

EMINENT DOMAIN UPDATE

September 18, 2006

Mark Riso
Senior Director
State and Local Affairs

Mandy Hagan
Director
State and Local Affairs



The Forum for Commercial Real Estate

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Introduction

This summary was prepared by the National Association of Industrial and Office Properties for its members. The National Association of Industrial and Office Properties (NAIOP) is the nation's leading trade association for developers, owners, investors, asset managers and other professionals in industrial, office and mixed-use commercial real estate. Founded in 1967, NAIOP comprises 13,000+ members in 50 North American chapters.

In addition to lobbying on federal issues, NAIOP is active in state and local government affairs through its chapters, and provides monitoring and analysis of state legislation through its state and local government affairs staff. Issues monitored in 2006 include brownfields, building security, disability access, eminent domain, endangered species, growth management/land use, impact fees, real estate taxes and fees, and wetlands.

NAIOP has been monitoring and analyzing eminent domain bills in response to the U.S. Supreme Court decision in Kelo v. New London, which affirmed the right of state and local entities to acquire private property through eminent domain for economic development. Virtually every state with a regular 2006 legislative session has addressed the issue in 2006. This summary details changes in states in which NAIOP has at least one chapter. The map on page three also shows changes in every state regardless of whether there is a NAIOP chapter in that state.

For more information, please contact Mark Riso, Senior Director of State and Local Affairs, or Mandy Hagan, Director of State and Local Affairs, at 2201 Cooperative Way, 3rd Floor, Herndon, VA 20171-3034, Tel: 703.904.7100.

- The presence of property which, because of physical condition, use, or occupancy, constitutes a public nuisance or attractive nuisance *where the owner refuses to remedy the problem after notice by the appropriate governing body.*
- The presence of property with code violations affecting health or safety that has not been substantially rehabilitated within the time periods required by the applicable codes.
- The presence of property that has tax delinquencies exceeding the value of the property.
- The presence of property which, by reason of environmental contamination, poses a threat to public health or safety in its present condition.

Previously, blight was defined as “areas, including slum 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.”

Arizona was one of three states to see a bill make it through the legislature only to meet the Governor’s veto. On June 6, Arizona Governor Janet Napolitano vetoed H.B. 2675, a bill that would have provided that a municipality may not exercise the power of eminent domain without a separate determination by two-thirds vote of the local governing body that the property is maintained in a slum condition and the owner of the property is unwilling to cure the condition.

The bill defined economic development as any activity to increase tax revenue, tax base, employment or general economic health if that activity does not result in a public use. It defined public use as the occupation of the land by the public, the use of the land by public utilities, or acquisition of slum land or abandoned property, but stipulates that public use does not include economic development.

California A.B. 782 was signed by Governor Arnold Schwarzenegger on July 24. The bill amends the state’s blight definition. The blight definition remains broad, and is a two-prong test. First, a blighted area is one that is predominantly urbanized, with such a high prevalence of enumerated blighting factors that it constitutes a serious physical and economic burden on the community which cannot reasonably be expected to be reversed by private enterprise or governmental action, or both, without redevelopment. Second, the area must be characterized by one or more physical conditions such as unsafe buildings or nearby incompatible uses, and economic conditions such as depreciated property values and vacant businesses.

Under the previous definition, in lieu of the physical and economic conditions that are now the second requirement, the second factor could be the existence of subdivided lots of irregular form and shape and inadequate size for proper usefulness and development that are in multiple ownership. The bill also eliminates reference to this factor as one of two alternative requirements for a redevelopment project area, which now must instead be developed for urban use. There are other eminent domain changes currently awaiting the Governor’s signature in California.

Colorado H.B. 1411 added a new section to the eminent domain code and amended existing portions. It added that “‘public use’ shall not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue.” The bill also puts the burden of proof on the condemning entity. The condemnor must prove by a preponderance of the evidence that the taking is for a public use. If the taking is to eradicate blight, the condemnor must prove that the taking is necessary for that purpose.

Delaware S.B. 217, passed in 2005, provides that the acquisition of real property through eminent domain shall be undertaken, and the property used, only for a recognized public use as described at least 6 months in advance of the institution of condemnation proceedings: (i) in a certified planning document, (ii) at a public hearing held specifically to address the acquisition, or (iii) in a published report of the acquiring agency.

Florida H.B. 1567 was signed by Governor Jeb Bush on May 12. The law prohibits the transfer of private property acquired through eminent domain to another private entity, with exceptions for traditional public uses such as roads and utilities. It prohibits the use of eminent domain to eliminate blight conditions or to generate additional tax revenue as follows:

- “the state, any political subdivision ... or any other entity to which the power of eminent domain is delegated may not exercise the power of eminent domain to take private property for the purpose of abating or eliminating a public nuisance.”
- “abating or eliminating a public nuisance is not a valid public purpose or use for which private property may be taken by eminent domain and does not satisfy the public-purpose requirement of s. 6(a), Art. X of the State Constitution.”
- “This subsection does not diminish the power of counties or municipalities to adopt or enforce county or municipal ordinances related to code enforcement or the elimination of public nuisances to the extent such ordinances do not authorize the taking of private property by eminent domain.”
- “the state ... or any other entity to which the power of eminent domain is delegated may not exercise the power of eminent domain to take private property for the purpose of preventing or eliminating slum or blight conditions.”
- “taking private property for the purpose of preventing or eliminating slum or blight conditions is not a valid public purpose or use for which private property may be taken by eminent domain and does not satisfy the public-purpose requirement of s. 6(a), Art. X of the State Constitution.”

Local government will no longer be able to delegate their condemnation powers to community redevelopment agencies, and CRAs will only be able to acquire property for redevelopment through voluntary methods.

A separate measure, H.B. 1569, passed both chambers of the legislature and will now appear on the November 7, 2006, ballot for voter approval. It requires a three-fifths vote of both houses of the state legislature to approve the use of eminent domain to transfer private property to another private entity.

In *Georgia*, Governor Sonny Perdue signed H.B. 1313 on April 4. It prohibits a governmental entity from using eminent domain unless it is necessary for public use. Public use means:

- The possession, occupation, or use of the land by the general public or by state or local governmental entities;
- The use of land for the creation or functioning of public utilities;
- The opening of roads, the construction of defenses, or the providing of channels of trade or travel;
- The acquisition of property where title is clouded due to the inability to identify or locate all owners of the property;
- The acquisition of property where unanimous consent is received from each person with a legal claim that has been identified and found; or
- The remedy of blight.

The law stipulates that economic development does not constitute a public use. It defines economic development as any economic activity to increase tax revenue, tax base, or employment or improve general economic health, when the activity does not result in transfer of land to public ownership; transfer of property to a private entity that is a public utility; lease of property to private entities that occupy an incidental area within a public project; or the remedy of blight.

The bill provides that blighted property means any urbanized or developed property which presents **two or more** of the following conditions:

- Uninhabitable, unsafe, or abandoned structures;
- Inadequate provisions for ventilation, light, air, or sanitation;
- An imminent harm to life or other property caused by fire, flood, hurricane, tornado, earthquake, storm, or other natural catastrophe respecting which the Governor has declared a state of emergency under state law or has certified the need for disaster assistance under federal law; provided, however, this division shall not apply to property unless the relevant public agency has given notice in writing to the property owner regarding specific harm caused by the property and the owner has failed to take reasonable measures to remedy the harm;
- A site identified by the federal Environmental Protection Agency as a Superfund site pursuant to 42 U.S.C. Section 9601, et seq., or environmental contamination to an extent that requires remedial investigation or a feasibility study;
- Repeated illegal activity on the individual property of which the property owner knew or should have known; or
- The maintenance of the property is below state, county, or municipal codes for at least one year after notice of the code violation;

And is conducive to ill health, transmission of disease, infant mortality, or crime in the immediate proximity of the property. The law specifies that property shall not be deemed blighted because of esthetic conditions.

Governor Perdue also signed H.R. 1306 on April 4. This proposed constitutional amendment would require that the condemnation of property for redevelopment purposes be approved by vote of the elected governing authority of the county or city in which the property is located. It restricts the use of eminent domain for redevelopment purposes to public uses.

Illinois S.B. 3086 prohibits the use of eminent domain to confer a benefit on a private entity or for a public use that is a pretext for conferring a benefit on a particular private entity. The bill limits the use of eminent domain for private development unless the area is blighted and the state or local government has entered into a development agreement with a private entity.

In *Kentucky*, H.B. 508 was signed into law on March 28. The bill defines public use as:

- Ownership of the property by the Commonwealth or other governmental entity;
- The possession, occupation, or enjoyment of the property as a matter of right by the Commonwealth or other governmental entity;
- The acquisition and transfer of property for the purpose of eliminating blighted areas, slum areas, or substandard and unsanitary areas;
- The use of the property for the creation or operation of public utilities or common carriers; or
- Other use of the property expressly authorized by statute.

It prohibits the condemnation of private property for transfer to a private owner for the purpose of economic development that benefits the general public only indirectly, such as by increasing the tax base, tax revenues, employment, or by promoting the general economic health of the community. However, this provision does not prohibit the sale or lease of property to private entities that occupy an incidental area within a public project or building, provided that no property is condemned primarily for the purpose of facilitating an incidental private use.

The law specifically exempts the exercise of the power of eminent domain for the acquisition of property financed by state road funds or federal highway funds.

Both houses of the *Michigan* legislature passed a proposed constitutional amendment that defines public use to not include the taking of private property for transfer to a private entity for the purpose of economic development or tax revenues. Public use would include the taking of private property for blight removal even if the property is subsequently transferred to a private entity. It defines blight on a case by case basis, and provides that when private property is taken for blight clearance, the burden of proof is on the condemning authority to show, by a preponderance of the evidence, that the area is blighted. The amendment requires approval by a majority of voters in the next general election on November 7, 2006.

Minnesota S.F. 2750 limits the use of eminent domain to a public use or public purpose, defined as “exclusively: (1) the possession, occupation, ownership, and enjoyment of the land by the general public, or by public agencies; (2) the creation or functioning of a public service corporation; or (3) mitigation of a blighted area, remediation of an environmentally contaminated area, reduction of abandoned property, or removal of a public nuisance.”

The public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health, do not by themselves constitute a public use or public purpose under this law. Blighted area means an area that is in urban use where more than 50 percent of the buildings are structurally substandard. Environmentally contaminated area, abandoned property, and public nuisance are also defined by the new statute.

Missouri H.B. 1944 prohibits the use of eminent domain solely for an economic development purpose, which is defined to mean an increase in the tax base, tax revenue or employment in the area. It stipulates that eminent domain may only be used to take property in blighted areas or for a public use.

Nevada amended its eminent domain statutes in 2005. Nevada law requires a finding of blight to use eminent domain for redevelopment. A.B. 143 restricted the blight definition, requiring a property to meet at least four of the following factors:

- The existence of buildings and structures which are unfit or unsafe for those purposes and are conducive to ill health, transmission of disease, infant mortality, juvenile delinquency or crime because of defective design and character of physical construction; faulty arrangement of the interior and spacing of buildings; inadequate provision for ventilation, light, sanitation, open spaces and recreational facilities; or age, obsolescence, deterioration, dilapidation, mixed character or shifting of uses.
- Economic dislocation, deterioration or disuse.
- Lots of irregular form and shape and inadequate size for development.
- The laying out of lots in disregard of the contours and other physical characteristics of the ground and surrounding conditions.
- The existence of inadequate streets, open spaces and utilities.
- The existence of lots or other areas which may be submerged.
- Prevalence of depreciated values, impaired investments and social and economic maladjustment to such an extent that the capacity to pay taxes is substantially reduced and tax receipts are inadequate for the cost of public services rendered.
- A growing or total lack of proper utilization of some parts of the area, resulting in a stagnant and unproductive condition of land which is potentially useful and valuable for contributing to the public health, safety and welfare.
- A loss of population and a reduction of proper use of some parts of the area, resulting in its further deterioration and added costs to the taxpayer for the creation of new public facilities and services elsewhere.
- The environmental contamination of buildings or property.
- The existence of an abandoned mine.

A separate measure was also passed. S.B. 326 includes provisions for when eminent domain is used to acquire open space, and compensation. It also provides that an agency may exercise the power of eminent domain to acquire a parcel of property that is not blighted for a redevelopment project if the agency adopts a resolution that includes a written finding by the agency that a condition of blight exists for at least two-thirds of the property within the redevelopment area at the time the redevelopment area was created. Otherwise, each parcel must be blighted.

New Mexico Governor Bill Richardson vetoed H.B. 746 on March 7. The bill provided, in its entirety, that "the state or a local public body shall not condemn private property if the taking is to promote private or commercial development and title to the property is transferred to another private entity within five years following condemnation of the property." While several eminent domain bills were introduced in the Legislature, H.B. 746 was the only one to reach the Governor.

North Carolina H.B. 1965 was signed by Governor Mike Easley August 10. The law clarifies that eminent domain may only be used for specified purposes such as roads, parks, and public buildings. The law adds a definition of blighted parcel, and states that in blighted areas, eminent domain can only be used to take a blighted parcel, i.e., each parcel taken in a blighted area must itself meet the blighted parcel definition, which is:

“a parcel on which there is a predominance of buildings or improvements (or which is predominantly residential in character), and which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsanitary or unsafe conditions, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs the sound growth of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and is detrimental to the public health, safety, morals or welfare; provided, no parcel shall be considered a blighted parcel nor subject to the power of eminent domain, within the meaning of this Article, unless it is determined by the planning commission that the parcel is blighted.”

The law also provides that redevelopment commissions can only use eminent domain to take blighted parcels. It removes the authority of municipalities to exercise eminent domain in revenue bond projects unless the bonds were approved before July 1, 2006.

Ohio S.B. 167, passed in 2005, places a moratorium on the use of eminent domain for economic development in areas that are not blighted until December 31, 2006, and creates a task force to study the issue.

Pennsylvania S.B. 881 was signed by Governor Ed Rendell on May 4. The law prohibits eminent domain for private business purposes, with an exception for blight. The law states that for purposes of acquiring a single unit of property by eminent domain, a condemnor is authorized to declare a property, either within or outside of a redevelopment area, to be blighted only if the property is any of the following:

- A public nuisance or an attractive nuisance to children.
- A dwelling which, because it is dilapidated, unsanitary, unsafe, vermin-infested or lacking in required facilities and equipment, is unfit for human habitation.
- A structure which is a fire hazard or otherwise dangerous to persons or property.
- A structure without plumbing, heating, sewerage or other facilities.
- Any vacant or unimproved lot in a predominantly built-up neighborhood which has become a place for accumulation of trash and debris or a haven for vermin.

- An unoccupied property which has been tax delinquent for a period of two years.
- A property which is vacant but not tax delinquent which has not been rehabilitated within one year of notice from the appropriate enforcement agency.
- An abandoned property.
- A property with defective or unusual conditions of title or unmarketable title.
- A property which has environmentally hazardous conditions.
- A property having three or more enumerated characteristics relating to safety.

For purposes of acquiring multiple units of property by eminent domain, a condemnor is authorized to declare an area, either within or outside of a redevelopment area, to be blighted only if a majority of the units of property meet the blight requirements.

South Carolina H.B. 1031 proposes a constitutional amendment that provides that private property must not be condemned for any purpose or benefit including, but not limited to economic development, unless the condemnation is for public use. It also provides that for remedying blight, the General Assembly may provide by law that private property constituting a danger to the safety and health of the community by reason of lack of ventilation, light, and sanitary facilities, dilapidation, deleterious land use, or any combination of these factors may be condemned by eminent domain without the consent of the owner and put to a public use or private use if just compensation is first made for the property. This proposal will appear on the ballot this fall.

S.B. 1029 creates the South Carolina Eminent Domain Study Committee to review the condemnation authority exercised by any state agency or other entity that possesses the power of eminent domain and evaluate if its use of eminent domain meets or exceeds constitutional, statutory, and case law requirements.

Tennessee S.B. 3296 provides that the public uses for which eminent domain may be used do not include private use or benefit, or the indirect public benefits resulting from private economic development and private commercial enterprise, including increased tax revenue and increased employment opportunity, except for traditional public uses such as roads, utilities, redevelopment of blighted areas, the acquisition of property by a county, city or town for an industrial park, or private use that is merely incidental to a public use. The law defines blight as:

- areas (including slum areas) with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, lack of ventilation, light and sanitary facilities, deleterious land use, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.
- “Welfare of the community” does not include solely a loss of property value to surrounding properties nor does it include the need for increased tax revenues.
- Under no circumstance shall land used predominantly in the production of agriculture be considered a blighted area.

Texas S.B. 7, passed in 2005, provides that a governmental or private entity may not take private property through the use of eminent domain if the taking confers a private benefit on a particular private party through the use of the property; is for a public use that is merely a pretext to confer

a private benefit on a particular private party; or is for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas. The law enumerates other exceptions, such as for roads and utilities.

Utah Governor Jon Huntsman signed S.B. 117 on March 21. The bill requires approval by the governing body of a local government before eminent domain may be exercised for a public use. It requires written notice at least 10 days prior to the public hearing where the proposed taking will be considered. The bill expands the definition of public use to include bicycle paths and sidewalks adjacent to paved roads.

Virginia Governor Tim Kaine signed H.B. 132, making changes to eminent domain procedures, and H.B. 699, which defines blighted area, blighted property, conservation area, redevelopment area, and spot blight abatement plan. It clarifies that the elimination of blight in a redevelopment area, the prevention of blight in a conservation area, and the designation of individual properties as blighted pursuant to a spot blight abatement plan are public uses and purposes. He also signed H.B. 1099, which raises from \$50,000 to \$75,000 the cap on relocation expenses that may be paid to certain persons displaced from their business or farm operation.

Wisconsin A.B. 657 became law March 31 with Governor Jim Doyle's signature. The bill prohibits the condemnation of property that is not blighted if it will be transferred to a private entity. It defines blight as:

- any property that, by reason of abandonment, dilapidation, deterioration, age or obsolescence, inadequate provisions for ventilation, light, air, or sanitation, high density of population and overcrowding, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, or the existence of conditions that endanger life or property by fire or other causes, is detrimental to the public health, safety, or welfare.
- Property that includes one or more dwelling units is not blighted property unless, in addition, at least one of the following applies: the property has been abandoned; the property has been converted from a single dwelling unit to multiple dwelling units, and the crime rate in, on, or adjacent to the property is higher than in the remainder of the municipality in which the property is located.

NAIOP is continuing to monitor this issue and will update this report in December, 2006.