NEW YORK STATE BAR ASSOCIATION

SPECIAL TASK FORCE ON EMINENT DOMAIN

Report

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Executive Summary

In November 2005, New York State Bar Association President A. Vincent Buzard appointed a Special Task Force on Eminent Domain to provide legal analysis and recommendations about appropriate legislative and regulatory considerations in the practice of eminent domain law in the aftermath of the recent U.S. Supreme Court ruling in *Kelo v. City of New London*, 125 S.Ct. 2655 (2005). The Task Force met four times to review research on eminent domain laws in New York and to evaluate state and local legislative proposals introduced in the aftermath of the *Kelo* decision.

Part II of this report contains a description of the *Kelo* decision and an analysis of the "public use" requirement for purposes of the use of eminent domain under both the federal and New York State Constitutions. In Part III, post-*Kelo* legislative reactions are discussed at both the state and local levels in New York.

Among the Task Force recommendations is the need to create a Temporary State Commission on Eminent Domain Reform in New York. In Section IV of this report, the Task Force identifies a list of potential items for study by such a Commission. Part V contains a brief review of the prior state-initiated eminent domain reform effort almost thirty years ago, and demonstrates how little attention has been focused on the important issues embedded in the use of eminent domain.

The Task Force recommendations are set forth in Section VI of this report. In developing this particular list of recommendations, the Task Force focused almost exclusively on the seventeen proposed bills in the State Legislature. In no particular order of priority, the task force recommends (with more explanation in the report) the following:

- The use of eminent domain should not be restricted to specified public projects.
- Local governments should not have a veto over exercises of eminent domain by public authorities of larger entities within their borders.
- Agencies exercising eminent domain for economic development purposes should be required to prepare a comprehensive economic development plan and a property owner impact assessment.
- The present 30-day statute of limitations in EDPL § 207 for judicial

review of the condemnor's determination and findings should be expanded.

- A new public hearing under EDPL § 201 should be required where there has been substantial change in the scope of a proposed economic development project involving the exercise of eminent domain.
- No exceptions to the EDPL are necessary for acquiring property for public utility purposes.
- Acquisitions should not be exempted from the EDPL's eminent domain procedures simply because other statutes provide for land-use review.
- A Temporary State Commission on Eminent Domain should be established.

The Task Force believes there is still more work to be done. The Task Force has presented this report with the offer to President Buzard that its members are willing to continue to discuss and debate significant constitutional, jurisdictional and other legal aspects of eminent domain reform in New York. The Task Force urges the Executive Committee and the House of Delegates of the New York State Bar Association to adopt the eight specific recommendations contained in this report and to direct the Government Relations staff of the Bar Association to communicate these recommendations to the New York State Legislature.

Introduction

In November 2005, New York State Bar Association President A. Vincent Buzard appointed a Special Task Force on Eminent Domain to provide legal analysis and recommendations about appropriate legislative and regulatory considerations in the practice of eminent domain law in the aftermath of the recent U.S. Supreme Court ruling in *Kelo v. City of New London*, 125 S.Ct. 2655 (2005), which held that economic development is a valid public use for purposes of eminent domain.

A. Mission Statement

The mission statement of the Task Force is as follows:

> The mission and objective of the New York State Bar Association's Task Force on Eminent Domain is to review existing and proposed legislation regarding eminent domain in New York and make recommendations regarding appropriate legislative and regulatory considerations. This Task Force will work to shed light on the real issues while removing some of the hyperbole from the debate process and, above all, stop the blaming of judges for simply ruling on the law to the best of their abilities.

B. Members of the Task Force

The Task Force is comprised of lawyers and law professors who practice in the public, private and non-profit sectors. Lawyers on the Task Force represent both public and private clients, developers and property owners. In addition, the Task Force includes members active in the following NYSBA Sections/Committees: Environmental Law, Municipal Law, Real Property Law, and the Committee on Attorneys in Public Service. To date, the Task Force has met four times, once each in November, December, January and March for the purpose of reviewing the current state of the law in New York, analyzing existing federal, state and local legislative proposals introduced following the Supreme Court ruling, examining the need for reform in all areas of the Eminent Domain Procedure Law and the Urban Development Corporation Law, and

exploring the impact of eminent domain reform at the local government level. The Task Force considered, among other things, federal and state constitutional implications of reform proposals, and issues of fairness and access to administrative and/or judicial review of eminent domain actions.

The Task Force is chaired by Patricia Salkin, Associate Dean and Director of the Government Law Center of Albany Law School. Task Force members are:

- John M. Armentano of Uniondale (Farrell Fritz, P.C.)
- Professor Vicki Been, NYU School of Law
- Lisa Bova-Hiatt of New York (New York City Corporation Counsel's Office)
- Kevin Crawford of Albany (Association of Towns)
- Hon. John D. Doyle of Rochester
- Robert A. Feldman of Rochester (Ward Norris Heller & Reidy LLP)
- M. Robert Goldstein of New York (Goldstein, Goldstein, Rikon & Gottlieb, P.C.)
- Charlene M. Indelicato of White Plains (Westchester County Attorney)
- Linda S. Kingsley of Rochester
- Robert B. Koegel of Rochester (Remington, Gifford, Williams & Colicchio, LLP)
- Harry G. Meyer of Buffalo (Hodgson Russ LLP)
- Professor John R. Nolon of White Plains (Pace University School of Law)
- Richard L. O'Rourke of White Plains (Keane & Beane, P.C.)
- James T. Potter of Albany (Hinman Straub, P.C.)
- Carl Rosenbloom of Albany (Bond Schoeneck & King)
- Joel H. Sachs of White Plains (Keane & Beane, P.C.)
- Jon N. Santemma of Garden City (Jaspan Schlesinger & Hoffman LLP)
- William L. Sharp of Glenmont (New York State Department of State)
- Lester D. Steinman of White Plains (Municipal Law Resource Center, Pace University)
- Prof. Philip Weinberg of Jamaica (St. John's University School of Law)
- David C. Wilkes of Tarrytown (Huff Wilkes, LLP)

Hon. Joel K. Asarch is the NYSBA Executive Committee Liaison to the Task Force.

The Task Force appreciates the outstanding NYSBA staff support provided by Mark Wilson, Glenn Lefebvre, and Ronald Kennedy.

II. Background

A. Kelo v. City of New London

Under the Fifth Amendment's Taking Clause, private property may not be taken for "public use" without just compensation. May private property be taken for the "public purpose" of economic development?

Resisting decades of economic decline, respondent City of New London, Connecticut embarked upon an ambitious, integrated development plan to build commercial, residential, and recreational facilities in an area where petitioners Kelo and others just happened to live. While the stated purpose of the project was to create jobs, increase tax revenues, and revitalize the economy, the project site would be leased to a private developer and adjoin land to be used by a large pharmaceutical company as a research center. When negotiations to purchase petitioners' non-blighted homes stalled, the City, through its non-profit development corporation, commenced condemnation proceedings. Petitioners sued, not arguing that the compensation they were offered was unjust, but rather that economic development is not a "public use" for which their property may be taken.

By a 5-4 decision, the Supreme Court upheld the condemnation of petitioners' properties. Writing for the majority, Justice Stevens, joined by Justices Kennedy, Souter, Ginsberg and Breyer, found that the Supreme Court had long ago abandoned the literal requirement that condemned property be put to "public use" and instead accepted the view that the evolving needs of society demand a broader interpretation of "public use" so as to mean "public purpose." Relying primarily on *Berman v. Parker*, 348 U.S. 26 (1954) (upholding condemnation of properties in Washington, D.C. in part for private development in a blighted area) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (upholding forced transfer of title from lessors to lessees to reduce land oligopoly in Hawaii), the majority found that there was no reason to exempt economic development from the traditionally broad understanding of public purpose.

The majority considered petitioners' contention that using eminent domain for economic development blurs the boundary between permissible public takings and impermissible private takings, acknowledging that the government's pursuit of a public purpose will often benefit individual private parties. Nevertheless, the majority found that

a public purpose may be better served through private enterprise than public ownership, or that public ownership is not the only method of promoting the public purpose of community redevelopment projects. The majority also weighed petitioners' argument that without a bright-line rule, nothing would stop the government from taking one private person's property and handing it to another private person on the sole speculation that the latter will use the property more productively than the former and thus pay more taxes. The majority rejected this concern, noting that one-to-one transfers of property apart from an integrated development plan can be challenged if and when they arise.

The majority also reflected on petitioners' view that if economic development takings are to be allowed, courts should require with "reasonable certainty" that the expected public benefits will actually accrue. Again, the majority dismissed this approach, explaining that courts must not substitute their predictive discretion for that of elected legislatures and expert agencies and that the court's role is limited to determining whether the legislature could have rationally believed that a taking could promote a legitimate public purpose.

Finally, the majority expressed sympathy for the hardship that condemnations may entail, but emphasized that nothing in its opinion would prevent any state from placing further restrictions on the exercise of eminent domain, as many states already have. The majority simply reiterated that the proposed condemnation of petitioners' property in this case is for a "public use" within the meaning of the Fifth Amendment.

In his concurring opinion, Justice Kennedy agreed with the majority that a taking is constitutional so long as it is rationally related to a conceivable public purpose, but noted that when applying this rational basis review, a court should review the record and strike down any taking that is intended to favor a particular private party with only incidental or pretextural public benefits. Justice Kennedy found that the trial court determined that substantial public funds were committed by the state to the development project before most of the project beneficiaries where known, that the private developer was chosen from a group of applicants instead of being selected beforehand, that the pharmaceutical company's proximity to the site benefited the project, and that all lower court justices agreed that the development plan was intended

to revitalize the local economy and not to serve the interests of any particular private party. Under these circumstances, Justice Kennedy found that the taking survived rational basis review, and that a more stringent standard of review to detect impermissible favoritism was unecessary. Justice Kennedy also rejected petitioners' argument that economic development takings should be treated by the courts as per se invalid, noting that such a rule would prohibit a large number of government takings that have the purpose and expected effect of conferring substantial benefits on the public at large.

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, authored a dissenting opinion. Justice O'Connor observed that the following three categories of takings comply with the public use requirement: first, when private property is transferred to public ownership, such as for a road, hospital, or a military base; second, when private property is transferred to private parties, often common carriers, who make the property available for the public's use, such as with a railroad, a public utility, or a stadium; and third, when private property is transferred for subsequent private use to meet "certain exigencies," such as to ameliorate blighted housing in *Berman* or to mitigate the housing oligopoly in *Midkiff*. The economic development taking in this case, Justice O'Connor reasoned, does not address any such exigencies and instead allows the government to take private property currently put to ordinary private use and give it over for new ordinary private use, so long as the new use is predicted to generate some secondary public benefit.

Contrary to the view of the majority and Justice Kennedy that courts have a role in ferreting out takings designed to solely benefit private transferees, Justice O'Connor opined that it is difficult to disentangle the private and public benefits of an economic development taking, and even if it could be done, the majority concedes that courts are not supposed to get bogged down in predicting whether or not the public will actually be better off after a property transfer. Indeed, Justice O'Connor reasoned, if the economic development taking in this case was upheld because it involved a careful, deliberative process, an integrated development plan rather than an isolated property transfer and projected incidental public benefits, there is nothing in the analysis by the majority or Justice Kennedy to prohibit property transfers generated with less care, less

comprehensive planning, less elaborate process, and less clear incidental public benefits. In the end, Justice O'Connor portended, while economic development takings jeopardize the security of all private property ownership, it will be those with the fewest resources who will be the greatest victims of such takings.

Justice Thomas also penned a dissenting opinion. Relying on historic dictionaries, the Constitution's common law background, and disparate phrases from the Constitution, Justice Thomas concluded that the "public use" requirement means that the government can take private property only if the government will own, or the public will have a legal right to use, the property, as opposed to taking the property for any public purpose or necessity whatsoever. Justice Thomas maintained that early American eminent domain practice is generally consistent with this understanding of "public use," and that the "public purpose" interpretation of the "public use" clause needlessly crept into more modern jurisprudence as many of the cases adopting the "public purpose" test involved property which was, in fact, transferred for the use of the public, if not for outright public ownership.

Rejecting both *Berman* and *Midkiff* for equating the eminent domain power with the police power of the states, Justice Thomas concluded that the "public purpose" test cannot be applied in a principled manner. He shared Justice O'Connor's skepticism about a public use standard that requires courts to second guess the wisdom of public works projects. Responding to the majority's criticism that the "public use" test is difficult to administer, Justice Thomas asserted that it is far easier to ask whether the government owns or the public has the legal right to use the taken property than to ask whether the taking has a purely private purpose. Citing examples of how the exercise of eminent domain through urban renewal programs disproportionately hurt poor and minority communities, Justice Thomas, like Justice O'Connor, promised that the consequences of the majority's decision would be harmful.

B. Defining Public Use

1. A Review of U.S. Constitutional Analysis

To fully understand the state of the law as to what may be condemned in New York State, the nature of the power of eminent domain as well as the history of the eminent domain provisions of the Fifth Amendment to the Constitution of the United States is critical. What follows is an overview of the law.

Starting with the nature of the power, it was stated in *People v. Adirondack R. Co.*, 160 N.Y. 225, 54 NE 689, *aff'd*, 176 U.S. 335:

> The power of taxation, the police power and the power of eminent domain, underlie the Constitution and rest upon necessity, because there can be no effective government without them. They are not conferred by the Constitution, but exist because the state exists, and they are essential to its existence. They are not rights reserved, but rights inherent in the state as sovereign. While they may be limited and regulated by the Constitution, they exist independently of it as a necessary attribute of sovereignty. They belong to the state because it is sovereign, and they are a necessity of government. The state cannot surrender them, because it cannot surrender a sovereign power. It cannot be a state without them. They are as enduring and indestructible as the state itself. (Black Cons. Law, § 123; Cooley Const. Lim. 524; Eminent Domain by Randolph, 77; Lewis, § 3; Mills, § 11.) Each is a peculiar power, wholly independent of the others, and not one of them requires the intervention of a court for effective action by the state. In the case of eminent domain, when the state is not itself an actor, compensation for property taken, unless the amount is agreed upon, can be ascertained only through the aid of a court, but otherwise judicial action is unnecessary except as provided by statute.

> (State Const. Article 1, § 7.) While the state may delegate the power to a subject for a public use, it cannot permanently part with it as to any property under its jurisdiction, but may resume it at will, subject to property rights and the duty of paying therefor. There is no limitation upon the exercise of the power except that the use must be public, compensation must be made and due process of law observed. (*Secombe v. RR Co.*, 90 U.S. 108; *Matter of Fowler*, 53 N.Y. 60, 62).

The power is exercised legislatively either directly or by delegation of power through legislation (i.e., statutes, charters, etc.). *See Cuglar v. Power Auth. of N.Y.*, 4 Misc.2d 879, 163 N.Y.S.2d *aff'd*, 4 A.D.2d 801, 164 N.Y.S.2d 686, *aff'd*, 3 N.Y.2d 1006, 170 N.Y.S.2d 341; *County of Orange v. MTA*, 71 Misc.2d 691, 337 N.Y.S.2d 178, 188–89, *aff'd,* 39 A.D.2d 839, 332 N.Y.S.2d 420 (2d Dep't, 1972).

Thus, the State of New York and the federal government each independently have that power. The Fifth Amendment does not grant the power, it restricts it. The question then is, in what way? It provides for "just compensation," but is the "public use" language also a restriction, and if it is, does it have a literal reading?

The power existed prior to both the Constitution and the Fifth Amendment, the latter being adopted in 1791. The Fifth Amendment did not apply to the states prior to 1897 when it was decided it applied via the 14th Amendment Due Process Clause (*Chicago B&Q Rail Road v. Chicago*, 166 U.S. 226, 239). Since the very first use of the federal power of eminent domain did not occur until 1872 (*see Kohl v. U.S.*, 91 U.S. 367, 373 (1876)) there are very few decisions of the U.S. Supreme Court interpreting the "public use" provision of the Fifth Amendment prior to the 20th century.

However, the specific language of the Fifth Amendment raises interesting questions as to the meaning of the phrase. The specific language which is virtually the same in the New York State Constitution, Article 1, § 7 is "…nor shall private property be taken for public use, without just compensation…" What it does not say is, "unless for public use." Some question why it was not so written if the intention was to make "public use" a restriction.

In 1797, in *Calder v. Bull*, 3 U.S. 386, in dicta, there is discussion of the nature of the power (as well as the police power and the power of taxation) and its limitations. In applying general principles of law, applicable with or without a constitutional provision, and stated as grounded in the "social compact," the Court said that "a law that takes property from A and gives it to B" was invalid. Noteworthy is that this discussion relied not on any constitutional provision or the Fifth Amendment, which had been adopted only a short time before, but on generally accepted principles of law. This specific language found its way into *Kelo v. City of New London*, 125 S.Ct. 2655 (2005), without any attribution of where it came from, it having been repeated in other cases over the years. Thus, it was early recognized that it was not any constitutional provision which prohibited such a taking, but "the general principles of law and reason (which) forbid them."

One assumption as to why the language of the Fifth Amendment was written as it was in omitting the word "unless" for public use is that the restriction already existed. You could not take property from A and give it to B, without more. It was not written as a restriction on the purposes for which the power of eminent domain could be exercised, but rather a requirement that when it was exercised for a public use, there must be just compensation. It was a just compensation clause, not a public use clause. It was not until *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), that for the first time the Supreme Court made a direct connection between the "public use" language of the Fifth Amendment and how the right of eminent domain could be exercised. If the language of the Fifth Amendment prior to *Midkiff* was not a restriction limiting a taking to a "public use" and general principles of law prohibited the taking of the property of A and giving to B, what short of that was the limitation on the purposes for which the power could be exercised under general principles of law and reason?

Since a basic power of any sovereign included, besides the power of eminent domain, the taxing power and the police power as attributes of sovereignty, it appears that the earliest limits for the power must have been the same source of the police power, the health, safety and welfare of the public.

This connection was recognized and spelled out in *Berman v. Parker*, 348 U.S. 26 (1954). While some may have deemed this a revolutionary concept, to other scholars

it appeared to be a repetition of a common understanding of the law at the time of the drafting of the U.S. Constitution. Justice O'Connor, in *Midkiff*, cited *Berman v. Parker* extensively, with approval.

Long before *Berman v. Parker*, many cases had equated "public use" with "public purpose" or "public benefit." Private property could be taken from A and given to B if there were a public purpose or benefit. Thus, early on, there were condemnations for privately owned mill dams, canals, railroads, toll roads, electric transmission and other utility lines, and the like. While they served the public, it was still the taking of property from A to give to B. While it took many years to recognize the curing of the social ills connected with "slums" as a public purpose, or benefitting a locality by providing jobs and increasing the tax base, both on a national level and in New York, the genesis was the police power, the public health, safety and welfare.

2. Analysis Under the New York State Constitution

While these cases were taking place on the national level, New York State had its own body of case law on the subject.

In 1936, in *Matter of New York City Housing Authority v. Muller*, 270 N.Y. 333, the Court of Appeals said, in the context of approving what was then called "slum clearance" of a blighted area: "use of a proposed structure, facility or service by everybody and anybody is one of the abandoned universal tests of public use." The Court then went on, setting the stage for the decisions to come to the present time, when it said: "over many years and in a multitude of cases, the courts have vainly attempted to define comprehensively the concept of a public use and to formulate a universal test. They have found here, as elsewhere, that to formulate anything ultimate, even though it were possible, would in an inevitably changing world be unwise, if not futile. Lacking a controlling precedent, we deal with the question as it presents itself on the facts at the present point of time. The law of each age is ultimately what that age thinks should be law." The Court went on to say that elimination of slums is a matter of state concern and that elimination of the conditions found in the slums "is a public purpose." The Court spoke not of "public use," but of "public purpose." The door was

opened by this case in New York. This opinion was rendered well before the U.S. Supreme Court decision in *Berman v. Parker*, *supra*.

Did that mean that only "slum" buildings could be condemned? The Court answered that in *Kaskel v. Impelliteri*, 306 N.Y. 73 (1953) when the Court said the test was not as to a particular building but an entire area. But the Court went a step further, with portents for the future. The Court, after noting that no corruption or fraud was charged and that the purpose was not illegal, declared it would not look behind the statement of purpose by the legislative body and then stated: "One can conceive of an hypothetical case where the physical conditions of an area might be such that it would be irrational or baseless to call it substandard or unsanitary, in which case, probably the conditions for the exercise of the power could not be present. However, the situation here actually displayed is one of those as to which the legislature has authorized the City officials including elected officials, to make a determination, and so the making thereof is simply an act of government, that is an exercise of governmental power, legislative in fundamental character which, whether wise or unwise cannot be overhauled by the Courts. If the Courts below should decide in favor of plaintiff there would be effected a transfer of power from the appropriate public officials to the Courts. The question is simply not a 'justiciable one.'"

That had been preceded in 1940 by *Bush Terminal Co. v. City of New York*, 282 N.Y. 317 and later in 1963 by *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*, 12 N.Y.2d 379. In both cases the Court approved a much larger improvement than that needed to satisfy the basic need for the stated purpose of the project, on the basis that the revenue generated by the additional space would make the project economically feasible and thus that space was only incidental to the main purpose of each project. However, the latter case, which enabled the construction of the World Trade Center, approved the primary purpose as a public use—what is called today "economic development."

Yet, in 1951, the Court decided *Denihan Enterprises, Inc. v. O'Dwyer*, 302 N.Y. 451 in which it struck down a proposed condemnation for a parking garage for a privately owned apartment building where only 17 out of the 308 spaces in the proposed garage were to be for the general public, with the balance leased to the apartment

tenants. Here the Court stated that it did not view the private use as only incidental to the public use. It accepted that building a garage could be a public use but that the public use here was subordinate to the "private benefit to be conferred on the Company."

The private use versus public use dichotomy had been earlier present in *Watkins v. Ughetta*, 273 App. Div. 969, 78 N.Y.S.d 393, *aff'd*, 297 N.Y. 1002 (1948) where the Court approved condemning private property and turning it over to homeowners whose property had been condemned for the Van Wyck Expressway, so that those houses could physically be moved to that new location. It treated the later condemnation as part and parcel of the highway condemnation. It was not a giant step from that to *K & C Realty, Inc. v. State of New York*, 69 Misc.2d 98, 329 N.Y.S.2d 252, *aff'd*, 32 N.Y.2d 664 (1973) to upholding Highway Law, Sec. 10, Subd.2d which authorized the condemnation of private property to turn over to other private home owners, pursuant to a written agreement to do so, to provide access to their property which had been rendered landlocked as a result of a highway project condemnation. As was stated in the decision: "The Courts have consistently recognized the validity of appropriations for 'quasi private use.'" With this, we had a new term and a new concept in the ever-widening concept in New York of what was to be deemed a "public use."

Following this precedent, in *Cannata v. City of New York*, 11 N.Y.2d 210 (1962), the condemnation pursuant to General Municipal Law, § 72N of Article 15 passed muster as a public use. This statute stated that the taking of a predominately vacant area which is economically dead can be condemned as it impairs the community's growth and tends to develop slums. The project proposed was to condemn a large area including sixty-eight homes to create sites for private development as an industrial park. The objectors contended the area was not a "slum." The Court's answer that an area need not be a slum and turning an area such as was involved into needed industries was a public use. The use of condemnation for economic development was born in New York. It subsequently found expression in *Courtesy Sandwich Shop*, *supra*, a year later and in *In re Fisher*, 287 A.D.2d 262, 730 N.Y.S.2d 56 (2001) which was a condemnation of a square block on Wall Street to expand the New York Stock Exchange on the grounds of the economic benefit to New York City. As was stated in *Fisher*, *supra*:

"Given the breadth with which public use is defined in the condemnation context (cases cited), and the restricted scope of our review of respondent's finding in support of condemnation (cases cited), we perceive no ground upon which we might reject respondent's finding that the condemnation of 45 Wall Street as part of respondent's New York Stock Exchange project will result in substantial public benefit."

The question then is what is the nature of the court's function in all of this? In 1975 in *Yonkers Community Agency v. Morris*, 37 N.Y.2d 47, Otis Elevator, a large employer in Yonkers, threatened to move unless it could expand. Whereupon, Yonkers proceeded to attempt to condemn as an urban renewal project adjacent "substandard" land. The taking was challenged by the landowner. The Court held the predominant purpose was to clear substandard land and the benefit to Otis Elevator was only incidental. The Court held that for the plaintiff to succeed it had to submit proof "sufficient to sustain a charge of fraud." It further stated that, "among other things, economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose." However, the Court stated that once the land was deemed "substandard" it was not necessary to weigh whether the predominant benefit was to Otis Elevator or the public. Weighing the issue of the municipality's determination of substandard, the courts, it said, have a limited role, but they are not rubber stamps for mere conclusary findings, the basis for such findings must be spelled out. While not stated there, but in other cases, where it is spelled out, the Court was not going to look behind it. The Court, however, found that the findings were never challenged by the plaintiff, that the takings had already occurred and the buildings were already demolished and in that posture no relief would be granted.

Other New York cases have applied these principles. For example, in *Centerport Bird Sanctuary, Inc. v. Town of Huntington*, 125 A.D.2d 521, 509 N.Y.S.2d 600 (2d Dep't, 1986) the Court stated "public use is a term which is broadly defined to encompass any use which contributes to the health safety, general welfare, convenience or prosperity of a community." And *Matter of Horoshko v. Town of East Hampton*, 90 A.D.2d 99, 456 N.Y.S.2d 99 (2d Dep't, 1985), upheld a taking of "substandard lots" to promote proper land development.

In *Northeast Parent & Child Society v. City of Schenectady*, 114 A.D.2d 741, 474 N.Y.S.2d 503 (3d Dep't, 1985), the Court approved condemnation of property to increase the tax base and diversify the economy so as to promote the City's economic welfare, citing General Municipal Law, Sec. 852 and 858. Those statutes give the basis for condemning property as to "advance the job opportunities, health, general prosperity and economic welfare—and to improve their recreation opportunities, prosperity and standard of living." *Lubella v. City of Rochester*, 145 A.D.2d. 954, 536 N.Y.S.2d 325 (4th Dep't, 1988) held that acquisition as an historic landmark was a public purpose. *Neptune Associates v. Con Edison Co. Of New York*, 125 A.D.2d 437, 509 N.Y.S.2d, 574 (2d Dep't, 1980) stated the rule which, in effect, makes a decision to condemn virtually unchallengeable, despite the Court of Appeals statement in *Yonkers Community Development Agency v. Morris*, *supra*, that the courts would not be a rubber stamp for a potential condemner's fact-finding as to why there should be a condemnation. It held that to undo a fact-finding one had to prove the finding was arbitrary, capricious or fraudulent. The reasoning is that such a finding is legislative in character and there attaches to it a legislative presumption of constitutionally. To overcome such a presumption requires proof beyond a reasonable doubt, unless such findings are irrational, baseless or palpably unreasonable (*see Hotel Dorset Co. v. Trust for Cultural Resources of City of New York*, 46 N.Y.2d 358, 413 N.Y.S.2d 357 (1978); *Matter of Bottillo v. State of New York*, 53 A.D.2d 975, 386 N.Y.S.2d 475 (3d Dep't, 1976); *Matter of Dowling College v. Flacke*, 78 A.D.2d 551, 552, 432 N.Y.S.2d 23 (2d Dep't, 1980).

While some have treated the *Kelo* decision as a revolutionary departure from existing law, the *Kelo* decision is in the mainstream of U.S. jurisprudence, and certainly in New York. The healthy and robust discussion and debate generated by the Supreme Court decision has generated significant public policy debate around dozens of potential reforms to the law of eminent domain.

III. Post-*Kelo* Legislation Affecting the Exercise of Eminent Domain

A. State Legislative Proposals

According to the National Conference of State Legislatures, to date in 2006 there have been 325 legislative proposals introduced in statehouses across the country that specifically address eminent domain in the aftermath of *Kelo.* Seventeen bills have been introduced in the New York State Legislature addressing various aspects of eminent domain reform. Both the Senate and Assembly held a series of public hearings throughout the State in the Fall of 2005 to gather information about the use and abuse of eminent domain in New York and to determine what types of reform would be desirable. The Task Force is also aware that the New York State Law Revision Commission has been asked to examine the issue of eminent domain.

To review the various legislative proposals in New York, the Task Force developed a chart organized by subject matter to ascertain the differences and similarities in the proposed approaches. This subject index is followed by a chart that describes the primary content of the individual proposals. To date, none of the bills has been adopted.

1. Pending New York State Eminent Domain Legislation
Subject-Matter Index

Subject	Chart #	Scope of Coverage
A. Prohibitions to be imposed in the exercise of eminent domain		
Public Projects/defined:	5	Defined;
	9	Limiting the use of Eminent Domain to Public Projects, as defined therein
	13	Defines 'acquisition' and 'public project'
	14	Limiting the use of Eminent Domain to Public Projects, as defined therein
Economic Development:	5	Allowed only in 'blighted areas';
	6	Prohibited;
	10	Defined; where applicable, triggers additional procedures and findings;
	11	Defined; where applicable, triggers additional procedures and findings;
	12	Defined; where applicable, triggers additional procedures and findings
B. Procedures to be imposed in the exercise of eminent domain		
Procedural Matters:	1	Additional procedures imposed where plan revised due to field conditions;
	10	Time to challenge increased when project scope is altered;
	11	Expansion of hearing obligations
	12	Expansion of filing times
	15	Additional approvals required where private developers will use lands
	17	Creates option for a jury trial
Local Government Approvals:	2	Where private developer involved;
	3	Where Onondaga County IDA condemning;
	4	In cities with a population of 1m. or more, where public authority or public corporation condemning;
	9	Where IDA condemning;
	10	Where IDA, public authority or public benefit corporation condemning;
	11	Where IDA, public authority or public benefit corporation condemning;
	12	Approval required
	15	Unanimous approval/permissive referendum required where land will be used by a private developer
Public Utilities:	7	Municipal acquisition for utility purposes
Special Offices:	8	Creation of a temporary state commission
	10	Creation of a temporary state commission
	16	Creation of an Eminent Domain Ombudsman
C. Procedures to be imposed in the exercise of eminent domain		
Condemnee Reimbursement:	9	Entitled to 'relocation expenses'
	10	Additional 150% of market value*
	11	Additional 150% of market value*
	12	125%, plus 'consequential' relocation expenses*
	17	Defines just compensation
Constitutional Amendments	6	
	14	

*Applies only where condemnation is for an economic development project.

2. Chart of Pending New Yorks State Eminent Domain Legislation

1.	A02226/O'Donnell 1/25/05 referred to Judiciary Comm. 1/04/06 referred to Judiciary Comm.	§205, EDPL[1] (amendment)	Additional procedural requirements imposed where amendments to project proposals are made due to field conditions	A) Condemnor will be required to conduct additional public hearings if any amendments/alterations are made to the proposed project after hearings are completed; and B) Condemnor will be required to conduct additional public hearings *and* publish a new determination and findings if any amendments/alterations are made to the proposed project after the determination and findings are published.
2.	A08865/Christense[2] 6/17/05 referred to Judiciary Comm. 1/04/06 referred to Judiciary Comm.	§204-a, EDPL (new)	Additional procedures imposed where condemnation is for the use of a private developer	Would require local governmental approval of any condemnation undertaken "for the use of a private developer."
3.	A09015/Christense 6/29/05 referred to Judiciary Comm. 1/04/06 referred to Judiciary Comm.	§204-a, EDPL (new)	Additional procedures imposed where condemnation is undertaken by the Onondaga County IDA	Would require local governmental approval of any condemnation approved by the Onondaga County Industrial Development Agency.
4.	A09051/Brodsky[3] (S05949/Montgomery) 8/12/05 referred to Judiciary Comm. 1/04/06 referred to Judiciary Comm.	§2901, PAL[4] (new)	Additional procedures imposed where condemnation is undertaken by public authorities or public benefit corporations	Would require city council approval, in cities with a population of one million or more, of the use eminent domain by any public authority or public benefit corporation.
5.	S05936/Marcellino 7/20/05 referred to Rules Comm. 1/04/06 referred to Judiciary Comm.	§103, EDPL (amendment)	Restricting the use of eminent domain for economic development purposes	Would prohibit the use of eminent domain for economic development purposes except where the site of such condemnation is 'blighted,' as defined therein.[5]

1 EDPL = New York State Eminent Domain Procedure Law
2 Cosponsors: Magee, Glick, O'Donnell, Fields, Powell, Cohen A, Galef, Greene, Peoples and Pheffer
3 Cosponsor: Millman
4 PAL = New York State Public Authorities Law
5 *Blighted area* is defined as "an area in which one or both of the following conditions exist: (i) predominance of buildings and structures which are deteriorated or unfit or unsafe for use and occupancy; or (ii) a predominance of economically unproductive lands, buildings, or structures, the redevelopment of which is needed to prevent further deterioration which would jeopardize the economic well-being of the people."

6.	S05961/DeFrancisco 9/12/05 referred to Rules 9/20/05 referred to Attorney General for opinion 10/12/05 opinion referred to Judiciary 1/04/06 referred to Judiciary Comm. 1/12/06 referred to Attorney General for opinion 1/30/06 opinion referred to Judiciary	Article 1, §7 of the NYS Constitution (repeal & replace)	Prohibits the taking and/or transfer of private property to another private owner or for economic development purposes	Would allow the taking of private property only "when necessary for the possession, occupation or enjoyment of land by the public at large, or by public agencies." Allows private enterprise use only for common carriers and public utilities.
7.	S01474/LaValle 1/28/05 referred to Local Government 1/04/06 referred to Local Government	§360-a, GML[6] (new)	Establishing special procedures for municipal acquisition of lands for public utility purposes	Would create limited exceptions to the standard EDPL procedures for municipal acquisition of lands for public utility purposes, thereby allowing the municipality to ascertain the value of the property prior to taking title, and allowing for the discontinuation of the acquisition once the value is determined. Provision to complement §360 of the GML which authorizes municipalities to establish, own and operate public utilities.
8.	A09060/Brodsky[7] (S06216/Flanagan) 9/19/05 referred to Judiciary Comm. 1/04/06 referred to Judiciary Comm.	N/A (Act to create a temporary commission)	Creation of a temporary commission on eminent domain	Would provide for the creation of a temporary commission to examine, evaluate and make recommendations regarding: (a) the appropriate constitutional standard for condemnation when used for economic development purposes and (b) the procedural fairness of eminent domain laws. 13 members with a term of 1 year to coincide with the deadline for issuance of its report/findings. $100,000 budget.
9.	S05938/DeFrancisco[8] (A09079/Christensen)	§104, EDPL (amendment) §204-a, EDPL	Limits use of eminent domain to 'public projects.'	§104, EDPL: Limits application of EDPL to "public projects" as defined therein.[9]

6 GML = New York State General Municipal Law

7 Cosponsors: Tonko, Reilly, Rivera P, Cohen A, Clark, Cook, Brennan, Millman, Pheffer, Canestrari, Lupardo, LaVelle, Gottfried, Galef, Farrell, McEneny

8 Cosponsors: Bonacic, Johnson, Larkin, LaValle, Morahan, Padavan, Spano, Wright

9 *Public projects* are defined as "including for the purpose of establishing, laying out, extending and widening streets, avenues, boulevards, alleys, and other public highways and roads; for pumping stations, waterworks, reservoirs, wells, jails, police and fire stations, city halls, office and other public buildings including schools,

	7/22/05 referred to Rules Comm. 1/04/06 referred to Judiciary Comm.	(new) §702, EDPL (amendment)	Requires local government approval when eminent domain is used by an IDA Adds 'relocation expenses' to list of reimbursables for displaced homeowners.	§204-a, EDPL: Requires County legislative or (where the city is co-terminus with county lines and has a population of one million or more) City Council approval of any approval of the use of eminent domain by an industrial development agency. §702, EDPL: Adds 'relocation expenses' to the list of incidental expense which a condemnor is required to pay to a condemnee.
10.	S05946/Flanagan[10] 8/12/05 referred to Finance 1/04/06 referred to Finance	§103, EDPL (amendment) §204, EDPL (amendment) §204-a, EDPL (new) §207, EDPL (amendment) §1411, NFPCL[11] (amendment) §858-c, GML (new) §1831-b, PAL (new) Plus, creation of a temporary commission	Additional procedural requirements imposed where eminent domain is used for purposes of economic development, including: additional findings required to be made re: benefits of projects and homeowner impacts coordination with/approval of local governments creation of a temporary commission to evaluate the eminent domain law and make recommendations for its improvement	*The Eminent Domain Reform Act* §103, EDPL: Would add new definitions to the EDPL, including defining "*economic development project*" as one where the public use is "primarily for economic development or revitalization" and where the condemnee's real property is a 'home' or a 'dwelling' as those terms are defined in the bill. §204, EDPL: Requiring the inclusion of a statement, where applicable, that the primary purpose of the condemnation is for economic development in the determination and findings. §204-a EDPL: In the case of an economic development project, a *comprehensive economic development plan* for the affected area must be prepared, citing: (a) actual/expected benefits of the project (including

cemeteries, parks, playgrounds and public squares, public off-street parking facilities and accommodations, land from which to obtain earth, gravel, stones, and other material for the construction of roads and other public works and for right-of-way for drains, sewers, pipe lines, aqueducts, and other conduits for distributing water to the public; for flood control; for housing; for use by the government of the United States; for railroads, canals and navigable waterways, airports and other public transportation facilities and services; for water power, public utilities or other production and transmission of heat, light or power; for recreation, conservation, open space and historic, environmental and cultural resource protection, and solid waste management; for river regulation or management; for public hospitals and health care facilities; for reclamation of swamp lands and to take such excess over that needed for such public use or public improvement in cases where small remnants would otherwise be left or where other justifiable cause necessitates the taking to protect and preserve the contemplated improvement or public policy demands, the taking in connection with the improvement, and to sell or lease the excess property with such restrictions as may be dictated by considerations of public policy in order to protect and preserve the improvement; provided that when the excess property is disposed of it shall be first offered to the abutting owners for a reasonable length of time and at a reasonable price and if such owners fail to take the excess property then it may be sold at public auction."

10 Cosponsors: Alesi, LaValle, Leibell, Little, Maltese, Maziarz, Montgomery, Morahan, Rath, Seward, LaValle

11 NFPCL = New York State Not-for-Profit Corporation Law

				expected tax revenue increase or expected creation of jobs); (b) the types of business/industry that will use the condemned property; and (c) alternatives to the plan. The comprehensive economic development plan must be discussed at least one public hearing and then submitted to the local government for approval. The condemnor must also create a *homeowner impact assessment statement* in which the actual harm to condemnees who would lose their homes will be assessed and compared with the community benefits of the plan. Finally, where a condemnee's home/dwelling is condemned for an economic development project, the condemnee shall be entitled to compensation – in addition to statutory compensation already provide for – an amount equal to 150% of the fair market value of the property (150% also applies to annual rent values). §207, EDPL: In a case where the condemnor substantially alters the scope of the project – or the determinations and findings, the condemnee shall have an additional 90 days from the publication of such change/alteration to seek judicial review of same. Would require local legislative approval of any eminent domain proposal by a local development corporation (§1411, NFPCL), by an industrial development agency (§858-c, GML), or by any public authority (§1831-b, PAL). Would provide for the creation of a temporary commission to examine, evaluate and make recommendations regarding: (a) the appropriate constitutional standard for condemnation when used for economic development purposes and (b) the procedural fairness of eminent domain laws. 14 members with a term of 1 year to coincide with the deadline for issuance of its report/findings. $100,000 budget.

11.	A09043A/Brodsky[12] 8/5/05 referred to Rules Comm. 9/19/05 amendment to (t)/recommit 9/19/05 print number A9043a 1/04/06 referred to Judiciary Comm.	§1831-b, PAL[13] (new) §1411, NFPCL (amendment) §858-c, GML (new) §103, EDPL (amendment) §204, EDPL (amendment) §204-a, EDPL (new)	Additional procedural requirements imposed where eminent domain is used for purposes of economic development, including: additional findings required to be made re: benefits of projects and homeowner impacts coordination with/approval of local governments when eminent domain is to be used by IDAs, public authorities or local development corps.	*The Eminent Domain Reform Act* Would require local legislative approval of any eminent domain proposal by a local development corporation (§1411, NFPCL), by an industrial development agency (§858-c, GML), or by any public authority (§1831-b, PAL). §103, EDPL: defines "*economic development project*" as "any project for which acquisition of real property may be required for a public use, benefit or purpose where such public use, benefit or purpose is primarily for economic development and where condemnee's real property is a home or dwelling (which terms are also defined in this amendment)." §204, EDPL: Requiring the inclusion of a statement, where applicable, that the primary purpose of the condemnation is for economic development in the determination and findings. §204-a, EDPL: Where the primary purpose of the condemnation is for economic development, the condemnor must – in cooperation with the local government – prepare a *comprehensive economic development plan* for the affected area, citing: (a) actual/expected benefits of the project (including expected tax revenue increase or expected creation of jobs); (b) the types of business/industry that will use the condemned property; and (c) alternatives to the plan. The comprehensive economic development plan must be discussed at least at one public hearing and then submitted to the local government for approval. The condemnor must also create a *homeowner impact assessment statement* in which the actual harm to condemnees who would lose their homes will be assessed and compared with the community benefits of the plan. Finally, where a condemnee's home/dwelling is condemned for an economic development project, the condemnee shall be entitled to

12 Cosponsors: Tonko, Reilly, Rivera P, Cohen A, Clark, Cook, Brennan, Millman, Pheffer, Canestrari, Lupardo, LaVelle, Gottfried, Galef, Hoyt, Farrell, McEneny, Weisenberg

13 PAL = New York State Public Authorities Law

				compensation – in addition to statutory compensation already provide for – an amount equal to 150% of the fair market value of the property (150% also applies to annual rent values).
12.	A09050/Tokasz[14] 8/12/05 referred to Judiciary Comm. 1/04/06 referred to Judiciary Comm.	§103, EDPL (amendment) §201,EDPL (repeal/replace) §201-a, EDPL (new) §202, EDPL (repeal/replace) §203, EDPL (amendment) §204, EDPL (amendment) §205, EDPL (repeal/replace) §206, EDPL (amendment) §207, EDPL (amendment) §303, EDPL (amendment) §701-A, EDPL (new) §702, EDPL (amendment)	Additional procedural requirements imposed where eminent domain is used for purposes of economic development, including: additional findings required to be made re: benefits of projects and homeowner impacts coordination with/approval of local governments	*The Comprehensive Eminent Domain Procedure Reform Act*[15] §103, EDPL: Would add new definitions to the EDPL, including defining "*economic development project*" as one where the public use is "primarily for economic development or revitalization" and where the condemnee's real property is a 'home' or a 'dwelling,' as those terms are defined in the bill. §201, EDPL: Would require, where the proposal is an economic development project, the issuance of a '*comprehensive economic development plan*' (which details the annual/expected benefits of the project, including increased local & state tax revenues; number of jobs to be created; type of businesses to be brought into the municipality, as well as alternatives to the plan), which includes a '*housing relocation plan'* (which details the availability of replacement housing in the locality), all of which shall be made available free of charge to all persons to be displaced by the proposed project. §201, §201-a, §202, §203 EDPL: Expansion of public hearing and public hearing notice requirements. §204, EDPL: Would add to the statutory requirements for the determinations & findings, by requiring the issuance of a statement of the fiscal costs vs. benefits of the project for the locality. §205, EDPL: Would require, where the condemnor is not the local municipality, a majority vote of that municipality approving the project. §206, EDPL: Would eliminate certain exemptions to compliance with the provisions of Article 2 of the EDPL.

14 Cosponsors: John, Delmonte

15 Will be retroactively applied to pending eminent domain proceedings which are deemed to be economic development projects (§14).

				§207, EDPL: Would increase the filing time for judicial review of a condemnation from 30 to 120 days. §303, EDPL: In the case of an economic development project, condemnee to be paid at least 125% of the highest approved appraisal. §701-A, EDPL: Would require that tenants housed in dwellings subject to an economic development project for a term of at least 6 months be entitled to displacement payment equal to 2 months' rental. §702, EDPL: Expands the scope of added expenses which are to be paid by condemnor from 'incidental' to 'incidental *or consequential*,' and specifically in the case of an economic development project, to include: transportation and storage of household goods; real estate brokerage fees/charges; title searches/title insurance; attorney's fees; transitional housing expenses for up to 3 months; and 'housing finance costs.
13.	A09171/Hooker 1/04/06 referred to Judiciary Comm.	§103, EDPL (amendment)	Amends the definitions of "acquisition" and "public project" to strictly limit the applicability of the eminent domain law	§103(A), EDPL: would change the definition of "acquisition" to allow condemnation for a "public project" (rather than for a "public use, benefit or purpose" as the law currently provides). §103(G), EDPL: would limit the definition of "public project" to those instances where the acquisition of property is "necessary to maintain, repair or expand the existing basic public facilities, services and installations needed for a community" or pursuant to §8, Art. 18 of the NYS Constitution (excess condemnation principle)
14.	A09173/Hooker 1/04/06 referred to Judiciary Comm. 1/09/06 referred to Attorney General for opinion 2/02/06 opinion referred to Judiciary	Article 9, §1 of the NYS Constitution (amendment)	Narrows the general scope of authority for municipalities to conduct eminent domain proceedings by substituting the term "public project" for "public use" and providing specific definitional parameters for a "public project"	Would restrict the instances where governments may condemn to "public projects" (rather than for "public use"), which projects shall be limited to those which "may be necessary to maintain, repair, or expand the existing basic public facilities, services and installations needed for a community," or pursuant to §8, Art. 18 of the NYS Constitution (excess condemnation principle). Also requires municipalities to attempt all reasonable alternatives to

				eminent domain before proceeding with same.
15.	A09144/Zebrowski 1/04/06 referred to Judiciary Comm.	§204-a, EDPL (new)	Where the condemned property is to be used by a private developer, requires municipalities to approve any use of eminent domain by a unanimous vote, subject to permissive referendum.	Would create additional requirements when eminent domain is proposed for property to be used by a private developer, including: (a) a majority vote of the government conducting such proceedings; and (b) upon such a unanimous vote, the use shall remain subject to permissive referendum.
16.	A09152/Brodsky 1/04/06 referred to Judiciary Comm.	§23, TL[16] (new)	Provides for the creation of an eminent domain ombudsman to serve as a bridge between governments and citizens in matters of eminent domain	*Eminent Domain Ombudsman Act* Would create an Eminent Domain Ombudsman in the State Transportation Department, whose duties shall include: (1) developing/maintaining an expertise in takings law; (2) assisting state/local governments in establishing takings guidelines, analyzing certain actions, and providing advice about certain actions; (3) mediating or conducting arbitrations of disputes between governments and private citizens (pursuant to which the government will be obliged to participate).
17.	A09473/Bradley[17] 1/17/06 referred to Judiciary Comm.	§501, EDPL (amend) §512, EDPL (amend) §701, EDPL (amend) §702(A), EDPL (amend)	Provides condemnees with the opportunity for a jury trial on the issue of just compensation; specifies that just compensation includes replacement value; attorney's fees; moving and relocation expenses.	§501, EDPL: Allows a condemnee to elect a jury trial where gross receipts from acquisition total less than $1 million. §512, EDPL: Just compensation = replacement value, "which shall be at least equal to the cost of purchasing an equivalent property in a similarly situated location with a similar structure on the property." §701, EDPL: allows condemnee to recoup attorney's fees associated with the condemnation. §702(A), EDPL: Just compensation shall also include reasonable moving and relocation expenses; closing costs; and "any incidental costs incurred as a result of having to move and reopen a business."

16 TL= New York State Transportation Law
17 Cosponsors: Colton, Fields, Benedetto, and Gordon. Multisponsors: Galef, Paulin & Weisenberg.

B. Municipal Legislation and Resolutions Passed in the Aftermath of *Kelo*

In furtherance of the Task Force's mission to examine existing and proposed legislation regarding eminent domain in New York and to recommend appropriate legal reforms, what follows is an analysis of various measures restricting the exercise of eminent domain for economic development purposes adopted or considered by local governments in New York State in response to the Kelo decision.

1. Counties

A. The legislatures of Greene County and Delaware County have adopted resolutions stating that the counties will voluntarily refrain from using their eminent domain powers to take private property to benefit another private entity or person for the purpose of generating higher tax revenue from private development of the property taken. Further, those resolutions urge the State government to review existing eminent domain laws with the goal of imposing additional limitations on the eminent domain power to protect the rights of property owners. In a similar vein, the Onondaga County legislature has adopted a resolution requesting that the County Industrial Development Agency suspend its use of eminent domain "to take private property for any project when another private entity is the principal beneficiary" in order to permit the State legislature to review proposed legislation to restrict the use of eminent domain.

B. The Oneida County Board of Legislators considered, but did not adopt, a local law to limit the use of the County's eminent domain power to only take privately owned property needed for public uses such as water and sewer lines, roads, hospitals, public recreation areas, public buildings, floodplain and watershed development.

C. The Westchester County Board of Legislators is considering a local law that would permit the use of eminent domain powers only to facilitate public uses. The legislation would prohibit County government from using its eminent domain powers to condemn private property for private use. Under the legislation, "private use" is defined as "the possession, occupation and/or employment of a parcel of land for any purpose

or function other than a ‘public use’ as defined herein and shall include development projects for retail shopping, commercial office space, industrial development and/or residential facilities.”

“Public use” under the local law is defined as “(1) the possession, occupation and/or employment of a parcel of land by the general public or by public agencies or for the creation of (sic) functioning of public utilities; (2) the acquisition of property to cure a concrete harmful effect of the current use of land, including the removal of public nuisances, structures that are beyond repair or that are unfit for human habitation or use; and (3) the acquisition of abandoned property. The public benefits of economic development, including an increase in tax base, tax revenues, employment, general economic health, shall not constitute a ‘public use.’”

Even where a “public use” is involved, the legislation would condition the exercise of eminent domain authority and require a two-thirds vote of the County legislature. A public hearing and a finding that the use of such powers is necessary to “achieve a clear and convincing public use” would be prerequisites to the exercise of eminent domain authority.

A third element of the law would prohibit Westchester County government from participating in or contributing monies or other support to a project that uses eminent domain or is the beneficiary of eminent domain to take private property for “private use.” Even where a “public use” is involved, the County’s participation or contribution could only be authorized by a two-thirds vote of the members of the Board of Legislators after a public hearing and based upon a finding that the use of such powers is necessary to achieve a “clear and convincing public use.” Affordable housing development projects undertaken by a government agency or a not-for-profit corporation in partnership with a government agency are exempted from the prohibitions on the use of eminent domain to condemn private property for private use or the contribution to a project that uses or benefits from the use of eminent domain. Nevertheless, even in these instances, a vote of two-thirds of the Board of Legislators, after a public hearing and a finding that the project is an appropriate use of eminent domain as defined in this legislation, is required.

The local law would grant a private right of action to enforce the prohibitions in the legislation to any person who owns property (a) which is the object of an eminent domain taking or which is immediately adjacent to such a property; or (b) which is otherwise within 1000 feet of such property. Enforcement authority would also be conferred on County government, including the County Executive, individual members of the Board of Legislators, and municipalities in Westchester County. Those authorized to enforce the law would be further empowered to seek injunctive relief and to recover reasonable attorney's fees and the legal costs and disbursements of any such action.

D. The County of Lewis has enacted a local law providing that "in addition to any other determinations or findings required pursuant to § 204 of the EDPL," an essential prerequisite to the County's exercise of eminent domain authority is a finding by the County that the property to be condemned is to be used for a "public project" and that the property to be taken is necessary for that public project. The term "public project" is defined in the legislation as any program or project for which condemnation of real property is required for a "public use, benefit or purpose," excluding any project where the real property to be taken (a) is being "actually used or occupied for residential, commercial or agricultural purposes" at the time of the condemnation proceeding; and (b) "is or shall be transferred or conveyed" to any individual, partnership, corporation, association, trust, or legal entity upon acquisition in the condemnation proceeding.

2. Towns

A. The Town Board of Bethlehem has adopted a resolution not to exercise its eminent domain authority, absent a compelling reason and unless in compliance with the Town's Comprehensive Plan, to take private residential property and transfer it to a private developer for purposes of economic development, improving Town tax revenues or expanding the Town's tax base.

B. The Town Boards of Saratoga and Greece have adopted resolutions declaring that (1) eminent domain authority should only be exercised to acquire private property for public uses (highways, bridges, schools, parks, utilities and other civic works directly

used by the public); and (2) eminent domain should never be used solely for economic development purposes and/or to increase tax revenues.

To implement these declarations, each resolution (a) establishes a policy limiting the Town's use of eminent domain to public uses as defined in the resolution; and (b) petitions the State Legislature to enact similar restrictions on the exercise of the power of eminent domain by the State and its instrumentalities and departments.

C. Similarly, the Town Board of Schroon has adopted a resolution supporting the enactment of federal and state legislation limiting governmental use of eminent domain solely for public purposes (defined similarly to the Town of Greece and Town of Saratoga resolutions) that benefit the public as a whole and not solely for economic development purposes.

3. Cities and Villages

The Task Force contacted the New York State Conference of Mayors, and to date, no city government has considered local reforms to the law of eminent domain as a result of the *Kelo* decision.

The Village of Lima has enacted a local law adopting "expanded or additional safeguards" to be adhered to in connection with the exercise of eminent domain authority by the Village Board or any instrumentality thereof. According to those safeguards, the Village Board agrees to:

(a) limit its exercise of eminent domain authority to projects that serve "a clear and demonstrable public use" and to relinquish its power to use eminent domain for or in connection with projects "intended to assist a private landowner or foster an economic revitalization project."

(b) expand the minimum written notice of public hearing requirement under EDPL § 202 from ten (10) to thirty (30) days.

(c) reimburse a condemnee or party whose property is taken "for reasonable costs of relocation within a radius

of thirty (30) miles” of the Village “actually and proximately caused” by the Village Board’s condemnation of private land.

Copies of the legislation discussed in this Section are attached as Appendix A.

IV. Need for Empirical Research and Data

In evaluating the various legislative proposals in New York, the Task Force realized that little State-specific research and data exists to accurately assess both the need for, and impact of, many of the proposed reforms. The Task Force urges, among other things, that the State Legislature begin the collection and analysis of this data before deciding on appropriate substantive modifications to the law. What follows is a listing of questions that could be answered through empirical research.

- How is eminent domain used in the State?
- How many times each month or each year is a condemnation proceeding instituted?
- How many times is eminent domain used for roads, highways, bridges, sidewalks, schools, government buildings and sewers (among other things)?
- How many times does the use of eminent domain result in the loss of a home?
- How many times does the use of eminent domain result in the loss of a business?
- How many times is eminent domain used for economic development?
- Of the number of times eminent domain is used for economic development in New York, what are the results of the proposed projects? Are they successful? How is success to be benchmarked?
- Is the use of eminent domain more prevalent in upstate or downstate? Is it used more often in urban, suburban or rural areas?
- How often is eminent domain used in New York by the federal government, the state government, local governments, other public benefit corporations? Is it

used by agencies with land use and planning oversight or agencies whose portfolio is only economic development?

- Has the use of Eminent Domain increased dramatically, as is implied by some? If so, what is responsible for that increase?
- How often do we use public-private partnerships to effectuate eminent domain for redevelopment projects in New York?
- To what extent are the so-labeled "private" transfers for matters such as industrial development that are essentially public/private partnerships?
- How many times is eminent domain not needed because there were willing sellers to enable projects to be completed?
- What efforts are made by government and developers to reach private agreements with property owners?
- Are there financial differences between property owners who settle quickly and those who do not?
- How many times are condemnations challenged based on the final compensation offer? What is the outcome of these court cases? How many times does a court award increased compensation to property owners?
- What compensation is being paid, and how does that compensation relate to market value, to costs such as relocation costs, and to subjective values, such as the nature of the planned projects?
- How many instances of abuse exist in New York State over a defined period of time (and how should "abuse" be defined)?
- Is there any information about redevelopment projects that involved the use of

eminent domain and those that did not to determine whether they were equally successful? What have been the social costs and benefits of such efforts?

While this list of questions is not exclusive of the type of information that would help to inform the ongoing dialogue, the Task Force offers these as a starting point should a Temporary State Commission on Eminent Domain be established. In addition to these issues that specifically relate to the use of eminent domain for economic development, the Task Force began to examine the need and opportunity for reform in other aspects of condemnation law in New York.

V. Recodification of the Eminent Domain Procedure Law

On January 7, 1970, Governor Nelson Rockefeller's annual message to the Legislature recommended the creation of a commission to recodify and modernize the State's multitude of laws which dealt with eminent domain. The ultimate goal was to simplify the many conflicting procedures that had arisen from various statutes, compounded by a host of local rules and regulations related to governmental acquisitions of private property for public purposes. In calling for such reform, the Governor expressed that "every individual whose property is required for a public purpose is entitled to fair compensation and an equitable procedure." This expression could only be achieved by overhauling both the procedural and substantive aspects of eminent domain. The 1970 Legislature heeded the call for reform and passed legislation necessary to create the State Commission on Eminent Domain[18] (hereinafter "Commission"). At the outset, the Commission was confronted with more than 50 different procedures employed by different governmental units which had the power of eminent domain.

In addition to regular full commission meetings conducted at least monthly in 1970 and 1971, the Commission held public hearings and informal meetings throughout the state with representatives of various bar associations, appraisal organizations and other interest groups. In response to its charge from the executive and legislative branches, the Commission began drafting a uniform procedure code in 1971.

Initially, its focus was to create a single procedure that would apply to any takings of property by eminent domain in New York State. To establish uniformity, the Commission inserted the word "acquisition" in its proposal to eliminate the distinction between an "appropriation" which had previously denoted a taking by the State of New York, and a "condemnation" which referred to any non-state taking. The Commission also proposed that claims arising from all acquisitions by eminent domain should be heard by a single court or tribunal. As early as 1971, the same notion of a single court to hear all eminent domain claims was advanced by the Temporary Commission on the New York State Court System. The recommendation, albeit unsuccessful, was to merge

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18 *See* Chapter 621 of Laws of 1970.

the Court of Claims with Supreme Court. Had such a merger occurred, it was anticipated that the former, as an arm of Supreme Court, would hear and decide all claims arising from eminent domain.

Recognizing that court reorganization was a task well beyond its scope, the Commission on Eminent Domain sought to fit its recommendations into the existing court organization rather than defer their implementation until a single uniform tribunal became a reality. To do so, the Commission tailored its proposals to existing rules and the respective practices of the Court of Claims and Supreme Court. As a result, jurisdiction for all claims due to state acquisitions remains with the Court of Claims today, while those claims from non-state acquisitions are heard by Supreme Court.[19]

The sought-after uniformity in all acquisition procedures under the EDPL was derailed by having to continue a system of dual tribunals. Although alterations and partial uniformity were brought about in areas such as notice, public hearings, offers and negotiations, the actual methods by which state and non-state entities acquire title in eminent domain did not change. The vesting of title in state takings remains an administrative matter, i.e., the condemnor's filing of a map and description of the property to be acquired in the office of the clerk of the county in which the property is located.[20] In all non-state acquisitions, title vests in a condemnor only after a judicial proceeding in Supreme Court which concludes with an order of condemnation that must be filed with a copy of the acquisition map in the office of the county clerk.[21]

Apparently, the dual taking procedure has led to a conflict in challenges to public use where exemptions have been invoked under Article 2 of the EDPL. At present, such challenges in cases of state takings are to be in the Appellate Division,[22] while similar

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19 Under the EDPL, the former practice of appointing Commissioners of Condemnation to hear, determine and report in cases of non-state takings was discontinued.

20 EDPL §402(A)(3).

21 EDPL §402(B)(5).

22 *Village of Poquott v. Cahill*, 11 AD3d 536, 543 (2d Dept 2004).

challenges to non-state takings must be raised as defenses before Supreme Court in opposition to condemnors' applications for orders of condemnation.[23]

Enactment of the EDPL did not completely satisfy the expressed intention of providing an "exclusive procedure by which property shall be acquired by exercise of the power of eminent domain in New York state."[24] Indeed, Commissioner Sidney Z. Searles lamented in 1974 that "the [proposed] Eminent Domain Procedure Law [did not fulfill] the mandate of the legislation which gave it birth."[25] Although he concurred with Commissioner Searles,[26] then Commissioner Jon Santemma, now a member of our present Task Force on Eminent Domain, also noted at the time that "the act as proposed by the majority of the Commission members [was] as close to a consensus as [could] be realized."[27] Commissioner Santemma felt compelled to underscore the essential need for a single tribunal before any legislative enactment could effectively become "an exclusive procedure [for eminent domain] in New York State."

In addition to crafting a procedural proposal which was ultimately passed by the 1977 Legislature and became the EDPL, as of July 1, 1978,[28] the Commission studied the substantive aspects of eminent domain. In particular, the Commission through this study discovered and noted that the substantive and procedural aspects of eminent domain were inextricably interwoven. It concluded that any meaningful modernization of the law of eminent domain would require redefinition of many areas of the substantive law before being deemed complete. Specifically, the Commission referred to such consequential items as business losses, changes of grade without any direct takings, changes in access to remaining properties without accompanying changes in highest and best use, and noise. While noting prior legislative attempts at remedial legislation in

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23 *Rockland County Sewer Dist. No. 1 v. J. & J. Dodge*, 213 AD2d 409, 409-410 (2d Dept 1995); *Town of Coxsackie v. Dernier*, 105 AD2d 966, 967 (3d Dept 1984).

24 EDPL §101.

25 1974 Report of the State Commission on Eminent Domain and Real Property Tax Assessment Review, p. 140.

26 *Id.* at 259.

27 1974 Report of the State Commission on Eminent Domain and Real Property Tax Assessment Review, p. 259.

28 L. 1977, c. 839, §3.

the area of relocation allowances for both business owners and homeowners, the Commission left little doubt that more changes could have been and should be made with regard to the substantive law.

Notwithstanding its concern, the Commission was faced with a preliminary question of what remedial devices were available to quickly speed the pace of such substantive reform. Because one of its proposed remedies for substantive reform was an amendment to the New York State Constitution transforming a "taking" formulation for just compensation to "taking or damage," the Commission's concern encountered a threshold consideration. Constitutional amendment caused several Commission members to fear that the remedy might far exceed the required revisions to substantive law and result in such increased costs that necessary public projects would be seriously curtailed. The alternative, remediation by statute, was unacceptable to the Commission because a statute could not be drafted with the degree of certainty necessary to prevent remote claims for compensability. Faced with this dilemma, the Commission left it to the Legislature to give serious consideration to the enactment of a constitutional amendment. To date, no such consideration has been forthcoming.

In the approximately twenty-eight years since enactment of the EDPL, little recodification has occurred. Actually, the vast majority of its provisions remains in its original form. In those instances where the EDPL has been amended, alterations consist primarily of word substitutions. For example, in 1982 the definition of condemnee was changed from "the owner of" a real property interest to "the holder of" an interest in real property. Given the constraint of New York's two-tiered system for state and non-state takings, most procedural changes via recodification have to await a constitutional amendment as a forerunner to the hoped-for single tribunal in claims arising from eminent domain. This is particularly so in the areas of "vesting" and "possession" governed by Article 4 of the EDPL, and "jurisdictional" matters embodied within Article 5.

One notable exception to any restraint on recodification is in the area of EDPL Article 2 which includes public projects, their definition, need and location. These areas, pushed to the front burner by the recent *Kelo* decision, can be dealt with now. The Legislature seems more than ready to take on such a challenge at this time.

There is a critical need today for codification in the substantive law of eminent domain. While hesitancy is understandable in cases where there are no takings to bring losses within the ambit of just compensation, this concern should not thwart reform in instances where governments have made acquisitions for public purposes. Indeed, Commissioner Searles in 1974 was adamant in urging that "the entire concept of damages in condemnation should be modernized."[29] It is the substantive law of eminent domain which remains most murky today. It cries out for serious study and immediate clarification. The impetus for any future reform in the field of eminent domain should be directed at the substantive law. With this as a goal, it is possible that needed changes in the area of compensation will relieve some of the pressures that have recently arisen with regard to the procedures integral to the acquisition process.

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29 1974 Report of the State Commission on Eminent Domain and Real Property Tax Assessment Review, p. 258.

VI. Recommendations

The Task Force has unanimously adopted eight recommendations, in response to legislation introduced in recent months. These recommendations largely reflect the Task Force focus to date on the legal issues contained in the seventeen bills currently pending before the New York State Legislature. At this time, the Task Force has not adopted recommendations that address all of the proposed areas of reform contained in the various bills. In addition, the Task Force has not had the time yet to more thoroughly review additional opportunities for reform of the Eminent Domain Procedure Law. The following recommendations are not listed in any order of priority or preference.

1. Eminent domain should not be restricted to specified public projects. Some of the bills introduced in the wake of the *Kelo* decision have attempted to list certain purposes, such as roads, parks and schools, as the only exercises of eminent domain to be allowed by law. The Task Force believes it is unduly restrictive, and probably not practicable, to so circumscribe the power of eminent domain.

2. Local governments should not have a veto over exercises of eminent domain by public authorities of larger entities within their borders. Where public authorities such as the Empire State Development Corporation or Metropolitan Transportation Authority employ eminent domain, the legislative intent supporting the grant of that power would be subverted by proposals to allow localities to override it. Were that the case, local governments would be enabled to veto proposals of statewide or regional benefit.

3. Agencies exercising eminent domain for economic development purposes should be required to prepare a comprehensive economic development plan and a property owner impact assessment. This would improve the existing process by mandating that agencies document the economic benefits they anticipate from exercises of eminent domain for economic development, as well as the expected impact on those whose property is to be acquired. These documents, like those

prepared under the State Environmental Quality Review Act (SEQRA) (Environmental Conserv. Law art. 8), should be subject to judicial review at the instance of aggrieved parties. This legislation will require agencies to examine the likely benefits and impacts of economic development projects before irreversibly committing public resources and displacing owners from their property.

4. The present 30-day statute of limitations in EDPL § 207 for judicial review of the condemnor's determination and findings should be expanded. EDPL § 204 requires the condemning agency to find that the project has a "public use, benefit or purpose," as well as describe its "general effect . . . on the environment and residents of the locality." The extremely short current time limit places residents in limbo. Thirty days is simply not sufficient time for many property owners to retain an attorney and for that attorney to bring suit to challenge agency determinations and findings for projects the agency has often been working on for months if not years. Lengthening the time limit will level the playing field.

5. A new public hearing under EDPL § 201 should be required where there has been substantial change in the scope of a proposed economic development project involving the exercise of eminent domain. In the course of large-scale phased development projects, the scope of the project, as well as the nature of the development itself, may well shift. When that occurs, a further hearing should be held, and further findings made, to support the project as a public use. The SEQRA process furnishes an effective model here, since it requires a supplemental environmental impact statement when significant changes in a project are contemplated. See the Department of Environmental Conservation's SEQRA regulations, 6 N.Y.C.R.R. § 617.9(a)(7), providing for a supplemental environmental impact statement to address "changes proposed for the project; or newly discovered information; or a change in circumstances related to the project." Contrary to these concerns, EDPL § 205, authorizing condemnors to amend projects where "field conditions warrant," explicitly states that "[s]uch

amendments or alterations shall not require further public hearings[.]" This provision should be repealed. Its practical effect is to preclude public participation and examination despite dramatic changes in the nature, and perhaps the size, of an acquisition, as well as whether it continues to serve a public use at all.

6. No exceptions to the EDPL are necessary for acquiring property for public utility purposes. Legislation has been proposed creating a separate procedure where municipalities seek to acquire property to operate a public utility under Gen. Mun. Law § 360. There is no justification for singling out these acquisitions for different treatment. The EDPL was expressly enacted "to provide the exclusive procedure by which property shall be acquired by exercise of the power of eminent domain in New York state." EDPL § 101.

7. Acquisitions should not be exempted from the EDPL's eminent domain procedures simply because other statutes provide for land-use review. Some have suggested exempting acquisitions from the EDPL's procedural requirements where alternative statutes regulating land use, such as the City of New York's Uniform Land Use Review Procedure (ULURP), exist. We disagree. Not only is the EDPL intended to "provide the exclusive procedure" for eminent domain (*see* item 6, *supra*), but the purposes of ULURP, SEQRA and similar statutes are different from those of the EDPL. The courts have developed an appropriate interaction between the EDPL and SEQRA. EDPL § 207 expressly provides for judicial review of compliance with SEQRA. *See Pizzuti v. MTA*, 67 N.Y.2d 1039, 503 N.Y.S.2d 720 (1986). Similarly, EDPL § 206 now sensibly exempts de minimis takings from its provisions, as well as takings governed by other laws, such as the Public Service Law siting articles, where the condemnor "considers and submits factors similar to those" mandated by the EDPL. But laws such as ULURP and SEQRA serve fundamentally different purposes from those of the EDPL, and should not be employed to bypass the EDPL's procedures.

8. A Temporary State Commission on Eminent Domain should be established. The *Kelo* decision and the publicity it engendered have focused attention on the complex legal, economic and constitutional issues surrounding eminent domain. While this Task Force may indeed make additional recommendations, and is continuing to study topics such as defining public use, the appropriate level of judicial scrutiny, just compensation, and others, we believe legislative proposals for a Temporary State Commission on Eminent Domain make sense. Resolving these issues will best be accomplished through study by a variety of stakeholders to assure that all viewpoints are represented.

VII. Conclusion

The Task Force believes there is still more work to be done. The Task Force has presented this report with the offer to President A. Vincent Buzard that the Task Force members are willing to continue to discuss and debate significant constitutional, jurisdictional and other legal aspects of eminent domain reform in New York. The Task Force urges the Executive Committee and the House of Delegates of the New York State Bar Association to adopt the eight specific recommendations contained in this report and to direct the Government Relations staff of the Bar Association to communicate these recommendations to the New York State Legislature.

Appendix A

November 16, 2005

RESOLUTION NO. 376-05

REGARDING VOLUNTARY RESTRICTIONS BY THE COUNTY ON ITS POWER OF EMINENT DOMAIN

Legislator Ohm offered the following resolution and moved its adoption:

WHEREAS, The United States Supreme Court on June 23, 2005 decided the case of Kelo vs. City of New London, (125 S.Ct. 2655) in which the Court upheld the taking of private property by a municipality or entity with the power of eminent domain in furtherance of an economic development plan that it is believed will provide appreciable benefits to the community; and

WHEREAS, opponents have argued that eminent domain should only be used for projects that have a clear public purpose, not private projects that typically displace less affluent communities to make way for developments enriching both the municipality and the developer; and

WHEREAS, lawmakers in 34 states have introduced bills or begun to study ways to prohibit use of eminent domain for private economic development; and

WHEREAS, the New York State Assembly is hosting a series of statewide hearings on eminent domain to discuss what changes, if any, should be made to the long held ability of governments to take property for public use if its owner refuses to sell outright; and

WHEREAS, promoting economic development is a traditional and long accepted function of government; and

WHEREAS, the Fifth Amendment to the federal Constitution prohibits the taking of private property for public use without just compensation;

NOW, THEREFORE, BE IT RESOLVED that the County of Greene shall voluntarily forego the use of its power of eminent domain pursuant to the eminent domain procedural law of the State of New York insofar as it will refrain from taking private real property to benefit another private entity or person for the purposes of generating higher tax revenue from private development of the property so seized, and shall support only property exchanged through voluntary methods in the market place; and

IT IS FURTHER RESOLVED, that the Legislature hereby resolves that it is in the public interest of the people of Greene County to have the State government review the current eminent domain laws with the goal of placing additional limitations on the eminent domain power beyond those already contained in the law protecting the property owners.

ROLL CALL VOTE: Seconded by Legislators Hitchcock and Speenburgh (10,000)
Ayes 14 Noes 0 Absent 0

CARRIED.

APPROVED AS TO FORM

Approved by Gov't. Ops. Comm.: 11/14/05

COUNTY ATTORNEY

STATE OF NEW YORK }
} ss.:
COUNTY OF GREENE }

I, the undersigned,

DO HEREBY CERTIFY that I have compared the above copy of a resolution adopted November 16, 2005 with the original record in this office and that the same is a correct transcript thereof and of the whole of said original record.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said Greene County Legislature this _______ day of November, 2005.

Tammy L. Barbato
Acting Clerk, Greene County Legislature

RESOLUTION NO. 299

TITLE: REGARDING VOLUNTARY RESTRICTIONS BY THE COUNTY ON ITS POWER OF EMINENT DOMAIN

WHEREAS, the United States Supreme Court on June 23, 2005 decided the case of Kelo vs. City of New London, (125 s.Ct. 2655) in which the court upheld the taking of private property by a municipality or entity with the power of eminent domain in furtherance of an economic development plan that it is believed will provide appreciable benefits to the community; and

WHEREAS, opponents have argued that eminent domain should only be used for projects that have a clear public purpose, not private projects that typically displace less affluent communities to make way for developments enriching both the municipality and the developer; and

WHEREAS, lawmakers in 34 states have introduced bills or begun to study ways to prohibit use of eminent domain for private economic development; and

WHEREAS, the New York State Assembly is hosting a series of statewide hearings on eminent domain to discuss what changes, if any, should be made to the long held ability of governments to take property for public use if its owner refuses to sell outright; and

WHEREAS, promoting economic development is a traditional and long accepted function of government; and

WHEREAS, the Fifth Amendment to the federal Constitution prohibits the taking of private property for public use without just compensation;

NOW, THEREFORE, BE IT RESOLVED that the County of Delaware shall voluntarily forego the use of its power of eminent domain pursuant to the Eminent Domain Procedural Law of the State of New York insofar as it will refrain from taking private real property to benefit another private entity or person for the purposes of generating higher tax revenue from private development of the property so seized, and shall support only property exchanged through voluntary methods in the market place; and

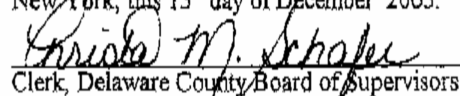
IT IS FURTHER RESOLVED, that the Board of Supervisors hereby resolves that it is in the public interest of the people of Delaware County to have the State government review the current eminent domain laws with the goal of placing additional limitations on the eminent domain power beyond those already contained in the law protecting the property owners.

BE IT FURTHER RESOLVED, that copies of this resolution shall be forwarded immediately to Senator John Bonacic, Assemblyman Clifford Crouch, Assemblyman Daniel Hooker and The Association of Counties.

State of New York
County of Delaware

I, Christa M. Schafer, Clerk of the Board of Supervisors of Delaware County, do hereby certify that the above is a true and correct copy of a resolution adopted by said Board on the 14th day of December, 2005 and the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Board at Delhi, New York, this 15th day of December 2005.



Clerk, Delaware County Board of Supervisors

September 6, 2005

Motion Made By Mr.DiBlasi

RESOLUTION NO. 162

REQUESTING THAT THE ONONDAGA COUNTY INDUSTRIAL DEVELOPMENT AGENCY SUSPEND THE USE OF ITS EMINENT DOMAIN POWERS TO CONDEMN PRIVATE PROPERTY FOR PROJECTS THAT PRINCIPALLY BENEFIT ANOTHER PRIVATE PARTY PENDING ACTION BY THE NYS LESIGISLATURE IN THE 2006 LEGISLATIVE SESSION

WHEREAS, the Onondaga County Industrial Development Agency (OCIDA) is an independent agency whose powers are derived from the State of New York, including Title 1 of Article 18-A of the General Municipal Law; and

WHEREAS, pursuant to the provisions of the General Municipal Law and the Eminent Domain Procedure Law, OCIDA is authorized to acquire private property for a public purpose by exercising the powers of eminent domain; and

WHEREAS, OCIDA's authorization to condemn property includes the power to take property from private parties, even if the taking will benefit another private entity; and

WHEREAS, there has been introduced into the NYS legislature proposed legislation to address the recent U.S. Supreme Court decision in Kelo v. City of New London to severely restrict on a statewide basis the right to condemn private property; and

WHEREAS, this Legislature encourages economic development in Onondaga County; and

WHEREAS, this Legislature also respects the rights of the owners of businesses and other private property; and,

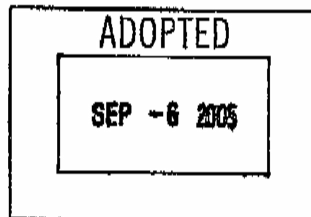
WHEREAS, it is the opinion of this Legislature that OCIDA should suspend the use of its eminent domain power to take the property of one private party for the benefit of another private party until such time as to the State has had the opportunity to review the proposed state legislation in the 2006 State Legislative session; now, therefore be it

RESOLVED, that in recognition of the interests of the owners of businesses and other private property, this Legislature hereby requests that OCIDA suspend the use of its eminent domain powers to take private property for any project where another private entity is the principal beneficiary of the project, for the 2006 New York State Legislative session, to give the New York State Legislature an opportunity to review the proposed legislation; and, be it further

RESOLVED, that the Clerk of this Legislature hereby is directed to send a certified copy of this resolution to OCIDA.

OCIDA.R.D.PARK
LHT/kak
slc

05 SEP -6 PM 2:52
RECEIVED
ONONDAGA COUNTY
LEGISLATURE



NEW YORK STATE DEPARTMENT OF STATE
41 STATE STREET
ALBANY, NY 12231

Local Law Filing

(Use this form to file a local law with the Secretary of State.)

Text of law should be given as amended. Do not include matter being eliminated and do not use italics or underlining to indicate new matter.

STATE OF NEW YORK
DEPARTMENT OF STATE
FILED
JAN 19 2006
MISCELLANEOUS
& STATE RECORDS

- ☐ County
- ☐ City of Lima
- ☐ Town
- ■ Village

Local Law No. 1 **of the year 20** 06

A local law procedurally limiting the authority of the Village of Lima to exercise the statutory right of eminent domain.
(Insert Title)

Be it enacted by the Board of Trustees **of the**
(Name of Legislative Body)

- ☐ County
- ☐ City of Lima **as follows:**
- ☐ Town
- ■ Village

Section 1.

This Local Law shall be known as the "Eminent Domain Local Law of the Village of Lima," and the purpose and intent of the local law is to procedurally limit the authority of the Village of Lima to exercise its statutory right of eminent domain, as authorized by the Eminent Domain Procedure Law of the State of New York. It is explicitly understood and provided that this local law shall govern any eminent domain proceeding initiated by the Village Board of the Village of Lima, but that said local law does not and is not intended to alter, affect or impair the Eminent Domain Procedure Law as it applies to other municipal or legal jurisdictions with authority to exercise the power of eminent domain. This local law is understood and intended to apply only to such instances in which the Village of Lima and/or its instrumentalities may initiate an eminent domain proceeding.

Section 2.

This Local Law is adopted pursuant to the authority granted by Municipal Home Rule Law.

Section 3.

The Village Board of the Village of Lima promulgates this local law to express the Board's formulation of its own public policy statement in the matter of eminent domain.

(If additional space is needed, attach pages the same size as this sheet, and number each.)

DOS-239 (Rev. 05/05)

Page 1 of 3

Section 4.

In any action undertaken by the Village Board of the Village of Lima or any instrumentality thereof with the authority to exercise the power of eminent domain, the Village Board of the Village of Lima stipulates to be bound by the following regulations which procedurally alter or amend the right of the Village Board of the Village of Lima to exercise its statutory right of eminent domain, acknowledging that said regulations may expand or exceed the procedural safeguards presently accorded private landowners in connection with an exercise of eminent domain rights by a municipal government under the Eminent Domain Procedure Law of the State of New York.

The Village Board of the Village of Lima hereby stipulates that the following expanded or additional procedural safeguards shall be observed and utilized in each and every instance in which the Village Board of the Village of Lima and/or its instrumentalities shall initiate an eminent domain action:

A. The Village Board shall have authority to exercise its statutory right of eminent domain only in connection with a project or need that serves a clear and demonstrable public use; it is specifically intended that the Village Board relinquishes its right of eminent domain for or in connection with a project that is intended to assist a private landowner or foster an economic revitalization project.

B. The Village Board agrees that written notice requirements pursuant to the Eminent Domain Procedure Law authorizing a ten (10) day notice of a public hearing (as required by EDPL section 202), the notice period is to be expanded to thirty (30) days.

C. The Village agrees that it shall be responsible to reimburse a condemnee or party whose property is taken by the Village through an eminent domain proceeding, for reasonable costs of relocation within a radius of thirty (30) miles of the Village of Lima, if such relocation costs are actually and proximately caused by the taking of private land by said Village Board of the Village of Lima or its instrumentality.

Section 5.

This Local Law shall take effect within thirty (30) days of its filing in the Office of the Secretary of State.

Local Law Filing

New York State Department of State
162 Washington Avenue, Albany, NY 12231

(Use this form to file a Local Law with the Secretary of State)

STATE OF NEW YORK DEPARTMENT OF STATE FILED NOV 29 2005 MISCELLANEOUS & STATE RECORDS

Text of law should be given as amended. Do not include matter being eliminated and do not use italics or underlining to indicate new matter.

County of Lewis

Local Law No. 6 of the Year 2005

"A LOCAL LAW ESTABLISHING LIMITS TO THE EXERCISE OF EMINENT DOMAIN FOR LEWIS COUNTY."
(Insert Title)

BE IT ENACTED by the Board of Legislators of the County of Lewis, as follows:

SECTION I. TITLE.

This Local Law shall be known as "ESTABLISHING LIMITS TO THE EXERCISE OF EMINENT DOMAIN FOR LEWIS COUNTY".

SECTION II. PURPOSE.

The purpose of this Local Law is to establish certain limits to the exercise of eminent domain by or for the County of Lewis (the "County").

SECTION III. DEFINITIONS.

As used in this LOCAL law:

(A) "Acquisition" means the act of vesting of title, right or interest to, real property by the County by virtue of the County's exercise of the power of eminent domain.

(B) "Eminent Domain Procedure Law" (EDPL) shall mean the New York State Eminent Domain Procedure Law as the same may be amended from time to time.

(C) "Person" means any individual, partnership, corporation, association, trust, or legal entity.

(D) "Real property" includes all land and improvements, lands under water, waterfront property, the water of any lake, pond or stream, all easements and hereditaments, corporeal or incorporeal, and every estate, interest and right, legal or equitable, in lands or water, and right, interest, privilege, easement and franchise relating to the same, including terms for years and liens by way of mortgage

or otherwise.

(E) "Public project" means any program or project for which acquisition of real property may be required for a public use, benefit or purpose, pursuant to the EDPL, provided however, that "public project" shall specifically exclude:

a. any project wherein the real property that is the subject of the proceeding is, at the time of such proceedings, being actually used or occupied for residential, commercial or agricultural purposes; <u>and</u>

b. the title or interest in or to the property to be acquired by the County pursuant to the EDPL, upon acquisition, is or shall be transferred or conveyed by grant, deed, easement, lease or otherwise to a person.

<u>SECTION IV. APPLICABILITY.</u>

This Local Law shall apply to any and all takings of real property pursuant to the EDPL by or for the County of Lewis.

<u>SECTION V. DETERMINATIONS AND FINDINGS.</u>

In addition to any other determinations and/or findings that may be required pursuant to EDPL § 204, upon conducting a public hearing as required by EDPL § 203, the County shall affirmatively determine and find:

c. That the property proposed to be acquired by the County shall, upon acquisition, be used for a public project, as defined herein; and

d. That the property proposed to be acquired is necessary for the proposed public project.

<u>SECTION VI. AUTHORITY.</u>

This Local Law shall take effect 45 days after the adoption hereof and all legal requirements having been met.

ONEIDA COUNTY BOARD OF LEGISLATORS

ONEIDA COUNTY OFFICE BUILDING • 800 PARK AVENUE • UTICA, N.Y. 13501-2977

Gerald J. Fiorini
Chairman
(315) 798-5900

Susan L. Crabtree
Clerk
(315) 798-5901

James M. D'Onofrio
Majority Leader

Harry A. Hertline
Minority Leader

October 20, 2005

7N2005-365

INTERNAL AFFAIRS

LAWS & RULES

WAYS & MEANS

Oneida County
Board of Legislators
800 Park Avenue
Utica, New York 13501

Honorable Members:

I have received a draft of a Local Law from Legislator Pamela N. Mandryck regarding Oneida County's power of taking land by eminent domain to be used by the County for only public purposes and for those purposes that would be of benefit to the general community.

Pursuant to Mrs. Mandryck's request, I hereby forward the attached to the full Board for consideration at the next available opportunity.

Respectfully submitted,

GERALD J. FIORINI
CHAIRMAN OF THE BOARD

GJF:pp
attachment

RECEIVED
ONEIDA COUNTY LEGISLATURE
05 OCT 20 PM 2:26

ONEIDA COUNTY BOARD OF LEGISLATORS

Pamela N. Mandryck *9245 Sly Hill Road* *Ava, New York 13303*

October 18, 2005

Hon. Gerald J. Fiorini
Chairman
Board of Legislators
Oneida County
800 Park Avenue
Utica, New York, 13501

RE: Eminent Domain Powers

Dear Chairman Fiorini:

In view of the recent U.S. Supreme Court decision in Kelo v. City of New London, which allows a municipality to take private property from a private landowner to provide the same to a private contractor under the guise of economic development, I submit the attached proposed local law.

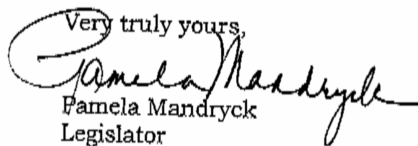
This local law would limit Oneida County's exercise of its power of land taking by eminent domain to only those properties needed for public uses and for the public's benefit, e.g., water/sewer lines, public buildings and hospitals, public recreational areas, etc.

I ask that you present this proposed local law to the Legislators for their immediate consideration. The private landowners of Oneida County need to be reassured that their homes and land holdings are not in danger of being taken by their County government for the benefit of private contractors.

I understand that legislation of this type is being considered by other counties in New York State. I would like Oneida County to be at the forefront of providing this particular safeguard and guarantee to its citizens.

I thank you for your kind attention to this request for action.

Very truly yours,



Pamela Mandryck
Legislator

Cc: Hon. Joseph A. Griffo

NTRODUCTORY
NO.

F.N.

ONEIDA COUNTY BOARD OF LEGISLATORS

RESOLUTION NO.

INTRODUCED BY:
2ND BY:

RE: A LOCAL LAW LIMITING THE USE OF THE COUNTY'S POWER TO TAKE PRIVATE PROPERTY BY EMINENT DOMAIN TO PROPERTY WHICH WILL BE USED BY THE COUNTY FOR PUBLIC PURPOSES ONLY

Legislative Intent: It is the intent of this Local Law to limit the County's power to take private property by eminent domain to those properties which will be used for public purposes only. The recent U.S. Supreme Court decision in Kelo v. City of New London authorized the use of eminent domain proceedings to take the homes, small businesses or other private property of one owner and transfer that same property to another private owner under the reasoning that such a taking and transfer will benefit the community through increased economic development. The Board of Legislators believes the protection of homes, small business and other private properties from government seizure or other governmental intrusion is a fundamental principle and core commitment of our nation's founders, and that the ability of government to take someone's private property should be limited to property needed for public uses such as water/sewer lines, roads, hospitals, public recreational areas, public buildings, development of electricity, flood plain and watershed development and other similar projects that provide a wider public benefit.

BE IT ENACTED by the Board of County Legislators of the County of Oneida, State of New York, as follows:

1. The Oneida County Board of Legislators shall limit its power to take privately owned property by eminent domain to only those properties or pieces of land needed for the siting, construction, development and creation of public properties for use by or benefit to the general public.

2. The Oneida County Board of Legislators shall not exercise its authority to take by eminent domain privately owned lands containing homes, small businesses and other property dedicated to private use in order to transfer such properties to other private owners for the purposes of economic development as provided for in the U. S. Supreme Court decision set forth in Kelo v. City of New London.

This Local Law shall take effect immediately in accordance with Section 20, 21 and 27 of New York State Municipal Home Rule Law.

WESTCHESTER COUNTY BOARD OF LEGISLATORS

800 MICHAELIAN OFFICE BUILDING
148 MARTINE AVENUE
WHITE PLAINS, NEW YORK 10601
(914) 995-2800
FAX: (914) 995-3884

MEMORANDUM

To: Board of Legislators

From: County Legislators Jim Maisano and Tom Abinanti

Date: September 20, 2005

Re: Eminent Domain Reform Legislation

Attached please find for formal introduction to the Westchester County Board of Legislators, our proposed Eminent Domain Reform Legislation. Please be advised that we are joined as co-sponsors by Legislators George Oros, Lois Bronz, Clinton Young, Judy Myers, Ursula LaMotte, Bernice Spreckman, Gordon Burrows and Rob Astorino.

We anticipate and welcome your questions and comments about this legislation. We look forward to working with all of you in our efforts to protecting the residents of Westchester County from the negative impacts of eminent domain.

cc: Chairman William Ryan
Perry Ochacher, Clerk of the Board (for agenda)

RESOLUTION NO. -2005

RESOLVED, that this Board hold a public hearing pursuant to Section 209.141(4) of the Laws of Westchester County on Local Law Intro No. -2005 entitled "A LOCAL LAW to Amend the Laws of Westchester County to restrict the use of eminent domain." The public hearing will be held at PM on the day of , 2005 in the Chambers of the Board of Legislators, 8th Floor, Michaelian Office Building, White Plains, New York. The Clerk of the Board shall cause notice of the time and date of such hearing to be published at least once in one or more newspapers published in the County of Westchester and selected by the Clerk of the Board for that purpose in the manner and time required by law.

BOARD OF LEGISLATORS

COUNTY OF WESTCHESTER

Your Committee respectfully recommends enactment of a new Westchester County Law to restrict the use of eminent domain powers only to facilitate public uses.

Your Committee notes that there are increasing demands on governments to use their powers of condemnation through eminent domain.

Your Committee finds that such powers of condemnation should be used only to facilitate genuine public uses and that action is necessary to protect the community from the harmful impacts of the unwarranted use of such condemnation in the taking of private property for public use.

In light of the aforementioned, your Committee recommends the adoption of the attached Local Law.

Dated: , 2005

White Plains, New York

LOCAL LAW INTRO NO. -2005

A LOCAL LAW amending the Laws of Westchester County to restrict the use of eminent domain.

BE IT ENACTED by the County Board of the County of Westchester as follows:

Section 1. **Legislative Intent.**

The Westchester County Board of Legislators finds that there are increasing demands on governments to use their powers of condemnation through eminent domain, that such powers of condemnation should be used only to facilitate genuine public uses and that action is necessary to protect the community from the harmful impacts of the unwarranted use of such powers of condemnation in the taking of private property for public use.

Section 2. **Definitions.**

(a) "Person" as used herein shall mean any individual, partnership, corporation or other entity living, working or doing business in Westchester County.

(b) "Private use" as used herein shall mean the possession, occupation and/or employment of a parcel of land for any purpose or function other than a "public use" as defined herein and shall include development projects for retail shopping, commercial office space, industrial development and/or residential facilities.

(c) "Public use" as used herein shall mean: (1) the possession, occupation and/or employment of a parcel of land by the general public or by public agencies or for the creation of functioning of public utilities; (2) the acquisition of property to cure a concrete harmful effect of

the current use of land, including the removal of public nuisances, structures that are beyond repair or that are unfit for human habitation or use; and/or (3) the acquisition of abandoned property. The public benefits of economic development, including an increase in tax base, tax revenues, employment, general economic health, shall not constitute a "public use."

(d) "Westchester County government" as used herein shall mean the government of the County of Westchester as duly constituted under the laws of the State of New York and all of its departments, agencies, subdivisions and instrumentalities and all persons acting under its auspices or exercising its powers.

Section 3. **Eminent Domain for Private Use Prohibited**

(a) Notwithstanding any other provision of law, the Westchester County government may use its powers of eminent domain to condemn private property only as follows:

(1) The Westchester County government is hereby prohibited from using its powers of eminent domain to condemn private property for private use.

(2) The Westchester County government may use its powers of eminent domain to condemn private property only upon the vote of two-thirds of the members of the Board of Legislators, after public hearing thereon, finding that the use of such powers is necessary to achieve a clear and convincing public use, as defined in this legislation.

(b) Notwithstanding any other provision of law, the Westchester County government may participate in and/or contribute monies or other support to a project that uses eminent domain or is the beneficiary of the use of eminent domain only as follows:

(1) The Westchester County government is hereby prohibited from participating in or contributing funds to, in any way, in any project that uses eminent domain or is the beneficiary of the use of eminent domain to take private property for private use.

(2) The Westchester County government may participate in or contribute funds to or other support to a project that uses eminent domain or is the beneficiary of the use of eminent domain only upon the vote of two-thirds of the members of the Board of Legislators, after public hearing thereon, finding that the use of such powers is necessary to achieve a clear and convincing public use, as defined in this legislation.

(c) Affordable housing development projects by a government agency or by a not-for-profit corporation in partnership with a government agency shall be exempted from the foregoing prohibitions on the use eminent domain to condemn private property for private use or the contribution to a project that uses or benefits from the use of eminent domain, but such use or contribution is prohibited unless first approved by the vote of two-thirds of the members of the Board of Legislators, after public hearing thereon, that such project is an appropriate use of eminent domain, as defined in this legislation.

Section 4. **Private Right of Action**

Any person who owns property which is the object of an eminent domain condemnation or which is immediately adjacent thereto or otherwise within 1000 feet thereof may enforce the prohibitions contained herein.

Section 5. **Enforcement**.

(a) In addition to those who have a private right of action as set forth above, this local

law may be enforced by the Westchester County government as defined herein, including the County Executive and any individual member of the Board of Legislators, as well as the local municipal governments geographically located in Westchester County.

(b) In addition to remedies otherwise available under law, the aforesaid and those with a private right of action may seek injunctive relief in any court of appropriate jurisdiction and shall be entitled to reasonable attorney's fees, legal costs and the disbursements of said action.

Section 7. **No Waiver**

As waiver of the provisions of this local law is contrary to public policy, any waiver shall be void and unenforceable.

Section 8. **Severability**

If any section of this chapter or the application thereof to any person shall be adjudged invalid or unconstitutional by any court of competent jurisdiction, such order or judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the controversy in which such order or judgment was rendered.

Section 9. **Effective Date**

This local law shall take effect ninety (90) days after its enactment.

Town of Saratoga, Saratoga County

REGULAR MEETING OF THE TOWN BOARD OF THE TOWN OF SARATOGA,
30 FERRY ST., SCHUYLERVILLE, NY Monday, September 12, 2005 7:00 P.M.

RESOLVED, that:

(1) The Town Board of the Town of Saratoga-

(A) disagrees with the majority opinion in *Susette Kelo v. City of New London* in its holdings that effectively negate the public use requirement of the Takings Clause; and

agrees with the dissenting opinion in *Susette Kelo v. City of New London* in its upholding of the historical interpretation of the Takings Clause and its deference to the rights of individuals and their property; and

(2) it is the sense of the Town Board of the Town of Saratoga that-

(A) state and local governments should only execute the power of eminent domain for those public uses that comply with the Takings Clause of the Fifth Amendment;

(B) state and local governments must always justly compensate individuals whose property is assumed through eminent domain in accordance with the Takings Clause of the Fifth Amendment;

(C) any execution of eminent domain by state and local government that does comply with subparagraphs (A) and (B) constitutes an abuse of government power and an usurpation of the individual property rights, contrary to the Takings Clause of the Fifth Amendment;

(D) eminent domain should never be used to advantage one private party over another;

(E) eminent domain should never be used solely for the purpose of economic development and/or to increase tax revenues;

(F) eminent domain should be solely used to acquire private property for public use, e.g., highways, bridges, schools, parks, public utilities, dams, and other civic works directly used by the public;

(G) the Town Board of the Town of Saratoga hereby establishes a policy to limit its use of eminent domain to the public uses expressly outlined in this resolution and in accordance with the dissenting decision in *Susette Kelo v. City of New London*; and

(H) the Town Board of the Town of Saratoga hereby petitions the State Legislature to adopt statutory limitations on the use of eminent domain By the State of New York and its departments, agencies, development corporation, and authorities to limit the use of eminent domain to the public uses expressly outlined in this resolution and in accordance with the dissenting decision in *Susette Kelo v. City of New London*.

This Resolution shall take effect immediately.
The Town Clerk is authorized and directed to transmit copies of this Resolution to:
Governor: George E. Pataki
New York State Senator: Joseph Bruno
Member of the New York State Assembly: Sheldon Silver
Chairperson Saratoga County Board Supervisors: Mary Ann Johnson

Supervisor Thomas Wood - aye, Councilman Fred Drumm – aye, Councilman Charles Hanehan – aye, Councilman Bruce Cornell – aye, and Councilman Michael McLoughlin - aye. Carried 5–0. (The full text of this resolution is on file in the Town Clerk's office.)

Supervisor Thomas Wood informed the board that a conference on Eminent Domain will be given in Latham on October 27th. He also announced that the next Budget Workshop meeting

will be Monday, September 19, 2005 @ 6:00 p.m. and Dick Behrens will be attending to explain the General Schuyler Emergency Squad's budget.

Town of Bethlehem, Albany County

TOWN BOARD

DECEMBER 14, 2005

A regular meeting of the Town Board of the Town of Bethlehem was held on the above date at the Town Hall, 445 Delaware Avenue, Delmar, NY. The meeting was called to order by the Supervisor at 5:30 p.m.

Resolution No. __38____

TOWN OF BETHLEHEM RESOLUTION

IMPOSING A RESTRAINT ON THE EXERCISE OF THE POWER OF EMINENT DOMAIN

WHEREAS, the state law grants the Town of Bethlehem the power of eminent domain to condemn property for any public purpose; and,

WHEREAS, the Town Board believes that the exercise of the Town's power of eminent domain should be balanced with the State and Federal Constitutional protections of private property; and,

WHEREAS, on June 23, 2005, the U.S. Supreme Court in its decision in Kelo v. City of New London, found it permissible under the Fifth Amendment of the United States Constitution for a municipality to seize residential property and transfer it to a private developer in order to promote economic development; and,

WHEREAS, the Town Board respectfully disagrees with the United States Supreme Court's interpretation of "public use" in the Fifth Amendment of the United States Constitution; and,

NOW, THEREFORE, BE IT RESOLVED that without compelling reason, and unless in compliance with the Town Comprehensive Plan, the Town shall not exercise its power of eminent domain upon private residential property and transfer it to a private developer for the purpose of improving tax revenue or
expanding the tax base or for the purpose of economic development.

The foregoing resolution was presented for adoption by __Mr. Marcelle__,

seconded by ___Mr. Lenhardt _____ and adopted by the following vote:

Ayes: Ms. Egan, Mr. Plummer, Mr. Lenhardt, Mr. Marcelle, Mr. Gordon.

Noes: None.

Absent: None.

Town of Greece, Monroe County

RESOLUTION

Expressing the Disapproval by the Town Board of the Town of Greece of the Majority Opinion of the United States Supreme Court in the Case of Kelo v. City of New London that Nullifies the Protections Afforded Private Property Owners in the United States Constitution; Adopting a Town Policy to Protect Private Property Owners' Rights; and Petitioning the State Legislature to Enact State Constitutional and Statutory Protections for Property Owners

Whereas, the Takings Clause of the Fifth Amendment to the United State Constitution states "nor shall private property be taken for public use without just compensation";

Whereas, the Fourteenth Amendment extended the application of the Fifth Amendment to every state and local government;

Whereas, the Takings Clause of the Fifth Amendment has historically been interpreted and applied by the United States Supreme Court to be conditioned upon the necessity that government assumption of private property through eminent domain must be for the public use and requires just compensation;

Whereas, the opinion of the majority in Kelo v. City of New London justifies the forfeiture of a person's private property through eminent domain for the sole benefit of another private person rather than for public use;

Whereas, the dissenting opinion in Kelo v. City of New London upholds the historical interpretation of the Takings Clause and affirms that "the public use requirement imposes a more basic limitation upon government, circumscribing the very scope of the eminent domain power: government may compel an individual to forfeit her property for the public's use, but not for the benefit of another private person";

Whereas, the dissenting opinion in Kelo v. City of New London holds that the "standard this Court has adopted for the Public Use Clause is therefore deeply perverse" and the beneficiaries of this decision are "likely to be those citizens with disproportionate influence and power in the

political process, including large corporations and development firms" and "the government now has license to transfer property from those with fewer resources to those with more"; and

Whereas, all levels of government have a Constitutional responsibility and a moral obligation to always defend the property rights of individuals and only to execute the power of eminent domain for the good of public use and contingent upon the just compensation of the individual property owner;

NOW, THEREFORE, BE IT RESOLVED BY THE TOWN BOARD OF THE TOWN OF GREECE, as follows:

Section 1. The Town Board of the Town of Greece —

(A) disagrees with the majority opinion in Kelo v. City of New London and its holdings that effectively negate the public use requirement of the Takings Clause; and

(B) agrees with the dissenting opinion in Kelo v. City of New London in its upholding of the historical interpretation of the Takings Clause and its deference to the rights of individuals and their property.

Section 2. It is the sense of the Town Board of the Town of Greece that—

(A) state and local governments should only execute the power of eminent domain for those public uses that comply with the Takings Clause of the Fifth Amendment;

(B) state and local governments must always justly compensate those individuals whose property is assumed through eminent domain in accordance with the Takings Clause of the Fifth Amendment;

(C) any execution of eminent domain by state and local government that does not comply with subparagraphs (A) and (B) of this section constitutes an abuse of government power and an usurpation of the individual property rights, contrary to the Takings Clause of the Fifth Amendment;

(D) eminent domain should never be used to advantage one private party over another;

(E) eminent domain should never be used solely for the purpose of economic development and/or to increase tax revenues; and

(F) eminent domain should be solely used to acquire private property for public use, e.g., highways, bridges, schools, parks, public utilities and other civic works directly used by the public.

Section 3. The Town Board of the Town of Greece hereby establishes a policy to limit its use of eminent domain to the public uses expressly outlined in this resolution and in accordance with the dissenting decision in Kelo v. City of New London.

Section 4. The Town Board of the Town of Greece hereby petitions the State Legislature to adopt State constitutional and statutory limitations on the use of eminent domain by the State of New York and its departments, agencies, development corporation, and authorities to limit the use of eminent domain to the public uses expressly outlined in this resolution and in accordance with the dissenting decision in Kelo v. City of New London.

Section 5. The Town Clerk is authorized and directed to transmit copies of this resolution to the Governor of the State of New York, the Members of the New York State Legislature representing the Town of Greece, the County Executive of the County of Monroe, the President of the County Legislature of the County of Monroe, and the Members of the County Legislature of the County of Monroe representing the Town of Greece.

Section 6. This resolution shall take effect immediately.

Town of Schroon, Essex County

RESOLUTION OPPOSING THE U.S. SUPREME COURT RULING
CONCERNING THE POWER OF EMINENT DOMAIN.

The following resolution was moved by: Roger Friedman

RESOLUTION

WHEREAS, eminent domain is the power of government to take private property and take title for public use, provided owners receive just compensation; and

WHEREAS, the United States Supreme Court in Kelo v. City of New London held by a 5-4 decision that government may seize the home, small business, or other private property of one owner and transfer that same property to another private owner, simply by concluding that such a transfer would benefit the community through increased economic development; and

WHEREAS, this Resolution is adopted to support prohibiting transfers of private property without the owner's consent, if the transfer is for purposes of economic development rather than public use; and

WHEREAS, the protection of homes, small businesses, and other private property rights against government seizure and other unreasonable government interference is a fundamental principle and core commitment of our nation's founders and the essence of what they fought for in the defense of their homes and private property; and

WHEREAS, the Town board of the Town of Schroon supports legislation currently being promulgated in the United States Congress and in the State of New York Legislature, that would clarify government's exercise of its power of eminent domain to be limited only for public use, rather than for economic development, and this standard of protection would apply to all exercises of eminent domain power by the local, and state governments, and

NOW THEREFORE, BE IT RESOLVED THAT: the Town Board of the Town of Schroon is of the opinion that eminent domain powers should be limited to such public projects as water or sewer lines, roads, streets, public parks, public buildings, electricity development and other similar projects that benefit the public as a whole and that the power of eminent domain should not be used simply to further private economic development; and

BE IT FURTHER RESOLVED THAT: the Town Board of the Town of Schroon does hereby support and advocate the passage of federal and state legislation to limit government's use of eminent domain for solely public purposes and protect the property of private citizens from unreasonable seizure by federal, state and local governments.

LET IT BE FURTHER RESOLVED THAT: this resolution be forwarded to Governor George E. Pataki, Congressman John Sweeney, Assembly Majority Leader Sheldon Silver, Senator Elizabeth Little, Assemblywoman Teresa Sayward, Senator Joseph Bruno, Assemblyman Roy MacDonald, U.S. Senator Charles Schumer, U.S. Senator Hillary Clinton, NYS Association of Towns and Villages, AATV, and the Essex County Board of Supervisors.

This resolution was seconded by: Donald Sage
Carried Unanimously
Janice E. Tyrrell —
DATED: 11-10-05

Appendix B

Select Bibliography

John M. Armentano, Esq., "More on 'Takings'—Property Owners Set Back in High Court Rulings," *New York Law Journal*, Real Estate Update, Wednesday, July 27, 2005

A. Vincent Buzard, Esq., Guest Essayist, "Unfair to Blast Supreme Court for Eminent Domain Ruling," *Rochester Democrat and Chronicle*, November 1, 2005

M. Robert Goldstein, Esq., "Condemnation for the General Practitioner," New York State Bar Association Section Newsletter *One on One*, Spring 1996 (Volume 13, Number 3), p. 5

Mark Hamblett, "Circuit Clarifies Notice Provision of New York's Eminent Domain Law," *New York Law Journal*, December 12, 2005

Alex Philippidis, "Lawyers Have Eye on State Eminent Domain Law," *Westchester County Business Journal*, January 1, 2006

Patricia E. Salkin, Esq., and Margaret Lavery, "Irresponsible Legislating: Reeling in the Aftermath of *Kelo*," *Real Estate Law Journal*, Winter 2006

Jon N. Santemma, Esq., Editor, *Condemnation Law and Procedures in New York*, New York State Bar Association, July 2005

Andrew Welsh-Huggins, "Eminent Domain Laws Get First State High Court Test Since U.S. Supreme Court Ruling," Associated Press, January 12, 2006

David C. Wilkes, Esq., and John D. Cavallaro, Esq., "This Land is Your Land?" New York State Bar Association *Journal*, October 2005, p. 11