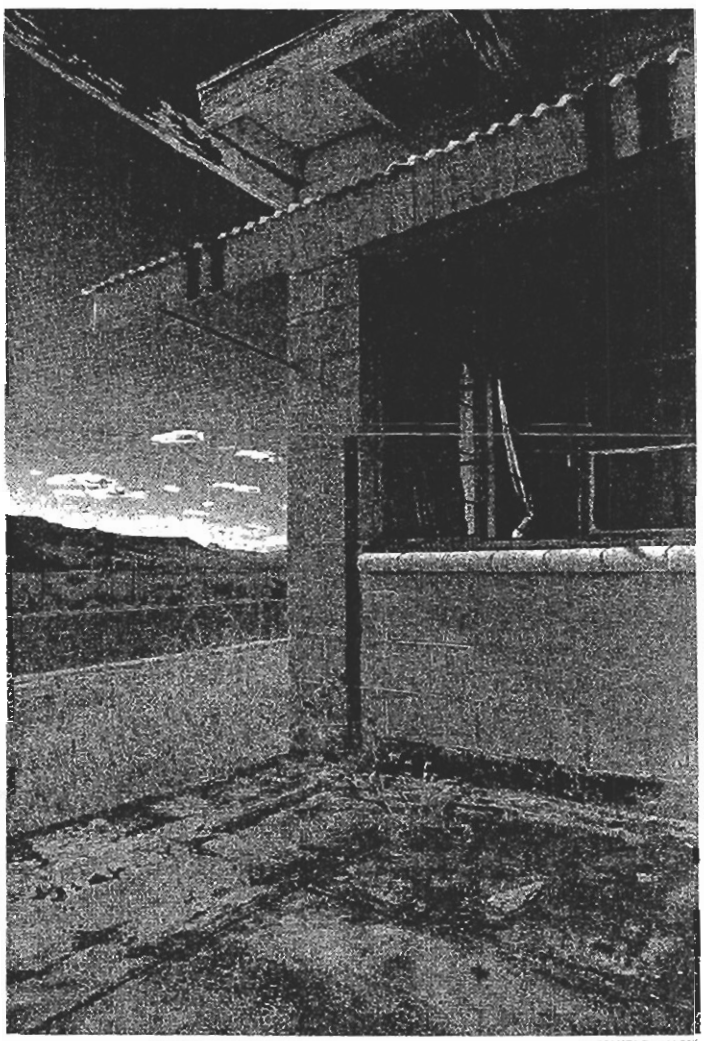
Eminent Domain in New Jersey After *Kelo*: What's Next?

by James J. Ferrelli

The power to take private property by way of condemnation is among the most awesome powers possessed by the government in a free society. Like so many things in the law, the notion of condemning blighted properties for redevelopment to stimulate economic growth and commerce does not sound bad in the abstract, especially when one considers that land is relatively limited in our state.



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In the appropriate case, the government's taking of blighted property and paying fair compensation to the owner in order to allow that property to be redeveloped would seem to be a necessary exercise of governmental power to serve the greater public good.

But what about those instances where a businessman's small but successful business happens to be located in or near a neighborhood that becomes slated for redevelopment? And what about the homeowner who happens to live in or near a neighborhood where some of the properties are abandoned, in serious disrepair, or otherwise distressed? And what of those instances where the city fathers have made up their mind that a particular part of the city is in need of redevelopment? For the small business owner, the homeowner, or the neighborhood that is the target of such redevelopment, there are few situations more traumatic than being uprooted from their business or home of many years.

Following the United States Supreme Court's decision in *Kelo v. City of New London*,[1] debate regarding these very questions—and the appropriate scope of the government's power to take private property through eminent domain—intensified. In New Jersey, courts grappled with the scope of appropriate eminent domain authority in three noteworthy cases decided in 2005—*Mount Laurel Twp. v. Mipro Homes, L.L.C.*,[2] *Twp. of Bloomfield v. 110 Washington Street Assocs.*,[3] and *LBK Assocs. v. Borough of Lodi*.[4] Following a summary review of *Kelo*

In *Kelo*, a 5–4 majority of the Supreme Court held that the city of New London, Connecticut, through a nonprofit development corporation, could exercise eminent domain against nine properties located in a redevelopment area, notwithstanding that the specific properties at issue were not blighted or otherwise in poor condition, but were condemned only because they were located in the redevelopment area.

and its immediate aftermath, this article will review these three recent New Jersey eminent domain decisions.

Kelo: Substantial Deference to Governmental Decisions Pursuant to a "Carefully Considered Development Plan"

In *Kelo*, a 5–4 majority of the Supreme Court held that the city of New London, Connecticut, through a nonprofit development corporation, could exercise eminent domain against nine properties located in a redevelopment area, notwithstanding that the specific properties at issue were not blighted or otherwise in poor condition, but were condemned only because they were located in the redevelopment area. The Supreme Court refused to second-guess the city's determination that the area at issue, including the non-distressed properties, was sufficiently distressed to justify a program of economic rejuvenation.

As the majority explained, the case turned on "whether the City's development plan serves a 'public purpose.'"[5] The Court held that the goal of economic development "pursuant to a 'carefully considered' development plan" qualified as a "public use" within the meaning of the takings clause of the Fifth Amendment.[6] The *Kelo* majority granted substantial deference to the Legislature based upon the city's detailed development plan, noting that there was no evidence of "an illegitimate purpose," and the development plan "was not adopted 'to benefit a particular class of identifiable individuals.'"[7]

The Aftermath of *Kelo:* Legislative Change and New Claims?

Reaction following *Kelo* was impassioned, reflecting the sentiment set forth in Justice Sandra Day O'Connor's 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."[8] By mid-August 2005, new legislation had been planned or introduced in some 22 states, including New Jersey, seeking to limit the reach of eminent domain powers following *Kelo*.[9] In New Jersey, besides proposed legislation, both gubernatorial candidates called for legislative action to protect homeowners from *Kelo*-type takings.

Kelo, however, does not totally immunize local government in exercising eminent domain powers to seize private property for economic development. Justice John Paul Stevens' majority opinion states that eminent domain would be inappropriate where the "actual purpose was to bestow a private benefit."[10] Moreover, *Kelo* expressly leaves open the possibility that eminent domain could be challenged where it is exercised in the absence of a "carefully considered" development plan, or where there is evidence of an "illegitimate purpose" or that the development plan was adopted to benefit "a particular class of identifiable individuals."[11]

Such claims have recently been asserted against the city of Philadelphia in *Down Under GFB, Inc. v. City of Philadelphia*, a federal civil rights suit filed in the United States District Court for the Eastern District of Pennsylvania by landowners asserting that the city illegally used its eminent domain powers to take four acres of land to create a driveway for an 11-acre FedEx facility. The suit alleges that the city's redevelopment authority never developed a carefully considered development plan, and that its taking was done solely to benefit a private corporation.[12] While the outcome of the *Down Under GFB* case remains to be seen, it is clear that even the *Kelo* majority opinion reaffirms certain limits on the exercise of eminent domain power.

Mipro: Open Space Preservation Trumps Large Single-Family Homes

In what is likely a landmark eminent domain decision, *Mount Laurel Twp. v. Mipro Homes, L.L.C.*,[13] the Appellate Division of the superior court reversed a trial court determination that Mount Laurel Township had improperly exercised eminent domain in condemning land for the stated purpose of open space preservation. In *Mipro*, the court framed the issue as "whether evidence that a municipality's motive in selecting properties for open space acquisition is to slow down residential development makes use of the eminent domain power for this purpose improper."[14]

The Mipro site was a 16.3-acre parcel occupied by a single house, located in a

The *Mipro* decision has been viewed by some as an assault on housing and the building industry. However, *Mipro* is perhaps best understood as a case about the preservation of an increasingly scarce natural resource, open space.

residential zone. The township did not initially list the Mipro parcel on its list of properties to be acquired for open space because Mipro's predecessor in title had planned an assisted living facility on the site that would have included affordable housing. After Mipro purchased the property and had obtained preliminary subdivision approval for a development of 23 single-family homes, Mount Laurel's governing body added the parcel to its list of property to be acquired under its open space acquisition program. Prior to final subdivision approval, the township passed an ordinance authorizing acquisition of the property. Mount Laurel filed a condemnation action 15 days after final subdivision approval, and a declaration of taking a week later.[15]

The trial court in *Mipro* determined that the township had initiated condemnation proceedings for the facially valid purpose of preserving open space, but that its real motive was to prevent another residential development. The court concluded that the articulated public purpose for the taking—the preservation of passive open space—was not based on true public need, but rather was stated in response to anti-development community sentiment expressed at the polls, as well as clear indications from township officials that they intended to stop residential development.[16]

In reversing the trial court, the Appellate Division discussed at length the "multiple statutory enactments" reflecting the public interest in acquisition of land for open space and a municipality's statutory authority to exercise eminent domain to acquire land for open space.[17] According to the Appellate Division, the absence of a plan to devote the condemned land to active use did not prevent the municipality from exercising eminent domain to conserve land for open space. Citing the Green Acres statutes,[18] the Municipal Trust Fund Act,[19] and the Garden State Preservation Act,[20] the Appellate Division explained that these numerous statutes "recognize that open space acquisition may serve the public interest not only by setting aside land for potential future recreational uses but also by preventing development that may aggravate a municipality's traffic congestion and pollution problems and put additional strain on municipal services such as schools."[21]

The Appellate Division was not troubled by the fact that the zone in which the subject property was located was not designated as open space in Mount Laurel's master plan under the Municipal Land Use Law (MLUL).[22] The court explained that the issue was one of eminent domain and not zoning, and that the statutes authorizing the acquisition of land for open space acquisition, including the statute establishing the Office of Green Acres,[23] "establish separate administrative procedures designed to assure that the municipality's open space program reflects sound planning."[24] Since the township had applied to and secured a grant under the Green Acres Program, there was a finding that the Mipro site was suitable for open space acquisition.[25]

Similar to *Kelo*, the Appellate Division's ruling reflected deference to the municipal determination. The court ruled that even if the township's primary goal was to slow down residential development, this was not a basis to find that the use of eminent domain constituted fraud, bad faith or manifest abuse. Rather, the Appellate Division explained, the township had a reasonable basis for concerns about aggravated traffic congestion, pollution problems, and additional stress on its school system and other municipal services that would flow from additional residential development.[26] Interestingly, the Appellate Division suggested that its decision might have been different had the property owner intended to construct facilities implicating significant public interests, such as medical rehabilitation and nursing facilities, or affordable multi-family housing.[27]

The *Mipro* decision has been viewed by some as an assault on housing and the building industry. However, *Mipro* is perhaps best understood as a case about the preservation of an increasingly scarce natural resource, open space. Unlike many eminent domain cases, *Mipro* arose in the context of an extensive state statutory and regulatory framework articulating a strong public interest in the preservation of open space and in a specific factual scenario in which the state had approved funding earmarked for the preservation of the subject property. Further, the factual record revealed widespread local support for the preservation of any open space remaining in Mount Laurel's dwindling inventory of undeveloped land. Given the complete absence of evidence that other private parties would benefit or profit from the taking of the subject property, the legislative and local determination to preserve open space carried the day.

Finally, in terms of intangibles, the *Mipro* plaintiff was a developer seeking to turn open space on which an assisted living facility had previously been planned into a 16-acre subdivision comprised of large, expensive houses—quite a different situation from homeowners being thrown out of their homes by a taking.

In contrast to the deference to the governmental action in *Kelo* and *Mipro*, two trial courts in New Jersey recently struck down takings based upon the insufficiency of the evidence relied upon by the municipalities as justification for the redevelopment project. These cases, addressing challenges to the exercise of eminent domain under New Jersey's Local Redevelopment and Housing Law (LRHL),[28] suggest that *Kelo* may be of limited relevance in redevelopment condemnation cases in New Jersey because of the extensive statutory requirements that must be satisfied as a prerequisite to a taking under the LRHL.

Bloomfield: Insufficient Evidence and the Appearance of Impropriety

In *Township of Bloomfield v. 110 Washington Street Assocs.*, the New Jersey Superior Court, Law Division, Essex County, dismissed the township's condemnation action in a *Kelo*-type taking, holding that the record in the case "is devoid of any finding that the property is detrimental to the public health, safety or welfare,"[29] as required by the LRHL. *Bloomfield* was a condemnation action filed by the township seeking to condemn a vacant industrial building that became a target of redevelopment after the owner had entered into an agreement of sale with a buyer, who sought a certificate of occupancy from the township.[30] Besides the absence of a finding of detriment, the court was also troubled by the course of events and appearance of impropriety arising from the same attorney representing the township, the zoning board and the planning board, discussed below.

The court initially rejected the property owner's argument that the redevelopment taking was for a private and not public purpose, in violation of the federal and state constitutions. Citing both New Jersey case law and *Kelo*, the court explained that the plaintiff township was authorized to condemn property for private development "as long as the development serves a public purpose," and eliminating blight is such a purpose.[31]

Nevertheless, the court held that the township had failed to establish evidence to support the determination that the property was in need of redevelopment. Reviewing the redevelopment area study prepared for the township, the court found that it was not done in accordance with the LRHL requirements. While the language of the study appeared to parrot the language of N.J.S.A. 40A:12A-5(d) and (e), the study did not reflect evidence to support a finding that the condition of the property was in fact detrimental to the public health, safety and welfare within the meaning of the LRHL.[32] In the court's view, the township merely "took the brief description of the property...and concluded without any further analysis that this condition equated to a detriment to the public health, safety and welfare." The court found that no analysis of the detrimental condition of the property had been made, a necessary predicate to support condemnation under the LRHL.[33]

Equally troubling to the court was the "appearance of conflict and impropriety that cannot be sanctioned," evident in the chronology and the facts before the court, a review of which reads like a property owner's nightmare.[34] Months before the township adopted a resolution requesting its planning board to conduct a preliminary investigation to determine whether an area including the subject property qualified for redevelopment under LRHL, the buyer had filed a planning board application for a certificate of occupancy to conduct light manufacturing concerns on the property. Thereafter, a zoning official advised the buyer that it needed to apply to the zoning board for a use variance, and the buyer did so. Following approval of the use variance on September 14, 2000, the zoning board advised that the information that a use variance was required was erroneous, and directed the zoning official to issue permits and a certificate of occupancy. A month later, on October 12, 2000, the zoning board rescinded its approval on the basis that it had no jurisdiction for its prior action, and referred the applicant back to the planning board. Between these two dates, the township passed a resolution requesting the planning board to investigate whether the same property was subject to redevelopment. The seller appealed the rescission to the Law Division, and the zoning board was reversed on June 1, 2001. In the interim, however, the buyer had terminated the sales contract with the property owner due to the delay. At all times during these proceedings, the township, zoning board, and planning board were represented by the same attorney.[35]

As summarized by the court:

> The applicant received contradictory direction from two boards, both represented by the same attorney. The diverse positions taken caused a delay in the completion of the application process to the detriment of the owner and gave rise to the very conditions cited in the Study, and relied on by the Boards. The tortuous and complex path this process took and the interconnected relationships lay bare the very dangers in having municipal boards charged with different and

independent functions operate under the same attorney.[36]

Citing N.J.S.A. 40:55D-24, as well as numerous ethical opinions, the court noted that independent representation was required in order to ensure independence between and among the public entities so that the "entire process be fair to the public and to the condemnee."[37] The court also cited *Kelo* for the proposition that courts should carefully watch condemnation proceedings because "undetected, impermissible favoritism of private parties" may be so acute that a presumption of invalidity is warranted.[38]

LBK: Fact Sensitive Analysis of Evidence to Support Redevelopment

Similarly, in a decision rendered on October 6, 2005, the New Jersey Superior Court, Law Division, Bergen County, in *LBK Assocs., L.L.C. v. Borough of Lodi* invalidated the actions of the borough of Lodi in determining that an area was in need of development and subject to condemnation.[39] Unlike *Bloomfield*, the properties in *LBK* were comprised primarily of trailer parks, including some 233 occupied mobile homes, as well as buildings occupied by commercial tenants.[40] Although there was no appearance of impropriety, the *LBK* court nevertheless found that condemnation was improper because it was not supported by substantial evidence of the need for redevelopment.

The court began its analysis with a review of *Kelo*. After discussing the facts and holding, the court noted that *Kelo* dictates that deference be given to the efforts and enactments of the Legislature as reflected in the LRHL, and of the actions of the local government. The court's role is "not to determine whether the actions taken by Lodi are sound decisions or effective governance, but rather, if Lodi has acted in accordance with the law."[41]

Turning to New Jersey law, the court explained that the LRHL sets forth specific procedures and conditions under which a municipality may conclude that an area is in need of redevelopment, and its review of a blight determination is limited to whether the municipality's finding is supported by substantial evidence. As explained by the court, "each project is fact sensitive and must be so analyzed."[42] The court noted that the case law demonstrated that a determination that redevelopment under the LRHL is appropriate should be based upon "very specific data and documentation demonstrating why the areas designated for redevelopment were found to be unsanitary, obsolete, dilapidated, and unlivable."[43]

Notwithstanding that the hearing on the redevelopment plan consumed some nine public meetings of the planning board,[44] the court found that the municipal planner had failed to address the "important criteria" applicable in this case under the LRHL: interior inspection of the trailers, lack of specific safety violations, and failure to identify any health hazards. Rather, the court summed up the borough's evidence as a "vague criticism of the conditions of the complex upon superficial observations," that did not include a trailer-by-trailer analysis. Indeed, Lodi's expert could not point to a single condition that was unsanitary or would make the area unlivable.[45]

Finally, the court emphasized that the ongoing productive use of the land supported its decision. There were no safety or health hazards, no excessive police activities, and the land generated license fees and taxes. Further, the majority of both plaintiffs' premises were part of an ongoing business: rental properties providing affordable housing that generated tax revenues to the borough. Such productive use of the land "negated" any presumption to which the borough may be entitled regarding the need for redevelopment.[46]

Where Do We Go From Here: Appellate Modification or Legislative Enactments?

Notwithstanding the deference to the state and local authorities affirmed by *Kelo*, subsequent eminent domain decisions in New Jersey suggest that local bodies will not be given *carte blanche* to condemn private property, at least in the area of redevelopment. The *Bloomfield* and *LBK* cases suggest that New Jersey courts reviewing redevelopment determinations of local government entities will continue to carefully scrutinize the factual basis underlying the determinations under the LRHL that redevelopment is appropriate and that private property should be taken for a redevelopment project.

For lawyers representing municipalities considering the exercise of eminent domain for redevelopment, these cases underscore the importance of a strong factual predicate for such action, as well as the importance of avoiding partiality or the appearance of partiality. For landowners whose properties may be the target of such action, the cases demonstrate that conclusory findings regarding condemnation or redevelopment may be subject to challenge, based upon the statutory elements of the LRHL. Barring reversal by the Supreme Court, *Mipro* reveals that municipalities exercising eminent domain in the context of open space preservation will likely be the beneficiaries of substantial deference in any challenges to their conduct.

Whether and to what extent the appellate courts or Legislature change the availability or scope of eminent domain for redevelopment or open space preservation remains to be seen. In the meantime, it will be left to municipalities to carefully exercise the awesome power of eminent domain in cases where the taking of private property is appropriate under the circumstances, and to our courts to ensure that the exercise of such power is based upon

appropriate factual circumstances, and not conclusory findings or impermissible favoritism.

Endnotes

1. __ U.S. __, 125 S. Ct. 2655 (2005).
2. 379 N.J. Super. 358 (App. Div. 2005).
3. Docket No. ESX-L-2318-05 (N.J. Super. L. Div., Essex Co. Aug. 3, 2005).
4. Docket No. BER-L-8766-03 (N.J. Super. L. Div., Bergen Co. Oct. 6, 2005).
5. 125 S. Ct. at 2663.
6. *Id.* at 2664-65. Reviewing the case law, the majority held that the city's interest in promoting economic development was a "traditional and long accepted function of government," and was consistent with the Court's "traditionally broad understanding of public purpose. *Id.* at 2666.
7. *Id.* at 2661-2662 (citations and quotations omitted).
8. *Id.* at 2676.
9. *See* States Race to Respond to Supreme Court Takings Case, *Kansas City Daily Record,* (August 13, 2005).
10. 125 S. Ct. at 2661.
11. *Id.*
12. *See* Suit Against City to Test *Kelo* Decision, *The Legal Intelligencer,* October 5, 2005 at 1.
13. 379 N.J. Super. 358 (App. Div., Aug. 2, 2005).
14. *Id.* at 362.
15. *Id.* at 365-66.
16. *Id.* at 367-68.
17. *Id.* at 371-373.
18. N.J.S.A. 13:8A-2; N.J.S.A. 13:8A-20; N.J.S.A. 13:8A-36.
19. N.J.S.A. 40:12-15.2; N.J.S.A. 40:12-15.1.
20. N.J.S.A. 13:8C-2; N.J.S.A. 13:8C-3.
21. 379 N.J. Super. at 373-74.
22. N.J.S.A. 40:55D-1 to -163.
23. N.J.S.A. 13:8C-24(a)(1).
24. 379 N.J. Super. at 369-70.
25. *Id.*
26. *Id.* at 375-76.
27. *Id.* at 376-77.
28. N.J.S.A. 40A:12A-1 *et seq.*
29. Docket No. ESX-L-2318-05, letter op. at 6.
30. Docket No. ESX-L-2318-05, letter op. at 1-2.
31. *Id.* at 3-4.
32. N.J.S.A. 40A:12-5(d) and (e) state:

    A delineated area may be determined to be in need of redevelopment if, after investigation, notice and hearing...the governing body of the municipality by resolution concludes that within the delineated area any of the following conditions is found:

    ...d. Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.

    e. A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

33. Docket No. ESX-L-2318-05, letter op. at 6.
34. *Id.* at 10.
35. *Id.* at 1-3, 9-10.
36. *Id.* at 10.
37. *Id.* at 8-9.
38. *Id.* at 9 (*citing Kelo,* 125 S. Ct. at 2699).
39. Docket No. BER-L-8766-03, slip op. at 21.
40. *Id.* at 2-4.
41. *Id.* at 12.
42. *Id.* at 15.
43. *Id.* at 15-16.
44. *Id.* at 15.
45. *Id.* at 16-17. Besides the "complete lack of detailed specific proof" as to why the property is in need of redevelopment, the court found that Lodi had failed to disclose the public purpose underlying the proposed taking, a requirement under the statute. *Id.* at 17. Nevertheless, the court reviewed evidence of a submission from the redeveloper that outlined the proposed uses, which included a planned two-story active adult villas, age-restricted residential apartments, and an upscale retail mall with 112,000 square feet of retail space. Based upon the broad definition in *Township of West Orange v. 769 Assoc.,* 172 N.J. 564 (2003), the court found that the condemnation could be classified as a public purpose, but held that the statutory criteria of N.J.S.A. 40A:12A-5 had not been met. Docket No. BER-L-8766-03, slip op. at 18.
46. *Id.* at 19-21.

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States eye land seizure limits

Bills would rein in eminent domain

By Dennis Cauchon
USA TODAY

More than 30 state legislatures are considering limits on the power of local governments to condemn private property and transfer it to real estate developers to spur economic growth.

Lawmakers are responding to a Supreme Court ruling in June that permitted eminent domain powers to be used in New London, Conn., to confiscate waterfront homes to build an office complex and condominiums. The 5-4 ruling prompted property rights advocates to take their case to state legislatures.

Five states enacted small changes last year, but most legislatures were not in session after the court ruling. "This is the crucial year for the eminent domain issue," says Larry Morandi, who tracks eminent domain legislation for the National Conference of State Legislatures.

Bills to restrict eminent domain have moved forward in Georgia, Virginia, Indiana, Kentucky and several other states, but none has become law yet. In New Mexico, the state Senate and House both approved limits, but the legislature adjourned before final approval.

In Ohio
■ A test case, 3A

Eminent domain is the power of the government to take private property for "public use" if the owner is fairly compensated. It has been used to build roads, schools and utility lines.

Cities also have used it to transfer property from unwilling sellers to developers who want to build shopping malls, offices or other projects.

Baltimore's Inner Harbor and New York City's Times Square are among the urban neighborhoods revamped by eminent domain.

After the Supreme Court decision, legislatures in Alabama, Texas, Delaware, Michigan and Ohio took modest steps to restrict eminent domain. Michigan approved a constitutional amendment that will be on the ballot in November. Ohio approved a one-year moratorium on eminent domain for economic development. Congress also is considering restrictions.

"There's been an explosion of outrage by people across the country and across the political spectrum about what can be done," says Scott Bullock of the Institute of Justice, a libertarian public interest law firm.

Last month, Charlotte-based BB&T, the nation's ninth-largest bank, announced it would not lend money to developers who used eminent domain to acquire property. The Rhode Island Economic Development Corp., a quasi-public agency headed by the governor, announced it would no longer use eminent domain for economic development.

Donald Borut, executive director of the National League of Cities, says state legislatures should not rush to judgment about eminent domain laws. He says careful study would show that eminent domain abuses are rare. "We all feel sympathetic for someone who is losing a home," he says. "But we also have to consider the faces of people of all income levels who benefit from the job creation these projects bring."

Legislatures' strategies

▸ **Explicit bans.** Some bills would ban the use of eminent domain for economic development. Others would do so indirectly by stating when it can be used and leaving commercial development off the list.

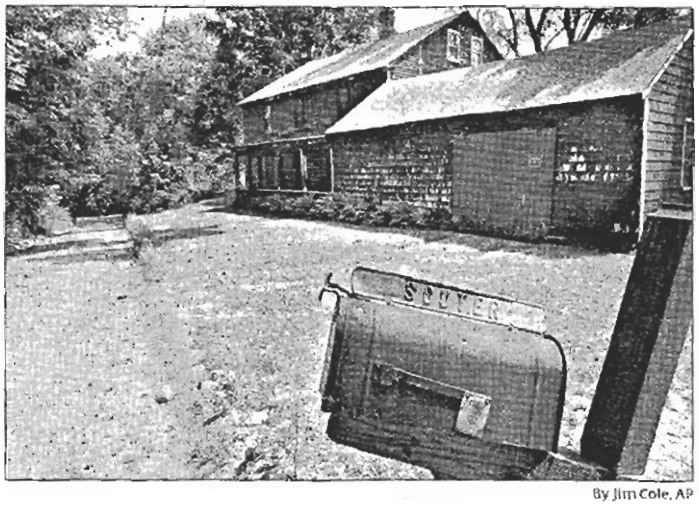
▸ **Narrower rules.** Many states are considering whether to make it harder for cities to declare a neighborhood "blighted" just for economic development through eminent domain.

▸ **Economic penalties.** New York and Indiana are among srates considering measures that would make eminent domain more expensive. The government would have to pay 25% or 50% above market value when it confiscates a property for commercial development.

Welcome to Hotel Souter?

Eminent-domain ruling triggers N.H. backlash

By Beverley Wang
The Associated Press



By Jim Cole, AP

Family place: Supreme Court Justice David Souter's home in Weare, N.H. Opponents of the court's eminent-domain ruling would love to take it.

WEARE, N.H. — Near the foot of an unmarked, dead-end dirt road sits a humble farmhouse. A sign on a mailbox jutting from a tilted post reads "SOUTER."

Some folks want to make that "Hotel Souter."

People from across the country are getting behind a campaign to seize Supreme Court Justice David Souter's farmhouse to build a luxury hotel, according to the man who came up with the idea after a Supreme Court decision favoring government seizure of property for private development.

"We would act just as these cities have been acting in seizing properties. We would give Souter the same sort of deal," said Logan Darrow Clements of Los Angeles.

Town Clerk Evelyn Connor has had to return checks from people wishing to donate to a hotel construction fund. A rival proposal from townspeople would turn Souter's land into a park commemorating the U.S. Constitution.

Souter has declined to comment on the matter, but he has some defenders. Among them is Betty Straw, his sixth-grade teacher.

"I think it's absolutely ridiculous," she said. "They're just doing it for spite."

New Hampshire is a state where people fiercely defend property rights. A recent University of New Hampshire poll reported 93% of state residents oppose the taking of private land through eminent domain for private development.

Souter was one of five justices who sided with the city of New London, Conn., last month in a decision that said the city could take people's homes to build a private hotel and convention center, office space and condominiums.

The justice has lived for decades in his family's home in this central New Hampshire town, about 15 miles from Concord. The house, more than 200 years old, is one of the few remnants of the original East Weare village, which was seized 45 years ago to make way for a dam.

Clements, 36, has never been to Weare, population 8,500, but is a member of the Free State Project, a libertarian movement that wants to move 20,000 followers to New Hampshire.

He knows his hotel plan is hard to take seriously.

"That's sort of the story of my life: Nobody takes me seriously until I do something," he said. "We will be taken seriously when we make a formal presentation to the powers that be in Weare," he said. He said he is talking to several development consultants.

Clements said his mission, like his long-shot bid for governor of California in 2003, is rooted in his passion for a philosophy of free-will capitalism embodied in Ayn Rand's 1957 novel, *Atlas Shrugged*.

"We should have a voluntary society where people interact with each other through trade, not through the initiation of force," Clements said.

(He received 274 votes in the election. Arnold Schwarzenegger won with 4.2 million.)

Connor, the town clerk, said it's all a little much for a town where the biggest excitement of the year usually is the Weare Patriotic Celebration, which this year featured an American Legion chicken barbecue, carnival rides and a men-vs.-women softball game. "We just got a Dunkin' Donuts," she said.

USA Today 7/25/05

State and Local Economic Development

The Challenge of Taking Property for Economic Development Post-Kelo

John Aughenbaugh, Chad Miller

The U.S. Supreme Court ruling in Kelo v. City of New London (2005) and a maelstrom in Virginia regarding eminent domain provide important insights for local and state economic development efforts. The Kelo case concerned a New London, Connecticut development plan that required the city's private non-profit economic development entity (New London Development Corporation; NLDC) to purchase a number of private properties, some of which would be transferred to private developers as part of the city's long-term plan to raise the community's tax base.

Some of the property owners, including a number of home owners, were unwilling to sell, and challenged NLDC's action on the grounds that the plan would lead to their property being used for non-public purposes (use by private developers). As such, this taking of their property would violate the Takings Clause of the 5th Amendment of the U.S. Constitution.

The Takings Clause states that government may take a person's private property as long as the "taking" is used for a public purpose and the property owner is given "just compensation." In this case, the Court held in favor of New London, claiming that how the NLDC planned to use the land fit the definition of public use. Specifically, the Court emphasized that the property being taken was part of a "carefully considered development plan" that was designed to improve the city's overall economic situation. In the whole, such takings would benefit the entire economic condition of the city.

Moreover, the Court reiterated that historically it has deferred to state and local governments' well-thought formulations of whether plans would help rejuvenate a given area. Because New London had crafted an extensive economic development plan based on authority given it by the state of Connecticut, the Court was loath to second-guess the decisions made by local authorities.

In the months after the Kelo ruling, the Court was strongly criticized–by elected officials in both political parties and at all levels of government. The Court made clear that it was not endorsing New London's actions but merely holding them constitutional. However, critics emphasized that the case and subsequent ruling was a prime example of local government planning run amok, that if people could lose their homes and property so that other private property owners may benefit, then things needed to change.

Much of the criticism highlighted a dichotomy many state and local government officials encounter today–the public expects them to provide jobs and improve a community or state's economy, but not if doing so means some citizens will have to sacrifice and be hurt in the process.

The Kelo ruling backlash culminated in dozens of states considering proposed legislation that would limit the eminent domain powers of government. An extreme example was in California where government regulations that even tangentially affected private property could lead to the government providing compensation for property owners not being able to fully use their land.

In our state of Virginia, the state legislature is presently considering over 20 pieces of legislation concerning eminent domain powers. Some of these bills deal with run-of-the-mill elements of that power (like who comprises juries in condemnation cases), but others could

lead to amendments of the Virginia Constitution and would effectively limit any/all government takings. This debate on eminent domain in Virginia has a particular urgency in light of an ongoing conflict near Roanoke.

With cries from one side that it is "undemocratic and will kill children" and the other side countering that it is the biggest economic development opportunity in twenty years, a vitriolic debate has erupted in the otherwise business-friendly community over the proposal to establish a rail-to-truck facility in the bucolic village of Elliston. Amid the hyperbole, there are valuable lessons that can be learned on the use of eminent domain and working with the public.

As part of the Heartland Corridor, a public-private partnership created to improve the movement of freight by railroad from the congested port areas to the Midwest, several intermodal facilities have been planned along the Norfolk Southern (NS) rail line. A similar facility in Virginia attracted $500 million in investments, created 5,000 jobs, and improved the competitiveness of companies in the area. Further, state officials have said the corridor could take 200,000 trucks off the congested roads near the coast.

With federal funding appropriated for the needed improvements, NS started a secretive search for fifty acres of relatively flat land served by both rail and highway for a 70% state funded $18 million intermodal facility near Roanoke.

Without warning, 10 property owners in Elliston received letters from the railroad saying the company wanted to buy "all or part" of their land with the implication that if they did not sell that eminent domain would be used. The community quickly began to mobilize against the "preferred site." Citizens raised a litany of concerns about air pollution, contaminated runoff, increased truck traffic, damage to the scenic vistas, and safety. They pointed out that the facility was not part of the village's or county's development plans. In response to the firestorm, the Montgomery County Board of Supervisors passed a resolution opposing the facility. Currently, the state has postponed any decision as alternatives are being sought.

To some the Elliston debate seemed a classic NIMBY (not in my backyard) debate, but to those involved, it was about democracy. They framed the debate as about self-government and the democratic right for communities, and not corporations, to make public decisions. This has led the state legislature to propose several bills that would give localities veto power over the use of eminent domain.

Even though there are differences in the Kelo and Elliston cases, both involve state sanctioned use of eminent domain for economic development purposes, and both have important implications for government. The most obvious is that using eminent domain for economic development is a contentious and ethically fraught proposition.

These cases point to how state and local governments may have an array of powers at their disposal to promote development, but they should be mindful that such powers are hardly ever exercised in a vacuum. The courts may grant approval of the use of eminent domain as part of a development plan, and the public may clamor for elected officials to grow the economic pie to benefit them. Yet, the method and context in which a power is used often requires the skills and reflection of a diplomat.

The cases also highlight the need for transparency and to explain the justification for public action to citizens. In the Elliston case, NS took a ham-handed approach and only belatedly made an effort to explain their reasoning, but NS is not in the economic development business. Economic development is an externality of it running a competitive railroad.

The state level public administrators and elected politicians should have made the case why placing the facility in Elliston is in the best interest of all the citizens of the Commonwealth. While transparency is not always possible in discussions between government officials and private sector executives, as the Kelo backlash and Elliston cases suggest, ways may need to be found in the future to accommodate a public more sensitive to how government uses its powers in conducting economic development efforts.

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Today's debate: Eminent domain

One year later, power to seize property ripe for abuse

Our view:
Backlash to high court ruling grows, as do land grabs.

Remember Susette Kelo? The New London, Conn., nurse lost a landmark legal fight to save her pink cottage from being seized by city officials, who wanted to hand it over to developers. Just over a year ago, the U.S. Supreme Court ruled against her. It held 5-4 that local governments could condemn private property, not just for a public purpose such as a road or school, but also to give to developers if a locality's economic future is at issue.

As it turned out, that wasn't the end of the story. The house won't be bulldozed after all. Last month, officials agreed to move it to another location so that her land can round out a waterfront development site — a compromise Kelo suggested years ago to little avail.

By Steve Miller for USA TODAY

Kelo: The Supreme Court ruled against her last year, but her house will be moved, not torn down.

Meanwhile, the ruling has ignited a nationwide fight between developers rushing to seize a fresh opportunity and an unlikely political coalition that sees the decision as an assault on America's "home-as-castle" mind-set.

Emboldened by the ruling, local governments have threatened or condemned 5,783 properties for private projects in the past year, according to the Institute for Justice, the libertarian law firm that defended Kelo. That's up from an annual average of 2,056 such threats and takings from 1998 to 2002, the Institute said.

Of 117 projects the Institute studied over the past year, most involved taking lower-income homes, apartments and mobile home parks to construct upscale condominiums or retail development, driving the working poor from their homes.

But the Kelo case also has inspired a political backlash unusual in the annals of Supreme Court rulings. It has united conservative defenders of property rights and liberals who say the seizures amount to corporate welfare at the expense of the powerless.

They've scored significant victories:

- Twenty-five states have enacted laws to curb eminent domain seizures — something the Supreme Court invited them to do in making its ruling.
- The U.S. House of Representatives voted 376-38 last year to bar federal economic development funds to state and local agencies that use eminent domain for private commercial development. A similar bill is stalled in the Senate.
- On June 23, one year after the Kelo decision, President Bush issued an executive order that federal agencies can seize private property only for public projects.

Those actions should help ensure that the growing movement to prevent unjustified seizures of private property will gain momentum. In the words of dissenting Justice Sandra Day O'Connor, "the government now has the license to transfer property from those with fewer resources to those with more" as long as there is some purported economic benefit. And that is wrong.

Supporters of seizures such as the one in New London argue that abuses are rare and that condemnation is needed to revitalize abandoned or blighted areas and encourage the growth of jobs. But the truth is that under the court's ruling almost no one's property is safe unless states impose limits.

Seizures of one person's property to benefit another should be rare and a last resort. The halfway happy ending to Susette Kelo's ordeal should encourage political leaders to do more to stop bulldozers from plowing through the American dream.

USA Today 7/10/06

Vital tool of last resort

Opposing view:
Uproar obscures eminent domain's crucial role in revitalizing areas.

By Donald J. Borut

In all the noise that surrounded the decision by the Supreme Court one year ago to continue to allow cities to use eminent domain when considering the economic future of their communities, something vital was left out: the facts.

Without eminenr domain to clear title on abandoned and vacant properties — the primary use of eminent domain in this country — rundown buildings and empty lots would attract trash, rodents and trouble. Blighted structures would sit abandoned. If owners didn't want to sell or were holding out for more money, the cities and their taxpayers could do nothing to get rid of them.

Despite what some might claim, this is how eminent domain has been and continues to be used in this country: to revitalize older parts of Philadelphia; to transform an area in Indianapolis once referred to as "Dodge City" into a beautiful, mixed-income neighborhood; to save a historic church in Fitzgerald, Ga.

Let's take a closer look at the facts:

Since the Supreme Court's *Kelo* ruling, 43 state legislatures reviewed eminent domain laws and made changes to meet the needs of their communities. In a few cases, after numerous public hearings, legislators determined that no change was needed.

According to a survey by the National League of Cities, 76% of municipalities had not used eminent domain in the past three years in connection with an economic development project. But where it was invoked, eminent domain was used only as a last resort after all other options were explored.

Of the 5,700-plus properties claimed by the Institute for Justice to involve eminent domain in the past year, many were part of 117 multiphased and publicly scrutinized economic development projects begun well before the *Kelo* decision to eradicate blight — a practice even dissenting Justice Sandra Day O'Connor found appropriate.

Ensuring that owners receive appropriate compensation for their properties is equally important. In cases such as Norwood, Ohio, which was cited by the Institute as an abuse, the majority of owners willingly received twice the assessed fair market value; the "hold-outs" three times their value.

The prudent use of eminent domain has brought hope and opportunity — through good jobs and better housing — to thousands of Americans. That story deserves to be told.

Donald J. Borut is executive director of the National League of Cities.