

PENDING AND ANTICIPATED GEORGIA LEGISLATION

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I. Introduction

Eminent domain has been identified as one of the primary issues for consideration and “improvement” for the 2006 session of the Georgia General Assembly. Several factors have brought eminent domain under the legislative microscope, but the most notable is the highly publicized and controversial decision of the United States Supreme Court in the case of Kelo v. City of New London, Connecticut. This decision has sparked legislative efforts throughout the country to limit or prohibit the use of eminent domain to acquire property for economic redevelopment or to increase the tax base, and specifically to prohibit the sale or lease of property acquired through condemnation to private enterprise for private development.

Even before the Kelo decision, legislation was introduced in the 2005 session of the Georgia General Assembly that would prohibit the exercise of eminent domain for the purpose of economic development or for improving the tax revenue or tax base, and would further prohibit the use of property acquired by eminent domain by a private entity for such purposes. Senate Bill 86 passed the senate and will be considered by the house of representatives during the 2006 session.

In response to the Kelo decision and in further consideration of the issues raised in Senate Bill 86, the Senate Committee on Eminent Domain and Economic Development met several times and conducted public hearing during 2005. The committee’s primary

focus began with an examination of condemnation for economic development purposes, but the scope of its inquiry was expanded to include virtually every area of eminent domain, including urban redevelopment for slum clearance, condemnation to clear title problems, fairness in the negotiating and acquisition process, the award of attorney fees, and the basic public purposes for which eminent domain may be exercised. In addition, the Senate Committee on Inverse Condemnation held public hearings to examine issues of inverse condemnation that may be the subject of specific legislation during the coming session.

Several constitutional amendments and statutes proposing changes to the law of eminent domain have been prepared or introduced for the 2006 legislative session. It seems clear that many more will be proposed during the session, and some changes to the current structure of eminent domain will be made.

II. Constitutional Background

The constitutional basis for the Georgia law of eminent domain is in Article I, Section III, Paragraph I of the Georgia Constitution which provides that “private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid . . .” The Georgia Constitution did not create the right of eminent domain, but it merely declared a common law principle that existed prior to the adoption of the constitution. Young v. McKenzie, 3 Ga. 1 (1846); Carr v. Georgia R.R. and Banking Co., 1 Ga. 524 (1846). The broad concept of public purpose as stated in the Georgia Constitution has been divided into the theory of public use and the theory of

public benefit. The public use theory applies where the general public has the right to use the property acquired, even though all members of the public may not actually use it. The public benefit theory applies where the property is acquired for a purpose that would promote the public interest even in the absence of actual use by the general public. Nolan v. Central Georgia Power Co., 134 Ga. 201, 67 S.E. 656 (1909); and Gold Mining Co. v. Parker, 59 Ga. 420 (1877). Public use includes government buildings, highways, streets, public transportation, railroads, and public utilities. Public benefit includes purposes that promote the public interest, develop natural resources, or provide for the public welfare, such as slum clearance, public housing, the redevelopment of economically or socially depressed areas, or the development of trade, commerce, industry and employment opportunities. Much of the legislative efforts will be aimed towards limiting or eliminating the use of eminent domain for public benefit purposes.

Georgia law in the area of public benefit has developed through constitutional and legislative means. Article IX, Section II, Paragraph VII of the Georgia Constitution entitled "Community Redevelopment" was approved in 1954. Under this provision, the General Assembly may authorize any county, municipality, or housing authority to undertake and carry out community redevelopment, which may include the sale or other disposition of property acquired by eminent domain to private enterprise for private uses. This constitutional provision is the basis for the Urban Redevelopment Law, O.C.G.A. §36-61-1, et seq. which provides for redevelopment of slum or blighted areas through various methods, including the exercise of the right of eminent domain and the use of property acquired by eminent domain by private enterprise for private use.

Article IX, Section VI, Paragraph III of Georgia Constitution entitled “Development Authorities” provides that the development of trade, commerce, industry, and employment opportunities are a public purpose vital to the welfare of the people of this state. This provision authorizes the General Assembly to create development authorities to promote and further such purposes. This provision is the constitutional basis for the Downtown Development Authorities Law, O.C.G.A. §36-42-1, et seq. and the Redevelopment Powers Law, O.C.G.A. §36-44-1, et seq. These statutes authorize the redevelopment of economically and socially depressed areas and the promotion of trade, commerce, industry and employment opportunities. Each statute authorizes the use of the eminent domain to acquire property for such purposes and the use of such property by private enterprise.

In addition to these general constitution and statutory provisions, there are numerous local constitution amendments that authorize cities to carry out economic and social redevelopment projects and to use eminent domain to implement the projects.

III. Redevelopment Issues

While the initial legislative incentive was to limit or prohibit the use of eminent domain for economic development or to increase the tax base, the legislative agenda clearly will be expanded to consider limitations on all redevelopment activities, including the Urban Redevelopment Law. Senate Bill 391 and House bill 960 propose an immediate moratorium on the exercise of eminent domain under the urban redevelopment law.

Other proposed legislation is aimed at a more permanent change in the law of eminent domain:

House Bill 943 provides that economic development or redevelopment shall not constitute a public purpose for which property may be acquired by eminent domain. This bill also prohibits state and local governments from exercising eminent domain for governmental purposes other than those specified in the bill, which purposes are limited to public roads and streets and for public transportation and for public utilities and pipelines to the extent specifically authorized by law. The bill concludes with the statement “In any doubtful case, all laws of the State shall be construed to favor the protection of private property rights over the public right of eminent domain.”

House Resolution 1036 is a proposed amendment to the Georgia Constitution that contains a major revision to Article I, Section III, Paragraph I. This proposed amendment would limit the exercise of eminent domain to public purposes as defined by the General Assembly; would prohibit the state, county or municipality from transferring property acquired by eminent domain to any other entity, public or private; includes a specific definition of the term “blighted areas;” and

contains procedural notice requirements before condemnation can be filed and time limits on which a public project must be commenced.

House Resolution 1037 is a proposed amendment to Article I, Section III, Paragraph I of the Georgia Constitution providing that eminent domain may be exercised only for specified public purposes to include (1) public road or street purposes or public transportation purposes; (2) for ownership by a governmental entity and used in the performance of one or more governmental functions; and (3) for public utility and pipeline purposes to the extent specifically authorized by existing or future general laws. The proposed amendment specifically provides that economic development or redevelopment shall not constitute a public purpose for which private property may be acquired by eminent domain.

House Resolution 87 proposes an amendment to Article I, Section III, Paragraph I of the Georgia Constitution to provide that eminent domain may be exercised only by the state, counties or municipalities of the state and may not be exercised by any government authority, government created entity or corporation, private entity, or person. The resolution would allow the state, counties, or municipalities to transfer ownership of property to a public authority or other government entity or to a publicly regulation utility company for the purposes specifically authorized in the resolution. The resolution would prohibit the use of the eminent domain

for purposes of increasing the tax revenue of a government including the transfer of property to a private entity for economic development purposes.

In a related area of the use of eminent domain for a public purpose, House Resolution 168 purposes an amendment to the Georgia Constitution to add Article IXA to specifically provide that a system of public transportation of passengers for hire is a public purpose for which the power of eminent domain may be exercised.

IV. Inverse Condemnation

The Senate Inverse Condemnation Study Committee held public hearings to consider whether additions to general law are required in the area of inverse condemnation. The committee considered extensively and received testimony regarding Senate Bill 30 that would amend O.C.G.A. Title 22 to provide procedures for a petition in Superior Court and a hearing before special master to adjudicate allegations that a persons property had been taken or damaged by inverse condemnation. Much of the public comment and consideration went beyond the procedural ability to bring an inverse condemnation action and dealt with the substantive issues of when compensation could be recovered. Much of the discussion dealt with issues of regulatory takings such as expansion of stream bed buffers in northeast Georgia, zoning restrictions on the use of property and other governmental regulations that might restrict an owner's preferred use of the

property. The major issue is how much regulation is required before compensation must be paid.

V. Other Legislation of Interest

House Bill 913 is a proposed amendment to O.C.G.A. Title 22 that would allow compensation for interference with a property owner's access rights including any median or other interference creating increased circuitry of travel or a change in traffic patterns.

Senate Bill 276 is a proposed amendment to O.C.G.A. Title 20 relating to the powers of local Boards of Education and would provide that such boards may not exercise the power of condemnation if another appropriate parcel of property is for sale within three miles of the property being considered for condemnation.

House Bill 210 is a proposed amendment to O.C.G.A. Title 48 that would exclude from taxable net income any capital gain resulting from a condemnation of property or a transfer of property to a potential condemnor under threat of condemnation.

During the senate hearings concern was expressed over the existing eminent domain attorney fee provisions that would allow a condemning body to recover attorney fees from a property owner depending on the results of a jury trial appeal. O.C.G.A. §22-2-84.1; constitutionality upheld in Martin v. Henry County Water and Sewage Authority, 279 Ga. 197 (2005). No legislation has been proposed on this subject.

The senate committee also expressed concerns over perceived threats and abuses in the negotiating and acquisition efforts prior to condemnation. No legislation has been proposed in this area, but one means to address the concerns would be to amend the Georgia Relocation Assistance and Land Acquisition Policy Act of 1973 to apply to state projects as well as to federally assisted projects within Georgia.

VI. Conclusion

It is certain that additional legislation will be proposed during the session and that substantial amendments will be made to any proposed legislation before it is approved. But it is a foregone conclusion that changes will be made to the law of eminent domain in Georgia.