

**AMERICAN PLANNING ASSOCIATION
NEW YORK METRO CHAPTER**

Policy Position on the Use of Eminent Domain for Economic Development

The New York Metro Chapter of the American Planning Association addresses planning issues that concern the physical, social, and economic environment in the metropolitan region encompassing New York City, Long Island (Nassau and Suffolk Counties) and the Hudson Valley (Rockland, Westchester, Putnam, Orange, Dutchess, Ulster and Sullivan Counties). The Chapter represents close to 1,200 practicing planners and others involved in the planning and design of the region's communities.

INRODUCTION

There has been a tremendous reaction and, in many cases, overreaction to the recent U.S. Supreme Court decision in the case of *Susette Kelo v. City of New London*; 125 *S.Ct.* 2655 (2005). While many observers note that the Court did not really alter the status quo, others have interpreted the decision as having granted sweeping new powers to government (and quasi-government) entities. Legislation has been introduced at both Federal and State levels which seeks to prohibit the use of eminent domain altogether for purposes of economic development or to limit the use of certain funds for this purpose. While a few of the new laws appear to be well reasoned efforts to safeguard against potential abuses of power, the majority seem to be hastily drafted expressions of outrage at the threat to property rights.

The New York Metro Chapter seeks to articulate a position, not on the merits of the *Kelo* decision per se, but on the use of eminent domain as a valuable tool for economic development, the potential for abuse of power and the need for reasonable legislative protections against such abuses.

THE VALUE OF EMINENT DOMAIN AS AN ECONOMIC DEVELOPMENT TOOL

It is hard to dispute that the use of eminent domain has been a vitally important tool in the development of several major, beneficial projects. Large-scale projects naturally require the assemblage of large, contiguous sites. It is simply not possible, in many cases, to either acquire all the necessary property through negotiated purchase or to just build around holdout parcels. Notable local projects such as Lincoln Center, the revitalization of Times Square and numerous affordable housing developments may not have come to fruition without the use of condemnation. It is very likely that future projects such as the redevelopment of the West Side Yards, the Atlantic Yards and Long Island City (Queens West) will require some amount of involuntary land acquisition. To many people, it does not seem right that a project with the potential to benefit thousands, or even millions, of people can be thwarted by just one or two landowners, especially when these landowners can be fully compensated for their losses. In several cases, just invoking the powers of eminent domain has expedited negotiations for voluntary purchases so that, ultimately, condemnation could be avoided

THE DOWN SIDE OF EMINENT DOMAIN

Despite a legacy of successful projects, the use of eminent domain remains one of the most controversial, and often feared, uses of government power. There are many legitimate concerns about the use of condemnation powers. Are landowners given adequate notice of the government's action? Are they given a fair and thorough explanation of their rights? Is the amount of compensation fair? If not, is there sufficient recourse? What a city may view as a "slum" in need of clearing may be viewed by its residents and business owners as a viable, productive neighborhood. Provisions to relocate displaced residents or businesses are often inadequate.

There is also a widely expressed concern that the targets of condemnation are disproportionately lower income and/or minority property owners. In part this is logical, as economically depressed areas are naturally the more frequent focus of economic development programs. However, the concern is that these are the landowners least equipped to protect their own rights and interests, and least likely to have access to appropriate legal counsel. Even if inclined to sell voluntarily, they may be more inclined to accept a purchase price significantly lower than fair market value, or feel they are powerless to seek better terms.

LEGISLATIVE ACTIONS

Almost as soon as *Kelo* was decided, a number of reactive proposals have emerged at all levels of government including at least 38 state legislatures.

On November 3rd, the U.S. House of Representatives passed H.R.4128, the Private Property Rights Protection Act of 2005, by a margin of 376 to 38, indicating broad bipartisan support. H.R. 4128 expressly prohibits the use of eminent domain for economic development purposes and further stipulates that all agencies found to be in violation would lose all federal economic development funds for a two-year period. Economic development is broadly defined to include any "enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health." Certain exceptions are allowed, including property acquired for transportation, public utilities, brownfield redevelopment, and to remove immediate threats to public health and safety. Economic development funds are broadly described as any funds "designed to improve or increase the size of the economies of States or political subdivisions of States". The legislation also grants aggrieved property owners up to seven years to bring a lawsuit against governmental entities. Upon passage, the bill was submitted to the U.S. Senate where a companion bill, S.1313, awaits action as of the time of this writing.

The Senate did, however, adopt an amendment (S.AMDT.2113 to H.R.3058) to the 2006 appropriations bill for the Departments of Transportation, Treasury, and Housing & Urban Development that prohibits the use of federal funds for any project appropriated under the bill if eminent domain is utilized for a non-public use. The amendment specifies that transportation, utilities, brownfield redevelopment and blight removal are considered to be public uses. The amendment also mandates a Government Accountability Office study of the use of eminent domain.

In New York State, several bills have been introduced which seek to limit or clarify the purposes for which eminent domain may be used. Many are slightly differing variations on the same themes. In addition is a bill in draft that would increase the appeal time for condemnations and allow citizens to appeal condemnation decisions when the scope of a project is substantially changed. If eminent domain is used for economic development, the locality must present a comprehensive economic plan and homeowner impact statement. Several similarly worded proposals have appeared at the local level as well, including the City of New York, Dutchess and Westchester Counties.

NY METRO CHAPTER POSITION

The Metro Chapter shares the concern that many of the recent legislative proposals have been hasty, “knee jerk” reactions to the *Kelo* Decision, and seem to be based a misconception that under present rules, the government has unlimited powers of condemnation. We fear that legislative overreactions to *Kelo* may preclude the implementation of a number of beneficial projects that could create jobs, housing opportunities and economic growth. At the same time, we do not feel that *any* bill that seeks to narrow or even clarify the use of eminent domain should simply be rejected out of hand. It is not necessary to frame the discussion such that the only choice is to be either “for economic development” or “for property rights” and not “for both”. The Metro Chapter generally supports legislation that preserves the use of eminent domain, when it can be justified, but also seeks to protect the rights of property owners.

Current New York law requires that there be a showing of “public purpose and need” before a condemnation proceeding may be commenced and that there be a demonstration of blight. In most cases, there must also be an adopted urban renewal plan or, in the case of the Empire State Development Corporation, a project plan. We feel the present rules are fair and have generally worked well in practice. The Metro Chapter generally supports legislation that ensures that owners of property targeted for acquisition be given adequate notice and adequate recourse in the event that the amount of compensation is believed to be unfair. We encourage New York State legislators to examine requirements for early public participation in the preparation of plans where acquisition of private property is involved so that the involved communities (and, especially, those who may have to relocate) are given ample opportunity to voice concerns and provide substantive input prior to the finalization of such plans.

In its Amicus Curiae brief to the Court in the *Kelo* case, APA stated that eminent domain should only be used as a tool of last resort. This is to say, only when all reasonable efforts to achieve a mutually agreed purchase have been exhausted and the project cannot be redesigned to exclude the property. We agree and would support legislation that would require an agency to document its attempts to reach a negotiated purchase and to demonstrate that there are no feasible alternatives to taking the property.

We do not support the generally punitive nature of the provisions of H.R. 4128 that would deny funding for two-year period (and even seeks to recapture funds that were already paid) nor the provision that grants a right of private action for a seven-year period. We do, however, support the U.S. Senate proposal for the General Accountability Office to study the use of eminent domain, and to call for the involvement and input of the urban planning profession, local

governments and interest groups in developing such a study. We further believe that APA should monitor the effectiveness of the recently created office of the Utah Property Rights Ombudsman to mediate disputes arising from condemnation. If effective, the APA may consider proposing the Utah example as a model for other states and localities.

In local legislatures, we oppose overly broad proposals to simply prohibit (or eliminate funding for) any use of eminent domain for economic development purposes or any case where the land will be conveyed to a private party. The issue is too complex, and the potential impacts too great, to simply enact categorical exclusions. Measures that the APA Metro Chapter recommends be evaluated for implementation through future state legislation include the following:

- Require evaluation of phasing techniques for projects involving eminent domain that would permit more existing uses to remain over time and then be phased out;
- Require early participation and input during plan preparation from community advisory boards and members of the public in preparation of plans associated with use of eminent domain;
- Mandate compensation beyond the constitutional minimum for persons displaced from occupied residences or businesses because of government condemnations

In the words of the Supreme Court, “promoting economic development is a traditional and long accepted governmental function, and there is no principled way of distinguishing it from the other public purposes the Court has recognized.” As planners and decision makers, we must always be aware of the need to ensure a balance between the needs of economic revitalization and the need to ensure community viability and stability. What the Metro Chapter advocates, above all else, is that there be a reasoned approach to addressing the benefits and drawbacks of eminent domain and that the debate (and any resultant legislative action) is not overtaken by ideological divides.