



5. LAND USE: Eminent domain restrictions spread through nation

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Reactions to the 2005 U.S. Supreme Court decision in *Kelo v. City of New London* continue to reverberate across the nation, as legislatures in every state have taken up some form of a bill to restrict or refine the limits of eminent domain actions.

According to the latest tally from the National Conference of State Legislatures, eminent domain legislation has been raised in 39 states so far this year. "Each of 16 states that did not pass Kelo-related bills or a ballot measure during 2005 or 2006 is considering legislation this year," said Larry Morandi, director of state policy research for NCSL.

Although none of the measures has been fully enacted, at least two states that ended their legislative sessions this week -- Virginia and Wyoming -- have passed bills that are likely to be signed into law.

A surprising finding is that 23 states that did act on eminent domain last year are again considering measures. About half of these are taking up bills that directly relate to key aspects of the *Kelo* decision, Morandi said. These include bills that define what a "public use" is, that clarify the conditions of "blight" that may warrant condemnation, or that restrict use of eminent domain for economic development. The other half are considering changes to eminent domain laws that do not directly relate to *Kelo*, he said, "in other words, that address issues that might be considered whether or not *Kelo* was decided" by the court.

While its figures are a bit different, the assessment of widespread anti-*Kelo* legislation was shared by the Castle Coalition and the Institute for Justice in Arlington, Virginia. Steven Anderson, director of the institute told *Land Letter* that in the past two years, 34 states have passed eminent domain legislation or ballot measures, and currently 41 states are considering bills.

While there are many bills that take on such aspects of eminent domain as compensation or the legal process for condemnation, the institute is mainly concerned with property rights policy issues that include definitions of public use, and the use of condemnation for private gain or economic development. A common theme seen in legislation this year is to define blight in "more objective terms as a threat to public health or safety," he said.

Out of some 30 bills or variations introduced into the Virginia General Assembly this year or carried over from 2006, **S.B. 1296** was the only one to survive passage in both chambers. Besides providing a definition for blighted property, the bill states that eminent domain may only be used when the public interest dominates private gains and specifies that the primary purpose of the condemnation action is not to enhance private financial gains, an increase in tax revenues, or an increase in employment--except in the formation of a public service corporation or for public utility purposes.

In Wyoming, which ended its legislative session this week, lawmakers approved **H.B. 124** a bill calling for "good faith negotiations" between private companies and landowners whose properties might be condemned for public uses, including gas pipelines or electric transmission lines. The bill also described elements to be used in determining fair market values for land.

Many observers are keeping a close eye on developments in Connecticut, the home state of the *Kelo* decision, as the Legislature considers **H.B. 1054**, a bill sponsored by Gov. Jodi Rell (R).

Among the many restrictions on eminent domain actions in the bill are requirements that condemnation of properties may only be done as part of a redevelopment plan that spells out "an identified public need," specifies alternative approaches to meeting that need, and provides a description of how the project would achieve the relevant agency's goals for blight remediation.

It would require a two-thirds vote of the condemning municipality's legislative body and prohibits the city from selling the property to a third party, unless the prior owners or their legal heirs have an opportunity to repurchase the land.

Eminent domain may not be used against an owner-occupied dwelling that meets building codes and zoning regulations. In addition, the bill provides for relocation compensation of up to \$22,500 for displaced homeowners, or in the case of renters, compensation for as much as four year's worth of rental or lease costs.

Still, some critics of the bill say that it does not provide sufficient property owner protections. "Nowhere in the governor's recommendations does she eliminate eminent domain for economic development," said Scott Bullock, an attorney with the Institute for Justice. "Most of her reforms would require more paperwork to be produced by city officials, which is hardly raising the bar. While the proposed legislation offers some new protections, it falls far short of the mark for protecting Connecticut's citizens from eminent domain abuse," Bullock said.

H.B. 1054 is set for a public hearing March 7.

State courts disagree with high court

The anti-*Kelo* backlash is also being seen at the state Supreme Court level, said Anderson of the Institute for Justice. There have been four cases -- in Ohio, Rhode Island, Maryland and Oklahoma -- which specifically rejected *Kelo*-like determinations and ruled in favor of property owners, he said.

In *Norwood v. Horney*, (110 Ohio St.3d 353, 2006-Ohio-3799), for example, the Ohio Supreme Court in January 2006, ruled against the city of Norwood's use of eminent domain to allow a private developer to take over properties to build a complex of chain stores, condominiums and office space. The developer paid for a study that found the area to be "deteriorating."

The court determined that while economic factors may be considered in a public land appropriation, "the fact that an appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement" of state law. In addition, the court found that the city of Norwood's declaration that the affected property was in a "deteriorating area" was too vague to justify the condemnation.

While not as direct a rebuke against *Kelo* as the Norwood case, just this month in the case *Mayor of Baltimore v. Valsamaki* (Case No. 55-06), the Maryland Court of Appeals ruled that cities can only condemn property through "quick take" procedures if they prove that there is an "immediate necessity" for doing so.

According to the Pacific Legal Foundation, the Feb. 8 ruling invalidated Baltimore's attempt to seize business owner George Valsamaki's land as an abuse of the "quick take" procedure that allows government to take immediate possession of a person's property and settle legal issues later. Under Baltimore's city code, government can use "quick take" if officials file an affidavit explaining why they need the property immediately. But in Valsamaki's case, officials simply filed an affidavit saying they needed the property so that they could transfer it to a private developer without delay.

The court determined, "The purpose of quick take is for it to be used when the need for the public use is immediate. It was not conferred for the purpose of allowing a condemning authority to run 'roughshod' over the owners of private property. When that happens, or begins to happen, the property owner's recourse is to the courts."

Despite such decisions at the state level, Anderson does not expect the eminent domain issue to find its way back to the federal court anytime soon. "At some point, I imagine it will make its way back to the Supreme Court, but they prefer to let things simmer for a while before revisiting issue," he said.

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