betty and I many sleepless nights. It was a wake up call to us. We believed in America. We believed that America was the land of freedom and justice, free from fear. Now the township government will take away my restaurant, my property, and my lively hold under the name of "for public good" and more tax dollar. The township tries to take away our property and give it to a powerful and rich developer. The action severely violated my right to hold on my prop-

erties. We have worked so hard, and we have earned it. No body should have the right to take it away. The government should have protected us, not destroy us. We are equal under the law, no matter you are rich or poor, whether you are powerful or underprivileged. I believed that the elected officials should represent the people, work for the people, and listen to the people. This was what I believed in the American system—a democratic system at its best, of the people, by the people, and for the people. But I was too naive, the political system does not work that way at all.

The board of commissioners wanted to eminent domain our property and our neighbors, but gave us only three minutes each to speak our mind and vent our frustration at the public meetings. The 14 commissioners seated behind the podium liked a group of wise men, they could hear us, but they don't have to listen. We could ask questions, but they did not have to answer. There was no dialogue between the people and the commissioners. We asked the township manger to arrange a private meeting with the president of the board of the commissioners last year. We have heard nothing from him. Even though there were seven thousands signatures against the eminent domain, collected. A overwhelm of majority of people spoken at the public meetings were against the destruction of the historical Ardmore.

In order to calm the overwhelm opposition from the people, the township invited the Urban Land Institute, a nationally respected nonprofit organization based in Washington DC, to make a first hand study of the Ardmore redevelopment project. The ULI send ten well respected urban planning experts to Ardmore to study the merit of the plan. They stayed a whole week here, dined with the township official at the exclusive Cricket Club, hold a town meeting, and had private interview with stakeholders. We thought that the ULI would just rubber stamped the township proposal and lent a legitimacy to the misguided plan. On one Friday morning last summer, the ULI presented the final fact finding report at the township building, instead of supporting the township plan, they said that the old buildings in Ardmore are a vital component in its renewal, instead of destroying them, one should build on them. Ardmore has the upscale Suburban Shopping Center and the south side main street. Ardmore has everything, which other small towns' planners are envy for. After the report, the ULI members got a standing ovation, congratulated for their wonderful poetic presentation by everyone in sight including the commissioners.

We all thought the case was over. Everyone was celebrating and congratulating. The national respected impartial panel of experts had spoken and gave their verdict. We thought the commissioners would listen to the advice of their hand picked advisory expert panel. No surprise, we were wrong. They said that the ULI experts had never understand the Ardmore situation. What was the situation? Whose fault was it? Whose responsibility was it? Were the township staffs failed to briefing the ULI the correct situation? If so, the staffs should be responsible. Had the commissioners had their mind set already despite of the outcome of the ULI report? Or they are just trying seeking an ULI's endorsement to justify for their misguided plan. When the ULI failed to endorse their plan, they just throw the $1,100,000 report to the waste box. If this was the case, the commissioners owe the people, the stakeholders, the taxpayers, and also the ULI experts, an explanation or an apology. As usual, the commissioners did not have to answer to anybody. The commissioners had wasted our valuable time and our hard earned tax dollars, leaded us through an emotional roller coaster. The people are no fools. They want answers.

Despite the people's objection, the commissioners rushed ahead in full speed. The commissioner voted 10 to 3 with 1 absentee passed the resolution to designate Ardmore Business District as Redevelopment Zone. They obtained the power of eminent domain. They labeled Ardmore as "Blighted Area" using a very vague definition and legal loophole. Anyone in its rightful mind would not believe that Ardmore was "Blighted".

Seven out of fourteen commissioners will face reelection this fall. Out of the 7, 4 decided not to seek reelection, 1 was defeated in the primary, only 2 remaining. The Ardmore eminent domain became the most debated issue of this election. Philadelphia Inquirer made a study. They predicted that the new board of commissioner would be against the eminent domain by a margin of 6–5. We do have a chance to stop the eminent domain project this fall. However the lame duck Board of Commissioner rushed through another appropriation authorized another $400,000 for Hillier consulting firm for the eminent domain project. They spent $1,000,000 tax dollar. Do you think they should postpone the decision and let the new BOC to decide this issue. The 7 new commissioners in the fall will have the mandate of the people. I would like to ask the out going BOC to stop wasting any more of our tax dollars on the eminent domain project. Thank you.

PREPARED STATEMENT OF SHARON B. ECKSTEIN, PRESIDENT, SAVE ARDMORE COALITION, ARDMORE, PA, TO THE PENNSYLVANIA HOUSE OF REPRESENTATIVES' LEGISLATIVE COMMITTEE

Good morning, Representatives. My name is Sharon Eckstein. I am a resident of Ardmore, PA and the president of the Save Ardmore Coalition. Thank you for the opportunity to address you today about the impact the threat of eminent domain has had on me and other members of the Save Ardmore Coalition and to comment about the two (2) proposed bills which attempt to curb eminent domain abuse in Pennsylvania.The Save Ardmore Coalition is a grassroots community group comprised of Lower Merion Township residents and merchants who are united in their commitment to the revitalization of Ardmore's business district based on community input, consensus building, sound and comprehensive planning and the preservation of our architectural heritage.

Based on these principles, our group opposes the designation of Ardmore as "blighted", and opposes the use of eminent domain for economic development and the "taking" of one citizen's private property in order to give it to a private, for-profit entity. We therefore oppose the implementation of the Ardmore Redevelopment Plan because it is premised on the aforementioned bogus blight designation and the use of eminent domain for private gain.In February 2004, targeted businesses received letters from the Township which stated the Township's intention to acquire their properties. The community was outraged. Only one month earlier the Historic Ardmore sign was put up directly in front of these businesses. Immediately thereafter, Lower Merion Township began pursuing the designation of the Ardmore Historic District as redevelopment area. A finding of blight was necessary for Ardmore to be deemed a redevelopment area. Disregarding public outcry objecting to this false finding—where else can occupied and successful business properties valued in excess of 1 million dollars be considered blighted?—the Township voted unanimously to designate blight.

The Township in its Redevelopment Plan B was advocating the acquisition of 10 buildings within a legally designated PA Act 167 historic district via eminent domain, the selling of these properties, which house 8 viable businesses and a VFW Post, to one private developer who would then demolish these buildings, buildings in an historic district eligible for the federal National Register of Historic Places. Despite the numerous rallies, marches, and the submission of a petition with over 6,000 signatures objecting to the Plan, the Township approved this Plan in January 2005.The Save Ardmore Coalition was started by residents opposed to the designation of Ardmore as blighted and the approval by the Board of Commissioners of Ardmore Redevelopment Plan B. These residents did not own businesses targeted for eminent domain by the township. We would not be losing our property nor our livelihood. We all knew, however, that we would be losing our town and that a terrible immoral precedent would be established.

It is wrong for government to take one person's property so that it can be transferred to another private party. This is not public use nor public purpose. We all knew that if this eminent domain abuse could occur to our local businesses, it could happen to us. Residents throughout our Township have joined the Save Ardmore Coalition because they all realize that this is not an Ardmore issue. If an historic district, a designation which is supposed to afford special protections to those within it, could be targeted, no one in our Township was safe.As you are all aware, eminent domain abuse is rampant throughout the United States. Public use which had always been properly understood to mean public use (road, school, etc.) is now being construed to mean "economic development" which frequently is another private entity with the ability to make more money than the current property owner, a Ritz Carlton instead of a Motel 6. Eminent domain was always intended as a tool when necessary for public use; now, it is frequently a tool which furthers class warfare and economic segregation. The developer's "upscaling" of communities, ones which are viable but that do not fall into an affluent demographic, displaces lower income and lower middle income individuals, small business owners and immigrants disproportionally.This fundamental shift was evidenced in the recent Kelo v. New London decision. Never before had the U.S. Supreme Court said that a municipality could take private property and transfer it to a private entity strictly for economic development.

In response to the recent Kelo decision, more than 32 states have proposed or are drafting legislation to curb the eminent domain power of municipalities. Pennsylvania is one.Pennsylvania needs legislation to curb the eminent domain power. There may be others who testify today who will say "but eminent domain is a useful and important tool for neighborhood revitalization." They will object to the proposed legislation alleging that it will not aid neighborhoods in need and will eliminate a

needed tool for urban planning. But I ask "a tool for whom?"—for the developer to make money? No one is saying that eminent domain is never appropriate. A properly written law could prohibit eminent domain for economic development and then define economic development as any activity that increases tax revenues, the tax base and/or the general economic health of a community when that activity does not result in:

(1) the transfer of land to public ownership or

(2) the transfer of land to a private entity that is a common carrier or

(3) the transfer of property to a private entity when eminent domain was used to remove a threat to public health or safety, such as the removal of public nuisances, removal of structures that are beyond repair or that are unfit for human habitation or use, or acquisition of abandoned property.

Legislation can and must be crafted to protect citizens from eminent domain abuse while still enabling municipalities to use eminent domain when necessary.Others may assert that Pennsylvania residents and business owners do not need new legislation and can rely upon the local public process to safeguard communities from eminent domain abuse. The assumption that the local public process will be responsive to the will of the people is not only naive, it is inaccurate. We in Ardmore spoke out at public meetings, wrote letters and called our Commissioners, staged rallies, circulated a petition and obtained over 6,000 signatures—and the plan was approved nonetheless. Moreover, citizens should not have to be so vigilant to ensure that local government does not abuse its power. We need state protection, in the form of changed laws; the laws must be fixed so that eminent domain is not misused.This is a state issue, one of national importance and moral consequences. State statutes are the ones that local municipalities are applying and abusing. You have the power to correct this situation. You can not say "we will not get involved in the Ardmore or any other town's redevelopment issue, it is a local issue"—it is not since state laws are governing the actions of the local municipality. The proposed House Bills will curtail Pennsylvania's eminent domain abuse. They appropriately prohibit eminent domain for the transfer of property to a private entity or to increase the tax base and include the needed reverter clause which is critical to keep eminent domain abuse in check. Unfortunately, even if the Pennsylvania House and Senate pass laws preventing municipalities to exercise eminent domain for economic development, there exists a loophole in our Commonwealth's statutes—the blight loophole. Under Pennsylvania law, only 1 of 7 factors must be evidenced in order to find blight. These 7 criteria are so broadly written that any and every community could be found to be blighted if a municipality wished to do so. If a municipality wishes to find blight it can manipulate the statue to result in a finding of blight when none exists. This pretext of blight, simply found so that the municipality can then exercise eminent domain, is what occurred in Ardmore-Ardmore, a community on the affluent Main Line, with retail buildings in its business district selling for one million and upwards, was found to be blighted. I appeal to you to consider drafting legislation that will prevent municipalities from designating nonblighted communities as blighted ones. The blight definition must be one that targets only real blight—threats to public health or safety, the removal of public nuisances, removal of structures that are beyond repair or that are unfit for human habitation or use, or abandoned property. The 9 long term Ardmore establishments targeted for eminent domain, whose combined years of service to Ardmore totals almost 300 years, are part of the vibrant community of Ardmore that I call home. Today, owners of 2 of those businesses will testify. I would like to introduce them to you: Scott Mahan of Suburban Office Equipment and Dr. E-ni and Betty Foo, owners of Hunan Restaurant.Thank you for the opportunity to address you. I applaud you for confronting the problem of eminent domain abuse

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ADDITIONAL PREPARED STATEMENT OF CARLA J. ZAMBELLI

The three preceding e-mails represent the testimony ON the record in the Commonwealth of PA as of August 31st, 2005. They are relevant to your project at hand. I hope you will add them, as they are from two business owners and the president of our nonprofit. Please call me if you have questions—610–649–0809. Or call Sharon Eckstein at 610–896–2170.

Please be advised that I raised some Cain in Congressman Gerlach's DC office & spoke with a very nice guy named Bill Tighe. I raised the roof because our Congressman is playing political dodge ball with eminent domain in my part of his district, and that is unacceptable. He has a responsibility to his plurality, and a registered Republican, I am deeply troubled by his lack of response. And his local dis-

trict offices hat to deal with touchy issues, so they neither acknowledge nor reply to messages, e-mails, etc.

Jim Gerlach is a nice man, but whomever is advising him in PA is advising him right out of office. Bill Tighe asked me if I wanted the Congressman to vote for this pending legislation, and I said yes. But that is only part of the battle. I want this man to take a stand, a public position on eminent domain. Other US Congressmen seem to be able to do it, and he needs to get off that fence. And if ONE more person on his staff tells me eminent domain is a "local issue", I might just lose my sense of humor altogether at the bald stupidity of such comments. You can tell YOUR Congressman I said that. My position is hardly a secret.

Thank you from folks like me for what you are doing. I appreciate the small voice you have given us. I wish I could tell our story in person to the whole of Congress, but I am not important enough, so I appreciate you allowing me to play one small part.

If you all can accomplish what I have read and digested, you might possibly be the stay of execution for places like Ardmore, PA. But please, act swiftly. Our local government is going to try to ram something through before your bill goes to a vote, and during the last few weeks of their existence as a lame duck board of commissioners.

Thank you again!

E-MAIL FROM DARREN FELDENKREIS
TO THE HONORABLE F. JAMES SENSENBRENNER, JR.

Eminent Domain laws need to be changed. Specifically, the "blight" designation. By obtaining a "blight" designation on an area, a local government can then try to use eminent domain to seize individually owned properties & businesses. Only one item out of a very broad list of items can qualify an area as being "blighted". This will result in emient domain abuse by local governments "blighting" areas that are not blighted!

E-MAIL FROM LINDA RODDY, LANDOWNER AND FARMER,
TO THE HONORABLE F. JAMES SENSENBRENNER, JR.

Dear House Judiciary Committee:

I am a landowner, farmer, and factory worker. I live in Tennessee. We are fighting to keep our land Because we feed our families off this land and make a living off this land. We have formed an organization called S.T.O.P. See our commits at the FERC web site under Docket # CP05–372–000. Midwestern Gas Transmission Company (A BIG PRIVATE COMPANY)would like to put a pipeline across our land, the land that we make our living from and feed our families from. Is it fair for A big PRIVATE COMPANY to make BILLIONS of DOLLARS off our land and take away from our families? No this is America and our forefathers did not mean for this to happen. Farming is how they had food to eat and feed their families. Wake up AMERICAN LEADERS and protect our land, our homes, and our businesses from Eminent Domain.

E-MAIL FROM BILLIE HODGES, LANDOWNER AND FARMER,
TO THE HONORABLE F. JAMES SENSENBRENNER, JR.

Dear House Judiciary Committee:

Please be advised that I am for changing the Eminent Domain Laws in the United States. Please go to the FERC web site and see Docket # CP05–372–000. Midwestern Gas Transmission Company has filed an application with FERC for a proposed Eastern Extension Project that would cross our farms. My husband has recently passed away after MGT came to our house and lied to a very sick man. MGT said they would only cross one of his farms, but two weeks after his death they are crossing both of his farms. I am trying to carry out my late husband's Last Will and Testament, but I cannot until this pipeline is stopped. We are farmers that have bought and paid for our land by farming. We have fed and raised our children by farming. We have made our living off the land that Midwestern wants to take from us. Farm land is in short supply because it is being taken up in houses. I do not know how the American people are going to have food when everyone wants to take the farmers land from them. Is the American people, going to starve in years to come? I think the American leaders should start now and change the Laws on Eminent Domain to protect our land, homes, and our businesses from BIG PRI-

VATE COMPANIES. Why should Big Companies be allowed to use our land to make Billions of Dollars and take away from our families, when that is how we make our living is off our land. Please restore our faith in the American Leaders by changing the Eminent Domain laws to keep our land safe, and protect our property rights.

E-MAIL FROM "DANIEL" TO THE HONORABLE F. JAMES SENSENBRENNER, JR.

I live in the city of Rock Hill, MO. I live in the constant fear of losing my house. You see, the aldermen/mayor of Rock Hill have a long history of initiating "development projects" and never completing them. In nearly 10 yrs, Rock Hill has blighted neighbohoods comprised of more than 150 homes. To date, not one single brick has been laid upon another. These neighborhoods, once thriving and filled with beautiful homes, are now ugly, run down sections of the city filled with vacant buildings and poorly maintained rental properties. These are large areas of the city comprising approximately 7% of the city's residences.

In addition, the aldermen have taken property by eminent domain with the stated purpose of "public use" to build a city/community center and turned around and sold the property to a private developer instead.

The aldermen have just taken 5 more houses with the stated purpose of building a new city hall.

We will see if the "public use" intention of the property is ever fullfilled or if, once again, the land goes to a private developer.

Now, after 10 yrs of forcing reisdents out of their homes and not building a single structure, the aldermen are at it again. The current "redevelopment project" is stalled, some say dead, so these 6 people with no particular expertise and with staunch histories of incpomitance, are changing the zoning codes in Rock Hill to accomodate their designs of even more "development". They are, once again, changing our beautiful residential neighborhoods to commercial zones.

Private development is not public use. Tax revenue from privately owned entities is not public use.

We need protection. Please change the law to protect our property rights. Don't forget about "blight", the gaping loophole in the law that needs to be plugged. The term blight needs to be stictly defined in measurable terms.

PLEASE PROTECT OUR PROPERTY RIGHTS.

IF OWNING A HOME IS THE AMERICAN DREAM, THEN EMINENT DOMAIN IS THE AMERICAN NIGHTMARE.

PREPARED STATEMENT OF KEN TAYLOR, WAYNE, PA

My name is Ken Taylor and I live in Wayne, PA (Del.Co.) I have lived in this vicinity for 27 years and have seen the steady reduction in affordable housing and shopping for most of those years. The recent boom in real estate values and cheap loan rates has exacerbated this decline many-fold. This boom has also resulted in many of our local municipalities considering unprecedented relief to private or institutional developers in the form of "by right."

zoning relief ordinances and the use of (or threat of) eminent domain with properties taken to be turned over to private developers. I am very concerned that the foregoing two devices are certain to accelerate the reduction of affordable housing and shopping choices available to the significant portion of our local population who increasingly cannot afford to live and shop in this area.

There have always been neighborhoods where the lower to middle middle class lived and shopped in this area, but those areas have become prime targets of the use of eminent domain as they are predominantly proximate to the major thoroughfares and transit stations, the prime areas of interest for developers. Many of these neighborhoods are also the places where people of color live and shop. I am increasingly concerned that through eminent domain and the use of by-right zoning change, the municipalities in this area are unwittingly participating in an economic form of discrimination for the sole purpose of generating greater tax revenues.

Such an example is the Ardmore, PA redevelopment effort which has been pursued by the Board of Commissioners of Lower Merion Township. To date, that board has, against the overwhelming opposition of its constituency, committed the township to a redevelopment plan which by its design, would require the taking and destruction of numerous long-standing business and the historically-designated buldings they are located in. The post redevelopment rents as would be required to be paid by commercial tenants would not permit the businesses (and a Veterans of Foreign Wars Post) that currently occupy those properties to remain. The tenants

that would replace them would be markedly "up-scale" and the lower-income residents would loose their local shopping sites as a result.

I am reluctant to have the legislative branch act to "inactivate" a decision of our highest court and am reminded how repugnant that thought was during the recent controversy in Florida over a husband's right to terminate sustanance to his comatose wife, but in this instance I would welcome any help possible in restricting the right of a state or local government in pursuing a taking of private property for anything other than a necessary public purpose.

Local governments may try to justify their recent efforts to use eminent domain for private development by citing the lack of funding from federal tax dollars, but even if there is truth as to the lack of funding from federal sources, this cannot justify the use of eminent domain by local governments to assist private developers in the hopes that the resultant project will generate greater tax revenues as are currently being generated by those properties.

If this nation permits the taking of private property for private development, a hallmark of freedom has been compromised and those who see this type of eminent domain as the next salvo in a financially-motivated class, war will be proven correct. I sincerely hope this is not permitted to happen.

PREPARED STATEMENT OF STANFORD CRAMER

My name is Stanford Cramer and I am the owner of Cramer Airport Parking, located about 7 miles from downtown Harrisburg, Pennsylvania.

A few years ago the words 'eminent domain' had no real significance to me. I knew it was something the government could do—take someone's property—if it needed to build a new road, school, or had some public safety issue.

Sadly, I now know the government, or in our case, a quasi-government authority, can take away someone's property for far less public-minded reasons.

I decided to start a parking business near the Harrisburg International Airport and knew with great service—offering a free carwash and providing people extra help with the baggage and van service from their cars—we could build a loyal customer base. That is exactly what we have done; in fact we have more loyal customers than I ever would have dreamed. We serve nearly 50,000 customers each year.

Both my son and daughter are involved in the family enterprise and I have one little grandson who I would like to someday give the option of carrying on the Cramer business.

But that may not be possible. The Susquehanna Area Regional Airport Authority (SARAA) wants to shut down my business by taking my property through eminent domain. All but one of the authority members voted for it.

SARAA's declaration of taking my 17.6 acres of land contained a very vague statement that they needed it for airport purposes. Later the authority claimed that my land would be used for a cargo facility and airport repair area. Some people believe it is possible a private business involved in airport cargo could ultimately benefit from the airport taking my land. That is just the kind of thing Congress should stop. No government agency should be allowed to take someone's land for something like this and to potentially allow a business to benefit is simple un-American.

I am now fighting to keep my property and I still believe the main reason for taking it is to eliminate a competitor for the airport parking.

I am not alone. Just last week Pennsylvania Attorney General Tom Corbett filed an anti-trust suit against the airport authority saying it would have a parking monopoly if the authority took away my land.

I also have about 20 employees at our business. Many of them are senior citizens. It will be a tremendous loss for them if the business closes. As you all know, it is not easy for people of retirement age to find a job.

There is a public funding side to this. Cramer's Airport Parking pays $20,000 in taxes to the Middletown School District and borough, which will not be made up if the airport authority is successful at destroying my business.

My family and I are paying a great emotional price as we go through this. But one thing that has helped to keep us going is the public response. Since the plight to keep our land became public, there has been a tremendous outcry. Everywhere I go people stop me and tell me they support my effort to keep our property. They are angry about what is happening to our family and myself.

Just to give you a sense of the outpouring of support, we printed up cards asking people to fill them out if they oppose the airport authority shutting us down and taking our property. Not only customers at our parking lot filled them out but also people from all over are doing so. What you see beside me is just a few thousand

of those cards. In addition, nearly 200 people have sent emails to the airport authority condemning them for their actions.

Here are a few examples of the emails sent by our supporters to the airport authority:

From a Customer in Harrisburg:

The Board and Management of HIA is doing a great job to make HIA better for the region but the plans to condemn Cramer Airport Parking severely harms that image and will cause irreparable harm for HIA support in the region. Please reconsider this action.

From a Customer in Wormleysburg, Pennsylvania:

I am against Harrisburg International Airport's . . . using eminent domain to force a sale of the Cramer Airport Parking business. The Cramers provide the only real competition to parking at HIA. In addition, they provide a valuable and affordable service to the traveling public as well as needed employment for the local community . . . HIA's use of eminent domain is an inappropriate use of the law to take private property from its legal owners (the Cramers). Although it may be legal to use eminent domain to seize this private property from its rightful owners . . . it is not the right thing to do and it is a reprehensible use of the law.

And from a customer in Mechanicsburg, Pennsylvania:

. . . Why does HIA want to buy Cramers at this time and why is the purchase based on the use of a law predicated on public interest? . . . With air travel competition the way it is, HIA has enough trouble attracting customers from other major airports. Why dictate use of only HIA's parking? . . . If Cramers wants to sell, so be it. But to force them under the law is not justifiable within the meaning of common sense and morality.

From the very beginning of our fight, there has been a groundswell of support from all over but I have noticed an increase since the U.S. Supreme Court ruling in question. Although the ruling does not directly impact my case, it has done so indirectly. The ruling has put a spotlight on all eminent domain cases and how unfair the process can be.

Please consider making changes to the eminent domain law so that people around the country won't go through what my family and I have endured.

Thank you for your consideration.

PREPARED STATEMENT OF LINDA BRNICEVIC AND CAMERON MCEWEN, BOUND BROOK, NJ

The use of eminent domain in Bound Brook, New Jersey, provides a timely example after New Orleans of how government action can retard or outright prevent recovery from a national disaster. At the same time it illustrates the questionable use of federal government funding to motivate local government exercise of the eminent domain power.

The facts of the situation are these. In September 1999, Hurricane Floyd unleashed the largest flood in recorded New Jersey history which was concentrated in the small Borough of Bound Brook. President Clinton declared the area a national disaster. Although on a much smaller scale than New Orleans and the Gulf Coast, the all-too-familiar results were similar: dead neighbors, thousands of residents evacuated, homes and businesses inundated, people in shock, irreplaceable possessions lost, victims suddenly faced with the need to find medical attention, emergency housing, food and clothing, kids needing new schools, all transportation lost, victims needing, all at the same time, to pump out water, fight mold, register with FEMA, deal with insurance, help elderly and disabled neighbors—and so on—and on and on.

While the floodwaters were still covering the streets of Bound Brook, local government officials were meeting behind closed doors, not to consider how victims might be helped, but to consider how the disaster might be used to dispossess them. Redevelopment would be declared through which the flooded homes and businesses would be subjected to condemnation and then replaced by a private developer's office park.

But this redevelopment was not to take place immediately. Instead it was to follow completion of an Army Corps of Engineers federal flood control project which had just started as Hurricane Floyd hit and which would be finished in 10 to 15 years. Condemnation could take place at any time during this period—or during extensions to it.

Flood victims were therefore required to repair their homes and businesses absent knowledge of if, or when, they might be condemned. For local government officials, the national disaster had not hit these victims hard enough. Now they had to learn

that their own non-flooded neighbors only wanted to make their recovery more difficult and, at some unknown time in the future, to get rid of them entirely. The flood victims would not benefit from flood control; only their non-flooded neighbors would benefit.

Because a high percentage of the flood victims were Hispanic, the redevelopment 'plan' was included in a 2004 consent decree the DOJ reached with Bound Brook regarding discriminatory practices in the Borough.

Despite the bizarre timing and circumstance of a redevelopment plan declared on the basis of a national disaster not to help the victims, but to take over their properties, despite the bizarre idea of declaring redevelopment which could not take place, or even be planned, for a decade or two, despite a DOJ consent decree acknowledging discriminatory action within the redevelopment plan, state courts in New Jersey, including the state supreme court, have ruled, astonishingly, that Bound Brook's use of the redevelopment statute and its eminent domain power do not violate state law.

The government's use of eminent domain to take property from one private owner and give it to another therefore trumps, at least in New Jersey, the right of victims of a national disaster to decent help and recovery. Not to mention their right to equal treatment under the law and the enjoyment of their property. The NJ courts even ruled that there was no harm to state notification and open meeting requirements from the fact that flood victims were not able to live in their homes, were often not resident in Bound Brook at all and had, as we all know from New Orleans, a few other things to do than attend meetings with their dry fellow citizens.

The lessons the federal government might draw from the Bound Brook experience are these:

a) while use of federal money for flood control and other disaster prevention is absolutely necessary, local sponsors should be required to certify that their project will not be used to trigger eminent domain takings upon its completion;

b) the use of eminent domain takings in minority and low-income areas should explicitly be made subject to the equal treatment provisions in federal law;

c) the majority supreme court opinion in Kelo that restrictions to eminent domain might usefully be left to state legislatures should be seen as questionable. In New Jersey, at least, the eminent domain power is absolute, at least in minority and low-income areas.

E-MAIL FROM JOHN AND BARBARA BERNWELL, ST. LOUIS, MO

We live at 1386 N. Berry Rd. in Rock Hill, MO. We have been told that they will possibly take our home for expansion of the Steak 'n' Shake on Manchester. We have been told that they would take the 7-11, the home next door, our home and the home on the other side of us. We were told this back in Feb.

My husband is handicapped and we were planning to have a deck and lift put on the back of our home, so I can get him out of the house in a wheelchair. Right now, he can still struggle with the stairs, but as he gets worse, he will have to be taken out in a wheelchair. We connot invest anymore hard work and money into this house, if they are going to take it, therefore, we have been on a fence since Feb. Planned to build the deck this spring, but couldn't because of this doubt.

We have lived here for 28 yrs. and intended to live here until we passed on. We have no idea as to where we would be able to find another home as nice as the one we have for the money. We have put a lot of hard work into this home, because we intended to STAY here.

We have always been of the understanding that eminent domain was to be used for highways, bridges and airports, not shopping malls and parking lots. All our neighbors and everyone else we talk with, thinks the same way. Eminent domain has gotten out of **control** and someone needs to remind these big developers as for what eminent domain is **supposed** to be used.

Another point I would like to make is that they just did a big sewer job on Berry Rd., two summers ago. Put in new drains and installed sidewalks. Took half of our front yard and since we set high off Berry they had to install a wall, which is about 6–7 feet tall, out of landscape blocks. Now I know this cost a big chunk of money and now they are going to tear out the wall and sidewalks for all this expansion. Seems like the right hand doesn't know what the left hand is doing and someone is wasting a lot of money!!!!!!

We need your help to put a stop to their **using** eminent domain to kick people out of their homes. It seems to be happening a lot. Everytime you see the news,

they're trying to take a bunch of peoples' homes for a shopping mall. Like I said, **it's out of control!!!!!**

Please help!!!

Thank you for your time.

PREPARED STATEMENT OF CRISTINA HUERTA RODRIGUEZ, OGDEN, UT

My husband woke me up early one Sunday morning in January of 2004 to tell me I needed to read this article in the Standard Examiner, our local newspaper. This article stated that our city was going to acquire the property where we live so that a Wal-Mart Supercenter could be built, and that they would use "Eminent Domain" if necessary. In that first article we were already feeling threatened, knowing that if we did not agree to sell, our property would just be taken anyway and we would be given whatever they (the city/RDA) felt like giving us. Have you ever been given a blow that just makes you sick to your stomach, such a feeling of helplessness.

We were given notice of a City Council/RDA meeting where they were going to discuss the Wal-Mart issue. Many people in our area were concerned and attended because none of us knew what was in store for us and our futures, since most of us own our properties and we have quite a few retired, elderly people (on fixed incomes), we knew we could not or would not want to have another mortgage over our heads. We expressed our opinions letting the council know we did not want to have to move and that we were happy where we were living. The council/RDA at that time indicated that the Wal-mart project was not set in stone but many of us felt like the City was just going thru the formalities and it was set in stone. I stood and asked about the use of eminent domain, I guess I was naive in thinking that eminent domain could only be used if there was a public road going in, the need for a school or hospital something for the GOOD OF THE PUBLIC, not a Wal-mart, whose company is the largest retailer in the world. I was told that they could use eminent domain for this and that it was done all the time. My reply to that was that just because something is done all the time does not make it right. We asked about why they wanted our area and were told that ous was a mixed use area and the city didn't want that. A blight study would be done to determine if our area is blighted and they would go from there.

At one of the council/RDA meetings we were told what the qualifications were for blight, to my understanding there are nine criteria that can be used and five had to be met in order for our area to be considered blighted. Our area is mixed use, so there are residential homes as well as a few businesses, the zoning is manufacturing, Part of our area does not have sidewalk, curb and gutter, and we do not have adequate storm drains, some of the streets are very narrow. I asked why we were being penalized because our city has neglected our area, the curb, gutter, sidewalks and width of our streets, and lack of adequate drains were not of our doing, but the neglect of our city. We also pay property taxes, we do not live in this area not having to pay, but we have not received any of the benefits. I feel most of the things that were used in the blight survey were cosmetic (very easy to fix). All of our homes are old homes, some are well cared for and some are not, some need paint badly some don't, some of the yards are well taken care of and again some are not, but these things can be easily remedied and are found throughout our city and every other city.

During the process the city/RDA had our properties appraised and they used 3 different companies, some of us didn't agree with the appraisals we received and some of us didn't have a clue about what our property was worth since we were not planning on moving or selling. From personal experience we felt ours was incorrect so my husband called the ombudsman and had him come and review the appraisal and he felt we should be re-appraised. The second appraisal did not come back correctly because the appraiser combined two different properties together that had two different owners.

We made an appointment with the relocation specialist who came and looked thru our home, measured the rooms to come up with the correct square footage, we went outside and looked at the yard. I said that when he was looking that we wanted something comparable as far as the yard condition and the size, he told me they were not concerned about the size or condition of the yard their concern was the house. Our home is not by any means new, approx 8 years ago we did an addition to our home so we have upgraded all of our electrical and plumbing, we completely redid our roof, we tore down the existing bathroom and added an additional bathroom, in total we added approximately 1,000 square feet. We laid new sod added a patio and awning we have established fruit trees, we have flowers in different

areas of the yard, but none of the outside would count, to me, my home is not only the house but the total package. I didn't feel this was adequate.

The question was asked at one of the council/RDA meetings why Wal-Mart did not come in and deal with us individually (directly). The answer was that some people would try to hold out for a million dollars and Wal-Mart did not want to deal with that. Why would a company want to come in and treat people fairly if they can get what they want for pennies on the dollar and not be bothered. To my understanding Wal-Mart is willing to pay $7.00 a square foot. Most of our property (mine and my husbands) except for the lot where our home is) is considered commercial property the appraisal figured $2.15 a square foot. Our area is approximately 3 city blocks from the center of town and the old mall site (which was vacant and the mall building was torn down) is selling for $14.00 a square foot.

At every council/RDA meeting they always brought up the use of eminent domain. Many of our neighbors signed the agreement with the city because they felt pressured and were afraid of what would happen if they did not sign. We were lied to by the city officials dealing with us, the city go-between would call to see if we were going in to meet with them and would tell another neighbor that one of us had an appointment to sign or that we had already signed, I received a few calls from neighbors saying that they had heard that I or others had gone in to sign. At one point the single older ladies were being called on a daily bases and told they only had until a certain time and were given deadlines that were changed ;when that date had passed. I feel that some of our residents were harassed and I was told by others that they felt harassed.

During this whole process (many meetings) we do not feel we were treated fairly and do not feel we were treated with respect. One of our resident/business owners went in for a meeting to discuss price and was hollered at by the official during the meeting and was told that he had better sign or he would be thrown out on the street, I put this politely, the official used inappropriate language. Why should we be subject to this kind of behavior?

I feel there is an appropriate use for eminent domain but not to take the property from private owners to turn over to business, if business wants to come into our area let them deal directly with the property owner and not let the city/RDA use strong arm tactics to steal our property and then them turn around and sell what was ours for a profit. I always thought that owning property was a part of my constitutional right, as well as a privilege, that you could live in your home until you decided you wanted to move or sell, but it appears to me that is not the case. I only hope that I am not alone in my thinking. As I stated earlier that just because something is done all the time does not make it right.

I have used Wal-mart because that is what we are/have been up against, but I would feel the same if it were K-Mart, Costco, Target or any other private business.

Right now this is my property we are talking about, but how would you feel if it was you, and next time it could be. What if a Hotel or shopping center could come into your neighborhood and bring in more revenue than you are paying in taxes.

Thank you for taking the time to consider this and some of what we have gone thru, not knowing if we should plant a garden, paint the living room or even change the carpet because we want to, will we be living here in a few months or will we have done these things for nothing.

Please feel free to get in touch with me if you have any questions.

E-MAIL FROM LORI LO CICERO, LONG BEACH, NJ

Hello, we are homeowners in the town of Long Branch, NJ where the town in worked in collusion with the developers (Hovnanian and the Applied Group) to take people's property without just compensation.

We have been offered a very low price for our own oceanfront home and have been told that it will be taken if we do not accept this offer.

Eminent domain should not be allowed and it is specifically spelled out in the consitutiton. FOR PUBLIC USE ONLY.

Please support anti-eminent domain legislation and stop the abuse by the town working together with the developers to take our property.

Thanks.

E-MAIL FROM LEON HOWLETT, GLENDALE, KY

The constitution does not say public purpose it says "public use". We all understand the intent and use of eminent domain and it is not for the taking of A to be given to B.

The US Supreme Court decision leaves those of us without resources to fight litigation to give up our property even when, as in our case, it is not needed. Our family fought the taking of our 110-acre farm for the Hyundai Motor plant here in Glendale Kentucky. The state assembled 1500 acres around us but at the request of Hyundai and then Governor Paul Patton the county passed a resolution to condemn our farm. Not because it was needed but simply because Hyundai wanted it. After a promise from the state to be "dogged" with the suit for "as long as it takes" if Hyundai located in Kentucky, we signed their purchase agreement. After Hyundai decided to locate in Alabama, Patton honored all the contracts but ours (which was fine with us) and bought the 1500 acres around us.

In addition he vowed our farm "would never be a part of that industrial site." Admitting as we had asserted it was never needed in the first place.

Eminent domain has been used as a tool of intimidation for years. You have no idea the abuse that will follow this ruling. And those of us with little resource will suffer most.

E-MAIL FROM AARON EPSTEIN, TO THE HONORABLE F. JAMES SENSENBRENNER, JR.

I strongly urge you to end eminent domain use by local governments in confiscating property from one private property owner to turn over to another property owner.

Governments should exist to serve people, not to abuse people. Sincerely

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E-MAIL FROM MARGARET COBB, ATLANTA, GA,
TO THE HONORABLE F. JAMES SENSENBRENNER, JR.

I would only wish to add my voice to the millions of Americans who found the eminent domain Kelo decision by the Supreme Court to be horrifying. I am not yet elderly, but I can see it coming, and know that nothing would be more cruel to an elderly person, or to anyone else with fragile circumstances, than to be turned out of their home for the unjust benefit of someone else with more political clout and wealth.

We live in an era, thanks to the events of 9/11, when there remains within all of us Americans a residual fear for our safety and well-being. Our basic instincts suggest that home is the most natural place to want to be in time of danger. Thanks to the Supreme Court decision, we can no longer even count on having that place of refuge in time of trouble, or joy either for that matter. This decision cuts across the grain of the very reasons that this land was initially settled at its inception. Nothing is more sacred to Americans than their land and their freedoms to worship as they please, and maintain privacy and opportunity.

E-MAIL FROM GYLBERT COKER TO THE HONORABLE F. JAMES SENSENBRENNER, JR.

Dear Chairman Sensenbrenner,

My name is Gylbert Coker and I am writing on behalf of my mother Anita Garvin Coker. New York City took away her property on 145th Street and St. Nicholas Street back in 1990. They took all property belonging to individuals in this city block square. The property was then turned over to a company that built a cooperative high rise. Clearly, it is too late to protest the take over of the property (and by the way, my mother had an small apartment house and a store front that were functioning at the time and the other buildings were active as well), our concern is the fact that the government has not negotiated the price for this property taken.

My questions are the following:

1. Is there a deadline that government must meet to pay people for property taken?
2. Is there a penalty to the government for delaying payment? There is certainly a penalty of interest for individuals when taxes are not paid.
3. To what agency or organization do we the citizen turn to get a payment settlement settled?
4. What is fair value? Does the government have the right to go back to a 1940, 1950, 1960 or 1990 value or does the citizen have the right to a financial payment based upon the current value of the property?

In conclusion I want to say that this is not the first time my family has had this problem with the United States government. Back in the 1940s it took my family

through three generations (100 years) to get money for property we owned in Florida. I don't want my mother who is 82 to die before she can get her money.

Thank you

PREPARED STATEMENT OF ROSEMARY CUBAS, EXECUTIVE DIRECTOR, THE COMMUNITY LEADERSHIP INSTITUTE

Mr. Chairman and honorable members of the Committee:

I am a 61 year old home owning Latina resident of eastern North Philadelphia and I have a dream. I have lived in my strong masonry home for 33 years—more than ½ my life and plan on seeing my grand-children be able to live here too as they grow. I and my neighbors are now faced with the HOUND FROM HELL—what we call the Eminent Domain abuse of powers by the City of Philadelphia attempting to take our strong masonry homes, small businesses and churches in neighborhoods brought back from blight by the efforts, resources and courage of the residents.

When I moved here my neighborhood was severely blighted—many vacant rundown structures, rat/flea/roach infestation, free flowing drug traffic, poor city services. It was clear that City government had given up on this area after long time industry moved away or died. Old time low-income residents had lost hope. New low income and ethnic working people moving in had not yet organized to change it themselves.

In these 33 years we the residents of this area have transformed this neighborhood block by block with our sweat, our meager resources, our perseverance, our tenacity and above all our HOPE—not with the encouragement or help of city government. Where there were crumbling dangerous vacant drug infested structures neighbors began to demolish them (then the city would step in least there be injuries and suits). We got cats, cleared allies and dealt with the infestation. Where land became vacant we planted flowers, vegetable gardens and trees; sought ownership and built garages and home extensions. New small businesses sprang up. Neighbor traded service for service and cooperated to resolve difficult situations (ie. no one shoots anyone here over a freshly shoveled parking space in the middle of a snow storm as so often tragically appears in the newspaper). Our walls have become living art with muralists from various parts of the world especially Latin America, painting beautiful scenes of both our current and historical reality. We are on several city tour routes not only for our murals and gardens, but also for other aspects of our ethnic flavor—music ringing from back or side lots, sidewalk domino tournaments, summer festivals, emerging restaurants and stores. BUT now that we have begun achieving a better quality of life, the City of Philadelphia and its developer cohorts have unleashed the HOUND FROM HELL—Eminent Domain abuse, to try to take our homes and neighborhoods to give to developers for their private gain. WE ARE FIGHTING THIS WITH ALL THE MODEST RESOURCES WE HAVE AND THAT TRANSFORMED THIS NEIGHBORHOOD. *We need you to create and pass all enabling legislation that will STOP any Federal money going to Philadelphia or other municipalities forcibly taking residents' homes, small businesses and churches for others' private gain.* The residents involved in the KELO case have a right to remain and thrive—WE KNOW THEIR PLIGHT AND SUPPORT THEM.

In the end such things as this misuse of public funds against working and low income people for the private gain of the wealthy and will backfire. Example: the 10 year tax abatements Philadelphia is giving to new construction of upscale condominiums including $10 to $12,000,000, will backfire and fail (as the housing bubble/boom bottoms out). Those of us in the very neighborhoods the City is trying to take and destroy will be what sustains, gives value and grows the City into the future. MY NEIGHBORS HERE AND AROUND THE CITY WILL NOT BE MOVED BY THE HOUND FROM HELL—the abuse of Eminent Domain power.

E-MAIL FROM JOHN GEITHER, SHAWNEE, KS, TO THE HONORABLE F. JAMES SENSEBRENNER, JR.

Chairman Sensenbrenner,

I lost my business to eminent domain. Last year my sandwich shop, in Roeland Park, Kansas was bulldozed to make a parking lot for a mega grocery store. I still had 1.5 years left on my lease and the developer only reimbursed me for about 20% of my move. When I reopen next month it will be over a year of lost business.

I am the father of small children, so this was the financial disaster of a lifetime. It will take us many years to recover from this mess. I would have never dreamt that this could happen in the U.S.A. It was like the City Council became its own

dictatorship. Please put a stop to eminent domain so others will not have to suffer through this legalized government robbery.

E-MAIL FROM JANET GILLILAND, LONGWOOD, FL

As a property owner in Florida, I would like to make my voice heard against the ruling of the Supreme Court of this great country. It goes against one of our must important freedoms, the right to own property. In giving the government the power to seize private property for developers, we are moving away from the rights handed to us in the Constitution of the United States.

E-MAIL FROM DONALD J. UMHOEFER, MENOMONEE FALLS, WI

Property owners in Menomonee Falls, WI were notified in early July that their land could be seized for a redevelopment project. The Certified Letter included the statement; "Implementing the proposed Redevelopment Plan may involve the condemnation of private property within the Redevelopment Area for urban renewal purposes. Accordingly, you are hereby notified that your property might be taken for urban renewal."

In order to create the redevelopment district proposed, an inventory of all the homes and businesses within its boundaries has been completed. The entire area has been labeled "blighted". Vibrant, functioning businesses as well as many homes have been determined to "Impair the sound growth of the community" simply because they do not fit into the proposed plan.

This area is by no means blighted as defined by Wisconsin Statute. I have heard it said that Wisconsin does not allow the use of eminent domain to acquire land for economic development as was the case in Kelo v New London. However, under the label of "Blight" that is exactly what happens . . . economic redevelopment. The whole Main Street Redevelopment proposal is based not on blight, but an economically depressed group of businesses. I'm sure the same reasoning and blurring of the definition of blight could also be used in other communities.

At a public hearing on Tuesday July 26, 2005 many citizen's spoke out against the use of the use of eminent domain for private gain and urged local elected officials to protect the rights of the individual property owners in the Village of Menomonee Falls.

On Monday September 19th the Menomonee Falls Village Board approved a resolution finding the area within the boundaries of the proposed Main

Street Redevelopment Project to be "blighted" and approved the redevelopment plan.

This approval places 80 parcels of land, many that are occupied at risk for eminent domain abuse.

The property owners who have been notified of possible condemnation of their properties have been told that this is a long term plan and that eminent domain will only be used as a last resort.

Will the Village of Menomonee Falls use eminent domain to take private property from the existing home and business owners to benefit private developers?

The Village Trustees have told us that this is not their intention, but should we as private property owners even have to feel the threat of condemnation for a private development?

You can add my name to the long list of citizens throughout the nation that are loosing sleep every night wondering if I will still have my home when this is all over.

Please undo the damage done by the Supreme Court's decision and protect the residents of our country from the threat of condemnation of our homes and business in order to benefit private developers.

Thank you for considering this issue,

E-MAIL FROM LO MEDICH

THIS IS NOT FAIR.

LAND IS A COMMODITY AND IF ANY PERSON OWNS IT, YOU PAY THEIR PRICE OR CHANGE YOUR PLANS.

THE ONLY REASON THE MAYOR WANTS THIS IS FOR SOME PAYBACK IN THE FUTURE IN MY OPINION.

E-MAIL FROM MARY CORTES, CAMDEN, NJ

How dare a small group of people think they "know what's best for us"—just because we voted them into power—POWER corrupts and took hold of a few by freezing hearts and opening pockets. One thousand two hundred families on the poorest of income scales will lose their roofs for a golf course, five hundred for a rail line to bring monies into the city, hundreds for a college-appeal look. Four people have died as a result: one was a World War II veteran who survived the war and epidemics and riots, but who developed an ulcer that popped. Any more deaths? Any more illnesses to fill clinics? My house is not going—yet. I will indirectly be forced out with rising taxes from tax-exempt projects that will not bring in money anyway because of the small print that exempts redevelopers if the project is not completed or full. That clause that says "amended from time to time" and only the city Redevelopment agency and the developers have that power—no voice from the people. What people? Those mindless illerate drones, those useless non-dying elderly, those troublemaking minorities, those drug dealing nobodies, etc. Well, that is what our dictator Melvin Primas thinks of us residents. We have a six-years-to-concoct community plan that was rejected by our "superiors" because ?? I presented a job-producing, people/money attracting, good-use-of-land plan to these carpetbaggers, and they put it aside to my face. Their plans for the city is old and never included grassroots ideas and okays. They are set on keeping promises to rich developers to take our land for pennies.

Camden is not the most dangerous city in the nation. You always hear Philly with a crime or two daily. Camden has property taxes at $100-250 a month and mortgages starting at $150 a month. Transportation is a walk away. Schools, too. We have the most diverse cultures in the tri-state area all sharing and growing together. One lady pays $700 rent to Housing: "If I lose my job tomorrow, my rent is adjusted and I will still have a roof for my family." One man moved to a high-class town, invited the families to a BBQ, lit it up at 6pm still daylight, was told to take it inside by the police, now wishes to return to Cramer Hill (my side) where we a freer to enjoy the pleasures of life and share with neighbors. Life is different here. I invite you to a tour of Camden, even if I lose my job. I have lived in many cities and have settled here, my kids graduated honors here, one went to Princeton U from here, one is in Millersville U,PA. I like it here. Neighbors know and respect neighbors. We greet and chat and joke around and protect each other. COME ON DOWN. Before we lose it all!!!!

DO NOT GO TO CITY HALL AND SEE WHAT THEY WANT YOU TO SEE. WE NEED SUPPORT. I will sent an invitation next. Hope to hear from you or see you soon.

E-MAIL FROM NICK ERICSON TO THE HONORABLE F. JAMES SENSENBRENNER, JR.

Dear Honorable Members of the House Judiciary Committee's Subcommittee on the Constitution:

Having experienced the use of eminent domain to take my property, property that was listed for sale at the price set by a local real estate agent, for the "public purpose" of building single family homes for other people in Duluth, Minnesota I fully support the efforts of the Institute for Justice and the Castle Coalition. Frankly it is exhausting and unproductive to obtain fair market value through the court system. Fair market value has no relation to the actual market value established in the open real estate market, and the local governments are using this fact to their benefit. I lost many nights of sleep and a couple of months of work on the taking that I experienced, and can barely imagine the mental anguish that the Kelso people are going through.

It is too late to stop the taking that already occurred on my property, but I expect the City of Duluth and the Duluth Housing Redevelopment Authority are considering taking additional property which is adjacent to their project in Duluth. Property which I have held for the purpose of building my personal home. Property which I am now attempting to sell for the sole purpose of avoiding yet another experience with eminent domain. Because the City of Duluth has declared the entire city open for the use of eminent domain with Resolution 03–0317R, I am afraid to own property in that city. The Duluth Housing Redevelopment Authority would rather build a home for someone else and award profitable contracts to their friends, than let tax paying people build their own homes. The use of eminent domain in this manner is wrong and should be illegal.

Please support any and all legislation to eliminate the use of eminent domain for the "public purpose" of building private residence.

E-MAIL FROM GAIL HUNTER, MIDWEST CITY, OK

Midwest City, OK, left me homeless and property-less after taking my house of nearly 10 years. I sold, but under threat of eminent domain. I was going to left it condemn, but MWC's e-domain-in-charge called me 2 days prior, to again say their oft-repeated refrain: you'll get LESS if you let it condemn! (plus, I couldn't be out that soon and had no where to go). Also, a local real estate person told me that IF I let them condemn my huge house, with $13K rehab done on it under 5 years ago, new roof, new decking, etc, etc, that the "3 appraisers" would tend to side with the city, which I didn't doubt.

The City didn't even put it to a vote of the people, as they were required to do previously. Why? I can only suppose it was because to do so would have TIPPED US OFF (!!) to the fact they would STEAL our houses along WITH our quite-soon-to-be home APPRECIATION!!

PREPARED STATEMENT OF EDWARD H. COMER, VICE PRESIDENT AND GENERAL COUNSEL, EDISON ELECTRIC INSTITUTE

The Edison Electric Institute (EEI) is the association of United States shareholder-owned electric companies, international affiliates, and industry associates worldwide. Our U.S. members serve 97 percent of the ultimate customers in the shareholder-owned segment of the industry, and 71 percent of all electric utility ultimate customers in the nation. Our U.S. members also generate almost 60 percent of the electricity produced by U.S. electric generators.

EEI and our members have a direct interest in Congressional action on eminent domain issues, including proposed legislation such as H.R. 3135 and H.R. 3405, which have been developed in response to the Supreme Court's June 2005 *Kelo v. City of New London* decision. As discussed in the remainder of this statement, our members must sometimes rely—as a last resort—on eminent domain authority to be able to construct necessary new electricity generation, transmission, and distribution facilities to provide electricity to the public. Such facilities clearly satisfy the public use criterion of the 5th Amendment to the U.S. Constitution, and the ability to use eminent domain as to such facilities, subject to the protections that already accompany its exercise, should not be disturbed.

In fact, section 201(a) of the Federal Power Act declares that "the business of transmitting and selling electric energy for ultimate distribution to the public is affected with the public interest." Most states have statutes that similarly recognize that the sale and distribution of electric energy is affected with the public interest. Furthermore, just six weeks ago, on August 8, 2005, the President signed into law the Energy Policy Act of 2005. Section 1221 of that Act permits the use of eminent domain authority for certain electric transmission facilities permitted by the Federal Energy Regulatory Commission in "national interest electric transmission corridors" designated by the U.S. Department of Energy in consultation with affected states. Together, these provisions demonstrate that this Congress continues to believe that electricity facilities provide an essential public service.

We encourage the Committee and Congress to take great care in imposing constraints on the use of eminent domain to be sure that any legislation in this area does not to constrain the use of eminent domain for traditional public purposes, including the development of electricity generating and delivery facilities. Together with other traditional uses of eminent domain such as roads, pipelines, telecommunication facilities, schools, and parks, electricity facilities are vital to our local communities and our nation's economy and are a legitimate public use of land. Any bill Congress passes should specify that such traditional uses are not impacted by the bill.

Electricity is a critical commodity. Customers and communities throughout the nation rely on it for essential functions such as heating and cooling homes and offices; pumping water, gas, and oil; powering wastewater and drinking water treatment plants, and operating traffic signals, street lights, building lights, elevators, hospitals, factories, computers, and the host of other places and devices that rely on electricity. Furthermore, electricity is closely tied to growth in the economy, not only paralleling that growth, but facilitating it through improvements in workplace and energy efficiency.

EEI's members provide electricity to millions of customers across the country. In order to provide reliable, affordable electricity to these customers and the communities where they live, our members must construct and operate a complex array of electricity generating, transmission, and distribution facilities, or contract with others who do so. The nation's electricity system is a carefully balanced set of such

facilities, which must be operated in careful coordination to ensure that electricity is available in homes and businesses when and where needed.

When new generation, transmission, or distribution facilities need to be added to the nation's electricity system, EEI's members or others that build the facilities go through an elaborate siting process that involves approvals by federal, state, and local governments and substantial participation by landowners and the public. State public utility commissions and energy boards determine the need for the facilities, and the Federal Energy Regulatory Commission plays a role if the facilities involve sales or transmission of electricity in the wholesale market. State and local planning agencies review land use issues, along with federal land management agencies if federal lands are involved. In addition, federal, state, and local environmental agencies consider and address air, water, and land use concerns. The public, including landowners, has multiple opportunities to raise concerns and to have them addressed.

At the conclusion of this elaborate process, utilities normally are able to obtain the land needed to construct the facilities through negotiation with landowners and communities involved. In the case of transmission and distribution facilities, which can be narrow in width but cover long distances, these negotiations can involve substantial numbers of landowners, including not only private parties, but also federal, state, and local agencies.

On the rare occasion where negotiation alone cannot secure the land needed, the utility or other facility developer may need to exercise eminent domain authority in order to obtain a right-of-way or piece of land needed to site a facility. The exercise of eminent domain in such rare instances is carefully bounded. The U.S. Constitution and state constitutions require just compensation for any such taking of land. Further, federal and state laws authorizing use of eminent domain provide careful procedural protections, including active involvement of the courts, to ensure that landowner interests are carefully protected.

While H.R. 3135 and H.R. 3405 appear intended to prevent or discourage use of eminent domain for commercial taking of private land for other private purposes, EEI is concerned that the bills are so broadly written they could impede or prevent use of eminent domain when needed for electricity facilities and other such traditional uses. For example, if a shareholder-owned utility should need to exercise eminent domain authority it has under federal or state law to obtain a piece of land for a generation or transmission facility, and the facility will have some "economic" benefit to the community such as providing for lower electricity rates, the bills could be read to prohibit such use of eminent domain at risk of state and local governments losing federal funds.

To address this concern, EEI encourages the Committee and Congress (1) to carefully define the type of "private to private" transfer of property as to which Congress intends to discourage use of eminent domain, and (2) to clarify explicitly that any constraints the legislation may impose do not apply to uses of eminent domain for electricity generating, transmission, distribution, and related facilities, regardless of whether the owner of the facilities is private and whether the facilities may have some economic or commercial benefit.

EEI would be happy to provide additional information to the Committee if needed. Please contact either Meg Hunt at 202/508–5634 or Henri Bartholomot at 202/508–5622 if you need additional information.

PREPARED STATEMENT OF THE NATIONAL ASSOCIATION OF REALTORS(

The National Association of REALTORS®, "The Voice for Real Estate," is America's largest trade association, representing over 1.2 million members, including NAR's institutes, societies and councils, involved in all aspects of the residential and commercial real estate industries. Our membership is composed of residential and commercial REALTORS®, who are brokers, salespeople, property managers, appraisers, counselors and others engaged in all aspects of the real estate industry. Members belong to one or more of some 1,600 local associations/boards and 54 state and territory associations of REALTORS®.

The protection of the right of citizens to be secure in their ownership of property is a core value of REALTORS®. NAR believes it is an essential condition for the operation of our free enterprise system and a first principle of the social contract upon which our democratic system of government relies for legitimacy. Any erosion of this protection, real or perceived, is cause for serious alarm. So much depends on it.

Therefore, REALTORS® greeted the news of the Supreme Court's decision in the *Kelo* case with understandable alarm. NAR had filed an *amicus* brief urging the

court to apply a higher level of scrutiny, to insist that the government provide persuasive and objective evidence to justify its use of eminent domain in cases where property is not taken for public ownership and use, but merely to advance a public purpose. Our arguments were rejected by the majority.

Since the announcement of the *Kelo decision we have heard from our members about it. In general, the reaction is anger, disbelief, and chagrin. But there are a few who support the decision. Rather than rely on random responses to gauge our members' reaction, NAR commissioned a scientific opinion poll of REALTORS®* nationwide on the topic of eminent domain in general. This poll was conducted in late August and has a margin of error of +/– 2.8 %. Some the key findings are:

- 66% of REALTORS® do not support the *Kelo* decision; almost half are **strongly** opposed
- 86% would support condemnation of **blighted** properties that pose a risk to public health or safety
- 53% said eminent domain **should not** be used to take non-blighted properties, even if required by an economic development plan
- 58% responded that "just compensation" should include more than fairmarket value
- 69% said **each state** should have the power to make its own laws about eminent domain, while 29% said the Congress should establish standards for the proper use of eminent domain

The last finding of the survey underscores the point NAR wishes to make today. Many are disappointed with the Court's decision and many want to create a solution. That is understandable, healthy and welcome. But we should be careful that the solution does not create unintended consequences we will live to regret. NAR feels that some of the solutions being discussed in the Congress could unintentionally harm important principles of federalism, such as the constitutional division of power between the federal and state governments.

In our view, matters concerning land use, economic development, blight and the like are essentially local issues better handled at the local and state level. These levels of government are closer to the issues and to the people affected. The federal government should preempt state rules rarely and only when a significant federal interest is at stake. Our research indicates that in the area of eminent domain, the states have not been lax. In fully half the states a taking such as occurred in New London would not have been legal due to restrictions in the state constitution, statutes or case law. In the wake of *Kelo* three states, Delaware, Alabama, and Texas, have already amended their laws to further restrict the use of eminent domain. Many other state legislatures, including Connecticut's, are preparing to act in their next session to toughen their eminent domain laws. NAR applauds this effort and encourages our state REALTOR(associations to work with legislatures to craft reasonable reforms.

REALTORS® believe it is preferable that states be given the chance to devise their individual solutions appropriate to conditions in the respective states rather than have the federal government impose a "one-size-fits-all" solution from above. An appropriate federal role might be to provide technical assistance grants to the states to help them get the job done. For its part, NAR is doing just that through our state affiliates. For example, NAR has provided analysis and suggested improvements for eminent domain reform bills in Pennsylvania and New York.

While the *Kelo* decision is troubling and the impulse to act is strong, NAR urges the Congress to exercise restraint. The states are moving rapidly to correct this problem. At the very least, Congress should take a wait and see attitude while the process works itself out at the state level.

NAR is grateful for the opportunity to make its views known to the Subcommittee. We would welcome the opportunity to work with the Subcommittee on this issue.

PREPARED STATEMENT OF TIM IGLESIAS, ASSOCIATE PROFESSOR, UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW

First, thanks for holding a hearing on a difficult issue. My hope is that more light rather than just heat will be generated.

Second, please be careful and judicious is how you respond to this case. There has been wide misunderstanding of what the majority held and why, as well as the likely consequences of the decision. Please see the attached explanation of the case by Georgetown law professor John Echeverria. The majority opinion held correctly that

the facts of the case brought by the plaintiffs fall within the Court's already decided precedent. The majority also explained both the federalist and separation of powers reasons for the Court's general deference to legislative decisions in this complex area. This is essentially a state's rights decision and it was correctly decided. Reading the majority's opinion through the lens of Justice O'Connor's dissent as many have done is a mistake for two reasons: (1) it is the majority's opinion itself that is the law not a dissent's interpretation of the majority's opinion; and (2) her dissent mischaracterizes the majority's opinion.

Third, by agreeing with the majority's decision in this case I am not saying that there is no problem to be addressed here. Clearly, like any public or private power, the power of eminent domain is subject to abuse. However, the fact is that we know very little about what "abuses" there are, their frequency and their causes. The Institute for Justice has published a report entitled "Public Power, Private Gain," which has been considered by some to provide relevant information. However, that report when read closely is merely a partially examined collection of second hand anecdotes and cannot really be considered as providing sufficient information to form the basis for any significant change in public policy. Though effective as an advocacy piece, it fails as a serious, objective information gathering instrument because : (1) it is poorly design (e.g. "abuse" is never actually defined clearly and there is no "baseline" comparing the number of instances of economic development which have occurred without the exercise of eminent domain); (2) inadequate data collection (e.g. mostly local news stories are used which fail to include often relevant facts); and (3) interpretive problems (e.g. the study includes cases in which courts found that eminent domain was not allowed or in which governments decided against its use still to constitute "abuse").

Fourth, the issues raised by the plaintiffs in the Kelo case are most usefully understood and regulated in the broader context of the popular and complex arena of "public-private partnerships." Local governments' economic development and urban renewal efforts usually take the form of "public-private partnerships" which creatively combine the expertise of the government, the market and volunteer groups/civil society to address difficult problems that no sector can solve alone. While these partnerships can bring many otherwise unavailable benefits to communities, there is a clear potential for abuse. Any wholesale limits or restrictions on the power of local governments to exercise the power of eminent domain in the context of economic development projects is too blunt a reform to deal with the intricacies of regulating "public-private partnerships" so that they deliver the promised public benefits. Such regulation should be primarily left to the States, which is exactly what the majority opinion recommended, and is precisely what is occurring now.

I request that you please be cognizant of the limited role that the federal government can and should play in this complex issue.

I would be happy to explain or elaborate further on any of the comments made in this testimony.

ATTACHMENT

Georgetown Environmental Law & Policy Institute

The Myth That *Kelo* Has Expanded the Scope of Eminent Domain

John D. Echeverria
July 18, 2005

In the wake of the Supreme Court's June 23, 2005, decision in Kelo v. City of New London, some have contended that the Court's decision expanded government authority to condemn private property for economic development. For example, a story in The Washington Post states, "The ruling greatly broadened the types of projects for which government may seize property to include not only bridges and highways but also slum clearance and land redis-tribution." The idea that Kelo expanded the law of eminent domain is simply *incorrect.*

I. The Law Before *Kelo*

In the modern era prior to Kelo, there were basically four Supreme Court cases dealing with the use of eminent domain for economic development. In each of these cases the Court, applying a deferential standard, upheld the use of eminent domain because the taking was found to serve a legitimate public purpose and the owner received just financial compensation.

National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992), involved an Interstate Commerce Commission order requiring one railroad to transfer a rail line to a second railroad. The ICC issued the order because the first railroad had neglected to maintain a portion of the line which carries the Amtrak "Montrealer" through New England, and it believed the second railroad would do a better job of maintaining the line. The Court unanimously rejected the first railroad's objection that the taking was not for a public use because the use of the rail line would not physically change. The Court said it could not "strike down a condemnation... so long as the taking is rationally related to a conceivable public purpose." In this case, Justice Kennedy said, "there can be no serious argument that the ICC was irrational in determining that the condemnation will serve a public purpose by facilitating Amtrak's rail service. That suffices to satisfy the Constitution...."

Hawaii Housing Authority v. Midkff, 467 U.S. 229 (1984), involved a challenge to a Hawaii statute designed to deal with the problem that a very few owners held most of the private land in the state. The statute required owners of large holdings, under certain conditions, to sell residential lots to individual citizens so that they could own their own homes. The unanimous Court, in an opinion by Justice O'Connor, recognized that the Constitution does not permit a compensated taking "for no reason other than to confer a private benefit on a particular private party." However, the Court said it had an obligation to uphold the use of eminent domain where it is "rationally related to a conceivable public purpose." Under that standard, Justice O'Connor concluded that the Hawaii statute was constitutional. "Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers."

Ruckleshaus v. Monsanto, 467 U.S. 986 (1984), involved a takings challenge to the Federal Insecticide, Fungicide, and Rodenticide Act. The Act authorizes the Environmental Protection Act to rely on trade secret data submitted by a prior pesticide applicant in considering the application of a subsequent applicant, subject to payment of compensation to the first applicant. While it acknowledged that subsequent applicants permitted to exploit confidential business information in this fashion were the "most direct beneficiaries," the Court had no difficulty concluding that this use of the eminent domain power served a public use.

Finally, Berman v. Parker, 348 U.S. 26 (1954), involved a major urban redevelopment project in southwest Washington, D.C. that displaced numerous homeowners, renters, and small businesses. The owner of a non-blighted department store in the redevelopment area challenged the taking as not being for a public use. The Court unanimously rejected the challenge, reasoning that the eminent domain power can be exercised to achieve any legitimate legislative objective. "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well–nigh conclusive.... This principal admits of no exception merely because the power of eminent domain is involved." The Court also rejected the argument that eminent domain can only be used to eliminate "slum" properties. "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

These modern decisions are consistent with a long line of Court decisions stretching back to the 19th century. Indeed, if anything, the older decisions even more emphatically uphold the power of government to take and retransfer property, upon payment of just compensation, in order to promote economic development. To cite a few examples, in Head v. Amoskeag Manufacturing. Co., 113 U.S. 9 (1984), the Court authorized a manufacturing company to build a mill pond that flooded upstream landowners so that it could produce hydropower to drive a manufacturing facility. In Strickley v. Highland Bay Gold Mining Co., 200 U.S. 527 (1906), the Court approved condemnation of a right of way over private property so that a private mining company could operate an aerial bucket line to its mine. And in Fallbrook Irrigation District v. Bradley, 164 U.S. 112 (1896), the Court upheld condemnation so an irrigation district could build an irrigation ditch across neighboring private property.

II. The Law After *Kelo*

In light of the state of the law prior to Kelo, it is incorrect to suggest that Kelo broke new ground and expanded government's power of eminent domain. If anything, Kelo moved the law in the direction of *more* restrictions, not fewer restrictions, on the use of eminent domain for economic development.

The Court affirmed a decision by the Connecticut Supreme Court upholding use of eminent domain to assemble over 100 separate parcels within a 90-acre area characterized by high vacancy rates, significant disinvestment and neglect. The City of New London has lost a substantial portion of its population and suffers an employment rate twice the state average. Seeking to take advantage of the economic spark generated by the decision of the Pfizer company to construct a major new facility on an adjacent site, the city sought to implement a comprehensive redevelopment of the area for residential, commercial, office, and recreational purposes.

The Court said that New London's redevelopment plan easily met the public use test. "It would be incongruous," the Court said, "to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of... [the] other interests" endorsed in prior cases. Applying its deferential standard for local legislative judgments about how and when to deploy the eminent domain power, the Court also rejected plaintiffs' novel argument that it should demand a "reasonable certainty" that the redevelopment program would actually succeed.

Significantly, none of the dissenters in Kelo made a strong argument that the majority opinion departed from longstanding precedent. Justice O'Connor acknowledged that her position was inconsistent with the language, if not the specific holdings, of Berman and Midkiff. She suggested that those decisions could be distinguished on the ground that eminent domain had been used to address an "extraordinary, precondemnation condition of the targeted property [that] inflicted affirmative harm on society." But, in reality, nothing in the analysis or facts of those cases – much less the full body of relevant Supreme Court precedent – supports a sharp distinction harm-preventing and benefit-conferring government action. Furthermore, as Justice Scalia observed in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), this difference is often "in the eye of the beholder," making it a weak potential basis for distinguishing action that serves a legitimate public use.

Justice Thomas argued, based on the language and original understanding of the phrase public use, that eminent domain should be used only when the public will own the property or have a legal right to use it. But this constitutional analysis is fundamentally flawed. Dictionaries (modern and old) include public "advantage" among the definitions of public use, meaning that actions which serve a legitimate public purpose fit comfortably within the language "taking for a public use." Moreover, other scholarly examinations of the constitutional history indicate the drafters intended the phrase "public use" to impose few, if any, constraints on the eminent domain power. See, e.g., Mathew P. Harrington, "'Public Use'" and the Original Understanding of the So-Called 'Takings' Clause," 53 Hastings L.J. 1245 (2002). Justice Thomas acknowledged that his position required overruling over a century of Supreme Court precedent. This candid statement confirms that Kelo does not expand the eminent domain power.

Even as it followed well-settled precedent in Kelo, the Court placed new limits on the use of eminent domain for economic development purposes. First, the Court emphasized that New London was seeking to implement a "carefully considered development plan" for the area based on "thorough deliberation," including several public hearings and explicit approvals by the city council. The Court indicated that while it approved this type of carefully considered redevelopment program, it would not necessarily uphold "a one-to-one transfer of property, executed outside the confines of an integrated development plan." The Court's virtual mandate that future exercises of eminent domain proceed in accord with a comprehensive, carefully considered plan represents an important new limit on the eminent domain power.

Second, the Court strongly suggested that it is critical that the developer chosen to implement the development be bound to carry out the redevelopment and serve as the public's agent. Opponents of redevelopment projects sometimes suggest that property is being turned over to private developers without strings, with the public benefiting solely through enhanced tax revenues and a general increase in economic activity. In fact, in Kelo the city will retain title to the property and lease the property to the redeveloper on a long-term basis. An enforceable agreement binds the developer to provide specific facilities and services in accord with the city's development plan. Public welfare and private profit are no doubt inextricably linked – as in any effective public/private partnership – but there is no question that firm controls are in place to ensure the public interest will be protected.[1]

Finally, the limits placed on the eminent domain power in Kelo are underscored by Justice Kennedy's concurring opinion. Because his fifth vote was necessary to make a majority in Kelo, Kennedy's concurring opinion is likely to be especially influential in determining how courts interpret and local jurisdictions apply the decision. Although the judicial standard is deferential, Justice Kennedy said, courts should review exercises of eminent domain using a "meaningful" rational basis standard. He also echoed the concerns about one-to one transfers, stating that there might be categories of eminent domain in which "a presumption (rebuttable or otherwise) of invalidity" might be warranted. He identified a set of factors that justified upholding use of eminent domain in this case, suggesting that the absence of these factors might lead to a different outcome in another case. These factors included that "[t]his taking occurred in the context of a comprehensive development plan," the plan was meant to address "a serious city-wide depression," the "economic benefits of the project cannot be characterized as *de minimis*," the identities of project beneficiaries "were unknown at the time the city formulated its plans," and the city followed various "procedural requirements" that facilitated review of the project's *bona fides*.

In sum, while Kelo, in line with prior precedent, upheld the city's use of eminent domain for economic development purposes, the decision represents a change in the direction of less, not more, deferential judicial examination of the use of the eminent domain by state and local governments.

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[1] The Court also suggested in a footnote that the traditional measure of just compensation, based on fair market value, might not be an appropriate measure of compensation when government takes private property for economic development purposes. The Court said that this issue, while "important," was not raised by the Kelo litigation.

E-MAIL FROM RICHARD B. TRANTER, DINSMORE & SHOHL LLP, TO THE HONORABLE STEVE CHABOT

Dinsmore&Shohl LLP
ATTORNEYS

Richard B. Tranter
513-977-8684
richard.tranter@dinslaw.com

September 20, 2005

Via E-mail
Congressman Steve Chabot
129 Cannon House Office Building
Washington, D.C. 20515

Re: *Comments to the House of Representative's Subcommittee on the Constitution Oversight hearing as to Kelo decision*

Dear Congressman Chabot:

I am writing in response to the legislative initiatives that have arisen following the *Kelo v New London* decision by the United States Supreme Court. Having represented clients on both sides of the eminent domain issue and written nationally on the topic, I have but one request of the House of Representatives before it acts on this important issue. Ensure that any action is taken only after a thorough and weighty consideration of the issue has occurred. The constitutional power of eminent domain, particularly in an economic development context, is too important to be accompanied by misinformation and hyperbole. This issue requires in depth study and deliberative hearings - not rash decisions espoused by ideologues. Restating Justice Stevens, the libertarian arguments advanced by the Institute for Justice were supported by "neither precedent nor logic." Despite the criticism that the Court has endured after its decision, I request that the House of Representatives exercise the same judicious temperament that Justice Stevens and his colleagues demonstrated in affirming that economic development was a valid governmental objective and that courts should defer to such local legislative determinations.

Although I understand the despair felt by anyone forced out of his or her home[1] for the sake of community goals, the larger issue involves whether or not the federal government will intervene to prevent local communities from having the resources and powers necessary to address their critical issues. The House of Representatives should be cognizant of the overall benefits to those communities utilizing redevelopment plans even where the assemblage of the property is obtained through the exercise of eminent domain. Urban redevelopment

[1] It is assumed that property owners are fairly compensated by jury award for their property loss. As I understand, the compensation issue is not the subject of this hearing. Also, it has been my experience that the real anxiety associated with a taking is whether the taking represents a total taking involving displacement of an individual versus a partial taking, and not what the ultimate public use of the property will be; property owners subject to a total taking are not ameliorated if the development is a road, bridge, or stadium as opposed to an office park.

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accomplishes several commendable objectives. It fosters job growth, sustains essential governmental services, provides a more beneficial land use and improves public infrastructure such as sewers and utility lines upon the redevelopment of the project area. Attached to this letter is information on two of the more prominent urban redevelopment projects in Cincinnati, Ohio: "The Banks," on the Ohio river front and "The Calhoun Street Market Place" just south of the University of Cincinnati. The anticipated project investment will total more than $700 million dollars in investment bringing hundred of jobs, enhancing the urban landscape and improving the public infrastructure. But these projects will not occur if the federal government seeks to deprive communities of the financial incentives necessary for their success. Diminishing urban redevelopment eliminates one half of the revenue side of the equation for municipalities and, by discouraging urban renewal, conversely leads to the adverse consequences of suburban sprawl.

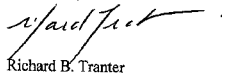
To the extent that there are valid concerns, the House of Representatives may wish to consider the procedural protections, not highlighted in economic development projects, that typically accompany urban renewal projects. The urban renewal model works like a zoning overlay. Prior to any exercise of eminent domain, a municipality must review a study area for possible qualification as an urban renewal district. Several safeguards are thereby ensured. The initial step, which is legislative in nature, invites a full and open public debate. Another step involves a planning component that requires study of the existing and future land uses in the area. Finally, if a district is created, there is generally a requirement of a public/private contract for redevelopment which ensures on-going public input into the redevelopment and use of the property consistent with the community goals.

Elected officials should not be criticized but applauded for having the foresight to address problems before the "levees break." Local communities need federal incentives to successfully complete urban redevelopments. If the House of Representatives strips away federal incentives, it would allow any holdout to effectively veto the legislative action adopted by a community's elected officials.

Accordingly, I emphasize the importance of deliberative hearings on this issue. Experts in law, economic development, social equity, and public administration should be solicited to address these very difficult social policy and legal issues before Congress acts.

I appreciate the opportunity to submit these comments.

Very truly yours,



Richard B. Tranter

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ATTACHMENT A

September 19, 2005

RE: Urban Renewal Update - Cincinnati, Ohio

Urban Renewal Planning has played an important role in the development of the City of Cincinnati for the last fifty years. Such Planning remains vital to the City and is responsible for downtown projects such as office buildings, apartment buildings, hotels, and the Contemporary Arts Center.[1] Additionally, the Great American Ballpark (as well as its predecessor Riverfront Stadium), Paul Brown Stadium, the Freedom Center and the Aronoff Center for the Arts are all urban redevelopment projects. Currently, development groups are in the process of completing two projects that will enhance two distinct parts of Cincinnati: "The Banks" along the Ohio riverfront, and "The Calhoun Street Marketplace Project" near the University of Cincinnati.

- **The Banks**[2]

  Description

  - "When the Riverfront Advisors Commission was chartered by the City/County Riverfront Steering Committee in February 1999, they were charged with creating a comprehensive development program to build on the bold riverfront initiatives being undertaken by the community at the time. Not only were two new sports stadiums being built, but attractions such as the National Underground Railroad Freedom Center and the national Steamboat Monument were in the planning stages. At the same time, significant public improvements were under way in anticipation of the private sector investments to come. While the most dramatic was the reconfiguration of Fort Washington Way to make land available for The Banks, seven other major street and utility infrastructure projects have been constructed, or are under way, in support of riverfront initiatives. Thus, eight city blocks of land will be ready for development with streets and utilities in place."
  - "The result of the Riverfront Advisor's efforts was a far-reaching and spectacular vision for "The Banks," a development that will create a 24-hour seven-day-a-week diverse, pedestrian-friendly urban neighborhood with a mix of uses consisting of residential housing, specialty retail, restaurants, entertainment, office, boutique hotel space, public greenspace and parking. Located on the Ohio River, The Banks will become the focal point of the Greater Cincinnati Region."

[1] *See*, Susan Vela, "Group promotes fights against eminent domain," Cincinnati Enquirer, Sunday December 15, 2002; available at http://www.enquirer.com/editions/2002/12/14/loc_eminentdomain15.html. *See also*, City of Cincinnati's Community Development and Planning website at http://www.cincinnati-oh.gov/cdap.pages/-3496-/.
[2] All quotes describing The Banks taken from Port of Greater Cincinnati Development Authority's website, available at http://www.cincinnatiport.org/pa_pg5A.html.

- "Nowhere else has approximately 15 acres - eight city blocks - of prominent waterfront property been pre-assembled at one time."

Funding

- "The Port Authority issued $50 million in tax-exempt revenue bonds for the construction of Freedom Center improvements. Located at the northern terminus of the Roebling Suspension Bridge, the National Underground Railroad Freedom Center is a national interpretive and educational center designed to relate the lessons of the Underground Railroad Movement to contemporary freedom movements across the globe. The $110 million Freedom Center (totals) 160,000 square feet, with a park south of the facility connecting the Freedom Center to the Central Riverfront Park."
- "The Banks has pursued public funding opportunities at the federal, state, and local levels."
- "The Banks has aggressively pursued grant funding in order to bring the project to fruition."
- "The Port of Greater Cincinnati Development Authority was successful in its submittal of an application for a $10.4 million federal Congestion Mitigation/Air Quality grant for the creation of The Banks Intermodal Facility to replace the existing Cinergy Field Plaza Garage and surrounding surface parking lots with below-grade parking facilities. This is a joint project between the Port Authority, the City of Cincinnati, Hamilton County, and the Southwest Ohio Regional Transit Authority to provide a regional transportation hub near the riverfront."

- **Calhoun Street Marketplace Project (South of the University of Cincinnati)**[3]
  - "A corridor of new housing, shops and restaurants will rise opposite the university along Calhoun Street."
  - "New housing options will include 241 upscale condominiums atop ground-level retail shops and a 600-car underground garage."
  - "Led and owned by the Clifton Heights Community Urban Redevelopment Corporation (CHCURC), the redevelopment plan was approved by Cincinnati City Council in June 2001. The aim is to move from a drive-through, fast-food strip to a pedestrian-friendly, ethnically mixed hub of housing, international dining, shopping, entertainment and green spaces. Developer for the project is Higgins Development Partners out of Chicago working in partnership with CHCURC. All told, this project will cost about $125 million, partly funded by a $40 million loan from the University of Cincinnati, and $3 million in contributions for infrastructure improvements from the City of Cincinnati."

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[3] All quotes describing the Calhoun Street Marketplace Project, *see* The University of Cincinnati's Community Partnership Projects: Upcoming Plans for 2005, available at http://www.uc.edu/ucinfo/commpart.htm.

E-MAIL FROM ANNA CURRENT, JUPITER, FL,
TO THE HONORABLE F. JAMES SENSENBRENNER, JR.

Chairman Sensenbrenner:

My home is located within a CRA area that has been deemed "blighted." As you may know, adopting a Finding of Blight is the first step in the State of Florida before Eminent Domain comes to take your property. This area isn't actually "blighted" but the criteria for blight is so wide-open that a Mac truck could drive through. It includes, "numerous property owners, narrow lots, etc. I hope you will do your part to see that the Federal government takes stringent measures to un-do the harm caused by the recent Kelo supreme court ruling.

Thank you,

Anna Current
Jupiter, Fl 561-746-7354
Anna Current [annac711@bellsouth.net]

P. S. I am attaching a recent LONDON OBSERVER news article, in which I was interviewed by the largest Sunday newspaper in England. It suggests that foreigners shouldn't consider buying in the States due to this Eminent Domain ruling.

Uncle Sam invades the land of the free

American homeowners are fighting a compulsory purchase war,
writes Karen Dugdale

Sunday August 21, 2005
The Observer

If you own or are looking to buy property in the United States, take care: you could find yourself caught in a land grab controversy.

Eminent domain - similar in principle to a UK compulsory purchase order - is the power of the state to appropriate private property for 'public use' in return for just compensation.

Historically, the definition of 'public use' restricted eminent domain to the development of schools, roads and public offices, but a gradual broadening of the term by government agencies has seen it being used as a tool to promote questionable urban development. Thousands of properties have been designated 'blighted', making them eligible for seizure.

In a landmark case on 23 June, Kelo v City of New London (in Connecticut), the Institute For Justice, a non-profit law firm, lost a planned eminent domain condemnation on behalf of Susette Kelo. The Supreme Court granted local governments the power to seize homes and other property, ostensibly to boost economic development.

Within hours, private property owners and businesses, across the US - in particular in lucrative waterfront and coastal locations - found their properties threatened as developers took the decision as a green light for similar actions.

But proposals of developers and city planners to replace established coastal communities with million-dollar condominiums and shopping malls - which would increase local tax revenue - may be premature.

There has been an unprecedented backlash, spearheaded by Castle Coalition's $3 million grassroots campaign, Hands Off My Home.

Castle, an activism project set up by the Institute For Justice, equips property owners with the means and tools to fight the abuse of eminent domain. Its 'survival kit' illustrates the steps short of litigation ordinary people can take to protect homes and businesses.

'The Institute For Justice can take only a couple of cases each year,' says Castle's co-ordinator and attorney, Steven Anderson,'but we found people were doing a good job of stopping cases of eminent domain abuse by applying political pressure and raising awareness.'

The campaign - complete with its logo of a giant hand grabbing a house - has been effective. In the two months since the Supreme Court ruling, bills have been introduced in 16 states, restricting the use of eminent domain for private development. Alabama went one step further, on 3 August by becoming the first state to legislate against the use of eminent domain for private development or bumping up taxes.

There is now evidence of private developers pulling out of multi-million dollar projects. Buoyed up by public support, landowners are refusing to accept the low compensation offered and standing their ground.

Rather than forcing the sale of the land, many city planners and developers - made aware of the strength of public opinion by a recent poll that showed 89 per cent of those surveyed were against the use of the eminent domain law for private development - are backing down, although their frustration is evident.

When an investment company pulled out of a $30m project to build condominiums and retail units in the St Louis suburb of Florissant, the mayor was quick to point out that eminent domain was not about 'taking grandma out of her house'. Nevertheless, the development was abandoned.

Anderson feels this is just the start of the process to roll back abuses of eminent domain. The Institute For Justice carried out a study from 1998 to 2002, which showed more than 10,000 threatened condemnations took place over that period, many involving bogus blight designations.

'In Ohio blight means not having an attached two-car garage or two bathrooms,' says Anderson. 'Or in some cases having a home which is more than 40 years old. The way a state defines blight is so vague that it can be applied to any property the government wants.'

He feels that unless current blight laws are reformed to curb the abuse, property owners will never be secure.

'If the mere possibility of an increase in tax revenue is a justification to take someone's home, then nowhere is safe. The government can say this is the price we will give you and if you don't accept it we'll take your home anyway.'

Anna Current, a resident of Jupiter, Florida, agrees. Her home is in the area of old Jupiter, 20 miles north of West Palm Beach, now designated as blighted and earmarked to make way for a river walk and new town.

'People always thought eminent domain was for public works,' she says. 'But now they're targeting beautiful waterfront areas and uprooting entire communities. It shouldn't be happening.'

http://observer.guardian.co.uk/cash/story/0,6903,1553040,00.html

PREPARED STATEMENT OF SCOTT A. MAHAN, SUBURBAN OFFICE EQUIPMENT, ARDMORE, PA, TO THE PENNSYLVANIA HOUSE OF REPRESENTATIVES' LEGISLATIVE COMMITTEE, AUGUST 31, 2005

This is my testimony that I gave at the eminent domain abuse hearing of the Legislative Committee of the PA House Of Representatives in Philadelphia on 08/31/05. If I can ever be of any assistance in getting these bills passed, please let me know. Eminent Domain Abuse and especially Bogus Blight Designations need to be eliminated from our state laws. Pennsylvanians must know that their private property is safe and that our state legislature will ensure it. Thanks...

Testimony of
Scott A. Mahan, Suburban Office Equipment, Ardmore PA
To The Pennsylvania House of Representatives'
Legislative Committee
August 31, 2005

Thank you for the opportunity to give testimony today on such an important issue. Private property rights are one of the most important elements of a democracy, because as Samuel Adams, known as the father of the American revolution said, "Among the natural rights of the colonists are these: first, a right to life; secondly, to liberty; thirdly to property; together with the right to support and defend them in the best manner they can.

My name is Scott Mahan. I run my family business, Suburban Office Equipment, with my mother, brother and seven full and part-time employees in Ardmore Pennsylvania. My grandfather started the company in 1926 and it has survived the great depression, several wars, bad economies and the onslaught of big box super stores. Ours is the epitome of a multi-generation, American small business.

My family's business is successful because we take care of our customers and we have always been active in our community. Our building is well maintained and attractive, as are our neighbors'. On our east side is a thrift store whose total proceeds benefit a local hospital. To the east is Hun Nan Chinese Restaurant, a veteran's hall that houses a VFW and American Legion post, an auto tag store, a nail salon and very popular Italian Restaurant called Fellini's. These are all active, thriving businesses, each of which is an important part of the community and truly each a piece of Americana. All of these buildings are located in Ardmore's Historic District and each are listed on Pennsylvania's list of historic places. Sounds great, right?

In February 2004 we received a letter in the mail from Lower Merion Township stating that they intend to acquire our property for inclusion in a mixed-use development project that will include new retail, apartments and parking to be owned by a private party. The letter stated that the Township WILL create a Revitalization District and that WILL enable them to acquire our property.

It seems as though Lower Merion Township was using a common tactic of creating a ***bogus blight*** designation that enables them to abuse the power of eminent domain to take private property from its own citizens and pass that

property to another private party. I always thought that eminent domain was a last-resorts power of the government to acquire property for public uses like roads, schools and bridges.

However, due to a case called Berman vs Parker 1954, it can also be used to clear blight from slums. BUT, because of over-broadened criteria for blight designations, anything can be declared blighted and therefore anyone's property can be taken and handed over to someone else. Robert Guest from The Economist magazine came to Ardmore a few weeks back to do a story on eminent domain abuse in The United States. I had walked around with Robert and showed him our block. I asked him what he thought of our blighted area. He said with a confused look, "what Blight?". He didn't see it. Ya know why? Because it is not blighted!! He wrote in last week's issue, **The local government had declared the area "blighted". But a brief walkabout reveals that it is no more blighted than the potato you ate for lunch**.i[i]

We banded together with the other targeted property and business owners. We marched and protested with hundreds of local residents. We spoke at the required public meetings of the Township Board of Commissioners and Planning Board, but to no avail. At one of the Lower Merion Township Planning Committee meetings, 114 people spoke from the general public. 109 of them spoke out against plans that would use eminent domain. No matter how much the plan was opposed by residents (the hearings where overwhelmingly against), the Board of Commissioners and Planning Commission were simply going through the motions – doing whatever they had to do procedurally to comply with the law.

The Urban Land Institute was brought in, as outside experts in land use, planning etc, to view the commissioner's plans and to see Ardmore's assets. They saw Ardmore as a charming town with a mix of businesses that many towns strive to achieve, but rarely do. They also said not to use eminent domain. **We believe that all of the things that we think should be done, can be done without any taking, without any condemnation of private property – not because we're afraid of condemnation…a lot of people on the table have been on this business for a long time..but rather because we're trying to improve and enhance existing assets. We're not trying to tear them down, goes against our basic assumptions of what ought to be done here.ii[ii]**

The Township was presented alternative plans that were backed by the township civic associations that would avoid the use of eminent domain. The Township did just as they stated in their initial letter and declared the area blighted and affirmed their intentions to use eminent domain by selecting a plan that would take our properties over plans that would accomplish their same goals without hurting anyone. It was a classic dog and pony show. **Justice Stevens in the Kelo majority says that local governments are the best venues to consider these issues – he's detached from the reality of the situation where the**

commissioners are yawning, falling asleep and generally ignoring everything that is being said.iii[iii]

The Lower Merion Township commissioners ignored the recommendation of the Urban Land Institute.

As we continued to fight for our rights, Suzette Kelo was fighting for hers and her neighbors' in New London CT. We contacted The Institute For Justice in Washington DC for assistance which they have us provided much. Residents and businesses formed the Save Ardmore Coalition over a year ago to give the people a voice. Our numbers are growing because of every citizen's concern to have their right of private property protected.

When The US Supreme Court handed down the horrible *Kelo* decision, we thought that our problems would get worse. However the ground swell of opposition to the decision has fueled the efforts of state legislatures to get right what the US Supreme Court got wrong, and that is where we are today.

Legislative reform of Pennsylvania's eminent domain laws is imperative. Urban renewal laws that give condemnation power for blight removal must be changed and the criteria by which communities are deemed blighted must be re-worked so that local governments can't take non-blighted property just to increase their tax base or to benefit politically privileged developers and other private entities.

The power of eminent domain is awesome, so awesome that in the early days of this country, the U.S. Supreme Court described it as "the despotic power". Put simply, it is the power to remove individuals from their long-time homes and destroy small family businesses. It is a power that must be used sparingly and only for the right reasons.iv[iv] To protect property owners, the Fifth Amendment to the U.S. Constitution provides: "nor shall private property be taken for public use without just compensation.

Lower Merion Township has been presented with several plans that would satisfy their goals without the need for eminent domain. Any plan selected for any project anywhere, even those projects that are truly for a public use, should try to accomplish those projects without the taking of any private property and eminent domain should only be used as an absolute last resort. **"What matters is whether the plan represents such a pressing public good that it is reasonable to use the state's vast coercive power to execute it. For most Americans, Interstate-95 passes muster, but yuppie condos don't."**v[v]

U.S. Supreme Court Justice John Paul Stevens, who wrote the majority opinion in *Kelo vs. City of New London*, said during a speech last week that the result in the case is one "I would have opposed if I were a legislator," the New York Times reported.

In a speech to the Clark County Bar Association in Las Vegas, Stevens noted that the result of his majority opinion in *Kelo* is "entirely divorced from my judgment as concerning the wisdom of the program" to take homes for private development. "My own view is that the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials"

Private Property must be protected in Pennsylvania. The US Supreme Court has said that the protection of private property is the responsibility of each state. Please commit to legislation, which prohibits the taking of private property and its transfer to a private entity for the sole purpose of generating increased tax revenues, and encourage the re-working of Pennsylvania's blight laws.

Thank You

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i[i] Robert Guest, ***The Economist***, August 18, 2005
ii[ii] Charlie Kenrick, chair; Urban ILand Instittue Ardmore Presentation 09/24/2004
iii[iii] Steven Anderson, Castle Coalition Coordinator Institute For Justice Washington DC
Before the Missouri Task Force on Eminent Domain 08/18/2005
iv[iv] Steven Anderson, Castle Coalition Coordinator Institute For Justice Washington DC
Before Lower Merion Township Board Of Commissioners 12/14/2004
v[v] Robert Guest, ***The Economist***, August 18, 2005

Letter from Cheng Tan, Jersey City, NJ, to the Honorable Arlen Specter, and the Honorable F. James Sensenbrenner, Jr.

To: Senate Judiciary Committee House Judiciary Committee

Chairman Specter Chairman Sensenbrenner

Dear Honorable Members of Congress ,

I am sending this letter to you because a monumental injustice has been commiitted by the local government of my City, Jersey City in New Jersey . I believe my case is a typical example of eminent domain abuse committed by the local authorities which small business owner like me have little recourse. Unquestionable, I believe the taking was racially motivated or social cleansing by groups of idealogues who wishes to decide who can reside in the up and coming lucrative Waterfront of Jersey City . With a new luxurious golf course in the making and a $250,000 fee to be a member it does not take too much common sense to conclude the type of inhabitants that will eventually reside here. Real estate and rents are soaring to levels that the average american family will no longer be able to afford to live here, in Jersey City. The major developers are literally remaking the Downtown section for the wealthy and chasing out the original inhabitants who have settled here for decades, many of whom will have difficult time relocating elsewhere if displaced.

What happened to Life, Liberty and the Pursuit of Happiness ?

The core issue of this letter is to let you know of the wrongful taking of my very valuable commercial property through selective eminent domain under the guise of a Redevelopment Plan know as the "Tidewater Basin Redevelopment Plan".

One of the ways to prevent me from developing this real estate was the conversion of a prior zoning of (R-2 dual commercial use) into a recreational use area for open space or a ball field.

If the current zoning was left as it was I in fact will , as redevelopment takes place, build and augment my business and turn what was a mere $540,000 parcel into a multi million dollar enterprise. This in fact is the business planning for hundreds of other designated Tidewater basin Project Property Owners all of whom Two, have been favorable zoned and will reap these immense benefits ..all but two,

and those two are minorities, Asian Americans..small fish !

This is a taking contrary to the Mount Laurel decision, planned to deliberately deprive me and one other owner of a fair piece of the prosperity said Tidewater basin Redevelopment will create, and deprive us minorities from the Project.

To complicate matters the City is taking my property on behalf of a Church and its partnerships together forming a Corporation known as the The Peter's Athletec Foundation, Inc. who has been designated as the developer of choice. Property Owners like me are left out for months or years of "secret negotiations" with the developer eying the property.

Efforts to have dialogue with City Officials were in vain. Politicians I contacted including the current mayor, shied from responding to my pleas for help in addressing this injustice.

Since I was told to limit my testimony to two pages I will gladly provide more details of my case if requested the Committee members request me to do so..

Respectfully submitted on September 16th 2005 by:

Cheng Tan

195 Grand Street

Jersey City, NJ 07302

Tel: 201-736-2392

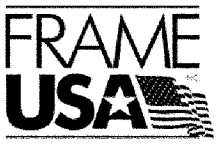
email: terrytan@earthllink.net

E-mail from Andrina Sofos

I will be glad to tell you my story. We had a body shop for over 26 years, and for those years the city of daly city
has tried 3 times to come back to us on eminent domaine for the use to benefit the Borel Developement Corp.
which are located in San Mateo, Calif.
They have taken out 2 thriving businesses that were doing very good all these years, and litterally gave away
the farm to this developer. for one million dollars they gave him about l.75 acreas where land up there on mission street where are property is located is worth over 300.00 a foot.
They gave away even the War Memorial building ,had now been demolished and they plan to build a new one and sweetheart deal with this
developer , for office space condominiums and retail space including my property for so called parking they claim. Its not right to take
away property for the use of someone else to make money, we came from the old country and work hard to have what we have my husband and I, and they have deliberately caused us great harm to our family , for their spite and greed to make money. The address is 6601=05 Mission St. in Daly City.
They have lusted for our land for many years they took it in 1978 and then they release it in 1979 because of lack of money, when proposition 13 came in and they were in violation of not having an EIR report then as well.
Now they are throwing thePolanco Act.
at us , we have to remove tanks underneath the ground plus we had to remove asbestos paint, while the war memorial had asbestos, the city did not do any type of covering as they had us do to our building. It was like
putting a big bubble of plastic over our
building and we were all covered up at a very great expense. Do you call this
justice and liberty for all. We were believing that this is a free country to live in and work hard to make our future here for our family and children,
what do I tell my grandchildren, now,
I have to tell them the truth. People are losing their property rights thats why grandpa and grandma are suffering right now and they have torn down our land. We the greek civilization braught this freedom called democracy, but the politicians do not know what the word means, much less
our 4 Justices that went against the people, please find it in your hearts to tell the story and help the people get back their freedomo to own land and be left alone to suceed. We are not using taxpayers money, we wanted to build a medical Building it would have been one of a kind, it would have been called the name the doctors swear in when they get their doctorial degrees, the HIPOCRATIC MedICAL CENTER.
YOU KNOW HOW MUCH IT HURTS TO SEE YEARS OF HARD WORK TAKEN AWAY FROM YOU, PLEASE DO NOT LET THESE GOVERNMENTAL PEOPLE HARM ANY MORE PEOPLE LIKE THEY HAVE, IF IT WAS A HOSPITAL I WOULD SAY OK, BUT ITS FOR TO BENEFIT THIS DEVELOPER, WHO THEY CLAIM IS BETTER THEN THE PEOPLE OF THIS COUNTRY. PLEASE FIND IT IN YOUR HEARTS TO HEP ALL THE PEOPLE AND ESPECIALLY THE KELO'S AS SHE
IS A NURSE HAS THREE JOBS AND A HANDY CAP HUSBAND. MAKE US BELIEVE THAT THIS IS TRULY THE GREAT CONTRY IN WHICH WE HAD ONCE BELIEVED IN. AS FOR US WE ARE FIGHTING OUR CASE IN COURT ,USING OUR OWN MONEY, WHERE THE POLITICIANS ARE USING HUD GRANTS. MILLIONS OF DOLLARS OF TAXPAYERS MONEY HAVE BEEN SPENT BY THESE CITIES AND HUD IS ALLOWING THIS ,ITS A SHAME FOR THIS TO GO ON, THEY ARE RIPPING THE PEOPLE OUT AND LEAVING THEM IN SHAMBLES, THIS EMINENT DOMAINE ABUSE IS WRONG ITS NOT GOOD FOR THE COMMUNITY,NO ONE WANTS THIS
PROPJECT , CALLED THE LANDMARK TOP OF THE HILL. THEY WILL EVENTUALLY HAVE TO OPEN UP THE SIDE TREETS AND TAKE HOMES AWAY FROM THE PEOPLE BEHIND OUR PROJECT.

I HAVE AS AN ATTORNEY PETE MCLOSKEY OUR GOOD CONGRESSMAN THAT REPRESENTE ALL THE PEOPLE IN THIS DALY CITY AREA AT ONE TIME, HE IS VERY APPAULED WHAT THE CITIES ARE DOING AND IS HOPING THAT YOU WILL ENDEAVER TO HELP CHANGE THIS GREGIOUS LAW ON ABUSIVE TAKINGS OF PEOPLES PROPERTY. IT IS TRULY HITLERISM IN ACTION. WE ARE SUPPOSE TO LIVE IN A FREE AND DEMOCRATIC GOVERNMENT WHERE THE PEOPLE ARE HEARD,
WHERE ARE THEY TO HEAR THE PEOPLE THEY ARE TRULY SENDING THE WOLFS OUT LIKE SUZEETTE KELO SAID. THANK YOU FOR LISTENING TO US, WE ARE IN RETIREMENT AGE AND DO NOT LOOK FORWARD TO WHAT THESE CITY PEOPLE ARE MAKING US GO THROUGH. THIS PROPERTY IS VERY VALUABLE, WHY SHOULD IT BE THE DEVELOPER MAKE MONEY BY OUR OWN SWEAT AND HARD WORK. WE WILL FIGHT TO THE END TO GET OUR VALUE OF THIS PROPERTY AS IT IS PRICELESS, AND THEY KNOW IT, THEY JUST DO NOT WANT TO PAY THE RIGHT PRICE FOR IT. STOP THIS DANGEROUS LAW ,THAT THE JUSTICES HAVE TWISTED IN FAVOR OF THE DEVELOPERS. MAY GOD GIVE YOU GOOD DIRECTION TO HEAR THE PEOPLE AND DO THE RIGHT THING, FOR THIS WAS SUPPOSE TO BE THE U.S. OF AMERICA WHERE ALL THE PEOPLE HAD THE RIGHT TO OWN LAND AND ENJOY THEIR HARD WORK AND BE LEFT ALONE, PLEASE ENFORCE LAWS IMMEDIATELY TO HELP THE PEOPLE NOW . THANK YOU FOR HEARING ME .ANDRINA AND ARISTIDES SOFOS I HAVE A CELLULAR PHONE IF YOU NEED TO TALK TO ME,I WILL BE IN CALIFORNIA ON THE 18 AND UNTIL THE 21ST. 775-233-1590

LETTER FROM DANIEL P. REGENOLD, CEO, FRAME USA



September 16, 2005

Hon. Chairman Sensenbrenner
House Judiciary Committee

Hon. Chairman Specter
Senate Judiciary Committee

PLEASE INCLUDE AS TESTIMONY IN THE
HEARINGS REGARDING EMINENT DOMAIN

Dear Chairman Specter and Chariman Sensebrenner:

The threat that Eminent Domain poses to ordinary small businessmen and home owners is growing and rampant. We all appreciate your review of this subject in light of the madness of the recent Supreme Court decision which creates confusion about the rights of ordinary citizens to own property.

In October 1991, I woke up to find that the City Council of Evendale Ohio (Hamilton County, Ohio) had designated our entire business corridor (130 properties) a blighted area. The Council had hired a consultant to go out and come up with this creative definition of the area to allow them to create an Urban Renewal Plan. By creating this Urban Renewal Plan this meant that Evendale would be able to take any single piece of property in the area by Eminent Domain if the owner did not want to sell.

In no way was this particular area of Hamilton County (one of the most affluent in Ohio) deteriorating, deteriorated or blighted.. The blight designation was done simply to allow control and influence over property owners. The Council took this action because they thought they could. They were told this by their advisors and their Economic Development Director that everyone was doing it and the legislature had broad powers to make such a designation.

For two years several of us business Owners fought the designation. During our investigation process we were denied documents regarding the blight designation. We were forced to file a lawsuit against the City to turn over documents which we won had been withheld (we won). We uncovered fabrications in a consultant's report which had been paid for with taxpayer's money which they had tried to use to back up their efforts. In summation, the Village would go to any lengths to get their goal – control over a huge block of valuable property. (for more information go to www.blightedevendale.com).

The long and the short of it is that after fighting for two years we thought we lost and I went and bought a new building for my growing business. The move and the hassle cost me hundred's of thousands of dollars in lost time and acquisition costs. Please don't make other's go through this completely unfair and painful process. If you don't do something to hold the Eminent Domain process "in check" cities feel like they have unlimited power. Stop their hungry land grab now and affirm the rights of citizens to own and enjoy their property. Thank You!

Sincerely.

Dan.

Daniel P. Regenold, CEO
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LETTER FROM CARL AND ARLEEN YACOBACCI, DERBY CT, TO THE HONORABLE ARLEN SPECTER AND THE HONORABLE F. JAMES SENSENBRENNER, JR.

Carl and Arleen Yacobacci
10 Lombardi Drive
Derby, Ct. 06418
203-734-3135 (h)
203-732-0267(w)
203-668-6597(c)

RE: Senate Hearings on Eminent Domain, September 20, 2005

Dear Chairman Spector, Chairman Sensenbrenner and members of the committees:

We own a small business and several parcels of commercial property in Derby, Connecticut, which are being threatened by eminent domain. We strongly disagree with the power of the government to evoke eminent domain to take private property to hand over to developers.

The US Supreme Court had originally limited the power of eminent domain, defined as the taking of private property for public use, as long as just compensation is paid, and the purpose was for public use. Public use should be for highways, schools, libraries, etc. Public use should not be for privately-owned office buildings, condominiums and industrial parks that benefit the large developers and politically-connected businessmen.

Approving condemnation of private property, residential or commercial, for the purpose of new buildings owned by one company, can only lead to corruption within local government and large developers. With this abuse of eminent domain, a developer does not have to negotiate fairly with property owners. Local governments seem to be eager to give away this property instead of offering incentives to the local businesses to improve their communities. This process eliminates small businesses and land ownership by a multitude of people. What is left is one corporation owning large pieces of the choicest properties and dictating property use and cost.

In our city, Derby, the smallest city in the state, the businesses and property owners in the redevelopment zone are being threatened by our local government to be taken by eminent domain if we do not bow down to the developers wishes. To make matters worse, our local government has let city-owned property become blighted and unusable. Our downtown has been an unsightly mess by the partial demolition of some of these buildings which was never completed due to non payment to the contractor. Two weeks ago the roof of another city-owned property collapsed next to us. Our city has closed-off portions of sidewalks and put in concrete barricades which block parking spaces, adversely affecting businesses on Main Street. We are then told our properties are devalued by the town's actions.

The offers we received from the developers are approximately half of the appraised values. If we are forced out through eminent domain, we could not afford to relocate as we would not be receiving fair market value. It could take years in court to receive "just

compensation" and by then we would be out of business and the lawyers would end up with a huge amount of any settlement. Furthermore, our local government nor the developer have presented any relocation plan for the businesses in downtown nor does the approved redevelopment plan include any alternatives for local businesses presently located in the zone. When we ask where we can be relocated, we are told the City will not discuss any details. Due to the size of our city, there are few options where the affected businesses can be relocated. One of the "options" mentioned by the City is land acquired from the Connecticut DOT which was a former asphalt plant that is contaminated.

In October 2004, the public was told the project would be completed in June of 2007. This information has put many peoples' lives and livelihoods on hold. Now the developer has changed plans to include more than twice the residential units previously proposed. The developer has increased their plans for commercial space by 67%. They have restructured its plan to take even more downtown land, some of which we purchased to move our business. The developer has missed numerous deadlines (without penalty) on a project that may never be built. The developer's representatives have made it clear to the affected business owners during an informal meeting at City Hall that they are motivated by "greed".

There are many people who wish to rebuild our town by means of individual ownership and development. Eminent domain as it currently stands, makes it easier for towns and cities to take property, give it away and not have the responsibility to rebuild what they let deteriorate.

Please adopt laws to protect individual rights of citizens to own property, to prosper by expanding and growing their businesses and to keep our right of private property ownership in the hands of its citizens and not large developers.

Thank you,

Carl and Arleen Yacobacci
Email: classictops@sbcglobal.net

E-MAIL FROM BRIAN CALVERT, CEO, CALVERT SAFE & LOCK, DERBY, CT

My name is Brian Calvert; C.E.O. of Calvert Safe & Lock, Caroline Street Derby, CT 06418 My store and property is under threat of eminent domain from the City of Derby and its agent Ceruzzi Development LLC. These are some my thoughts on this matter.

I immigrated to America in 1969 with my family looking for the opportunity to determine my future with hard work and a strong work ethic. All we heard about America was that it was the land of opportunity and that if you worked hard and invested wisely you could attain your dreams. I am now 63 and in the last 36 years I have built a business that employees 14 people and contribute a great deal to the community and the country, I have attained my dream! And now I am informed that my investment in the property that I own and the future that I want to give to my children is going to be handed over to a billionaire businessman to give to his children, they have offered a pittance to purchase this fine store and land although I have told them it is not for sale. We told the City and the developer that if they could relocate us and replicate what we have now we would talk to them but have not been offered any options. The threat by the city lawyer that they would use eminent domain to take our property and give it to this developer is a constant worry to our business and us.

The American Dream or the American Nightmare?

"Good Guys"-People who are conscientious and work hard for what they have and contribute to society
"Opportunists"- People who look for anybody they can take advantage of and take what does not belong to them.

Although there are still a lot of the "good guys" around we are being pushed to the side by people who want to take what they have not earned by using loopholes in the law.

The State should think long and hard about the people it serves and supports. Whether it be the smooth talkers and land stealers or the majority of hard working "Good Guys"!!

They use words like 'eminent domain' and 'adverse possession' and think that entitles them to any land or property they want without working for it or inheriting it.

In our instance we have a multi billionaire company who can well afford to purchase what they need but will go to the Government and make a case for the government to steal the land from the lawful owners and give it to them for what ever price they both determine. I call this 'Hood Robin' taking from the poor and giving to the rich. The opposite of Robin Hood who at least fought for the poor.

I urge you to reject this concept and put a permanent hold on any of these land-taking ideas for use for nongovernmental projects. If someone wants some land and if it is for sale then negotiate in good faith, if it not for sale then move on!

By: Brian Calvert
Calvert Safe + Lock
Caroline Street
Derby, CT 06418

LETTER FROM WRIGHT GORE, III, WESTERN SEAFOOD CO., FREEPORT, TX, TO THE HONORABLE F. JAMES SENSENBRENNER, JR.

September 18, 2005

The Honorable F. James Sensenbrenner, Jr.
Chairman
House Judiciary Committee
2449 Rayburn House Office Building
Washington, DC 20515

Dear Rep. Sensenbrenner:

I am writing to testify on the impact that eminent domain for "economic development" has had on my family's 55-year-old business. My grandfather purchased our wholesale shrimping business in 1949. Both my father and he have worked seven days a week for most of their lives in this hardscrabble business. The business has overcome many serious adversities over the decades including environmental upheaval, dozens of hurricanes, and even the entry of a Fortune 100 company (whose operations we now own and use). But my family's business has finally met an adversary that may destroy us: our own city government.

The City of Freeport teamed up with a multimillionaire heir developer to take my family's business property, which is entirely dependent on its access to the waterfront, and to immediately convey title to this developer for a marina project. We subsequently offered to share over half of the contested property with the developer, who simply decided that wasn't enough. In the one meeting the developer granted us, we asked him to drop his eminent domain threats so that we could negotiate in good faith. His response was that eminent domain was a tool at his disposal, and that "we're going to use this hammer." Then he proceeded to serve me with a lawsuit for speaking up against this injustice by my publishing of a website, http://scandalinfreeport.com.

Our case is the one that was mentioned by Sen. Cornyn during his June 30 press conference introducing his bill in response to the Supreme Court's Kelo decision, when he was asked if there were any examples of eminent domain abuse in Texas.

Our case also involves the use of federal funds in order to take our property by eminent domain and give it to our next-door neighbor. The U.S.
Army Corps of Engineers is intimately involved in working with the City and the developer, because the project is located along a federally regulated waterway.

The City of Freeport has literally rented out its power of eminent domain in what many, including myself, believe to be a quid pro quo arrangement. The developer, whose family also owns the local bank, donated the bank building (the only office building with elevators in town) to the City of Freeport. A few months later, the City's Master Plan explicitly stated that it would use eminent domain to take property from my family and several other waterfront property owners, and convey title to the developer for his proposed marina project. The

developer never approached us about his project. He simply went to the city fathers and said, "I want that property."

We would like to see the definition of federal funds involved in eminent domain projects expanded to include not only direct federal funds used in the assembly and construction of a project, but also to include other federal resources used to promote such projects, such as the hundreds of hours of federal employees' efforts being used to implement this legalized theft of my family's property.

Despite the passage of Texas' Senate Bill 7 during the second called session this summer, my family's property may yet still be taken. Freeport's City Manager testified in a deposition that the developer's marina project would employ 10-15 people. My family's business directly employs 56 people along the waterways in Freeport. Hundreds more workers can be found on the docks during the shrimp season. This project would result in the net destruction, not creation, of jobs.

Our case made nationwide news when we became the first victim of the Kelo decision. Within hours of the decision, the City of Freeport filed in federal court to condemn my family's property, cutting off access to our unloading facilities. Losing access to this property means that we would be unable to take in shrimp from boats as we have for over 50 years.

In this regard, the eminent domain abuse we are facing is even more egregious than the process in New London, where the City of New London would own the property and lease it for a nominal amount. Rep. Kucinich had it right when he asserted that Kelo turned every municipality into "a carnival of real estate bargains" on the backs of homeowners and business owners. Our case is on appeal at the Fifth Circuit Court of Appeals, and is currently stayed pending further legislative action on the federal, state, and local levels.

On behalf of my family's business and of the hundreds of homeowners and business owners all across the country who eminent domain cases are stayed pending legislative action on this subject, I urge the committee to pass meaningful restrictions on eminent domain by municipal governments in the name of "economic development."

Yours truly,

Wright Gore III

Western Seafood Co.

Freeport, Texas

E-mail from Don and Lynn Farris, L D Farris & Associates, Inc., Lakewood, OH

Hi!

I just wanted to briefly share with you our experience with Eminent Domain.

Our city, Lakewood, Ohio, did a study and decided that our business was in one of the most desirable areas of the inner ring suburbs of Cleveland. We had invested heavily in our property as well as other residents and business people. All of a sudden the plan to "update" our area was changed by the mayor and the developer in a memorandum of understanding signed well before it became public, that she would take our properties by eminent domain. No longer were we part of the plan but our property seized to be given to another private individual for their gain.

To accomplish this, she had to go through an exercise of a community development plan in which she had our area declared blighted. The reasons used for this "bogus blight" was the lack of a two car attached garage, central air, 2 full baths (not the 1 1/2 baths most of the homes had) and other amenities of new construction. One of the worst reasons used to blight us in my opinion was "diversity of ownership". The fact that people owned their own homes and businesses made it blighted. (The American Dream is not blight.) The definition used for blight met the criteria of 93% of the homes in our city. A city that was largely developed many years ago. This was highlighted in the Mayor's appearance on **60 Minutes** when she admitted to Mike Wallace that her home was as blighted as the homes that she was taking.

Additionally the Mayor had agreed to a TIF with the city backing the developer with 42 Million dollars in Bonds. They also planned to use Federal and State funds as well.

Fortunately for us, the Institute for Justice agreed to represent us. It is extremely difficult for an individual or small business to fight city hall with all the resources they bring to bear (e.g., our taxes). We were also fortunate in the fact that we live in a very politically active city and not only was a law suit filed on our behalf by the Institute for Justice, community groups went out and filled a referendum on the Project, an Initiative Petition on the Blight and a Charter Amendment to prevent this from happening again. The city with the developer and the attorneys representing the developers outspent us considerably.

Without the assistance of the Institute for Justice, which can't help everyone, we would have had no chance of winning this battle. They were able to assist us in making the big national media contacts such as the Fleecing of America and 60 Minutes who were not controlled by local politicians which helped us sway public opinion our way. In short, we won by a mere 47 votes. But our win was nothing short of a miracle. Those of us that had our homes and business threatened spent almost 2 1/2 solid years fighting to save them. The loss in productivity was amazing in our business alone. Hundreds of thousands of dollars were spent that could have been used to revitalize neighborhoods instead of fighting each other.

What cities need to rebuild is financial instruments to allow us to do this cost effectively and to address small infill projects. We need to be able to cost effectively fix the infrastructure. The slash and burn policy offered by Eminent Domain is not a good solution. I'm sure you are looking at research that shows the fallibility and the risk in these large non public projects. Putting all of your eggs in 1 basket is never a good idea. Doing many small projects, spreading the risk and allowing citizens to help rebuild their city is more successful.

The court has assumed that the city does a good job in evaluating their community. Normally I would agree. But having lived through this. I found that the city and the city officials did a great job of going through the motions of holding all the meetings. These were all meaningless steps to them. The law said they had to find a pretense for the blight - so they did. It didn't matter if the data was accurate or a reasonable person would have found it blighted. The whole thing was a charade so that they could transfer land from middle class Americans to a rich politically connected developer. Kelo makes it even easier. Now they don't even have to pretend. Please save the American dream of allowing people to own their own homes and businesses. Protect our right to own property.

Thank you,
Don and Lynn Farris

PREPARED STATEMENT OF ANDREA C. ZINKO AND JODY CAREY

This is testimony from San Diego, California, on the San Diego Model School Agency, an independent State-created agency with no oversight, that proposes to take mostly single-family homes in a largely minority community. Federal funds are proposed for this project to build Section 8/affordable housing after using/threatening Eminent Domain on the current residents. This Agency and project has garnered media coverage in San Diego, as well as resident Jody Carey testifying at the State Judicial Committee Meeting on Eminent Domain on August 30, 2005. It is being called the "Kelo Case of California".

Sincerely

Andrea C Zinko and Jody Carey

Californias' Kelo

On September 10th and 11th, 2004, a glossy brochure came in the mail. What it contained astounded and angered residents in Swan Canyon and Castle neighborhoods of City Heights, an urban community of San Diego approximately 5 miles from the Downtown area.

This brochure came from the "San Diego Model School Development Agency", and it was a plan to create a "model" community around the Florence Griffith-Joyner Elementary School . This school was still in the design phase, though the homes on the site had already been obtained and leveled at least two years earlier. This "model" plan showed replacing mostly single-family homes with some apartments and a business strip with "market rate" condominiums and "affordable" apartments. The 509 "units" would replace approximately 120 -188 homes and businesses.

The brochure went on to explain that the Agency was made up of the City of San Diego, the City Redevelopment Agency, the Housing Commission (handles the Section 8 and 23 housing programs as well as their own housing units) and San Diego Unified School District (City Schools). It also stated that groups in the Community of City Heights had been involved in the development of the project, and that public meetings had been held for public input.

The reality is that until this brochure was received by the residents in September 2004, VERY FEW PEOPLE KNEW ABOUT THIS PROJECT. It was a shock to the majority of residents in this "potential" project area. People who had heard about it, like Jody Carey who bought into the neighborhood in early 2004, were told that their homes were safe because nothing was firm yet, and that the project possibly would not happen at all. There were a few who knew more about the project, such as the "Community Representative", but did NOTHING to inform the residents what was coming.

City Heights is a redevelopment district; it is also the most heavily minority and lower income community in the City of San Diego. Immigrants from all over the world and disabled/elderly/low income minority families live here. The neighborhoods that were selected were ones that had a higher income ratio, and were naturally revitalizing. Generational families live in some of the homes; very few had been sold over the previous 10 years.

As the residents organized and started obtaining evidence regarding the true nature of the project, we became more astounded and angry that this type of railroading could occur. The project was conceived in 2002 and pushed by a 501(c)(3) not-for-profit that "prided" itself in helping the community of City Heights "revitalize" itself. Then-State Assemblywoman Christine Kehoe took the idea of a "Joint Powers Authority" to the

California State Legislature, and risked censure in pushing this JPA bill to a vote. The bill passed, with the caveat of Eminent Domain assigned to the Agency, and no recourse as the Agency is independent of City and State oversight. The respective organizations that sit on the JPA vote for each others' Board positions, admit that they do not have to follow California Redevelopment law, and answer to no one but themselves.

In October 2003 the project area was enlarged to allow for more "market rate" condominiums so that any "Master Developer" could recover their costs more easily and make a profit. The final project area was decided in April 2004, supposedly with massive community support and input. Community organizations were misrepresented as being in support of the project, when in actuality they were not. Public meetings were not posted in local public places, and, again, residents in the affected areas were not told until they received the brochure. The Project Manager, tasked with due diligence, did not know the population they were dealing with, treating the residents as if they were "ignorant" of knowing what was good for them. They apparently did not even have an accurate list of homeowners, which was readily available from the Planning Department, saying it was mostly "renters" with only a small amount of resident homeowners, when the opposite it true.

The residents keep being told that this is not an "approved " project; however, the JPA acts as though it is. Residents were just required to fill out an Owner Participation Agreement/Proposal, which under normal California Redevelopment law is AFTER a project has gone through its Environmental Impact Report (which is still on-going) and has been approved by government agencies. The reason? JPA feels that since funding may not occur at the level they need, that the residents may be able to get better loan deals than the City could. The residents also keep being told that Eminent Domain is a last resort, but in a workshop held earlier this year, the JPA Legal Counsel stated that anyone who did not sell would be condemned, forced out of their homes, then "dealt" with in court. In essence, Eminent Domain is not used as a "tool", it is used as a legal threat of intimidation and persecution that for all due intent and purpose is against the law.

Because the Housing Commission sits on the Board, they have made clear that there would be Federal funds used, some of which they had been "setting aside" for several years to build the affordable apartments. There has been talk about receiving Federal funds at some point to "restore" the delicate ecosystems of the surrounding canyons that would be damaged by the project, as well as taking care of problems that had already been ignored for years by the City of San Diego itself.

When asked about senior/disabled and accessability, we are told that "families" only would be living in the condos and affordable housing, hence the designs of multiple levels and steps, no slopes or elevators. When asked about maintenance, they tell us they do not know who will take care of the properties, including the federally funded housing, and that it would take a JPA to get our basic maintenance done. Currently, because this is a "potential" project, the City is not required to maintain street lights,

sewers, etc because "someone else" will take care of it within 5 years. This puts current residents at risk and allows using increase in crime and "blight" from ill maintenance as a reason to destroy a sustainable community to create gentrification under the banner of "smart growth".

The similarities between the San Diego Model School Agency and the Kelo case are so glaring that news agencies and State legislators are calling this the "Kelo Case of California".

PREPARED STATEMENT OF ROGER PILON, PH.D., J.D., VICE PRESIDENT FOR LEGAL AFFAIRS, B. KENNETH SIMON CHAIR IN CONSTITUTIONAL STUDIES, DIRECTOR, CENTER FOR CONSTITUTIONAL STUDIS, CATO INSTITUTE

STATEMENT

of

Roger Pilon, Ph.D., J.D.
Vice President for Legal Affairs
B. Kenneth Simon Chair in Constitutional Studies
Director, Center for Constitutional Studies
Cato Institute

before the

Committee on Agriculture
United States House of Representatives

September 7, 2005

Re: Strengthening the Ownership of Private Property Act of 2005

Mr. Chairman, distinguished members of the committee:

My name is Roger Pilon. I am vice president for legal affairs at the Cato Institute and the director of Cato's Center for Constitutional Studies. I thank you, Mr. Chairman, for inviting me to testify today on the Supreme Court's recent decision in the case of *Kelo v. City of New London*[1] and to offer members of the committee my thoughts on H.R. 3405, the Strengthening the Ownership of Private Property Act of 2005 (STOPP).

I. Introduction

Let me say at the start that I'm delighted, but not surprised, that both houses of Congress as well as state legislatures across the country have responded to the Supreme Court's *Kelo* decision as they have. The public outcry against the decision has been loud and sustained—and rightly so.[2] For the Court, in effect, removed what little remained of the "public use" limitation on government's eminent domain power, its power to take private property for "public use" provided just compensation is paid to the owner. As a result, except where states limit their own power through state law, federal, state, and local governments are free today to take property from one private party and transfer title to another for virtually any reason they wish. Not surprisingly, it is usually the poor and powerless who are at greatest risk of losing their homes or businesses under this regime, while the well-connected profit handsomely by obtaining title to property "on the cheap." Exploiting those connections, they ask government officials to exercise their "despotic

[1] 125 S. Ct. 2655 (2005).
[2] See, e.g., "Missouri Condemnation No Longer So Imminent: Supreme Court Ruling Ignites Political Backlash," Washington Post, Sept. 6, 2005, at A2.

power," as eminent domain was known in the 17th and 18th centuries,[3] so that they might be spared from having to offer prices a willing seller might accept. It is a rank abuse of that power, and the Court's complicity in the abuse makes it only worse.

People are turning to their legislatures, therefore, including to the United States Congress. Since the purpose of these hearings is twofold—to review the *Kelo* decision and to consider whether and how the STOPP Act addresses the problems raised by it—I will discuss both, at least in summary form.[4] I should note here, however, that the problem rests rather more with the Court than with the political branches, although it starts with those branches. Had the Court done its job over the years, that is, these hearings would not be necessary. And let me be clear about that. This is not exactly a case of "judicial activism," at least as that term is often used today, although it is "activism" of a kind. What we have here, rather, is political bodies exercising eminent domain and the courts failing to police their use of that power to ensure that it is exercised consistent with the limits imposed by the Fifth Amendment's Takings Clause.

Thus, although the problem begins with the political branches, it is the failure of judicial review—the Court's "restraint," if you will, its *deference* to those branches—that brings us together here. That deference amounts to "activism" insofar as the term refers to judges failing to apply the law: whether that failure arises because they are too active or too passive, it comes to the same thing—they are not doing their job. It is not a little ironic, however, that people are turning to their legislatures to address this problem since the problem could be addressed quite simply by the political branches themselves, merely by restraining their own power in the first place. Thus, the STOPP Act might usefully be recast to legislatures, including this one, as follows: Stop abusing eminent domain in the first place; then we wouldn't need to turn to the courts.

But as the Founders understood, it is in the nature of political power that it will inevitably be abused, which is why they provided for an independent judiciary—to check that power.[5] The courts have failed in that, however, so H.R. 3405 has been proposed. To see whether it will address the problem, let me first review very briefly the principles of the matter, distinguishing the regulatory takings issue, which is not before the committee today, from eminent domain in its fuller sense, which is before us. I will then look even more briefly at how the Court has failed to police abuses in both of those areas.

II. The Court and Eminent Domain

There are two great powers that belong to government, the police power and the power of eminent domain. As the Declaration of Independence says, the reason we create government in the first instance is to secure our rights. That's what the police power is all

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[3] "The despotic power, as it is aptly called by some writers, of taking private property, when state necessity requires …." Vanhorne's Lessee v. Dorrance, 2 U.S. 304 (Dall.) (C.C. Pa. 1795).

[4] I have discussed these issues more fully in "Property Rights and Regulatory Takings," Cato Handbook on Policy, chap. 22 (2005); and Roger Pilon, Property Rights, Takings, and a Free Society, 6 Harv. J.L. & Pub. Pol'y. 165 (1983).

[5] For a thorough recent treatment of that subject, see Saikrishna B. Prakash and John Yoo, The Origins of Judicial Review, 70 U. Chi. L. Rev. 887 (2003); available at http://ssrn.com/abstract=426860.

about: it's what John Locke called the "Executive Power" that each of us enjoys in the state of nature,[6] which we yield up to government to exercise on our behalf once we leave that state, enter civil society, and create government. Although the Executive Power, now the police power, is nowhere mentioned in the Constitution, implicit in the document's structure and in the Tenth Amendment in particular is the idea that we left that power with the states, delegating to the federal government only certain enumerated powers—to tax, to borrow, to regulate interstate commerce, and so forth.

Like the police power, the eminent domain power too is nowhere found in the Constitution. It is said to be an "inherent" power of government, yet unlike the police power, no one enjoys the power of eminent domain in the state of nature and hence no one has it to yield up to government when government is created. Indeed, there could hardly be any such inherent power in the state of nature, for it is a power to take what belongs to another, albeit with just compensation, but against his will and hence in violation of his inherent right to be left alone in his life, liberty, and property.[7] For that reason it was known as the "despotic power." Thus, unlike the police power, the eminent domain power is inherently illegitimate.

Such legitimacy as the power enjoys stems, therefore, from two sources. First, although none of us had the eminent domain power to yield up to government, we agreed all the same, through the social contract we drafted in the original position (the Constitution), to let government exercise that power so that it might provide us with "public goods" at a reasonable cost. Yet even then the power was recognized only implicitly, in the Fifth Amendment, in connection with the explicit limits on its exercise that are set forth in the Takings Clause: "nor shall private property be taken for public use without just compensation." By implication, government may take private property, but only for a public purpose, and only with just compensation. (Note too that eminent domain is merely an instrumental power, exercised in service of some other power—the power to build roads, forts, schools, and the like.) Second, as a practical matter, the power exists to enable public projects to go forward without being held hostage to holdouts seeking to exploit the situation by extracting far more than just compensation. When properly used, therefore, eminent domain protects the individual from being exploited for the public good, but it protects the public from being exploited as well.

Thus, the best that can be said for eminent domain is this: the power was ratified by those who were in the original position, the founding generation; and it is ''Pareto superior,'' as economists say, which means that at least one party (the public) is made better off by its use while no one is made worse off—provided the owner does indeed receive just compensation. In virtue of its inherent illegitimacy, however, there must be a strong presumption against its use. Thus, if property can be acquired through voluntary means, our principles as a nation urge us to take that course. Only if necessary should governments resort to this despotic power.

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[6] John Locke, Two Treatises of Government, The Second Treatise of Government ¶ 13 (Peter Laslett ed., 1965) (1690).

[7] As the old common law judges understood, all rights can be reduced to property. Locke put it simply: "Lives, Liberties and Estates, which I call by the general Name, *Property*." Id. at ¶ 123.

Here, then, is how the police power and the power of eminent domain are related. First, when government acts to secure rights—when it stops someone from polluting on his neighbor or on the public, for example—it is acting under its police power, not its power of eminent domain, and the owner thus regulated is entitled to no compensation, whatever his financial losses, because the use prohibited or ''taken'' was wrong to begin with. Since there is no right to pollute, we do not have to pay polluters not to pollute. Thus, the question is not whether value was taken by a regulation but whether a *right* was taken. Proper uses of the police power take no rights. To the contrary, they protect rights.

Second, when government acts not to secure rights but to provide the public with some good—wildlife habitat, for example, or a lovely view, or historic preservation—and in doing so prohibits or ''takes'' some otherwise *legitimate* use, then it is acting, in part, under the eminent domain power and it does have to compensate the owner for any financial losses he may suffer. The principle here is quite simple: the public has to pay for the goods it wants, just like any private person would have to. Bad enough that the public can take what it wants by condemnation; at least it should pay rather than ask the owner to bear the full cost of its appetite. This is your classic regulatory takings case, of course: the government takes uses, thereby reducing the value of the property, sometimes drastically, but refuses to pay the owner for his losses because the title, reduced in value, remains with the owner. Such abuses today are rampant as governments at all levels try to provide the public with all manner of amenities, especially environmental amenities, ''off budget.'' There is an old-fashioned word for that practice: it is ''theft,'' and no amount of rationalization about ''good reasons'' will change the practice's essential character. Even thieves, after all, have ''good reasons'' for what they do.

Third, when government acts to provide the public with some good and that act results in financial loss to an owner but takes no right of the owner, no compensation is due because nothing the owner holds free and clear is taken. If the government closes a military base, for example, and neighboring property values decline as a result, no compensation is due those owners because the government's action took nothing they owned. They own their property and all the uses that go with it that are consistent with their neighbors' equal rights. They do not own the value in their property.

Finally, we come not to takings of illegitimate uses, requiring no compensation, nor to takings of legitimate uses, requiring compensation, nor to takings of mere value, requiring no compensation, but to takings in the full sense—takings of the entire estate. Here, compensation is not the issue—although *just* compensation often is an issue, for rarely does an owner receive the full value of his losses. Setting that problem aside, the main question here, as in the *Kelo* case, is whether the taking is for a "public use." That the term does not enjoy a precise definition does not mean that it cannot be defined at all, of course, yet that is the implication, in effect, of *Kelo*. The Court stripped the term of its very purpose—to limit condemnations to those that are for a public use. It read that limit on power out of the Constitution, leaving every owner in America exposed.

In the amicus brief the Cato Institute filed in *Kelo*, written by the University of Chicago's Richard Epstein, one of the nation's preeminent experts on property rights law,

we distinguished four categories of "public use" that can be found in the case law.[8] The first is straightforward and unproblematic: when government condemns private property and takes title itself for some public use like a public road, park, military facility, or the like, we have a clear public use. The second category is ordinarily unobjectionable as well: this involves condemnations and transfers of title from one private party to another, whether undertaken by government or by the party under government authorization, when the subsequent use will be available to the public at large. Common carriers like railroads, utilities, and network industries, facing holdout and assembly problems, come to mind here. As Cato's brief states:

> It would be a major mistake to insist that all railroads, canals, and utilities be publicly owned in order to invoke the state's eminent domain power to overcome the holdout problems that block the formation of a unified network. Why risk inefficient operations when a better system is available—namely, private operation, where the property taken is open to the public at large on a reasonable and nondiscriminatory basis?[9]

There are a few other odd cases as well in which the "public use" limit might be satisfied. These involve situations in which the use of eminent domain promises large social gains without disadvantaging the individuals who are thus forced to surrender their property for the public good. Professor Epstein cites certain older grist mill and mining cases that satisfy this narrow extension of the public use limit. But in general, it is use by the public, often accompanied by regulated rates-of-return, that justifies the use of eminent domain for such private-to-private transfers.

The third and fourth categories, however, stretch "public use" beyond recognition. The blight cases, for example, often involve labeling whole neighborhoods as "blighted," thereby enabling government to condemn the properties and transfer titles to others—large developers, ordinarily—all under the guise of "urban renewal." As our brief notes, these cases often involve the court's conflating the police power and the eminent domain power:

> But while the police power would allow the state to enjoin the nuisance, without compensation, it would *not* allow it to take title to the property once the nuisance had been eliminated. Thus, the police power is at once stronger than the eminent domain power (in that it proceeds without compensation) and weaker (in that it does not justify taking title and transferring the property to another private owner for private use).[10]

These blight cases tend also to substitute "public benefit" for "public use," which opens the door for much greater scope for eminent domain.

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[8] Brief of the Cato Institute as amicus curiae in support of petitioner, Kelo v. City of New London, 125 S. Ct. 2655 (2005)(no. 04-1080); available at http://www.cato.org/pubs/legalbriefs/kelovcityofnewlondon.pdf.
[9] Id. at 13.
[10] Id. at 17-18.

That substitution is most evident, however, in the fourth category, which involves the use of eminent domain to promote "economic development." Here again we often find states and municipalities condemning whole neighborhoods. The infamous *Poletown* case of 1981 is Exhibit A of this rationale for eminent domain.[11] That case arose after the City of Detroit condemned the homes and small businesses of some 4,200 people to make way for a Cadillac plant—all to promote jobs, a greater tax base, and other economic benefits that in fact never did live up to expectations. Fortunately, the Michigan Supreme Court overturned that decision just last year, but it remains the textbook example of what is wrong with economic development condemnations. To be sure, such condemnations *may* generate "public benefits," although the evidence very often suggests a net loss. From a consideration of constitutional principle, however, the main problem is not with the difficulty of calculating benefits and losses, but with the Supreme Court's refusal, as in *Kelo*, to read "public use" as a serious limit on the power of eminent domain. If the Framers had wanted that power to be used to generate "public benefits," they could have written it in a way that would have enabled that. They didn't. "Public use" was employed to *limit* power, not to facilitate it.

As this brief outline of the issues suggests, the Court has failed, especially over the course of the 20th century, to develop anything like a well-worked-out theory of property rights of a kind the Framers had in mind. In the area of regulatory takings, we have had what Justice Antonin Scalia in 1992 called 70-odd years of "essentially ad-hoc" jurisprudence, even as he was adding yet another year to the string.[12] Thus, owners today can get compensation when title is actually taken, as in the outright condemnations just discussed; when their property is physically invaded by government order, either permanently or temporarily; when regulation for other than health or safety reasons takes all or nearly all of the value of the property; and when government attaches conditions that are unreasonable or disproportionate when it grants a permit to use property. Even if that final category of takings were clear, however, those categories would not constitute anything like a comprehensive theory of the matter, much less a comprehensive solution to the problem of regulatory takings. In particular, in the overwhelming number of cases, regulations take perfectly legitimate uses, thus substantially reducing the value of the property, but the owner must bear that loss entirely, while the public benefits from the "free goods" thus produced. Again, this issue is beyond the scope of today's hearings, but it is one the committee should put on its agenda if it is serious about "strengthening the ownership of private property."

Turning to the kinds of eminent domain cases that are before the committee, here too, as the above analysis suggests, the Court has made a mess of things by essentially eviscerating the public use restraint on the exercise of eminent domain. To rectify that problem, however, there is just so much that Congress or state legislatures can do since a court, in any case involving federal law, will be applying the Supreme Court's current "public use" standard, which is essentially vacuous, to the facts of the case before it. Still,

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[11] Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), overruled County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). For a fuller discussion, see Ilya Somin, Robin Hood in Reverse: The Case against Economic Development Takings, Cato Policy Analysis No. 535, Feb. 22, 2005.
[12] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992).

Congress and state legislatures, although unable to change the Court's errant reading of the Constitution, can address the problem most fundamentally by simply not authorizing or underwriting exercises of eminent domain that are not for a genuine public use. More than anything else, that alone would go far toward correcting the problem of judicial indifference to constitutional limits and judicial deference to the political branches. Let us see whether H.R. 3405 takes that tack.

III. H.R. 3405

As I read the STOPP Act, it moves in just that direction. It's aim, that is, is to cut off federal funding for programs run by state and local governments that use "the power of eminent domain to obtain property for private commercial development or that fail[] to pay relocation costs to persons displaced by use of the power of eminent domain for economic development purposes." Section 2(a) of the Act provides that federal financial assistance under any federal economic development program "may not be provided" to any state or local government that engages in any of the acts described in Section 2(b). Those acts are (1) transferring property by eminent domain from one private owner to another "for any economic development purpose"; and (2) failing to provide relocation assistance that is equivalent to that provided under the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 "to any person displaced by the use of the power of eminent domain for any economic development purpose." Section 2(c) provides for state or local officials to give notice of compliance to heads of federal agencies. Section 3 defines "federal economic development program" and lists such programs; it also defines "federal financial assistance," "state," and "unit of local government." Section 4, "Applicability," has yet to be drafted, I understand.

The first thing to be noticed about this bill is that it is addressed to state and local abuses of eminent domain. Although that is where most eminent domain abuses take place, one would like to see a federal bill addressing federal abuses as well. In other words, Congress should clean its own house first, insofar as it needs doing.

Second, there is a certain lack of clarity in this bill concerning just whom it is addressing. The bill purports to limit federal funding for abusive state and local projects. One would expect it to be addressed, therefore, to those federal agency heads charged with administering such federal programs, directing them not to fund abusive projects. Sections 2(a) and (b), however, constitute general descriptions of the bill. Only in Section 2(c), "Certification of Compliance," are officials referenced, and obliquely at that. Rather than directing federal officials—e.g., "Heads of federal agencies shall not disburse federal funds until heads of state and local programs certify . . ."—this Section begins with a case in which the federal head does not have actual knowledge of a violation, then places the burden on the *state* official to notify the federal official that he is *not* engaged in an abusive act, and so forth. This Section needs to be substantially redrafted.

Third, the "may not be provided" language of Section 2(a) is ambiguous. The more natural reading is "shall not be provided," but a weaker, discretionary reading of "may" is possible as well. Replace "may" with "shall."

Fourth, it is unclear what Section (2)(b)(2) adds to Section (2)(b)(1). If funds will be withheld when states use eminent domain for private-to-private transfers "for any economic development purpose," ((2)(b)(1)), why threaten to withhold funds if states fail to provide relocation assistance after using eminent domain for private-to-private transfers "for any economic development purpose" ((2)(b)(2))? Won't (2)(b)(1) do the job? Isn't it sufficient?

Fifth, and now I move to more serious concerns, "for any economic development purpose" is the operative language in this bill, but what does it mean or include? Would states be penalized if they used eminent domain for network industries as discussed under category two above? At the very least, this crucial term needs to be fully defined in light of the analysis sketched above.

Sixth, I would note a glaring irony in this bill. It seeks to restore constitutional guarantees by restricting federal funding of state programs, funding that, under a proper reading of the Constitution's doctrine of enumerated powers, is unauthorized to begin with. Most of the programs listed in Section 3(1) are beyond the authority of Congress to enact and hence are unconstitutional.[13] But that is the subject for another day.

Finally, in this same vein, a question arises as to the authority of Congress to enact this bill. The modern view is that Congress finds its authority under the so-called General Welfare Clause or the so-called Spending Clause, neither of which exists, but both of which are said to be found at Article I, Section 8, Clause 1 of the Constitution, which in truth is the Taxing Clause. That clause authorizes Congress to tax, just as the next clause authorizes Congress to borrow. Appropriations and spending, which are different, must be carried out under the Necessary and Proper Clause. Thus, properly read, Congress has no authority to spend "for the general welfare," yet that is the modern reading under which this bill proceeds.[14]

And that brings us to *South Dakota v. Dole*[15] and to the question of whether Congress may restrict states as this bill proposes to do. I believe *Dole* was wrongly decided, but given that decision, I see nothing in the opinion that would restrict Congress from conditioning states' receipt of federal funding on their refraining from exercising a power the Supreme Court claims they have, namely, to condemn private property for economic development purposes. But the legal morass here is so tangled that it is not likely to be untangled in these hearings, so I will say nothing further about it.

Nevertheless, this bill needs more work if it to accomplish the worthy ends it has in view.

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[13] For a trenchant discussion of this issue, see this aptly titled book, written by a Harvard Law professor in 1932, just before the birth of the modern American welfare state: Charles Warren, Congress as Santa Claus (1932).

[14] See id. See also Gary Lawson and Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke Law Journal 267 (1993); Spending Clause Symposium, 4 Chapman Law Review (2001).

[15] 483 U.S. 203 (1987).

PREPARED STATEMENT OF MICHAEL A. MASSICOTT, ATLANTA, GA

Please be aware of the following...

After the U.S. Supreme Court decided that the Constitution allows homes to be taken for potentially more profitable, higher tax uses, the defenders of eminent domain abuse already have begun desperate attempts to keep the power to take homes and businesses and turn them over to private developers. And they are struggling to convince outraged Americans that ordinary citizens shouldn't care. The beneficiaries of the virtually unrestricted use of eminent domain – local governments, developers and planners – will frantically lobby to prevent any attempt to diminish their power.

Their main message is that nothing has changed and there is nothing to worry about, because local officials always have the best interests of their citizenry at heart. Nothing could be further from the truth. The Kelo v. City of New London decision represents a severe threat to the security of all home and business owners in the country. Not only does it give legal sanction to a whole category of condemnations that were previously in legal doubt, but it actually encourages the replacement of lower-income residents and businesses with richer homeowners and fancier businesses. The vast majority of Americans understand what is at stake, even if many so-called experts do not.

What the Supreme Court Actually Said in Kelo The Court ruled that 15 homes in the Fort Trumbull waterfront neighborhood of New London, Conn., could be condemned for "economic development." There was no claim that the area was blighted. The project called for a luxury hotel, upscale condominiums and office buildings to replace the homes and small businesses that had been there. The new development project would supposedly bring more tax revenue, jobs and general economic wealth to the city. Connecticut's statutes allow eminent domain for projects devoted to "any commercial, financial, or retail enterprise." Conn. Gen. Stat. § 8-187.

The Fifth Amendment to the U.S. Constitution states, "[N]or shall private property be taken for public use, without just compensation." Yet in the Kelo decision, Justice John Paul Stevens explains that the fact that property is taken from one person and immediately given to another does not "diminish the public character of the taking." The fact that the area where the homes sit will be leased to a private developer at $1 per year for 99 years thus, according to the Court, has no relevance to whether the taking was for "public use." Instead, the Kelo decision imposes an essentially subjective test for whether a particular condemnation is for a public or private use: courts are to examine whether the governing body was motivated by a desire to benefit a private party or concern for the public. Thus, because the New London city officials intended that the plan would benefit the city in the form of higher taxes and more jobs, the homes could be taken.

The Court's decision allows cities to take homes or businesses and transfer them to developers if they think the developers might generate more economic gains with the property. The Court also rejected any requirement that there be controls in place to ensure that the project live up to its promises. According to the majority, requiring any kind of controls would be "second-guess[ing]" the wisdom of the project.

Worse yet, cities do not need to have any use for the property in the foreseeable future in order to take it. In fact, the opinion encourages cities to condemn first and find developers later; the Court claims that it is "difficult to accuse the government of having taken A's property to benefit the private interests of B when the identity of B was unknown." In the future, then, cities can negotiate a sweetheart deal but wait until after the condemnation to actually sign it. Or they can simply take property first and market it to developers later. Some of the homes in Connecticut were being taken for some unidentified use and others for an office building that the developer had stated it would not build in the foreseeable future.

So, according to the Supreme Court, cities can take property to give to a private developer with no idea what will go there and no guarantee of any public benefit.

If the majority thinks they offered any meaningful protection to home and business owners, they are completely disconnected from reality. The decision suggests some extremely minor limits to the use of eminent domain for private development. Those few condemnees in cities that don't bother to do a plan, fail to follow their own procedures, or actually engage in corruption may still find some hope in federal court. But there is almost always a plan; cities are quite adept at following their own procedures; and most cases of eminent domain abuse do not involve outright and blatant corruption, such as bribes. Consequently, the vast majority of individuals are left entirely without federal constitutional protection.

The Supreme Court's Kelo Decision Changes the Law and Threatens All Home and Business Owners.

Some commentators are claiming that Kelo didn't change anything and therefore no one needs to worry about it. This statement is wrong on two levels: Kelo did change the law, and to the extent that governments were already taking homes and businesses for private commercial development, that is cause for greater concern, not less. Kelo threw a spotlight on an already-existing practice that an overwhelming majority of people find outrageous and un-American. More importantly, by declaring that there are virtually no constitutional limitations on the ability of cities to take property from A and give it to B, the Court invited more abuse and thus made the problem of eminent domain abuse much worse.

The law before Kelo did sometimes allow condemnation of property that would result in private ownership, but each of these situations was extremely limited.1
None necessitated the decision of the majority in Kelo.

1. National Railroad Passenger Corp. v. Boston and Maine Corp., 503 U.S. 407 (1992) (railroad track transferred to another common carrier); Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) (land ownership transferred to lessees as part of program to break up remnants of feudal land system dating from Hawaii's pre-state monarchy); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (pesticide research results available

to later pesticide producers; obviously related to public health); Berman v. Parker, 348 U.S. 26 (1954) (single unblighted building in severely blighted area taken as part of large project to clear slum and redevelop); Strickley v. Highland Bay Mining Co., 200 U.S. 527 (1906) (aerial bucket line for mining ore, available to any user); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1905) (condemnation for construction of irrigation ditch as part of statewide irrigation infrastructure program); Head v. Amoskeag, 113 U.S. 9 (1885) (riparian rights for private mill; Court explicitly refused to hold that economic benefits justified condemnation).

Indeed, four members of the Court agreed that its prior decisions did not dictate the result in Kelo. Justice Sandra Day O'Connor broke those previous cases into three categories: (1) transfers of property from private ownership to public ownership; (2) transfer of property to a privately owned common carrier or similar public infrastructure; (3) transfer of property to eliminate an identifiable public harm. But, as pointed out by Justice O'Connor, "economic development" fits into none of these categories. Now, government may condemn property as long as there is a plan to put something more expensive there.

The text of the Constitution does not change, so the question in any constitutional case is how the Court will apply that law to the facts. How far will it go in either enforcing or ignoring constitutional rights? For example, we know that the First Amendment protects free speech. But how far will the Court go in enforcing that right? The Court has applied free speech protections to everything from advertising and the internet to criticism of the government and Nazi marches. In one sense, of course, the "law" did not change; the Constitution reads the same, and the Court still says that free speech is important. But in fact, each of these decisions did change the law, because they applied it to a new situation. In the same way, in Kelo, the Court applied the Fifth Amendment to a different and far more extreme type of use of eminent domain and upheld it. In Kelo, the Court went to extraordinary lengths to ignore the constitutional mandate that property only be taken for "public use," and thus went much further than it ever had before.

So when some law professors say that nothing has changed, what they mean is that the Court's general statements about public use have not changed. The Court has said for a number of years that it applies great deference to government decisions that a condemnation served a public use. At the same time, the Court had always said that there was a limit, that government could not take property from A in order to give it to B for B's private use. But in constitutional law, it is the application of general statements to facts that tells how seriously the Court takes constitutional rights. The question in every case, therefore, was whether the particular use of eminent domain fell into the category of deference or whether it went too far and would be held unconstitutional. Before Kelo, we knew that government could take property in deeply troubled, almost uninhabitable areas and transfer it to private developers. Now we know that government can take any property and transfer it to private developers. Only a lawyer would be unable to tell the difference.

Commentators are right that local governments, as a matter of practice, have been using eminent domain to assist private developers on a regular basis for years. That fact should

be a cause for deep concern, not comfort that nothing has changed. More than 10,000 properties were either taken or threatened with condemnation for private development in just a five-year period.2 Because this number was reached by counting properties listed in news articles and cases, it grossly underestimates the number of condemnations and threatened condemnations. In Connecticut, the only state that keeps separate track of redevelopment condemnations, we found 31, while the true number was 543. Now that the Supreme Court has actually sanctioned this abuse in Kelo and refused to provide any meaningful limits, the floodgates to further abuse have been thrown open. Home and business owners have every reason to be very, very worried now. As Justice O'Connor noted in her dissent, "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping center, or any farm with a factory."

2. Dana Berliner, Public Power, Private Gain: A Five Year, State-By-State Report Examining the Abuse of Eminent Domain (2003) (available at http://www.castlecoalition.org/report/).

So while there may be no change to the general idea of deference to legislative determinations of public use, there has been a different, more far-reaching application of it. That new application will change property ownership as we know it. That is not an overstatement. There had been many condemnations for private use going on before this decision. But cities still knew that there was no case upholding eminent domain for economic development. That provided some restraint or caution. Now, there is no reason to show any restraint.

Eminent Domain Is Not Necessary for Economic Development.

City officials often claim that without the power of eminent domain, they will be unable to do worthwhile projects and their cities will fall into decline.

These claims are at best disingenuous, and at worst outright dishonest. There are many, many ways to encourage economic growth that do not involve taking someone else's property. These include, for example, economic development districts, tax incentives, bonding, tax increment financing, Main Street programs, infrastructure improvements, relaxed or expedited permitting, and small grants and loans for façade improvements.3 Will a developer be able to put condos and a superstore on whatever piece of prime real estate it selects without using eminent domain? Maybe, maybe not. Will the city be able to have economic development? Absolutely.

Development happens every day, all across the country, without the use of eminent domain. At the same time, projects that do use eminent domain often fail to live up to their promises, and they also impose tremendous costs – both economic and social – in the form of lost communities, uprooted families and destroyed small businesses. Urban renewal is now widely recognized as one of the worst policy initiatives ever undertaken in our cities, destroying inner cities and displacing thousands of minorities and elderly

citizens.4 But at the time, of course, it was touted as a brilliant tool of revitalization. The condemnation of the Poletown neighborhood in Detroit for a General Motors manufacturing plant in 1981, one of the most infamous economic development condemnations, failed to bring prosperity to the city. Indeed, it cost the city millions of dollars and may well have destroyed more jobs than it created.5 Defenders of eminent domain for private development present a false choice between protecting people's rights and economic development. In fact, we can have both.

3. See Brief Amicus Curiae of John Norquist on behalf of Petitioners in Kelo v. City of New London (John Norquist is the former mayor of Milwaukee and President of the Center for New Urbanism); Brief Amicus Curiae of Goldwater Institute, et al. on behalf of Petitioners in Kelo v. City of New London. (All of the amicus briefs cited in this paper are available at http://www.ij.org/kelo.)

4. See Mindy Thompson Fullilove, Root Shock: How Tearing Up City Neighborhoods Hurts America, And What We Can Do About It (One World 2005); Wendell Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 YALE L. & POL'Y REV. 1 (2003); Brief Amicus Curiae of Jane Jacobs on behalf of Petitioners in Kelo v. City of New London; Brief Amicus Curiae of NAACP, AARP, et al. on behalf of Petitioners in Kelo v. City of New London; Brief Amicus Curiae of Better Government Assoc., et al. on behalf of Petitioners in Kelo v. City of New London.

Eminent Domain Is Not Used as a "Last Resort."

Many municipal officials claim that they use eminent domain responsibly and only as a "last resort." This is simply not true. In most cases, the threat of eminent domain plays an important role from the very beginning of negotiations. Cities know that most home and business owners will be unable to afford the tremendous legal costs associated with fighting eminent domain; this fact gives cities a strong incentive to threaten property owners with condemnation. People are told that if they do not sell, their home or business will be taken from them and they will get even less money. Cities plan projects on the assumption that there is no need to incorporate existing homes or businesses, because they can simply be taken. After cities design and pursue such projects, current owners are told to sell. If they do not, then eminent domain becomes a "last resort." In practice, the power of eminent domain often makes voluntary sales less likely, because owners who would have sold if treated with respect will refuse to once they have been threatened.

Changes to Planning and Hearing Procedures Will Not Stem the Tide of Eminent Domain Abuse.

Various commentators are suggesting that legislators can take a "moderate," "sensible" approach to the Kelo decision and just require a process with more public input and better planning. These measures will do nothing to protect the rights of home and business owners. The City of New London had a lengthy process, with studies, plans and public hearings. None of this lengthy process made any difference, however, because a deal had

been cut before the process even began. Local legislators typically know the outcome they want and then follow the procedures necessary to get it. City councilors and planning officials don't even need to listen at public hearings, because they already know how they are going to vote.

Better planning is also no solution and will do nothing to protect home and business owners from losing their property to private developers. Planners call for even more of the kind of planning that, if implemented, necessitates forcing some people out of their homes and businesses to make way for other, supposedly better-planned uses. Thus, we hear calls for comprehensive plans that outline every future use of property in the city and integrated redevelopment plans that implement the comprehensive plans for replacing current owners with other ones. While all of this additional planning will no doubt bring lots of money to planners, it will not prevent the use of eminent domain for private commercial development and in practice will probably encourage more abuse.

The Floodgates Are Opening and the Situation Will Only Get Worse If No Legislative Action Is Taken.
In the wake of the U.S. Supreme Court's decision in Kelo v. City of New London upholding the use of eminent domain for private development, the floodgates are opening to abuse. Already, the ruling has emboldened governments and developers seeking to take property from home and small business owners. Despite claims that eminent domain will be used sparingly, there have been a flood of new condemnations and new proposals of eminent domain for private commercial development after the Kelo ruling. In the first two months after the decision, more than 30 municipalities began condemnation proceedings for private development or took action to authorize them in the near future. Thousands of properties are now threatened with eminent domain for private commercial development, and those numbers will continue to swell unless state legislatures and Congress listen to their constituents and end the abuse of eminent domain.

5. See Brief Amicus Curiae of Jane Jacobs on behalf of Petitioners in Kelo v. City of New London.

Creating an Effective Statutory Protection Against Eminent Domain Abuse
Basic elements of a good law:
The outline below sets forth the basic elements of a law that will genuinely protect citizens from losing their land to other private parties for private development.

•Remove statutory authorizations for eminent domain for private commercial development.
• Explicitly forbid eminent domain for private commercial development and/or require that condemned property be owned and used by government or a common carrier.
• Prohibit "ownership or control" by private interests. In many cases, a government entity will technically own the property but lease it for $1 per year to a private party.
• Ensure that the statute or constitutional amendment applies to all entities that engage in eminent domain, using a term like "all political subdivisions."

• Clearly state any exceptions, i.e., any circumstances where property can be taken for private commercial entities. The main exception that should be made is private entities that are "common carriers" – these include railroads and utilities.
• If blight is an exception, revise blight definitions to clearly define the type of blight required to justify the use of eminent domain and require that the property has serious, objective problems before it can be taken for private development.
• Disentangle the designation of a redevelopment area for funding purposes and an area where property may be taken for private development. This allows cities to still get funding and acquire property voluntarily but prevents the use of eminent domain for private development.
• Require government to bear the burden of showing public use or blight, or at least put the parties on equal footing, with no presumption either way. The current rule typically means that the government's finding of public use or blight is conclusive, unless the owner can prove fraud, arbitrariness, or abuse of discretion.
• If allowing condemnation of unblighted property in blighted areas, require that the property be essential for the project.

Additional useful provisions
• Have blight designations expire after a certain number of years.
• Give owners the opportunity to rehabilitate property before it can be condemned.
• Return property to former owners if it is not used for the purpose for which it was condemned.

Common pitfalls in proposed reform legislation:
• Giving a complete exemption for any property taken under urban development laws and failing to change the definition of blight.
• Forbidding eminent domain for economic development without defining economic development.
• Forbidding condemnation for "solely" or "primarily" for economic development or private benefit. Whether a particular condemnation is solely or primarily for a particular purpose requires a judge to look at the intent of the governmental decision-makers. The legality of eminent domain should not depend on the subjective motivations of city officials, and proving intent as a factual matter is extremely difficult.
• Creating specific exemptions for pet projects. This will set a bad precedent for the future.
• Forbidding only ownership by private parties but allowing private control. This leaves open the common practice of sweetheart lease arrangements.
• Making loopholes or omitting some of the political entities that engage in condemnation for private development.

Prepared by the Institute for Justice September 2005

Best Regards,
Michael A. Massicott
5058 High Point Road
Atlanta, GA 30342

LETTER FROM BART A. DIDDEN, PORT CHESTER, NEW YORK, TO THE HONORABLE F. JAMES SENSENBRENNER, JR.

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Chairman Sensenbrenner
House Judiciary Committee
United States House of Representatives
Washington, DC

Re; Hearings on Eminent Domain

Dear Chairman Sensenbrenner,

My name is Bart A. Didden, a 45 year resident, along with my wife and two children of the Village of Port Chester, NY. Since 1982, I have been employed as president of U.S.A. Central Station Alarm Corp., an alarm monitoring service company employing over 60 professionals dedicated to the well being of our clients and their property located across the United States.

I apologize in advance for this late submittal, but I had to throw something together for your hearings because I am a victim of eminent domain and could not sit here and let the opportunity go by with nothing being submitted. My story is so strange that everyone who hears it agrees that I have been robbed. Should anyone on your staff be interested I would be happy to follow up with more material and visit your offices for a meeting to demonstrate what happen to me.

In the meantime,

I am the victim of government policies and laws that have become so twisted that they resemble nothing of the original intent. I am talking about eminent domain and takings that are planned in back room negotiations and sweetheart deals made between developers and elected government officials so hungry for renewal development that they would do and say anything, including violating my civil rights and the natural laws of our society.

Port Chester, NY is a Village of 28,000 residents packed into 2.5 square miles, on Long Island Sound. In its earliest years it started as a shipping port. With the deployment of the railroads the Village of Port Chester, became a manufacturing center with a concentration of various factories. Port Chester has the manufacturing home of Life Saver candies, and you knew when they were making the peppermint candies. All of the plants were gone by 1975, and the commercial tax base was in dire straits.

During the 70's, 80's & 90's, in response to a quickly diminishing tax base and job opportunities, the Village Leadership began to use Federal, State and County of Westchester funds to designate Urban Renewal Zones as the vehicle to re-invent itself, shore up the tax base and create job opportunities.

During the 80's & 90's I began to purchase various properties, well before a "preferred developer" with a real project appeared because I believed in the ability of Port Chester to come back to what it once was. In the end these properties became a contiguous assemblage of note.

Progress was slow in regards to the governmental process but a development agreement was eventually approved between the village and a "preferred developer", plans approved and a feeling of euphoria existed in the Village.

As redevelopment activity was focused on the other side of town, a section of my assemblage was also included in the designated area labeled as "blight". We always disagreed with the "blight" designation as our properties were rented and maintained. Blight is not what was going on on my property.

It was not until CVS Corporation approached us about developing our property that we learned that all of our rights, under the laws of New York State were lost 4 years earlier.

The Eminent Domain Procedure Law (EDPL) of New York State limits the rights of the property owner to file a challenge to being designated as "blighted" to 30 days from a public hearing and findings issued by the local government.

The EDPL is that it contains a provision that allows the municipality to grant a "phasing" status to a project. This provision enables the community to maintain a cloud of uncertainness for 10 years. In fact my property was designated before I owned it, back in the 1980's.

Then once a developer was chosen in the late 90's, it was not until I had a signed deal with CVS did the "preferred developer" make, what I consider EXTORTIONATE DEMANDS FOR REAL MONEY, if I wanted to keep my property and my deal.

The "preferred developer" demanded $800,000.00 dollars not to condemn my property and keep my deal with CVS.

In this case, there is no public benefit because I would have no tax deals on building materials or phased in tax advantages for being the "preferred developer".

And you may wonder what the "preferred developer" has planned for the property that was mine, A WALLGREENS DRUG store!

Congressman, the bigger problem here is the New York State Law that precludes me from challenging the blight designation for 10 years. The developer has the ability to play the land speculation game, which is what happened to me.

When they received the rights to condemn my property almost 5 years earlier they did not take it. They allowed me to pay the taxes and continue to maintain it, but when a multimillion dollar corporation, CVS, showed interest and we received ALL NEEDED GOVERNMENTAL APPROVALS to build a new building, I was victimized by politics, governmental deals and bad laws that stripped my rights years earlier.

Chairman Sensenbrenner, why should I have been required to pay my taxes if I really did not own the property anymore? Why should they have been allowed to take it without additional processes when clearly the status changed with the fully executed lease for a drug store, when it is a drug store that they intend to do?

Maybe your committee can fix what is obviously broken.

Respectfully submitted to the United States House of Representatives Judiciary Committee,

Bart A. Didden

E-MAIL FROM BRUCE R. MACCLOUD

Greetings All,

I, Bruce R. MacCloud, feel compelled to inform all Americans of the nightmare and abuse of the use of eminent domain to my family and what's happening to the residents in the City of Long Branch, N.J. This is not what our forefathers created the Constitution of the United States, and in particular, the 5th Amendment. To allow a developer to take the homes and property of the residents, and allow him to build luxury condominiums for his profit.

26 years ago, I purchased my 3 story, 17 room, 100 year old Victorian style home with a full basement. It was situated just 300 feet from the Atlantic Ocean. My profession is and has been in the historical restoration of buildings. For 23 years I toiled with the restoration of my home, from below grade, to the chimney caps above the roof. I created a family here in Long Branch, N.J., was a part of the community, and had a small business here.

10 years ago, the city of Long Branch, N.J. develops an idea to redevelop parts of the city, 6 redevelopment areas,

To date each area keeps expanding, using eminent domain as the mechanism to exploit this plague on the residents of it's city. They first started by proposing infill redevelopment of the oceanfront. Then they designate a developer- Joe Barry of the Applied Development Organization, who is in prison at this time, for bribery, extortion and embezzlement of elected politicians and officials in another city in N.J.--to use eminent domain to wipe out an entire existing neighborhood, to profit a crook. The city blighted my neighborhood first, then they go thru (what they say) legal procedures, at warp speed.

As far as the general public goes, just up until this year, not many people were aware of what eminent domain is. Now, after victimizing innocent people by taking their homes, their domain, destroying some family's, people are dying due to the stress caused by this threat of loosing their equity and the torture to their existence for not knowing the future of their homes.

Our legislators, federal, state and local, are introducing bills to protect home owners from this atrocity which is happening all across this country.

Just about 3 years ago, when my neighborhood was amidst evictions and quick demolition's, my wife left our home with my children. After trying to find a competent law firm to handle my case, I'm told that it would cost me 10's of thousands of dollars to fight this, and that in their professional opinion and experience, that I should not try to fight this because I would lose. They also suggested at that time that I should not divorce, because in the course of a jury trial for eminent domain, that it would appear to be a little more favorable for me, and that is where my marriage is at this time. A week before Thanksgiving Nov. 2002, I was speaking on the telephone with my lawyer in my 2nd floor room looking at the ocean, with a friend packing boxes on the 3rd floor, when he yells to me, that they looped Shadow (my dog). My response- I jumped to attention, go out into the hall and stairwell and was confronted by a large uniformed police officer who asked me if I was who I am, and then told me he was here to serve me with a formal eviction. As I looked down the stairs- I see 5 or 6 police officers with their guns drawn and pointed at me. I later learn that the city had a locksmith pick my front door lock, they had the dog catcher come in my house, loop my dog around his neck. My dog was 13 years old and was resting on the 2nd floor landing and drag him down the stairs, assaulting him as he yelped on every stair coming down. His health deteriorated rapidly and after 3 weeks of suffering he died. Then in came the police, and I was removed from my home of 23 years. The city immediately had 3 moving outfits pack and move most of my belongings, but not all, and not any of my business material or equipment, and to compound things, we had our first snow fall of the season. They moved my belongings to 3 separate facilities, eventually paid for 1 year by the city. It took the moving people 3-4 weeks to accomplish. From the start of the moving people they had the demolition people starting to dismantle my house. About 2 weeks before Christmas 2002, they razed my house.

3 years later, May 2005, this same law firm of mine asked the court to be dismissed from my case, and was granted.

Months after my eviction from my home and the razing of it, the city of Long Branch deposited $140,000.00 in my lawyers escrow account. This was over 3 years ago. I support the present roof over my family's head and my own, which is seperate. I no longer have a home, a place to conduct a business, no equity and no longer any retirement security due to the loss of my home.

After research, I come to find that the developer is deriving in excess of 25 million dollars on my property alone. When developer Joe Barry gets out of prison in 2 years, his business is involved in a billion dollar operation, here in Long Branch, N.J. His son is operating the business at this time.

They stopped demolition in my backyard. Their project is Beachfront North, phase 1, and the last of my neighborhood is phase 2. The 3 dozen of my surviving neighbors have an alliance called MTOTSA of Long Branch, N.J.. And just last week at the city council meeting, the city council passed a resolution to execute eminent domain on MTOTSA.

I now have new lawyers and appraiser, as of June 2005. A trial by jury is to start this Oct. 11, 2005. This will be my trial for "just compensation". "Just Compensation"- 4 years of nightmare, loss of home and family,and it will be up to a jury what my just compensation will be. I should be made whole again, and I should also be given a percentage of the developers profit as well. Even with the "just compensation" I'm to be awarded, after all of this, it is not just!! Here in the U.S.A., to have a family, a home and a job, and then have a private developer and the city government profit at the loss of it's residents, by the taking of their homes, it is deplorable, a crime and un-American.

Thank you,

Bruce R. MacCloud

LETTER FROM THOMAS J. PICINICH, NEW LONDON, CT

September 21st[h], 2005

RE: Testimony Regarding Eminent Domain to US Legislature

I am Thomas Picinich and I bought my home at 237 Howard Street, New London, CT, in the Fort Trumbull area in 1987. I then spent much time and money restoring it.

Per the 5th Amendment, we can not "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." I was denied due process and just compensation when a Pfizer executive's wife organized the theft of my neighborhood. I, and many others, were crime victims.

Prior to my property being seized, I attended and spoke at a number of public hearings and meetings. Over half the speakers at these sessions requested minor changes to the Municipal Development Plan: that owners who wanted to stay be allowed, and homes moved or exchanged for the planned new condos. NLDC adopted none of these- except to allow the politically powerful Italian Dramatic Club to remain. Those who supported the plan were largely from other towns and in financially beneficial relationships with NLDC.

My house was scheduled to be taken for both a four lane Pfizer gateway road enlargement (from two lanes) and some future, unannounced development. While no evidence was presented of a **need** to widen the road, a letter from a Pfizer executive requested the area be cleared of houses. The two lane road had previously easily handled traffic from the much larger Naval Underwater Sound Lab

I received notice and countless broker phone calls that my property would be taken by eminent domain if I did not sell to the NLDC. All pleas for assistance from the city went unanswered, and I was directed to contact the NLDC. The city officials and NLDC were like a mob that wanted my home.

I paid a $1,000 retainer to an attorney who promised to assist with finding independent, non-NLDC appraisals. After a couple of months I still didn't have one. Then, he informed me my house was legally confiscated. All subsequent attempts to contact him with phone calls and office visits went unanswered. I don't know why he did not get the two appraisals promised- or why he abandoned me. But I have a good idea why.

Finally, another lawyer took my case late in the process after I fired the first one. It was difficult to get an independent real estate appraiser- most were co-opted by NLDC. As I was trying to get a fair appraisal, NLDC did several things to lower the value of my property. First, the properties surrounding me that NLDC purchased were left with windows & doors open, lawns uncut, windows broken and a general slum like appearance (This also hurt my efforts to rent my property). My home underwent the same treatment after it was seized. They had workers enter my property who used hammers to punch holes in the walls and countertops, and removed doors from their hinges (under the guise of asbestos testing.) They started removing the shingles from the exterior walls. Against my pleas, this went on **while** I was trying to obtain an appraisal.

Then, I learned NLDC conspired to depress the value of the targeted properties by **not** including comparable real estate appraisals- any that were purchased in the MDP or on

Pequot Avenue in front of and by Pfizer. Although I was located 400 feet from Pfizer and the biggest development in Connecticut- all NLDC comparables were taken around the city and not in my immediate area. This resulted in a $130,000 appraisal from NLDC for my property. **My** appraiser **included** the properties NLDC and Pfizer purchased, resulting in a $230,000 valuation for my property.

Although I offered to settle by splitting the difference at $180,000, NLDC did little to no negotiating. New London's 30 day demolition waiting period was waived at NLDC's request- and my home was rapidly demolished. Although my home was now rubble, I was forced to pay the $1200/month mortgage for two years- while my case was argued in the courts. This gets right to one of the principal due process abuses visited upon me. If I appealed the compensation, I was forced to abandon the money deposited in the courthouse, pay interest on the mortgage for the house, and forgo any interest when I finally retrieved the deposit. Plus pay legal bills. The odds were overwhelmingly with the house, but it was not my house.

In the mean time, an adjoining owner's compensation case went before a judge who decided it **was** appropriate to include the nearby Pfizer and NLDC purchases as comparables. That owner, in the case of Renshaw v. New London, received a settlement over 70% higher than what NLDC had paid him. He had also been a vocal proponent of the plan, Pfizer and Gov. Rowland on his cable TV show. Go figure.

In court, NLDC having just lost the above case, vigorously attacked my appraisals and uncovered one error. My appraiser then testified that it didn't change the value of the property- but the judge sided with NLDC and my case was closed at their original offering. The adjoining owner had received more for a vacant lot than I did for a multi-family home. Go figure. Two years and expensive legal bills later, I was out both the interest on the mortgage and the lack of any return on the compensation I was finally able to retrieve. This is not due process. In New London, we call this getting screwed.

But the worst insult was that the entire plan was a sham. Justice Zarella, in his dissent for the Connecticut Supreme Court, did a superb job of outlining how nonsensical the plan is. The passage of time has only reaffirmed his bleak assessment of the economics (or lack thereof) underlying this alleged plan. But I will go a step further: the REAL plan was simply to level and clear the entire neighborhood, under the direction of Pfizer. Key excerpts from Justice Zarella's dissent are appended to my statement.

Sincerely,

Thomas J. Picinich

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New London, CT 06320

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CT Supreme Court Dissent in Kelo v. New London:

Whether the Development Plan Will Result in a Public Benefit

In my view, the development plan as a whole cannot be considered apart from the condemnations because the constitutionality of condemnations undertaken for the purpose of private economic development depends not only on the professed goals of the development plan, but also on the prospect of their achievement. Accordingly, the taking party must assume the burden of proving, by clear and convincing evidence, that the anticipated public benefit will be realized. The determination of whether the taking party has met this burden of proof involves an independent evaluation of the evidence by the court, with no deference granted to the local legislative authority. In the present case, the evidence fails to establish that the foregoing burden has been met. [FN22]

FN22. In my view, the evidence in the record also is insufficient to establish that the preponderance of the evidence standard has been met.

The record contains scant evidence to suggest that the predicted public benefit will be realized with any reasonable certainty. To the contrary, the evidence establishes that, at the time of the takings, there was no signed agreement to develop the properties, the economic climate was poor and the development plan contained no conditions pertaining to future development agreements that would ensure achievement of the intended public benefit if development were to occur.

. . . Despite extensive negotiations, however, no development agreement, which the trial court described as a "necessary engine to start any development project," had been signed at the time of the takings.

. . . Nevertheless, some minimal evidence was admitted as to the terms of a "proposed" agreement, and, insofar as those terms provide for the leasing of parcels 1, 2 and 3 to Corcoran Jennison by the development corporation at a rate of $1 per year for a term of ninety-nine years, they appear to be more beneficial to the developer than to the city. Under the agreement, it appears that the city would be locked into a long-term commitment to a single developer, who then would be in a position to reap substantial financial rewards without a corresponding penalty if the developer does not perform as expected. In addition, the very generous terms of the proposed agreement are indicative of either an extremely weak real estate market or a possible violation of General Statutes § 8-200(b) because that statute suggests that property acquired pursuant to chapter 132 of the General Statutes must be sold or leased to a developer at "fair market value" or "fair rental value ...." Accordingly, the terms of the unsigned, proposed agreement do not appear to be consistent with the long-term public interest.

Furthermore, the evidence in the record establishes that the real estate market at the time of the takings was depressed and that prospects, therefore, were poor that the contemplated public use could be achieved with any reasonable certainty. Specifically, the trial court stated that "[t]he [development plan] itself says that as of the date of its preparation its studies show that rent levels [of] class A office buildings have stabilized, but are below the level needed to support new speculative construction. In fact, historical values of class A office buildings have not recovered sufficiently to justify new construction except for end users." The trial court also referred to testimony that "[the city of] New London is still recovering from the recession of the early 1990s ... market values are still well below replacement cost and new construction is generally not feasible.... [T]he demand for class A office space in New London at the present time is soft ...." (Internal quotation marks omitted.) Indeed, testimony revealed that newly constructed office buildings in Shaw's Cove, an area adjacent to the project area, had not been fully occupied for more than fifteen years. Similar testimony described unsuccessful efforts by the redevelopment agency, over the course of several years, to attract investor interest in the construction of commercial office space at still another nearby location.

Additional testimony revealed that commercial real estate brokers had received few inquiries from companies with similar needs to those of Pfizer, Inc., and that, because it is difficult for the city of New London to compete against the city of New Haven in the market for biotechnology-bioscience office space, it is not economically feasible to develop this type of office space without a definite end user that will pay the rent to support the cost. Specific testimony adduced as to parcel 3 revealed that, in light of the uncertainty surrounding demand and the feasibility of creating biotechnology-bioscience office space, and in light of the fact that office development on parcel 3 probably would be deferred until after the development of office space on parcel 2, any design should remain flexible to accommodate future demand. The trial court relied on testimony that "market conditions do not justify construction of new commercial space ... on a speculative basis." (Internal quotation marks omitted.) Furthermore, the trial court noted that "buildings are not built without tenants and as of June, 2001, there were no tenant commitments as to ... the new[ly] proposed office buildings." (Internal quotation marks omitted.) The court also relied on testimony that "flexibility is needed in this type of planning. Market conditions change and sites are developed over decades not years. There must be an ability reserved to make alterations as market conditions change."

A close examination of the proposed plan from a financial standpoint also suggests that there were only limited prospects of a public benefit at the time of the takings. Although the trial court noted that the project ultimately would generate increased tax revenue, there apparently was no consideration of the loss in revenue that could result from the relocation of former residents and taxpayers out of the area during the ten, twenty or even thirty years that might be needed to fully implement the development plan.

Moreover, although the city tax assessor projected that annual tax revenue from the project, when fully implemented, was expected to increase sevenfold to approximately $2.6 million, she also testified that her projection was based on an estimate of the square footage to be constructed, a figure that was subject to change. Indeed, testimony confirmed that the square footage and proposed uses very likely would change over the course of the project. In addition, due to the lack of a development schedule, there was no testimony as to when the projected tax revenue would be realized. Accordingly, the tax assessor's revenue projection may not come to fruition if the area is not developed in the manner and in the time frame predicted.

For example, the projected receipt of $422,100 in annual revenue from parcel 4A does not take into account the tax assessor's opinion that the property may be exempt from taxation if developed for a museum owned by the federal government, as one proposal had suggested. State or nonprofit ownership of the museum would generate a portion of the projected revenue, but revenue would fall well below the $422,100 currently estimated. Moreover, the tax assessor's opinion that the market value of a museum that costs $30 million to build would be only $18 million is yet another indication of the depressed real estate market. Finally, and perhaps most significantly, the expected public investment in the project area of close to $80 million for a potential increase in annual tax revenue of $680,544 to $1,249,843, [FN25] at best, hardly can be considered a major financial benefit to the public. Accordingly, the projected increase in tax revenue should not be accepted at face value and does not support the conclusion that the project will further the public good.

FN25. These figures, which differ from the figures to which the tax assessor testified, are the figures contained in the development plan and quoted in the majority opinion. According to the tax assessor, the annual property tax revenue derived from the project area was approximately $362,111 prior to project approval, but was expected to increase to approximately $2,603,696 following completion of the project. If borne out, this constitutes an increase of approximately $2,241,585, far more than that projected by the development plan.

Various other elements of the plan also are problematical. The record contains no evidence that the

indirect benefits projected under the plan, namely, spin-off economic activities and between 500 and 940 indirect new jobs, will indeed be realized. There also is no evidence as to when in the next thirty years such benefits might be realized. In addition, although the trial court relied on testimony that the city of New London has limited high end housing, it also noted that there was little explanation as to why seventy to ninety high end attached residences would significantly improve the overall housing situation in a distressed municipality. The trial court further noted that high end housing concentrated in one small area of the city would not be likely to have a multiplier effect. Accordingly, the only possible positive consequence of the housing to be constructed appears to be a limited increase in tax revenue. This revenue is impossible to evaluate, however, *166 because it is not yet known whether a future development agreement will include a tax abatement incentive to encourage development of the property or other terms and conditions that may not be in accord with the general purposes set forth in the development plan or the applicable statutory scheme.

The development plan also contains few, if any, performance requirements for future developers. Section 6.2 of the plan, which concerns the disposition of the properties, contains a general description of restrictions on parcel use but no firm timetable for project implementation, no indication as to whether future developers will be offered tax abatements or other incentives that might not be in the public interest, and no indication of possible penalties if developers do not perform as required. Moreover, § 6.2.3 of the development plan provides that "[p]roceeds from sale of disposition parcels shall be used to offset costs of implementation of this [development plan]." The provision in the development plan that purports to lease parcels 1, 2 and 3 to a developer at the sum of $1 per year for a term of ninety-nine years is particularly troubling when viewed in this context.

The defendants note that the budget for the project is almost $80 million, of which approximately $31.1 million has been spent to date, that the project has been approved by numerous state and local agencies, that the city of New London has spent thousands of dollars planning road improvements to make the site more attractive to prospective tenants and that other properties in the project area have been acquired in accordance with the plan objectives. This has little bearing, however, on whether there is any reasonable certainty that the planned public benefit will be realized. As the trial court conceded, "the protections afforded by the [takings] clauses of the federal and state constitutions would be hollow indeed" if takings were found to be *167 constitutional merely because the condemning authority and various government agencies thought and acted as if they were so.

The record, therefore, fails to establish that there was any momentum in the project from a development standpoint or any reasonable development prospects for parcels 3 and 4A at the time of the takings. Evidence to the contrary consists of vague predictions of future demand. The trial court noted, for example, that according to the development plan, "the city [of New London] is at the threshold of major economic revitalization and the key catalyst is the Pfizer [Inc.] research facility"; (emphasis added); and that "a significant shortage of office space [was expected] by 2010," but none of the evidence in the record supports this conclusion. In most of the important economic development cases cited by the majority to support its analysis, developers had been identified and were prepared to develop the properties in question . . .

Although the trial court acknowledged that, for economic development policy to be practical, a substantial period of time might have to pass before a project plan can be accomplished, it nonetheless declared that "[t]he intent of chapter 132 [of the General Statutes] would be crippled if government intervention would only be feasible if immediate project development is possible--economically distressed communities are the very ones where, despite state intervention, project accomplishment might be difficult." On the other hand, I would submit that government intervention to take nonblighted properties by eminent domain is unwarranted in any circumstance in which there is no realistic prospect of a future public benefit. In the present case, there is no development agreement or time frame within which the proposed development must take place; indeed, all of the evidence suggests that the real estate market is depressed and the

development plan itself contains no detailed provisions to ensure that the future use will serve the public interest. Accordingly, the record in the present case does not contain clear and convincing evidence to establish that this portion of the test has been satisfied. I therefore would conclude that the takings are unconstitutional.

Having concluded that there is no reasonable certainty that the proposed public benefit will be accomplished, there is no need to consider whether the condemnations are reasonably necessary to implement the plan. . . .

CONCLUSION

. . . the takings of the plaintiffs' properties are unconstitutional because, in my view, the evidence is not clear and convincing that the property taken actually will be used for a public purpose.

To highlight this concern, consider the following hypothetical. A town is economically distressed and has seen no significant development for years. In good faith, and in accordance with the procedural prerequisites contained in chapter 132 of the General Statutes, the town creates a master plan of development in 1999 that designates an area within the city limits for mixed use development. A marketing study is completed while the plan is being drafted and demonstrates no significant shortage of office space until 2010, no immediate demand for hotel space without a corporate user that will subsidize the occupancy of up to one half of the projected 200 room facility, and no demonstrated demand for up-scale residential units to fulfill local housing needs. Despite this scenario, the town proceeds with the plan of development and settles on the above uses.

Further efforts result in a determination regarding the scope of the project and the location and general size of various proposed buildings. The master plan is submitted to a public hearing and subsequently approved by the local governing body. The plan projects that the new development will create between 518 and 867 construction jobs and 1200 and 2300 direct or indirect permanent jobs, and will result in an estimated sevenfold increase in annual property tax revenue. The master plan does not include any minimum standards that the contemplated private developer will be required to satisfy. [FN28] While the taking authority has had numerous discussions with a particular developer, there has been no agreement on the terms of a development agreement. Nevertheless, the taking authority purchases certain parcels of land in the economic development area and takes other properties by eminent domain. No one contends, under this scenario, that the properties acquired by eminent domain are not reasonably necessary for development to occur as provided in the master plan.

FN28. Such minimum standards might include a commencement date for the project, a construction schedule, a guaranteed number of jobs to be created, selection criteria for potential developers, financing requirements, the nature and timing of land disposition and a commitment as to the amount received in property taxes as a percentage of assessed value.

Now consider the following scenario. Six months after the takings are completed, an interested developer is located. The developer contends that the economic conditions of the town and region are such that the project is not economically feasible unless the development agreement requires the town and the taking authority to do the following: (1) remediate the environmental conditions affecting the property, (2) replace the road and utility infrastructure, and (3) take measures to reduce the risk of coastal flooding, all at a cost of more than $70 million. Additionally, the developer insists that the town abate property taxes on properties located in the development area for a period of years and, rather than require the developer to purchase the improved property at fair market value, enter into an agreement with the developer to lease the property for ninety-nine years for the sum of $1 per year. Furthermore, the developer agrees to commence construction

only after he is able to find viable tenants for the property or when a particular economic index for the area indicates demand for the uses, such as when the vacancy rate for class A office space drops below a certain level.

As I understand the majority's view, after according deference to the taking authority, the takings in the above scenario, which occur *six months before* any of the terms of the development agreement are known, would withstand a challenge by property owners who wish to remain in their homes. I, however, would find the takings to be, at best, premature. The majority has created a test that can aptly be described as the "Field of Dreams" test. The majority assumes that if the enabling statute is constitutional, if the plan of development is drawn in good faith and if the plan merely states that there are economic benefits to be realized, that is enough. Thus, the test is premised on the concept that "if you build it, [they] will come," and fails to protect adequately the rights of private property owners.

To conclude, I would grant the legislature no deference on this issue and place the burden on the taking authority to establish by clear and convincing evidence that the public benefit anticipated in the economic development agreement is reasonably ensured. This, in my view, cannot be accomplished without knowing initially what the actual public benefit will be. In the present case, it is entirely unknown whether the public interest will be served. There are no assurances of a public use in the development plan; there was no signed development agreement at the time of the takings; and all of the evidence suggests that the economic climate will not support the project so that the public benefits can be realized. The determination of whether the private benefit will be incidental to the public benefit requires an examination of all of the pieces to the puzzle. . . .

NOTE - JUSTICE ZARELLA'S 'HYPOTHETICAL' ABOVE IS NOT A HYPOTHETICAL, IT IS EXACTLY WHAT HAPPENED IN NEW LONDON.

PREPARED STATEMENT OF MAUREEN MORRIS, MANCHESTER, MO

6 Years of Condemnation Hell in a Nutshell - Maureen's Nightmare

2. On-going is the hell & proof on my website **www.mopr.org** that the U.S. Army Corps of Engineers **(ACE) &** the **City** of Valley Park **(VP)**, Missouri have CONFISCATED & IMPROVED at least 4 properties including my only rental via their rare Tax Increment Financed Federal Levee Project entangled of course **BUT arbitraily & capriciously** with municipal redevelopment & for profiteering purposes. In 11/92, the ACE estimated this 3.1 mile levee Total Project Cost at $15.4M, completion mid-to-late 90's . It is now $49M, completion expected by 11/05. Equally ludicrous & to blame is complacency.

In addition toTAKING properties wrongfully for the levee & ITS infrastructure, they devalued them & diverted those funds; yet the media promotes the ACE & condemnation attorneys & convinces the public with prospective jurors that landowners are the profiteers when in reality they have been the ACE, contracters, subs, funding, environmental & relocation consultants, condemnation attys & commissioners, appraisers, the **city**/prosecuting/levee **atty**, city appraiser & engineers. Quoting the infamous city atty, "the city's cost control is in getting the best bang for the buck on land acquisitions".

Because the ACE & City VP are in violation of Freedom of Information & Sunshine Laws, additional proof is outstanding, possibly being altered &/or pitched like the city atty said he has various levee designs. Topping the enormous Info-Wanted List are all details of all properties & easements acquired. I deeply regret being unable as yet to follow-up with Senator Talent on all above issues but having survived major flooding I fear drowning in this levee project & it's lawsuit against me but I am obsessively determined to prove this scam, instigate a truly independent, in-depth investigation & audit of levee finances, policies & procedures, promote Eminent Domain Law reforms & get back to reciting "...Indivisible with Liberty & Justice For All & I Damn-well Mean What I Pledge!"

In a nutshell, it was 1987 when I invested years of minimum-wage earnings in my only rental property, **#8 Arnold Dr**, a commercially-zoned house & detached 4-car garage, both built to withstand floods on a private cul-de-sac of about 10 acres in VP's flooplain called Arnold's Landing **(AL)**, the Interstate 44 entrance to the city. Having maintained & improved #8, & without flood insurance assistance, I was halfway to being 100% Financially Independent & blissfully unaware whenever the city changed the zoning to Planned Development Commercial.

By **4/98**, all "residential" owners at AL had willingly signed Actual-Fair-Market-Value Sales Contracts with a developer who had plans to fill & elevate AL from the **500-yr** floodplain & replace the buildings with a Quik Trip, restaurant & strip mall. His plan could've been completed by 1/00 & EVERYONE would've benefited ever since except the ACE with their 100-yr AL levee, finally now built & guesstimated at $5M.

BUT, because the developer could not overcome issues with city staff & other officials, which require thorough investigation, & because of the Levee TIF in-place, which should've been amended, he could not proceed; & even though years before, he had initiated the development of Meramec Valley Plaza which continually thrives directly across State Hwy 141 from AL. The owner/landlord of #7 next to my #8, was my friend Ed whose 2/98 contract was for **$500K;** mine in 4/98 was **$100K**. Aderman Causey's 3/01 affidavit of the levee-scam is on my website.

Over subsequent years, 3 AL property owners negotiated a bit & simply allowed their confiscation as multitudes despicably MUST. Ed & 2 others challenged only value & after Ed rejected the Commissioners $149K "Award", the city offered another $50K. When the ACE who must approve all settlements rejected it,

Ed's astonished atty sent subpeonas to depose Alderman Causey, the city's engineer, appraiser, judge/school board member, & the ACE's Project Mgr. Before the depositions, the additional $50K was approved, totaling $200K which left Ed $163K after atty fees; compared to Ed's 2/98 contract, a $337K loss.

In **9/99** I ignored the city atty's letter stating that my property was "required in connection with the levee project". Word was, 'it's just another drill; the levee may never be completed'. Like many people in early 2000, I was losing thousands in stocks except that I felt safe & secure with my American Bricks & Mortar & Eminent Domain Laws designed to protect landowners but it all came crumbling down **7/11/00** with the city atty's letter stating highest & best use as single family residential, JUST Compensation $30,123 & please respond within 10 days!

In 8/00, I began attending Levee Cmsn meetings, found out what a Board of Aldermen was & in 12/00 went to those meetings also; started transcribing my audio tapes verbatim, eventually posting those grassroots public records on my site to be easily scrutinized at any time by every/anyone. **In early 2001**, my 4-yr tenants were fed-up like most people with years of levee limbo. They were shorting me on rent which had to be endured as new tenants would be elusive at best. In 4/01 an AL business/property owner having received the city's lowball $86,900 offer, contacted Congressmen Talent & Akin. The levee was realigned, sparing his property & the back half of mine with the house & garage but the levee & its access road were to be built 20' in front of the 50-ft deep garage.

In 5/01, after those tenants damaged #8, trashed it & skipped out owing thousands, St Louis County/VP Police Officer Coleman refused to write a vandalism or such report. After the tenants' belongings were piled alongside Arnold Dr on city-acquired property & I denied responsibility, Officer Coleman & another male officer barged into & searched my Manchester Home where I was alone, arrested, handcuffed me in the front yard & drove me miles to Clayton jail while threatening me with a State littering lawsuit advised by the city atty when only a municipal court summons was required. My friend Ed was arrested, charged with littering & resisting arrest. Littering was dropped, but convicted of resisting in 11/01 because VP's Public Works Director lied on the witness stand, Ed ultimately had to pay $4500 & be on probation!

From **6 thru 11/01**, I invested $20K improving #8 while Hwy 141 opened from 2 to 6 lanes. **On 8/27/01, I crashed & later posted my transcript of the clandestine meeting between City, School & Fire Officials & 2 Quik Trip reps,** all salivating over AL & various redevelopment financing tools/incentives. On 8/31/01, the new 141/Marshall Rd 4-way, lighted intersection opened, providing immediate access to AL. On 12/19/01, with potential commercial tenants ready to move in @ $1150/mo + utilities, VP's Community Development Director replied to me that he knew what the city was trying to do to me, he was not a part of it, but also that, altho #8 was currently zoned PDC, I had been using it as residential which is fine, but changing the use now to commercial could cost me $2 to $10K; it would take at least 2 months, maybe a year or more to go thru the Planning & Zoning Committe before tenants could move in & if not rented as residential within 6 months, repeat scenario.

On 2/13/02 I met the city's appraiser at #8 for their partial-taking appraisal. At the 4/02 Public Hearing on VP's TIF/Amended Redevelopment Plan where I "lost it", screamed & cursed, the city atty implicated the ACE as the city's developer. On **5/24/02**, after having told all potential residential tenants about the Condemnation & the levee & its access road to be built 20' in front of the garage only to have them turn away, & having to ignore the desire to have good tenants, Tom & Becky signed a yearly rental agreement for $995, call it **$1000/mo** + utilities.

On **8/19/02**, a prominent Channel 2 News reporter visited the Levee Commission meeting, angered the

retired ACE St Louis District Engineer, now Levee Funding Consultant Colonel McKinney, upset the others & while interviewing me on camera, had it turned off while I was exposing the part about police barging into my home. I then corrected an alderman's number during his on-camera interview. My details & transcript of that levee meeting are posted, but to my knowledge nothing at all was aired on TV & the reporter never followed-up. On **8/30/02**, the city atty's letter stated that ALL of #8 was again required for the levee project AND to eliminate blight & offered $53K. The county's tax appraisal in 2003 was $52,700. In 10/02, one of my Condemning Alderman was asking $169K for his similar floodplain but residentially-zoned property 12 blocks from Hwy 141 & sold it a few months later for $141K once his agent's contract expired.

At my 10/24/02 Condemnation Hearing with my atty out of town & minutes before the judge entered, the city atty told me that he "would not take the back half of property if I didn't want him to"; case continued over his objections to 10/31/02. On 10/25 the city atty's fax to my atty stated that his offer to amend for a partial taking was expressly contingent on her acquiescence of the Taking so they could just do the Condemnation Cmsnrs Hearing, but his offer is withdrawn now because she requested the continuance & apparently intends to question the levee design.

On 10/29 the city atty told mine that since she would not withdraw from my case, he would file & pursue his Motion to Disqualify her as my atty, but he'd wait until the next afternoon, trusting there'd be no need to contest this matter. At my 10/31/02 Condemnation Hearing for the purpose of levee OR redevelopment, the city atty again implicated the ACE as the city's developer & along with Ed's Condemnation Atty convinced Judge Seigel that it was legit to condemn for redevelopment despite no city developer in the wings. All of #8 was Condemned & Ed's atty gave the city atty one of the biggest winks I had ever seen. On **11/27/02**, Judge Simon signed a Preliminary Order in Prohibition. Stopping that Condemnation cost me $10,500 in atty fees alone; still to be recouped.

At the **12/16/02** Levee Cmsn meeting, asinine reasons & vague cost comparisons required the back half of #8 as a **levee** detention pond. Coerced by my atty on 4/9/03, I offered to settle for $150,500. The Bd of Aldermen rejected it on the city atty's advise. On 5/15/03, all of #8 was again condemned but by Judge Wallace. At my **7/14/03** Commissioners Hearing with an armed police officer attending, the city atty & appraiser proudly devalued #8, justified no income appraisal as I was getting too much rent & my atty admitted being unprepared. I will always regret heeding her advise not to tape-record that hearing. My title was taken, cutting my income like in half when the $75K "award" was deposited in court **8/1/03** where it remains even now as it must, preserving my right to continue challenging the TAKING & even tho my atty now refused to do so, & even tho our disagreement as to WHEN her 33% fee of $7,326 was due, led to me paying it after she wrote that she would sue me if I didn't immediately pay. Since I had previously talked to a few attys & been unable to find one to handle a TAKING challenge until I had begged her, I dreaded but searched for another while trying my best to work with her on the Value & get copies from her of my court & other documents.

On 1/5/04, a Settlemt Conference & Scheduling Hearing was set for 9/15/04. #8 was demolished in 3/04. In 9/04, I terminated the contract with my atty & have yet to receive refunds due me. In 10/04 I hired a new atty. On 9/15/04 the **Valuation Trial** was set for oh, sometime in 2 or 3/05 but then in 12/04, it was set for 1/24/05; on 1/17/05 it was reset for 4/27/05 & on 4/19/05, it was reset & is so far, for the week of 10/11/05 & depositions of the city's appraiser & Building Inspector/Cmty Development Director are being scheduled. None of these changes were any fault of my new atty's or mine. We have a Value by Annual Income Approach of **$203,480**. On 3/8/05 the city atty deposed & interrogated me as to MY credibility; he cannot be deposed since he's not a party to the lawsuit! There's no telling when the Taking Trial will be.

Regarding the city atty & my tenants, in **10/02,** Tenant Tom told me that he thought the city atty was a nice guy; they'd had a nice conversation where the city atty commented that they must be paying pretty high rent. Thereafter, Tom was hostile towards me & Becky wavered back & forth. In 2003, I was informed that although hold-over Tenants Tom & Becky received about $20K in relocation benefits & lived at #8 until about 12/03, the few thousand they owed me for fees & rent to 8/1/03 could not be paid from it. After 3 court appearances where, without any atty except once with theirs, Tom & Becky characterized me as the landlord from hell; 2 judges ruled in my favor; it was determined that Tom was on untouchable disability; the third judge granted Becky's exemptions as head of household on unemployment & said that I could try again another time. This was despite my comments that Becky did not have custody of her 3 children & Tom had told me that go-cart & tractor repairs & parts were his hobby but I had been informed that it was his business. Knowing that the city atty had a copy of the rental agreement with the hold-over clause, it was especially astonishing when Becky yelled at me outside the courthouse that the city atty had told them when to quit paying me.

Personally, during these 6 years, levee & municipal redevelopment benefiters wished me to just shut up & go away. During public meetings, my character has been assassinated by those in charge of the levee project. Five who meant the world to me, my stepfather & my 4 dogs, have all died. Being in a world foreign to the rest of my family & friends as it still is to me, we are alienated. My smoking habit & so its cost quickly doubled. After last year's trip to the emergency room, I was started on $50/mo blood/pressure meds & told that once started, they're a life-sentence. Lacking time & income, my home & yard continue to deteriorate. Being 56, without a college education & work ethics trampled, starting over seems impossible. My heart goes out to coutless victims everywhere over all the years as I put all my flag-postage stamps on upside-down.

I apologize that this testimony is late & since it's over the 2 pages I heard it should be, my brief suggestion here is to improve Eminent Domain Laws so that they provide for strict oversight, accountablity, a deterrent of severe penalties for abusers & Accurate Just Compensation for CONDEMNED AMERICANS. Thank you for your valuable time, empathy & expertise.

NEWS ARTICLE ENTITLED "PORT CHESTER PROJECT SCRATCHES MANY BACKS," SUBMITTED BY BART DIDDEN, PORT CHESTER, NEW YORK

Thursday, September 22, 2005 The Journal News

Port Chester project scratches many backs

The following is a true political parable. It is set in the village of Port Chester.

Five years ago, Westchester County agreed to lease a strip of land along the Byram River waterfront that would later be transformed into a "nautical-themed" promenade.

For all intents and purposes, the lease was a taxpayer-supported gift. What else could you call it? Endorsed and approved by County Executive Andrew Spano and the county Board of Legislators, the land deal called for the county to make annual payments of $840,000 for 20 years.

Phil Reisman

The beneficiaries were the village and G&S, a Long Island-based development firm whose $100 million downtown redevelopment scheme, of which the waterfront is an integral part, has largely been realized through bullying, hardball tactics and the use of eminent domain to seize private property.

Ask anyone who has lost their buildings and land to this bulldozing crew and they'll tell you that the initials G&S stand for "grab" and "swipe."

The county looked past the moral implications of its involvement with a project that was made possible only by threats, harassment and the most ruthless application of the eminent domain law. A blind eye was turned to all the people who got screwed out of their homes, businesses and hard-earned money.

They said it was a "win-win" situation, a wonderful partnership of government and private enterprise. Spano said as much, and so did the Democratic mayor at the time, Christine Korff.

What they didn't say (and never would) is how their well-connected friends and associates stood to gain on this deal. Look no further than the lawyers. Three powerful firms with ties to the county's Democratic Party

Please see REISMAN, 2B

Port Chester project is a real eye-opener

REISMAN, from 1B

are worth mentioning in the context of mutual back-scratching.

First and foremost is DelBello Donnellan Weingarten Tartaglia Wise & Wiederkehr of White Plains. It's been in on the G&S project from the start. Alfred DelBello is a former county executive and was briefly lieutenant governor under Gov. Mario Cuomo. His partner, Mark Weingarten, is a former Democratic Party chairman.

A prominent lawyer in the DelBello firm is Alan Scheinkman, who served as county attorney under Spano for a couple of years before resigning at the end of 2000.

Scheinkman went to work for Epstein Becker & Green, a New York City law firm. Under the county ethics code, he would ordinarily have been prohibited from taking the job until a full year had passed, but he was a good guy and able servant, so the county Board of Legislators kindly granted him a waiver. Well, say no more than "abracadabra" because, within six months of his leaving, Epstein Becker & Green had secured $255,000 in county contracts.

Among his legal tasks over the years, Scheinkman has served as Port Chester's attorney and represented the village in its ongoing legal battle with Bill Brody, a victim in the eminent domain travesty in which four downtown buildings and two adjacent pieces of land were plowed under to make way for a Stop & Shop parking lot.

A few years ago, Scheinkman delivered one of the great understatements of all time. Referring to Brody's quixotic quest for due process, he said, "Port Chester got involved in this project to revitalize the village. My client's perspective was not to address great issues of state law and constitutional principles."

Finally, there is the White Plains law firm of Oxman Tulis Kirkpatrick Whyatt & Geiger. Mark Tulis has served as counsel for the Port Chester Industrial Development Agency, which, of course, has played a major part in the village's downtown redevelopment, not to mention the securing of funds for the promenade. Tulis' partner, Marc Oxman, is a former executive director of the county Democratic Committee and a longtime political pal of Spano's.

All three of the aforementioned law firms have generously supported Spano's re-election in 2005. Just this year alone, they have contributed a combined total of $16,000 to his campaign, according to electronic filings at the Westchester Board of Elections.

See how it works? Understanding the basics should remove any mystery lingering behind such things as the $840,000-a-year lease for the promenade.

That is the Port Chester parable. You can apply it anywhere.

But there is good news. A measure was introduced this week that would limit future county involvement in projects in which eminent domain is used to transfer property into private hands.

A provision under Section 3 in the bill is worth mentioning. It states that county government "is hereby prohibited from participating in or contributing to, in any way, in any project that uses eminent domain or is the beneficiary of the use of eminent domain to take private property for private use."

In other words, no more gifts like the one given to G&S.

The bill was researched and written by Legislator Jim Maisano, a Republican from New Rochelle who was shocked by all the eminent domain horror stories that have lately made national headlines.

"This was so against my beliefs of what this county was founded upon and what I believe is fair and right," he told me.

The bill is being co-sponsored by Tom Abinanti, a Greenburgh Democrat. Ten out of 17 board members are already backing it, Maisano said.

If it passes, it won't change things in Port Chester, where yesterday, on the last hot day of summer, a few fishermen were casting lures over the railing of the promenade. Looming nearby were the giant Costco store and Lowes multiplex theater, both of which were made possible by the hard work of lawyers and the people who pay them.

Schools of baby bluefish were in a feeding frenzy, leaping and swirling by the thousands in the shallows of the Byram. It was a sight to behold.

NOTE: In Sunday's column, state Sen. Jeff Klein's party affiliation was incorrectly stated. Klein is a Democrat.

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STATEMENT SUBMITTED TO
HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION
ON
Oversight of the Kelo Decision and Potential Congressional Responses

September 22, 2005

I am submitting this statement based on my experience representing property owners and merchants at the Skyland Shopping Center in Southeast Washington, D.C. The District of Columbia Council has passed legislation which specifically provided that the Skyland property could be taken by eminent domain. The property would then be sold to a developer. There has been litigation about this eminent domain legislation in federal court and in the Superior Court for the District of Columbia. The National Capital Revitalization Corporation (the redevelopment agency affiliated with the District of Columbia government) has filed suit in Superior Court to take some of the parcels at Skyland by eminent domain.

I believe that there is a role for federal oversight and legislation on the subject of eminent domain. Federal involvement is particularly important in the case of the District of Columbia, in which there is no state legislature to review existing eminent domain provisions and rework them as necessary. The District of Columbia Council and Mayor can target an existing shopping center and simply take it by passing special legislation. The existing property owners and merchants are facing the loss of their property and livelihoods without having a chance to participate in a fair legislative process.

Following are specific issues that should be addressed by this Committee:

I. Use of federal funds for economic development should be strictly monitored for cost-effectiveness.

The proposed legislation addresses the use of federal funds for economic development. I believe it would be useful to set guidelines or other criteria which the agencies should follow in granting the use of federal funds when economic development is the stated objective. It is generally understood that projections of the benefits of economic development may well be greatly overstated and the forecasted job and tax benefits are not attained. Particularly in light of the extensive demands on the federal

budget to rebuild whole communities after Katrina, much stronger oversight is needed in the use of federal funds for "economic development." Projects that may have appeared to be desirable - such as those designed to provide fancier hotels or more upscale shopping opportunities - seem a particularly misguided use of funds when many have lost the basic necessities and even a place to live. The private sector should have the ability to plan for and fund any new shopping centers, without relying on federal funds.

The proposed Skyland project is a telling example of problems with the reliance of development agencies on federal funds. A recent article in The Washington Post discussed the proposed federal funding of the Skyland project. *See* Debbi Wilgoren, "Federal Funding for Mall in SE Falters," The Washington Post, September 15, 2005, at B3. The article reports that the U.S. Department of Housing and Urban Development (HUD) has told the District of Columbia that it cannot use $47 million in federal funds because of sanctions levied against the city eight years ago for repeatedly mismanaged federal development grants. A contract for NCRC to purchase one parcel at Skyland expired on August 31 because federal funds were unavailable.

An obvious question is why the D.C. government and NCRC simply assumed that they could obtain $47 million from HUD to develop a shopping center, even though previous grants had been mismanaged. Further, the proposed Skyland project has been described as featuring a big-box store, such as Target. However, Target has indicated that it does not plan to be involved in Skyland because it is planning its first store in the District of Columbia at Columbia Heights. In other words, the D.C. government is apparently willing to devote $47 million to a new shopping center with no signed anchor. The contrast to the existing Skyland Shopping Center is startling, because it is a functioning facility with a variety of stores. However, if federal funds are available, a municipality, such as the District of Columbia, is willing to bet those funds on the search for better shopping.

Federal funds should not be available for this type of speculative real estate venture by a municipal government. Further, the potential for cost overruns is significant in a project such as Skyland, which involves acquiring land by eminent domain. The famous Poletown project in Detroit, in which land was taken by eminent domain to permit General Motors to build a new plant, is instructive. A book written about the Poletown experience states:

> Meanwhile, the debts incurred by the city of Detroit for the GM project came home to roost. The $100 million Section 108 loan was originally slated to be repaid in six years. Detroit agreed to repay an average of $5 million a year between 1984 and 1987 and, at the end of the decade, to make balloon payments of $37.5 million and $41.6 million. The interest due on each portion of the $100 million drawn by the city ranged from 9 percent to 15 percent. The city monies which had been offered to the Department of Housing and Urban Development as collateral for the loan were Detroit's Community Development Block Grant (CDBG) monies,

> which were originally legislated for neighborhood development. However, there was no doubt that the balloon payments due for 1988 and 1989 were going to exceed the city's block grant allocations. Therefore, Detroit floated $54 million worth of revenue bonds in 1984 to repay part of the Section 108 loan.
>
> However, covering the costs of the Poletown plant would prove to be a further burden. Court awards exceeding the "just compensation" paid to home and business owners in Poletown began to roll in early. And, of course, the new quick-take act provided that the city pay attorney fees totaling one-third of the difference between the court award and the city's original payment. Within two years it was clear that the city would be at least $80 million dollars overbudget for its land acquisition in Poletown.

See Jeanie Wylie, Poletown: Community Betrayed (1989) at p. 216.

The increase in costs experienced in the Poletown project also presents a substantial risk in the Skyland plan. A recent Washington Post article discussed the costs of land acquisition, as follows:

> NCRC recently increased the projected cost of buying the properties, relocating businesses and doing environmental cleanup to $48.8 million, up from a 2003 estimate of $33 million. Freeman [Anthony Freeman, chief executive of NCRC], who took over the organization last summer, said the lower number was overly optimistic.
>
> The corporation has budgeted $35.5 million for those pre-development costs, mostly from the sale of land it owned near Union Station. Freeman said the corporation will try to trim some costs and is continuing to explore additional financing options, including seeking District or federal subsidies and additional investment in the project from Rappaport.

See Debbi Wilgoren, "D.C. Makes First Land Deal at Skyland," The Washington Post, April 10, 2005, at p. C6.

Federal funds should be used only if the project passes a cost-benefit analysis. Guidelines for determining whether Section 108 projects are financially feasible are at 24 CFR § 570.209. One guideline provides that Community Development Block Grant (CDBG) funds should create or retain at least one full-time equivalent, permanent job per $35,000 of CDBG funds used.

The proposed Skyland project is projected to create 300 additional full-time equivalent jobs. The District of Columbia has proposed to borrow up to $27.97 million

in Section 108 loans. According to these estimates, $93,233 of CDBG funds would be used for each full-time equivalent job created. Each job created by the Skyland project would cost $93,233, which is more than 2.6 times the cost of $35,000 permitted in the regulations.

Before federal funds should be permitted to fund eminent domain projects that displace existing homes and businesses, there should be a significant showing that the projected economic benefits will occur. The agencies reviewing requests for federal funds must have strong criteria and not simply rubber-stamp a municipality's request for economic development funds based on a rosy description of the projected future benefits.

II. Legislation is needed to provide just compensation for relocation of homes and businesses.

One important factor in eminent domain takings has been essentially ignored. The displacement of existing businesses puts the business owners and employees in severe financial hardship and uncertainty. In the Skyland project, the existing businesses will have to be relocated (assuming that eminent domain proceeds). The D.C. government and NCRC have offered help to the businesses as provided in the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970 (URA), 42 U.S.C. §§ 4621-4638. Although it may appear that the URA addresses relocation issues, it is widely acknowledged that the statutory provisions of the URA are wholly inadequate.

The relocation assistance in the URA provides for reimbursement by an actual cost method or a fixed payment. Both methods have statutory caps. The actual cost method includes a maximum of $10,000 for a business reestablishment allowance. The fixed payment method provides for a single payment of up to $20,000, which is all-inclusive.

The dollar maximums for reimbursement are contained in the statute. There is no provision for a cost-of-living increase even though the dollar amounts were established in 1987. Thus, the assistance available under the URA is far short of what could be described as just compensation. In fact, the agencies providing such assistance do not even attempt to provide just compensation - they merely endeavor to comply with the provisions of the URA, which are objectively inadequate. Moreover, if displaced business owners believe they have been offered compensation which is inadequate even under the URA, there appears to be little remedy. The claimants for relocation assistance under the URA are not entitled to an evidentiary hearing at any level. *Kroger Co. v. Reg'l Airport Auth.*, 286 F.3d 382 (6th Cir. 2002).

Finally, even if the relocation assistance under the URA provided some meager amount of compensation, the business owners have no assurance that their business will succeed in a new location. Particularly in an urban area, such as the District of Columbia, the task of finding a new location for an existing business is a difficult one. There may be pressure on the existing businesses simply to close, rather than to relocate.

The absolute unfairness to existing business owners in an eminent domain procedure is startling. Under the guise of economic development, existing small businesses will be closed with little likelihood of a successful relocation. At the same time, the proposed private developer may be given a windfall based on the sale price of the assembled sites. For example, in the Skyland project, NCRC's strategy apparently is to sell the Skyland property to the private developer for $4-5 million, after NCRC has spent $25 million or more on land acquisition and site preparation. The private developer would reap a $20 million or more windfall, while existing businesses would be closed and provided only minimum assistance to attempt to relocate.

Federal funds should not be used to pay windfalls to private developers while small businesses are destroyed.

III. Legislation should provide for a private right of action by property owners and merchants affected by an eminent domain taking.

It would be useful for any legislation to include a private right of action for property owners and merchants affected by eminent domain. As soon as the property owners and merchants are threatened with the prospect of eminent domain, they face uncertainties and the possible loss of their businesses and livelihood. Even if eminent domain itself is not accomplished for a significant period of time, the uncertainties generated from the possibility of eminent domain place the property owners and merchants in an untenable situation. For example, any funds expended on maintenance or upkeep may be wasted if the building will eventually be torn down. In addition, customers and employees will want to know what are the prospects for the business, with the result that both may simply stay away. The anxiety caused by this uncertainty cannot be overstated.

When the property owners and merchants are facing such uncertainty, they should be able to pursue a private right of action in court to challenge the eminent domain legislation and pending condemnation of their property. In other words, they should not have to wait on the city or other condemning authority to follow the onerous eminent domain process and simply be a defendant trying to obtain just compensation.

The courts have in some circumstances held that these property owners lack stainding until after the eminent domain process has proceeded to the point of the property owners receiving and rejecting an offer of compensation. The cause of action which has been permitted in that situation is a claim that the compensation was inadequate and therefore in violation of the Just Compensation provision of the Fifth Amendment. However, that cause of action would only accrue after a considerable period of time had passed during which the property owners and merchants had been facing the threat of eminent domain.

The legislation should include a provision for a private right of action that would be permitted at the beginning of the eminent domain process, when legislation is enacted or when funding decisions are made. The property owners and merchants should be empowered to stand up for themselves in court and not be forced by rigid standing rules to simply wait and see what harm they will suffer as a result of the eminent domain process.

The private right of action should also include a provision for attorneys' fees. As commentators have noted, those persons facing eminent domain are often the least privileged and lacking in political clout. As a result, they may be unable to hire and pay for attorneys who would assist them in protecting their property rights. Moreover, the contingent fee method of payment likely would not be feasible, particularly for merchants who do not own the land on which their business operates. When individuals are forced to face off against the government and its lawyers in court, there should be a provision for those individuals to recover attorneys' fees.

The *Kelo* case provides a telling example of the burdens of litigation. In November 2000, the New London Development Corporation initiated condemnation proceedings. The property owners sued in New London Superior Court in December 2000, claiming that the taking of their property would violate the Fifth Amendment public use restriction. A seven-day bench trial was conducted and both sides appealed to the Supreme Court of Connecticut. After the Supreme Court of Connecticut ruled, the case was taken to the Supreme Court of the United States. The widely-noted opinion, *Kelo v. City of New London, Conn.*, 125 S.Ct. 2655 (2005), was issued on June 23, 2005. *See* history of case reported in *Kelo*, 125 S.Ct. at 2660. Thus, the *Kelo* litigation has been ongoing for about five years. The burdens of this type of litigation cannot possibly be undertaken by individuals and small business owners.

If property owners and merchants have to defend their property rights in the courts, then legislation is necessary to ensure them adequate standing and the prospects of recovering attorneys' fees.

I would be pleased to provide additional information on these matters.