EMINENT DOMAIN IN NEW MEXICO: PRINCIPLES FOR EFFECTIVE REFORM

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EXECUTIVE SUMMARY: In *Kelo v. New London,* the United States Supreme Court held that the United States Constitution does not prevent state and local governments from seizing homes and small businesses to transfer to private developers to build luxury condominiums and big-box stores. Current New Mexico law provides a number of mechanisms for eminent domain abuse to occur. To avoid the kind of abuse that occurred in New London from happening here, New Mexico law should be reformed so that these avenues of abuse are closed off while still permitting legitimate exercises of eminent domain. Meaningful eminent domain reform should contain the following principles in order to protect New Mexico's and businesses:

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

- If allowing condemnation of unblighted property in blighted areas, require a predominant portion of the area be blighted and that the unblighted property be essential for the project.
- Have blight designations expire after a certain number of years.
- Give owners the opportunity to rehabilitate property before it can be condemned.

Introduction

On June 23, 2005, the United States Supreme Court issued its notorious decision in *Kelo v. City of New London, Connecticut.*[i] This decision held that the City of New London could condemn private property and transfer that property to other private entities in order to promote "economic development," increase the city's tax base, and meet the "diverse and always evolving needs of society."[ii] The decision effectively removed any federal impediment to eminent domain abuse. The public's response to that decision was immediate, strong, and almost uniformly negative.[iii]

Under both the United States and New Mexico Constitutions, the government may only condemn property to put it to a "public use." Historically, public use meant things actually owned and used by the public—roads, courthouses and post offices. Increasingly, particularly over the last 50 years, the notion of public use has expanded to the point that the public use restriction is no restriction at all. Property is routinely transferred from one person to another in order to build luxury condominiums and big-box stores. Between 1998 and 2002, the Institute for Justice found that there were more than 10,000 actual or threatened condemnations for private development across the country.[iv] And since the *Kelo* decision was announced, the average yearly amount of abuse is triple that of previous years.[v]

Many people in New Mexico wondered what impact the *Kelo* decision could have here. In response to the concerns raised by the *Kelo* decision, a number of bills were introduced in the last session of the Legislature. The Legislature passed House Bill 746, which contained the following language: "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."

This bill, although well meaning, had a major flaw: it required a court to speculate about the intent behind the taking. If the law prohibits using eminent domain "to promote private or commercial development" then every condemning authority will assert some other rationale for the taking. That means any time a property owner asserted the true intent was to promote private or commercial development, the court would be required to speculate with regard o intent, a role many courts are reluctant to play. The intent requirement renders the five-year moratorium on private transfers useless if courts are unwilling to speculate about the intent underlying the taking. A better option is to more clearly define what takings are for "public use" and to prohibit transfers to private entities forever, while specifying a limited number of exemptions (for example, private utilities, incidental use, etc).

Despite the fact that this bill did not do enough to protect New Mexicans from eminent domain abuse, Governor Richardson vetoed it, explaining that he believed the bill would do more harm

than good. Governor Richardson claimed that the bill's language was ambiguous and that it could inhibit the public's interest while failing to sufficiently protect private property rights.

The Governor instead called for a Task Force to examine the issue and make proposals for the next Legislative session. It is in response to the Task Force's mandate to review New Mexico's eminent domain laws to forestall abuse while still allowing those entities that possess eminent domain power to function effectively within the dictates of the United States and New Mexico Constitutions that we submit this White Paper.

It is important to remember, however, that while eminent domain abuse in this state has neither been as egregious or commonplace as it has in other states, it has still occurred and it has done so under the very constitution and state laws municipalities and developers assure us prevent this type of abuse. What New Mexico's citizens have now is a false sense of security, not real protections from eminent domain abuse. The United States Supreme Court has demonstrated that it is not interested in providing protections from eminent domain abuse and the New Mexico Supreme Court has never clearly indicated that the New Mexico Constitution forbids condemnation for private uses. It is therefore necessary for the Legislature to act to protect the homes and small businesses across New Mexico.

The U.S. and New Mexico Constitutions Provide Protections For Home and Small Business Owners, But the Courts Have Failed To Recognize Them

The power of eminent domain is awesome, so awesome that in the early days of this country, the U.S. Supreme Court described it as "the despotic power." Quite simply, it is the power to remove residents from their long-time homes and destroy small family businesses. It is a power that must be used sparingly. In order to protect property owners, the Fifth Amendment to the U.S. Constitution provides: "[N]or shall private property be taken for public use, without just compensation." The New Mexico Constitution in Article II, § 20 provides: "Private property shall not be taken or damaged for public use without just compensation." Read together, these provisions plainly indicate that this nation's Founders and this state's constitutional drafters were not only wary that eminent domain could be abused, but also clearly committed to protecting private property rights and forestalling such abuse.

Unfortunately, the ability to transfer property from one private owner to another under the Fifth Amendment was given ultimate endorsement in June by the Supreme Court in *Kelo*. As a result of this decision, every home, every church and every small business has lost the protection of the United States Constitution. According to a narrow majority of the Court, the mere *possibility* that private property may make more money as something else is reason enough for the government to take it away. The *Kelo* decision signifies a fundamental shift in the sanctity of all our property rights—an entire portion of the Federal Constitution has been erased. Under *Kelo*, economic development is the only justification necessary to condemn property.

There is one thing the Court did get right in *Kelo*, however—states are free to enact their own property rights protections. States can also make sure the law that currently exists actually provides home and small business owners with the security that they can hold on to their property. Unfortunately, the New Mexico Supreme Court has never explicitly held that the New

Mexico Constitution prohibits the government from condemning property and transferring it to private parties simply because the government believes a different owner would put the property to a better use. To the extent that the court has weighed in on the issue, it has allowed such takings in the context of certain natural resources.[vi] When the fact that the text of the New Mexico Constitution's property provision is similar to that contained in the United States Constitution, it becomes clear that New Mexico residents are at significant risk that a *Kelo*-type taking could occur in this state.

This threat is exacerbated by the fact that New Mexico law contains numerous statutory vehicles to neutralize what protections the constitution does continue to provide. Thus, to protect the citizens of this state from these kinds of abuses, it is incumbent on the New Mexico Legislature to act.

How Eminent Domain Abuse Can Occur Now in New Mexico

Blight: Anything the Government Says It Is.

Historically, with very few limited exceptions, the power of eminent domain was used for things the public actually owned and used—schools, courthouses, post offices and the like. Over the past 50 years, however, the meaning of public use has expanded to include ordinary private uses like condominiums and big-box stores. The expansion of the public use doctrine began with the urban renewal fad of the 1950's. In order to remove so-called "slum" neighborhoods, cities were authorized to use the power of eminent domain and to transfer the condemned property to other private entities.

This "solution," which has been a dismal failure, was approved by the Supreme Court in *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98 (1954). The New Mexico Supreme Court relied on *Berman* in *Kaiser Steel Corp. v. W.S. Ranch Co.*, 81 N.M. 414, 420, 467 P.2d 986, 992 (1970), and held that a legislative determination of public use is "well-nigh conclusive." Like the *Berman* Court, the New Mexico court ruled that the removal of blight was a public "purpose," despite the fact that the word "purpose" appears nowhere in the text of the U.S. Constitution and government already possessed the power to remove blighted properties through public nuisance law.

What started as a way to remove dilapidated, vermin-infested properties like those at issue in *Berman*, however, has been perverted into the ability to take away perfectly fine middle- and working-class neighborhoods to give to private developers who promise increased tax revenues and jobs. New Mexico's current blight statute has such vague or amorphous definitions of blight that literally any property can be considered blighted—and, as a result, subject to being taken away. This must stop.

New Mexico's current law contains three separate statutory schemes that allow for eminent domain to be used on "blighted" property. As is the problem in most states containing blight laws, the definition of blight is so broad as to be virtually meaningless. The Urban Renewal Law[vii], Community Development Law[viii], and also the Metropolitan Redevelopment Code[ix] all allow condemnation for blight if the subject property meets any one of the following conditions, among others:

- Deteriorated or deteriorating structures;[x]
- Predominance of defective or inadequate street layout;
- Faulty lot layout in relation to size;
- Diversity of ownership;
- Improper subdivisions or obsolete platting

Each of these possible conditions suffers from a lack of clear definition—for instance, what constitutes an "inadequate street layout" and why should the property owner face condemnation for a problem caused by the government? How is a lot layout faulty in relation to size? When does platting become obsolete? The vagueness and lack of definition in these terms leave virtually all property unprotected from a bogus blight designation.

Even more offensive to property rights is the standard of "diversity of ownership" which, as with the others, is not a term defined in the statute. Thus, any neighborhood which includes a diversity of ownership—essentially every single neighborhood in this state—is potentially subject to a blight designation and thereafter condemnation for "blight removal" based on that bogus blight designation.

The best solution to the problem of bogus blight would be to delete the term blight from all New Mexico statutes allowing for the use of eminent domain, and require instead that the condemning authority establish the property in question meets the definition of "slum" area. Municipalities opposing eminent domain reform—and even Governor Richardson in his veto message—allege a concern that eminent domain reform will prevent cities from taking properties that threaten the health and safety of the public.

The definition of "slum" in New Mexico statutes includes a variety of factors that establish the property to be "detrimental to the public health, safety, morals or welfare."[xi] While this definition is still vague (when does property become detrimental to public morals?), it contains more definitive standards than New Mexico's blight statute. Because the statutes already in place allow for cities to condemn properties that truly pose a threat to public health and safety, asserting that as a basis for retaining blight statutes can be seen for what it is: a pretext allowing cities to take any property that a developer wants regardless of the actual condition of the property.

<u>New Mexico Law Allows The Government To Take More Land Than It Needs For Legitimate Public Uses</u>.

Another problematic area in condemnation law is the "necessity" determination; in general, statutes allowing for the use of eminent domain power for blight removal or other development or redevelopment goals require a finding of necessity by the local governing body. The same is true in New Mexico; the Urban Development Law and Metropolitan Redevelopment Code both require the local governing body to make the same two findings: first, the existence of a slum or blighted area, and second, that the "rehabilitation, conservation, redevelopment or development, or a combination thereof, of and in such area or areas is necessary in the interest of the public health, safety, morals or welfare of the residents of the municipality."[xii]

Under New Mexico's Community Development Law, no further determination of necessity is required as the statute itself states: "The necessity, in the public interest, for these provisions is declared as a matter of legislative determination."[xiii]

The problem arises where the courts have declined to review in any meaningful way the determination of necessity by the legislative body. New Mexico's courts have done just that. In *North v. Public Service Company of New Mexico*, 101 N.M. 222, 228, 680 P.2d 603, 609 (1983), the New Mexico Supreme Court found:

> [A] grant of authority by the legislature to exercise the power of eminent domain carries with it the right of the grantee of that power to decide the question of necessity as well as questions of expediency and propriety. The decision of the grantee of the power of eminent domain as to the necessity, expediency, or propriety of exercising that power is political, legislative or administrative, and its determination is conclusive and not subject to judicial review, absent fraud, bad faith, or clear abuse of discretion.

The *North* court relied on earlier precedent within New Mexico for this finding, "In *State Ex Rel. State Highway Commission v. Burks*, 79 N.M. 373, 443 P.2d 866 (1968), the Supreme Court stated the rule as follows: It appears that the overwhelming weight of authority makes clear that the question of the necessity or expediency of a taking in eminent domain lies with the legislature and is not a proper subject for judicial review."

It is thus now a well-established rule in New Mexico that the courts will not protect citizens' private property rights by reviewing whether a taking is <u>actually</u> necessary, regardless of a municipality's finding of necessity. In other words, if the government can manufacture a fig leaf of "public use" in a project, it can seize as much land as possible for as long as possible and transfer any "surplus" property beyond that needed for the public use and the courts will not question this decision. Given the legislative bodies making the necessity finding are the same entities that hope to profit from a taking for the purpose of economic development, some form of judicial review must be involved.[xiv]

To address this issue, the Legislature should amend the Urban Development Law, Community Development Law, and Metropolitan Redevelopment Code to indicate that no greater interest shall be taken in condemnation than is necessary to accomplish the public use associated with the project. Importantly, the amendments should include a requirement that courts should not completely defer to the government's determination of necessity and should instead conduct judicial review whether actual necessity exists. This will provide some protection from excessive condemnations while permitting the state and municipalities sufficient latitude and flexibility to structure legitimate public use projects.

<u>New Mexico Law Permits The Government to Declare a "Public Use"</u>.

As with the necessity determination, the New Mexico Supreme Court has abdicated its duty of protecting New Mexicans' constitutionally protected property rights by declining to conduct a

meaningful review in the determination of public use. In *Kaiser Steel Corp. v. W.S. Ranch Company,* as noted above, the New Mexico Supreme Court stated:

> Although, in the last analysis, the question of 'public interest' is a judicial one, the presumption is that a use is public if the legislature has declared it to be such, and the decision of the legislature must be treated with the consideration due to a coordinate branch of our government. In fact, it has been held that when the legislature has spoken, the public interest (i.e., 'public use') has been declared in terms well-nigh conclusive. Since our legislature has, in effect, declared the use in question to be public, we are constrained to accept their judgment in the absence of obvious unconstitutionality.

Even if the Supreme Court gives it permission to do so, the Legislature should decline the invitation to allow the government to define "public use." It should revise the Eminent Domain Code to expressly declare that legislative declarations of public use by the state or any local government are not to be considered or given any weight by the courts. Rather, the courts as the final arbiters of constitutional compliance must conduct a complete and meaningful review of whether a particular use can constitutionally be considered a "public use."

Principles for Effective Eminent Domain Reform

As is detailed above, reform is needed in New Mexico. We have identified the following as integral components of any meaningful eminent domain reform. A good eminent domain reform bill should:

- Remove statutory authorizations for eminent domain for private commercial development
- Explicitly forbid eminent domain for private commercial development and/or require that condemned property be owned and used by government or a common carrier.
- Prohibit "ownership or control" by private interests. In many cases, a government entity will technically own the property but lease it for $1 per year to a private party.
- Ensure that the statute or constitutional amendment applies to all entities that engage in eminent domain, using a term like "all political subdivisions."
- Clearly state any exceptions, i.e., any circumstances where property can be taken for private commercial entities. The main exception that should be made is private entities that are "common carriers" or "public utilities" – these include railroads, utilities and water districts.
- If blight remains an exception, revise blight definitions to clearly define the type of blight required to justify the use of eminent domain and require that the property have serious, objective problems before it can be taken for private development.

- Disentangle the designation of a redevelopment area for funding purposes and an area where property may be taken for private development. This allows cities to still get funding and acquire property voluntarily but prevents the use of eminent domain for private development.
- Require government to bear the burden of showing public use or blight, or at least put the parties on equal footing, with no presumption either way. The current rule typically means that the government's finding of public use or blight is conclusive, unless the owner can prove fraud, arbitrariness, or abuse of discretion.
- If allowing condemnation of unblighted property in blighted areas, require a predominant portion of the area be blighted and that the property be essential for the project.
- Have blight designations expire after a certain number of years.
- Give owners the opportunity to rehabilitate property before it can be condemned.

These principles are reflected in the model legislation attached to this White Paper as Attachment 1.

Conclusion

Constitutional rights are only as strong as the courts that protect them and both the United States and New Mexico courts have not provided New Mexicans with the protections to which they are constitutionally entitled. It is therefore incumbent on the Legislature to act. As it is at the federal level, legislators on both sides of the aisle in New Mexico have tried to enact significant and substantial eminent domain reforms. While a narrow majority of the U.S. Supreme Court said eminent domain is okay for private commercial development and our state supreme court has failed to give real meaning to the protections in our state constitution, a vast majority of Americans in every major poll have said that they fundamentally and strongly oppose eminent domain abuse. The people have made their views clear. While much of the debate regarding eminent domain concerns abstract concepts of private property and public use, we should recall that eminent domain abuse does not harm property; it harms people. The time to act is now. New Mexico has a historic opportunity to join the dozens of other states working to protect the rights of its citizens and reverse years of exploitation and misuse of the eminent domain power by passing real eminent domain reforms. The people are counting on this Task Force to recommend and push for real reform that allows the Legislature to recognize the critical importance of private property rights to everyone in this state. New Mexico has led on many things in the past. This is another time for it to take the lead.

i *Kelo v. City of New London, Connecticut*, __ U.S. __, 125 S.Ct. 2655, (2005).

ii *Id.* at 2662.

iii *See Testimony of Steven Anderson, Castle Coalition Coordinator, Institute for Justice, Before the House Subcommittee on Commerce, Trade and Consumer Protection,* 108th Cong. (2005) (*available at* http://energycommerce.house.gov/108/hearings/10192005Hearing1637/Anderson.pdf).

iv Dana Berliner, *Public Power, Private Gain* 2 (2003).

v Dana Berliner, *Opening the Floodgates: Eminent Domain Abuse in the Post*-Kelo *World* (2006).

vi *Kennedy v. Yates Petroleum Co.*, 104 N.M. 596, 725 P.2d 572 (1986) (allowing condemnation of private land where sole direct beneficiaries are private interests of petroleum company where private interests generated substantial tax revenues through royalty and tax payments, and involved the uniquely important natural resource of the oil and gas industry); *Kaiser Steel Corp. v. W.S. Ranch Co.*, 81 N.M. 414, 467 P.2d 986 (1970) (allowing condemnation of private land for water transport to solely benefit private coal mining operation because of unique status and importance the New Mexico constitution affords water as a natural resource).

vii N.M.S.A. 1978, § 3-46-10

viii N.M.S.A. 1978, § 3-60-8

ix N.M.S.A. 1978, § 3-60A-4

x The Ohio Supreme Court two weeks ago rejected a "deteriorating area" standard as a basis for condemnation finding that it was to vague and also "incorporates speculation as to the future condition of the property to be appropriated rather than the condition of the property at the time of the taking." *Norwood v. Horney*, ___ Ohio St.3d ___, 2006-Ohio-3799, ¶ 10 (July 26, 2006)

xi N.M.S.A. 1978, § 3-46-9, § 3-60-7, § 3-60A-4

xii N.M.S.A. 1978, § 3-46-29; § 3-60A-7

xiii N.M.S.A. 1978, § 3-60-22

xiv Despite this judicial history, the New Mexico Supreme Court has not always abdicated its duty to protect property rights by avoiding judicial review of the necessity determination. In *Hobbs Municipal School District No. 16 v. Knowles Development Co.*, Inc., 94 N.M. 3, 606 P.2d 541 (1980), the court affirmed district court's approval of 15 acre condemnation where school district attempted to condemn 40 acres because facts established the school district could only establish a reasonable necessity for the 15 acre portion, rather than the entire 40 acres sought. With established precedent in place permitting courts to avoid this type of review, however, the problem remains.