

Eminent Domain and Economic Development in Indiana

Prepared Statement by

Samuel R. Staley, Ph.D.
Director of Urban and Land Use Policy
Reason Foundation
<http://www.reason.org>
(e) sam.staley@reason.org

And

Adjunct Scholar
Indiana Policy Review Foundation
<http://www.inpolicy.org>

Submitted

Interim Study Committee on Eminent Domain
Indiana Government Center South
302 W. Washington Street, Indianapolis

August 10, 2005

Chairperson Wolkins and members of the committee, thank you for giving me this opportunity to address eminent domain issues in Indiana. I hope my comments today will help clarify key issues in this debate and perhaps even give you some guidance in developing effective public policy for the state of Indiana on the use of eminent domain.

I should mention from the outset that I will be approaching eminent domain primarily, but not exclusively, from the perspective of economic development. I will not address the legal aspects of its use except in addressing the ways federal and state courts have provided state and local governments with relatively more or less discretion in its use. I will leave legal issues to attorneys that specialize in this area of property law.

I. *Kelo v. New London* and Local Government Discretion

The U.S. Supreme Court has left the door wide open for individual states and cities to use eminent domain for a wide range of purposes. The majority opinion in *Kelo v. City of New London* was quite clear that federal courts would not invalidate takings of private property by state and local governments as long as those governments followed proper administrative procedures. In essence, the federal court said that “public use” could be, from a public policy perspective, anything the majority of a local government considered important to the public health and welfare.

Many in the planning and economic development community have attempted to trivialize the importance of this decision by claiming the U.S. Supreme Court simply validated what state and local governments have been doing for fifty years.

In 1954, the U.S. Supreme Court upheld the use of eminent domain in *Berman v. Parker* because it determined that the removal of urban blight served a “public purpose”. “Public use” was not longer limited to public services and facilities with broad access or use by the public. Supporters of broad discretionary authority for local government use of eminent domain claim *Kelo* simply validated practice established in *Berman*.

I don't believe this is accurate. While *Kelo* did put a federal judicial stamp of approval on eminent domain for economic development purposes, most state and local governments were at least bound by one substantive limit—they had to make a determination of “blight” before the power could be used. As Sandra Day O'Connor noted in her dissent in *Kelo*, a blight determination at least required local governments to show that the current land use was negatively impacting the community or neighborhood. In the original meaning, urban blight also meant that the neighborhood would not likely turnaround without direct government intervention.

Kelo removed this limitation at the federal level. In essence, the court said a public use was anything a legislative majority said would benefit the community more broadly. This could be something as narrow as a project that raises more tax revenue than the current use, even if the current use is both viable and thriving. Communities could use eminent domain to seize a Motel 6 or Holiday Inn if they believed a Ritz Carlton could generate more tax revenues.

In short, *Kelo* laid down legal reasoning that transformed the term “public use” to “public benefit”.

II. Judicial Protections for Private Property

Critics of *Kelo* are correct when they say that that the new standard makes all private property vulnerable to a taking by government with virtually no substantive constraints. States and localities are bound by procedural requirements, and are required to pay compensation to the land owner, but there is no longer any practical presumptive right to private property. Indeed, the U.S. Supreme Court even allows the transfer of property seized by local governments to be transferred over to new private owners at steeply subsidized rates as long as the local government publicly decides it serves a public benefit.

These concerns are not hypothetical or unique to the circumstances surrounding *Kelo*. In *Eminent Domain, Private Property, and Redevelopment: An Economic Development Analysis* (<http://www.reason.org/ps331.pdf>), I document with economist John P. Blair examples where cities have declared entire neighborhoods “blighted” because houses had one-car rather than two-car garages, were too small, or too old.

In many cases, the public benefit is dubious at best. In Mesa, Arizona, for example, property with a long-time family business was targeted by another business owner. The city condemned the property so it could be redeveloped by another private business.

Closer to home, eminent domain is being used to bulldoze long-time homes and businesses for parking lots for the new Colts stadium, even though research shows the public benefits of sports stadiums are dubious at best.

III. Eminent Domain and Economic Development

So, the time is ripe for the General Assembly to look carefully at the use of eminent domain for economic development purposes. In deliberating on the potential benefits of eminent domain, however, state legislators should keep its role in economic development in perspective.

In an article for the Indiana Policy Review (<http://www.inpolicy.org/Vol16No2.pdf>), I observe that private property rights are at the core of market economies. Protecting those rights is an essential task of government. To the extent the General Assembly makes those rights less stable and less secure, economic development will suffer.

Economic development relies on the spontaneous development of private businesses and the willingness of people to move into homes where their lifestyle and livelihoods are secure. But,

- o How secure can someone's home or business be when state and local governments can seize their property and transfer it to someone else on the basis of a simple legislative majority?
- o Will someone buy a home in a deteriorating inner city neighborhood, invest thousands of dollars in its renovation, or make a long-term commitment to the community if their property can be seized at the whim of the local government or redevelopment authority for high profile projects with questionable benefits?

Oddly enough, no one questions this reasoning when it comes to large investment by large corporations. Their property rights are usually secured by contracts or development agreements with local governments; the idea that a large company would invest in a state or city where their plant could be bulldozed at anytime if another company provides a better offer to the local government seems absurd. For some reason, we fail to recognize that families and businesses of all sizes use the same calculus.

IV. Proper Scope for Eminent Domain

Looking at property rights and economic development this way does not imply that eminent domain can never be used. On the contrary, eminent domain may be necessary. But the Founding Fathers (and the U.S. Constitution) envisioned that those circumstances would be rare and the power would be used only when there was a clear and obvious public benefit.

Thus, they placed two significant constraints on its application:

- o *Just compensation* to ensure there was a financial cost to seizing property and the victims of eminent domain would be made financially whole; and
- o *Public use*, meaning the public had broad access to the service provided or that a public service would be provided that could not (or would not) be provided by the private sector.

The public use constraint has been seriously eroded through judicial interpretation. In fact, I believe it is not longer practically binding on state and local government.

The General Assembly must also keep in mind that a number of alternatives to using eminent domain for economic development purposes exist, including:

- Market purchases of land;
- Phasing development to accommodate properties at different times in the development cycle;
- Purchasing easements or options for future development;
- Lowering taxes;
- Lowering regulatory barriers to development and investment;
- Streamlining planning, zoning, and permit approvals;
- Providing public infrastructure in a timely and efficient manner;
- Mediating land disputes or acquisitions among private property owners; and
- Providing loans, grants, and tax incentives;

So, what guidelines should state legislators consider? I suggest four:

1. **Require use for public use.** The “public benefit” criterion adopted by the U.S. Supreme Court is so vague it lacks any meaningful constraint on government seizures of private property. The General Assembly should consider criteria that, at a minimum, require eminent domain to be used when: a) the general public benefits from general access to the service or facility *and* b) the private sector cannot provide the public service or facility even though significant benefits will accrue to the community through its development.
2. **Use as a tool of last resort.** Eminent domain should be used only when all other reasonable and voluntary approaches have been exhausted *and* the failure to acquire the property will prevent the project from moving forward. Eminent domain should not be considered “just another tool” for economic development purposes with the same standing and legitimacy given to other strategies and approaches such as tax incentives.
3. **Use when faced with imminent public endangerment.** Eminent domain should properly be used if the public health and safety are endangered by the current use of the property, and its seizure will materially reduce the danger to public health and safety.
4. **Ensure that private benefits are incidental to the projects.** Eminent domain should not be considered as an alternative strategy for acquiring land and property for private development. All private property owners should shoulder similar burdens and costs to ensure a level playing field.

Thank you for your time and consideration. I am available for questions from the committee.