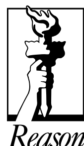

Privatization Watch

Analyzing privatization developments since 1976

Vol. 29, No. 5, 2005

A Project of Reason Foundation, the World Leader in Privatization

Regulating for Recovery

How Policy Can Help (or Hinder) the Gulf Coast

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Privatization Watch

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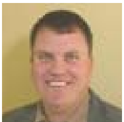

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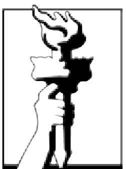

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Eminent Domain: Is there an alternative?

By Samuel R. Staley

Eminent domain destabilizes the investment climate for everyone except those negotiating directly with the city for a piece of the development project. Even in these cases, investors cannot be certain their investments and property are safe. If the neighborhood or commercial area continues to decline, or fails to achieve the investment objectives established by the redevelopment plan, their property rights will be at risk as well.

In fact, based on the conventional wisdom in the economic development community, cities would be obligated to reinitiate the redevelopment process, putting each property at risk again. Few people will invest in homes or small businesses if they are unsure that they will be in the home or neighborhood for long. Yet, this is the climate the broad-based use of eminent domain for redevelopment purposes creates.

Cities increasingly think of redevelopment as large-scale, comprehensive projects. An incremental approach to redevelopment is discouraged even when a project's timetable for completion may be 10 or 15 years.

An alternate approach is to look for more incremental and property-rights-friendly approaches to redevelopment. Dozens of such tools exist, including:

- Upgrading roads, sewers, public transit and other infrastructure;
- Implementing zoning regulations that restrict land uses to certain types and densities;
- Employing tax rates, tax abatements, and tax incentives to promote certain types of development;
- Reforming zoning codes to allow fast, streamlined project approvals;
- Encouraging private-sector development of specific types of projects through incentive zoning;
- Landscaping and streetscaping;
- Offering loans, grants, and direct subsidies to developers and builders; and/or
- Purchasing land voluntarily.

Samuel R. Staley is Reason's director of urban and land use policy. ■

Privatization Briefs

Incentives Matter

Hurricane Katrina slammed a barge into a bridge on Interstate 10 in Jackson County, Mississippi. Motorists prepared for many weeks of delays, but the repairs were made roughly twice as fast as expected. How did it happen?

"The bridge was repaired in record time thanks to a flexible bidding process and incentives in the contract," said U.S. Secretary of Transportation Norman Mineta, "We slashed red tape and got the job done."

The *Mississippi Business Journal* reports that T.L. Wallace Construction won the $5.2-million contract and earned a $1 million bonus for getting traffic flowing ahead of schedule.

Is No One Safe?

The *Kelo v. City of New London* decision gave governments greater latitude to use eminent domain to take property from one private owner and hand it over to another private owner, so long as the new owner generates more tax revenue. Many worried that this would give the well-connected more power to bully the not-so-well-connected. Yet even the most powerful among us may have reason to worry.

In June, Logan Darrow Clements faxed a request to the code enforcement officer of the town of Weare, New Hampshire seeking to begin the application process to build a hotel on the site of Supreme Court Justice David Souter's home. Souter voted with the majority in the *Kelo* case.

The proposed development is called "The Lost Liberty Hotel," and it would serve as a monument to the erosion of property rights in the United States. Clements claims that his hotel would generate much greater tax revenue for the city than leaving the property in Souter's hands.

Eminent Domain—Who needs it?

Not Bruce Benson. And the Florida State economist argues that those who want to build roads, pipelines, and so on don't need it either.

In an *Independent Review* article Benson tackles the "holdout problem" and other justifications for grabbing land:

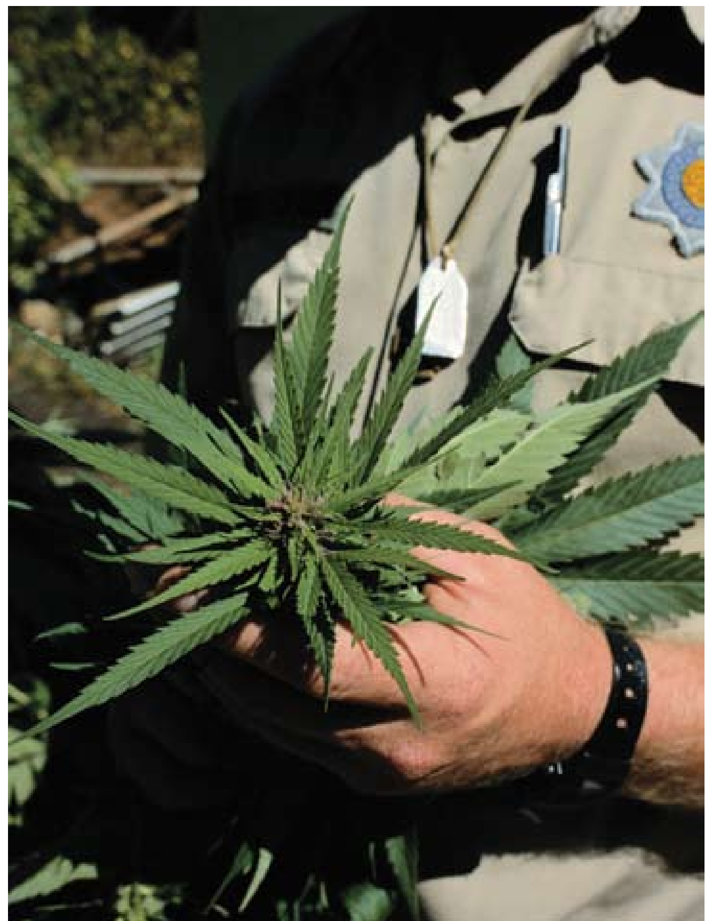
> *According to the conventional wisdom, road transportation would be highly inefficient without the government's power of eminent domain, because property owners could refuse to sell their property at the government's asking price. In reality, there are strong grounds for thinking that private, for-profit road companies would have fewer problems with holdouts and few problems as severe as that of government failure in road transportation.*

The article is available online: independent.org/publications/tir/article.asp?issueID=43&articleID=544

Privatizing Pot?

This summer DEA administrative law judge Mary Ellen Bittner began hearings that could establish a private, independent source of marijuana for research purposes. A University of Massachusetts at Amherst plant scientist is seeking permission to grow cannabis, but currently the National Institute on Drug Abuse is the only legal source.

Often who gets access to the government's marijuana has more to do with politics than science. Unsurprisingly perhaps, researchers who share NIDA's views on medicinal marijuana are more likely to get access. Interestingly, Bittner's predecessor referred to marijuana as "one of the safest therapeutically active substances known to man." ■



Regulating for Recovery:
How Policy Can Help (or Hinder) the Gulf Coast

By Adrian T. Moore

Of course lawmakers cannot prevent natural disasters. All they can do is prepare, respond, and recover. Governments endured much criticism for how they prepared for and responded to Hurricanes Katrina and Rita. Now as the Gulf Coast turns to the long process of recovery, lawmakers should consider how regulations affect a community's ability to bounce back from disaster.

Regulations typically arise to deal with problems where markets have failed, or from political pressure to benefit certain parties by reducing competition, or by attempting to alter people's behavior. Regulation is also popular for imposing an order and certainty onto free markets that many find desirable.

Like all policy instruments, regulations embody tradeoffs. They may effectively resolve a problem, but give rise to new problems or to unintended consequences. To decide if regulation is the right answer, you must look at the tradeoffs between the solution and all of its consequences.

During recovery from Hurricane Katrina, state and local government should give those tradeoffs a very close look. Regulations that may have been viewed as desirable or even a necessary evil during normal times may be an undue or unbearable burden during recovery and rebuilding.

Remember Charley

Consider how red tape tripped up another recovery effort. Many suffered damages and were forced to pick up the pieces when Hurricane Charley hit Florida, but, as the *Journal News* (Westchester County, NY, August 28, 2004) reported, even a hurricane was no match for occupational licensing laws.

> *Anthony Howell flew to Florida last week to help out a friend whose home was badly damaged by Hurricane Charley. Now, he may face a $5,000 fine and a felony charge.*
>
> *Howell, a Rockland County licensed contractor who runs Triad Builders in the hamlet, said his friend, Alex Arzoomanian, had called him on Aug. 14, because Arzoomanian's home in Kissimmee had been damaged by the hurricane and subsequent thunderstorms.*
>
> *His 4,000-square-foot shingled roof had taken a beating, and after the numerous Florida contractors he had called said they couldn't help him immediately, Howell offered to take a week off work to help.*
>
> *They began repairing the roof the next day. Three days into the job, Howell was approached by two deputies from the Osceola County Sheriff's Office and two investigators from the state's Department of Business and Professional Regulation, who gave him a cease-and-desist order.*

Under Florida law, only contractors licensed by the state may engage in roof repair. It carries up to a $5,000 fine. Not to mention that the practice of unlicensed contracting becomes a third-degree felony when the governor has declared a state of emergency.

The city's permit requirements imposed significant costs on property owners. Homeowners who wanted to legally perform any significant work on their own house had to obtain one or more permits from the city. The often arduous process required submitting an application and waiting up to eight weeks while the site plan was reviewed and approved by as many as four separate city agencies. One local bank president who tried to put an awning on his new downtown branch spent more than twice as much money winning bureaucratic approval for his plan to

beautify his business than it cost him to buy the awning.

If property owners are unwilling to deal with these bureaucratic hassles, their legal alternative is to hire a licensed contractor, who will secure the permits as part of the job. Hiring a contractor, however, is much more expensive than the property owner doing the work himself. (Not surprisingly, licensed contractors are great supporters of the property-owner work permit requirements.) Thus the consequences of the permitting process and associated costs may deter property owners from repairing or improving their property.

Reforming for Recovery

Instead of repeating the mistakes of the past, lawmakers should look closely at what has worked before. The following reforms can help speed and improve the recovery process.

1. Develop a Performance-Based Fast Track Contracting System.

This will help state and local governments get key infrastructure rebuilt much more quickly. When the 1994 Northridge earthquake in California resulted in the collapse of two bridges on the Santa Monica Freeway, the world's busiest, it was estimated that it would take from nine months to two years to open the damaged sections of the roadway if the bridge repairs were to go through the normal bidding process. The estimated cost to the local economy: $1 million to $3 million a day. To speed up the process the state transportation agency streamlined procurement requirements and offered substantial performance incentives and penalties to the contractor: a $200,000-per-day bonus for completing the project ahead of schedule and a $200,000-per-day penalty for each day the project was behind schedule. The financial incentives resulted in the overpasses being replaced in a little over two months — 74 days ahead of the deadline. The $13.8 million the contractor received in performance bonuses was more than offset by the estimated $74 million in savings to the local economy and $12 million in contract administration savings thanks to the shortened schedule.

2. Suspend Licensing Requirements for Construction Trades.

Usually after a disaster there is increased pressure to allow only local licensed construction workers to help the rebuilding. But this only provides great benefits to local licensed construction workers and great harm to local residents who want to rebuild. Certainly, enforcing rules against fraud and criminal behavior, and helping residents know what to look for in picking someone to work on their house or business becomes much more important when customers are desperate to rebuild. But restricting the supply of workers is even worse and dooms many to wait. For businesses such delays are often fatal. Residents have to be trusted to look out for their own welfare and make what deals are sensible to them, with reasonable help, not a heavy regulatory hand, from government.

3. Streamline the Building Permit Process.

Building review and permitting processes are notoriously slow and cumbersome. Contractors deal with it all the time and learn to live with it, but after a disaster thousands of residents find themselves having to deal with the permitting system and its frustrations.

There is little evidence that building fees and permits have a significant impact on the quality of work and compliance with local codes. Direct inspections for code compliance, with direct punishment for infractions, regulate outcomes rather than inputs and are far more effective. Permit requirements should be limited to ensuring compliance with zoning laws and other such broad community concerns.

To help speed up rebuilding, local officials should modify the permitting system to:

- Eliminate building permits for construction activity that creates no significant health or safety risk.
- Simplify issuance of building permits for major construction projects by allowing general contractors to obtain a "master building permit" for structural, electrical, heating and cooling, plumbing, and wrecking work.
- Allow employees and agents to apply for building permits.
- Allow owners of residential and commercial buildings to secure building permits for construction work to be done by their employees or by subcontractors that the owners hire.
- Enhance consumer protection by increasing the city's ability to police illegal contractors and contractors who violate building code provisions.
- Consolidate development review guidelines and develop performance goals and measures with a citywide project tracking database.
- Create a portal for electronic plan submission and review.

Immediately after disaster strikes, it is easy for television cameras to reveal government fumbling. Inadequate preparation and slow response result in countless people stuck in their homes, in shelters, and on freeways. What is less visible is how regulations help or hinder the recovery process. For the Gulf Coast, the long and lingering question will be how governments behave when the television cameras leave. ■

Paying for Recovery: Tapping Unused Assets

By Geoffrey F. Segal

The experience of other governments shows that leveraging the value of Mississippi's portfolio of state-owned assets can generate significant capital to help with rebuilding efforts. Furthermore, asset sales are also a long-term benefit as well by reducing state expenditures on maintenance as well as increasing the tax base. But simply divesting an unneeded asset is attractive for a variety of reasons.

First, asset divestiture typically results in a lump-sum payment of cash, providing much needed resources in this time of need.

Second, divesting state-owned real estate increases the tax base. State-owned lands do not pay property taxes nor do they typically produce sales and income taxes. Moreover, in constrained real estate markets with limited developable land, state-owned property represents a desperately needed source of capital for private economic activity.

Finally, systematically reviewing the state's assets portfolio—and divesting the state of those assets which are not deemed to be most efficiently owned by the state—will result in lower maintenance and operations costs, and, hence free money for other priorities. Divesting an unneeded property rids the government of an unproductive asset that saps resources. Selling this deadwood streamlines government service.

A review of assets that could be divested in California netted an interesting find including several billion dollars worth of assets.

State asset sales and realignment can take a variety of forms. In some cases, government entities sell real property outright, in either an "as is" or "entitled" state (having secured necessary zoning approval). In other cases, these transactions are established (particularly for enterprises like a golf course or other fee-generating facility) as a long-term franchise agreement or concession. Still in other cases, such as state-owned buildings, asset realignment includes sale-leasebacks, where the private sector purchases the property for a fixed price and agrees to lease back the facility to the government entity for an agreed upon period of time. Importantly, the state receives a lump sum cash payment in all three scenarios.

A review of assets that could be divested in California netted an interesting find including several billion dollars worth of assets. While Mississippi may not generate the same findings, similar types of properties may offer some potential to the state of Mississippi. Those include:

- Unused or underutilized portions of state correctional facilities, state universities, and state hospitals, particularly in high-growth areas;
- State-owned parking garages;
- State-owned transportation right of way;
- Old or obsolete state-owned buildings in high-value urban commercial real estate markets (shifting located services to leased facilities funded through sale proceeds);
- State-owned maintenance yards and facilities;
- Obsolete or unneeded armories; and
- Developable parcels of state-owned vacant land (does not include conservation lands, trust lands, etc.).

It is important to note that in most cases, the properties identified for potential disposal in California provided no direct benefit to the delivery of state programs. For instance, huge buffers exist around state correctional facilities and hospitals. Where once these facilities were located in largely remote areas with low property values, explosive growth has brought both population and commerce into these regions and property values have skyrocketed. What was once a relatively worthless piece of buffer land has become high-value developable

See ASSET SALES on Page 15

Paying for Recovery: Selling Federal Land

Rep. Tom Tancredo (R-Colorado) has proposed funding hurricane recovery by selling millions of acres of government-owned land. The government owns over 650 million acres, mostly in Western states and Tancredo asserts that over five million acres of federal land are classified as "vacant with no definable purpose."

And the feds are sitting on a lot of unused real estate, which includes plenty of commercial and agricultural properties. Yet, as a recent Reason policy brief points out, the federal government has little idea of what it actually owns. The brief also proposes a system for inventorying and selling excess federal lands. *What's in the Government's Attic* is available online: reason.org/pb33.pdf.

Rebuilding Schools and Public Buildings

By Lisa Snell

The areas hit hardest by Katrina should focus on creating new schools. Chester Finn from the Fordham Foundation has proposed using chartering and contracting to help the state quickly build new schools. The governor could put out a bid for proposals to new school leaders. Over the past decade and a half, the charter school movement has been developing expertise in building schools from scratch. Existing school networks—such as KIPP, Aspire Public Schools, Achievement First, Edison, etc. could quickly set up autonomous school networks. According to the Heritage Foundation's Ron Utt,

> *Section 422 of the Economic Growth and Tax Relief Reconciliation Act of 2001, give towns and cities throughout the country the opportunity to build public school facilities faster, better, and at lower cost by forming public-private partnerships with qualified real estate investors and developers. Under this approach—pioneered in England, Scotland, and Nova Scotia, as well as in the states of Florida and Texas—public school systems can now form partnerships with private-sector investors who fund the construction of public school buildings and lease the facilities to public school systems at annual costs that are below the costs that communities would incur if they built the schools on their own.*

To the utmost extent schools should be built with public-private partnerships. Perhaps one of the best and brightest examples of the potential to be harnessed through private enterprise comes from the District of Columbia Public Schools (DCPS). In December 1999, DCPS entered into a unique partnership with LCOR, a firm specializing in developing and managing facilities, to rebuild the James F. Oyster School. The new school will replace the deteriorating 73-year-old school in the Woodley Park neighborhood of Northwest Washington. LCOR will build the new school in exchange for excess land on which a new privately owned 211-unit apartment building, named the Henry Adams House, will be located.

The new school is the first new public school built in the District in 20 years. The current school has a leaky roof, does not have a cafeteria or gym, and cannot be wired for computers. The new school will be twice the size of the old one and will have a gym, kitchen, cafeteria, and common space.

A creative financing structure, made possible through the partnership, helped make the new school possible while realizing the value of an undervalued asset, the school's excess land. The new school is being financed by an $11 million, 35-year tax-exempt bond issue underwritten by Paine Webber. The bonds will be retired by means of PILOT (Payment in Lieu of Taxes) payments made by the private owners of the Henry Adams House project. Under the unique PILOT program, the apartment building owners will make these payments in place of real-estate taxes.

The partnership has brought a much-needed new school, as well as housing, to the D.C. area. Most importantly, the unique financing structure has brought these projects to fruition with little or no cost to the taxpayers—truly a win-win situation.

D.C. school officials started out skeptical but eventually got behind the project when the benefits became obvious. Mary Filardo, former head of the Oyster PTA, said after she helped arrange the deal: "It is important for other communities to do what we have done." ■

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The Kelo Aftermath

By Leonard Gilroy

This summer the Supreme Court made it clear that governments can seize private property via eminent domain and turn it over to another private owner. In *Kelo v. New London*, the nation's highest court sided with the city of New London by the slimmest of margins (5 to 4). Soon after, the American public would overwhelmingly side with lead plaintiff Suzette Kelo.

Within hours of the release of the *Kelo* decision, the story had rippled through the print, broadcast, and electronic media and firmly implanted itself in the national consciousness, provoking a sense of outrage across wide swaths of the American populace. For example, a Quinnipiac University poll taken in Connecticut found that 89 percent of respondents opposed the taking of private property for private uses, even if it promotes the "public good."

Justice Stevens wrote that the Court recognized that condemnation of property would entail hardship and that the states were free to impose restrictions on the use of this power by local authorities. In fact, the overwhelming reaction of citizens nationwide to the *Kelo* decision has prompted a flurry of state-level activity to limit the use of eminent domain for economic development purposes (see sidebar). Similarly, local governments nationwide have also been active in passing resolutions opposing the *Kelo* decision and ordinances limiting the scope of the power of eminent domain.

Federal lawmakers have also begun taking steps to address eminent domain abuse. Texas Senator John Cornyn and 18 co-sponsors introduced S. 1313 just days after the Kelo decision, which would bar federal funding for projects involving takings for economic development.

One week after the *Kelo* decision, the U.S. House of Representatives approved an amendment to a Treasury, Transportation, and Housing and Urban Development Appropriations bill that would deny federal funds to any state or local project involving the use of eminent domain on economic development grounds. And by an overwhelming 365-33 margin, the U.S. House of Representatives passed a resolution expressing disagreement with the majority in the *Kelo* decision. In addition, five other House bills have been introduced to address eminent domain abuse, as well as a proposed Constitutional amendment that would explicitly limit the federal and state government exercise of eminent domain to public conveyances or transportation projects.

More State Action

Other state-level responses to the Kelo decision include the following:

- Lawmakers in nine states—Alaska, Louisiana, Maryland, Mississippi, Oklahoma, South Carolina, South Dakota, West Virginia, and Wisconsin—have announced plans to introduce eminent domain legislation in upcoming sessions.
- Legislators in Colorado, Georgia and Virginia plan to bring up previously introduced bills for reconsideration.
- Legislators in Alabama, California, Colorado, Florida, Louisiana, Massachusetts, Michigan, New Jersey, Ohio, Oklahoma, and Texas are planning to introduce state constitutional amendments prohibiting eminent domain for private development.
- Officials in seven states—Arkansas, Delaware, Florida, Indiana, Missouri, Tennessee and New Hampshire—have established task forces or study commissions to research the eminent domain issue and, if necessary, recommend further action to curb eminent domain abuse.

States Respond

State governments have also responded swiftly. Legislation limiting the use of eminent domain for private projects has been introduced in 18 states: Alabama, California, Connecticut, Delaware, Florida, Illinois, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee and Texas. As of September 2005, three of these states have enacted legislation to prevent the use of eminent domain for economic development:

Alabama: In August, Alabama became the first state to pass a post-Kelo law limiting the use of eminent domain for economic development. Gov. Bob Riley signed Senate Bill 68, prohibiting local governments from using eminent domain for the purposes of non-governmental retail, office, commercial, industrial or residential development or for generating tax revenue. But an exception allows the seizure of "blighted" properties in areas covered by redevelopment or urban renewal plans.

Texas: The Texas legislature passed Senate Bill 7 (signed into law by Gov. Rick Perry in August) that prohibits government condemnation of private property for economic development projects. Exceptions include public uses such as transportation projects, public buildings, parks, ports and utility service

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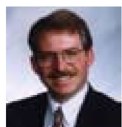
Two Decades of Eminent Domain

By Samuel R. Staley



On June 23rd, the U.S. Supreme Court upheld government efforts to use the power of eminent domain to seize private property for economic development purposes. In *Kelo v. City of New London*, a small band of property owners challenged New London, Connecticut's authority to seize their homes and businesses for the sole purpose of redeveloping the land to generate higher tax revenues.

Facing a steadily declining population and tax base, New London officials targeted a 90-acre section of the city for redevelopment in 2000—including 115 properties in the Fort Trumbull neighborhood—to clear the way for new offices and luxury apartments to complement a recently completed research facility developed by Pfizer, Inc. A group of 15 property owners, including lead plaintiff Suzette Kelo, refused to sell their properties, prompting the city to exercise its right of eminent domain and condemn these owners' lots. These owners subsequently sued the city for misusing its eminent domain power, arguing that economic development did not qualify as a "public use."

The Supreme Court sided with the city in a 5-4 decision. "Promoting economic development is a traditional and long accepted function of government," wrote Associate Justice Stevens for the majority. "There is…no principled way of distinguishing economic development from the other public purposes that we have recognized." The decision effectively makes private property rights non-issues for local governments as long as they follow proper legal procedures.

In a stinging dissent, Justice Sandra Day O'Connor wrote, "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms."

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A Green Light for Eminent Domain

Eminent domain is the government power to forcibly confiscate, or "take," private property as long as it is for a legitimate "public use" and property owners receive "just compensation." Originally intended to ensure that public facilities, such as roads, schools, and municipal buildings, were available for use by the public, local and state governments have increasingly exercised the power of eminent domain for any project that is considered economically beneficial. "Public use," as a practical matter, has morphed into a more ambiguous "public purpose."

The Institute for Justice, a Washington D.C.-based public interest law firm that defends property owners in eminent domain cases (including *Kelo*), estimates that eminent domain was used to threaten, or "take," more than 10,000 properties nationwide between 1998 and 2002 where the primary beneficiary would be another private property owner.

The *New London* case is a direct descendant of the judiciary's "hands off" approach to eminent domain. Case law, including the groundbreaking decision in the mid-1980s by the Michigan Supreme Court in *Poletown v. the City of Detroit*, broadened the power of local governments and gave them license to effectively void individual property rights at their discretion as long as they say it is for a public benefit. The *Poletown* case, in particular, was important because the Michigan Supreme Court allowed a city to raze an entire neighborhood to accommodate a new General Motors plant in order to meet an explicit economic development goal.

While *Poletown* was a state court decision, the decision had nationwide impact. Building on federal law that granted increasingly broad scope to state and local governments, cities and states across the nation have used eminent domain to seize private property and hand it over to other private property owners using economic development as a justification. The result, perhaps inevitably, was *Kelo*.

The Michigan Supreme Court overturned *Poletown* in July 2004 when it ruled against a county's use of eminent domain for a private business and office park in *County of Wayne v. Edward Hathcock*. The effects of this reversal are likely to be limited given the U.S. Supreme Court's decision in *Kelo* (although the Court explicitly noted the ability of states to adopt more strict guidelines than in federal law).

The change in attitudes toward property rights among urban policymakers has corresponded with changing the legal definition of public use and the scope of activities that could

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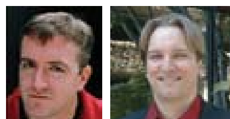
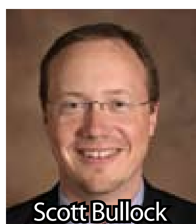
Supreme Advocate

Interview by Tim Cavanaugh and Ted Balaker



The attorney who argued the landmark eminent domain case surveys the blight in the wake of the Supreme Court's decision.

Scott Bullock, senior attorney at the Institute for Justice, represented the plaintiffs before the U.S. Supreme Court in the landmark eminent domain case *Kelo vs. City of New London*. On June 23rd the court came down on the side of the city. The day after the decision *Reason's* Web editor Tim Cavanaugh interviewed Bullock. Then in October *PW* editor Ted Balaker conducted a follow up interview to get Bullock's impressions on the post-Kelo fallout.


Scott Bullock

The following includes excerpts from the first interview, but the entire exchange is available online: reason.com/interviews/bullock.shtml.

Cavanaugh: Are you surprised by the decision?

Well I was surprised. It was rather shocking that a majority of the Supreme Court would permit this type of abuse. We're in an America where, as Justice Sandra Day O'Connor points out, church property can be taken for a Costco, a farm can be turned into a factory, and a neighborhood can be leveled for a shopping mall. Most people cannot believe that this can happen in this country and the Supreme Court gave sanction to that with their decision.

Cavanaugh: Is there any recourse for the plaintiffs now?

There is. There are going to be battles on two fronts. One, we're going to do everything in our power to keep these people in their homes. And we're going to explore all options to do so. But one thing that's coming out of this opinion that's very clear is that people are furious about this. And the anger comes from the left, right, libertarians, and everybody in between. People cannot believe that the court sanctioned something like this. So, I think that the growing grassroots rebellion against this is going to gain momentum (See "The Kelo Aftermath," Page 8). And I think that you'll see litigation about this in state courts, where the battle will largely be, at least for the time being. And you'll see a number of legislative changes through both legislatures and then also through the initiative process, as well. And we'll be there every step of the way to make sure that these abuses stop.

Cavanaugh: How is this going to affect lower court decisions in other eminent domain cases, such as the Michigan Supreme Court's reversal of the* Poletown *decision last year?

What's important to point out is that even the majority admitted that state courts are free to interpret their own provisions in a manner that's more protective of property rights. Thankfully, every state Constitution has prohibitions against private takings and a requirement that takings be for public use. And, only six states have held that economic development condemnations are Constitutional. Nine have held that they are not. And most states have not addressed it.

We're talking about taking somebody's home for a Costco.

Cavanaugh: Speaking of private economic development, the import of the decision has largely been seen as clearing the way for seizures for private economic development, but that's not really unprecedented. Even railroads were private endeavors. So are we seeing something new here or does this decision just affirm the status quo?

It's very different from something like a railroad. A railroad typically follows a very narrow strip of land. Railroads and utilities are what are known in the law as something called common carriers. So even though they might be privately owned, they're really the equivalent of public bodies because everybody, the public, has an equal right to them. Everybody has a right to the utility line. And they're very tightly controlled by public officials, so they're really the equivalent of public bodies; that's why the court upheld them. Here, we're talking about ordinary private uses of land—taking somebody's home for a Costco, taking church property to give to another private owner. That's why this opinion is so sweeping and it's so far removed from even what the courts did in the railroad cases, or even in the situations involving blight. Because even in those cases, the government had to show that there was some type of harmful condition to that land before it was justified for condemnation. Here, the court said, whatever land the developers happen to desire is up for grabs.

Cavanaugh: Can you give some examples of other eminent domain abuses among the 10,000 cases you guys have cited?

I'll give you one primary example that's brewing in Long Branch, New Jersey right now, where a group of people want to hang on to their working-class beach homes. They've worked very hard to get their modest bungalows along the shore. These houses were purchased by working-class folks in Newark and other places, and now many of the elderly residents live there

full-time; these are their dream homes. And the city of Long Branch is just proposing taking these people's homes and transferring them to wealthier homeowners. They want to tear them down and build million-dollar condominiums for people right along the shore in northern New Jersey. And so it's a case of taking the property of poorer folks and giving it to wealthier folks, and using it for the same purpose.

Balaker: The post-*Kelo *coverage has overwhelmed Oregon's Measure 37 (voters passed the measure, but it was later ruled unconstitutional by Marion County Circuit Judge Mary Mertens James). To what extent have the post-*Kelo *legislative efforts sought to incorporate protections against takings?

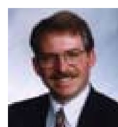
Not very much. The regulatory takings issue, while important, has a different body of law surrounding it and a different set of concerns distinct from public use, so many people do not see the issues as related. For instance, many of the folks who believe in a strict interpretation of "public use" do not agree with that the just compensation clause of the Constitution should reimburse people for loss in property values due to burdensome regulation.

Balaker: The day after the decision you were rather prophetic when you said: "People cannot believe that the court sanctioned something like this. So, I think that the growing grassroots rebellion against this is going to gain momentum." What are the chances that 20 years from now people will look back at the* Kelo *decision as something that actually strengthened property rights?

I think there is a pretty good chance of that and we are working hard to make sure that happens. It might be in certain waves. For instance, right now, there is a lot of interest on the part of legislatures in changing the law and that is very encouraging. However, the people who gain from eminent domain abuse—local political figures, redevelopment officials, and developers—are definitely mobilizing to try to stop any changes or to water them down to such an extent that they are not very meaningful. And while the public is overwhelmingly opposed to eminent domain abuse, the people on the other side know how to play to the political game and walk the halls of various state legislatures. So it is going to be a big battle, and, if legislative efforts fail, then the initiative/referendum process may have to take place. Because of the power of the other side, it is essential that citizens hold legislators feet to the fire on this issue and ultimately make them accountable. Also, encouragingly, I think state courts will be emboldened by the dissenting opinions in *Kelo* to recognize greater protections for property owners under their own state constitutions. ■

Refocusing Urban Redevelopment Policy

By Samuel R. Staley



In the wake of *Kelo*, citizens and local policymakers are starting to take a fresh look at how the economy repositions itself in an information-driven, globally competitive world market and what, if anything, public policy can do to influence these shifts.

Reason's 2005 study, *Eminent Domain, Private Property, and Redevelopment: An Economic Development Analysis* (reason.org/ps331.pdf), identified the following key observations and principles to help redefine how public officials approach redevelopment in urban areas.

- Focus on the Achievable. Vision is not enough. A practical key to successful economic development policy is the ability of local leaders to be realistic in their expectations and in the programs they create to achieve them.
- Provide Core Services Efficiently for Long-Term Success. Government investment does not create long-term job growth. Certain types of investments, such as road and sewer infrastructure, help lay a broad-based foundation for private investment.
- Create Sustainable Economies Through Private Investment. The vast majority of jobs come from local small businesses starting up, expanding and diversifying over time. These are the businesses hurt the most by eminent domain proceedings and large-scale redevelopment plans.
- Lead with Focus, Drive and Simplicity. A more effective strategy has been for local leaders to identify two or three key areas and goals, and then develop a timed, phased action plan to achieve them. The results are easier to measure, and implementation is clear and more likely to succeed.
- Respect the Rights of All Citizens. Government should focus on providing core services that serve the broad-based citizenry and avoid the trap of believing the biggest or wealthiest citizen has more rights or more to offer than the hundreds of homeowners and businessmen that make up the city's foundation.
- Encourage Voluntary Investment and Redevelopment. Cities can work with developers to accommodate property rights protections to create a business climate more supportive of property rights, greater investment certainty, and a more cohesive community. Most redevelopment projects are implemented in phases, and few projects depend on all properties being acquired in order for them to be successful.

See URBAN POLICY on Page 15

Privatization City Emerges in Georgia

By Geoffrey F. Segal

Watch closely as Georgia plays host to a fascinating experiment in public administration.

Sandy Springs, an unincorporated suburb of Atlanta in northeast Fulton County, holds enormous promise in demonstrating what local government is, how it should work and what it should be.

After decades of opposition, Sandy Springs finally won support for cityhood from the General Assembly this year, when HB 37 finally allowed the 35-year-old Committee for Sandy Springs the opportunity to fulfill its mission to "obtain accountable and responsive local government for the citizens of Sandy Springs."And in a June 21st referendum on turning the community into one of the largest cities in the state, Sandy Springs citizens approved incorporation with 94.6 percent of the vote, in effect seceding from the county.

At the forefront of the charge was a call for more local control over land use decisions. Leaders suggested that the county was "not accountable" or responsive on deciding the type of development the city would have and where it would be permitted. Residents have also been upset about public services that are both dismal and skyrocketing in cost. Now that they've wrestled control away, the new city has a unique opportunity to redefine how municipal government should look, function and interact with citizens.

Land use decisions will be relatively easy. A newly elected council will be in charge of making that policy at a more responsive local level.

In terms of improving services and controlling costs city leaders are starting with a blank slate enabling them to ask the fundamental questions about what role government should play and how it will undertake those responsibilities.

First, taking a page from management guru Peter Drucker, every "traditional" service or function will need to prove its worthiness and proper role and place within government. Absent any program history, city officials are able to apply Drucker's test for business—"If we weren't doing this yesterday, would we do it today?"—to the operation of municipal government.

There is little doubt that some services will no longer be provided by Sandy Springs, either because they've outgrown their purpose, they no longer are effective, or they are outside the role of government.

Second, city officials are determining whether to "make or buy" public services. City officials expect to contract out as many services as possible to the private sector. In addition, they hope to partner with neighboring municipal governments for service or even with the county. All of these options, for the most part, are preferred over "making" their own internal bureaucracy.

With a focus on efficiency and, more importantly, effectiveness of public service, Sandy Springs has embraced the power of competition to determine how services will be provided. Public and private entities alike are competing for the right to provide services in Sandy Springs. In addition, city officials see the value and power of a contract to guarantee high quality services and plan on using them for all services, including those potentially "made" with internal resources.

The plan is modeled after the city of Weston, Florida population 65,000, which incorporated in 1996 after years of poor public service and spiraling costs. Today the city has only three public employees. Most of Weston's services were privatized, resulting in better service at significantly lower cost.

"Over what the county was providing, there was a dramatic increase in the quality of services, with the next jurisdiction in the county more than double our property taxes," said Weston City Manager John Flint.

Weston and Sandy Springs are the latest to version off of the "Lakewood plan." In the 1960s Lakewood, California was the pioneer for this type of incorporation and management and the idea was copied by a lot of communities that were growing and wanted out of Los Angeles County services for the same reasons as Sandy Springs and Weston. Unfortunately, over the years Lakewood has not kept up with the original vision.

All of this activity in Sandy Springs is taking place under the fearless direction of Oliver Porter, who was appointed by Gov. Sonny Perdue to oversee a transition board. With the help of countless volunteers, Porter is steering uncharted waters for Georgia. However, a number of other communities are closely watching his progress and determining if a similar effort is what their community needs.

If you are suffering from a high tax burden, high cost of government or stale business climate, your local governments can learn a thing or two from Oliver Porter and Sandy Springs' approach to governance. All levels of government should periodically ask the fundamental questions about how governments operate and whether there is a better way; about what types of services and programs are essential and necessary to provide, and perhaps more importantly, what are not. ■

Denver Launches Permit Reform Effort

By Leonard Gilroy

Bureaucracy is driving up the costs of development in Denver, according to the city's multi-agency Development Council. The Council, established by Mayor John Hickenlooper to revamp the city's slow and burdensome development review and permitting process, released a report in July that found that delays in the process increase the cost of development in Denver by approximately 3 to 5 percent. The Council likens these delays to a tax that drives developers to Aurora, Lakewood, Douglas County, and other jurisdictions that compete with Denver for development investment.

With over $1.4 billion worth of permits issued in 2004, the Council estimates that Denver's "bureaucracy tax" totaled roughly $40 to $60 million of added costs for developers in that year alone. And this is no small concern. Regulatory delays and uncertainty increase the costs of development in communities nationwide, which in turn places upward pressure on housing prices, reduces housing production, and limits the market's ability to provide affordable housing.

To address this issue, the Council's report outlines a series of reforms intended to streamline the development review process and create a more certain regulatory climate for developers to operate within. For example, the Council found that there are currently no city-wide performance goals or standards for how long development review should take. Not only would such standards be created in the reform effort, but the Council also recommended creating a city-wide project tracking system and project management database that would allow city staff, elected officials, developers, and other stakeholders to see exactly where a project stands under the new development review scheme.

The experience of Clark County, Washington may be useful as Denver embarks on its permitting reform, particularly with regard to measuring performance and ensuring that reforms are actually working. In 2000, Clark County's Community Development Department undertook a similar reform effort as part of a wide-ranging performance audit. By comparing actual outcomes to performance measures and goals over the next several years, Clark County was able to identify significant variances from its performance goals and analyze why they were occurring. For example, despite reforms the county was still missing its time goals for approving certain single-family

building permits by over 200 percent. This led to subsequent reviews to determine further areas for improvement.

Performance reviews also helped track improvements. Between 2000 and 2002, the county reduced the average time to deem development applications "fully complete" (containing all required information for review) from 60 days to 50 days. Though still a long way from meeting their goal of 30 days, the share of applications deemed complete within 30 days increased from 22 percent to 33 percent during that time.

Denver's Development Council has begun to seek public input on its draft report, and a 12-member advisory board will be appointed to guide further reforms. But the city has already started taking steps to streamline its permitting and approval processes.

An appeals board comprised of city department heads has been established to resolve disputes holding up projects in the development pipeline. And the city's Community Planning and Development Department has teamed with the city attorney's office and the Public Works and Parks and Recreation departments to start streamlining the permit approval process to reduce delays.

Still city leaders are not underestimating the difficulty of the task ahead, particularly affecting change in city employees steeped in an entrenched bureaucratic culture. According to Public Works Director Bill Vidal, "Transforming them is at the root of the process...[t]hey have to stop being merely regulators and work more on being facilitators. It's not easy, but it's working. Many of these people felt they were the unsung heroes of the city, saving the city from possible harm. But we have to show them that doing the process well doesn't necessarily translate into doing a good job."

The Council's draft report is available online: http://www.denvergov.org/admin/news/newsforms/Development%20Review%20Draft%20Report%20For%20Public%20Comment%20July%202005.doc ■

Toll Road Sale Proposals Proliferate

By Robert W. Poole, Jr.

The fact that Chicago was able to sell the right to own, operate, and charge tolls on the Chicago Skyway for 99 years—and get $1.83 billion up front for this right—was bound to have consequences. And so it has turned out. Initially there was just speculative talk, by public officials in New Jersey, New York, and Indiana. But by the end of summer 2005, things had gotten a lot more serious.

The action has taken three forms. First is serious discussions by public officials about privatization of specific existing toll facilities. Second is unsolicited proposals from the private sector to bail out troubled start-up toll roads. And third is an unexpected proposal to lease the (mature) Dulles Toll Road and build the proposed rail transit extension to Dulles Airport.

In four states public officials are seriously exploring long-term leases of well-established toll roads. A Knight Ridder story in July explained that New Jersey's acting governor, Richard Codey, hopes to bail out the collapsing state Transportation Trust Fund, which has issued so much debt over the past decade that by June 2006 nearly all its revenue will have to be devoted to debt service, leaving nothing available for new projects. A sale or lease of the New Jersey Turnpike could put many billions into the fund. Democratic gubernatorial candidate Jon Corzine (currently a U.S. Senator) is believed to be supportive of the idea.

Delaware Secretary of Transportation Nathan Hayward has proposed the privatization of 51-mile Route 1, a toll road linking I-95 to Dover. There have been speculations that the bidder would also have to commit to the $500 million widening of US 301 from Rt. 1 to the Maryland border.

Indiana Gov. Mitch Daniels and his new DOT director issued a request for proposals in September for the long-term lease of the Indiana Toll Road (I-80/90). They are being advised by a national legal firm with expertise in tolling and public-private partnerships and a major investment banking firm. Daniels has also announced plans to develop the proposed I-69 from Indianapolis to Evansville as a toll road, under one of the new toll pilot programs in SAFETEA-LU.

Also in September, officials in Houston authorized a study of the pros and cons of leasing the toll roads of the Harris County Toll Road Authority. The move was prompted by two recent studies of the idea. A report by First Southwest Company on options for the toll roads, commissioned by the county, estimated that a lease or sale could net between $2.7 and $4.4 billion. A separate study by Goldman Sachs estimated the proceeds at $7 billion. The new study is to be completed by April.

So far, two unsolicited private-sector proposals have been made to rescue shaky start-up toll roads whose traffic is far enough below projections to put their bonds at risk of default. In California, Macquarie (part-owner of the Chicago Skyway franchise) made an informal proposal to lease the troubled San Joaquin Hills Toll Road (SR 73) for 50 years, taking on the revenue risk and presumably planning to refinance the existing toll revenue bonds. And in Virginia, a more formal proposal has been submitted by Transurban to the Virginia DOT to rescue the Pocahontas Parkway (SR 895) in Richmond. This start-up toll road's revenues have been running at about 50 percent of projections, making it unable to meet the debt service payments on its $350 million worth of bonds. Both Macquarie and Transurban are headquartered in Australia, where they own and operate a number of toll roads.

And less than a month after Virginia House Speaker Bill Howell made a speech suggesting the sale of healthy assets like the Dulles Toll Road, the state received an unsolicited proposal from a consortium of local firms and Italy's Autostrade offering $1 billion for a 50-year lease of the Dulles Toll Road. But unlike the case of the Chicago Skyway, in this case the billion dollars would not consist of a check handed to the state. Rather, the consortium offered to invest "more than $1 billion" in (1) improvements to the toll road, (2) operating and maintaining it for 50 years, and (3) paying for Virginia DOT's share of the planned $2.4 billion Dulles Rail project. The state recently doubled toll rates on the toll road, and plans to use much of the new revenue for the controversial rail project. Transportation Secretary Pierce Homer and Gov. Mark Warner have said that they are eager to receive competing proposals.

In anticipation of the growing interest by public officials in the sale or long-term lease of toll roads (in the wake of the Chicago Skyway deal), Reason Foundation in June published "Should States Sell Their Toll Roads?" This new policy study is a comprehensive 56-page guide to thinking through the pros and cons, including a set of guidelines on how to proceed so as to maximize the chances of ending up with both a financial success and a transportation success. (www.reason.org/ps334.pdf). ■

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AFTERMATH

provision. S.B. 7 also prevents universities from using eminent domain to acquire land for lodging and parking facilities. It also establishes a study commission to further examine eminent domain during the legislative interim.

Delaware: Delaware Gov. Ruth Ann Minner signed Senate Bill 217 in July, which "requires that the State's power of eminent domain only be exercised for the purposes of a recognized public use as described at least 6 months in advance" in an official planning document. However, the Institute for Justice has criticized Delaware's law as effectively reinforcing *Kelo*, as it ties the exercise of eminent domain to planning and doesn't limit the scope of "public use," which includes private economic development under the *Kelo* ruling.

Leonard Gilroy is a Reason policy analyst and a certified planner. ■

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URBAN POLICY

- Evaluate the Process Rigorously. A more rigorous definition of "blight" or "deteriorating" would provide guidance regarding which neighborhoods do in fact degrade community welfare. Public officials should also be required to consider the feasibility of accomplishing the project's goals by less aggressive means.

Selected Eminent Domain Resources

- Reason's Eminent Domain resource center (reason.org/eminentdomain/)
- 2005 Reason Study: *Eminent Domain, Private Property, and Redevelopment: An Economic Development Analysis* (reason.org/ps331.pdf)
- Reason's *Amicus Brief on* Kelo v. New London (reason.org/KeloAmicusFinal.pdf)
- *Public Power, Private Gain.* A report documenting the extent of use of eminent domain to turn land over to private parties. (castlecoalition.org/report/)
- Institute for Justice. The public interest law firm that represented Suzette Kelo and the other plantiffs before the Supreme Court in Kelo vs. New London. (ij.org)
- The Castle Coalition. A group organized to fight eminent domain abuse. (castlecoalition.org)
- Eminent Domain Watch. A Weblog on eminent domain abuse (emdo.blogspot.com). ■

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PROPERTY RIGHTS

fall under eminent domain. Even though governments are still responsible for paying "just" compensation when private property is seized, they often don't. Local officials often attempt to minimize payment for the property. Many of these and other abuses were chronicled in a recent book by Steven Greenhut, *Abuse of Power*. Cities often:

- hire appraisers that underestimate property valuations;
- use the threat of eminent domain to compel property owners to sell at below-market rates;
- compensate property owners at assessed valuation even though market values are significantly higher;
- avoid paying relocation costs for businesses and homeowners;
- discount the value of "good will" and other intangible value implicit in a business's reputation or location; and/or
- underestimate start-up and marketing costs involved after a business moves.

Whether the courts will scrutinize compensation decisions more rigorously in the wake of *Kelo* has yet to be seen. ■

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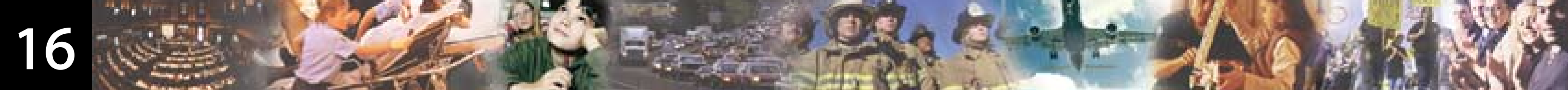
ASSET SALES

land in a housing-starved region. The facilities can continue to operate with smaller buffers.

Other government entities across the United States can confirm Mississippi's opportunities. In June of 2003, the Arizona Land Department generated $51.2 million through the sale of two parcels of land, even though the properties appraised for $27.9 million. In other words, the state generated more than $23 million more than anticipated through the sale of two parcels of state-owned land.

In another illustration, Orange County, California raised more than $300 million through real asset sales and sale leasebacks over the course of 18 months to help recover from collapse into bankruptcy in 1995.

In New York, the Empire State Development Corporation also generated hundreds of millions of dollars in revenues through sales and leasebacks of state-owned properties including the New York Coliseum, state mental health campuses, parking lots, armories, and state-owned golf courses. In one of its first sales, New York divested a state-owned golf course for more than $3 million. ■



Who, What, Where

Reason Studies

New Approaches to Affordable Housing, Chris Fiscelli, Project Director: Adrian T. Moore, Policy Update No. 20: reason.org/update20_affordablehousing.pdf

Restricting Eminent Domain: Model State Statutory Language & Ordinance/Charter Provision, reason.org/eminentdomain/eminentdomaintools.shtml

Eminent Domain, Private Property, and Redevelopment: An Economic Analysis, Samuel R. Staley and John P. Blair, Policy Study No. 331: reason.org/ps331.pdf

Affordable Housing in Monterrey County: Analyzing the General Plan Update and Applied Development Economics Report, Benjamin Powell, Edward Stringham, and Adam Summers, Policy Study No. 323: reason.org/ps323.pdf

Do Affordable Housing Mandates Work? Evidence from Los Angeles County and Orange County, Benjamin Powell and Edward Stringham, Policy Study No. 320: reason.org/ps320.pdf

Housing Supply and Affordability: Do Affordable Housing Mandates Work?, Benjamin Powell and Edward Stringham: reason.org/ps318.pdf

Driving More Money into the Classroom: The Promise of Shared Services, William D. Eggers, Lisa Snell, Robert Wavra, and Adrian T. Moore, Policy Study No. 339: reason.org/ps339.pdf

The Sky Isn't Falling in Colorado: Proven Strategies for Budget Reconciliation, Geoffrey F. Segal and Adam B. Summers: reason.org/segal_co_budget_study.pdf

Virtual Exclusive Busways: Improving Urban Transit While Relieving Congestion, Robert W. Poole, Jr. and Ted Balaker, Policy Study No. 337: reason.org/ps337.pdf

Reason Foundation studies archived at reason.org/policystudiesbydate.shtml

Privatization Watch Back Issues available at reason.org/pw.shtml

Publications

Kelo v. City of New London: What it Means and the Need for Real Eminent Domain Reform, Castle Coalition: castlecoalition.org/pdf/Kelo-White_Paper.pdf

Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain, Dana Berliner, Castle Coalition: castlecoalition.org/report/

New Tax Law Boosts School Construction with Public-Private Partnerships, Ronald D. Utt, Heritage Foundation: heritage.org/Research/Taxes/BG1463.cfm

Agenda 2005: A Guide to the Issues—Land Use, Georgia Public Policy Foundation: heartland.org/pdf/17013.pdf

Events

Advanced Performance-Based Solutions in Government, Performance Institute, Arlington, VA, January 12-13: performanceweb.org

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