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Quick Takes

August 2005

NEEDED FOR EMINENT DOMAIN-

"LESS HEAT, MORE LIGHT"

The controversy following the U.S. Supreme Court's decision in *Kelo* has become unhealthily heated. In this issue of *Quick Takes*, I want to talk about this decision, without heat, in hopes of shedding some light on what all of this means. That's what the eminent domain debate needs- "less heat, more light!

This needs to be done because of the near certainty that the Georgia General Assembly will pass some sort of eminent domain legislation this session. After all, S.B. 86 has already passed the state Senate. We are not alone. According to a bond industry trade publication, there are only 15 states where there is no new law or court decision restricting eminent domain for the benefit of private development, or at least announcements by legislators that they intend to introduce such a law.

The U.S. Supreme Court said in *Kelo* that, for purposes of the public sector's taking private sector property, the necessary "public use" was satisfied by a "public purpose". That's not new news; the Supreme Court said it has used this interpretation "since the close of the 19th century." In *Kelo*, the public purpose requirement was satisfied by the City of New London's "program of economic rejuvenation", even though the area was not blighted, and even though the City did not intend to open all of the condemned land to use by the general public.

In S.B. 86, the Georgia state Senate said that "in no event shall a public purpose be construed to include the exercise of eminent domain solely or primarily for the purpose of improving tax revenue or the tax base or the purpose of economic development." S.B. 86 cites Georgia Constitution Article I, Section III, Paragraph I. That Constitutional provision talks about the General Assembly's being authorized to determine the "public purposes" necessary for purposes of the exercise of eminent domain.

This raises a lot of questions.

It doesn't use the phrase "public purpose", but Georgia Constitution Article IX, Section II, Paragraph VII authorizes the "sale or other disposition of property acquired by eminent domain to private enterprise for private uses" in connection with community redevelopment. Our redevelopment laws rely on that Constitutional provision to empower cities, counties and downtown development authorities to use eminent domain for purposes of redevelopment. S.B. 86 says that laws authorizing the power of eminent domain for purposes of community

redevelopment "shall be strictly and narrowly construed for use solely on legitimate redevelopment projects." Obvious question- what makes a redevelopment project legitimate? Or illegitimate!

And what about the eminent domain powers that cities, counties, development authorities (that are "governmental bodies") and other qualified public bodies can use under the Revenue Bond Law to carry out an "undertaking"? "Undertaking" includes the "purchase of land and the construction thereon of facilities for lease to industries, so as to relieve abnormal unemployment conditions". This is economic development. But will eminent domain for an undertaking like this still be valid under new restrictions?

And a number of "Constitutional" development authorities were created by local constitutional amendments that empower these development authorities to use eminent domain. For example, one local constitutional amendment authorizes the local development authority to use eminent domain "for the purpose of developing and promoting, for the public good and welfare, industry [within the county]." That also is economic development. Would communities with development authorities like these have a competitive advantage over communities that don't, under new eminent domain restrictions?

What's even more interesting, is Georgia Constitution Article IX, Section VI, Paragraph III, which authorizes statutory development authorities. That Constitutional provision says that the "development of trade, commerce, industry, and employment opportunities [is] a public purpose vital to the welfare of the people of this state …." These activities are economic development. Can economic development be a "public purpose" in the Constitution, but get rejected as a public purpose in new eminent domain restrictions?

Big question- Is there a "middle ground" for change, that protects property rights, but without taking away a tool (eminent domain) that economic development sometimes needs?

Here's an approach at one end of the spectrum (minimum changes). If we want to protect one individual from having that individual's property condemned for the purpose of directly transferring that property to a private business, then we can pass a new law that says just that. (S.B. 86 does say that, but goes on to limit eminent domain for economic development purposes). A change like this isn't really necessary anyway, because according to the U.S. Supreme Court in *Kelo*, it's what the U.S. Constitution says already.

A change mid-way through the spectrum of possibilities would be to establish by law what Kelo said were the limits to eminent domain under the U.S. Constitution- no use of eminent domain to " benefit a particular class of identifiable individuals"; and no taking of private property under a public purpose that is just a "pretext." This would mean leaving the eminent domain laws alone, but saying that, before they could be used, the government would have to: (1) have a plan (this could be an economic development plan, not necessarily just a redevelopment plan); (2) be sure that the "identity of most of the private beneficiaries [are] unknown at the time" the plan is developed; and (3) establish and follow "procedural requirements that facilitate [judicial] review of the record and inquiry into the [government's] purposes." So, if this change in our laws were implemented, in the interest of fairness and justice there would be more "hoops" to jump through, but in a proper case, eminent domain could be used for economic development.

Here's an approach on the other end of the spectrum from just a minimum change in our laws. Suppose that we passed a new law that generally restricts eminent domain for economic development purposes. Then suppose we granted more exceptions (in addition to redevelopment), where economic development sometimes really needs to be able to use

eminent domain.

One good example of when exceptions are needed is when a community is assembling an industrial or business park. A park like this will initially be publicly owned. The intention, of course, is to "privatize" it, by selling lots. Otherwise, it will not be a success!

Even though the private sector will ultimately come to own it, shouldn't a public industrial or business park be considered a public purpose? And what if the park needed an access road? The road would stay in public ownership. You'd think that eminent domain for the road would be possible, particularly if the road also served other landowners along the way to the park. But what if the road only served the park?

At this point, there are a lot more questions than answers about what will happen when the General Assembly changes our eminent domain laws. When they do that, let's hope that the General Assembly finds that middle ground!

If you have any questions or comments, please let me know.

Daniel M. McRae

August 10, 2005 interest rates on IDBs (variable rate demand bonds; AMT 7 day general markets; rates are market extracted and approximations):

Interest Rates:
tax-exempt 2.75%
taxable 3.62%

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General note: This issue of *Quick Takes* is a quick-reference guide for economic developers, participants in the real estate and financial industries, and company and public body directors, executives and managers and their advisors. The information in this issue is general in nature. Various points that could be important in a particular case have been condensed or omitted in the interest of readability. Specific professional advice should be obtained before this information is applied to any particular case.