



Sub. S.B. 167*

126th General Assembly

(As Reported by H. Civil and Commercial Law)

Sens. Grendell, Zurz, Harris, Jacobson, Cates, Mallory, Brady, Amstutz, Armbruster, Carey, Dann, Gardner, Goodman, Miller, Roberts, Schuler, Schuring, Spada, Wachtmann, Wilson, Padgett, Austria, Clancy, Mumper, Hottinger, Niehaus, Jordan, Fedor, Coughlin

BILL SUMMARY

- Generally establishes a moratorium, until December 31, 2006, on the use of eminent domain to take private property that is located outside a blighted area for the primary purpose of economic development that will ultimately vest ownership in a private person other than the original owner.
- Specifies that the moratorium applies only to taking actions initiated on or after the bill's effective date.
- If a public body uses eminent domain to take private property subject to the moratorium before December 31, 2006, precludes the award or distribution of funding to the public body under certain programs or funding designated for capital purposes in any act of the General Assembly.
- Creates the Legislative Task Force to Study Eminent Domain and Its Use and Application in the State consisting of 25 members, and requires the Task Force to study the use of eminent domain and its impact on the state, how the decision of the United States Supreme Court in *Kelo v. City of New London* (2005), 125 S.Ct. 2655, affects state law governing the use of eminent domain in the state, and the overall impact of state

* This analysis was prepared before the report of the House Civil and Commercial Law Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.

laws governing the use of eminent domain on economic development, residents, and local governments in Ohio.

- Requires the Task Force to submit one report by April 1, 2006, to include the findings and recommendations concerning the use of eminent domain and its impact on the state, and another report by August 1, 2006, to include findings and recommendations regarding necessary updates to state laws governing eminent domain.
- Specifies that all meetings of the Task Force are to be public meetings open to the public at all times and that minutes of meetings are public records, requires the Task Force to give reasonable notice of its meetings, and prohibits the Task Force from holding a meeting unless it gives at least 24 hours advance notification to news media organizations that request the notification.
- Provides that nothing in the bill is to be construed to imply that any public body with eminent domain authority has prior to the bill's enactment abused that authority or engaged in any wrongdoing in the exercise of its eminent domain authority conferred by statute or the Ohio Constitution.
- Declares the General Assembly's statements of findings and intent.
- Declares an emergency.

CONTENT AND OPERATION

Background

The United States Supreme Court, in *Kelo v. City of New London*, 125 S.Ct. 2655 (2005), upheld a Connecticut city's right to take private property by eminent domain for a downtown revitalization project based on the city's plan for economic development. A private development corporation received city approval to develop a 90-acre waterfront residential neighborhood, with a resulting benefit of an increased tax base. The owners of 15 properties, which were not blighted, refused to sell voluntarily. After the properties were acquired by eminent domain authority, the property owners sued, asserting that the takings of their properties were unconstitutional because they were for a private use in violation of the Takings Clause of the Fifth Amendment to the U.S. Constitution. That clause prohibits the government from taking private property "for public use, without just

compensation." Over the years, judicial construction has resulted in the concept of "public use" meaning "public purpose" and "public welfare."

In deciding whether the city's development plan served a "public purpose," the Court noted that the *sole* purpose of a taking cannot be to give or sell the property to private development. The Court also stated that it would be unconstitutional to take property from one private party to give it to another private party under the pretext of a public purpose when the actual purpose was to bestow a private benefit. The Court recognized the possibility for private profit, noting that the government's pursuit of a public purpose will often benefit individual private parties. Under the facts in issue, the Court decided the taking was for a public purpose and, therefore, was constitutional. It also noted that courts should give deference to a government's decision about what constitutes a public benefit.

The bill responds to policy concerns that the *Kelo* case may authorize the taking of private property that is not located in a blighted area for economic development purposes that ultimately vest ownership of the property in another private person "in violation of Sections 1 and 19 of Article I, Ohio Constitution" (Sections 4 and 7). (See **COMMENT 1**.)

Moratorium

The bill generally establishes a moratorium, until December 31, 2006, on the use of eminent domain by any entity of the state government or any political subdivision of the state that has the power to take private property by eminent domain (denoted as a "public body" in the bill). The moratorium relates to private property that is not located in a blighted area as determined by the public body, that is taken without the owner's consent, and that is taken for the primary purpose of economic development that will ultimately result in ownership of the property being vested in a private person other than the original owner. (Sections 1(B) and 2(A).)¹

¹ A "blighted area" essentially means an area within a county or a municipal corporation that, by reason of a substantial number of slum, deteriorated, or deteriorating structures, predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions to title, or the existence of conditions that endanger life or property by fire and other causes, or any combination of such factors, substantially impairs or arrests the sound growth of a county or municipal corporation, retards the provision of housing accommodations, or constitutes an economic or social liability and is a menace to the public health, safety,

The moratorium *does not apply to* the use of eminent domain to take private property to be used as follows (Section 2(C)):

- In the construction, maintenance, or repair of streets, roads, or walkways, paths, or other ways open to the public's use, including rights of way immediately adjacent to those public ways, including, but not limited to, such use pursuant to authority granted under the Roads, Highways, and Bridges Law (R.C. Title LV).
- For a public utility purpose.
- By a common carrier.
- For parks or recreation areas open to the public.
- In the construction, maintenance, or repair of buildings and grounds used for governmental purposes.

The bill further specifies that the moratorium *applies only to* taking actions initiated on or after its effective date. "Initiated" is defined to mean: "the adoption of a resolution or ordinance of necessity by the public body, or filing of a court action, but excludes taking actions for which a resolution or ordinance of necessity or other official action of a public body has been taken and public funds have been expended in connection with that taking action prior to the effective date of" the bill (Section 5).

If a public body uses eminent domain to take private property subject to the moratorium, before December 31, 2006, all of the following apply under the bill (Section 2(B)(1)):

(1) The Ohio Public Works Commission may not award or distribute any funding to the public body under a capital improvement program created under the Aid to Local Governments Improvement Law (Chapter 164. of the Revised Code).

(2) The Department of Development may not award or distribute any funding to the public body under a shovel ready sites program created by state law (R.C. 122.083--not in the bill);

(3) The public body may not receive any funding in any act of the General Assembly that appropriates funds for capital purposes.

morals, or welfare in its present condition and use. (Section 1(A) of the bill and R.C. 303.26--not in the bill.)

Until December 31, 2006, any public body seeking to obtain funds described in (1), (2), or (3), above, must certify in writing to the grantor of the funds that the public body has not used its eminent domain authority on or after the bill's effective date to take private property in violation of the moratorium (Section 2(B)(2)).

Creation of Task Force

Functions

The bill creates the Legislative Task Force to Study Eminent Domain and Its Use and Application in the State (Section 3(A)). The Task Force, consisting of 25 members, must study each of the following (Section 3(C)(1)):

- (1) The use of eminent domain and its impact on the state;
- (2) How the *Kelo* decision affects state law governing the use of eminent domain in the state;
- (3) The overall impact of state laws governing the use of eminent domain on economic development, residents, and local governments in Ohio.

Reports

The bill requires the Task Force to prepare and submit two reports to the General Assembly, one report by April 1, 2006, and another by August 1, 2006. The April 1, 2006, report must include the findings of the study and recommendations concerning the use of eminent domain and its impact on the state. The August 1, 2006, report must include findings and recommendations regarding necessary updates to state laws governing eminent domain. The Task Force ceases to exist upon submission of the August 1, 2006, report. (Section 3(C)(2).)

Membership

The 25-member Task Force will consist of the following members (Section (A)):

- Three members of the House of Representatives, with two members appointed by the House Speaker and one member appointed by the House Minority Leader. The Speaker must designate one of the members the Speaker appoints to serve as a Task Force co-chairperson.
- Three members of the Senate, with two members appointed by the Senate President and one member appointed by the Senate Minority

Leader. The Senate President must designate one of the members the President appoints to serve as a Task Force co-chairperson.

- One member representing the home building industry in the state, appointed jointly by the House Speaker and the Senate President;
- One member who is a statewide advocate on the issues raised in *Kelo v. City of New London, supra*, insofar as they affect eminent domain, appointed jointly by the House Speaker and the Senate President;
- One member representing the agricultural industry in the state, appointed jointly by the House Speaker and the Senate President;
- One member representing the commercial real estate industry in the state, appointed jointly by the House Speaker and the Senate President;
- One member representing licensed realtors in the state, appointed jointly by the House Speaker and the Senate President;
- One member representing the Ohio Prosecuting Attorneys Association or the Ohio Association of Probate Judges, appointed jointly by the House Speaker and the Senate President;
- One member who is an attorney who is knowledgeable on the issues confronting the Task Force and represents persons who own property and reside within Ohio, appointed jointly by the House Speaker and the Senate President;
- One member who is knowledgeable on the issues confronting the Task Force and who represents persons who own property and reside within Ohio, appointed jointly by the House Speaker and the Senate President;
- One member representing the planning industry in the state, one member representing an Ohio labor organization, one member representing a statewide historic preservation organization that works within commercial districts, one member representing municipal corporations, one member representing counties, and one member representing townships, each appointed by the Governor;
- The Director of Development or the Director's designee;
- The Director of Transportation or the Director's designee;



- Two members who are attorneys with expertise in eminent domain issues, each appointed by the Attorney General;
- One member representing small businesses, appointed jointly by the House Speaker and Senate President.

Appointments must be made within 30 days after the bill's effective date. And, vacancies must be filled in the same manner as original appointments. The Task Force's members will serve without compensation. (Section 3(B).)

Staff and meetings

The Legislative Service Commission is required to provide any necessary technical, professional, and clerical employees for the Task Force. All Task Force meetings are public meetings open to the public at all times. A member of the Task Force must be present in person at a meeting that is open to the public in order to be considered present or to vote at the meeting and for the purposes of determining whether a quorum is present. The Task Force must promptly prepare and maintain the minutes of its meetings, which are public records under R.C. 149.43 (Public Records Law). The Task Force must give reasonable notice of its meetings so that any person may determine the time and place of all scheduled meetings. The Task Force is prohibited from holding a meeting unless it gives at least 24 hours advance notification to the news media organizations that have requested such notification. (Section 3(D) and (E).)

General Assembly's findings and intent

The bill sets forth statements of findings and intent, including the General Assembly's belief that, as a result of the *Kelo* decision, the interpretation and use of the state's eminent domain law could be expanded to allow the taking of private property that is not blighted by eminent domain for economic development purposes and ultimately the vesting of the property's ownership in a different private person "in violation of Sections 1 and 19 of Article I" of the Ohio Constitution. Those sections protect the rights of Ohio citizens to maintain property as inviolate, subservient only to the public welfare. Accordingly, the bill declares that the General Assembly finds it necessary to enact a moratorium on these types of takings by any public body until further legislative remedies may be considered. (Section 4(A).)

Additionally, the bill states that the General Assembly (1) finds it a matter of statewide concern (see **COMMENT 2**) to enact the moratorium to protect the general welfare and rights of citizens under Sections 1 and 19 of Article I and to ensure that these rights are not violated as a result of the *Kelo* decision and (2) wishes to ensure uniformity throughout the state (Section 4(B)).

Construction of bill

The bill provides that nothing in the bill is to be construed to imply that any public body with eminent domain authority has prior to the bill's enactment abused that authority or engaged in any wrongdoing in the exercise of its eminent domain authority conferred by statute or the Ohio Constitution (Section 7).

Severability and emergency clauses

The bill has a specific severability provision. It also states that it is an emergency measure necessary for the immediate preservation of the public peace, health, and safety. (Sections 6 and 8.)

COMMENT

1. Section 1 of Article I, Ohio Constitution, provides as follows:

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

- Section 19 of Article I, Ohio Constitution, provides as follows:

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

2. In Ohio, municipal corporations have "home rule" authority granted by the Ohio Constitution that includes eminent domain authority to take property within their borders; they also have constitutional authority to take property within or outside their borders for public utility purposes. Article XVIII, Sections 3 and 4, Ohio Constitution. The General Assembly generally may not interfere with a



municipal corporation's home rule authority to exercise matters of local self-government unless the state's action is held to be a matter of statewide concern.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	08-03-05	p. 1382
Reported, S. State & Local Gov't & Veterans Affairs	10-05-05	pp. 1474-1475
Passed Senate (29-0)	10-05-05	pp. 1476-1478
Reported, H. Civil and Commercial Law	---	---

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