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Protecting the Private Property Rights of Ohioans After *Kelo v New London*

"nor shall private property be taken for public use, without just compensation"
- 5th Amendment, US Constitution

Private property shall ever be held inviolate… where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money.
Article I, Section XIX, Ohio Constitution

The US Supreme Court's recent decision permitting the government-sanctioned transfer of private property from a private citizen to a private developer has stricken a constitutional nerve throughout the Country. While the use of eminent domain for roads and utilities has long been recognized, the governmental taking and transferring of a well-maintained parcel of real property from one private owner to another private owner is fundamentally un-American. Trampling on one individual's property rights for the speculative collective good through a future development smacks of socialism. The Ohio Legislature can and should take immediate action to protect Ohioans' private property rights from the intrusive impact of the Supreme Court's ruling.

Historical Background

Our Founding Fathers believed that private property ownership, as defined under common law, pre-existed government. They further believed that government, whether federal or state, served as the contractual agent for the people and, unlike the English monarchy, was not a sovereign. Thus, protecting private property ownership rights against unwarranted governmental appropriation motivated the inclusion of the "takings" clause in the Fifth Amendment of the US Constitution and various state constitutions (Including the Ohio Constitution). Of course, by including the takings clause, the Framers of the Bill of Rights also recognized the need for a *limited* "public use" exception to the sanctity of private property rights, provided that the property owner is justly compensated.

The takings clause buttressed the Founding Fathers' respect for private property rights in two ways: (1) private property can only be taken for public use, and (2) such taking can occur only if the property owner is adequately compensated. The "takings" clause in the Fifth Amendment was intended to protect private property owners from arbitrary government power.

The drafters of the Ohio Constitution emulated the federal constitutional recognition of private property rights in Article I, Section XIX, of the Ohio Constitution, which declares that private property rights are "inviolate" and permits appropriation of private property only for "public use."

For approximately 175 years, eminent domain was employed by government for obvious public uses such as roads, canals, railroads, military bases, fire stations, school and parks. Then, eminent domain became a tool for urban revitalizationists, who invoked governmental takings powers to acquire "blighted" or "deteriorated" private property, often for private redevelopment as urban renewal projects. Courts upheld such actions, finding that eliminating blight was a legitimate public purpose. In hindsight, these cases started takings law down a dangerous and slippery slope.

Kelo v New London

On June 23, 2005, in *Kelo v New London*, the US Supreme Court, by a narrow 5-4 decision, issued one of the most controversial rulings in history. The majority of the Supreme Court expanded far beyond the traditional, limited view of eminent domain powers by holding that non-blighted private property can be taken, against the will of property owners, by a governmental authority for ultimate ownership by another private entity, in the name of "economic development."

The majority of the Justices found that the city of New London, Connecticut, did not violate the Fifth Amendment by taking several unblighted residents properties to clear the way for a private office complex. The majority concluded that the economic benefits of such new development to the city – new jobs and increased taxes – satisfied the constitutional "public use" prerequisite to an eminent domain action.

Justice Sandra Day O'Connor and three other justices disagreed with the majority's more broadly defined concept of public purpose or public use. In her vigorous dissent, Justice O'Connor chastised the majority for abandoning the two-century old principle of preventing the government from acting beyond its authority, warning that "nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, and any farm with a factory."

To some, *Kelo* is the natural extension of the urban renewal/eliminate blight cases (economic benefit = public use). To others, *Kelo* is an affront to the fundamental protection of private property ownership guaranteed by the Fifth Amendment. A review of our Founding Father's early writings supports the position that *Kelo* is an affront to property rights. It is doubtful that Thomas Jefferson ever envisioned a government right

to take his home, Monticello, and give the property to a private developer for an office complex or a big-box super center.

The Supreme Court noted that the *Kelo* decision does not prevent states from adopting a more protective approach to private property rights. At least 34 states have initiated legislative efforts to negate the impact of *Kelo*.

Ohio Eminent Domain Law

Presently, Ohio law governing eminent domain neither contemplates nor adequately protects private property owners should unblighted private property be taken by eminent domain under the banner of "economic development." Courts have almost uniformly acceded to the government's determination that a public necessity exists justifying the "take." At least in the urban renewal cases, the taking authority had to obtain a blight study before it could proceed with eminent domain. After *Kelo,* government officials merely need to conclude that the taking of property from one private owner to transfer to another private owner will be more economically beneficial to the public. But such economic socialism does not constitute "public use."

Eminent domain procedures under Ohio law do not properly address the private-to-private takings permitted by *Kelo*. Currently, the private property owner (1) bears a substantial burden with respect to establishing the value of property to be taken, and (2) is usually limited to presenting evidence of value based on the property's current zoning.

This could lead to substantial inequity in a *Kelo* taking situation. For example, the owner of a house on one acre zone residential worth a maximum of $150,000, in most cases, would be limited to offering evidence at that value. Should that acre be taken by eminent domain and subsequently transferred to a developer of a commercial complex, the ultimate value of that property could be $250,000 to $300,000. Such governmentally induced inequity cannot be condoned or considered "just compensation."

Senate Bill 167

Ohio must take action to protect Ohioan's property rights after *Kelo*. To that end, I, along with State Senators Kimberly Zurz, Gary Cates, and 23 others, have sponsored SB 167 in the Ohio Senate. This legislation provides for a temporary statewide moratorium on governmental taking of unblighted private property for economic development by another private party. The moratorium would be in force until December 31, 2006, and would affect both state and local government projects involving eminent domain proceedings. In addition, SB 167 forms a Legislative Task Force to conduct a comprehensive review of Ohio's eminent domain laws and procedures.

The task force, comprised of 24 individuals, will include representation from a broad set of interested parties, including property rights groups, state and local government, agriculture, commercial and residential real estate, and the Legislature. The task force will conduct a comprehensive review of Ohio's eminent domain law and procedures and

make recommendations as to statutory or constitutional actions needed to protect private property rights in Ohio in light of *Kelo.* The Task Force's report will be due in the spring of 2006, giving the Legislature time to take action on its recommendations during the current term.

SB 167 protects Ohioans' private property rights in the short term, while providing a thoughtful and comprehensive approach toward a permanent change in Ohio's eminent domain law. While eminent domain can be an important tool for state and local government when employed for legitimate public uses, that governmental power should not be abused or exploited. Too make way for new developments simply because such developments will generate more jobs and taxes or for some other speculative public "good" is fundamentally un-American.

Under Article I, Section XIX, of Ohio's Constitution, private property rights are "inviolate." Despite the US Supreme Court's overly expansive notion of eminent domain, "inviolate", in Ohio, still means inviolate.

Conclusion

States have numerous options in response to *Kelo*. These options range from taking no action and letting the courts grapple with the problem to adoption of a state constitutional amendment prohibiting the taking of all private property or unblighted private property that would ultimately be owned by another private property. In between, state law can be changed to redefine public use, but such a statutory action could be circumvented by a municipality's home rule powers. Such home rule concern can be avoided by way of a state constitutional amendment. States also should reexamine their definitions of "blight" and "deteriorated properties" to prevent circumvention of any *Kelo* responsive changes through the abuse of those terms. Finally, if a total prohibition against the taking of unblighted private property is not adopted, state procedures for determining the "just compensation" for property to be taken should be changed to allow the current private property owner to offer evidence demonstrating the value of the property based on its proposed future development after the take.

Swift action is needed to protect Ohioans' private property rights after *Kelo*. SB 167 will provide immediate relief, while proposing the appropriate long-term solution. This approach will protect Ohioans private property rights now and for the future.

Senator Tim Grendell currently represents the 18th Ohio Senate District, which includes all of Lake and Geauga Counties, as well as the Cuyahoga Communities of Gates Mills, Highland Heights, Mayfield Heights, and Mayfield Village. Tim Grendell is an attorney who specializes in matters of constitutional law, land use, real property, and zoning.

July 19, 2005 Eminent Domain Legislative Working Group Meeting

Minutes

Meeting began at approximately 9:05. Attendees are attached.

Senator Grendell opened with a brief discussion of eminent domain.

The traditional use of eminent domain has always been roads, public buildings, schools, etc. In the 1960's, the concept of urban renewal recognized taking of 'blighted' property could be done – specifically private property – if the community required.

Kelo is a new manifestation of his. A CT city tried to get property owners to sell for tax generating use. The decision was 5-4 and allows appropriation for economic development reasons.

There are two parts to eminent domain in Ohio.

1. *Public necessity and/or Public need:*
   - *Decided by administrative or legislative body*
   - *May be challenged by property owner early on (EARLY)*
   - *Challenges tried by probate judge as a matter of law (no jury).*
2. *Compensation:*
   - *Decided by probate judge. Decision can be challenged, resulting in a jury trial.*
   - *Property owner has burden of proof. Either side can appeal jury decision.*
   - *No action until culmination of trial -- Exception is in "quick take" – Generally road projects and 'public exigencies' (war, emergency) are begun immediately with argument over value possibly extended.*
   - *** Procedurally, authority must make a good-faith-effort to purchase before starting eminent domain.*
   - *** Values are (largely) based on zoning at time of the take, rather than on projected value (ODOT suggested that in a very few instances homeowner can get value based on an adjusted figure, but this varies by judicial interpretation) on the property taken as well as possible loss to residual property value.*

Roundtable Discussion of Kelo Impact

- AG is interested, but acting primarily as an interested party at this time.

- ODOT believes a similar situation (to Kelo) is possible in Ohio. For the most part, Kelo problems are not expected within the agency, but ODOT would like to maintain good, consistent policy within the state.
- Citizen impacted by 'bogus blight' in Lakewood, Ohio. Detailed how homes were "blighted" due to their only having 1 full bathroom and unattached garages. Citizens defeated eminent domain proceedings through a local referendum.
- OHBA filed amicus on behalf of Kelo, and noted that the 'vast majority' of homebuilders are not doing these sorts of developments.
- Township Representative thanked LSC for the research memorandum, reiterated need to have good eminent domain use.
- Municipality representative noted desire to keep fair and easily recognized processes.
- State Rep very concerned about future of private property. Noted that proposed constitutional amendment needs to be adjusted and was only intended as a starting point. Believes that private property should be held inviolate and concerned that Kelo opens door to simply use eminent domain to raise funds. Has to be some way to balance economic development and traditional concept of private property rights.
- Greater Ohio Representative noted that (almost) no one seems supportive of Kelo. Suggested a two-year moratorium on Kelo type uses while we codify the process. Also, this is a good opportunity to update zoning laws – which has not been done since 1925.
- Suburban Communities Representative noted that suburbs do not support a 'scorched-earth policy,' but do support local tools for redevelopment. Currently, there are not many options. Perhaps we can review revenue and tax base sharing or implement planning with teeth to protect economic viability.
- State Rep who expressed concern that Ohio's eminent domain allows similar situation as Kelo.
- Grendell/Zurz clarified that this is why they are holding these workgroups. We should not approach this in a purely reactionary manner. We need to ensure that we are fair to citizens while continuing to recognize legitimate uses such as roads, blight, etc.
- State Senator's office noted that Butler County has the most growth in the state and massive redevelopment of formerly rural areas. Would like to keep a reasonable balance between development and property rights.

Review of Possible Action

Grendell and Zurz discussed the possible responses to Kelo – including "do nothing," "possible legislation" and "possible constitutional amendment."

I. Take No Action

II. <u>Possible Legislative Changes</u>

A. Withhold state money to a municipality that takes unblighted private property for economic development. (Sen. Coughlin)

B. Change valuation provisions to allow the jury to decide the value of the property taken based on new proposed development use, not current use.

C. Require that the municipality pay the property owner's attorneys' fees when unblighted property is taken for economic development.

D. Place the burden to establish the value of unblighted property on the municipality when taken for economic development.

E. Allow jury to decide if the taking of unblighted property is a legitimate public purpose.

F. Other Suggestions?

III. Ohio Constitutional Amendments

A. Prohibit taking property for private economic development, except to eliminate blighted area.

B. Require vote by electorate (referendum) to approve government's taking of unblighted private property.

C. Increase compensation and provide for attorneys' fees if unblighted private property is taken for economic development.

Other Suggestions?

- Two-year moratorium statewide to allow the GA to develop a potential response. Recognition that one bad project can drive statewide law; Kelo is the fever, but problem should be looked at in a larger response.
- Review the definition of blight and possible revision to how we determine blight (also: functional and economic obsolescence)

As Introduced

126th General Assembly
Regular Session
2005-2006

S. B. No. 167

Senators Grendell, Zurz, Harris, Jacobson, Cates, Mallory, Brady, Amstutz, Armbruster, Carey, Dann, Gardner, Goodman, Miller, Roberts, Schuler, Schuring, Spada, Wachtmann, Wilson, Padgett, Austria, Clancy, Mumper, Hottinger, Niehaus, Jordan

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A BILL

To establish, until December 31, 2006, a moratorium on the use of eminent domain by any entity of the state government or any political subdivision of the state to take, without the owner's consent, private property that is in an unblighted area when the primary purpose for the taking is economic development that will ultimately result in ownership of the property being vested in another private person, to create the Legislative Task Force to Study Eminent Domain and Its Impact on Land Use Planning in the State, and to declare an emergency.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. As used in Sections 2 to 4 of this act:

(A) "Blighted area" has the same meaning as in section 303.26 of the Revised Code, but also includes an area in a municipal corporation.

(B) "Public body" means any entity of the state government, and any county, municipal corporation, township, commission, district, authority, or other political subdivision of the state, that has the power to take private property by eminent domain.

Section 2. (A) Notwithstanding any provision of the Revised Code to the contrary, until December 31, 2006, no public body shall use eminent domain to take, without the consent of the owner, private property that is not within a blighted area, as determined by the public body, when the primary purpose for the taking is economic development that will ultimately result in ownership of that property being vested in another private person. This prohibition does not apply to the use of eminent domain for the taking of private property to be used as follows:

(1) In the construction, maintenance, or repair of roads, including, but not limited to, such use pursuant to authority granted under Title LV of the Revised Code;

(2) For a public utility purpose;

(3) By a common carrier.

(B) Until December 31, 2006, if any public body uses eminent domain to take, without the consent of the owner, private property that is not within a blighted area, as determined by the public body, when the primary purpose for the taking is economic development that will ultimately result in ownership of that property being vested in another private person, each of the following shall apply:

(1) The Ohio Public Works Commission shall not award or distribute to the public body any funding under a capital improvement program created under Chapter 164. of the Revised Code.

(2) The Department of Development shall not award or distribute to the public body any funding under a shovel ready sites program created under section 122.083 of the Revised Code.

(3) The public body shall not receive any funding provided in any act that makes appropriations for capital purposes.

Section 3. (A) There is hereby created the Legislative Task Force to Study Eminent Domain and Its Impact on Land Use Planning in the State. The Task Force shall consist of the following twenty-five members:

(1) Three members of the House of Representatives, with two members appointed by the Speaker of the House of Representatives and one member appointed by the Minority Leader of the House of Representatives. The Speaker of the House of Representatives shall

designate one of the members the Speaker appoints to serve as co-chairperson of the Task Force.

(2) Three members of the Senate, with two members appointed by the President of the Senate and one member appointed by the Minority Leader of the Senate. The President of the Senate shall designate one of the members the President appoints to serve as co-chairperson of the Task Force.

(3) One member representing the home building industry in the state, appointed jointly by the Speaker of the House of Representatives and the President of the Senate;

(4) One member who shall be a statewide advocate for intelligent land use in the state, appointed jointly by the Speaker of the House of Representatives and the President of the Senate;

(5) One member representing the agricultural industry in the state, appointed jointly by the Speaker of the House of Representatives and the President of the Senate;

(6) One member representing the commercial real estate industry in the state, appointed jointly by the Speaker of the House of Representatives and the President of the Senate;

(7) One member representing licensed realtors in the state, appointed jointly by the Speaker of the House of Representatives and the President of the Senate;

(8) One member who shall be an advocate for the use of parks and recreation, appointed jointly by the Speaker of the House of Representatives and the President of the Senate;

(9) One member representing the Ohio Prosecuting Attorneys Association or the Ohio Association of Probate Judges, appointed jointly by the Speaker of the House of Representatives and the President of the Senate;

(10) One member who shall be an attorney who is knowledgeable on the issues confronting the Task Force and who represents persons who own property and reside within Ohio, appointed jointly by the Speaker of the House of Representatives and the President of the Senate;

(11) One member knowledgeable on the issues confronting the Task Force who represents persons who own property and reside

within Ohio, appointed jointly by the Speaker of the House of Representatives and the President of the Senate;

(12) One member representing the planning industry in the state, one member representing an Ohio labor organization, one member representing a statewide historic preservation organization that works within commercial districts, one member representing municipal corporations, one member representing counties, and one member representing townships, each appointed by the Governor;

(13) The Director of Development or the Director's designee;

(14) The Director of Transportation or the Director's designee;

(15) Two members who shall be attorneys with expertise in eminent domain issues, each appointed by the Attorney General.

(B) Appointments to the Task Force shall be made not later than thirty days after the effective date of this section. Any vacancy in the membership of the Task Force shall be filled in the same manner as the original appointment. Members of the Task Force shall serve without compensation.

(C)(1) The Task Force shall study each of the following:

(a) The use of eminent domain and its impact on land use planning in the state;

(b) How the decision of the United States Supreme Court in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) affects state law governing the use of eminent domain and the law's impact on land use in the state;

(c) The overall impact of state law governing the use of eminent domain on land use, economic development, residents, and local governments in Ohio.

(2) The Task Force shall prepare and submit to the General Assembly by not later than April 1, 2006, a report that shall include the findings of its study and recommendations concerning the use of eminent domain and the updating of state law governing land use that is impacted by eminent domain. On submission of its report, the Task Force shall cease to exist.

(D) The Legislative Service Commission shall provide any technical, professional, and clerical employees that are necessary for the Task Force to perform its duties.

(E) All meetings of the Task Force are declared to be public meetings open to the public at all times. A member of the Task Force shall be present in person at a meeting that is open to the public in order to be considered present or to vote at the meeting and for the purposes of determining whether a quorum is present. The Task Force shall promptly prepare and maintain the minutes of its meetings, which shall be public records under section 149.43 of the Revised Code. The Task Force shall give reasonable notice of its meetings so that any person may determine the time and place of all scheduled meetings. The Task Force shall not hold a meeting unless it gives at least twenty-four hours advance notification to the news media organizations that have requested such notification.

Section 4. The General Assembly hereby makes the following statements of findings and intent:

(A) On June 23, 2005, the United States Supreme Court rendered its decision in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), which allows the taking of private property that is not within a blighted area by eminent domain for the purpose of economic development even when the ultimate result of the taking is ownership of the property being vested in another private person. As a result of this decision, the General Assembly believes the interpretation and use of the state's eminent domain law could be expanded to allow the taking of private property that is not within a blighted area, ultimately resulting in ownership of that property being vested in another private person in violation of Sections 1 and 19 of Article I, Ohio Constitution, which protect the rights of Ohio citizens to maintain property as inviolate, subservient only to the public welfare. Thus, the General Assembly finds it is necessary to enact a moratorium on any takings of this nature by any public body until further legislative remedies may be considered.

(B) The General Assembly finds that it is a matter of statewide concern to enact the moratorium. The moratorium is necessary to protect the general welfare and the rights of citizens under Sections 1 and 19 of Article I, Ohio Constitution, and to ensure that these rights are not violated due to the *Kelo* decision. In enacting this provision, the General Assembly wishes to ensure uniformity throughout the state.

Section 5. This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for the necessity is that the United States Supreme Court decision in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) could allow the taking of private property that is not within a blighted area, ultimately resulting in ownership of that property being vested in another private person in violation of Sections 1 and 19 of Article I, Ohio Constitution, and, as a result, warrants a moratorium on any takings of this type until further legislative remedies may be considered. Therefore, this act shall go into immediate effect.