EMINENT DOMAIN: ARE OHIO HOMEOWNERS AT RISK?

FIELD HEARING

BEFORE THE

SUBCOMMITTEE ON
HOUSING AND COMMUNITY OPPORTUNITY

OF THE

COMMITTEE ON FINANCIAL SERVICES

U.S. HOUSE OF REPRESENTATIVES

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EMINENT DOMAIN: ARE OHIO HOMEOWNERS AT RISK?

Thursday, August 18, 2005

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON HOUSING AND
COMMUNITY OPPORTUNITY,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:10 a.m., in the Council Chambers, Village of Hebron Administration Building, 934 West Main Street, Hebron, Ohio, Hon. Bob Ney [chairman of the subcommittee] presiding.

Present: Representative Ney.

Chairman NEY. The meeting will come to order. I want to thank everybody for coming here. Jeff Riley, who works for the ranking member, Barney Frank from Massachusetts, is on his way.

My name is Bob Ney, I am the chairman of the subcommittee. We have had hearings in Washington D.C., on this issue. Mike Oxley from Ohio is Chairman of the full Financial Services Committee and he sends his regards. All members of the committee were notified today of the hearing, from across the United States. So, everything today, we will take for the record. It will be an official hearing and without objection, the record will be open for 30 days in case people have things they want to add or delete.

Before we start, I thought if we could, because we have other elected officials; if we just want to start over here. We will start with you, Grant, why don't you stand up and show the elected officials that are here.

Mr. DOUGHERTY. Grant Dougherty, County Commissioner, Coshocton County.

Ms. PHELPS. Good morning, everyone, Marcia Phelps, Licking County Commissioner. Thank you.

Mr. SMITH. Good morning, Doug Smith, Licking County Commissioner.

Mr. MOORE. Good morning, Bob Moore, Morgan County Commissioner.

Mr. GAINE. Dean Gaine, Morgan County Commissioner.

Chairman NEY. Thank you. And I want to especially thank Mayor Clifford Mason, who is the Mayor of Hebron. The council chambers we are using today, I want to thank the Council and special thanks to Mike McFarland also, for Mike's assistance.

After the hearing I will have some—as a resident of Licking County—some complaints about roads and different things that I will talk to you about later.

(Laughter.)

On our first panel Tim Bubb was elected commissioner on the Licking County Board of Commissioners in November 2004. Previously Commissioner Bubb served as a Newark City treasurer for 3 years. Tim Bubb was raised in Newark and graduated with honors from Newark High School in 1970, and from Ohio University in 1974 with a degree in communications.

State Senator Tim Grendell represents the 18th District in the Ohio Senate. He just took office this past January. Senator Grendell is from Chesterland. Prior to his election he was an attorney and has been active on this issue that we are having a hearing on today, in the legislature.

State Representative Bob Gibbs is serving his second term in the Ohio House of Representatives, representing the 97th District. State Representative Gibbs is from Lakeville. Before his election to the State House he was a small business owner.

Clifford Mason, of course, is the Mayor of the Village of Hebron, and again we thank you for your and the staff's time and attention and for helping us with this hearing.

Rick Platt is the executive director of the Heath-Newark-Licking County Port Authority, a position he has held since August 2002. The Port Authority owns the Central Ohio Aerospace and Technology Center, which encompasses the property of the former Newark Air Force Base and is the 18th largest industrial park in central Ohio. Mr. Platt has experience from over 18 years in economic development in government working on a portfolio of projects totaling more than $750 million in capital investment, that has created or retained over 7,000 jobs. We knew him in eastern Ohio, Jefferson County, where he did a lot of work.

And last but not least, is Steve Nutt. He is a director of strategic development for the Citywide Development Corporation located in Dayton.

I just have a brief statement for the record.

The Subcommittee on Housing and Community Opportunity meets in a unique setting today for its second field hearing of the 109th Congress. Today, I will be holding two hearings, one in the 18th Congressional District here of course. And the other will be down in Chillicothe, Ohio, to discuss the Supreme Court's recent ruling in the case of *Kelo* v. *the City of New London*, and the serious implications this ruling could have on low income housing, family farms, and rural Ohio. And, of course, the Nation in general.

The last of the U.S. Constitution's Fifth Amendment liberties provides that "no private property be taken for public use, without just compensation." Under this provision, government entities may invoke their power of eminent domain, or right of condemnation, to remove property from private ownership for public use. On June 23, 2005, the United States Supreme Court held in *Kelo* v. *the City of New London*, that the city's condemnation of private property, which was part of the city's redevelopment plan aimed at invigorating a depressed economy, was a "public use" satisfying the United States Constitution—even though the property might be turned over to private developers. The majority opinion was grounded on recent Supreme Court decisions holding that "public use" must be read broadly to mean for a public purpose. The dis-

senters, however, argued that even a broad reading of "public use" does not extend to private-to-private transfers solely to improve the city's tax base and create jobs.

While the Supreme Court's decision does authorize governments to exercise greater eminent domain powers, the effect of *Kelo* on Ohio homeowners will depend upon Federal, State, and local laws deeming what land is appropriate for condemnation. It is important that, as stewards of the public's tax dollars, we strike the appropriate balance needed between the government's power to condemn land for "public use" and to maintain the rights of citizens who wish to retain their private property. Although the Court's decision allows for a broader sense of private-to-private transfer, eminent domain is still limited by local and State regulations and statutes.

Long ago, Sir William Blackstone in his Commentaries on the Law of England wrote that "the law of the land postpones even public necessity to the sacred and inviolable rights of private property." Our founding fathers embodied that principle while drafting the United States Constitution, allowing the government to take property not for "public necessity" but instead for "public use." Defying this understanding, the Court through its recent *Kelo* decision replaces the "public use" clause with a "public purposes" clause.

And the rest of my statement will be put into the record. We do want to hear from you and this will be taken back to Washington. And as we go across the county, we will seek comments to see where this will balance out at the end of the day.

So we will start with you, Commissioner. Thank you.

STATEMENT OF COMMISSIONER TIMOTHY E. BUBB, LICKING COUNTY BOARD OF COMMISSIONERS

Mr. BUBB. Good morning Congressman Ney, fellow panelists, elected officials, staff and others. Thank you for this opportunity to speak briefly on some of the past uses by State and local governments of eminent domain for public projects here in Licking County, Ohio. And also, Congressman, thank you for bringing this committee of the House of Representatives on this important issue to the grassroots level on the western side of your House District, Licking County. We appreciate the opportunity.

Congressman, I do share your concern resulting from the Supreme Court's June decision titled *Kelo* v. *the City of New London*. I believe most Americans who have read the split decision are concerned that the private property protections afforded in the takings clause of the Fifth Amendment could be placed at risk. Specifically that their homes, land, or even small businesses could be at risk for taking for something other than a clearly public purpose.

I think it is safe to say here in Ohio, and across the Nation, that States are responding by considering amended laws or even constitutional amendments to prevent or restrict eminent domain powers for private development.

While my term as a county commissioner here in Licking County began just this past January, my recollection is that the authority of eminent domain locally has been used only for public purposes. Specifically I think of a number of major highway projects in my lifetime including the development of Interstate 70 through the

county in the late 1950's; the development of the Newark Expressway beginning in the late 1950's and continuing through the 1990's for both Ohio Routes 16 and 79, that did involve the taking of land, with the resulting compensations and in some cases litigation over appraisal considerations and the amounts of compensation.

Currently the redevelopment of State Route 161, which is an 11-mile stretch from New Albany reaching to Granville, includes a number of takings to accommodate the widening, the realignment of that important roadway. The construction of phase one is set for 2006.

While there have been and will continue to be some disagreement over some of the specifics and amounts of compensation in the takings of some of the parcels involved, I do not believe there is any questions that these highway projects represented and represent needed public improvements.

At the Licking County level, the two instances in my mind that involved eminent domain were the construction of the new Licking County Justice Center on Newark's near east side in the 1980's and also in that era the development of the Buckeye Lake Sewer Project. And I believe these were both clearly public projects with no private involvement. It should be noted in the case of the Justice Center that this public project also served to redevelop a blighted area near downtown Newark. Again, I am not aware of any use of eminent domain to assist a private development project here. However, this county office/jail project was in many ways similar to some of the urban renewal projects seen in other parts of the country.

Congressman, while I have heard of both Federal and State legislation to address this concern, I would simply say to you that I would agree with the prevailing thought, simply do not move too quickly. I would certainly endorse the idea of a 1- or 2-year moratorium on the so-called private project eminent domain which would ease fears and I think prevent any additional private property takings. While I believe this has the potential to be a slippery slope, I would suggest that legislation could be crafted to allow a process for certain exceptions. In other words "never say never."

An outright ban on any takings for other than public purpose would make it very difficult, if not impossible, to ever redevelop the inner-city urban areas of Ohio and in many States. I could see a situation where redevelopment of a major industrial site and job creation, possibly in a "brownfield" area of an urban region could be nearly unattainable without some tools of eminent domain, possibly for access, a rail spur, or even port access.

Again, such power in support of a public-private or private development certainly would have to have thorough public review to ensure that it is used sparingly and in an appropriate way. One way to evaluate such use of takings could be a regional review by a broad-based panel using as its guide local and regional land use plans and zoning districts.

Congressman Ney, the preservation of green space and maintaining a healthy blend of land uses is a front burner issue for all of us here in Licking County. We are seeing a substantial relocation of residents from Franklin County into counties such as Licking and our neighboring counties such as Delaware and Fairfield. And

while we welcome growth, we are also concerned about the rapid loss of easily developed farmland and woodlands to those looking to site new subdivisions for residential housing and commercial projects as well.

I believe for our central Ohio region to remain healthy that some tools, such as eminent domain, may need to be available to allow for limited specific public-private redevelopment projects in the older cities. Such redevelopment has the potential to take some of the pressure off of the rural unincorporated areas in terms of growth. Without some relief in this area, I believe it will be impossible for county and township governments to keep up with the unfettered growth, and the resulting demand for infrastructure and public services in these large unincorporated areas.

So, maybe it is possible to view *Kelo* v. *the City of New London* as the Court's way of spurring this discussion as to when eminent domain possibly could be a consideration for other than strictly public applications. It is possible that this is a discussion the framers never could have conceived.

Congressman, I do thank you for the opportunity to speak to your subcommittee today and offer my thoughts, and again I appreciate you being here today.

[The prepared statement of Mr. Bubb can be found on page 54 of the appendix.]

Chairman NEY. Thank you, Commissioner. Senator.

STATEMENT OF STATE SENATOR TIMOTHY J. GRENDELL, 18TH DISTRICT, OHIO STATE SENATE

Mr. GRENDELL. Thank you Congressman Ney, good morning. Good morning to all the public officials here. It is a beautiful building and thank you, Congressman Ney, for bringing Congress to Ohio and providing us an opportunity to testify before the subcommittee on an important constitutional property rights issue.

In addition to the Fifth Amendment language that you stated Congressman, the Ohio Constitution even is more explicit. It says that "Private property shall ever be held inviolate . . . where private property shall be taken for public use a compensation therefor shall first be made in money, or secured by a deposit."

The U.S. Supreme Court's recent decision permitting the government sanctioned transfer of private property from a private citizen to a private developer has struck a constitutional nerve throughout the country. While the use of eminent domain for roads and utilities has long been recognized, the government taking and transferring of a well-maintained parcel of real property from one private owner to another private owner is fundamentally un-American. Trampling on one individual's property rights for the speculative, collective good through a future development smacks of socialism. The Ohio legislature can and should take immediate action to protect Ohio's private property rights from the intrusive impact of the Supreme Court's ruling.

Our Founding Fathers believed that private property ownership, as defined under common law, pre-existed government. They further believed that government, whether Federal or State, served as the contractual agent for the people and, unlike the English monarchy, was not a sovereign. Thus, protecting private property own-

ership rights against unwarranted governmental appropriation motivated the inclusion of the takings clause in the Fifth Amendment of the U.S. Constitution and various State constitutions, including Ohio's. Of course, by including the takings clause, the framers of the Bill of Rights also recognized the need for a limited public use exception to the sanctity of private right—private property rights, provided that the property owner was justly compensated.

The takings clause buttressed the Founding Fathers' respect for private property rights in two ways: private property can only be taken for public use; and such taking can only occur if the property owner is adequately compensated. The takings clause in the Fifth Amendment was intended to protect private property owners from arbitrary governmental power.

The drafters of the Ohio Constitution emulated the Federal constitution recognition of private property rights in Article I, Section 19, which declares that private property rights are inviolate and permits appropriation of private property in Ohio only for public use.

For approximately 175 years, eminent domain was employed by government for obvious public uses such as roads, canals, railroads, military bases, fire stations, schools and parks. Then eminent domain became a tool for urban revitalizationists who invoked government taking powers to acquire blighted or deteriorated private property, often for private redevelopment as urban renewal projects. Courts upheld such actions, finding that eliminating blight was a legitimate public purpose. In hindsight, these cases started takings law down a dangerous and slippery slope.

On June 23, 2005, in *Kelo* v. *the City of New London*, the U.S. Supreme Court, by a narrow five to four decision, issued one of the most controversial rulings in history. The majority of the Supreme Court expanded far beyond the traditional, limited view of eminent domain powers by holding that non-blighted private property can be taken, against the will of the property owners, by a governmental authority for ultimate ownership by another private entity, in the name of economic development.

The majority of the Justices found that the City of New London, Connecticut, did not violate the Fifth Amendment by taking several unblighted residential properties clearing the way for a private office complex. The majority concluded that the economic benefits of such new development to the city, new jobs and increased taxes, satisfied the constitutional public use prerequisite to an eminent domain action.

Justice Sandra Day O'Connor and three other justices disagreed with the majority's more broadly defined concept of public purpose or pubic use. In her vigorous dissent, Justice O'Connor chastised the majority for abandoning the 2-century old principle of preventing the government from acting beyond its authority, warning that "nothing is to prevent the State from replacing any Motel 6 with a Ritz Carlton, any home with a shopping mall and any farm with a factory."

To some, *Kelo* is the natural extension of the urban renewal eliminate blight cases where economic benefit equals public use. To others, *Kelo* is an affront to the fundamental protection of private property ownership guaranteed by the Fifth Amendment. A review

of our Founding Fathers' early writings supports the conclusion that *Kelo* is an affront to property rights. It is doubtful that Thomas Jefferson ever envisioned a government right to take his home, Monticello, and give it to a private developer for an office complex or a big box super center.

Thankfully, the Supreme Court noted that the *Kelo* decision does not prevent States from adopting a more protective approach to private property rights. At least 34 States have initiated legislative efforts to negate the impact of *Kelo*.

Presently, Ohio law governing eminent domain neither contemplates nor adequately protects private property owners should unblighted private property be taken by eminent domain under the banner of economic development. Courts have almost uniformly acceded to the government's determination that a public necessity exists justifying the take. At least in the urban renewal cases, the taking authority had to obtain a blight study before it could proceed with the eminent domain.

We have had two controversies involving that in Ohio; one, the Lakewood case where there was a question of the validity of the blight study which held that merely having a detached garage and one bathroom constituted a blight if you were within the boundaries of that particular take area, which was ironic because the mayor of the city who did not live in the take area had a home with one bathroom and a detached garage, which apparently was blighted but not taken.

After *Kelo*, government officials merely need to conclude that the taking of property from one private owner to transfer to another private owner will be more economically beneficial to the public. But such economic socialism may not constitute public use.

Eminent domain procedures under Ohio law do not properly address the private-to-private taking permitted by *Kelo*. Currently, under chapter 163, the private property owner bears a substantial burden with respect to establishing the value of the property to be taken. And in fact, is required to go first before the jury, which is an oddity in civil litigation in Ohio, and is usually limited to presenting evidence of the value based on the property's current zoning. This could lead to a substantial inequity in a *Kelo* taking situation. For example, the owner of a house on one acre zoned residential worth a maximum of $150,000, in most cases, would be limited to offering evidence of that value. Should the acre be taken by eminent domain and subsequently transferred to a developer of a commercial complex, the ultimate value of that property could be $250,000 to $300,000. Such governmentally induced inequity cannot be condoned or considered just compensation.

Additionally, the property owner has to absorb their own attorney's fees and expert costs, even though the private developer will get the benefit of that take.

Ohio must take action to protect Ohio's property rights after Kelo. To that end, I, along with State Senator Kimberly Zurz, Gary Cates, and 23 other Ohio State Senators have sponsored Senate Bill 167 in the Ohio Senate. This legislation provides for a temporary statewide moratorium on governmental taking of unblighted private property for economic development by another private party. The moratorium would be in force until December 31, 2006,

and would affect both State and local governmental projects involving eminent domain proceedings. In addition, Senate Bill 167 forms a legislative Task Force to conduct a comprehensive review of Ohio's eminent domain laws and procedures.

The task force, comprised of 24 individuals, will include representation from a broad set of interested parties, including property rights groups, State and local government, agriculture, commercial and residential real estate and the Legislature. The task force will conduct a comprehensive review of Ohio's eminent domain law and procedures and make recommendations as to the statutory or constitutional actions needed to protect private property rights in Ohio in light of *Kelo*. The task force report will be due in the spring of 2006, giving the legislature time to take action on its recommendations in the current term.

Senate Bill 167 protects Ohioans' property rights in the short term, while providing a thoughtful and comprehensive approach toward a permanent change in Ohio's eminent domain law. While eminent domain can be an important tool for State and local government when employed for legitimate public uses, the governmental powers should not be abused or exploited. To make way for new developments simply because such developments will generate more jobs and taxes or for some other speculative public good at the expense of a private property owner is fundamentally un-American.

Under Article I, Section 19, of the Ohio Constitution, "private property rights are inviolate." And despite the *Kelo* ruling and its overly expansive notion of eminent domain, "inviolate", in Ohio, still means inviolate.

States have numerous options in response to *Kelo*. These options range from taking no action and letting the courts grapple with the problem to adoption of a State constitutional amendment prohibiting the taking of all private property or unbilighted private property that would ultimately be transferred by another property owner to a private property owner. In between, State law can be changed to redefine public use, but such statutory action could be circumvented by a municipality's home rule powers. Such home rule concern can be avoided by way of a State constitutional amendment. States also should reexamine their definition of blight and deteriorated properties to prevent future circumvention of any *Kelo* responsive changes in the law through the abuse of those terms.

Finally, if a total prohibition against the taking of unblighted private property is not adopted, State procedures for determining just compensation for property taken should be changed to allow the current private property owner to offer evidence demonstrating the value of the property based on its proposed future development after the take.

Swift action is needed to protect Ohioans' private property rights after *Kelo*. Senate Bill 167 will provide immediate relief, while proposing the appropriate long-term solution. This approach will protect Ohio private property rights now and in the future.

Congressman, thank you very much for the chance to address you today.

[The prepared statement of Mr. Grendell can be found on page 73 of the appendix.]

Chairman NEY. Thank you, Senator, for your testimony. Representative Gibbs.

STATEMENT OF HON. BOB GIBBS, STATE REPRESENTATIVE, 97TH DISTRICT, OHIO HOUSE OF REPRESENTATIVES

Mr. GIBBS. Thank you, Congressman Ney, and welcome. Appreciate the opportunity to come and testify. I will try to paraphrase some of my testimony because it is very similar to Senator Grendell's testimony.

Just as a side note, one of the reasons why I wanted to get involved in this issue is because of my past. A few years ago, I was president of the Ohio Farm Bureau and I have seen takings by government agencies, regulatory type takings, which is a similar issue to this. Not exactly the same, but I can see the impact it does to private business and families and that is why I got concerned and concerned about private property rights.

As you know, the Supreme Court decision in *Kelo*, the 5-4 decision, allows for eminent domain takings from the private sector for development. It provides for a wide range of discretion to State and local governments to decide how eminent domain powers should be employed in their jurisdiction. I believe that this decision opens a flood gate for eminent domain abuse. I and other members of the General Assembly realized this early on and we think that it is imperative that legislative action be taken immediately to ensure fair and uniform enforcement of eminent domain powers and protect private property rights in our State.

Eminent domain has been a necessary tool to provide public infrastructure projects for public good. However, the *Kelo* decision allows for eminent domain proceedings for private sector development that ultimately enhances the tax base, making the argument it is for the public good because of increased tax revenues. This argument is appalling, essentially the government is saying revenues to a taxing jurisdiction are paramount to private property rights. This contradicts the founding principles this Nation was founded upon.

Currently, Ohio law provides for eminent domain authority to be used to eliminate slums and blighted neighborhoods. A strong case can be made with this provision and the current law that the *Kelo* type provision is not necessary, but only opens the door for eminent domain abuse. The *Kelo* decision will take our free market system out of private development projects.

And it was just a couple of weeks ago I received a correspondence from a citizen in northeast Ohio, he stated that a large insurance company up there made an offer to the local land owners to buy their property to expand their office complex. And the landowners denied the request and I do not know if they do not want to sell or if it might be the free market system working here. But according to his correspondence, they have now pursued the local jurisdiction, since the *Kelo* decision, to pursue the use of the eminent domain. So that is the future concern for me that you are taking the free market system out of the process.

Of course under the current system, you know, the judicial system and the juries will decide what compensation will be. I asked a question here when the private property remains in the private sector, you know, what is the basis for compensation. Since *Kelo* takes out the free and open competitive market, who determines what the property rights are.

Also, as stated, I have been working with Senator Grendell and others and as Senator Grendell stated, he has introduced the Senate Bill with the moratorium. I am introducing the identical companion legislation in the House. We had a little bit of a paper snafu, and it should be introduced today, along with about 30 some co-sponsors, a very bipartisan support. As Senator Grendell stated, it would put a moratorium on until December 31, 2006. And the study task force and I think we probably are looking at a constitutional amendment here in Ohio, next November to address this situation.

However, I do want to caution that we need to be careful. We were working on this project or this issue with the Jobs for Ohio issue. There are a lot of complex issues and a lot of nuances and some questions came up between the attorneys and the government leadership here in Ohio. And that is why we need this task force to look at all the complexities and make sure that we do not something that is going to cause more problems in the future. And I would also caution at the Federal level not to have a knee jerk reaction, because I think most people can see that *Kelo* is a problem, the decision is a problem and raises some concerns, but then we do not want to do some things with eminent domain that causes some problems on the other side of it.

As stated, there was the Lakewood case Senator Grendell talked about. Also in Norwood, Ohio, there was a similar case and in that case, my understanding is it was declared an emergency so a referendum could not take place as opposed to in Lakewood where the citizens overturned the eminent domain proceedings. And the Court of Appeals in Hamilton County upheld the lower court's decision saying that the city council amended their laws and had a plan in place and they ruled unconstitutional and I had the opportunity to meet the person whose land was taken, and I think it goes against all our principles of government here in the United States.

As I stated it is also an opinion of this working group that we have put together, an ad hoc group that Senator Grendell put together of many stakeholders that we should not rush into this and that is why a moratorium makes a lot of sense and I am happy to sponsor that in the House.

I do feel strongly that an eminent domain authority should be used judiciously and only for public infrastructure projects and common carrier easements in question.

I think also we need to address in Ohio the definition of blighted neighborhoods so that it is closely defined so we protect the private property owners' rights. And we also, need to strengthen those rights. I think Senator Grendell alluded to it a little bit, you know, property owners do not have much—they have to hire their own legal counsel and the costs associated with challenging eminent domain action for public use grounds and we need to probably

strengthen those protections for the private property owners when they are in eminent domain proceedings.

So, again, I want to thank the Congressman for having the hearing and the opportunity to talk here. I would be happy to answer any questions you have. Thank you.

[The prepared statement of Mr. Gibbs can be found on page 69 of the appendix.]

Chairman NEY. Thank you, Representative. Mayor.

STATEMENT OF HON. CLIFFORD L. MASON, MAYOR, VILLAGE OF HEBRON, OHIO

Mr. MASON. Honorable Chairman Ney, committee members, fellow elected officials, and guests.

Thank you for allowing me the opportunity to address the committee this morning. As Mayor of the Village of Hebron, I would like to welcome everyone to our community for this important event.

The Fifth Amendment to the Constitution of the United States allows for the government taking of private property for the public good through the application of due process and fair compensation. Clearly, many of the roads, utility infrastructure, schools, flood control reservoirs, and numerous other projects that improve the quality of life for all would not be possible if it were not for this law.

I believe that while the eminent domain process can yield great benefit for communities, it can also inflict significant hardship on private property owners who have their own vision for their property. The property owners have a right to that vision and the government should be hesitant to impose a different vision. The need to strike a balance between the public good and the property rights of the individual should always be uppermost in the minds of elected officials.

It seems to me that the taking of private property from one private individual and giving it or selling it to another private individual or business is unlikely to be what the framers of the Fifth Amendment had in mind. When the taking is done solely to enhance the revenue stream for the government by expanding the tax base, I believe it is beyond the boundaries of expectation of the electorate.

There is no question that any of our homes would produce more jobs and taxes if they were turned into an office building site, and every small business would produce more jobs and taxes if it were torn down and a Lowe's or Wal-Mart were constructed. If that's the definition of public good to be used, then everything we own as individuals is in jeopardy as soon as some private business delivers their plan or vision to the local council.

Our country has always supported a strong system of protecting private property rights. I believe that the process of eminent domain is a necessary tool for the betterment of our communities and public safety and health, and should continue. As with many laws, the interpretation of this one seems to have expanded beyond what most Americans would consider common sense. I am one of those Americans.

I support the efforts of your committee to investigate what may appear to some as abuses of the eminent domain process. I also

would encourage our representatives at all levels that any restriction of the process be approached with great caution. This is a law that has helped provide an American infrastructure that is the envy of most of the world. It will continue to be needed as we move forward as an innovative and progressive society.

Those of us who have the privilege of serving our communities simply cannot forget that we have a responsibility to protect and defend the rights of the private individual as we strive to improve the quality of life for all.

Thank you for this opportunity to share these comments.

[The prepared statement of Mayor Mason can be found on page 86 of the appendix.]

Chairman NEY. Thank you, Mayor. Mr. Platt.

STATEMENT OF RICHARD J. PLATT, EXECUTIVE DIRECTOR, HEATH-NEWARK-LICKING COUNTY PORT AUTHORITY

Mr. PLATT. Good morning. I appreciate the opportunity to offer testimony. I will paraphrase my written remarks. I thank you, Chairman Ney, for listening to your constituents and for conducting this hearing outside of Washington. Eminent domain is a local issue and it is entirely appropriate that these hearings be conducted in the seat of a local government.

My remarks today are based on my past professional experiences and observations over the last 18 years in economic development and government. My current employer, the Port Authority, has not exercised eminent domain powers and has no current plans to exercise those powers.

My experience, though, tells me—and it is my personal opinion—that the Supreme Court got it right. My contention is that local governments can, and should, be trusted to continue to have power to use eminent domain for economic development and other public purposes.

Many want to portray this decision in *Kelo* as a battle of big business winning while mom and pop are losing. However, I fear legislation aimed at countering *Kelo* might actually end up with unintended consequences.

My thinking comes from observations on several sides of this issue. In 1999, while serving as the head of a public/private economic development group in Steubenville, Ohio, my employer earned this Pittsburgh Post-Gazette headline. "Alliance 2000 to Heinz: You've Got a Friend in Ohio."

Jefferson County, Ohio, a suburb of Pittsburgh stood to gain a baby food and soup plant expansion by Heinz if the City of Pittsburgh could not successfully acquire properties adjacent to the existing inner city Heinz plant. Heinz had proposed a $40 million expansion and desired to stay in Pittsburgh but was hemmed in by surrounding built-out properties.

Though eminent domain was not ultimately used in this Pittsburgh case, it was central to the discussions aimed at keeping Heinz, its jobs, and its economic impact in the inner city. The possible condemnation of properties was enough to get negotiators to the table and make it possible for Pittsburgh to gain the expansion and retain this legacy business in their city.

The unintended consequence of tying the hands of urban areas is continued flight of businesses and people to greener pastures in the suburbs. Had the local government officials in Pittsburgh found themselves unable to consider using eminent domain powers in this case, it is quite possible Heinz would have gone to a suburban site west of Steubenville.

The big business in this case, Heinz, would not have lost. Their costs were not much greater relocating the whole plant to Steubenville. The losers would have been the hundreds of moms and pops who would have lost their jobs in Pittsburgh.

Do not think suburban communities are lining up to suggest the end to eminent domain for economic development though. Steubenville faces eminent domain issues itself. The south end of town, once a thriving ethnic neighborhood with a flourishing mix of industrial, retail, and housing development, is dilapidated. Overgrown vacant lots, absentee landlords, and economic despair are the only things flourishing in the south end now.

But, replace the name Steubenville with the name of many of our large and medium size cities around Ohio and the Nation and the same exact story could be told. The only way for most of these cities to turn this dire economic situation around is through government-led land assembly aimed at attracting private, capital investment.

Some years ago, the city crafted a redevelopment plan that called for assembling dozens of parcels into four distinct sites. During that planning process, there were strategy discussions of using eminent domain powers as a last resort to acquire vacant properties.

Eminent domain powers are a critical part of any redevelopment plan. It is necessary to assemble land, clean it up and get the area's property values pointing in a positive direction before there is any hope of inviting the private sector in to turn it around.

It is quite possible in this case that eminent domain never has to be used. The mere ability to use it though, is enough to tilt the balance in the favor of redevelopment. Restrict eminent domain powers to just building a new government building or new highways in places like Steubenville, Ohio, and you might as well write off neighborhoods like the south end forever.

Again, unintended consequences and really the reverse of protecting mom and pop could result.

The national discourse on this issue has been so strong that I fear a pendulum-like swing of public policy could bring us to restrictions on eminent domain powers so great that a single individual could be empowered to stop a project expected to impact hundreds of families. Local governments will have their hands tied. In an era of global competition for the economic benefits of private capital investment we need to give a long, hard look to anything that ties our hands and local officials' hands more than our global competitors.

Every time we look at public policy measures that could tend to make the job of those who are tasked with attracting economic development more difficult, we need to ask the question: Will this legislation make it easier to bring new jobs and new investments to the United States? In the Pittsburgh case, the Heinz case, there is

a point where it gets easier to do your expansions outside of the borders of the United States. That is the time that we need to be concerned about our country.

There exist today eminent domain policies and practices that allow us to compete but are not displacing mom and pop for big business. Thomas Jefferson was right. Government is best which is closest to the people.

The International Economic Development Council publishes what it calls guiding principles for land assembly and economic development. Those principles are in my testimony. These principles make sense. Eminent domain should always be a last resort and the local community should carefully review, in a public forum, the benefits of redevelopment versus displacement of occupied homes and businesses.

Additionally, the Federal Government already properly restricts the power of eminent domain. When Federal funds are used, relocation of individuals is greatly protected.

The rhetoric following the June Supreme Court decision continues to be strong. We need a cooling-off period, and we need to explore with great care the potential consequences of restricting eminent domain powers.

Again, Mr. Chairman, thank you for the opportunity to share my personal thoughts and experiences.

[The prepared statement of Mr. Platt can be found on page 97 of the appendix.]

Chairman NEY. Thank you. Mr. Nutt.

STATEMENT OF STEVEN NUTT, DIRECTOR OF STRATEGIC DEVELOPMENT, CITYWIDE DEVELOPMENT CORPORATION

Mr. NUTT. Good morning, Chairman Ney. I thank you for the opportunity to be with you today. I appreciate the opportunity to share the experiences of economic development professionals with you. And I hope that our experiences will help you and your colleagues as you review eminent domain.

Eminent domain is an economic development tool which allows local communities to acquire and assemble land for new development projects. It generates new jobs, new investments, and taxes. For example, Dayton is a landlocked community without space for businesses to grow. As a result, those businesses often choose to locate outside the city. Without eminent domain as one of our tools that we use in economic development, we do not have the ability to create the space that is necessary for those companies to grow.

I can tell you that, in the City of Dayton, we use eminent domain very judiciously; in fact, we have not used it for the purposes of turning a property over for private development in the last 10 years.

The Ohio legislation—the proposed legislation of the Ohio General Assembly—would prohibit the use of eminent domain for economic development. Ohio law as it exists now keeps the economic health of the communities in the hands of local leaders who are not out to destroy communities but rather who work for the best interest of their communities at large.

Unduly constraining eminent domain would eliminate an entire category of projects from the redevelopment tool box of local offi-

cials. And it, in fact, would thwart job creation and job retention, particularly in landlocked communities like Dayton. This would mean that no municipalities in Ohio could use eminent domain to carry out an economic development project. One person could veto the redevelopment of the entire distressed community. This would have the practical effect of making such properties virtually impossible.

State or Federal bills prohibiting the use of eminent domain for economic development are job killing pieces of legislation. Though 167 comes in response to the Supreme Court's decision in the case of *Kelo* v. *the City of New London*, the Supreme Court's case affirms eminent domain as an important tool for local government and leaves eminent domain where it should be; in the hands of the States and localities. The Supreme Court did not in any way expand the power of eminent domain. Rather the Court simply upheld the long-standing inclusion of economic development as a public use. It is therefore highly unlikely that the Supreme Court's decision will result in city officials exercising eminent domain randomly or without a balanced consideration. They will come to use eminent domain as they have in the vast majority of cases, judicially and in the light of day.

Judicious use of eminent domain is critical to the economic growth and development of cities and towns throughout the country. Assembling land for redevelopment helps to revitalize local economies, create much needed jobs and generate revenues that enable cities to provide essential services to their customers.

Many of our urban communities were developed in the late 1800's and the early 1900's. These cities have small lot sizes and were developed in an era of horse and buggy. It is very difficult to redevelop in these communities without the ability to assemble land. Big box retailers, shopping malls, new office buildings, etc., often choose to locate in greenfields and suburbs where large parcels of land are available, especially if they are not available in the city. We have a number of industrial customers for example, that need to expand and without having those types of land assemblies available for them, they will move to a suburb and hurt the City of Dayton's income tax base.

Each time those development decisions are made, the tax base and jobs are going to those other places. There is no question that eminent domain is a power that like any other government power must be used prudently. And there are many built-in checks. One such check is the public nature of the takings process. Probing questions should be raised about any complex undertaking financed by taxpayers. And nothing in local government attracts more scrutiny or more criticism than eminent domain.

Few government or elected officials are willing to risk their position and political stability in pursuit of a project that is overwhelmingly opposed by the community.

In another check on abuse, the Fifth Amendment requires that anyone whose property is taken for public use be fairly compensated. And in practice, most takings are compensated generously. Local officials use eminent domain to achieve the greater good when holdout landowners think their property is worth far more than ever could be achieved. If governments have to wait for

holdouts, communities will see jobs and market opportunities disappear.

At a time when so many of our businesses and communities are being confronted with intense competition from oversees and areas of our cities and rural areas are in decline, Congress should be expanding its efforts to solve the problems of economic deterioration, not imposing restrictions on community growth.

I thank you again for the opportunity to speak to you today and I would be happy to answer any question you have.

[The prepared statement of Mr. Nutt can be found on page 88 of the appendix.]

Chairman NEY. Thank you, Mr. Nutt.

Mr. Riley is here, he works for the ranking member Barney Frank with the committee, and he may have some questions.

I want to go to the legislators for a second. So your bill would have a moratorium in place and then you would have a task force that comes back with recommendations. Would those recommendations—would they be making recommendations of how to carry out the Supreme Court's decision with restrictions or how would you envision that they would—not what they are going to decide, but is their task to find out how to do this considering Supreme Court's decision stands?

Mr. GRENDELL. Congressman Ney, first of all if I may clarify an issue. The legislation that Representative Gibbs and I have proposed does not prohibit the use of eminent domain for economic development. It restricts for a 17-month period the taking of unblighted, in other words, well-maintained, not your usual urban renewal situation property, to go from one private owner to another. And the task force charge is sort of unlimited, on one end they can recommend doing nothing and letting this process continue under *Kelo* and sort of work its way through some judicial interpretations that may fall from that under Ohio's Constitution. At the other end could be a constitutional amendment that could either prohibit all private taking that ends up in private use or private taking of unblighted, or maybe just say taking of occupied personal residences that are unblighted. There is a lot of variety at that end. And in between the task force is going to look at totally overhauling Ohio's eminent domain procedures as to how we determine compensation. There may be a different form of compensation calculation for one that is going to end up in private use versus for a road or a public use, based on what I alluded to in my testimony, the potential increase of value that the taking will add to the property itself. We are not going to tie the hands of the task force. They will be able to go from one end of that spectrum to the other and make their recommendations.

And the only other thing that we are asking the task force to do is re-look at this definition of the words "blight" and "deterioration". Because to the extent there has been any abuse of eminent domain power in Ohio, it has been the Norwood and the Lakewood situations, particularly the Lakewood situation, where arguably the concept of blight was taken to its farthest extreme to try to justify the take. And we do not want people to circumvent whatever we do to address *Kelo* by being clever in how they define blight.

But the task force will have that entire area to look at, Congressman. We are not going to try to tie their hands or give them a predisposed conclusion.

Chairman NEY. So there would be a moratorium in effect and then they can come back and they will have whatever recommendations?

Mr. GRENDELL. Correct, they are—the way the statute now reads or the legislation reads is that by April they have to come back with a report. That report could be anywhere along that line of potential recommendations. There are some who hope there will be a constitutional amendment. There are some who hope that there will be nothing, and there are some, I think, who hope it will fall somewhere between. The task force will be able to look at all those and make a report by April and then the legislature will have to make a decision how it wants to address the *Kelo* situation.

What we did not want to have happen in the interim is to have people get what I refer to as "Kelo-ized", that, you know, while we are studying the problem people who may want to expand the use of eminent domain rush out and use it before we can find a final State approach to the situation. That's why the moratorium we felt was important, again, for unblighted property, the traditional *Kelo* situation, where your property is perfectly habitable, perfectly valuable but it is now going to be taken not for a road or a fire station, but to go to some private development.

Mr. GIBBS. Congressman, I would just like to, you know, imply that this moratorium only applies to the *Kelo* type takings and the blighted definition. It does not apply to public infrastructure projects, like roads that most people are accustomed to under eminent domain. I think a precursor of what this task force might look like is the working group that has been working on this—it is an ad hoc working group because around that table there are about 30-some people, the stakeholders are involved, there are developers. There are the people who have had eminent domain, Lakewood, Norwood, legislators and—so I think that as Senator Grendell states, that task force is going to be wholly encompassing the whole picture and there will be economic development people obviously on that task force. So all sides will be heard and I think that is the best part of our governmental process, is when that process works that way, we will come up with a solution that will work and protect private property rights. But also not hinder economic development in a detrimental way.

Chairman NEY. Mr. Nutt, you had said that it has not been used for 10 years in Dayton, why was that?

Mr. NUTT. It has not been used in a situation where we have turned the property over to a private developer for development. A couple of reasons for that, one being that eminent domain takes a lot of time; it is very expensive. Another reason being that in the City of Dayton, we have a more restrictive definition of slum and blight than the State definition. So it is much more difficult for us to use eminent domain in those cases.

Chairman NEY. So Dayton passed—approximately when did Dayton pass the more restrictive laws, do you know?

Mr. NUTT. Congressman, I am not sure. I can find out for you.

Chairman NEY. I am curious, if you could find out. Somebody's answer dealt with it, but once a property is condemned and the area developed, the land value rises. Does that play a role in the compensation, do you know, of eminent domain use, Senator?

Mr. GRENDELL. Congressman, having defended on behalf of property owners numerous eminent domain actions, and having been on the other side representing some governmental authorities, generally speaking, the Ohio law deals with the property as of its value on the day of the take, which means the way it is zoned and the way that it is used on the day of the take. The appraisals that are offered both by the governmental taking authority and the private individual, generally speaking, reflect one's view of that property. They can be widely disparate as one who is more generous on how they apply appraisal practices to the other. But generally speaking, you are tied with the value and the use at the take.

That has proven to be a problem. We have attempted in some cases to try to show the increased value, because we have had some situations where the property has been taken from blight and turned into a private development. Most times the probate court has not been overly generous to the property owner and allowed that expanded—what they refer to speculative—evidence of its future value. And so as a rule, in my experience, it has not allowed a lot of evidence of that future prospective value post-take. And that has been the problem.

And as I said in my testimony, that is where the person with the residential property will lose value to a private individual who will convert that to a Wal-Mart store, for example, where the price is substantially greater. Yet in most cases, they are not going to get that testimony in front of the jury. Albeit, the big argument in takings cases is to at least try to appeal to the sympathy of the jurors that they are a fellow property owner, like the rest of us. And that they should be generous to the person who owns the land. The converse is a good governmental attorney would argue that it is taxpayers' money we are dealing with to try to get the jurors who are all taxpayers not to be that overly generous.

Chairman NEY. The ones that I have seen or been involved with has been for public use. And I know when I was in the State Senate we could not give buildings away, government buildings away to people, you know, and the people that wanted to use one of them up near Cleveland one time and they would say—what is that big place?

Mr. GRENDELL. Rehab center on Conquest.

Chairman NEY. Yes, and we were arguing about that, somebody said well, it is worth $6 million. Nobody would have bought it for a dollar, because you had to go in and there was asbestos and the whole nine yards. So in a lot of cases that I have seen—a prison in Belmont County, where they came in and took one parcel of land for public use. That land really usually does not rise in value, because if the prison shuts down who is going buy it, you know. We have a situation like that down in Hawking County area.

So, that is one whole concept for the public. The private is a different world, because, you know, instantly that can easily escalate a price. Has there been any—would there have to be rules set up? Let us say nothing happens and the Supreme Court decision stands

and somebody comes in and their small business is taken and there is a strip mall developed. Could there be rules or local laws maybe, or county, that would come into effect that that person would have a right to be in that strip mall, as a small business owner that was—whose property was taken. Do you think it would get to that point if nothing changes with this decision? That maybe local governments would have to get to that point of getting it all the way down to that level or would it be just broad open?

Mr. PLATT. In Steubenville, on the South End, I mean, to get a 4-acre parcel together you had to take about 40 parcels to do it. And so, yeah, there would be times where you would look on a map and say that makes sense, we would love to if we could keep some businesses in the location and maybe attract a multi-tenant building to be developed on that property. So that is something that you would try, but again, I think if you do not have eminent domain capability in that case you will never get anybody to the table to even have it be a part of the dialogue.

Mr. GRENDELL. Congressman, I mean, there was a comment before about negotiating and that is very true. In a lot of the cases in the negotiations—Representative Gibbs called free market system, which is very true. In the free market discussion in an eminent domain case it is not unusual to negotiate yourself a cash amount and space in the new center. That is part of the negotiating process. I would not like to see us get to the point where government dictates that a landlord is required to take anybody as a tenant and would prefer to address increasing the compensation for the person who is being displaced before I want government dictating who should be tenants in shopping centers. That is taking government a different path that could be dangerous.

Mr. GIBBS. I wanted to address I think, a little bit, the previous question about the economic compensation and deciding that. You know, notwithstanding the increased tax revenue, let us set that aside and, you know, eminent domain for public good for a road, you know, society benefits from that road, and so that is the economic benefit. But when it stays in the private sector and notwithstanding the tax base increase, the only economic benefit is to a sole beneficiary, you know, the person that owns that and I think that goes to the root of the *Kelo* problem. You know, the economic benefit under what normally we would think as eminent domain, you know, the whole community benefits and when only a sole—only one beneficiary of that economic benefit, I think that is the problem that we have.

And like I said in my testimony, how do you decide what the compensation is. What it was worth yesterday, today, or what the speculative value is. And when it is only—when only Senator Grendell is going to benefit when he does economic development and not the community, then that is where they use the argument about the economic tax base. I think that is a flawed argument, because it goes against the constitutional principle.

Chairman NEY. I wonder if the local elected officials—the legislation the legislators have, would that be considered a cooling off period that you both have mentioned about not moving too fast, any opinions on that legislation?

Mr. BUBB. My opinion is that I agree with this point, that maybe sort of "de-Kelolizing" the whole process. Maybe taking it out of the frenzy sort of part of the argument that all of a sudden people are very fearful of their private property that is not blighted being taken. Kind of putting that into a more introspective process, I think, is very valuable. I do not think that people really need to be worried about this, and I think that the moratorium would guarantee that and it would allow for that thoughtful discussion. So that we, again, as I said, never say never, but leave ourselves the option to do thoughtful things that might really make a big differences in some areas that are blighted.

Mr. MASON. I would certainly support the moratorium to give time for the committee to discuss that and see what is in the best interest of the parties.

Chairman NEY. One thing I wanted to mention, the community development block grant, which the Financial Services Committee and our subcommittee, as authorizers, we are involved with that.

Recently, I did not support taking the CDBG over into the Commerce Department, because during the hearings it came out that Commerce would completely undo all the rules and create all new rules on CDBG. So you can imagine California fighting New York versus Ohio versus West Virginia, etc. You would have one huge battle out there. We would not recognize CDBG probably after it came out of there. So we fought, you know, a pretty good battle to keep CDBG intact as it is.

But the one thing that we did is we authored legislation. Maxine Waters is our ranking member of the subcommittee, and Congressman Waters and I and Congressman Bachus and I do not know if we have any other co-sponsors yet? Do we?

Mr. RILEY. Not on the legislation.

Chairman NEY. We just introduced it and this is kind of one of the first pieces dealing with the Supreme Court decision. But I wanted to mention this. It would prevent CDBG funds from being used for this eminent domain under *Kelo* decisions. So in other words, we are not restricting the State, but if a local government would attempt to somehow use CDBG funds, we then would restrict those funds to not be used under the new Supreme Court decision.

I think one of the rationales behind trying to make this move is that we have had enough of a battle and if all of a sudden CDBG funds are used to take somebody's farm or whatever, for a store, you know, a business, you would have an outcry that CDBG needs to be altered and changed. So that is the one thing that we have done.

And one question that I guess I have asked all of you and I think I might know the answer to this, you know, because we do not know what to do yet in the Federal Government and maybe we should not do anything right now. Maybe the States should act. If the Federal Government did anything, what would you see—a national moratorium would that work? The only thing that I am afraid with the Federal Government getting into this, although I do not like the Supreme Court decision, I am afraid that at the end of the day if we actually passed law, we would put eminent domain under the EPA or something.

[Laughter.]

And then hire 25,000 people and our entire lives would be upside down across the county. That is a fear I have. How would you regulate eminent domain?

Mr. GIBBS. Congressman, I have been giving that a lot of thought and I think I concur with you. I am concerned about the Federal Government taking an action here, because, you know, I have seen in my past capacities how things are handled differently in different States. And the State constitutions are not identical. We have some questions that came up here in Ohio, you know, we have universities that have eminent domain authority and they also have non-profit foundations. And the question is does that foundation have eminent domain authority? I do not know the answer to that. And so, there is probably some difference between States and the current Constitution and regulations in Federal law to preempt some of that and cause some problems in local jurisdictions that we do not anticipate.

So I think from the outset, from here it is better addressed by individual States and see how we work through this. It is kind of like the sales tax issue. The States are trying to work through that because for Federal legislation to address that issue with all the complexities between the different States, it creates a myriad of problems. So, I think you are probably right, let us wait to see what the States can work up and see if there is any commonality.

Mr. GRENDELL. Congressman, I am a big Tenth Amendment fan and I certainly hope that we have not reserved the power of the property takings to the Federal Government somewhere else. While the Constitution protects the compensation clause, I think the Supreme Court got one thing right in *Kelo*, it is that States need to address this issue to protect the private property rights. We have taken the part of your legislation in the legislation that Representative Gibbs and I did. Our carrot and stick to any community that might think that their home rule power circumvents Senate Bill 167, is they will lose their funding if they implement any violation of the moratorium. And so, we borrowed that from the Congressional language and we thank you for that. Because we felt that we needed some sort of back stop in case home rule came around the corner.

But we do commend the thought that Federal money should not contribute to the problem. And so, where you are heading is the right direction although, we would ask that Congress look at this issue, because there is this balance that needs to be struck. There is this issue of unblighted private property that somebody is living in should not just be taken because somebody decides they want a Wal-Mart store versus there is a role for eminent domain in the area of our blighted urban areas that we do not want to lose that ability.

And so, I think the thing we all can agree up here is that while we want to address this issue, we do not want to go so far over that the law of unintended consequences has a negative impact long-term on Ohio. And that is why we think the moratorium which Commissioner Bubb, I think, correctly said will give us a cooling-off period so that we can look at this in a rational long term solu-

tion that protects private property rights, but also understands the need for still having eminent domain in the right circumstances.

We do not have a solution there but that is where we should go. And we hope that whatever Congress is going to do will also reflect long term that there might be a time when that eminent domain does have a right play in the blighted situation that it does not have in the unblighted situation.

Chairman NEY. Like I said, we were trying to do that so that the CDBG funds, there would not be some outrageous case where they were used. Then people would come through the back door saying well you have got to change it now and the CDBG is going in working in the right way. The—I think your approach eases some fears because what is happening to Members of Congress, you know, 435 people, I am sure they are hearing it when they are back home, there is in the letters that we are getting and the immediate phone calls a fear out there that, you know, a few very, very wealthy people are going to start to seize what they want and have a lot of influence and get property and take farms. So there is a a lot of the unknown. So maybe the moratorium makes sense to give at least a little bit more calmer atmosphere until we can find out what to do.

Questions?

Mr. RILEY. I have a question on behalf of Mr. Frank and Ms. Waters. Mr. Frank and Ms. Waters, like Mr. Ney, are strong housing advocates. They have a concern for renters. Are there any examples of what has happened to renters that are in, you know, affordable housing units. Is there any consideration taken for them when the property is taken?

Mr. NUTT. I am not the definitive source on that particular topic, but I do think that we pay relocation for renters as well.

Mr. RILEY. You pay for relocation of renters?

Mr. NUTT. Yes.

Mr. GRENDELL. Under Ohio law, the renter, if a lease is in effect, does have some rights vis-a-vis their leasehold interest, because you are taking not only the fee interest of the property owner, the landlord, you are taking the leasehold interest of the tenant. There are provisions, some provisions for making an accommendation. This situation actually is part of like the Norwood situation. More of the property involved there was rental property rather than occupied property. At least the ones that are in controversy. But there are some protections in place.

I think again, going back to that concept that if we are throwing somebody out of a perfectly good place, we need to be more attentive to what that does value wise. Because the tenant's value there would be different than the tenant whose value may be in a less valuable property. So the concept applies both to the owner and the tenant at some point.

Chairman NEY. Any other statement that you have?

Mr. GRENDELL. I want to thank you very much, Congressman Ney, and the committee. This is great to have Congress come to Ohio; I mean that on behalf of my constituents. And on behalf of, I think, everybody in Ohio, it is nice to see this kind of activity right here in our State and we truly appreciate it.

Chairman NEY. Thank you. I actually introduced a bill—moratoriums tend to work. I did it in Ohio years ago on an emergency, the board reconstituted you know, stopped the rules until they could get going. But I was thinking one of the concepts we ought to carry out is to require Federal agencies such as used to be called HCFA, CMS, that makes all these rules as we sit here and speak, require them to go out and do their hearings around the country versus doing the hearings in Washington. And you know, you cannot—500–600 people cannot get to D.C., but 500–600 people could get into an auditorium.

So, I appreciate your comments. It is important what we are doing, and we are going down like I said to Ross County. I appreciate all your time in this because this gives us a good way to officially go back for the record and to give some thought to what has happened here.

And I am sure that other Members will be coming in and, you know, after the recess we will be having future hearings. But I wanted to just show some of the ideas of how you approached the hearing in Ohio, which I think is a good local approach.

I want to thank all of you for your time and again, the Mayor for hosting us, and the Village of Hebron, thank you very much.

The record will remain open for 30 days. Some Members may have additional questions. Or some Members of the House reviewing the transcripts may want to ask you some questions, so without objection it will be open for Members to submit questions for the record.

And thank you all again for your time.

[Whereupon, at 10:15 a.m., the Subcommittee was adjourned.]

EMINENT DOMAIN: ARE OHIO HOMEOWNERS AT RISK?

Thursday, August 18, 2005

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON HOUSING AND
COMMUNITY OPPORTUNITY,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:00 p.m., in the Ohio University-Bennett Hall Auditorium, 101 University Drive, Chillicothe, Ohio, Hon. Bob Ney [chairman of the subcommittee] presiding.

Present: Representative Ney.

Chairman NEY. I want to thank everyone for coming today. The Subcommittee on Housing and Community Opportunity meets in a unique setting today, for its second of two field hearings in the 18th Congressional District to discuss the Supreme Court's recent ruling in the case of *Kelo* v. *the City of New London* and the serious implications this ruling could have on low-income housing, family farms, and rural Ohio.

With us today is Jeff Riley, who works for the Ranking Member of the Financial Services Committee, Barney Frank of Massachusetts. The Chairman of our Committee is Mike Oxley of Ohio, and I am the Chairman of the Subcommittee. Our Ranking Member of the Subcommittee is Maxine Waters of California, and Tallman Johnson also is here today. I want the two of you to introduce yourselves.

Mr. KANGAS. I am Paul Kangas, I work on the committee for Chairman Mike Oxley.

Mr. SCARDENA. My name is Frank Scardena and I work for Chairman Ney.

Chairman NEY. And these are the fine staff who put the bits and pieces and nuts and bolts together.

The last of the U.S. Constitution's Fifth Amendment liberties provides that no private property be taken for public use without just compensation. Under this provision, government entities may invoke the power of eminent domain or right of condemnation to remove property from private ownership for public use.

On June 23, 2005, the United States Supreme Court held in *Kelo* v. *the City of New London*, that the city's condemnation of private property which was part of the city's redevelopment plan aimed at invigorating a depressed economy, was a public use, satisfying the United States Constitution, even though the property might be turned over to private developers. The majority opinion was grounded on the recent Supreme Court's decisions holding the public use must be read broadly to mean for a public purpose.

The dissenters, however, argued that even a broad reading of public use does not extend to private-to-private transfers, solely to improve the city's tax base and to create jobs.

In the other hearing, we heard again from elected officials and people involved in development. There is a bill, a piece of legislation authored by Maxine Waters, myself, and Spence Bachus of Alabama in a narrow area, it takes the community development block grant funds and if they are used by a community under the new Supreme Court ruling, we will pull those funds. And one of the reasons we did this, community development block grant has been under the gun and under fire and we kept it where it is at versus the Department of Commerce. And we felt if those funds were used—several reasons, but if those funds were used, it really may not be real supportive of the fund and lead to controversy that could hurt CDBG. Or on top of it, we just felt those funds should not really be part of private-to-private use.

I have another statement I am going to just put in for the record because I want to start with the witnesses; we want to hear what you have to say.

And again, we have our hearings in Washington D.C., we do go throughout the country, Democrats and Republicans on the committee, and it is a pleasure to be here. And bringing government here locally and the subcommittee is, I think, a good thing to do. So we really look forward to seeing you.

And today, we have State Senator John Carey, who represents the 17th District in the Ohio State Senate, having taken office in January 2003. Previously, Senator Carey served as a state representative and before that as the Mayor of Wellston.

On his way is State Senator Tim Grendell, he represents the 18th District in the Ohio Senate. He took office just this past January. Senator Grendell is from Chesterland, and prior to his election he was an attorney.

Jeff Finkle is the president and CEO of the International Economic Development Council located in Washington, D.C. The Council is a non-profit organization dedicated to helping economic developers do their job more effectively and thereby creating more high quality jobs, developing more vibrant communities and generally improving the community's quality of life. He also graduated from Ohio University and is originally from Licking County.

Dona Smith has been the executive vice president of the Ross County Community Improvement Corporation for 15-and-a-half years. During that time she has been involved with major industries for expansion projects, worked with new business development bringing new jobs into Ross County, and worked the city and county for infrastructure improvements such as roads, gas lines, water and sewer lines, some of which utilized Federal and State grants.

And also with us is our State Representative Clyde Evans, who has done a wonderful job working with Senator Carey for our region and has excelled in a lot of areas including education, being of the education background that he was prior to his arrival in the legislature.

And with that I want to thank you. And we will start with Senator Carey.

STATEMENT OF STATE SENATOR JOHN CAREY, 17TH DISTRICT, OHIO STATE SENATE

Mr. CAREY. Chairman Ney and the members of the subcommittee, thank you for allowing me the privilege of testifying before you today here in Chillicothe. It is nice to see our officials from Washington. Congressman, we see you quite often, but we are glad to meet the staff of other Members. And we appreciate you taking the time to let us have our voices heard.

Let me start by saying that as a former Mayor, I vehemently oppose the use of eminent domain to take unblighted, private property for the sole purpose of passing that property to a developer for private development. While I can understand how the promise of increased revenue and jobs could make this option palatable for some officials, I feel the safety and security that our constituents feel in their own home is more important. In fact, when I was Mayor, I did not use eminent domain at all but I certainly understand that it is sometimes needed for road, sewer, or water improvements. And I believe that is where eminent domain powers should stop.

As I am sure is the case across the country, the Ohio Legislature has had to act quickly in the recent *Kelo* decision by the U.S. Supreme Court. Just 2 weeks ago Senator Grendell, whom you will hear from today, introduced Senate Bill 167, which I will outline later in my testimony. Considering this bill has been co-sponsored by 26 of the remaining 32 senators, including myself, I think it is safe to say that this issue has resonated here in Ohio and that something will be done about it.

In addition to Senate Bill 167, the issue of expanded eminent domain powers came up during the recent deliberations on House Joint Resolution 2, which will be Issue 1 on the ballot this November. House Joint Resolution 2 would authorize $1.35 billion for public infrastructure, $500 million for research and development, and $150 million for shovel-ready sites. Due to the fact that Issue 1, if passed by the voters, would go to the Ohio Constitution, the legislature did not get specific in terms of language in HJR 2 but I believe there is an understanding that none of the $500 million for research and development and the $150 million for shovel-ready sites will be used for eminent domain. This will be addressed in the implementation language, if approved by the voters.

Senate Bill 167, of which the sponsor now is sitting beside me, creates a moratorium on the use of eminent domain by the State or any political subdivision of the State to take without the owner's consent, private property that is in an unblighted are when the primary purpose is for economic development that will ultimately result in the property being owned by another private person. This moratorium would last until December 31, 2006, while a 25 member legislative task force, with a wide range of interested parties represented, conducts research and provides recommendations to the General Assembly on how to best update Ohio's eminent domain statutes by April 1, 2006.

While I am not generally the biggest proponent of legislative study task forces, I believe in this case this is the right approach to take. I believe the worst thing the Ohio Legislature can do is rush this process. While I think most legislators in Ohio do not

want to see unblighted, private land taken for private development, it is also important that we do not make the problem worse by rushing legislation through before all the possible ramifications are known. Having a moratorium in place until we can receive recommendations from the task force will allow Ohio to protect property owners while the legislature comes up with a more permanent solution to this problem.

That is a brief outline of how the Ohio Legislature has responded to the *Kelo* decision to this date. I am sure this topic will remain in the spotlight for the near future and other proposals will be made. But I think it is safe to say that here in Ohio the idea of taking unblighted private property through eminent domain for private development has not been received well. I would be happy to answer any questions you may have.

Mr. Chairman and members of the subcommittee, this concludes my testimony. Again, thank you for the opportunity to testify here today. I would be happy to answer any questions.

[The prepared statement of Senator Carey can be found on page 58 of the appendix.]

Chairman NEY. Thank you, Senator Carey. I appreciate your attendance here. And we read your bio. Senator Grendell is here, he was also up in Hebron, Ohio. We sure appreciate the drive and time that you took for this important issue.

STATEMENT OF STATE SENATOR TIMOTHY J. GRENDELL, 18TH DISTRICT, OHIO STATE SENATE

Mr. GRENDELL. Thank you, Congressman Ney, good afternoon to the local officials and guests. And thank you, Congressman Ney, for bringing Congress to Ohio. I think this is a wonderful thing to do, to give folks in Ohio an opportunity to speak to their Congressman without having to travel all the way to D.C., for this opportunity.

I am going to echo and paraphrase some of my written testimony, because I am going to echo my good friend Senator John Carey's thoughts. And one thing I want to do is to thank him, in the process of doing the ballot initiative for jobs in Ohio, working with Senator Carey and Senator Harris, we did address language to protect private—unblighted private property for the *Kelo* effect. And I think that was an important first step.

Like the Fifth Amendment, the Ohio Constitution in Article I, Section 19, provides that private property shall be held inviolate and shall not be taken for public use without proper compensation. The U.S. Supreme Court's recent decision permitting the government sanctioned transfer of private property from a private citizen to a private developer has struck a Constitutional nerve throughout the country.

While the use of eminent domain for roads and utilities has long been recognized, the governmental taking of a well maintained parcel of real property from one private owner to another private owner is fundamentally un-American.

Our Founding Fathers believed that private property ownership as defined under common law pre-existed government. They further believed that government, whether Federal or State, served as the contractual aid for the people and unlike the English monarchy was not the sovereign. Thus, protecting private property ownership

rights against unwanted governmental appropriations motivated the inclusion of the takings clause in the Fifth Amendment. Of course they included the takings clause and in including the takings clause the framers of the Bill of Rights also recognized the need for a limited public use exception to the sanctity of private property, provided that the private property owner was justly compensated.

The drafters of the Ohio Constitution included similar language. For approximately 175 years, eminent domain was employed by governments for obvious public uses, such as roads, canals, railroads, military bases, fire stations, schools, and parks. Then eminent domain became a tool for urban revitalizationists to invoke government's takings power to acquire blighted or deteriorated private properties, often for private redevelopment as urban renewal projects. Courts have upheld such actions finding that eliminating blight was a legitimate public purpose. But in hindsight, those cases started the takings law down a different slope.

On June 23, 2005, the *Kelo* case expanded the definition for public use or public purpose for the first time to look at non-blighted private property. The majority of the Justices found that New London, Connecticut, did not violate the Fifth Amendment by reaching that conclusion.

Justice Sandra Day O'Connor and three other justices disagreed with the majority's broadly defined concept of public use and in her vigorous dissent, Justice O'Connor chastised the majority for abandoning the 2-century old principle of preventing the government from acting beyond its authority, warning that there is nothing to prevent the State from replacing a Motel 6 with a Ritz Carlton, or any home with a shopping mall, or any farm with a factory.

To some, *Kelo* is the natural extension of the urban renewal eliminate blight concept of economic benefit equals public use. To others *Kelo* is an affront to the fundamental protection of private property ownership guaranteed by the Fifth Amendment. A review of our Founding Fathers' early writing supports that latter position. It is doubtful that Thomas Jefferson ever envisioned a governmental right to take his home, Monticello, and give it to a private developer for an office complex or a big box super center.

Thankfully, the Supreme Court, the U.S. Supreme Court, noted that the *Kelo* decision does not prevent States from adopting a more protective approach to private property rights. And 34 States have initiated such legislation.

Under Ohio eminent domain law, however, as it is currently on the books it neither contemplates nor adequately protects private property owners should unblighted private property be taken by eminent domain under the banner of economic development. Courts have almost uniformly acceded to the government's determination that a public necessity exists, justifying the take.

At least in the urban renewal cases, the taking authority had to obtain a blight study, determining that the property in the area was blighted before it could proceed with the eminent domain.

After *Kelo*, government officials merely need to conclude that the taking of the property from one private owner to transfer to another private owner will be more economically beneficial for the public. Eminent domain procedures under Ohio law, however, do

not properly address this private-to-private taking as permitted by *Kelo*. Currently the private property owner bears a substantial burden with respect to establishing the value of the property to be taken and is usually limited to presenting evidence of value based on the property's current zoning.

This could lead to a substantial inequity in the *Kelo* taking situation. For example, the owner of a house on one acre zoned residential worth a maximum of $150,000, in most cases would be limited to offering evidence of that value. Should that acre be taken by eminent domain and subsequently transferred to a developer of a commercial complex, the ultimate value of that property could be $250- or $300,000. Such governmentally induced inequity cannot be condoned or be considered just compensation.

As Senator Carey mentioned, myself, Senator Carey, Senator Zurz, Senate Cates and 22 others have introduced Senate Bill 167 in Ohio which would place a moratorium on the taking of unblighted or *Kelo* type taking of private property. This legislation provides for a temporary statewide moratorium to the end of December of next year and forms a task force with 24 individuals from a broad set of interested parties including property rights groups, State and local government, agriculture, commercial and residential real estate, and the legislature. The goal is to do a comprehensive review of Ohio's eminent domain law, particularly looking at the impacts of the private-to-private taking allowed by *Kelo* and also look at the definition of blight and deterioration to see where Ohio law needs to change to protect private property rights in light of the *Kelo* decision.

The task force report will be due in spring of 2006, which will give the legislature time to take the necessary actions whether they are statutory or constitutional to address the issue.

Senate Bill 167 protects Ohioans' private property rights in the short term, while providing a thoughtful and comprehensive approach towards a permanent change in Ohio's eminent domain law. While eminent domain can be an important tool for State and local government when employed for legitimate public uses, that governmental power should not be abused or exploited.

Under Article I, Section 19 of the Ohio Constitution, private property rights are inviolate. And regardless of what the U.S. Supreme Court's notion of eminent domain is we must strive to make sure that it stays inviolate in Ohio.

In conclusion, States have numerous options in response to *Kelo*. These options range from taking no action and letting the courts grapple with the problem as to where *Kelo* hits in a State-by-State base to adopting a State constitutional amendment prohibiting the taking of all private property or all unblighted private property that will ultimately be owned by another private property owner.

In between, State law can be change to redefine public use, but such a statutory action can be circumvented by a municipality's home rule powers. Such home rule concern can be avoided by way of a constitutional amendment. States also should re-examine their definition of blight and deteriorated properties to prevent circumvention of the *Kelo* responsive changes by the legislature. If a total prohibition against unblighted properties is not adopted, State procedures for determining just compensation for private takings

should be changed to allow the current private property owner to offer evidence demonstrating the value of the property based on the proposed future development after the take. Since there will not be public ownership but the private ownership, that would only be equitable.

Swift action is needed to protect Ohioans' private property rights. Senate Bill 167 will provide a balance by giving immediate relief on unblighted property owners concerned about a taking, while proposing the appropriate long term solution to still protect the State's economic well being. This approach will not only protect private property owners rights now but also in the future.

Congressman, thank you very much. I will be glad to answer any questions.

Chairman NEY. Thank you, Senator. Mr. Finkle.

[The prepared statement of Senator Grendell can be found on page 73]

STATEMENT OF JEFFREY A. FINKLE, PRESIDENT AND CEO, INTERNATIONAL ECONOMIC DEVELOPMENT COUNCIL, WASHINGTON, D.C.

Mr. FINKLE. Congressman Ney, thank you very much for giving me the opportunity to speak before you today. I have submitted formal comments and so what I am here to say is just some subset of those comments.

I appreciate the opportunity to talk about the issue of *Kelo* in the context of economic development, the role of communities as they try to create, retain, expand jobs, develop a tax base, and enhance wealth in the communities where they work.

As you know, I represent economic developers from across the country and I work for the International Economic Development Council. We have 4,000 members who each and every day are trying to improve the quality of life for people in the communities where they live and work.

I have worked in the field of economic development for over 25 years. Five years working for the U.S. Department of Housing and Urban Development working on the community development block grant program, of which your legislation in fact, attempts to change.

To digress for a second as I talk about the issues around *Kelo* and eminent domain, I would point out that the statutory challenge for the Congress, particularly in light of the community development block grant program, you have set out the block grant program, you have set out the block grant program to meet three pressing urgent needs of communities. One, to meet the needs of low and moderate income people. Two, to meet a pressing local need and third to eliminate the slum and blight. To limit the use of CDBG dollars and not allow it to be used for dealing with the elimination of slum and blight in fact, would jeopardize one of the three tenets of the community block grant program.

Congressman, as you noted, you were in my home county this morning, which I understand you are becoming a Licking Countian as well. And it is wonderful to be at a branch campus of Ohio University where I graduated in 1976 and have remained a part of the

Ohio University family serving on the Institute of Local Government Administration and Rural Development Board for some time.

So what is it that we are talking about? We are talking about the *Kelo* decision which affirms economic development as an important tool for local governments and leaves eminent domain where it should be—in the hands of State and local governments. The Supreme Court decision did not change anything, and that is one of the concerns that I have had, is I have listened to people talk about the *Kelo* decision. There was absolutely no changes from what the practice of using eminent domain has been for many years. What it did was it gave the Institute for Justice, a libertarian think tank law firm, an opportunity to espouse the issue of property rights and use that bully pulpit in a very loud way to scare the heck out of all of us.

At the end of the day, most communities do not use eminent domain for the taking of owner-occupied homes. They do not go out and take viable businesses from people. For the most part when they use eminent domain, they use it to take—for the elimination of slum and blight.

In fact, only 11 States have statutory language or constitutional languages similar to what Connecticut has. As they propose the use of eminent domain for economic development purposes in New London, Connecticut.

It is very unlikely that as a result of the *Kelo* decision that we would have much change in terms of how eminent domain is used across the country. I have been to Congresswoman Water's district and have met city council members there after the actions that were taken in south central L.A. As I talked to city council members in Los Angeles, they refer to the issue of eminent domain as there was a desperate need for grocery stores in south central L.A., and they specifically said we would not take homeowner-occupied housing. And so, this is not a radical change from a position many communities have taken. In fact when Senator Carey was Mayor, you know, he kind of had a personal guidepost in terms of how he would use eminent domain and I hear that constantly as I travel around the country.

But judicious use of eminent domain is critical to the economic growth and development of cities and towns throughout the country. Assembling land for redevelopment helps to revitalize local economies, create much needed jobs and generates revenues that enable cities to provide essential services. When used prudently and in the sunshine of public scrutiny, eminent domain helps achieve a greater public good that benefits the entire communities.

Many of our urban communities were developed in the late 1800's and early 1900's. Those cities have small lot sizes and were developed in an era of horse and buggy. It is often difficult to redevelop these communities without the ability to assemble land. Big box retailers, shopping malls, and new office buildings often choose to locate in greenfields and suburbs because of the lot sizes that we are dealing in our urbanize centers. Each time these development decisions are made, the tax base and jobs are also going to those places.

Let me give you some examples of where eminent domain has been used. In Columbus, there is a famous chocolate company

called Anthony Thomas Chocolates, which is located or used to be located on West Broad Street in Columbus. Eminent domain was used to allow that facility to remain located on West Broad Street for many years. They needed to expand, most of their employees were poor, most of them walked to work. And as a result when they needed to expand, the City of Columbus demised an alley behind the business and relocated the alley taking in a homeowner-occupied home in order to maintain those jobs in what is referred to as the hilltop district in Columbus, one of the lowest income neighborhoods in the City of Columbus.

When BMW wanted to locate a facility in South Carolina, the State of South Carolina used their powers of eminent domain to create a site for BMW to locate in South Carolina. The same was true in Toledo, Ohio, when the Jeep plant went into an urbanized area of Toledo. The city used eminent domain to allow the Jeep plant to go forward. When the City of New York, tried to clean up Times Square, they used the power of eminent domain to take New York City's ugliest place with strip joints and massage parlors and various pornographic venders in what was Times Square. And they used the power of eminent domain to revitalize Times Square. It is now a family friendly area with Disney stores in the Times Square area.

The City Center Mall in downtown Columbus, when the City of Columbus tried to ready that site for Toddman to take that project over. The city used eminent domain to acquire that site, as the City of Indianapolis did when they prepared their downtown mall as well.

I worry about places like my hometown of Newark, Ohio. We all know where the Owens Corning fiberglass plant would be—currently is. What would happen if the city fathers and mothers were told we have to remain in this place but we also need to expand and we have no sellers on our borders. What is the City of Newark going to do? Are they merely going to say we can do nothing any longer, and we understand that if we cannot do anything, you are going to have to shut your doors and hundreds of people that live in Licking County would loss their jobs. This puts central cities—the judicious use of eminent domain allows places like Newark, Columbus, Cleveland, Cincinnati, etc., to have the ability to expand jobs in their current locations.

There is no question that eminent domain is a power that like any government power must be used prudently and there are many built-in checks. One such check is the public nature of the takings process. Many of us watched 60 Minutes as the people just east of downtown Cleveland tried to use eminent domain and came up with a silly definition of what eminent domain is. I am here to report that no member of that city council nor the Mayor survives at this point as a result of the public outrage for the eminent domain and the potential takings there.

We obviously have checks on the use of eminent domain, as the court requires just compensation when it is taking. But I worry about a rule of unintended consequences assuming that each and every homeowner can be a developer and can take what might be a value of $150,000 and magically turn it into $250,000 if we take a presumed appraisal in terms of what its future use might be.

Unduly constraining eminent domain would work job creation by eliminating an entire category of projects from the redevelopment tool box of local officials.

Should Congress act to prohibit the use of eminent domain for economic development purposes, the economies of many Congressional districts might suffer. No municipalities in America could use eminent domain to carry out an economical project. One person can veto the redevelopment of the entire distressed community. This would have the practical effect of making such projects virtually impossible. At a time when so many of our businesses and communities are being confronted with intense competition from the global economies and areas of our cities and rural areas are declined, Congress should be expanding its efforts to solve the problems of economic deterioration, not imposing restrictions on community growth.

Thank you, for allowing me to have the opportunity to testify before you today. And I look forward to answering any questions.

Chairman NEY. Thank you. Ms. Smith.

[The prepared statement of Mr. Finkle can be found on page 60 of the appendix.]

STATEMENT OF DONA SMITH, EXECUTIVE VICE PRESIDENT, ROSS COUNTY COMMUNITY IMPROVEMENT CORPORATION, CHILLICOTHE, OHIO

Ms. SMITH. Congressman Ney, thank you very much. And we appreciate you bringing part of the Federal Government to Ohio's first capital. We look forward to seeing you any time.

The Ross County Community Improvement Corporation, the CIC, is a private non-profit economic development agency. The CIC has been involved in economic development on a full time basis for the past 20 years. During those years we have worked to develop industrial parks, located sites for business growth, and worked to bring many jobs into the Ross County area.

We have also looked at and worked on smart growth initiative. This would be a development plan for the entire county, locating areas that would be appropriate for future developments such as housing, commercial and industrial growth. These types of plans, developed by broad based community members, provide directions on developments within communities and supported by citizens and elected officials.

The recent ruling by the U.S. Supreme Court concerning eminent domain has brought forth many questions and concerns not only to local citizens, but also to elected officials and economic development professionals. It jeopardizes the efforts of economic development professionals and severely puts these efforts at risk. The goals of development are to bring increased investment and job opportunities to local area. However, there needs to be trust and understanding within communities to assure that everyone is protected.

Eminent domain has been available to local governments in Ohio for the taking of land for public purpose or for necessary purposes. Landowners are to be justly compensated. Public purpose and necessity are not intended for profit-making. Giving local governments a much broader power to take property for the purpose of generating more tax revenue opens up a potential Pandora's Box.

Our public officials need to be protected. Most of Ohio has been experiencing the pressures of lower tax revenues, higher cost of services, and the loss of jobs. Economic development has become very competitive with many thousands of economic development organizations across the State competing for projects, investments, and jobs. Allowing local governments to take land for economic development purposes puts undue pressure on these elected officials. These pressures could come from different directions: like developers who offer jobs and increases tax revenues; property owners who feel that they could hold out for higher dollars if eminent domain is used; and lengthy legal battles.

Recently I have seen recall elections brought about by just a few disgruntled citizens over frivolous things. Ohio law allows recall petitions to be presented with a very small number of signatures and without just cause. This can severely affect communities as they can become fragmented and disorganized. These communities will suffer significant setbacks, creating a lack of vitality and economic growth.

Our Constitution was written to protect citizens and government. The ruling by the U.S. Supreme Court, to give government more powers of eminent domain, could lead to more irate citizens recalling government officials. We could create a revolving door of elected officials with the end result being qualified people will not seek offices due to the fears of association with public service.

Congressman Ney, we thank you for your interest in hearing how your constituents view the eminent domain ruling. We hope our U.S. Congress protects the rights of landowners and protects our elected officials who are facing increasing scrutiny and financial pressures.

Thank you.

Chairman NEY. Thank you very much. Representative Evans.

[The prepared statement of Ms. Smith can be found on page 106 of the appendix.]

STATEMENT OF CLYDE EVANS, STATE REPRESENTATIVE

Mr. EVANS. Thank you very much, Congressman. I just want to take a couple of moments to thank you for the diligent and efficient work that you and your staff have done to service my clients in the 87th House District when we have been able to work with you on issues for them. And also, many times that you have come into my district to talk with people about problems and issues that we have had there.

I guess to save time, I am going to be very much like my youngest daughter—when my three daughters were young, the first would say well I am going to do this and the second one would say well I will too, and the third would say me too. Basically, I agree very much with most everything that has been presented here.

Senator Grendell, when he asked for legislators who would like to join the group that he put together to study this issue, I joined and met with him. And when, he called for co-sponsors I co-sponsored the bill. I think that it is very important that these issues be left to the States, to each of them to study on their own. And to make a thorough study of blighted areas and decisions that would be best for the public as a whole.

There has been much testimony to indicate that good can come from eminent domain if it can provide jobs for poor people in blighted areas and areas of social decay. But this is a very tricky area and that is why I very readily joined with Senator Grendell in asking for a moratorium to give us a chance to study in more detail the definition of blighted areas and some other kind of legal terms that we need to take a look at over the next year or so. I think it is a mistake when some of these issues come up and the newspapers of course give them a lot of hype that we jump in very quickly and try to make quick decisions in an emotional state.

So therefore, basically again, I guess my main emphasis would be let us take some time and study this issue and make sure that we made the right decisions, during this period of moratorium.

Thank you.

Chairman NEY. I want to thank all of you for your testimony today. And also, the elected officials for your public service that has been many long hours helping people.

I had a question, Mr. Finkle. What do you think of the actual bill, the moratorium? I know where you are at on the Supreme Court case. What do you think about the moratorium approach in itself?

Mr. FINKLE. Well, I think that is a far better approach than what we have seen in Alabama and Texas. In both Alabama and Texas, they have done what I would refer to as a rush to judgment. In Alabama, the Governor has already signed a new law that bans eminent domain. And the Governor has a bill in Texas on their desk. The interesting thing is, they are chock full of what one might refer to as pork barrel because they excluded a great number of different types of projects that were coming up.

As we all know, in Texas, there in Dallas, they are getting ready to build a new sports stadium. And they planned to use eminent domain, that is excluded in the Texas statute. And as many of us know, when President Bush was the owner of the Texas Rangers, they used eminent domain to acquire the site for the current Texas Ranger stadium.

But it is always good to see the pragmatism that is found in my home State and that moratorium seems to make a lot more sense when you are sitting back and saying, you know, there are a lot of potential good uses that we need eminent domain for. And you do not want to have what would be a rule of unattended consequences, you rush out there and you do something and then you find that you really messed things up.

Chairman NEY. I had a question about—anyone can answer this that has been involved with eminent domain. Most of the cases, as I was telling Senator Grendell, we have all have served in the legislature, try to give them—when you do public private taking for public use, those buildings that you have, you practically cannot give them away when they get old. Nobody wants them and usually somebody gets them off of the State and then has to spend a lot of money for them.

The issue arose today too, about taking private property for private use and all of a sudden that piece of property that was worth $50,000 escalates into, you know, a $400,000 to $500,000 piece because the private entity is building something there. So, did the

person really get value out of the taking? Anybody like to comment on that?

Mr. FINKLE. Congressman, I happened to be on a radio station the other day. This was a call-in show in Indiana on this issue of eminent domain. And the water resource people in the greater Indianapolis area took land 25 years ago. And over the next 25 years they finally determined that they had more land than they needed. And in the meantime, the value of that land had increased over the time period. They sold off some of the land that they needed and they built million dollar homes on it. Now one of the families whose farms that had been taken for—and this was clearly a public use. This was not under what would have been a *Kelo* decision type property.

Some of the farmer families were saying well, we should get the appreciated value. One, they did not have a water resource when they had the land there in the first place. Second, 25 years had transpired. At what point, do you determine an appropriate appraisal of that property and at what point can you say what their action was actually caused the appreciation in value?

Now, I am not one to argue that maybe there ought to be a standard that says if you are taking land for an economic development purpose just compensation is 150 percent of value. But to leave it open ended that person has somehow to be given equity in that project or that the enhancement that a developer, a bank, a builder, a construction company, put into the property, envisioning the concept and taking the market risk should be shared with the property owner seems to be a stretch in what would be considered an appraisal process. Give them a greater value just compensation, but do not have people as part of a deal.

Chairman NEY. Do you ever consider—and I will move on to the Senator. Is there ever consideration, there is a family farm, maybe it is not worth so much per acre, but it has been in the family 125 years, is there any considerations given for that?

Mr. FINKLE. Clearly, emotional value is attached to a great deal of the properties that we are talking about. And I do not know how an appraiser deals with emotional value as they appraise property. But typically what happens to hold-outs and somebody who has emotional value attached to a property, a hold-out is generally going to get more money than somebody who sells early. And so, they are going to get a greater value because they are the ones that are going to take a community closer to court as the community is trying to gather that property for whatever purposes they are going to take it for.

Chairman NEY. Senator Grendell.

Mr. GRENDELL. Thank you, Congressman Ney. Let me answer the second one first, the emotional value issue. Right now in Ohio law, if you are the landowner you have two ways of trying to establish value. First of all, under Ohio law, the owner always gets to testify as to their opinion if it is privately owned. Corporate does not have the same. But if you are a farmer, you have the right to stand up there and say my farm is worth this to me. It has been in my family 100 years and you need to hope the jury hears that loud and strong and ultimately the jury makes the decision. But

the court has to let the owner give their view of the value under Ohio law.

The second form of evidence the owner can propose is some sort of expert, an appraiser who gives a value. But as I mentioned this morning, one of the problems with Ohio law on that value, and this is where that concept of *Kelo* runs afoul of private-to-private versus Ohio law. Right now, the valuation is based on the value of the property as of the date of the take. And it is what it is zoned at the date of the take. And many courts will not allow you to have an appraiser who comes in and says—and it is not magical, residential property is worth less than commercial, farm land is worth less than commercial and industrial. I mean, that is just the way it works in the real world. And your appraiser has to say it is based on the residential zoning or based on the farm land.

And the farm acreage may be $3,000 an acre. A Wal-Mart is not $3,000 an acre. The house may be $50,000 an acre, I have represented Wal-Mart, I have been involved in eminent domains all over northeast Ohio, I will tell you there is no magic to this valuation. It is pretty well established in any mark of what commercial land is worth versus residential and versus farm land. And more importantly in many cases, the developers will know because he is going to lease based on the valuation that he places on the property, based on his total project. That number is not necessarily going, if he is trying to set his rents with a high end retailer, is not going to represent the lowest value he can put on an acreage, it is going to represent the highest value.

All we are suggesting is that when you take private property for a true public use, a fire station or a road, the value is not going to appreciate. In fact, I think you are correct, Congressman Ney, the value tends to get flattened or depreciate because there is not a whole lot of market out there for used government buildings these days.

But when it goes to a private development, I believe that the landowner should be entitled to offer expert evidence as to what the ultimate value of what that land will be in that newly increased developed use. When you are taking unblighted property from somebody, because that person is literally contributing some equity that they are not getting compensated for to the good of a project that is ultimately going to held by a private owner. I think that is why it is important we have the moratorium so we can study that issue, see how in Ohio we can best protect property owners on that issue. And maybe it has to deal with how we value it, bonus value, the fact that in Ohio that you have to pay your own attorney's fees if you are the property owner. Where the government usually is using taxpayers' money. Maybe we should change the law so that not only do you not get some bonus in the value, but if it is a private-to-private take, should that be where the legislature ends up, that legal fees and expert cost get reimbursed to the private property owner as part of trying to stabilize the equities of that situation.

Chairman NEY. This question is for the legislators, are you hearing a lot via letters or phone calls from constituents or farm groups on this issue, I was curious?

Mr. EVANS. I have received very few, but in talking with people in my district, of course they are very concerned and I think a lot of people do not understand the Supreme Court's decision and how it relates. Once I talk them a little bit, and explain a little bit to them, they understand a little more. But they still of course are very, very much concerned about taking anyone's private property and they very well should be. I have not had a lot of correspondence coming to my office about it, but there is concern.

Mr. CAREY. Congressman, I have had some contact and especially since we are in Appalachia today, private property rights are a very strong sentiment in Appalachia. Even in traditional zoning that we see in cities and towns, it is very hard to accomplish in the Appalachian part of the State. So, the idea that some one can come in and take their land for private enterprise would be not welcome in this part of the State.

Mr. GRENDELL. Congressman Ney, I put together with the blessing of Senator Harris, the president of the Ohio Senate, a working group. In fact, Representative Evans is on the working group and we have had calls, letters, e-mails, and interesting enough, we have had people come and show up at the working group meetings, citizens who have had problems with the Lakewood take, west of Cleveland, people from Norwood who have concerns about the Norwood situation, as well as representatives of the Farm Bureau and several other citizen groups who certainly do think that we need to at least review the situation and do what we have to do to protect the private property rights that are now subject to the *Kelo* decision.

Chairman NEY. On the CDBG, I wanted to mention, I mentioned earlier, but as you know, it is designed to serve families at the very low-income level and try to get them up into self-sufficiency. So it tries to protect them so they continue to serve those families most in need. That was again one of the theories of not allowing those to be used for this purpose, because they are an intended fund. But Mr. Finkle, you had mentioned the third provision though that CDBG—I was trying to follow that?

Mr. FINKLE. Yes, as you may remember, I was the Deputy Assistant Secretary in charge of the CDBG program during the Reagan Administration. There are three fundamental legs to the CDBG program. And those are meeting the needs of low and moderate income people, meeting a pressing, urgent need, and the elimination of slum and blight.

Admittedly the majority of the funds used by the CDBG program are meeting the needs of low and moderate income. But the CDBG program, in both in its original construct, its legislative intent, its current use, allowed for meeting a pressing urgent need. Say for instance a small community loses its water system after a major flood. That is an allowable use of CDBG dollars for meeting a pressing urgent need. But the last part, the elimination of slum and blight, anticipates the government using CDBG to take down dilapidated buildings, sometimes occupied buildings, sometimes commercial properties that are a blighting influence on the community.

When the community takes those buildings, they are often going to turn them over in some type of redevelopment plan, in some

type of allowing another private sector user to take those properties and reuse them in some way.

Chairman NEY. What is the definition of blight, because Senator Grendell had an interesting—what was the one car attached?

Mr. GRENDELL. Congressman Ney, up in Lakewood, Ohio. in a desire to try to take an area where they wanted to eliminate some apartment buildings, the developer had a grander scheme. And to get to that scheme, you have to take out several blocks of occupied primary residences that were not in any, what you or I would call, blighted condition.

They got some experts to come up with the concept that within this geographic area blight was having a detached garage and one bathroom. The problem with that, as the mayor of the city found out when she was on 60 Minutes, is when they confronted her with that, she did not live within that geographic area that they wanted to develop, but she indeed lived in another part of the city in Lakewood with a detached garage and one bathroom.

And so, that is probably the most egregious case of abuse of the definition of blight that I have ever seen and certainly the most egregious in Ohio. And while it is true that the folks ultimately undid that by going to referendum, there are some problems with that as the ultimate solution. Those people had to spend a lot of money—they did get some outside help—but they also had to hire lawyers, while the city continued to use taxpayer dollars to pursue their development plan. I do not think Ohio citizens should have to pay twice to defend their homestead.

And so I think we do have to take a look at the definition of blight as part of what we are doing here. And with *Kelo*, you do not even have to get to blight. That is the concern. With *Kelo*, those councilmen no longer have to even go through the facade of a one bathroom, one car detached garage. They can just claim it is good for the city because it is going to generate jobs and taxpayer dollars and get past that issue and just start taking those homes.

I do think there is a real legitimate concern that we need to find that line. And there is a line that I think hopefully with the moratorium we will be able to find between true economic needs and true use of eminent domain for public purpose, real public purpose, versus what I refer to as economic socialism, that we just decided to tear down some houses because we want a Wal-Mart store. I just think that is un-American.

Mr. FINKLE. Congressman, to answer your question—the Federal Government has blight definitions that Lakewood would not fall under. I would agree with the Senator that Lakewood was an abuse of the process. But those homes would not meet the blight definition the Federal Government has laid out for CDBG use. It is a much, much tougher standard. You and I both know Washington D.C. and we both know Columbus very well. When we saw blight, we would know it is blight.

Chairman NEY. The national standard on CDBG is set for blight?

Mr. FINKLE. That is correct and I do not have that definition or standard memorized unfortunately.

Chairman NEY. Do you think there ought to be a national standard on—

Mr. FINKLE. No, for the purposes of the way eminent domain is carried out across the country now, the Federal Government has left that up to the States to decide. So, I would not encourage the Congress to set a national standard, but rather leave it to the States to allow them to make the decision as to how they want eminent domain to be used within their specific States. That is how it is currently done. There are, as I indicated in my testimony, 11 States that have statutes similar to Connecticut. If they choose to change it, even in the decision by the Supreme Court, they said essentially that this was an issue for the State to grapple with.

Chairman NEY. I wanted to ask Dona Smith, you have been in the development arena a long time, did you ever have any situations where it was going to be a hairy issue of taking somebody's property? Was it re-thought to do it another way, or was this ever approached?

Ms. SMITH. We have never really been involved in any eminent domain situations. As I see it, if a developer—you know, I work with a lot of developers who have offered "X" amount of dollars for a property, but have also said if we develop that site and sell it, you know, the property owners will share in the wealth in the future. I think there are ways that you can work with, rather then taking it just by eminent domain. I think there are ways you can work. If developers are upright and forthcoming, they should be able to. And as you said, when they rent it they use a high value, well if the person could share in some of that income, based on both the value of the land, I mean that is one way of looking at it. We have to make it safe. But no, we really have not been involved in anything to that point, but we are getting close.

Chairman NEY. Because I thought you took an interesting point of view, for somebody involved with the CIC.

Ms. SMITH. Yes, I look at it this way. We have to protect people from—our government, you know, in Ohio, we are just seeing people recalled and stuff like that. And this is just another opportunity for disgruntled people to say, you know, a few hundred signatures and you are out of here if you do not. It is costly, you know, things like that. So, I think there are other ways, there are other things to look at down the road as to what this could mean. There is too much pressure right now. We have to figure out how we can all work together.

Chairman NEY. A question I had, people have mentioned 34 States are moving to enact laws. Let us say that in "X" amount of States, it is up to the States and let us say, you know, 45 States enact some type of law, like the one you have, the legislators, or something effective, Texas or whatever. And there are a handful of States that do not enact that type of law, would that be a situation more prone for developers to go to those States that have not enacted that law or would it be insignificant thinking towards that? Anybody speculate?

Ms. SMITH. My personal opinion, I would think, you know, not everybody has to be in a certain location, but certain people have to be in a certain location. So, if ABC company has to be in Texas because that is where their customers or their suppliers are and Texas does not have a law it is probably, you know, or they do have a law, they are probably not going to go next door.

I do not, economic development is not fair anywhere, I mean it is a shot in the dark and it is the luck of the draw so, I do not see it affecting—now I may be wrong and you probably have a better handle on it, Jeff.

Mr. FINKLE. Where I think the issues are going to be the greatest, I see the issue as being somewhat black and white. The places which are experiencing a great deal of growth are going to be the places where if they enact this type of legislation, there is nothing going to be felt because they are growing like crazy anyhow. So, California, Arizona, Texas, Alabama, and Florida are still experiencing a great deal of job growth. They are still getting a great deal of population growth and they are experiencing revenue increases. And as a result, they can pass darn near anything to limit growth, to limit economic development, and it would not hurt them.

Places like New York, Pennsylvania, Ohio, Rhode Island, Connecticut, places that are stagnant both in economic growth, and in population growth, and in tax revenue are going to put themselves—any time that they limit one of their economic development tools, they put themselves at an inherent competitive disadvantage.

Now, I am not saying that you will loss a major factory if you limit eminent domain. I am not going to say—I do not know where that particular facility might want to go. But the more restrictions you put that limit your ability to grow either in place in a business retention or the ability to attract and acquire land, it is going to put a community at a disadvantage.

I do want to step back though from this issue and say, in many cases, and fortunately I have heard from all three of the members of the legislature that they have been very careful in saying non-blighted versus blighted property. Because a lot of Ohio has a fair amount of blight in it. And particularly in our central urban centers. But often times the impetus for these redevelopment project is a community looking at a blighted neighborhood or a distressed inner city downtown and they say we need to clean this up and we need to prepare for some future use of an area of land. So that the community uses their eminent domain power. They ultimately do turn that land over to a private sector developer for a mall, for a new industrial plant, for an inner city grocery store, which is missing in many communities across the country.

So it seems to me, at least the discussion that I have heard today, at least positions Ohio in the right ways when they make the difference between blighted and non-blighted properties.

Mr. GRENDELL. Congressman Ney, if I may, in those five States, two things will happen; you will have opportunists who will show up because they think they have a benefit that they might get land cheaper if they can convince the local government to do an eminent domain. And you will have some people who specialize in maybe urban redevelopment who will see an opportunity in States that do not take any action about *Kelo*, because there are folks who do make specialties out of these sort of urban projects. Ultimately though, the market is going to drive the issue. It those States are not attracting business, this is not going to do much to attract business in those States.

And I do appreciate Mr. Finkle's comment. I mean one of the things that I am very cognizant of, I know Senator Carey, Rep-

resentative Evans, is that we know if we go off the cliff too quickly the unintended consequences are going to be very difficult to deal with, especially when you start talking about constitutional changes. And that is why we do recognize there is a role for eminent domain particularly when you are talking about true blight. But there is also a role not to let eminent domain take away people's private property rights when there really is not a blighted situation, a true *Kelo* situation, and the struggle we have the next couple of months is to try to clarify how you identify and define that parameter. And I do not have that answer today. That is why we think we need the moratorium to calm everybody's concerns about *Kelo* while we work on the bigger issue and come up with an ultimate solution.

Chairman NEY. We have had a lot—I said this earlier up in Hebron, we have had a lot of inquiries into the Congress in offices, we have had them in the urban areas and the rural areas. Also, in the urban areas I talked to my colleagues that represent cities and there is also a feeling that maybe the cities can do this a lot quicker then we could. After all we are in small communities. You do something, you take somebody's land or family farm, or something, or try to do it for a landfill, you have got to live here and you know just about everybody in these communities. When you are in a large city of a million people, things could maybe be done and not as much emotion would be there.

So, I have heard from the urban legislators too, you know, the concern on that. With the volume of inquiries that we have had, we had also thought about some type of national language on it, settled on after discussions on the small niche with CDBG because that I think is our role on the subcommittee, to do something with those funds. But after listening earlier and today, and you know, I said this up in Hebron, if the Federal Government tried to come in—and I am worried about the Supreme Court decision, I think we have to watch it. I think the purposes that you all are doing are pretty balanced. I think it is something to be watched and to be concerned about, and people's property rights is something I feel very strong about.

But if the Federal Government were to try to set up something to define blight, and I used the EPA as an example, and create the United States Department of Eminent Domain in our 12,000 or 16,000 people and have everybody's life, you know, a nightmare. That fact would be worst then having the Supreme Court decision. So I think we have got to be very careful on a generic broad—personally I think on generic broad Federal approach. But I think it is of great concern. Jeff?

Mr. RILEY. Yes, sir, I would just repeat what I stated this morning, Mr. Frank and Ms. Waters, the ranking members of the Housing Subcommittee and the Full Committee are concerned about renters. Particularly the poor when it comes to government takings and I guess it was just Senator Grendell answered the question this morning, I guess that is provided for in the legislation.

Mr. GRENDELL. As I mentioned this morning, under Ohio law, when you go to take, you take both the fee, the ownership interest and if somebody has a leasehold interest you are taking their lease, too. And you have to make provisions for dealing with that in the

process. But it is probably more so again with this valuation issue that we have to look at, that we are going to have to include that we will include looking at the tenants' rights as well as the landlords' rights as we get this task force going, hopefully in September if all goes well.

Mr. CAREY. If I could add to that, I mean the issue that eminent domain ultimately goes to is the hold out. And oftentimes you are—I mean in the case in Norwood, you had about 90 to 100 individual landowners and there were only about seven or eight holdouts. That was about similar in the New London case. So, there are people who are emotionally attached to their homes. They do not think enough money has been put on the table or they are trying to get rich quick and be the ultimate key parcel that, you know, is the trigger to allow the project to go forward.

What I think the real issue in my mind regarding tenants is that I would worry that as somebody is trying to acquire property that you end up having a slumlord who wants to be the holdout. And that they are, one, using as an interim use their housing parcels and at the same time being a slumlord just waiting for the time that somebody is going to take their land. If they use eminent domain maybe the benefit ought to go to the person who is a renter, not necessarily to that slumlord who is ultimately trying to be that key parcel and hoping just to get rich quick in the process of holding up other community projects that are necessary.

Mr. RILEY. Do you know if any of those 11 State statutes expressly provide for renters?

Mr. CAREY. I do not know.

Chairman NEY. I wonder if we could find that out. That raises another issue that I want to ask about. You know, there is sort of the bartering process. Because you have mentioned, and rightfully so, there is always maybe one person holds out, other people go along. With the new Supreme Court decision codifying being able to take property, does it not kind of change the scope of things because now you can come in and it is not a public use, but people know that their property can be taken after all by eminent domain? Does that cause a little bit more of a psychological problem on the part of the people with the property? I am not talking about low income, I am just taking about property? They feel at the mercy of—

Mr. FINKLE. If we go back to my testimony, and my testimony is that *Kelo* changed nothing. And that if we go back to the early 1980's and you go to Detroit and what General Motors did with Poletown, which was a project we founded in the Reagan Administration, we funded the Poletown or the General Motors plant in inner city Detroit. They used eminent domain for turning over a project to other private sector uses, General Motors.

The *Kelo* case only affirms what State law or State constitutions currently allows. If the State constitution does not allow an economic development taking which most do not, it does not somehow grant those States new powers. It only grants them what they already have under their State constitution or their State statute. If they prohibit it, it is still prohibited. It was not dealing with what is already covered by various States.

Now, I have heard the argument that you make Congressman, that in fact, somebody feels less power, but I guarantee you their attorney would not feel more inhibited now that the *Kelo* case has been settled.

Mr. GRENDELL. Congressman, I am going beg to differ with Mr. Finkle on this one issue. The *Kelo* decision did change something. And I am going to give you two examples. Three years ago, I represented an owner of an 1950's motel on Morane Avenue in Fairview Park, Ohio. Fairview Park decided that those motels which they loved in the 1950's and 1960's because it is close to the Cleveland Airport, they no longer liked in the 21st century, because it became of a sub par tenancy than the traditional motel. They wanted to eliminate these motels and put in some tax generating offices, because everybody wants that income tax dollars from offices. There was nothing wrong with this motel, this motel was about 70 percent occupied, albeit some of them were more permanent occupants than in the past. But the city went out and got a blight study. Based on the age of the motel and the nature of some of the occupants they claimed the property was blighted. Under *Kelo* they would not have to take that step. They would just say, it is going to generate jobs, forget the blight study.

The reason why the blight study was important is in Ohio law, when you do an eminent domain case there are two procedures, two steps. The first step is as the landowner you can challenge the public necessity. You have a right to challenge—except it is takings for roads, you have the right to challenge the public necessity. That is decided only by the probate judge who hears your case. And you have a hearing on that and we presented three days of hearings on this issue with this motel. And when it became clear that the issue of whether this was blighted was a little murky, the ante went up and we settled the case quite favorably to our client.

Under *Kelo*, that event never would have happened. They would have said it is going to generate jobs, they would have had somebody show up with the number of jobs that office building was going to generate and the taxes that it was going to generate versus the transient nature of a motel. We would have no negotiating. The judge would have dropped the gavel and said, public use because of *Kelo*. And that would have been the end of the story.

We would have then gone to the second step in Ohio. Which is the jury decision of the value of the property taken. Well, needless to say most of these cases settle, because a good eminent domain lawyer will position his case to try to up the valuation, because the juries are sometimes, you know, seen as a gamble. Sometimes you go because you have no choice, but often you are trying to get a certainty before you get to that phase of the litigation.

Kelo would have changed that and now changes that whole situation. You no longer have a blight study issue that you can debate whether the take is a valid taking, before you even get the valuation.

Second in my district, and Representative Gibbs raised it this morning, we do have a 9-acre parcel that is located between two parcels which are occupied by Progressive Insurance, the largest employer in my Senate district, with about 21,000 employees. Pro-

gressive wants to expand their campus and connect the two parcels.

Prior to the *Kelo* decision, they did not have a chance to buy the 9 acres in between. They attempted to purchase it but they could not take it because there is nothing blighted. There is nothing on it and the last I checked, trees and grass still do not constitute blight.

Now, the Village of Mayfield Heights has started the eminent proceedings based on *Kelo* to take the 9 acre parcel of land to ultimately transfer to Progressive, to keep Progressive happy. Which is something that I also want to see done, to keep them in the district, which is important, but they are taking advantage of *Kelo* that they did not have an opportunity to do 90 days ago.

Now, I have to say in that case, they also offered the property owner $3 million, which in my opinion was a substantial offer for the property in question.

Mr. FINKLE. If I can, Congressman, they could have done this before *Kelo*. *Kelo* merely at best confirmed what they could have already done prior to the *Kelo* decision.

Mr. GRENDELL. Well, the lawyers would disagree with that.

Chairman NEY. Do you have any other observations or anything that you want to say?

[No response.]

Chairman NEY. If not, I really do appreciate your time.

Mr. GRENDELL. Congressman, if I can just add one thing from this morning. You had talked about the Federal, and I mentioned this morning, I am not a big fan of getting the Federal Government involved in this, because I think it is a Tenth Amendment issue. However, if there is a desire of Congress to look at something, I would like to leave you with a thought—42 United States Code 1983, sometimes known as the Civil Rights Act, prohibits the violation of a civil right under color of law. If you are looking at a way that the Federal Government could take a position to influence this process, it would be that the violation of a private property owner's right, by taking his property for ultimate transfer to another private property owner would be considered a valid cause of action under 42 USC 1983, which would allow that landowner access to Federal courts to argue over the validity of the taking, which removes it from the politics of the local situation and enhances their property rights and chances in the Federal forum.

Chairman NEY. That is not a bad idea.

(Laughter.)

I thank you for that observation, that is great.

Again, I want to thank all of you for your time, your opinions, I think it is a good hearing. We will be able to take this back to Washington and we will be able to, you know, definitely share with our colleagues and see what they are hearing from across the country.

And also, without objection, the statements by State Representative Clyde Evans, Jackson County Commissioner Ed Armstrong, and State Rep John Schlichter, who had called and could not make it today, will be placed in the record. Again I thank you for your time and your attention to this issue.

With that, the committee is recessed.

[Whereupon, at 3:25 p.m., the subcommittee was adjourned.]

A P P E N D I X

August 18, 2005

Opening Statement of the Honorable Bob Ney
Chairman, Subcommittee on Housing and Community Opportunity

Hebron Field Hearing on

"Eminent Domain: Are Ohio Homeowners at Risk?"

Thursday, August 18, 2005

The Subcommittee on Housing and Community Opportunity meets in a unique setting today for its second field hearing of the 109th Congress. Today I will hold two hearings in the 18th Congressional district to discuss the Supreme Court's recent ruling in the case of *Kelo v. City of New London* and the serious implications this ruling could have on low-income housing, family farms, and rural Ohio.

The last of the U.S. Constitution's Fifth Amendment liberties provides that no "*private property be taken for public use, without just compensation.*" Under this provision, government entities may invoke their power of eminent domain, or right of condemnation, to remove property from private ownership for public use. On June 23, 2005, the U.S. Supreme Court held in *Kelo v. City of New London, Connecticut* that the city's condemnation of private property, which was part of the city's redevelopment plan aimed at invigorating a depressed economy, was a "public use" satisfying the U.S. Constitution – even though the property might be turned over to private developers. The majority opinion was grounded on recent Supreme Court decisions holding that 'public use' must be read broadly to mean 'for a public purpose.' The dissenters, however, argued that even a broad reading of 'public use' does not extend to private-to-private transfers solely to improve the city's tax base and create jobs.

While the Supreme Court's decision does authorize governments to exercise greater eminent domain powers, the affect of *Kelo* on Ohio homeowners will depend upon Federal, state and local laws deeming what land is appropriate for condemnation. It is important that, as stewards of the public's tax dollars, we strike the appropriate balance needed between the government's power to condemn land for "public use" and maintaining the rights of citizens who wish to retain their private property. Although the Court's decision allows for a broader sense of private-to-private transfer, eminent domain is still limited by local and state regulations and statutes.

Long ago, Sir William Blackstone in his *Commentaries on the Law of England* wrote that "the law of the land postpones even public necessity to the sacred and inviolable rights of private property." Our founding fathers embodied that principle while drafting the U.S. Constitution, allowing the government to take property not for "public necessity" but instead for "public use." Defying this understanding, the Court through its recent *Kelo* decision replaces the "public use" clause with a "public purposes" clause.

The possible consequences of the Supreme Court's decision are not difficult to predict and have the potential to be harmful. While "urban renewal" programs provide some compensation for the properties they take, no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Extending the concept of eminent domain for public purpose to encompass any economically beneficial goal would virtually guarantee that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use but are also the least politically powerful.

The narrowly decided *Kelo* decision overrules over two centuries of legal precedent and tradition regarding the public use provision of the Fifth Amendment's Takings Clause. Through this decision, it would appear that the Supreme Court has essentially erased any protection of private property as understood by our Founding Fathers. As Thomas Jefferson once said, "A government big enough to supply you everything you need is a government big enough to take everything you have."

As Chairman of the Subcommittee on Housing and Community Opportunity, I feel it is my duty to protect Ohio's working families and prevent private land seizures simply to generate tax revenues. To this end, I have co-sponsored a piece of legislation, H.R. 3315, with several members of the Financial Services Committee that would withhold Community Development Block Grants from states and communities that do not limit their use of eminent domain.

In addition to Mr. Platt and Mr. Nutt, I would like to thank Mayor Clifford Mason, State Senator Tim Grendell, State Rep. Bob Gibbs, and Commissioners Tim Bubb and Marcia Phelps for their participation today. I would also like to thank all other local Mayors, Commissioners and private citizens that provided valuable insight for today's hearing. This is an important hearing for the 18th Congressional District and the entire state of Ohio, as we begin the process of understanding the full ramifications of the Supreme Court's decision.

Opening Statement of the Honorable Bob Ney
Chairman, Subcommittee on Housing and Community Opportunity

Chillicothe Field Hearing on

"Eminent Domain: Are Ohio Homeowners at Risk?"

Thursday, August 18, 2005

The Subcommittee on Housing and Community Opportunity meets in a unique setting today for its second of two field hearings in the 18th Congressional district to discuss the Supreme Court's recent ruling in the case of *Kelo v. City of New London* and the serious implications this ruling could have on low-income housing, family farms, and rural Ohio.

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In addition to Jeff Finkle and Dona Smith, I would like to thank State Senators John Carey and Tim Grendell. Jackson County Commissioner Ed Armstrong could not be here today, but he did submit testimony that will be part of the official hearing record. State Rep. John Schlitcher will also submit testimony for the record. Also, I would like to thank State Rep. Clyde Evans, who will also submit testimony for the record. This is an important hearing for the 18th Congressional District and the entire state of Ohio, as we begin the process of understanding the full ramifications of the Supreme Court's decision.

August 18, 2005

Testimony by Licking County Commissioner Tim Bubb.

Offered before a Field Hearing of the U. S. House of Representatives Sub Committee on Housing and Community Opportunity in Hebron Ohio.

Good morning Congressman Ney, staff and others. Thank you for the opportunity to speak briefly on some past uses by state and local governments of eminent-domain for public projects here in Licking County Ohio. And thanks for bringing the consideration of the House of Representatives, of this important issue, to the grass roots level on the western side of your House District here in Licking County.

Congressman, I share you concern resulting from the Supreme Court's June Decision titled "Kelo versus New London". I believe most Americans, who have read of the split decision, are concerned that the private property protections afforded in the 'Takings Clause' of the Fifth Amendment are placed at risk. Specifically that their homes, land or even small businesses could be at risk for a 'taking' for something other than a clearly public purpose.

I think it is safe to say here in Ohio, and across the nation, that states are responding by considering amended laws or even constitution amendments to prevent or restrict eminent-domain powers for private development.

While my term as County Commissioner began just this past January, my recollection is that the authority of eminent-domain locally has been used only for public purposes. Specifically I think of a number of major highway projects in my lifetime including the development of Interstate 70 through the County in the late 1950's, and the development of the Newark Expressway beginning in the late 50's and continuing through the 1990's for both Ohio

Routes 16 and 79, that involved takings of land, with the resulting compensation, and in some cases litigation over appraisal considerations and the amounts of compensation.

Currently the redevelopment of State Route 161, an 11-mile stretch from New Albany to Granville, includes a number of 'takings' to accommodate the widening and realignment of this roadway, with construction on Phase One set for 2006.

While there have been and will continue to be disagreement over some of the specifics and amounts of compensation in the 'takings' of some of the parcels involved, there is no question these highway projects represented and represent needed public improvements.

At the County Government level the two instances in my mind that involved eminent-domain were the construction of the new Licking County Justice Center on Newark's near eastside in the 1980's, and also in that era the development of the Buckeye Lake Sewer Project. Again, I believe these were clearly public projects with no private involvement. It should be noted, in the case of the Justice Center, that this public project also served to redevelop a blighted area near to downtown Newark. Again, I am not aware of any use of eminent-domain used to assist a private development projects here – however this county office/jail project was in many ways similar to the urban-renewal projects seen in other parts of the country.

Congressman, while I have heard of both federal and state legislation to address this concern, I would simply say I would agree with the prevailing thought not to move too quickly. I would certainly endorse the idea of a one to two year moratorium on private-project eminent-domain which would ease fears and prevent any additional private project 'takings'. While I believe this has the potential to be a 'slippery slope' - I would suggest that legislation could be

crafted to allow a process for certain exceptions. In other words 'never say never'!

An outright ban on any 'takings' for other than public purpose could make it difficult if not impossible to ever redevelop the inner-city urban areas of Ohio and in many of the states. I could see a situation where redevelopment of a major industrial site and job creation, possibly in a 'brownfield' in an urban area, could be unattainable without some tools of 'eminent-domain'; possibly for access, a railroad spur, or even port access.

Again, such power in support of a public-private or private development certainly would have to have thorough public review to ensure it is used sparingly and in an appropriate way. One way to evaluate such use of 'takings' could be regional review by a broad based panel using as its guide local and regional land use plans and zoning districts.

Congressman Ney, the preservation of green space and maintaining a healthy blend of land uses is a front burner issue here in Licking County. We are seeing a substantial relocation of residents from Franklin County into counties such as Licking, and our neighboring counties such as Delaware and Fairfield. While we welcome growth, we are also concerned about the rapid loss of easily developed farm land and woodlands to those looking to site new subdivisions for residential housing and commercial projects as well.

I believe for our Central Ohio region to remain healthy that some tools, such as eminent-domain, may need to be available to allow for limited specific public-private redevelopment projects in the older cities. Such redevelopment has the potential to take some of the pressure off of the rural unincorporated areas in terms of growth. Without some relief in this area I believe it will be impossible for county and township governments to keep up

with the unfettered growth, and resulting demand for infrastructure and public services in these large unincorporated areas.

So, maybe it is possible to view "Kelo versus New London" as the Court's way of spurring this discussion as to when eminent-domain possibly could be a consideration for other than strictly public applications. It is possible this is a discussion the "framers" could have never conceived. Thank you for the opportunity to speak today and offer my thoughts.

Ohio Senate
Statehouse
Columbus, Ohio 43215

Testimony of State Senator John Carey
Prepared for the
Subcommittee on Housing and Community Opportunity
Congressman Bob Ney, Chair
August 18, 2005

Chairman Ney and members of the subcommittee, thank you for allowing me the privilege of testifying before you today here in Chillicothe.

Let me start by saying that as a former Mayor, I am vehemently opposed to the use of eminent domain to take unblighted, private property for the sole purpose of passing that property to a developer for private development. While I can understand how the promise of increased revenue and jobs could make this option palatable for some officials, I feel the safety and security that our constituents feel in their own home is more important. In fact, when I was Mayor, I didn't like to use eminent domain at all but I certainly understand that it is sometimes needed for road, sewer or water projects and I believe that is where eminent domain power should stop.

As I am sure is the case across the country, the Ohio Legislature has had to act quickly in response to the recent *Kelo* decision by the U.S. Supreme Court. Just two weeks ago, Senator Grendell introduced Senate Bill 167, which I will outline later in my testimony. Considering this bill has been co-sponsored by 26 of the remaining 32 senators, including myself, I think it's safe to say that this issue has resonated here in Ohio and that something will be done about it.

In addition to S.B. 167, the issue of expanded eminent domain powers came up during the recent deliberations on House Joint Resolution 2, which will be Issue 1 on the ballot this November. HJR 2 would authorize $1.35 for public infrastructure, $500 million for research and development and $150 million for shovel ready sites. Due to the fact that Issue 1, if passed by the voters, would go into the Ohio Constitution, the legislature did not get specific in terms of language in H.J.R. 2 but I believe there is an understanding that none of the $500 million for research and development and the $150 for shovel ready sites will be used for

eminent domain. This will be addressed in the implementation language, if approved by the voters.

Senate Bill 167 creates a moratorium on the use of eminent domain by the state or any political subdivision of the state to take, without the owner's consent, private property that is in an unblighted area when the primary purpose is for economic development that will ultimately result in the property being owned by another private person. This moratorium would last until December 31, 2006 while a 25 member legislative task force, with a wide range of interested parties represented, conducts research and provides recommendations to the General Assembly on how to best update Ohio's eminent domain statutes by April 1, 2006.

While I am generally not the biggest proponent of legislative studies and task forces, I believe in this case this is the right approach to take. I believe the worst thing the Ohio legislature can do is rush this process. While I think most legislators in Ohio do not want to see unblighted, private land taken for private development, it is also important that we do not make the problem worse by rushing legislation through before all the possible ramifications are known. Having a moratorium in place until we can receive recommendations from the task force will allow Ohio to protect property owners while the legislature comes up with a more permanent solution to this problem.

That is a brief outline of how the Ohio Legislature has responded to the *Kelo* decision to this date. I am sure this topic will remain in the spotlight for the near future and other proposals will be made but I think it is safe to say that here in Ohio, the idea of taking unblighted, private property through eminent domain for private development has not been received well. I would be happy to answer any questions you may have.

Mr. Chairman and members of the Subcommittee, this concludes my testimony. Again, thank you for the opportunity to testify here today and I would be happy to answer any questions.

INTERNATIONAL
ECONOMIC DEVELOPMENT
COUNCIL

The Power of
Knowledge and Leadership

STATEMENT OF
JEFFREY FINKLE
PRESIDENT AND CEO OF THE INTERNATIONAL ECONOMIC
DEVELOPMENT COUNCIL

BEFORE THE
HOUSE FINANCIAL COMMITTEE,
SUBCOMMITTEE ON HOUSING AND COMMUNITY OPPORTUNITY

The Power of Knowledge and Leadership

Statement of Jeffrey Finkle
President and CEO, the International Economic Development Council (IEDC)
before the
House Committee on Financial Services,
Subcommittee on Housing and Community Opportunity

August 18, 2005

Chairman Ney, thank you for the opportunity to appear before you today. I am honored to be here and to be given the opportunity to discuss the experiences of economic development professionals. We hope our experiences can be an important source of information as Congress reviews the rights of local officials to exercise eminent domain in an effort to protect the economic health and vitality of their communities.

My name is Jeff Finkle, and I am the President and CEO of the International Economic Development Council (IEDC.) IEDC is the premier membership organization dedicated to helping economic development professionals. Like you and your colleagues in Congress, our 4,000 members work every day to create high-quality jobs, develop vibrant communities and improve the quality of life in their regions. IEDC provides a diverse range of services, including conferences, certification, professional development, publications, research, advisory services and legislative tracking.

I have been a leader in economic development field for nearly 25 years and am the former U.S. Department of Housing and Urban Development (HUD) Deputy Assistant Secretary of Community Planning and Development during the Reagan Administration. In that role, I was HUD's Deputy Assistant Secretary in charge of the Urban Development Action Grant Program (UDAG) and the Community Development Block Grant Program (CDBG), and the Housing Rehabilitation program from 1981-1986. Additionally, I served in the Rhodes Administration between 1978 and 1980 working on facility issues for the Ohio Department of Mental Health and Mental Retardation.

On a personal note, I was born in Licking County, Ohio and grew up Newark, Ohio. I attended Ohio University and return to the institution often. It feels like being at home today, as this hearing is being held at Ohio University Chillicothe branch. Over the years, I have assisted the Institute of Local Government Administration and Voinovich Center. I have also had the pleasure of working with the Southern Ohio Diversification Initiative in Piketon as they confront the economic diversification issues at the Department of Energy facility in Piketon.

What is eminent domain? Eminent domain is an economic development tool that allows local communities to acquire and assemble land for new development projects that generate new jobs, investment and taxes. The Supreme Court's 5-4 decision in Kelo v. New London leaves eminent domain in the hands of states and affirms eminent domain as an important tool for local governments in the redevelopment and revitalization of economically distressed areas.

The court stated in its opinion that the pursuit of economic development is a "public use" within the meaning of the Fifth Amendment's Takings Clause. The

New London economic development project at issue in the case is similar to projects across the country aimed at revitalizing depressed communities.

It is IEDC's understanding, based on conversations with lawyers familiar with the decision, that the Supreme Court decision did not in any way expand the power of eminent domain. Rather, the Court simply upheld the long-standing inclusion of economic development as a 'public use.'

It is therefore unlikely that the Supreme Court's decision will result in city officials exercising eminent domain randomly or without balanced consideration. Rather, the court affirmed years of interpretations allowing the use of eminent domain to redevelop our nations communities and to protect our local economies.

Judicious use of eminent domain is critical to the economic growth and development of cities and towns throughout the country. Assembling land for redevelopment helps to revitalize local economies, create much-needed jobs, and generate revenues that enable cities to provide essential services. When used prudently and in the sunshine of public scrutiny, eminent domain helps achieve a greater public good that benefits the entire community.

One example of this success can be seen in the return of retail to our urban cores. Eminent domain has been crucial in encouraging retailers, particularly anchor tenant supermarkets, to locate in the heart of inner cities rather than on the periphery where they have traditionally positioned themselves. A combination of educational efforts and economic development incentives are encouraging the supermarkets that abandoned inner cities in the 1970s to return.

Successful redevelopment projects facilitated by eminent domain are proving that there are underserved populations/markets, and that perceived or actual higher costs of doing business in inner cities can be absorbed by sales volume. Without the ability to exercise the power of eminent domain for redevelopment purposes, the public would be unable to support many inner-city retail projects, and those neighborhoods would continue to decline.

Many of our urban communities were developed in the late 1800s and early 1900s. Those cities have small lot sizes and were developed during an era of horse and buggy. It is often difficult to redevelop these communities without the ability to assemble land. These communities want desperately to be competitive, but they are competing with farmland and suburbs. Big box retailers, shopping malls and new office buildings often choose to locate in greenfields and suburbs. Each time those development decisions are made, the tax base and jobs are also going to those places. That puts central cities like Newark, Columbus, Cleveland and Cincinnati at a competitive disadvantage. This translates to the inability of those communities to pay their police and fire departments and generate new jobs in their municipal limits.

Eminent domain has also helped struggling rural communities. In March 2002, Shawnee County, Kansas exercised its power of eminent domain to acquire the last few remaining parcels of a 432-acre site intended in part for a new Target Corporation distribution center. Although two property owners fought the condemnation proceedings primarily on the grounds that the distribution center did not satisfy a "public use," the Kansas Supreme Court ultimately ruled that the taking of private property for industrial and economic development was in fact a valid public purpose. The $80 million, 1.3 million square-foot warehouse

distribution center opened in June 2004 to the tune of over 600 new jobs, with the expectation of adding an additional 400 jobs within the next three years.

Whether you live in an urban or rural area, the use of eminent domain is never the first choice of any community. The eminent domain process is time consuming and expensive; it is therefore the last resort pursued during a land assembly process. Many local authorities rarely exercise their power of eminent domain, particularly when it deals with occupied housing. Public officials who do use eminent domain comply with existing rules protecting individual property owners, and they have the ultimate accountability to the citizens and voters.

There is no question that eminent domain is a power that, like any government power, must be used prudently, and there are many built in checks. One such check is the public nature of the takings process. Probing questions should be raised about any complex undertaking financed by taxpayers, and nothing in local government attracts more scrutiny or more criticism than eminent domain.

In their majority opinion in Kelo, the Supreme Court refers favorably to New London's long engagement in an open and comprehensive planning process. There are many other examples of public officials engaging their constituents. The City of Lakewood was a Denver suburb with little sense of place when the Lakewood Reinvestment Authority and developer Continuum Partners, LLC decided to redevelop a failing shopping mall into a mixed-use town center. The result was Belmar, 22 city blocks of stores, entertainment, office space, and residences, that has emerged as the symbolic heart of the community.
Over the course of a year, the city underwent an extensive public process, establishing a citizens advisory committee and inviting members of the community to comment on potential redevelopment options.

Each state and locality legislates the use of eminent domain, and a public purpose or benefit generally needs to be clearly demonstrated. Authorities that abuse this privilege risk creating volatile political situations. Few government or elected officials are willing to risk their position and political stability in pursuit of a project overwhelmingly opposed by the community.

In another check on abuse, the Fifth Amendment requires that anyone whose property is taken for a public use be fairly compensated, and in practice, most takings are compensated generously. The eminent domain process requires just compensation for displaced property owners. In case after case, the majority of property owners willingly accept just compensation for their property in support of the development projects. According to our research, some are compensated as much as 25% above market value for their property. Just compensation allows property owners to relocate with an equal or improved quality of life.

Critics of the *Kelo* decision have said that it authorizes seizing the property of one person merely to give it to another. While it is true that once the public entity acquires title to the property, it is conveyed to a developer to carry out the project, eminent domain is part of the land assembly process for redevelopment with the intent to remove blight and/or create jobs and/or create housing. The public sector intervenes so that the private sector can bring much needed investment to a distressed area.

Government agencies are not and should not be in the private real estate development business; therefore, the assembled land is typically leased or sold to the private sector for redevelopment. As a matter of policy, cities should not be in the long-discredited practice of building redevelopment projects, rather they should

facilitate the use of private capital and private management to achieve the same end.

For years, public purpose has been more broadly defined than public ownership, and most development projects involve both public and private land uses and cooperation between public and private entities. Often the prices and terms of the deals are very favorable because 1) the location and characteristics of the property are otherwise very unfavorable, and/or 2) the private party can create or retain much-needed jobs.

How did we get here in the first place? One reason: eminent domain is used differently than it was in the 1960s. In the 1960s our federal government gave cities resources under the Urban Renewal Act to plow down hundreds of acres of land and thousands of homes and commercial buildings. That left many cities with land vacant for years. This policy has since been attacked by many as an inefficient use of resources.

Today we wait until there is a market opportunity before we use eminent domain to acquire distressed properties to redevelop. Local officials use eminent domain to achieve the greater good when holdout landowners think their property is worth far more than could ever be achieved. If governments have to wait for holdouts, communities will see jobs and market opportunities disappear.

In closing, I would like to comment on pending eminent domain legislation. In response to the Kelo decision, Congress is offering legislation that would prohibit the use of federal funds for economic development projects that involve the exercise of eminent domain. Should Congress act to prohibit the use of eminent domain for economic development purposes, the economies of many

Congressional districts will suffer. No municipality in America could use eminent domain to carry out an economic development project. One person could veto the redevelopment of an entire distressed community. This would have the practical effect of making such projects virtually impossible.

In IEDC's opinion, Congress should not preempt or displace existing state and municipal laws that govern the local application of eminent domain. The Supreme Court's decision keeps the economic health of communities in the hands of local leaders who are not out to destroy communities, but rather who work for the best interests of their communities at large. State or federal bills prohibiting the use of eminent domain for economic development are job-killing pieces of legislation.

Judiciously used eminent domain is critical to the economic growth and development of cities and towns throughout our country. Assembling land for redevelopment helps revitalize local economies, create much-needed jobs, and generate revenues that enable cities to provide essential services. Exemplified by New London, eminent domain is used to breathe new life and give new hope to residents by providing new jobs.

Thank you again for the opportunity to speak with you today.

Bob Gibbs
State Representative

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Vice Chairman

Testimony Before House Subcommittee on Housing and Community Opportunity
Presented by Ohio State Representative Bob Gibbs, 97th House District
Thursday, August 18, 2005
Village of Hebron Administration Building, Hebron, Ohio

Chairman Ney and honorable members of the House Subcommittee on Housing and Community Opportunity, thank you for the opportunity to testify today on legislative action being taken here in the State of Ohio in response to the U.S. Supreme Court decision, *Kelo v. City of New London.* The U.S. Supreme Court 5-4 decision allows for eminent domain takings for private sector development and provides a wide range of discretion to state and local governments to decide how eminent domain powers should be employed in their jurisdiction. I believe this decision opens the floodgate for eminent domain abuse. I and other members of the Ohio General Assembly realized early on that it was imperative that legislative action be taken immediately to ensure fair and uniform enforcement of eminent domain powers and protect private property rights in our state.

Eminent domain has been a necessary tool to provide public infrastructure projects for the public good. However, the Kelo decision allows for eminent domain proceedings for private sector development that ultimately enhances the tax base, making the argument it is for the public good because of increased tax revenues. This argument is appalling; essentially the government is saying revenues to a taxing jurisdiction are paramount to private property rights. This contradicts the founding principles this nation was founded upon. Currently, Ohio law provides for eminent domain authority to be use eliminate slums and blighted neighborhoods. A strong case can be made that with this provision a Kelo type provision is not necessary, but only opens the door for eminent domain abuse. The Kelo decision will take our free market system out of private development projects. Two weeks ago I received an email from a citizen in northeast Ohio, he stated, a large insurance company in northeast Ohio made an offer to private property owners to buy their land for their office complex expansion. The landowners refused the offer and now the corporate giant is pursing the local jurisdiction to use eminent domain.

Under current eminent domain authority the judicial system by a jury will determine compensation. This makes sense when property is being developed for roads and utilities that serve a greater public purpose and no private entity will be the sole beneficiary. When the property remains in the private sector what basis should be used for compensation under Kelo type takings? Prior to Kelo our free and open competitive market determined what the property is worth and protected the rights of the landowners.

Since the *Kelo* decision was handed down in June, I have been working closely with other members of the Ohio General Assembly, including State Senator Tim Grendell of Geauga County and State Senator Kimberly Zurz of Summit County, to enact legislation which will prohibit this gross expansion of government on private property. We have already hosted a series of work group meetings, inviting representatives from a variety of backgrounds, including agriculture, commercial and residential development, government and members of the public to discuss solutions to the *Kelo* dilemma. From this work group, Senator Tim Grendall and I have introduced companion legislation in both chambers of the Ohio General Assembly with bi-partisan support that enacts a moratorium on Kelo type eminent domain and "urban blight" takings until December 31, 2006. In addition, this legislation would create a Legislative Study Committee, comprising members of the General Assembly, representatives of the executive branch, representatives of the agriculture community, commercial and residential developers, and others, to study permanent solutions to this matter.

In Ohio we have already experienced what I consider abuse of eminent domain authority. In Lakewood, Ohio eminent domain was tried using the blighted neighborhood definition. Their definition of the law determined the neighborhood is blighted because the residences lack air conditioning and attached garages. These local homeowners were paying taxes and this neighborhood would not be considered blighted by any reasonable and responsible individuals who are not blinded by the potential of increased tax revenue. Fortunately, the citizens were successful in a referendum and prevented the private property takings. In Norwood, Ohio the Court of Appeals in Hamilton County ruled that an eminent domain proceeding did not violate the law and was not unconstitutional. The Court upheld a lower court's ruling that an urban renewal plan submitted by an independent company substantially complied with the requirements of local law, when the city council amended the plan to include appropriate details and the city council did not abuse its discretion in determining that the renewal area was deteriorating, when the plan included elements that allowed a determination that the area was deteriorating under the definition provided by local law. In this case an emergency was declared; therefore a referendum was not an option.

Ultimately, the solution to the problem in Ohio will most likely have to be corrected with the implementation of an amendment to the Ohio Constitution. Section 19 of Article I and Section 3 of Article XVIII on the Constitution of the State of Ohio clearly identify who was the power of eminent domain and under what circumstances eminent domain may be applied. In addition, the Ohio General Assembly has passed a number of legislative actions which have extended eminent domain power beyond those in the Ohio Constitution.

However, as it clearly states in the Ohio Constitution, private property in Ohio shall be held inviolate to the government. The *Kelo* decision clearly indicates the opinion of a slight majority of the U.S. Supreme Court believe that private property is no longer inviolate to the government. Rather, it was the opinion of the high court that private property is subservient to the needs of the government, because expansion of taxable property is in the public welfare.

Under Ohio's home rule authority, municipalities would be more likely to use Kelo type eminent domain proceedings. Current law restricts counties and townships.

It is the opinion of everyone who is participating in the work group that Ohio should not rush into a quick solution that could cause more problems than it resolves. Rather, we feel it best to thoroughly research and identify the problems that currently exist in Ohio Law, propose and debate possible solutions, and make and formal recommendation to the members of the General Assembly as to the solution that is in the best interest of all parties involved.

I strongly feel that eminent domain authority should be used judiciously and ONLY for public infrastructure projects and common carrier easements. In addition, the definition of blighted neighborhoods needs to be narrowly defined and the rights of private property owners needs to be strengthened. For example, property owners must pay their own litigation costs in eminent domain proceedings. In many cases property owners cannot afford the legal and other costs associated with challenging an eminent domain action on public use grounds. Greater protections for property owners will help prevent eminent domain abuse.

I want to thank and commend Congressman Ney for his work and commitment to resolve this complex issue and protect the Constitutional rights of our citizens. However, I caution the committee to be careful not to overreact and limit states rights to regulate eminent domain authority, but only address Kelo type proceedings. In my work thus far on this issue I have learned there are many nuances and complexities and a "knee jerk" reaction legislatively to the Kelo decision will create unexpected and unfavorable results.

Chairman Ney and members of the Subcommittee on Housing and Community Opportunity, thank you for the opportunity to testify today. I would be happy to answer any questions you may have.

Constitution of the State of Ohio

Article I: Bill of Rights

§ 1.19 Inviolability of private property (1851)

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 therefore 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.

Article XVIII: Municipal Corporations

§ 18.03 Powers (1912)

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

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Protecting the Private Property Rights of Ohioans After *Kelo v New London*

"nor shall private property be taken for public use, without just compensation"
- 5th Amendment, US Constitution

Private property shall ever be held inviolate... 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.
Article I, Section XIX, Ohio Constitution

The US Supreme Court's recent decision permitting the government-sanctioned transfer of private property from a private citizen to a private developer has stricken a constitutional nerve throughout the Country. While the use of eminent domain for roads and utilities has long been recognized, the governmental taking and transferring of a well-maintained parcel of real property from one private owner to another private owner is fundamentally un-American. Trampling on one individual's property rights for the speculative collective good through a future development smacks of socialism. The Ohio Legislature can and should take immediate action to protect Ohioans' private property rights from the intrusive impact of the Supreme Court's ruling.

Historical Background

Our Founding Fathers believed that private property ownership, as defined under common law, pre-existed government. They further believed that government, whether federal or state, served as the contractual agent for the people and, unlike the English monarchy, was not a sovereign. Thus, protecting private property ownership rights against unwarranted governmental appropriation motivated the inclusion of the "takings" clause in the Fifth Amendment of the US Constitution and various state constitutions (Including the Ohio Constitution). Of course, by including the takings clause, the Framers of the Bill of Rights also recognized the need for a *limited* "public use" exception to the sanctity of private property rights, provided that the property owner is justly compensated.

The takings clause buttressed the Founding Fathers' respect for private property rights in two ways: (1) private property can only be taken for public use, and (2) such taking can occur only if the property owner is adequately compensated. The "takings" clause in the Fifth Amendment was intended to protect private property owners from arbitrary government power.

The drafters of the Ohio Constitution emulated the federal constitutional recognition of private property rights in Article I, Section XIX, of the Ohio Constitution, which declares that private property rights are "inviolate" and permits appropriation of private property only for "public use."

For approximately 175 years, eminent domain was employed by government for obvious public uses such as roads, canals, railroads, military bases, fire stations, school and parks. Then, eminent domain became a tool for urban revitalizationists, who invoked governmental takings powers to acquire "blighted" or "deteriorated" private property, often for private redevelopment as urban renewal projects. Courts upheld such actions, finding that eliminating blight was a legitimate public purpose. In hindsight, these cases started takings law down a dangerous and slippery slope.

Kelo v New London

On June 23, 2005, in *Kelo v New London,* the US Supreme Court, by a narrow 5-4 decision, issued one of the most controversial rulings in history. The majority of the Supreme Court expanded far beyond the traditional, limited view of eminent domain powers by holding that non-blighted private property can be taken, against the will of property owners, by a governmental authority for ultimate ownership by another private entity, in the name of "economic development."

The majority of the Justices found that the city of New London, Connecticut, did not violate the Fifth Amendment by taking several unblighted residents properties to clear the way for a private office complex. The majority concluded that the economic benefits of such new development to the city – new jobs and increased taxes – satisfied the constitutional "public use" prerequisite to an eminent domain action.

Justice Sandra Day O'Connor and three other justices disagreed with the majority's more broadly defined concept of public purpose or public use. In her vigorous dissent, Justice O'Connor chastised the majority for abandoning the two-century old principle of preventing the government from acting beyond its authority, warning that "nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, and any farm with a factory."

To some, *Kelo* is the natural extension of the urban renewal/eliminate blight cases (economic benefit = public use). To others, *Kelo* is an affront to the fundamental protection of private property ownership guaranteed by the Fifth Amendment. A review of our Founding Father's early writings supports the position that *Kelo* is an affront to property rights. It is doubtful that Thomas Jefferson ever envisioned a government right

to take his home, Monticello, and give the property to a private developer for an office complex or a big-box super center.

The Supreme Court noted that the *Kelo* decision does not prevent states from adopting a more protective approach to private property rights. At least 34 states have initiated legislative efforts to negate the impact of *Kelo*.

Ohio Eminent Domain Law

Presently, Ohio law governing eminent domain neither contemplates nor adequately protects private property owners should unblighted private property be taken by eminent domain under the banner of "economic development." Courts have almost uniformly acceded to the government's determination that a public necessity exists justifying the "take." At least in the urban renewal cases, the taking authority had to obtain a blight study before it could proceed with eminent domain. After *Kelo,* government officials merely need to conclude that the taking of property from one private owner to transfer to another private owner will be more economically beneficial to the public. But such economic socialism does not constitute "public use."

Eminent domain procedures under Ohio law do not properly address the private-to-private takings permitted by *Kelo*. Currently, the private property owner (1) bears a substantial burden with respect to establishing the value of property to be taken, and (2) is usually limited to presenting evidence of value based on the property's current zoning.

This could lead to substantial inequity in a *Kelo* taking situation. For example, the owner of a house on one acre zone residential worth a maximum of $150,000, in most cases, would be limited to offering evidence at that value. Should that acre be taken by eminent domain and subsequently transferred to a developer of a commercial complex, the ultimate value of that property could be $250,000 to $300,000. Such governmentally induced inequity cannot be condoned or considered "just compensation."

Senate Bill 167

Ohio must take action to protect Ohioan's property rights after *Kelo*. To that end, I, along with State Senators Kimberly Zurz, Gary Cates, and 23 others, have sponsored SB 167 in the Ohio Senate. This legislation provides for a temporary statewide moratorium on governmental taking of unblighted private property for economic development by another private party. The moratorium would be in force until December 31, 2006, and would affect both state and local government projects involving eminent domain proceedings. In addition, SB 167 forms a Legislative Task Force to conduct a comprehensive review of Ohio's eminent domain laws and procedures.

The task force, comprised of 24 individuals, will include representation from a broad set of interested parties, including property rights groups, state and local government, agriculture, commercial and residential real estate, and the Legislature. The task force will conduct a comprehensive review of Ohio's eminent domain law and procedures and

make recommendations as to statutory or constitutional actions needed to protect private property rights in Ohio in light of *Kelo*. The Task Force's report will be due in the spring of 2006, giving the Legislature time to take action on its recommendations during the current term.

SB 167 protects Ohioans' private property rights in the short term, while providing a thoughtful and comprehensive approach toward a permanent change in Ohio's eminent domain law. While eminent domain can be an important tool for state and local government when employed for legitimate public uses, that governmental power should not be abused or exploited. Too make way for new developments simply because such developments will generate more jobs and taxes or for some other speculative public "good" is fundamentally un-American.

Under Article I, Section XIX, of Ohio's Constitution, private property rights are "inviolate." Despite the US Supreme Court's overly expansive notion of eminent domain, "inviolate", in Ohio, still means inviolate.

Conclusion

States have numerous options in response to *Kelo*. These options range from taking no action and letting the courts grapple with the problem to adoption of a state constitutional amendment prohibiting the taking of all private property or unblighted private property that would ultimately be owned by another private property. In between, state law can be changed to redefine public use, but such a statutory action could be circumvented by a municipality's home rule powers. Such home rule concern can be avoided by way of a state constitutional amendment. States also should reexamine their definitions of "blight" and "deteriorated properties" to prevent circumvention of any *Kelo* responsive changes through the abuse of those terms. Finally, if a total prohibition against the taking of unblighted private property is not adopted, state procedures for determining the "just compensation" for property to be taken should be changed to allow the current private property owner to offer evidence demonstrating the value of the property based on its proposed future development after the take.

Swift action is needed to protect Ohioans' private property rights after *Kelo*. SB 167 will provide immediate relief, while proposing the appropriate long-term solution. This approach will protect Ohioans private property rights now and for the future.

Senator Tim Grendell currently represents the 18th Ohio Senate District, which includes all of Lake and Geauga Counties, as well as the Cuyahoga Communities of Gates Mills, Highland Heights, Mayfield Heights, and Mayfield Village. Tim Grendell is an attorney who specializes in matters of constitutional law, land use, real property, and zoning.

July 19, 2005 Eminent Domain Legislative Working Group Meeting

Minutes

Meeting began at approximately 9:05. Attendees are attached.

Senator Grendell opened with a brief discussion of eminent domain.

The traditional use of eminent domain has always been roads, public buildings, schools, etc. In the 1960's, the concept of urban renewal recognized taking of 'blighted' property could be done – specifically private property – if the community required.

Kelo is a new manifestation of his. A CT city tried to get property owners to sell for tax generating use. The decision was 5-4 and allows appropriation for economic development reasons.

There are two parts to eminent domain in Ohio.

1. *Public necessity and/or Public need:*
   - *Decided by administrative or legislative body*
   - *May be challenged by property owner early on (EARLY)*
   - *Challenges tried by probate judge as a matter of law (no jury).*
2. *Compensation:*
   - *Decided by probate judge. Decision can be challenged, resulting in a jury trial.*
   - *Property owner has burden of proof. Either side can appeal jury decision.*
   - *No action until culmination of trial -- Exception is in "quick take" – Generally road projects and 'public exigencies' (war, emergency) are begun immediately with argument over value possibly extended.*
   - *** Procedurally, authority must make a good-faith-effort to purchase before starting eminent domain.*
   - *** Values are (largely) based on zoning at time of the take, rather than on projected value (ODOT suggested that in a very few instances homeowner can get value based on an adjusted figure, but this varies by judicial interpretation) on the property taken as well as possible loss to residual property value.*

Roundtable Discussion of Kelo Impact

- AG is interested, but acting primarily as an interested party at this time.

- ODOT believes a similar situation (to Kelo) is possible in Ohio. For the most part, Kelo problems are not expected within the agency, but ODOT would like to maintain good, consistent policy within the state.
- Citizen impacted by 'bogus blight' in Lakewood, Ohio. Detailed how homes were "blighted" due to their only having 1 full bathroom and unattached garages. Citizens defeated eminent domain proceedings through a local referendum.
- OHBA filed amicus on behalf of Kelo, and noted that the 'vast majority' of homebuilders are not doing these sorts of developments.
- Township Representative thanked LSC for the research memorandum, reiterated need to have good eminent domain use.
- Municipality representative noted desire to keep fair and easily recognized processes.
- State Rep very concerned about future of private property. Noted that proposed constitutional amendment needs to be adjusted and was only intended as a starting point. Believes that private property should be held inviolate and concerned that Kelo opens door to simply use eminent domain to raise funds. Has to be some way to balance economic development and traditional concept of private property rights.
- Greater Ohio Representative noted that (almost) no one seems supportive of Kelo. Suggested a two-year moratorium on Kelo type uses while we codify the process. Also, this is a good opportunity to update zoning laws – which has not been done since 1925.
- Suburban Communities Representative noted that suburbs do not support a 'scorched-earth policy,' but do support local tools for redevelopment. Currently, there are not many options. Perhaps we can review revenue and tax base sharing or implement planning with teeth to protect economic viability.
- State Rep who expressed concern that Ohio's eminent domain allows similar situation as Kelo.
- Grendell/Zurz clarified that this is why they are holding these workgroups. We should not approach this in a purely reactionary manner. We need to ensure that we are fair to citizens while continuing to recognize legitimate uses such as roads, blight, etc.
- State Senator's office noted that Butler County has the most growth in the state and massive redevelopment of formerly rural areas. Would like to keep a reasonable balance between development and property rights.

Review of Possible Action

Grendell and Zurz discussed the possible responses to Kelo – including "do nothing," "possible legislation" and "possible constitutional amendment."

I. Take No Action

II. Possible Legislative Changes

A. Withhold state money to a municipality that takes unblighted private property for economic development. (Sen. Coughlin)

B. Change valuation provisions to allow the jury to decide the value of the property taken based on new proposed development use, not current use.

C. Require that the municipality pay the property owner's attorneys' fees when unblighted property is taken for economic development.

D. Place the burden to establish the value of unblighted property on the municipality when taken for economic development.

E. Allow jury to decide if the taking of unblighted property is a legitimate public purpose.

F. Other Suggestions?

III. Ohio Constitutional Amendments

A. Prohibit taking property for private economic development, except to eliminate blighted area.

B. Require vote by electorate (referendum) to approve government's taking of unblighted private property.

C. Increase compensation and provide for attorneys' fees if unblighted private property is taken for economic development.

Other Suggestions?

- Two-year moratorium statewide to allow the GA to develop a potential response. Recognition that one bad project can drive statewide law; Kelo is the fever, but problem should be looked at in a larger response.
- Review the definition of blight and possible revision to how we determine blight (also: functional and economic obsolescence)

As Introduced

126th General Assembly
Regular Session
2005-2006

S. B. No. 167

Senators 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

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A BILL

To establish, until December 31, 2006, a moratorium on the use of eminent domain by any entity of the state government or any political subdivision of the state to take, without the owner's consent, private property that is in an unblighted area when the primary purpose for the taking is economic development that will ultimately result in ownership of the property being vested in another private person, to create the Legislative Task Force to Study Eminent Domain and Its Impact on Land Use Planning in the State, and to declare an emergency.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. As used in Sections 2 to 4 of this act:

(A) "Blighted area" has the same meaning as in section 303.26 of the Revised Code, but also includes an area in a municipal corporation.

(B) "Public body" means any entity of the state government, and any county, municipal corporation, township, commission, district, authority, or other political subdivision of the state, that has the power to take private property by eminent domain.

Section 2. (A) Notwithstanding any provision of the Revised Code to the contrary, until December 31, 2006, no public body shall use eminent domain to take, without the consent of the owner, private property that is not within a blighted area, as determined by the public body, when the primary purpose for the taking is economic development that will ultimately result in ownership of that property being vested in another private person. This prohibition does not apply to the use of eminent domain for the taking of private property to be used as follows:

(1) In the construction, maintenance, or repair of roads, including, but not limited to, such use pursuant to authority granted under Title LV of the Revised Code;

(2) For a public utility purpose;

(3) By a common carrier.

(B) Until December 31, 2006, if any public body uses eminent domain to take, without the consent of the owner, private property that is not within a blighted area, as determined by the public body, when the primary purpose for the taking is economic development that will ultimately result in ownership of that property being vested in another private person, each of the following shall apply:

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

(2) The Department of Development shall not award or distribute to the public body any funding under a shovel ready sites program created under section 122.083 of the Revised Code.

(3) The public body shall not receive any funding provided in any act that makes appropriations for capital purposes.

Section 3. (A) There is hereby created the Legislative Task Force to Study Eminent Domain and Its Impact on Land Use Planning in the State. The Task Force shall consist of the following twenty-five members:

(1) Three members of the House of Representatives, with two members appointed by the Speaker of the House of Representatives and one member appointed by the Minority Leader of the House of Representatives. The Speaker of the House of Representatives shall

designate one of the members the Speaker appoints to serve as co-chairperson of the Task Force.

(2) Three members of the Senate, with two members appointed by the President of the Senate and one member appointed by the Minority Leader of the Senate. The President of the Senate shall designate one of the members the President appoints to serve as co-chairperson of the Task Force.

(3) One member representing the home building industry in the state, appointed jointly by the Speaker of the House of Representatives and the President of the Senate;

(4) One member who shall be a statewide advocate for intelligent land use in the state, appointed jointly by the Speaker of the House of Representatives and the President of the Senate;

(5) One member representing the agricultural industry in the state, appointed jointly by the Speaker of the House of Representatives and the President of the Senate;

(6) One member representing the commercial real estate industry in the state, appointed jointly by the Speaker of the House of Representatives and the President of the Senate;

(7) One member representing licensed realtors in the state, appointed jointly by the Speaker of the House of Representatives and the President of the Senate;

(8) One member who shall be an advocate for the use of parks and recreation, appointed jointly by the Speaker of the House of Representatives and the President of the Senate;

(9) One member representing the Ohio Prosecuting Attorneys Association or the Ohio Association of Probate Judges, appointed jointly by the Speaker of the House of Representatives and the President of the Senate;

(10) One member who shall be an attorney 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 Speaker of the House of Representatives and the President of the Senate;

(11) One member knowledgeable on the issues confronting the Task Force who represents persons who own property and reside

within Ohio, appointed jointly by the Speaker of the House of Representatives and the President of the Senate;

(12) 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;

(13) The Director of Development or the Director's designee;

(14) The Director of Transportation or the Director's designee

(15) Two members who shall be attorneys with expertise in eminent domain issues, each appointed by the Attorney General.

(B) Appointments to the Task Force shall be made not later than thirty days after the effective date of this section. Any vacancy in the membership of the Task Force shall be filled in the same manner as the original appointment. Members of the Task Force shall serve without compensation.

(C)(1) The Task Force shall study each of the following:

(a) The use of eminent domain and its impact on land use planning in the state;

(b) How the decision of the United States Supreme Court in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) affects state law governing the use of eminent domain and the law's impact on land use in the state;

(c) The overall impact of state law governing the use of eminent domain on land use, economic development, residents, and local governments in Ohio.

(2) The Task Force shall prepare and submit to the General Assembly by not later than April 1, 2006, a report that shall include the findings of its study and recommendations concerning the use of eminent domain and the updating of state law governing land use that is impacted by eminent domain. On submission of its report, the Task Force shall cease to exist.

(D) The Legislative Service Commission shall provide any technical, professional, and clerical employees that are necessary for the Task Force to perform its duties.

(E) All meetings of the Task Force are declared to be public meetings open to the public at all times. A member of the Task Force shall 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 shall promptly prepare and maintain the minutes of its meetings, which shall be public records under section 149.43 of the Revised Code. The Task Force shall give reasonable notice of its meetings so that any person may determine the time and place of all scheduled meetings. The Task Force shall not hold a meeting unless it gives at least twenty-four hours advance notification to the news media organizations that have requested such notification.

Section 4. The General Assembly hereby makes the following statements of findings and intent:

(A) On June 23, 2005, the United States Supreme Court rendered its decision in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), which allows the taking of private property that is not within a blighted area by eminent domain for the purpose of economic development even when the ultimate result of the taking is ownership of the property being vested in another private person. As a result of this decision, the General Assembly believes the interpretation and use of the state's eminent domain law could be expanded to allow the taking of private property that is not within a blighted area, ultimately resulting in ownership of that property being vested in another private person in violation of Sections 1 and 19 of Article I, Ohio Constitution, which protect the rights of Ohio citizens to maintain property as inviolate, subservient only to the public welfare. Thus, the General Assembly finds it is necessary to enact a moratorium on any takings of this nature by any public body until further legislative remedies may be considered.

(B) The General Assembly finds that it is a matter of statewide concern to enact the moratorium. The moratorium is necessary to protect the general welfare and the rights of citizens under Sections 1 and 19 of Article I, Ohio Constitution, and to ensure that these rights are not violated due to the *Kelo* decision. In enacting this provision, the General Assembly wishes to ensure uniformity throughout the state.

Section 5. This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for the necessity is that the United States Supreme Court decision in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) could allow the taking of private property that is not within a blighted area, ultimately resulting in ownership of that property being vested in another private person in violation of Sections 1 and 19 of Article I, Ohio Constitution, and, as a result, warrants a moratorium on any takings of this type until further legislative remedies may be considered. Therefore, this act shall go into immediate effect.

The Village of Hebron
Office of the Mayor
Hebron Municipal Complex
934 Main Street ~ Hebron, Ohio 43025
740-928-2261 Fax 740-928-5104

August 18, 2005

Honorable Chairman Ney, Committee Members and guests:

Thank you for allowing me the opportunity to address the committee this morning. As Mayor of the Village of Hebron I want to welcome everyone to our community for this important event.

The Fifth Amendment to the Constitution of the United States allows for the government taking of private property for the "public good" through the application of due process and fair compensation. Clearly, many of the roads, utility infrastructure, schools, flood control reservoirs, and numerous other projects that improve the quality of life for all would not be possible if it were not for this law.

I believe that while the eminent domain process can yield great benefit for communities it can also inflict significant hardship on private property owners who have their own vision for their property. They have a right to that vision and the government should be hesitant to impose a different one. The need to strike a balance between the "Public Good" and the "Property rights of the individual" should always be uppermost in the minds of elected officials.

It seems to me that the taking of property from one private individual and giving/selling it to another private individual/business is unlikely to be what the framers of the Fifth Amendment had in mind. When the taking is done solely to enhance the revenue stream for the government by expanding the tax base, I believe it is beyond the boundaries of expectation of the electorate.

There is no question that any of our homes would produce more jobs and taxes if they were turned into an office building site, and every small business would produce more jobs and taxes if it were torn down and a Lowe's or Wal-Mart were constructed. If that's the definition of the "public good" to be used then everything we own as individuals is in jeopardy as soon as some private business delivers their plan or vision to the local council.

Our country has always supported a strong system of protecting private property rights. I believe that the process of "eminent domain" is a necessary tool for the betterment of our communities and public safety and health and should continue. As with many laws, the interpretation of this one seems to have expanded beyond what most Americans would consider to be "common sense". I am one of those Americans.

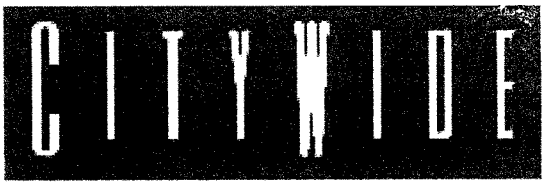
I support the efforts of your Committee to investigate what may appear to some as abuses of the eminent domain process. I also would encourage our representatives at all levels that any restriction of the process be approached with great caution. This is a law that has helped provide an American infrastructure that is the envy of most of the world. It will continue to be needed as we move forward as an innovative and progressive society.

Those of us who have the privilege of serving our communities simply cannot forget that we have a responsibility to protect and defend the rights of the private individual as we strive to improve the quality of life for all.

Thank you for the opportunity to share these comments with you today.

Original signed by

Clifford L. Mason
Mayor



STATEMENT OF

STEVEN NUTT

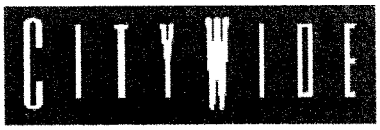
DIRECTOR OF STRATEGIC DEVELOPMENT FOR CITYWIDE

DEVELOPMENT IN DAYTON, OHIO

BEFORE THE

HOUSE FINANCIAL COMMITTEE,

SUBCOMMITTEE ON HOUSING AND COMMUNITY OPPORTUNITY



Statement of Steven Nutt, Director of Strategic Development
City Wide Development Corporation of Dayton, Ohio
before the
House Committee on Financial Services
Subcommittee on Housing and Community Opportunity

August 18, 2005

Chairman Ney, thank you for the opportunity to appear before you this morning. I am honored to be here today and to be given the opportunity to discuss the experiences of economic development professionals. We hope our experiences can be an important source of information as you determine the future of eminent domain in Ohio and in Washington, DC.

My name is Steven Nutt, and I am the Director of Strategic Development for the Citywide Development Corporation of Dayton, Ohio. I also represent Steve Budd, the Board Chair of the International Economic Development Council (IEDC.) Steve is sorry he could not be with us today. IEDC is the premier membership organization dedicated to helping economic development professionals. Like you and your colleagues in Congress, IEDC's 4,000 members work every day to create high-quality jobs, develop vibrant communities and improve the quality of life in their regions.

I have a Masters Degree in Economic Development Planning from the University of Cincinnati. I've been working in inner city economic development for fifteen years. In my current role, my primary duties are to create economic development strategies for the city of Dayton. Dayton is a landlocked community without space for businesses to grow. As a result, they often choose to locate outside the city. Eminent domain is one of the few tools we have that enables us to create space to keep our companies in the city.

The judicious use of eminent domain is critical to the economic growth and development of cities, towns and rural areas throughout the country. Assembling land for redevelopment helps revitalize local economies, create much-needed jobs, and generate revenues that enable cities and rural areas to provide essential services. When used prudently and in the sunshine of public scrutiny, eminent domain achieves a greater public good that benefits the entire community.

The Ohio State legislature currently provides for the use of eminent domain for public use. The state constitution states that "[p]rivate property shall ever be held inviolate, but subservient to the public welfare . . . where private property shall be taken for public use, a compensation therefore shall first be made in money, or first secured by a deposit."

The state legislature determines who may use eminent domain in the Ohio Revised Code. Some grants are general grants of power that allow an entity to take private property for any public purpose. Other grants of authority are specific, allowing the entity to use eminent domain only for stated purposes.

The state legislation does not stipulate or limit the parameters of public use. Since it does not designate limits, there is no reference to economic development

purposes. The extent of public use, including for economic development purposes, and the definition of blight are currently in the hands of Ohio's local authorities. Although local authorities have the right to limit the understanding of public use and can prohibit the use of eminent domain for economic development purposes, none of them do at this time.

Proposed legislation in the Ohio General Assembly would prohibit the use of eminent domain for economic development. Ohio Senate Bill 167 calls for a moratorium, until December 31, 2006, on takings through eminent domain of private property in an unblighted area when the primary purpose for the taking is economic development and where a private person or entity will ultimately own the property.

The bill also calls for the creation of a legislative task force to study eminent domain and its impact on land use planning in the state. The task force must submit to the General Assembly (by not later than April 1, 2006) a report of its findings and recommendations. At this writing, 27 out of the 33 Senators have signed on as co-sponsor for the bill. The bill is expected to pass immediately upon the return of the General Assembly on September 7th.

Bill 167 comes in response to the Supreme Court decision in the case of Kelo v. City of New London. The Supreme Court's 5-4 decision in Kelo affirms that eminent domain is an important tool for local governments in the redevelopment and revitalization of economically distressed areas. The court stated in its opinion that the pursuit of economic development is a "public use" within the meaning of the Fifth Amendment's Takings Clause. The New London economic development project at issue in the case is similar to projects across the country aimed at revitalizing aging or depressed communities.

As a result of the Kelo decision, Ohio's General Assembly is concerned that the interpretation and use of the state's eminent domain law could be expanded to allow the taking of private property that is not within a blighted area and will ultimately result in private ownership.

Congress is also offering legislation in response to the Kelo decision that would prohibit the use of federal funds for economic development projects that involve the exercise of eminent domain. Should Congress or the General Assembly act to prohibit the use of eminent domain for economic development purposes, the economies of many Congressional districts will suffer. No municipality in America could use eminent domain to carry out an economic development project. One person could veto the redevelopment of an entire distressed community. This would have the practical effect of making such projects virtually impossible.

Legislators should not preempt or displace existing state laws that govern the local application of eminent domain. The Supreme Court's decision keeps the economic health of communities in the hands of local leaders who are not out to destroy communities, but rather who work for the best interests of their communities at large. State or federal bills prohibiting the use of eminent domain for economic development are job-killing pieces of legislation.

Unduly constraining eminent domain would thwart job creation by eliminating an entire category of projects from the redevelopment toolbox of local officials.
At a time when nearly every business and community within our region is being confronted with intense competition from the global economy, and areas of our cities and rural areas are in decline, Congress and the Ohio General Assembly should be expanding its efforts to solve the problems of economic deterioration, not imposing restrictions on community growth.

The use of eminent domain is never the first choice of any community. Because the process is time consuming and expensive, it is the last resort pursued during a land assembly process. Many local authorities rarely exercise their power of eminent domain, and public officials who do use eminent domain comply with existing rules protecting individual property owners, and they have accountability to the citizens and voters.

It is IEDC's understanding, based on conversations with lawyers familiar with the decision, that the Supreme Court decision did not in any way expand the power of eminent domain. Rather, the Court simply upheld the long-standing inclusion of economic development as a 'public use.' It is therefore unlikely that the Supreme Court's decision will result in city officials exercising eminent domain randomly or without balanced consideration.

There is no question that eminent domain is a power that, like any government power, must be used prudently, and there are many built in checks. One such check is the public nature of the process. Probing questions should be raised about any complex undertaking financed by taxpayers, and nothing in local government attracts more scrutiny or more criticism than eminent domain.

Like Ohio, each state legislates its use of eminent domain, and a public purpose or benefit generally needs to be clearly demonstrated. Authorities who abuse this privilege risk creating volatile political situations. Few government or elected officials are willing to risk their position and political stability in pursuit of a project overwhelmingly opposed by the community.

In another check on abuse, the Fifth Amendment requires that anyone whose property is taken for a public use be fairly compensated, and in practice, most takings are compensated generously. In case after case, the majority of property owners willingly accept just compensation for their property in support of the development projects. According to our research, some are compensated as much as 25% above market value for their property allowing them to relocate with an equal or improved quality of life.

Critics of the *Kelo* decision have said that it authorizes seizing the property of one person merely to give it to another. While it is true that once the public entity acquires title to the property, it is conveyed to a developer to carry out the project, eminent domain is part of the land assembly process for redevelopment with the intent to remove blight and/or create jobs and/or create housing. The public sector intervenes so that the private sector can bring in much needed investment in a distressed area.

Eminent domain has been used successfully in Ohio. The city of Columbus used land acquisition powers and tax increment financing to facilitate the creation of the Arena District, a 75-acre, $500 million mixed-use development. The centerpiece of the district is Nationwide Arena, home of the NHL's Columbus Blue Jackets; a mixture of residential, retail, and office space rounds out the district. Since its creation in 2000, the Arena District, bustling with round-the-clock activity, has become the northern anchor of downtown Columbus.

The private sector, led by Nationwide Realty Investments, a diversified insurance and financial services organization based in Columbus, funded the creation of the Arena District. Nationwide agreed to finance the construction of the 18,000-plus

capacity arena north of the city's central business district, if the National Hockey League guaranteed a franchise team for Columbus.

Government agencies are not and should not be in the private real estate development business; therefore, the assembled land is typically leased or sold to the private sector for redevelopment. As a matter of policy, cities should not be in the long-discredited practice of building redevelopment projects; rather they should facilitate the use of private capital and private management to achieve the same end.

This is exactly what happened with the Arena District project. In addition to the arena, Nationwide Realty developed plans to transform the 75 acres of underutilized space surrounding the arena, consisting primarily of gravel parking lots and an abandoned state penitentiary, into a lively urban quarter. Nationwide acquired the necessary parcels, targeting a 23-acre tract of city-owned land, a six-acre parcel owned by American Electric Power, and a handful of properties owned by surface parking lot operators. When purchase agreements failed for the parking sites, the Franklin County Convention Facilities Authority used its condemnation powers to acquire the land. The authority may acquire lands intended for 'convention facilities,' even if a private party develops the facility. Following acquisition, the authority leased the land to Nationwide provided that an arena be constructed on the grounds.

Currently, the Arena District employs 3,600 people in 40 businesses. The businesses located in the Arena District include financial consultants, creative companies, law firms and legal offices, restaurants, and government offices.

Judiciously used eminent domain is critical to the economic growth and development of cities and towns throughout our country. Assembling land for redevelopment helps revitalize local economies, create much-needed jobs, and generate revenues that enable cities to provide essential services. Eminent domain is used to breathe new life and give new hope to residents by providing new jobs.

Thank you once again for the opportunity to speak to you today.

Testimony of Richard J. Platt of Heath-Newark-Licking County Port Authority in Heath, Ohio
to the Committee on Financial Services
Subcommittee on Housing and Community Opportunity
August 18, 2005
Hebron, Ohio

Good morning. My name is Rick Platt and I am the Executive Director of the Heath-Newark-Licking County Port Authority, a local government entity established in 1995 by agreement of the cities of Heath and Newark as well as the Licking County Commissioners.

I appreciate the opportunity to offer testimony on this very important issue of local governments' use of the power of eminent domain. I thank you, Chairman Ney and distinguished committee members, for listening to your constituents and for conducting this hearing outside of Washington, DC. Eminent domain is a local issue and it is entirely appropriate that these hearings be conducted in the seat of a local government.

In its 10-year existence, the Port Authority has not exercised eminent domain powers and has no current plans to exercise those powers. My remarks today, thus, are based on my past professional experiences and observations over the last 18 years in economic development and government.

My experience tells me and it is my personal opinion that the Supreme Court got it right.

The recent decision in *Kelo v. City of New London* properly upholds a local government's ability to implement a redevelopment plan and attempt to retain and grow its tax base through economic development.

My contention is that local governments can, and should, be trusted to continue to have the power to use eminent domain for economic development and other public uses.

Many want to portray this decision in *Kelo* as a battle of big business winning while mom and pop are losing. However, I fear legislation aimed at countering *Kelo* might actually end up with unintended consequences.

My thinking comes from observations on several sides of this issue. In 1999, while serving as the head of a public-private economic development partnership in Steubenville, Ohio, my employer earned this *Pittsburgh Post-Gazette* headline—"Alliance 2000 to Heinz: You've Got a Friend in Ohio." [See Exhibit A.]

Jefferson County, Ohio—a suburb of Pittsburgh—stood to gain a baby food and soup plant expansion by Heinz if the City of Pittsburgh could not successfully acquire properties adjacent to the existing inner city Heinz plant. Heinz had proposed a $40 million expansion and desired to stay in Pittsburgh but was hemmed in by surrounding built-out properties.

Though eminent domain was not ultimately used in this Pittsburgh case, it was central to the discussions aimed at keeping Heinz, its jobs and its economic impact in the inner city. The possible condemnation of properties was enough to get negotiators to the table and make it possible for Pittsburgh to gain the expansion and retain this legacy business in their city.

The unintended consequence of tying the hands of urban areas is continued flight of business and people to greener pastures in the suburbs. Had the local government officials in Pittsburgh found themselves unable to consider using eminent domain powers in this case, it is quite possible Heinz would have gone to a suburban site west of Steubenville.

The "big business" in this case wouldn't have lost. Their costs were not much greater relocating the whole plant to Steubenville. The "losers" would have been the hundreds of moms and pops who would have lost their jobs in Pittsburgh.

Don't think suburban communities are lining up to suggest the end to eminent domain for economic development though.

Steubenville faced eminent domain issues itself. The South End of town, once a thriving, ethnic neighborhood with a flourishing mix of industrial, retail, and housing development is now dilapidated. Overgrown vacant lots, absentee landlords, and economic despair are the only things flourishing in the South End now.

Replace the name Steubenville, though, with the name of many of our large- and medium-sized cities around Ohio and the nation and the same story could be told.

There are many parts of towns like Steubenville's South End where block after block consists of small, fragmented parcels and where property values are a negative number. Even though the neighborhood has a four-lane highway exit and lays flat in an area that is challenged by hilly geography, there aren't any developers lining up to invest. The only way for most of these cities to turn this dire economic situation around is through government-led land assembly aimed at attracting private, capital investment.

Some years ago, the City crafted a redevelopment plan that called for assembling dozens of parcels into four distinct sites. During that planning process, there were strategy discussions of using eminent domain powers as a last resort to acquire vacant properties.

Eminent domain powers are a critical part of any redevelopment plan. It's necessary to assemble land, clean it up, and get the area's property values pointing in the positive direction before there's any hope of inviting the private sector in to turn it around.

It's quite possible that eminent domain never has to be used. The mere ability to use it, though, is enough to tilt the balance in the favor of redevelopment.

Restrict eminent domain powers to just building new government buildings or new highways in places like Steubenville, Ohio, and you might as well write off neighborhoods like the South End forever.

Again, unintended consequences and the reverse of protecting mom and pop could result.

The national discourse on this issue has been so strong that I fear a pendulum-like swing of public policy could bring us to restrictions on eminent domain powers so great that a single individual could be empowered to stop a project expected to impact hundreds of families. Local governments will have their hands tied.

From my experience, I can tell you that increasingly more and more potential development prospects are multi-national. Our competition for jobs and investment is, often, not within our U.S. borders. In an era of global competition for the economic benefits of private, capital investment, we need to give a long, hard look to anything that ties our hands more than our global competitors'.

Every time we look at public policy measures that could tend to make the job of those who are tasked with attracting economic development more difficult we need to ask the question, "Will this legislation make it easier to bring new jobs and new investment to the United States?"

If the answer is "no" and the benefits to the greater public good can't be fully explained, then we shouldn't do it.

There exist, today, eminent domain policies and practices that allow us to compete and that are not, truly, displacing mom and pop in favor of big business. And, again, I believe local government can and should be trusted. Thomas Jefferson was right. Government is best which is closest to the people.

The International Economic Development Council, the professional association for economic development practitioners, publishes what it calls its "Guiding Principles" for land assembly and economic development.

The six principles read:

1. Public agency initiated land assembly should be an inclusive process attained by a discussion amongst stakeholders, including residents and local businesses.

2. Eminent domain should be used as a last resort in the land assembly process. It should be used when a property owner is unwilling to sell or refuses to sell at a fair market value and only after attempted negotiations have failed. To protect landowners, independent appraisals should be conducted.

3. When embarking on a redevelopment project that requires land assembly, all reasonable efforts should be made to avoid relocating occupied residences and businesses. The community must carefully weigh the benefits of redevelopment versus displacement.

4. In cases where eminent domain is used for occupied properties, relocation costs should be covered. Federal, state and local laws typically require these benefits. This may also include providing assistance to homeowners for finding a new residence.

5. Eminent domain cases should rest on a solid legal foundation and should be fully documented to ensure adequate transparency.

6. States that require blight should establish a clear definition of blight to reduce the amount of ambiguity for municipalities undertaking condemnation. Municipalities should establish a standardized approach in land assembly and eminent domain to provide consistent expectations amongst stakeholders.

These principles make sense. Eminent domain should always be a last resort and the local community should carefully review, in a public forum, the benefits of redevelopment versus displacement of occupied homes and businesses.

Additionally, the federal government already properly restricts the power of eminent domain. When federal funds are used, relocation of individuals is greatly protected.

The rhetoric following the June Supreme Court decision continues to be strong. We need a cooling off period, and we need to explore, with great care, the potential consequences of restricting eminent domain powers.

Many thanks, Chairman Ney, for the opportunity to share my personal thoughts and experiences. I hope these hearings are productive. I would be happy to take any questions.

Alliance 2000 to Heinz: You've got a friend in Ohio

Friday, July 30, 1999

By Dan Fitzpatrick, Post-Gazette Staff Writer

If H.J. Heinz Co. is unable to expand its North Side plant, a Steubenville, Ohio, economic development group is offering to make room for the food giant at a 1,000-acre industrial park along U.S. Route 22.

"We would prefer people in Pittsburgh work it out," said Rick Platt, director of Alliance 2000, a public/private group formed in 1996 to spur economic development in Jefferson County, Ohio. But, if Heinz needs space, "We are ready. We would be happy to keep that project in the region."

To Platt, the "region" includes Steubenville. His group markets the eastern Ohio city as an extension of Pittsburgh, stressing its 30-minute ride to the Pittsburgh International Airport.

Exhibit A Headline from *Pittsburgh Post Gazette*, July 30, 1999

Note: Exhibit depicts headline and first few paragraphs of article only.

U. S. House of Representatives Committee on Financial Services
Subcommittee on Housing and Community Development

Field Hearing: "Eminent Domain- Are Ohio Homeowners at Risk?"
Ohio University-Bennett Hall Auditorium
101 University Drive, Chillicothe, OH

Testimony of State Representative John Schlichter
August 18, 2005

Thank you Mr. Chairman, and members of the Subcommittee on Housing and Community Development, for providing me with a forum in my home legislative district to express my outrage at the United States Supreme Court's recent decision on eminent domain – a decision that could very well jeopardize the homes and businesses of any one of us here today.

There is an old adage that says "a man's home is his castle."

I always thought this was true. As it turns out, it was true – at least until June 23 of this year. That's the day the U.S. Supreme Court, in the cased of *Kelo vs. City of New London*, granted exceedingly broad eminent domain powers to local governments for "economic development" purposes.

Eminent domain, a fancy term for the power of a government to acquire private property for a greater public purpose, is a longstanding legal and philosophical principle. The concept is protected in the U.S. Constitution, and the constitutions of all 50 states.

Specifically, the U.S. Constitution provides for the "taking" of private property for "public use," provided that just compensation is paid to the property owner (*U.S. Constitution, Amendment V)* Similarly, the Ohio Constitution grants to its citizens the rights to acquire, possess, and protect property, and declares the rights of Ohio citizens to maintain property "inviolate, subservient only to the public welfare." (*Ohio Constitution, Article I, Sections 1 & 19)*

Exactly what constitutes a "public purpose" for which the government may acquire private property has been the subject of heated debate for decades. Until recently, most state and local governments used their power to acquire private property only in cases where a road, library or park was involved, or in cases of urban renewal, and even then only as a last resort after negotiations with property owners proved unsuccessful.

A dangerous recent trend, however, has evidenced local governments pushing the boundaries of eminent domain beyond the typical road and bridge projects, and willing to use – or at least attempt to use – their eminent domain power to achieve much more ambitious, not to mention remunerative, public policy goals.

One example is the city of New London, Connecticut's condemnation of 15 private properties – in a non-blighted area – for a private waterfront development. City officials condemned and attempted to acquire these private homes and businesses to make way for an office building, retail shops and luxury condos and apartments. They reasoned that the new ownership would provide more jobs and greater tax revenue for the city, and thus, in their opinion, would constitute a public use.

Several property owners in the redevelopment area refused to sell their parcels, however, so the city initiated condemnation proceedings. In response, the property owners claimed that the condemnations of their properties were not for a public use. Instead, they claimed that because the property was to be transferred to, and developed by, a private, non-

governmental developer, that these transfers were "private" to "private," and thus did not amount to a "public use."

In a 5-4 ruling, however, split largely upon ideological lines, the court defined the concept of "public use" extremely broadly and ruled that when it comes to eminent domain, "public use" can include economic development, even private development, and even if the area is non-blighted, so long as it serves a "public purpose."

In other words, a "public use" could simply mean "raising additional tax revenues," and soon anyone's property could be in jeopardy of being acquired to pay for new and expanding services.

Retiring Justice Sandra Day O'Connor rightly warned in her dissent that "[u]nder the banner of economic development," the majority opinion makes "... all private property ... vulnerable to being taken and transferred to another private owner; so long as it might be upgraded, ...nothing is to prevent the state from replacing ... any home with a shopping mall or any farm with a factory."

Rest assured that we've taken notice in Ohio. We have already taken action, and have begun to craft a response to protect the hearths and homesteads across our great state.

In passing the Jobs for Ohio package – an economic development, investment and infrastructure proposal which will appear on the ballot before Ohio voters this November – the Ohio General Assembly made certain to include language that would adopt a more limited interpretation of a "public purpose" when recipients of public grant dollars exercise eminent domain. The purpose of this language is in direct response to the U.S. Supreme Court ruling and will ensure reasonable parameters and limitations for the use of eminent domain.

Other suggestions have also been made and will certainly receive legislative attention. We need to remember, however, that these are complicated issues. As outraged as I am at the Supreme Court's decision, in my opinion, we should avoid rushing into any kind of reactionary scheme or rigid ban.

An outright ban could have serious unintended consequences, which is why I firmly support the concept recently introduced in the Ohio Senate. Senate Bill 167, which has 26 co-sponsors in the 33-member chamber, would place an immediate 17-month moratorium (until December 31, 2006) on the use of eminent domain to acquire private property in private development projects, thereby easing fears and preventing new land grabs.

Furthermore, the legislation provides for the appointment of a 24-member task force, which would review the use of eminent domain and its impact on land-use planning in the state. This would allow the state to craft a long-term policy that would take into account Ohio's outdated planning statutes and the reasons behind the use of eminent domain.

This bipartisan panel, appointed by members of the Ohio House and Senate, would include legislators, homebuilders, land-use-reform advocates, farm interests, planners, preservationists and local governments.

We all know that economic development is necessary and inevitable. Accordingly, what we need to consider is not how to stop local governments from using eminent domain powers altogether, but rather how to ensure that the power is used sparingly and fairly.

A temporary moratorium, one that can be re-enacted before the end of this session of the General Assembly, and a land-use task force are the way to do that.

I thank you, again, for the opportunity to speak before you today on this issue.

EMINENT DOMAIN TESTIMONY

AUGUST 18, 2005

DONA SMITH
EXECUTIVE VICE PRESIDENT
ROSS COUNTY COMMUNITY IMPROVEMENT CORPORATION

The Ross County Community Improvement Corporation (CIC) is a private non-profit economic development agency. The CIC has been involved in economic development on a full time basis for the past twenty years.

During those years, we have worked to develop industrial parks, located sites for business growth, and have worked to bring many jobs into Ross County.

We have also looked at and worked on a smart growth initiative. This would be a development plan for the entire county, locating areas that would be appropriate for future developments such as housing, commercial and industrial growth. These types of plans, developed by broad based community members, provide directions on developments within communities, and are supported by citizens and elected officials.

The recent ruling by the US Supreme Court concerning eminent domain has brought forth many questions and concerns not only to local citizens, but also to elected officials and economic development professionals. It jeopardizes the efforts of economic development professionals and severely puts these efforts at risk. The goals of development are to bring increased investment and jobs opportunities to local areas. However, there needs to be trust and understanding within communities to assure that everyone is protected.

Eminent domain has been available to local governments in Ohio for the taking of land for public purpose or for necessary purposes. Land owners are to be justly compensated. Public purpose and necessity were not intended for profit making. Giving local governments a much broader power to take property for the purpose of generating more tax revenue opens up a potential Pandora's Box.

Our public officials need to be protected. Most of Ohio has been experiencing the pressures of lower tax revenues, higher costs of services and the loss of jobs. Economic development has become very competitive with many thousands of economic developments organizations across the United States competing for projects, investments and jobs. Allowing local governments to take land for economic development purposes puts undue pressures on these elected officials. These pressures could come from different directions: developers who offer jobs and increased tax revenues; property owners who feel they could hold out for higher dollars if eminent domain is used; and lengthy legal battles. Recently I have seen recall elections brought about by just a few disgruntled citizens over frivolous things. Ohio's laws allow recall petitions to be

presented with a very small number of signatures and without just cause. This can severely effect communities and they can become fragmented and disorganized. These communities will suffer significant set backs, creating a lack of vitality and economic growth.

Our Constitution was written to protect citizens and government. The ruling by the US Supreme Court, to give governments more powers of eminent domain, could lead to more irate citizens recalling government officials. We could create a revolving door of elected officials with the end result being qualified people will not seek offices due to the fears associated with public service.

We thank you, Congressman Ney, for your interest in hearing how your constituents view the eminent domain ruling. We hope our U.S. Congress will protect the property rights of land owners and protect our elected officials who are facing increasing scrutiny and financial pressures.

Respectfully submitted

Dona Smith

RICK MCNELLY
JACKSON, OHIO

EDMUND ARMSTRONG
JACKSON, OHIO

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August 11, 2005

The Honorable Bob Ney
18th District, Ohio
2438 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Senator:

"Nor shall private property be taken for public use without just compensation." - U.S. Constitution, Amendment V.

Restricting Eminent Domain: In the wake of the Supreme Court's *Kelo vs. New London* decision, state and local governments nationwide are starting to take action to oppose or restrict the use of eminent domain for economic development purposes. To assist state and local elected officials in these efforts, it is necessary for citizens to express their views on this issue. I write not only as an elected official of Jackson County Ohio, but also as a private property owner.

Enshrined in the U.S. Constitution and the constitutions of all 50 states is the power of eminent domain, which allows the government to take private property for a "public use" and requires the payment of just compensation for the taking.

But the definition of "public use" has gradually expanded over time. Originally constrained to projects like roads, bridges and public buildings, local governments are increasingly willing to use the power of eminent domain to achieve all sorts of public policy goals, and eminent domain has become a primary tool for promoting urban development.

Average citizens might not consider retail centers, office buildings, and casinos to constitute a reasonable "public use," but state and local governments often use the power of eminent domain to open land for these and other questionable uses. Often using jobs and tax revenue as a justification, local governments have wide latitude to invoke eminent domain and seize private property, destroying lives and livelihoods in the process.

As we have a primarily rural environment in Jackson County, the temptation to use this ruling as a mechanism to acquire large parcels of family owned farm and residential lands for either private or state government development may exist. Many area families own their homes and property without a mortgage, some handed down from generation to generation, and many families ownership of these lands pre-date Ohio statehood. Ohio State and Local Government, along with business and commercial developers must show restraint and not place the desire for commercial development above the sovereign rights of the private property owner. Quick and decisive action should be taken by the State of Ohio legislature to negate the Supreme Court's decision, which is in fact an attempt to write rather than interpret law.

Sincerely,

JACKSON COUNTY COMMISSIONERS

Edmund Armstrong
Member

O