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Assembly Standing Committee on Judiciary  
Assembly Standing Committee on Corporations,  
Authorities and Commissions  
Assembly Standing Committee on Local Governments  
Assembly Standing Committee on Government Operations

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Thank you for the opportunity to testify today. I am the Executive Director of the Georgetown Environmental Law & Policy Institute at Georgetown University Law Center. The Institute conducts research and education on legal and policy issues relating to protection of the environment and conservation of natural resources. My testimony includes some broad observations about the recent controversy surrounding the use of eminent domain for economic development purposes. I will then offer some recommendations on how the Assembly might approach legislative reform in this area, and provide some specific comments on the reform bills pending before the Assembly.

The Natural Resources Defense Council (“NRDC”), a national environmental advocacy organization based in New York City with more than one million members and activists, including more than 44,000 in New York State, joins in offering these recommendations on how to approach legislative reform on eminent domain issues. The Georgetown Environmental Law & Policy Institute has had the pleasure of working with NRDC on various aspects of the takings issue in the past. (NRDC also may independently provide additional comments on the specific provisions of the bills in the future.)

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First, notwithstanding the substantial public commentary to the contrary, I firmly believe the U.S. Supreme Court decision in Kelo v. City of New London was correctly decided. Much of the criticism of the decision reflects a misunderstanding of what the Court ruled and, more generally, the proper role of the Court in interpreting and applying the Constitution. The Court did not break new ground in ruling that New London’s use of eminent domain to spur economic development in that depressed city did not violate the “public use” requirement of the Takings Clause of the Fifth Amendment. A long line of Court precedent stretching back to the nineteenth century supports the majority’s conclusion that the use of eminent domain to support publicly advantageous development in partnership with private businesses is constitutional. The most famous Supreme Court cases in this area, at least prior to Kelo, are Hawaii Housing Authority v. Midkiff (1984), and Berman v. Parker (1954). But many other decisions prior and since support

the same principle.<sup>1</sup> Thus, widespread suggestions in the media that the Court in Kelo created new government powers is simply incorrect.

Indeed, if anything, the decision erected new barriers to the use of eminent domain for economic development purposes. Past Court decisions have explicitly stated that the permissible use of the taking power, so long as it is accompanied by payment of “just compensation,” is as broad as the traditional police power. A repetition of that familiar doctrinal equation is notably absent from the majority opinion in Kelo, strongly suggesting that the Court has now embraced a new, somewhat narrower understanding of the public use requirement. In addition, the Court emphasized that it was persuaded to uphold the use of the eminent domain power by the City of New London by several important considerations, including the fact that the city was not acting in an ad hoc fashion, but instead was proceeding pursuant to a comprehensive development plan, and the plan of redevelopment had been specifically approved by the New London city council. Finally, Justice Anthony Kennedy, who supplied the fifth vote to affirm the Connecticut Supreme Court, wrote a separate concurring opinion articulating a still narrower view of the permissible scope of eminent domain for economic development.<sup>2</sup>

The criticism of the Kelo decision by certain public officials, particularly some members of the U.S. Congress, as an example of the Court ostensibly overstepping its bounds is also misplaced. Generally speaking, I believe the courts are often subject to unfair and misguided criticism by various interests groups and by certain elected officials, and the reaction to Kelo fits that unfortunate pattern. The Kelo decision is actually a model of judicial restraint because it represents an instance in which the Court is declining to make the fundamental policy choice about whether or how a particular governmental power should be exercised. Instead, the Court is handing off that responsibility to the legislative branches, where it belongs. It strikes me as painfully ironic that some members of Congress have criticized the Court for asking – and encouraging – the legislative branch to do its job.

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<sup>1</sup> See, e.g., National R.R. Passenger Corp. v. Boston & Maine Corp. (1992), Ruckelshaus v. Monsanto (1984), Head v. Amoskeag Manufacturing (1885).

<sup>2</sup> For example Justice Kennedy emphasized that the City of New London was acting to address “a serious city-wide depression.”

The second broad point I want to make is that the Kelo decision raises important, but somewhat special concerns about government action affecting private property. The negative public reaction to the Kelo decision, especially insofar as it highlights how eminent domain may displace long-term homeowners, reflects fundamental concerns most Americans share about their homes and their communities. Justice Antonin Scalia in a recent case quoted the famous Lord Coke as saying, “what is the land but the profits thereof?” While that statement may well be true in certain contexts, it is certainly not true in the case of a homeowner. The reason, of course, is that home ownership represents more than a legal interest in land and structures, it represents the physical key to long-term membership in a community and all that comprises, including our sense of personal history, neighborly relations, and a known and protective environment for our children. Understandably, for many (though certainly not all) homeowners, payment of bare “just compensation” does not represent fair recompense for losing all of the numerous benefits of retaining a home in a particular community. The apparent unfairness of an exercise of the eminent domain power may be exacerbated by the fact that only a relative handful of owners may be being singled out to bear the brunt of the government action and because the property is sometimes being transferred to another private owner who will enjoy significant individual profit from the transferred property.

Some property rights advocates have read the public reaction to Kelo – incorrectly in my mind – as expressive of a broader public antipathy to government supervision of the exercise of private property rights, including such things as zoning and growth management measures, protections for wetlands and similar environmentally sensitive areas, and historic preservation ordinances. These kinds of government actions raise very different issues than the use of the eminent domain power – both legally and in the minds of most citizens, and understandably so. First, the concerns we naturally have about protecting a citizen’s membership in a community based on home ownership are largely absent when what is at issue is not the continuation of an established use but the ability of an investor to make a speculative use of property. Furthermore, unlike exercises of the eminent domain power, zoning and other types of land use regulations commonly apply broadly across the community, meaning that landowners are not simply burdened by the government action but also are benefitted by application of the same regulations to their neighbors and others in the community. In the terminology of the Supreme

Court, broadly applicable land use regulations create a “reciprocity of advantage” among property owners, benefitting not only the community as a whole but also property owners. Thus, far from undermining the case for strong community protections, I believe the public reaction to Kelo tends to support strong community protections: restrained use of the eminent domain power, like reasonable regulations of private development activity that threaten the community, will help to protect what for many of us is our most valuable (in many senses) possession, our home.

Third, while a great deal of the public concern about the use of eminent domain has focused on the use of this power in the economic development context, from the perspective of the homeowner or other property owners, it likely will matter a good deal more that their property is being involuntarily taken than what particular use the property will be devoted to in the future. Anyone familiar with the history of New York City can recount examples of devastation of established communities caused by public projects implemented with the aid of the eminent domain power, perhaps starting with the Cross-Bronx Expressway, the impact of which has been vividly related by author Robert Caro. The siting of major utility lines, including electric transmission lines and natural gas pipelines, have frequently generated major landowner concerns. I am not suggesting that the special private benefit sometimes conveyed by an exercise of eminent domain for economic development does not merit focused policy attention. However, when addressing the human impacts of the eminent domain power, it is logical to not think exclusively in the economic development box.

My fourth point is that the eminent domain power, despite its sometimes serious impacts on individual property owners and communities, remains an essential governmental power which, judiciously deployed, can serve important public goals. The basic policy justification for the eminent domain power, of course, is the problem of the “hold out.” Without the ability to require a property owner to sell property at a fair price, an individual owner can either derail a worthy public project for idiosyncratic reasons, or extort a monopolist’s profits from the public. The problem is a serious one because, over time, ownership has become extraordinarily fragmented by successive waves of development in many cities and inner suburban communities. Without the power of eminent domain, more intensively developed areas of the state would be at a considerable competitive disadvantage relative to more “greenfield” areas. Looking at the

issue from a broader perspective, without the eminent domain power, more intensively developed states (such as New York), would be at a competitive disadvantage relative to other states and regions of the country that are less intensively developed.

Insofar as it lowers the barriers to the publicly beneficial reuse of already developed areas, the judicious use of the eminent domain power can have significant environmental benefits. In implementing smart growth strategies, such as transit-oriented development and conversion of antiquated manufacturing districts to residential uses, the eminent domain power can be an important tool. On the other hand, without the eminent domain power, and the ability to assemble disparate properties efficiently and at a reasonable cost, developers will tend to focus on development opportunities at the constantly expanding urban fringe, exacerbating the problems associated with sprawl.

My fifth and final general point relates to use of a finding of “blighted” conditions to justify a taking by eminent domain, including when the property will be transferred to a new private owner. I am aware that a finding of “blight” in New York is a precondition for the use of the eminent domain power in at least some circumstances. In addition, some proposals to restrict the use of eminent domain for economic development in the aftermath of Kelo include an exception for blighted properties. For example, a measure recently approved by an appropriations committee of the U.S. Senate would exempt from a general restriction on the use of federal funds for economic development projects involving eminent domain “projects for the removal of blight (including areas identified by units of local government for recovery from natural disasters).”<sup>3</sup>

For a variety of reasons, I believe that focusing on blight as a guideline for determining whether or not to use the eminent domain power represents a mistaken approach. First, historically, the term “blight” has proven very difficult to define and has been applied, or more accurately stretched, by some local governments in quite unpredictable and sometimes surprising ways. As a result, the use of a finding of blight as a precondition for the exercise of eminent

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<sup>3</sup> See H.R. 3058, Making appropriations for the Departments of Transportation, Treasury, Housing and Urban Development, and Related Agencies for the fiscal year ending September 30, 2006, and for other purposes, section 321. In addition, some courts adopting a narrow view of the eminent domain power have embraced a “blight exception.” See County of Wayne v. Hathcock (Mich. 2004)

domain has been the source of much wasteful litigation. Second, the blight designation is inherently backward looking rather than forward looking. The nature of the current uses of the property should be one consideration in evaluating a proposed use of the eminent domain power, but the potential benefits of the projected use arguably deserve at least equal consideration. Third, the use of a blight designation appears counterproductively pejorative, in the sense that it converts debates over the use of eminent domain into contests over whether an area is “bad” enough to justify use of eminent domain. Again, it appears more productive to focus on the potential future uses of the property and, perhaps more importantly, the procedures used in making the decision to deploy the eminent domain power and the level of compensation being offered to affected property owners. Finally, the use of a blight exception has the potential to encourage the more frequent use of eminent domain in lower-income communities, visiting the burdens of the eminent domain power on communities that may lack the political power to resist and on citizens who cannot easily relocate to other areas.

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My general recommendations to the Assembly are as follows:

- As the Supreme Court indicated in Kelo, the use of the eminent domain power is an entirely appropriate topic for legislative debate, at the state and federal level. In my view, Kelo has generated valuable public scrutiny of the use (and abuse) of an important governmental power that is not well understood and can stand some legislative refinement and updating.<sup>4</sup>
- I believe the primary legislative objective should be to establish additional procedural hurdles for the use of eminent domain, and create additional opportunities for the public to influence the exercise of this power. The goal should be to encourage uses of the eminent domain with significant public economic development benefits, and on the other hand to weed out those projects with modest public benefits or that primarily serve private interests. Steps in that direction would include requiring the senior elected body or official in the jurisdiction to

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<sup>4</sup> I observe that several years ago the legislature amended New York eminent domain law to provide expanded notice to those subject to eminent domain proceedings, apparently in response to litigation challenging the adequacy of notice on Due Process Grounds. See Brody v. Village of Port Chester, 2005 WL 13833, at 2 & n. 4 (S.D.N.Y., Jan. 4, 2005)

take political responsibility for the use of eminent domain power in each instance, requiring that any use of the eminent domain power advance general, publicly adopted planning goals for the area, and requiring preparation of some type of formal community and homeowner impact analysis prior to the exercise of eminent domain, including a discussion of why the use of eminent domain is necessary, what alternatives to the use of eminent domain were considered and the expected impacts on homeowners and other property owners.

In addition, to address the concern that in some redevelopment projects the public political institutions appear to act as the agents of private development interests, rather than the other way around, a mechanism is needed to create, to the maximum extent possible, a separation between the formulation of the redevelopment plan and the process of selecting a developer to carry out the plan. Ideally, redevelopment planning should be led by local elected and appointed officials, with expert staff support, and based on extensive public consultations, with the developer selected after the planning process is completed based on an open, competitive bidding process.

- On the other hand, I would advise against the approach, now being advocated by some in Congress and in some state legislatures, of attempting to come up with a laundry list of permissible and impermissible uses of eminent domain for economic development purposes. The basic purpose of this strategy is apparently to avoid the need for careful, thoughtful deliberation about the merits of individual projects. But, for better or for worse, thoughtful deliberation is precisely what is required to reap the rewards of good economic development while avoiding abuses. At a very practical level, the mantra of successful modern development projects is “mixed use,” that is, for example, combining public spaces with commercial and residential uses. The laundry list approach risks blocking such projects, or at least reducing the mix of uses, if one or more uses aren’t on the list of permissible uses. On the other hand, if the laundry list includes an absolute prohibition on taking one particular type of property, a single owner might be entitled to stop redevelopment of an entire area, regardless of the importance and social utility of the project. In addition, the laundry list approach creates difficult, seemingly arbitrary line-drawing problems. There appears to be a certain level of support for the use of eminent domain for sports facilities, but less so for shopping centers, for example. However, it would be difficult to draw a clear, principled line between these two types of uses. Many

versions of the laundry list approach would include a broad exemption for publicly owned facilities. But a broad restriction on the use of eminent domain for economic development, coupled with an exception for public ownership, would apparently have the perverse effect of requiring the government to own and operate projects such as stadiums and shopping centers, precluding the kinds of public/private partnerships that have been so successful in promoting downtown redevelopments in many areas. Finally, the categorical approach would provide little or no protection for owners who fall into certain categories, despite the fact that the procedures governing eminent domain could stand reform across the board. (Use of the so-called blight exception is another example of the categorical approach, and also seems objectionable for the reasons discussed above.)

- Finally, I would recommend consideration of providing a modest premium over and above fair market value “just compensation” in those instances when market-level compensation will plainly be insufficient to compensate an owner for subjective losses, particularly in the case of long-time homeowners. In addition, residential tenants should in some cases be afforded compensation above and beyond simple relocation expenses. This type of reform should improve the fairness of economic development projects that rely on eminent domain and, by increasing the costs of using eminent domain, discourage the use of eminent domain when homeowners and tenants would be displaced.

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Lastly, I will offer a few brief comments on some of the specific provisions in the various bills pending before the Assembly. In general, I believe the pending bills adopt positive and productive approaches to reforming the use of eminent domain for economic development purposes.

- All or most of the pending bills (A 8865, 9015, 9043, 9050, 9051) would require either (or both) the governing body of the condemning authority, and the top elected officials within the jurisdiction, to approve explicitly the use of eminent domain in every instance. I believe it is vitally important to have a transparent process with public political accountability for the eminent domain approval process to help constrain potential behind the scenes special interest influence and to ensure that those who may object to an exercise of eminent domain have a clear political channel to express their views. At a minimum, the governing body of the authority

should be required to explicitly approve the use of eminent domain in every instance.

- A 9043 would also require, when the eminent domain power is used for economic development purposes, the preparation of a “comprehensive economic development plan for the affected area.” The plan would include an explanation of the projected impacts of the plan, including a description of alternatives. The plan would be prepared in draft, subjected to public hearing, published in final form, and finally approved by the local legislative body before the project could go forward. Simultaneously with the preparation of the plan, the condemnor also would be required to prepare a homeowner impact assessment, explaining and justifying the projected impacts of the project on homeowners. I believe this set of proposals makes good sense. These procedural hurdles would simultaneously steer condemning authorities away from sites with private homes, and ensure that those (relatively few) projects affecting private homes that do go forward have been carefully considered and thoroughly ventilated in the local community. As I understand it, the requirement for the preparation of a planning document, like the requirement for an environmental impact statement, would not itself place substantive limits on the exercise of eminent domain, but would instead serve to expose the government’s rationale for using eminent domain to public scrutiny. As discussed above, I would urge the Assembly to consider going somewhat further by attempting to separate the public planning process from the process of selecting a developer to carry out a redevelopment plan. (A 9505 includes similar planning requirements, but apparently would go beyond A 9043 in requiring a “housing relocation plan” that would specifically address the availability of replacement housing. This too would be a useful addition to existing law.)

- A 9050 would also expand the public notice requirements for the use of eminent of eminent domain for economic development purposes. Speaking generally, this proposal to ensure wide public notice, presumably in order expand and intensify public involvement in the decision whether or not to exercise eminent domain, appears to make good sense.

- Several bills (A 9043, A 9050) would require payment of additional compensation, over and above the “just compensation” mandated by the Constitution. In principle, I believe this approach makes sense. However, I share the concern that Professor Thomas Merrill of Columbia Law School has expressed that this type of “extra compensation” provision might result in unfair windfalls in some instances and otherwise invite abuses of the system. To

minimize these risks, I concur in Professor Merrill's recommendation that the amount of any extra compensation be keyed in some fashion to the number of years that the homeowner (or tenant) has occupied the property.

- Another bill (A 2226) would require a new public hearing if a condemnor makes an amendment or alteration to a project after conducting a public hearing on an earlier version of the project, and likewise would require publication of new determinations and findings if a condemnor makes an amendment or alteration to a project after publishing determinations and findings based on an earlier version of the project. While I am unaware of specific circumstances giving rise to the need for this bill, the proposal certainly appears consistent with basic principles of fairness.

- Finally, A 9060 takes a quite different approach by calling for a study commission. Everything else being equal, the legislature, and the citizen of New York, would be well served by a legislative reform package based on a more complete factual record. The eminent domain issue has become a major policy issue only in the last several months in response to Kelo and in many ways the public understanding of this complex issue is still at an immature stage. Much of the publicly available information has been generated by advocacy organizations whose objectivity is open to question. More balanced information would certainly be helpful before the legislature makes major, substantive changes to the state's eminent domain law. I note that if the Assembly opted to embrace the commission approach, that might dovetail well with a pending proposal, approved by a committee of the U.S. Senate, to charge the General Accountability Office with the task of conducting a comprehensive national review of the eminent domain issue over the next year.

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Thank you again for the opportunity to testify, and thank you as well on behalf of NRDC. We applaud the Assembly and the Chairs of the Committees for holding these hearings and initiating this discussion about the appropriate use of eminent domain in New York State.