

Georgetown Environmental Law & Policy Institute

ALL OVER THE MAP:
THE DIVERSITY OF 2006 STATE BALLOT MEASURES
ADDRESSING EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT

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On November 7, 2006, voters in nine states approved ballot measures addressing the use of eminent domain for economic development. Earlier in the year, on September 30, voters in Louisiana also approved a ballot measure on eminent domain. While some have touted these ten measures as heralding a popular outcry against the use of eminent domain for economic development, the reality is more complicated and a good deal more interesting.

I. Overview of 2006 Eminent Domain Ballot Measures.

The most striking feature of the recent ballot measures is their extraordinary diversity. This suggests that voters believe that eminent domain presents distinctive issues calling for tailored solutions in each state. It also demonstrates that the states, the “laboratories of democracy,” are productively experimenting with different approaches to policy reform in this important and controversial area.

- Several states (New Hampshire and Nevada) adopted sweeping constitutional amendments that essentially bar any type of eminent domain for economic development, including, for example, creation of rights-of-way for electric transmission lines and other utility corridors or to promote the rejuvenation of even the most dilapidated and dysfunctional urban areas.

- Other states (Florida and Georgia) adopted unambiguously positive measures that do not affect the scope of the eminent domain power but ensure that its use is subject to greater political accountability. The Florida measure provides that eminent domain may not be used to transfer property to a new owner except pursuant to a general law approved by a three-fifths vote of the legislature, and the Georgia measure provides that an exercise of eminent domain by a

non-elected housing or development authority must first be approved by the elected governing authority of the county or municipality.

- Yet other states (Michigan and South Carolina) adopted measures essentially mirroring the restrictions that have already been placed on the use of eminent domain by their states' highest courts under their state Constitutions.

- More generally, state voters embraced a hodgepodge of different approaches, including in Louisiana expanding local governments' eminent domain authority to promote port development, in Oregon preserving government's authority to sell to private buyers the trees on property the government acquires through condemnation, and in Nevada granting owners the right to reclaim condemned property if it is not devoted to the planned public use after a certain number of years.

Section III of this paper provides a detailed description of each of the ten eminent domain measures adopted at the ballot box in 2006.

While this paper focuses on eminent domain measures, mid-term election voters also cast their ballots on other property rights proposals. The Arizona measure, approved by the voters, includes, in addition to new restrictions on eminent domain, a regulatory takings section modeled after Oregon's controversial Measure 37. Similar Kelo-plus measures – i.e., measures combining eminent domain reform with the regulatory takings agenda – were defeated at the polls in California and Idaho. In Montana, a Kelo-plus measure was struck from the ballot as a result of a Montana Supreme Court ruling that signature gatherers had engaged in voter fraud. See Montanans for Justice v. State ex rel. McGrath, 2006 WL 3030653 (October 26, 2006). The Nevada Kelo-plus measure was stripped of its regulatory takings provisions as a result of a Nevada Supreme Court ruling that combining eminent domain and regulatory takings provisions was unduly confusing to voters. See Nevadans for the Protection of Property Rights, Inc. v. Heller, 141 P.3d 1235 (Nev. 2006). In Washington, a measure solely designed to expand the definition of regulatory takings failed at the ballot box.

II. Where The States Stand Now on Eminent Domain.

Following the November elections, 34 states have now adopted laws or passed ballot measures in response to the Kelo decision. This means, of course, that more than a third of the states have declined to adopt new restrictions or are still studying the issue. Comprehensive information about all of the post-Kelo laws and measures is available on the websites of the National Conference of State Legislatures (www.ncsl.org) and the Castle Coalition (www.castlecoalition.org).

As with the November ballot measures, the rest of the state measures adopted in response

to Kelo reflect an extraordinary range of approaches to the issue. The National Conference of State Legislatures has categorized the various types of state responses as follows:

“Prohibiting eminent domain for economic development purposes, to generate tax revenue, or to transfer private property to another private entity.

Defining what constitutes ‘public use,’ generally the possession, occupation or enjoyment of the property by the public at large, public agencies or public utilities.

Restricting eminent domain to blighted properties and redefining what constitutes blight to emphasize detriment to public health or safety.

Requiring greater public notice, more public hearings, negotiation in good faith with landowners and approval by elected governing bodies.

Requiring compensation greater than fair market value where property condemned is the principal residence.

Placing a moratorium on eminent domain for economic development.

Establishing legislative study committees or stakeholder task forces to study and report back to legislatures with findings.”

The policies adopted by the states differ dramatically in terms of the extent to which they limit communities’ ability to use eminent domain for economic development. For example, in Vermont, the legislature amended the state’s general provisions governing eminent domain to provide that property cannot be condemned “primarily for the purpose of economic development;” yet it created an exception from this new mandate for very broadly-defined “blighted areas” which are the target of urban renewal efforts. In Delaware, the legislature adopted a legislative change providing that property can only be condemned for a “public use” as set forth six-months in advance of the initiation of condemnation proceedings in a planning document, at a public hearing on the acquisition, or in a published report by the agency; the evident purpose of this amendment is to improve the transparency and accountability of government decision-making involving eminent domain.

On the other hand, other states have adopted legislation imposing tight restrictions on eminent domain similar to the measures adopted in November by Nevada and New Hampshire. The South Dakota legislature adopted a measure imposing a blanket prohibition on government acquiring property by eminent domain “for transfer to any private person, non-governmental entity, or other public-private business entity,” or “primarily for enhancement of tax revenue.” Indiana and Florida are examples of states that have adopted legislation limiting the use of

eminent domain for economic development to situations where narrowly-defined “blight” conditions exist.

Several other general observations are in order:

- A number of states (Indiana, Pennsylvania, Texas, and Minnesota) adopted exemptions for specific types of development projects or for specific communities. These exemptions reflect both the intensity of the political debate over eminent domain, as well as the fact that the attitude of the public and political leaders on the use of eminent domain is highly context specific.
- Several western states (Idaho and Arizona) have exempted major resource industries (e.g., mining and forestry) from their eminent domain reform efforts. Particularly in the west, many states have broad constitutional and statutory provisions delegating eminent domain power to extractive resource industries. The irony is that the resource industries that successfully insulated their eminent domain powers from the recent reform efforts have been leaders in promoting the regulatory takings agenda in order to weaken public regulatory control over their activities.
- As discussed, a handful of states have responded to the Kelo decision by strengthening mechanisms designed to improve democratic accountability of the decision-making leading to an exercise of the eminent domain power. But most states have adopted the approach of categorically prohibiting consideration of certain types of projects through the normal political process. Thus, much of the recent policy reaction to Kelo can be viewed as a missed opportunity to strength the transparency and accountability of our democratic system of government.

III. Detailed Descriptions and Analysis of 2006 Eminent Domain Ballot Measures.

This section provides a detailed description and analysis of the eminent domain measures adopted in ten states in 2006: Arizona, Florida, Georgia, Louisiana, Michigan, New Hampshire Nevada, North Dakota, Oregon, and South Carolina.

Arizona. The voters of Arizona approved Proposition 207, which includes eminent domain reforms focused on limiting local governments’ ability to use eminent domain for urban redevelopment.

Like many states, Arizona has legislation authorizing the use of eminent domain for urban redevelopment projects and slum clearance. See ARZ § 36-1471 et seq. Prior to the adoption of Proposition 207, the statute provided broad definitions of “blighted” and “slum” areas. Proposition 207 limits local governments’ ability to use their urban redevelopment

authority in two ways.

First, it provides that, “in any eminent domain action for the purpose of slum clearance and redevelopment,” the government “shall establish by clear and convincing evidence that each parcel is necessary to eliminate a direct threat to public health or safety caused by the property in its current condition, including the removal of structures that are beyond repair or unfit for human habitation or use or to acquire abandoned property and that no reasonable alternative to condemnation exists.” While this language is obviously subject to interpretation, it would appear to prohibit the use of eminent domain to acquire viable structures, even if the area as a whole is a “slum” or “blighted,” and regardless of whether acquisition of the property is necessary to successful redevelopment. The “clear and convincing” evidence standard imposes a heavy burden on government to show that a building is blighted. Finally, even when the government meets these strict standards for the use of eminent domain, it also must show that “no reasonable alternative” to eminent domain is available.

Second, the proposition provides, again in relation to the exercise of eminent domain for the purpose of slum clearance and redevelopment, that if “private property consisting of an individual’s principal residence is taken,” the occupants shall receive “a comparable replacement dwelling that is decent, safe, and sanitary.” The proposition defines a satisfactory replacement dwelling by reference to federal and state relocation laws. Because at least the federal relocation law and its implementing regulations already mandate replacement housing, it is unclear what, if anything, this language adds to existing protections. The proposition then goes on to state that, at the option of the displaced occupant, he or she can demand equivalent financial compensation in lieu of replacement housing.

Proposition 207 includes several other provisions that appear to deliver more than they actually deliver. For example, the definitions section defines “public use” to mean “any of the following,” including “the possession, occupation or enjoyment of the land by the general public, or by public agencies, the use of land for the creation or functioning of utilities, and the acquisition of property to eliminate a direct threat to public health or safety caused by the property in its current condition, including the removal of a structure that is beyond repair or unfit for human habitation or use, or the acquisition of abandoned property.” This definitional provision further states that public use “does not include the public benefits of economic development, including an increase in tax base, tax revenues, employment or general economic health.” But, in reality, this listing of authorized and unauthorized definitions of public use leaves in place many other, customary uses of eminent domain in Arizona, a point that is reinforced by the statement in the preamble to the definition section that definitions shall not apply if “the context otherwise requires.” Thus the proposition leaves in place ARZ § 12-1111, which authorizes the use of eminent domain for a wide variety of purposes, including, most notably, the use of eminent domain by extractive resource industries.

As a result, Proposition 207 does not affect the use of eminent domain by any level of government, or by any “person,” for (1) “canals, aqueducts, flumes, ditches or pipes, for conducting water for the use of the inhabitants or for drainage of a county, city, town or village,” (2) “raising the banks of streams, removing obstructions therefrom, or widening, deepening or

straightening their channels,” (3) “aviation fields,” (4) “reservoirs, canals, ditches, flumes, aqueducts and pipes, for the use of a county, city, town or village, or its inhabitants, or for public transportation for supplying mines and other industrial enterprises, farms and farm neighborhoods with water for irrigation, domestic and other needful purposes, and for generating electricity,” (5) “draining and reclaiming lands, and for floating logs and lumber on nonnavigable streams,” (6) “roads, tunnels, ditches, flumes, pipes and dumping places for working mines, and outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from mines, and an occupancy in common by the owners or possessors of different mines, or any place for the flow, deposit or conduct of tailings or refuse matter from their several mines,” (7) “private canals, ditches, flumes, aqueducts and pipes for conducting water from natural water courses or bodies or from public sources where the lands to be irrigated are not directly reached by such natural water course or public sources,” and (8) “pipe lines to carry petroleum, petroleum products or any other liquid.”

Finally, Proposition 207 contains a broad statement that in all eminent domain actions “the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.” This merely restates a provision of the Constitution that provides that “Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.”

Florida. Florida voters approved a very modest and straightforward amendment to the state Constitution requiring that property taken by eminent can only be transferred to a private party pursuant to general law approved by a “three-fifths” vote of each branch of the state legislature. The measure reads as follows: “Private property taken by eminent domain pursuant to a petition to initiate condemnation proceedings filed on or after January 2, 2007, may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature.”

Georgia. Georgia voters passed a constitutional amendment for the exclusive purpose of directing that a local, non-elected housing or development authority cannot exercise eminent domain unless it is first approved by the elected governing authority of the county or municipality. Specifically the amendment eliminated the preexisting language in Paragraph V, Section II, Article IX of the Constitution, “The governing authority of each county and of each municipality may exercise the power of eminent domain for any public purpose,” and substituted the following language, “The governing authority of each county and of each municipality may exercise the power of eminent domain for any public purpose subject to any limitations on the exercise of such power as may be provided by general law. Notwithstanding the provisions of any local amendment to the Constitution continued in effect pursuant to Article XI, Section 1, Paragraph IV or any existing general law, each exercise of eminent domain authority by a non-elected housing or development authority shall be first approved by the elected governing authority of the county or municipality within which the property is located.”

Louisiana. On September 30, 2006, the voters of Louisiana adopted a constitutional

amendment that simultaneously limits and expands authority to use eminent domain for economic development.

The amendment restricts eminent domain by stating that, in general, private property shall not be condemned “for predominant use by any private person or entity,” or “for transfer of ownership to any private person or entity.” In addition, the measure provides that the term “public purpose” shall be limited to (1) “a general public right to a definite use of the property,” (2) continuous public ownership of property dedicated to various specified uses, and (3) “the removal of a threat to public health or safety caused by the existing use or disuse of the property.” Finally, the measure states, “Neither economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the taking or damaging of property is for a public purpose.”

These provisions raise a number of interpretive issues. For example, the measure prohibits the transfer (subject to one exception, discussed below) of property through condemnation to “any private person or entity.” Yet the measure includes a relatively narrow blight exception that presumably (though not necessarily) is intended to authorize use of eminent domain to eliminate blight even if the property is to be transferred to a new private owner. In addition, the measure appears to authorize continued use of eminent domain for public utility transmission lines, although the literal language of the measures suggests that the lines must be publicly owned.

In addition, the measure increases the level of compensation to be awarded in condemnation proceedings, by providing that an owner shall be entitled to recover for “the full extent of loss,” defined to “include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and any other damages actually incurred by the owner because of the expropriation.”

The measure expands the eminent domain power by amending section 21, Article VI of the Louisiana Constitution, which authorizes local governments to undertake various activities to promote economic development. The measure eliminated language requiring that exercises of eminent domain under this section be subject to the same restrictions as eminent domain generally, including the basic requirement that a taking be for a “public purpose.” The measure also expanded the types of development projects authorized by this section to include port facilities. The only limitation on this newly expanded power is that it cannot be exercised to take any “bona fide homesteads.”

Michigan. Michigan voters approved a constitutional amendment redrafting Section 2 of Article X of the Michigan Constitution. Substantively, the measure codifies the Michigan Supreme Court’s current interpretation of the scope of the eminent domain power. The measure also makes some procedural changes to the exercise of eminent domain.

In County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765 (2004), the Michigan Supreme Court blocked the use of eminent domain to assemble properties for a “business and technology park” adjacent to the Detroit airport. The Court ruled that the Michigan Constitution

permitted the use of eminent domain to transfer property to a new private owner in only three circumstances: (1) where the use of eminent domain was an actual “public necessity” in order to overcome holdout problems, (2) where the new private owner of the property would remain “accountable” to the public, or (3) where the selection of the land for condemnation is based on an independent “public concern,” such as blight conditions. The Michigan ballot measure basically codifies the limits articulated in Hathcock by stating, “Public use’ does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues,” and “Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph.”

On the procedural side, the measure provides that, if the government condemns private property “consisting of an individual’s principal residence,” the amount of compensation due “shall not be less than 125% of that property’s fair market value, in addition to any other reimbursement allowed by law.” In addition, the measure provides that in any condemnation proceedings the condemning authority shall have the burden to show that the taking is for a public use, and, in the case of a condemnation premised on blight conditions, the standard of proof shall be “by clear and convincing evidence.”

New Hampshire. New Hampshire voters approved a constitutional amendment adding the following language to Article 12 of the New Hampshire Constitution, “No part of a person’s property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property.”

This relatively extreme measure appears to prohibit the use of eminent domain for a variety of projects that even many of the most ardent critics of eminent domain accept, such as for transportation and utility projects. The “direct and indirect” language also appears to restrict the use of eminent domain in connection with a plan to lease public property to private entities.

Nevada. Nevada voters approved another broad constitutional amendment that limits the use of eminent domain for economic development. Nevada law requires that a constitutional amendment be passed in two consecutive general elections, so the measure would have to be resubmitted to the voters and passed in the 2008 general election in order to go into effect.

The language of the measure states that “Public use shall not include the direct or indirect transfer of any interest in property taken in an eminent domain proceeding from one private party to another private party.” This unqualified language, like the language of the New Hampshire constitutional amendment, appears to prohibit the use of eminent domain for transportation and utility projects.

The Nevada measure also includes a variety of other features, including: (1) assigning to the government in all cases the burden of demonstrating public use, (2) granting landowners a right of access to all government appraisals of their property; (3) affording landowners the option to have a jury resolve the public use question, (4) valuing property “at its highest and best use

without considering any future dedication requirements imposed by the government,” and, when property is taken for “a proprietary purpose,” based on the value of “the use to which the government intends to put the property, if such use results in a higher value for the land taken,” (5) more generally, providing that, “In all eminent domain actions where fair market value is applied, it shall be defined as the highest price the property would bring on the open market,” (6) creating an automatic reversion process, triggered by the owner’s payment of the original purchase price, “if the property is not used within five years for the original purpose stated by the government,” and (7) relieving landowners of any potential liability for attorneys fees in any eminent domain case.

North Dakota. The voters of North Dakota approved a constitutional amendment that prohibits the use of eminent domain to transfer property to a new private owner, except in the case of a common carrier or utility. The new language reads as follows: “For purposes of this section [Section 16 of Article I], a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health. Private property shall not be taken for the use of, or ownership by, any private individual or entity, unless the property is necessary for conducting a common carrier or utility business.”

Oregon. Oregon voters approved Measure 39 prohibiting the use of eminent domain to acquire private property used “as a residence, business establishment, farm, or forest operation” if the government intends to convey the property to another private party. The measure’s specific enumeration of protected uses begs the question of whether vacant or abandoned properties are included.

The measure includes four exceptions, including: (1) real property that is “a danger to the health or safety of the community by reason of contamination, dilapidated structures, improper or insufficient water or sanitary facilities, or any combination of these factors;” (2) “timber, crops, top soil, gravel or fixtures to be removed from the real property being condemned;” (3) real property condemned for utility and transportation projects; and (4) any real property acquired by a new owner after the government publishes a notice that it intends to exercise the eminent domain power. Exceptions (2) and (4) appear to be unique to Oregon. Exception (2) appears to allow sale of the enumerated items on land acquired by the government, when the items are of no use to the acquiring public agency. Exception (4) appears to address the possibility that a new owner might seek to invoke the measure’s limitations when the previous owner could not do so.

The measure affirmatively states that it does not prohibit the government “from leasing a portion of a public facility to a privately owned business for the provision of retail services designed primarily to serve the patrons of the public facility.” In addition, the measure authorizes government entities to convey a non-possessory – i.e., mortgage – interest in a condemned property for the purpose of financing the acquisition. These provisions appear designed to leave some continuing room for public-private development projects.

The measure provides that a court should independently determine whether a taking satisfies the measure’s requirements without according any deference to the determination made

by the public body. In addition, if an exercise of eminent domain is found to violate the measure, the objecting landowner is entitled to recover his attorneys fees and reimbursement for other reasonable expenses.

Finally, in a provision applicable to all condemnations, the measure makes the government liable for the land owners' attorneys fees if the amount awarded by the court exceeds the government's "initial" offer for the property made by the condemner at the start of negotiations. Under prior law, the government was only liable if the judicial award exceeded the government's "highest" offer made after condemnation had been filed and 30 days prior to trial.

South Carolina. South Carolina voters also approved a constitutional amendment limiting the eminent domain power. First, the measure added a new sentence to Section 13, Article I of the state Constitution, stating, "Private property shall not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose of economic development, unless the condemnation is for public use." While this language may have been intended to prohibit the use of eminent domain for economic development, it's preservation of takings for "public use" may prevent it from substantively changing the standard for eminent domain because "public use" is susceptible to various interpretations. More importantly, the South Carolina courts have already joined the handful of state courts that construe "public use" more narrowly than the U.S. Supreme Court. See Karesh v. City of Charleston, 271 S.C. 339, 247 S.E.2d 342, 345 (1978) (embracing a "strict interpretation" of the term public use and ruling that condemning land and leasing it to a private corporation for construction of a parking facility and convention center was unconstitutional under the South Carolina Constitution). Thus, the amendment's limitation does not appear to change the preexisting law in South Carolina.

Second, the measure provides that, "For the limited purpose of the remedy of blight, the General Assembly may provide by law that improved or unimproved private property that constitutes a danger to the safety and health of the community by reason of lack of ventilation, light, and sanitary facilities, dilapidation, deleterious land use, or any combination of these factors may be condemned by eminent domain without the consent of the owner and put to a public use or private use if just compensation is made for the property." This language is ambiguous because it both points toward a narrow construction of blight ("property that constitutes a danger to the safety and health of the community") and a fairly broad construction ("dilapidation, deleterious land use").

Finally, the measure eliminates language that granted eminent domain authority to municipalities and housing or redevelopment authorities for slum clearance and redevelopment purposes in nine specific counties in the state.

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November 27, 2006