

MINUTES OF THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE

The meeting was called to order by Chairman John Edmonds at 1:30 P.M. on March 6, 2006 in Room 313-S of the Capitol.

All members were present.

Committee staff present:

Athena Andaya, Kansas Legislative Research Department  
Dennis Hodgins, Kansas Legislative Research Department  
Mary Torrence, Revisor of Statutes Office  
Carol Doel, Committee Secretary

Conferees:

Representative Frank Miller  
Steve Golden, Castle Coalition  
Allie Devine, Kansas Livestock Association  
Brad Harrelson, Kansas Farm Bureau  
Charles Benjamin, Sierra Club  
Ron Hodgkinson, Chairman Libertarian Party  
Alan Cobb, Americans for Prosperity  
David Morgan, Jerry's Bike Shop  
Bob Tolbert, General Contractor - Topeka  
John Geither  
Bill House  
Donna Martin  
John Todd  
Ginny Pfrang  
Ron Gaches, Coalition for Kansas Job Growth  
Don Moler, League of Kansas Municipalities  
Jim Clark, Kansas Bar Association  
Doug Kinsinger, Topeka Chamber of Commerce  
Eric Sartorius, City of Overland Park

Others attending:

See attached list.

Chairman Edmonds opened the floor for bill introductions. There were none.

The Chairman directed the committee's attention to **HCR 5040** - Eminent domain; proposed constitutional amendment restricting government authority to take property. The floor was opened for public hearing.

Representative Frank Miller addressed the committee supporting **HCR 5040**. The Representative informed the committee that he had heard from a number of constituents who say they want protection from our current corrupted use of eminent domain law. He stated that his constituents are very clearly telling him to "stop the legal plunder of their property." Representative Miller did suggest two amendments to the bill which he feels would make it a stronger bill which he attached to his testimony. (Attachment 1)

Castle Coalition was represented by Steve Golden. They support the passage of **HCR 5040** which attempts to establish the important prohibition on private-to-private transfer of property. However, they feel that there are two large loopholes. They included their suggested language changes in their testimony. It is their opinion that the entire second sentence of Section 17 should be eliminated and replaced with **HCR 5025's** public use definition and judicial review requirement, or replace it with the model language suggested in their testimony. (Attachment 2)

Allie Devine, Vice President and General Counsel for the Kansas Livestock Association, spoke to the committee favoring the protection of private property interests. It is their feeling that the issues of eminent

## CONTINUATION SHEET

MINUTES OF THE House Federal and State Affairs Committee at 1:30 P.M. on March 6, 2006 in Room 313-S of the Capitol.

domain are very complex and raise a number of legal, social and economic issues, however reform is needed and requested by the people. They support reform of eminent domain authority and procedures for its use for economic development. They support Constitutional amendments and/or legislation that restricts the use of eminent domain. ([Attachment 3](#))

Kansas Farm Bureau was represented by Brad Harrelson, State Policy Director, KFB Governmental Relations. They support **HCR 5040** saying that the Farm Bureau Members have long been outspoken about intrusion and interference with private property rights by governments, especially when that action results in land being taken from one owner and subsequently conveyed to another under the auspices of economic development. ([Attachment 4](#))

Appearing before the committee on behalf of the Kansas Chapter of the Sierra Club, was Charles Benjamin, Ph.D., J.D. The Sierra Club is a proponent for **HCR 5040**. Doctor Benjamin informed the committee that one of the major strategic campaigns for the Sierra Club is the "Challenge to Sprawl Campaign" that works to fight poorly planned runaway development and promotes smart growth communities that increase transportation choices, reduce air and water pollution, and protect our natural places. ([Attachment 5](#))

Rob Hodgkinson, Chairman of the Libertarian Party addressed the committee supporting **HCR 5040**. In his testimony, Mr. Hodgkinson stated that he believes this bill can provide the protection needed against eminent domain abuse of forced private-to-private transfer. ([Attachment 6](#))

Alan Cobb represents American for Prosperity and they favor **HCR 5040**. Mr. Cobb expressed the opinion that **HCR 5040** would limit selected private developers from having the unfair advantage of eminent domain being their negotiating tool. He also included a survey of 400 registered voters in the State of Kansas. ([Attachment 7](#))

David Morgan related that he conditionally supports **HCR 5040**, but feels that it needs to be amended to limit abuses of power with stronger language and limits, such as is found in **HCR 5025**. ([Attachment 8](#))

Robert Tolbert, of General Building Contractors, Inc., related his support of **HCR 5040** is conditional upon strengthening the language in regards to "just compensation". Just compensation for one's home, business, or land must be greater than the appraised value of the property. ([Attachment 9](#))

John Geither told of having built a business and was making a good living for his family when he received notice that his business was going to be torn down to make room for a large grocery store. He has had difficulties in relocating. Mr. Geither urges the passage of **HCR 5025** rather than **HCRS 5040** in order to restore property rights in Kansas. ([Attachment 10](#))

Bill House testified in support of **HCR 5040**. Mr. House explained the term eminent domain and related the facts regarding England in the year 1215 when the feudal barons were angered by the corrupt practices of King John, and joined their armed forces and forced the King to sign the document called the Magna Carta which restricted his right to seize their land or to tax them without their consent. He further related that Kansas is one of the six states that allow private property to be taken for private economic development. He also included a copy from the Wall Street Journal entitled *Don't Kelo My House*. ([Attachment 11](#))

Donna Martin supports **HCR 5040** as they fought an eminent domain battle when their land was to be taken for the building of a lake. This battle was won through the help of **SB 461** which they are thankful for. She is requesting protection of irreplaceable agricultural land for Kansas' future by passing **HCR 5040**. ([Attachment 12](#))

John Todd of Wichita, Kansas supports **HCR 5040**, however he prefers the eminent domain reform contained in **HCR 5025**, and believes that the people of Kansas can best be served by the passage of **SCR 1616**. He further stated that in a poll commissioned by Americans For Prosperity a resounding 90% of Kansans polled favored eminent domain reform. Mr. Todd also included various other informative articles regarding eminent domain for committee review. ([Attachment 13](#))

CONTINUATION SHEET

MINUTES OF THE House Federal and State Affairs Committee at 1:30 P.M. on March 6, 2006 in Room 313-S of the Capitol.

Ginny Pfrang, wife of a Kansas farmer and rancher came to the committee to support **HCR 5040**. Ms. Phrang related incidents in which land had been taken from farmers for various projects in their county. Ms. Phrang stated that it doesn't matter whether the land is for economic development or watershed districts, Kansas needs to do a better job of protecting individual property rights. (Attachment 14)

Patrick Wilbur, Vice-Chair for the Libertarian Party of Kansas presented written testimony supporting **HCR 5040**. (Attachment 15)

Ron Gaches presented comments on behalf of the Coalition for Kansas Job Growth opposing **HCR 5040**. Mr. Gaches related that the Coalition agreed that new limits need to be imposed on the use of eminent domain for economic development purposes and further agreed that landowners deserve additional protection. It is their expectation to be able to be able to accomplish this without a constitutional amendment. (Attachment 16)

Don Moler, Executive Director of League of Kansas Municipalities informed the committee that the League is in strong opposition to **HCR 5040**. It is their belief that it is simply a device to make any use of eminent domain for economic development purposes virtually impossible as a matter of law, and therefore effectively end this practice in Kansas. He further stated that they believe that **HB 2741** strengthens the rights of private property owners while preserving the power of eminent domain for economic development purposes for the benefit of the public at large. (Attachment 17)

James Clark, Legislative Counsel for the Kansas Bar Association is in opposition to the restrictions contained in **HCR 5020**. It is the Kansas Bar Association's opinion that the Resolution creates restrictions on the eminent domain powers of state and local governments that will significantly impair their abilities to react to changing economic conditions in the future. (Attachment 18)

Doug Kinsinger, President and CEO of Greater Topeka Chamber of Kansas expressed opposition to **HCR 5040** stating it is a constitutional amendment to eliminate the use of eminent domain for economic development purposes. They requested the committee remain committed to Kansas economic growth by opposing the constitutional amendment and any other legislation that eliminates or virtually eliminates eminent domain for economic development purposes. (Attachment 19)

The City of Overland Park was represented by Erik Sartorius who gave testimony opposing **HCR 5040**. They believe that the process contained with the proposed constitutional amendment is wholly unworkable and will effectively end the use of eminent domain for economic development purposes. (Attachment 20)

Written testimony opposing **HCR 5040** was submitted by Ashley Sherard, Vice-President of Lenexa Chamber of Commerce (Attachment 21) and Randall Allen for the Kansas Association of Counties (Attachment 22).

With no other person wishing to address the Resolution, Chairman Edmonds closed the public hearing on **HCR 5040**.

With no further business before the committee, the Chairman adjourned the meeting.

# FEDERAL AND STATE AFFAIRS GUEST LIST

Date 3-6-06

Alisa Davis	Ks. Livestock Assn.
Carol House	Cedar Vale Ks
Bret House	Cedar Vale, Ks
<b>BRAD HARRELSON</b>	<b>KFB</b>
ALAN COBB	APP
Rob Hodgkinson	Libertarian Party
Jan Todd	private citizen
Helene Savage	KDOT
Steve Shiden	Rep. Frank Miller
C. FRANK MILLER	Rep. 12th DIST.
Tom Gaches	Coalition for KS Job Growth
Christy Caldwell	Topeka Chamber of Com.
Doug Kissinger	Topeka Chamber of Com.
Wanda Kinney	K. C. A.
Ging Prang	rancher
Doran Jonak	KCA
Don M. Rezac	KCA
JANNE GODWIN	City of Wichita
Carol Todd	Private citizen
Beth Jones	Huttley Government Relations
Bob Jellert	General Building Contractors
Jerry Morgan	Jerry's Bike Shop
DAVID MORGAN	JERRY'S BIKE SHOP
Mike Beam	Ks. Livestock Assn.
Brent Haden	KLA



**C. FRANK MILLER**  
 REPRESENTATIVE, TWELFTH DISTRICT  
 MONTGOMERY, CHAUTAUQUA, AND  
 ELK COUNTIES  
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TOPEKA

HOUSE OF  
 REPRESENTATIVES

COMMITTEE ASSIGNMENTS  
 VICE-CHAIR: AGRICULTURE  
 MEMBER: EDUCATION  
 GOVERNMENTAL ORGANIZATION  
 AND ELECTIONS  
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 ISSUES

March 6, 2006

Honorable Representative John Edmonds – Chairman  
 House Federal and State Affairs Committee  
 Ref: HCR5040 concerning Eminent Domain Legislation

Thank you Mr. Chairman and members of the House Federal and State Affairs Committee for the opportunity to come before you today to testify in support of an amended version of HCR5040.

In order to prepare and draft my own eminent domain amendment to the Constitution HCR5025, I studied a number of books regarding various aspects of how this great Nation of ours came to write the Fifth Amendment, which briefly, but clearly indicates how we are to treat private property. As you know that amendment reads as follows: “No person shall be . . . .deprived of life, liberty, or property, without due process of law; **nor shall private property be taken for public use without just compensation**”. Today we will hear testimonies that substantiate the truth that currently both “public use” and “just compensation” are routinely violated.

**The book “The Birth of The Republic 1763-89”, by Edmund S. Morgan, page 8.**

“The widespread ownership of property is perhaps the most important single fact about the Americans of the Revolutionary period. It meant that they were not divided so widely between rich and poor as the people of the Old World. . . . .Ownership of property gave not only economic independence but also political independence to the average American. In every colony that was to join in the Revolution there was a representative assembly, elected by property-holders, which made the laws and levied the taxes”. In other words the ownership of property was of paramount importance.

**Federalist Paper #10.**

States, “But the most common and durable source of factions (*dissension*) has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society”

**An excerpt from *The LAW* by Frederic Bastiat, first wrote in 1850 Page 17.**

Wrote, “How to Identify Legal Plunder”. Then asks, “But how is this legal plunder to be identified? Quite simply, see if the law takes from some persons what belongs to them, and gives it to other persons to whom it does not belong. See if the law benefits one citizen at the expense of another by doing what the citizen himself cannot do without committing a crime.”

FEDERAL AND STATE AFFAIRS

Date 3-6-06

Attachment 1

**Another excerpt from *The LAW*, Page 21.**

“The Seductive Lure of Socialism. Here I encounter the most popular fallacy of our times. It is not considered sufficient that the law should be just; it must be philanthropic. Nor is it sufficient that the law should guarantee to every citizen the free and inoffensive use of his faculties for physical, intellectual, and moral self-improvement. Instead, it is demanded that the law should directly extend welfare, education, and morality throughout the nation.

“This is the seductive lure of socialism. And I repeat again: These two uses of the law are in direct contradiction to each other. We must choose between them. A citizen cannot at the same time be free and not free.”

**An excerpt from “*Abuse of Power*” by Steven Greenhut, 2004 (page 11).**

From the Declaration of Independence, “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the **pursuit of Happiness.**’ Essential to the pursuit of happiness was the ownership of property.

“But when government can take property from anyone for virtually any reason and give it to anyone else, there’s no way that anything approaching the founders’ vision of freedom still exists. These days, the government is not doing what it is supposed to do, which is protect the guaranteed liberties of individual American citizens and ensure a fair legal playing field. Instead, it is making central plans and intervening in the market to favor some people over others. It is robbing Peter, paying Paul, and distorting the sense of fairness that is the bedrock of a true, market-oriented, democratic and freedom-protecting society.”

**An excerpt from “*Public Power, Private Gain*” by Dana Berliner, April 2003 (page 2).**

“In terms of sheer numbers of condemnations for private parties, California, Kansas, Michigan, Maryland and Ohio lead the pack for most private use condemnations filed.....From a legal standpoint, New York, Missouri and Kansas are the worst states to live in for owners who hope to avoid condemnation for private parties, while Idaho, Montana, New Mexico, South Dakota and Wyoming appear to be the best.”

A second excerpt (page 78).

“Unfortunately for the citizens of Kansas, their state is one of the worst abusers of eminent domain, especially in comparison to other states with similar population size. The Kansas Supreme Court in 1998 held that taking the homes of 150 families to make way for a private racetrack was a ‘public’ purpose.”

Fellow legislators, Committee, the truth is that for nearly 200 years this Nation understood and the courts respected the meaning of “Public Use,” however in the last 40 years we have come to use the power of eminent domain to **PLUNDER** the lands and properties of honest hard-working, frugal, fellow Americans.

Mr. Chairman and committee we now come to the question of HCR5040 and does it really protect the private property of the average American? We must answer that with a resounding “**NO**”. The last part of article 17 lines 26, 27, and 28 states; “except by law enacted upon the vote of 2/3 of the members of the senate and 2/3 of the members of the house of representatives and the signature of the governor”, gravely weakens the “public use” condition of the amendment. I

would speculate Mr. Chairman that if the NASCAR racetrack issue were brought to the Legislature this session it would get the 84 plus 27 plus the Governor's signature, and again plunder the property of 150 law-abiding citizens.

We legislators have all heard the resounding voice of a vast majority of our constituents saying they want protection from our current corrupted use of eminent domain law, and their collective voice will most assuredly mean the end of re-election for those legislators who just want to pass something that "feels good" or "spins good". My constituents are telling me very clearly "stop the legal plunder of our property!" The continued erosion of property rights will eventually lead to reluctance by business to develop in areas of the city or fringes of a city, because they dare not risk losing their property to eminent domain PLUNDER. The sword of Eminent Domain is double edged and can hurt long term economic development as much as it does "help". Who else but Government will stand-up and protect the little old lady who has lived the last 50 years in her home or the small business man who has been struggling for years to build a viable enterprise?

Mr. Chairman and committee attached to my testimony are two suggested amendments to HCR5040 that will make it a stronger bill. The first is wording suggested by the Institute for Justice and marked (best), the second is wording suggested by myself and our Revisor of statutes and marked (second best).

Mr. Chairman, I leave to the committee's judgment the task of amending HCR5040 to make it a stronger bill, and stand for questions at the appropriate time.

Thank you,

A handwritten signature in black ink that reads "Frank Miller". The signature is written in a cursive, slightly slanted style. The first letter "F" is large and loops around the "r".

Representative Frank Miller



1-4

House Concurrent Resolution No. 5040

By Committee on Federal and State Affairs

2-23

IN-SUGGESTED AMENDMENT  
(BEST)

9 A PROPOSITION to amend article 15 of the constitution of the state of  
10 Kansas by adding a new section thereto, concerning eminent domain.

11  
12 *Be it resolved by the Legislature of the State of Kansas, two-thirds of the*  
13 *members elected (or appointed) and qualified to the House of Repre-*  
14 *sentatives and two-thirds of the members elected (or appointed) and*  
15 *qualified to the Senate concurring therein:*

16 Section 1. The following proposition to amend the constitution of the  
17 state of Kansas shall be submitted to the qualified electors of the state  
18 for their approval or rejection: Article 15 of the constitution of the state  
19 of Kansas is amended by adding a new section thereto to read as follows:

20 "§ 17. Private property shall not be taken except for public use,  
21 and private property shall not be taken without just compensation.  
22 ~~The taking of private property with the intent to or in anticipation~~  
23 ~~of selling, leasing or otherwise transferring any interest in the prop-~~  
24 ~~erty to any private entity is not a valid public use and is prohibited~~  
25 ~~except by law enacted upon the vote of 2/3 of the members of the~~  
26 ~~senate and 2/3 of the members of the house of representatives and~~  
27 ~~the signature of the governor."~~

28 Sec. 2. The following statement shall be printed on the ballot with  
29 the amendment as a whole:

30 "Explanatory statement. There is currently no constitutional pro-  
31 vision prohibiting state or local government from taking private  
32 property except for public use, and there is no definition of "pub-  
33 lic use".

34 "A vote for this proposition would amend the Kansas constitution  
35 to prohibit state and local governments from taking private prop-  
36 erty except for public use and would require that the owner of  
37 any property taken for public use be paid just compensation. ~~It~~  
38 ~~also would clarify that "public use" does not include the taking~~  
39 ~~and transfer of private property to any private entity, except as~~  
40 ~~approved by a 2/3 majority of both houses of the legislature and~~  
41 ~~the signature of the governor."~~

42 "A vote against this proposition would not amend the constitution."  
43 Sec. 3. This resolution, if approved by two-thirds of the members

Real property may be taken only when necessary for the possession, occupation and enjoyment of the land by the public at large, or by public agencies or to eliminate an immediate threat to public health or safety.

Real property would be taken only when necessary for the possession, occupation and enjoyment of the land by the public at large, or by public agencies or to eliminate an immediate threat to public health or safety.

House Concurrent Resolution No. 5040

By Committee on Federal and State Affairs

2-23

PROPOSED AMENDMENT  
Representative Frank Miller  
March 3, 2006

1-5

REP. MILLER SUGGESTED AMENDMENT  
(SECOND BEST)

9 A PROPOSITION to amend article 15 of the constitution of the state of  
10 Kansas by adding a new section thereto, concerning eminent domain.

11  
12 *Be it resolved by the Legislature of the State of Kansas, two-thirds of the*  
13 *members elected (or appointed) and qualified to the House of Repre-*  
14 *sentatives and two-thirds of the members elected (or appointed) and*  
15 *qualified to the Senate concurring therein:*

16 Section 1. The following proposition to amend the constitution of the  
17 state of Kansas shall be submitted to the qualified electors of the state  
18 for their approval or rejection: Article 15 of the constitution of the state  
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21 and private property shall not be taken without just compensation.  
22 The taking of private property with the intent to or in anticipation  
23 of selling, leasing or otherwise transferring any interest in the prop-  
24 erty to any private entity is not a valid public use and is prohibited  
25 ~~except by law enacted upon the vote of 2/3 of the members of the~~  
26 ~~senate and 2/3 of the members of the house of representatives and~~  
27 ~~the signature of the governor."~~

28 Sec. 2. The following statement shall be printed on the ballot with  
29 the amendment as a whole:

30 "Explanatory statement. There is currently no constitutional pro-  
31 vision prohibiting state or local government from taking private  
32 property except for public use, and there is no definition of "pub-  
33 lic use".

34 "A vote for this proposition would amend the Kansas constitution  
35 to prohibit state and local governments from taking private prop-  
36 erty except for public use and would require that the owner of  
37 any property taken for public use be paid just compensation. It  
38 also would clarify that "public use" does not include the taking  
39 and transfer of private property to any private entity ~~except as~~  
40 ~~approved by a 2/3 majority of both houses of the legislature and~~  
41 ~~the signature of the governor."~~

42 "A vote against this proposition would not amend the constitution."

43 Sec. 3. This resolution, if approved by two-thirds of the members

. Whenever an attempt is made to take private property for a use alleged to be public and the property owner disputes whether the proposed taking is for a public use, the condemning authority shall bring an action to determine whether the contemplated use is a public use, and such issue shall be determined by the court. The condemning authority shall bear the burden of proof to show, by clear and convincing evidence, that the taking of the property is for a public use

. When there is a dispute as to whether a contemplated use is a public use, the issue would be determined by the court using the clear and convincing evidence standard

March 3, 2006

Kansas House Federal and State Affairs Committee  
Room 313-S  
Kansas State Capitol Building  
300 SW 10th St.  
Topeka, KS 66612

RE: House Concurrent Resolution No. 5040

Dear Chairman Edmonds and Members of the Committee:

I write today to express my concern about House Concurrent Resolution No. 5040. As I mentioned when I testified before the Senate Judiciary Committee, the Institute for Justice is the nation's leading advocate against eminent domain abuse. On the national level, we argued on behalf of property owners in the *Kelo* case before the U.S. Supreme Court last year. In the wake of that unfortunate decision and in response to public outcry, the Castle Coalition—IJ's grassroots advocacy project—launched the Hands Off My Home campaign, an initiative to effect legislative change of eminent domain laws. Given our litigation experience, and our familiarity with legislative proposals around the country, we are adept at recognizing troublesome language and potential loopholes that can undermine the substantive reform your state seeks.

House Concurrent Resolution 5040 attempts to establish the important prohibition on private-to-private transfer of property. Unfortunately, there are two large loopholes to this prohibition (one noticeable, one not). The obvious loophole is the 2/3 vote of the legislature and governor's signature that would override the provision. Property should only be taken for public use, not public use *or* private use approved by a super-majority of the legislature. The other loophole is the second sentence of §17 (line 22)" "The taking of private property *with the intent to or in anticipation of* selling, leasing, or otherwise transferring any interest in the property to any private entity is not a valid public use and is prohibited . . . ." Any reference to "intent" or "anticipation" is troublesome language. For a home or business owner, it is virtually impossible to establish that a condemning authority's purpose was to take property for a private use. Generally, courts simply accept at fact value an authority's statement as to the purpose of a taking. Thus, a focus on purpose still leaves property owners very vulnerable to abuse.

If you truly want to prohibit taking private property for private development, I would suggest replacing the current language with the following:

With just compensation paid, private property may be taken only when necessary for the possession, occupation, and enjoyment of land by the public at large, or by public agencies. Except for privately owned public utilities or common carriers,

FEDERAL AND STATE AFFAIRS

Date 3-6-06

Attachment 2

private property shall not be taken for private commercial enterprise, for economic development, or for any other private use, except with consent of the owner. Property shall not be taken from one owner and transferred to another, on the grounds that the public will benefit from a more profitable private use. Whenever an attempt is made to take property for a use alleged to be public, the question whether the contemplated use is truly public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

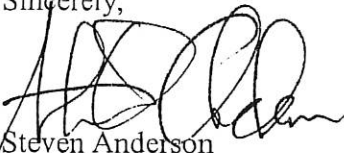
Representative Frank Miller's House Concurrent Resolution contains a requirement of judicial review, similar to that in the language above. HCR 5025 also contains a stronger "public use" requirement, with one minor correction, as noted:

Real property may be taken only when necessary for the possession, occupation or (should be replaced with "and") enjoyment of the land by the public at large, or by public agencies, or to acquire real property to eliminate an immediate threat to public health or safety.

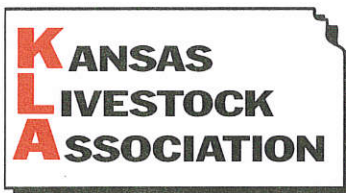
If the committee is serious about eminent domain reform, it must pass stronger language than the current HCR 5040. You should eliminate the entire second sentence of §17 and replace it with HCR 5025's public use definition and judicial review requirement, or replace it with the model language suggested above. Unless these or similar changes are made, Kansans will not have the strong protections for their homes, farms and businesses that their constitution should provide.

Please do not hesitate to contact us if you have any questions or concerns. I appreciate your willingness to consider this important issue.

Sincerely,



Steven Anderson  
Castle Coalition Coordinator



*Since 1894*

TESTIMONY

To: House Committee on Federal and State Affairs  
John Edmonds, Chairman

From: Allie Devine, Vice President and General Counsel

Date: March 6, 2006

Re: Eminent Domain Reform Bills

*The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing over 6,000 members on legislative and regulatory issues. KLA members are involved in many aspects of the livestock industry, including seed stock, cow-calf and stocker production, cattle feeding, grazing land management and diversified farming operations.*

KLA has a long standing history of protecting private property interests. We have appeared before various legislative committees on several occasions to support legislation to limit the use of eminent domain. Most recently, we appeared on behalf of our members in Cowley County who lived under the proposed threat of the use of eminent domain for the creation of a recreational lake. There are several parties here who can speak to that issue so I will focus my comments on a few key points. We are willing to provide a historical background of the Cowley County issues if the committee wishes.

There are four points I would like to stress today. (1) Reform is needed and requested by the people of Kansas. Without reform, there is no "check" on the authority of government to take private property from one person and transfer to another private person. (2) The legislature has the authority to act and that authority is clearly recognized by the courts. (3) Kansas needs "substantive" reform. The law needs to be changed to clearly state that private property rights have significance in Kansas and private property may not be easily taken. We need clear reform that reinstates the status of private property rights or at the very least assure there is no presumption of the validity of takings by governmental entities. (4) If the legislature agrees to allow the use of eminent domain for economic development, then there should be substantial "procedural" safeguards to assure fairness and just compensation to those whose land is taken. Taking of private property for economic development needs to be the exception and not the norm.

The issues of eminent domain are very complex and raise a number of legal, social, and economic issues. Reform is needed and requested by the people. In a recent survey 89% of those surveyed opposed the use of eminent domain for economic redevelopment (see

FEDERAL AND STATE AFFAIRS

Date 3-6-06

Attachment 3

*The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"*, 33 *Pepp. L. Rev.* 335, January 2006). Even Justice Stevens, the author of the famed *Kelo v. City of New London*, 125 S.Ct. 2655 (2005) stated that the outcomes were "unwise" but "in each I was convinced that the law compelled a result that I would have opposed if I were a legislator." (See *Justice Weighs Desire v. Duty (Duty Prevails)* N.Y Times, Aug. 25, 2005)

The issues today focus on the use of eminent domain for economic development purposes. In short, the taking of private property from one private entity and transferring that property to another entity. The Committee is being asked to define in Kansas what will be the permissible uses of eminent domain for economic development. These issues may best be broken into areas which will also assist in the understanding of the bills under consideration by the Legislature.

Three key questions are posed by this issue:

**1. Does the legislature have the authority to restrict the use of eminent domain?**

In Kansas that answer is yes, under the Kansas Supreme Court ruling in *Concerned Citizens, United, INC v. Kansas Power and Light Company*, 215 Kan. 218, 523 P.2d. 755 (1974) . The Kansas Supreme court held that the legislature may act to define what is or is not an appropriate use of eminent domain. There is no Constitutional grant of authority for cities or counties to use eminent domain. The power is granted by the legislature and may be restricted by the legislature.

Most of the national debate centers on the meaning of *Kelo*. Numerous articles have been written about the meaning of the *Kelo* decision. (To understand the evolution of the U.S. Supreme Court rulings on the use of eminent domain and private property rights see "*Poor Relation Once More: The Supreme Court and the Vanishing Rights of Property Owners*" 2005 *Cato Sup. Cr. Rev.* 39.) (Hereinafter *Poor Relation*) While the *Kelo* decision upheld the taking of property from one private party and transferring it to another, the Court explicitly held that state governments were free to limit the scope of eminent domain. The majority opinion written by Justice Stevens said, "nothing in our opinion precludes any state from placing further restrictions on its exercise of the takings power."

Clearly, these two provisions provide that the legislature has the authority to act.

**2. What limitations on the authority of eminent domain should the legislature enact?**

HCR 5040 is designed to provide the same Constitutional protections as does the US constitution. HCR 5040 does allow for a very limited use of taking private property by eminent domain and transferring the property to another entity if 2/3 majority of the Legislature and the Governor approve. This Constitutional amendment would allow the "race track" project but would preclude all other takings.

This proposed Constitutional amendment defines what “authority” governmental agencies have to act. This is not a “process” bill. This Constitutional amendment defines the fundamental legal question of whether a governmental agency should be allowed to use eminent domain for economic development. Further, if the government is allowed that authority, when it is appropriate.

KLA supports the fundamental principles of all the Constitutional amendments pending in the Legislature (SCR 1616, SCR 1612, HCR 5025): to limit takings of private property with the intent to transfer the property to another private party. Our membership strongly supports these limitations for several reasons. We support a Constitutional Amendment to assure that private property rights are given due consideration by the Courts. We believe it is important that the Kansas Constitution have, at a minimum, the same protections of the federal Constitution and those protections not be easily undone by the next legislature.

We believe that basic liberties are founded in private property rights. Our membership agrees with the scholars that have repeatedly supported the concept of a “person’s home is his castle”. We subscribe to the theory that the use of eminent domain to redistribute wealth is not what the Constitutional framers envisioned. We further believe that the use of eminent domain to create “economic development” is sometimes used to circumvent the market place. In short, we believe that the government should not interfere with the commonly known principle of economics; that the price for anything is what a willing buyer will pay and a willing seller accepts. (See *Poor Relation*)

### **3. If the legislature provides for the use of eminent domain, what procedural safeguards must apply?**

SB 323 prohibits the use of eminent domain to transfer private property from one private entity to another except in very specific situations as defined in section (c) lines 21-36. In short eminent domain is banned except as outlined by the bill. We understand that to many, any use of eminent domain for the taking of private property is unacceptable. In drafting these provisions, we sought to acknowledge the needs of quasi-governmental actions associated with what many view as traditional public functions of hospitals and utilities. The provisions of “abandoned,” “unsafe” and “waste” have long legal histories and need more definition and we are willing to work with the committee to improve these sections. Regardless of the final exceptions language, we strongly support the requirement that the use of eminent domain be supported by the condemning authority carrying the burden of proof of clear and convincing evidence.

HB 2543 is similar to SB 323 and we support it efforts of reform as well.

SB 446 allows for the use of eminent domain for economic development purposes. It places procedural restrictions on the use. For agricultural lands, the bill provides that just compensation is 125% of fair market value. Eminent domain is allowed as long as there is an economic development project plan which must contain certain “findings”. The

plan is required to have a public hearing and approval of the plan by a 2/3 majority of the governing body. The bill appears to say that eminent domain is the norm and not the exception. SB 493 is another procedural bill that provides additional compensation to parties whose property is taken for economic development.

HB 2741 is similar to SB 446 and we think these bills are not strong enough in the protection of private property rights and in particular agricultural properties.

HB 2964 is another bill that increases the compensation provisions for takings and we support these efforts. HB 2726 is a bill to prohibit tax incentives for projects wherein eminent domain was used. This bill is similar to SB 360 and we supported that bill in the Senate and would support HB 2726.

We have been working with the opponents of eminent domain reform on a bill that combines the aspects of SB 323, 446, and 493 and provides for an agricultural exemption from the taking of agricultural properties outside the city limits. We are hopeful that language will be ready for consideration by the full Senate within this week.

In summary, KLA supports reform of eminent domain authority and procedures for its use for economic development. We support Constitutional amendments and/or legislation that restrict the use of eminent domain. Without reform, there is no check on this governmental authority.





*PUBLIC POLICY STATEMENT*

HOUSE COMMITTEE ON FEDERAL and STATE AFFAIRS

RE: HCR 5040 – a proposition to amend article 15 of the Kansas Constitution, concerning eminent domain.

**March 6, 2006  
Topeka, Kansas**

**Testimony provided by:  
Brad Harrelson  
State Policy Director  
KFB Governmental Relations**

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Chairman Edmonds, and members of the House Committee on Federal and State Affairs, thank you for the opportunity to appear today to convey our reactions to the recent decision of the United States Supreme Court in *Kelo v. City of New London*, and our thoughts about the state of eminent domain law in Kansas in light of our own state Supreme Court decisions.

I am Brad Harrelson, State Policy Director—Governmental Relations for Kansas Farm Bureau. KFB is the state's largest general farm organization representing more than 40,000 farm and ranch families through our 105 county Farm Bureau Associations.

Our members have long been outspoken about intrusion and interference with private property rights by governments, especially when that action results in land being taken from one owner and subsequently conveyed to another under the auspices of economic development. KFB policy, developed at the grassroots level, clearly states that eminent domain procedures should be used only for legitimate governmental purposes. It is our belief that these practices are not legitimate uses of the power and should be limited by both Constitutional and statutory protections. Further, KFB members are united in their belief that the Kansas Legislature should take action this session to limit the taking of private property when the clear intent of the condemning authority is economic development.

FEDERAL AND STATE AFFAIRS

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For members of Kansas Farm Bureau, and property owners in general, there are four principals that are directly impacted.

From where we stand, **land is sacred**. For farmers and ranchers, land ownership is a bedrock principle. Many Kansas farmers raise kids, crops and livestock on ground that has been in their families for generations. This value cannot be measured.

**Farmers are good neighbors**. Those who live and work the land share the overwhelming public sentiment in Kansas that government taking land to build a highway or a school differs vastly from taking land to put up a parking lot or a strip mall.

There is a **basic fairness** issue at stake. As farmers and ranchers, we believe strongly in the American private enterprise system where property is privately owned, managed and operated for profit and individual satisfaction. We have real concern that government taking land from one businessperson and handing it to another weakens all of our Constitutional rights.

And finally, **left unchecked, no farmland is safe**. Farmland is already endangered, even before this added burden. Farmers and ranchers will stand up to defend their land and their lives.

Across the nation, and right here in Kansas, citizens are incensed over the current practices of our governments. In a recent survey conducted by the American Farm Bureau Federation, 95% of respondents disagreed with the United States Supreme Court interpretation of Connecticut law in the *Kelo* case. Additionally, 83% of those surveyed opposed the use of eminent domain for economic development.

Kansas Farm Bureau has been involved in discussions with numerous groups and individuals in an attempt to seek solutions to this issue. We have met at length both historically and recently with representatives of the opposition to eminent domain reform and have found little acceptance for any kind of meaningful effort. We believe Kansas property owners deserve more protection than the current law provides them and support current efforts that will:

- Provide Constitutional protection for Kansas property owners against the taking of their property for transfer to another private owner for any reason.
- Prohibit by statute takings intended for transfer of ownership and control by a governmental unit when the clear intent is for economic development.
- Provide reasonable mechanisms for governments to protect citizens from unoccupied and unsafe property.
- Provide exceptions for utilities and railroads which supply necessary services that benefit our state and nation.

The Power of eminent domain belongs exclusively to the Legislature, a reality that the US Supreme Court recognized in the *Keelo* decision. You have before you a proposal that provides alternatives to the current situation in Kansas. HCR 5040 provides the relief sought by Kansas citizens. We proudly offer our support for this measure. We cannot, however, offer our support for other proposals, which simply attempt to band-aid the issue with additional procedural requirements.

Kansans, both urban and rural, deserve greater protection for the homes and land they have worked hard to acquire and develop. Your efforts to address this crisis are appreciated. KFB stands ready to assist as you seek to end eminent domain abuses in Kansas.

Thank You.

*Kansas Farm Bureau represents grass roots agriculture. Established in 1919, this non-profit advocacy organization supports farm families who earn their living in a changing industry.*

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**Testimony as a Proponent for restrictions or elimination of economic or industrial development as a "public use" in eminent domain**

Before the House Federal and State Affairs Committee  
**On Behalf of the Kansas Chapter of Sierra Club**  
March 6, 2006

Mr. Chairman, members of the Committee, thank you for the opportunity to testify on behalf of the Sierra Club, the oldest and largest grass-roots environmental organization in the world with over 750,000 members including over 4,000 in Kansas.

**Sprawl Hurts Us All**

One of the major strategic campaigns for Sierra Club is the "Challenge to Sprawl Campaign" that works to fight poorly planned runaway development and promotes smart growth communities that increase transportation choices, reduce air and water pollution, and protect our natural places.

Sprawl spreads development out over large amounts of land; puts long distances between homes, stores, and job centers; and makes people more and more dependent on driving in their daily lives.

Sprawl pollutes our air and water. As reliance on cars and pavement of more and more roads increases, so does smog and pollution from water runoff. Today, more than half all Americans live in areas where the air is unsafe to breathe. Sprawl destroys more than two million acres of parks, farms and open space each year.

Sprawl increases traffic on our neighborhood streets and highways. Sprawl lengthens trips and forces us to drive everywhere. The average American driver currently spends the equivalent of 55 eight-hour workdays behind the wheel every year.

Sprawl wastes tax money. It pulls economic resources away from existing communities and spreads them out over sparse developments far away from the core. Taxes subsidize millions of dollars worth of new roads, new water and sewer lines, new schools and increased police and fire protection at the expense of the needs of the core communities. This leads to degradation of our older towns and cities and higher taxes.

**Eminent Domain for Economic & Industrial Development Will Encourage Sprawl**

Sierra Club is concerned that the use of eminent domain by state and local governments for the purpose of economic and industrial development will only increase problems with sprawl in Kansas and elsewhere. Here's why. Developers of big box retail stores or new housing developments typically go to the edge of towns where large amounts of

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land, typically agricultural land, is available at less expensive prices than in town. A developer would normally have to approach a landowner and offer that landowner a price for her land. That landowner can accept the price or turn down the offer. That's the end of the matter. The use of eminent domain for economic and industrial development allows developers to go the city or county commission, if the landowner will not sell, and ask the city or county commission to condemn the landowner's land for "economic and industrial development."

The use of eminent domain for industrial and economic development is irresistible for city and county commissions. Land on the edge of town is typically valued as "agricultural land use" which does not generate a lot of property taxes. If the land becomes a big box or a residential development the real property taxes are then based on land that is appraised as industrial, retail or residential – all of which generate more property taxes than agricultural land uses. In addition, a big box development will also generate personal property taxes that land in agricultural uses does not generate. Finally almost every local jurisdiction has some sort of retailer's sales tax. Agricultural land or land devoted to open space does not generate sales tax revenue. In a word, condemnation of land for economic and industrial development is irresistible to city and county governments.

I want to make clear that Sierra Club is not opposed to eminent domain powers for public uses such as streets, water supply, sewers and utility easements. Sierra Club has no problem with the use of eminent domain to alleviate blight, so long as blight is carefully defined. Sierra Club takes no position as to whether restrictions on eminent domain for economic and industrial development should be written into statute or into the state constitution.

I am willing to elaborate further on any of these experiences either before the whole committee or with individual members of the committee. My contact information is at the top of this testimony.

Thank you for your time and attention. I will stand for questions when appropriate.

*PUBLIC POLICY STATEMENT*

HOUSE COMMITTEE ON FEDERAL & STATE AFFAIRS

Re: HCR 5040—Concerning Eminent Domain

**March 6, 2006  
Topeka, Kansas**

**Testimony provided by:  
Rob Hodgkinson  
Stilwell Kansas**

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Chairman Edmonds and members of the House Committee on Federal and State Affairs, thank you for the opportunity to appear before you today to share my opinion regarding eminent domain powers. My name is Rob Hodgkinson and I serve as Chair of Libertarian Party of Kansas. I am a fifth generation Kansan, a small business owner and resident of Stilwell. I am also a candidate for Secretary of State this year.

The Kelo v. New London decision has brought the issue of property rights to the forefront of public awareness. While I disagree with the U.S. Supreme Court decision, the end result of that decision is that the U.S. Supreme Court said that this is a states rights issue. This year's legislative session provides an opportunity for you and the rest of the Kansas legislature to provide property owners the protection that they have lacked in Kansas for too long.

I am here today to express my conditional support for HCR 5040. I believe this bill can provide the protection needed against eminent domain abuse of forced private-to-private transfer (mostly wrongly misrepresented with the ambiguous and much overused term of "economic development").

The proper use of a constitutional amendment is to restrict the government. A constitutional amendment needs to be short and to the point without ANY loopholes.

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HCR 5040 currently has one loophole and I would like to see an amendment proposed to strike that legal loophole of allowing an exception of a vote of 2/3rds of the legislature and signature of the Governor. While I can still back this bill in its current form, the public is currently being subjected to a constant reminder (the national Abramoff scandal) that elected officials can be tempted to vote for poor legislation due to the flow of campaign dollars. Striking this wording would end that public concern. While anyone voting for an eminent domain exception would be setting themselves up for a battle in the next election cycle – the damage of eminent domain abuse could still be done under this bill as it now stands.

In the months since the June Kelo decision, I have been an outspoken champion for eminent domain reform in Kansas. I have been quoted in the press all across Kansas with my belief that we need change now. As I have been traveling all over the state and talking to the public in my role as Libertarian Party State Chair, one of the main topics of 2005/2006 has been the fact that Kansas has one of the worst records in the nation of eminent domain abuse. We need reform! I have easily talked to over one thousand Kansans on this subject To date, only two I have talked to think we should leave the system as is (one was from a city chamber of commerce and the other a developer). This constitutional amendment (if amended) will pass the public vote in Kansas with the highest percentages of any issue seen in recent history.

You have been given the chance to correct a situation that has been wronging Kansans for years, passing this constitutional amendment (preferably amended) would make you heroes in the eyes of most Kansans.

I have made a public stand for the people of Kansas – will you?

Please pass this legislation out to the floor of the House and be very active and vocal in lobbying for its passing the full House and Senate so that it will be sent to the people.

Thank you for your time.



# AMERICANS FOR PROSPERITY K A N S A S

March 6, 2006

Mr. Chairman and members of the committee:

I am Alan Cobb, representing the over 5,000 Kansas members of Americans for Prosperity.

We are in favor of HCR 5040.

The taking of private property by government should be rare and for true public purposes such as roads, schools, parks and hospitals.

Though an absolute ban on takings for private use is desirable, this resolution is a strong step in the right direction.

While some may say that government taking private property to transfer to another private party will help turn around Kansas' struggling economy, **there is little data** to support that notion.

In fact, looking at the counties where economic development has been used as the pretext for eminent domain proves the point.

From 2000 to 2004, the population growth of all of these counties except Johnson, was less than the state average of 1.7%, which is hardly robust.

### **Total Pop. Growth 2000 - 04**

Crawford -.05%  
Geary -10.1%  
Riley +.3%  
Shawnee +1.1%  
Wyandotte - .9%

While it is hard to argue with the success of Village West, we should be reminded that that property was not taken with eminent domain. In addition, the growth in other economic indicators in Wyandotte County and other areas where eminent domain has been abused is hardly robust.

### **Rank, growth in average wage per job, 2003 - 2004**

Kansas 4.11%  
Crawford 3.04%, #85  
Geary 4.22%, #61  
Riley 3.57%, #76  
Shawnee 4.85%, #47  
Wyandotte 4.16%, #63





# AMERICANS FOR PROSPERITY K A N S A S

Many publications report that Kansas is one of the states most frequently using economic development as a reason for the exercise of eminent domain power. Yet, we continue to struggle economically, even when compared to states in our region.

If state and local government want to make Kansas a more attractive place to do business, they can begin with our high state and local tax burden, and our high local government job growth.

Are we seriously talking about the abuse of eminent domain as the way out of our sluggish Kansas economy?

I suggest that *reducing* the growth of government would help our State's economy grow rather than *increasing* the government involvement by taking private property for non-public uses.

Though being involved in real estate development hardly seems something that our state's local government should be focused on, they can still purchase what property they want in an open market, even with the passage of HCR 5040.

HCR 5040 would limit selected private developers from having the unfair advantage of eminent domain being their negotiating tool. Just the specter of a developer's possible use of eminent domain can alter the marketplace significantly and shifts considerable bargaining power to the developer – power received from government, not the marketplace.

### A Survey of 400 Registered Voters in the State of Kansas

Margin of error: +/- 4.9%

Conducted January 2 - 5, 2006

Do you favor or oppose the increased use of eminent domain to include taking private property and transferring ownership to other private interests? (After response, ask:) Would you say you strongly (favor / oppose) or only somewhat (favor / oppose)?

Strongly favor .....	3%
Somewhat favor .....	4%
Somewhat oppose .....	11%
Strongly oppose.....	81%
Undecided (vol.).....	2%

I regret I cannot speak on eminent domain today as this verbiage is found in my contract with the developer:

Nothing in this Agreement shall prohibit Seller from speaking publicly against eminent domain at any time following the closing of the purchase of Seller's property and the completion of the improvements to the remainder of Seller's property. If at the time of Closing it is determined that eminent domain is not being used in this project, then there shall be no prohibitions on Seller discussing eminent domain thereafter.

I reluctantly signed this agreement that temporarily limits my 1<sup>st</sup> amendment rights because I felt it protected other's 5<sup>th</sup> amendment rights in serving as an example as well as preserving my part of the American Dream.

I do conditionally support this bill, but it needs to be amended to limit abuses of power with stronger language and limits, such as is found in HR 5025.

David Morgan  
1411 SW Lane St  
Topeka, Kansas 66604

*Testimony on Eminent Domain  
Committee on Federal and State Affairs  
March 6, 2006*

*Submitted by:  
Robert D. Tolbert  
General Building Contractors, Inc.  
5602 SW Topeka Blvd Suite C  
Topeka, KS 66609-1005  
(785) 862-1323*

*I was here two years ago to offer testimony and urge you to protect us from the abusive use of eminent domain for economic development as I do not want others to face the same fate as me.*

*I have attached my previous testimony from October 6, 2004 and will not go into it in great detail. But, I would like you to know that Shawnee County condemned our newly constructed office and warehouse which was only nine months old, gave us twenty days in which to vacate the property, and did not pay any of our relocation costs.*

*Since my last testimony we have had two separate incidents in Topeka where eminent domain was proposed to contrive private property from the rightful owners in the name of economic development and for the enrichment of private developers.*

*My support of HCR 5040 is conditional upon strengthening the language in regards to "just compensation". Just compensation for ones home, business, or land must be greater than the appraised value of the property.*

*How can one be compensated for the inconvenience of moving against their will, the interruption of their business, loss of profits, moving expenses, the mental anguish, harassment, bad publicity, loss of goodwill, legal fees, and in some cases health issues created by even the threat of eminent domain.*

*In my case I was unable to replace my business property with the money received from the appraisal. Plus, I lost the opportunity to develop the other seven light industrial lots at an anticipated profit. How can an individual ever be compensated for the effort and hours consumed in looking for replacement property? The condemning authority sure never helps anyone with this task.*

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*Eminent Domain  
March 6, 2006*

*We need a strong eminent domain law which will protect our individual property rights and one that assures the unfortunate individuals who have their property taken a fair value. Fair value must be in excess of the appraised value and moving expenses.*

*Robert D. Tolbert  
General Building Contractors*

**Testimony on Eminent Domain  
Legislative Hearing  
October 6, 2004**

**Submitted by:  
Robert D. Tolbert  
General Building Contractors, Inc.  
5602 S.W. Topeka Blvd.-Suite C  
Topeka, KS 66609-1005  
(785) 862-1323**

I present my testimony to express my concerns over the blatant misuse of the power of eminent domain in this state to wrongfully take privately held land and convey it to other private enterprises for economic development.

As a small business owner, I was able to realize my dream to not only have a successful business but to be able to own our building and warehouse in lieu of leasing space from others. It gave us room to expand our business and pursue other avenues to grow our business.

My dreams quickly became a nightmare due to the lack of private ownership rights, the power of big business, and political pressures. On November 16, 2000, we purchased approximately 8 lots totaling approximately 3 acres in a platted 84 acre Industrial Park in South Topeka. Our property fronted a newly constructed street with all utility infrastructures in place.

We developed plans and started construction in May 2001, on a new owner occupied office and warehouse on one of the 8 lots we owned. We moved into our new facility October 29, 2001.

Then in January 2002, the harassment began and the nightmare started! We were contacted by a local real estate firm about selling our property. We were told that GO TOPEKA was in the process of acquiring land for an Industrial Park, which was fine with us because it would only help in the development of our area. We were not interested in selling because our business was established in the new building and we had inquiries from other small businesses wanting to build new facilities and expand, which would have been beneficial for our company.

What finally came out in the negotiations with GO TOPEKA was that they didn't have the funds available to purchase our property but, rather, wanted us to agree to a 4-year option with them. This was not an acceptable agreement for us and we declined.

GO TOPEKA and KS Commercial Real Estate used the threat of eminent domain on all the small landowners to persuade them to sign the option agreements. The landowners involved in these threats were Valyer Enterprises - 1 acre, Door Controls Inc. - 2 acres, Frank Pase - 5 acres, General Building Contractors - 2 acres, Robert D. Tolbert - 1 acre.

These owners represent five of the twelve properties acquired by GO TOPEKA for their Industrial Park. Shawnee County filed eminent domain proceedings against three of the landowners on March 19, 2002 to gain control of their properties.

Doug Kinsinger of GO TOPEKA, and President of The Topeka Chamber of Commerce, has threatened Henry McClure, the owner of 160 acres adjacent to the Industrial Park, with taking his property by condemnation if McClure didn't work with them. This came out during a presentation by GO TOPEKA at the public TV Broadcast of the Topeka City Council Meeting.

We filed an injunction on April 17, 2002, to halt the condemnation proceedings; however, the District Court ruled against us. The case was appealed and the Kansas Supreme Court upheld the lower court ruling.

GO TOPEKA had under its control nearly 400 acres adjacent to our property. The 3 acres that we owned had no bearing on the success of the new Industrial Park or the possibility of bringing the Target Distribution Center to Topeka.

Our property and many more acres were conveyed to Target at no cost to them. They also received tax abatements on their property and improvements.

My lawsuit against the Shawnee County Commission started out as an attempt to retain my property on 57th Street, but it soon became evident to me that the issue was much bigger than 3 acres in Shawnee County. The outcome would affect all landowners and citizens in the state.

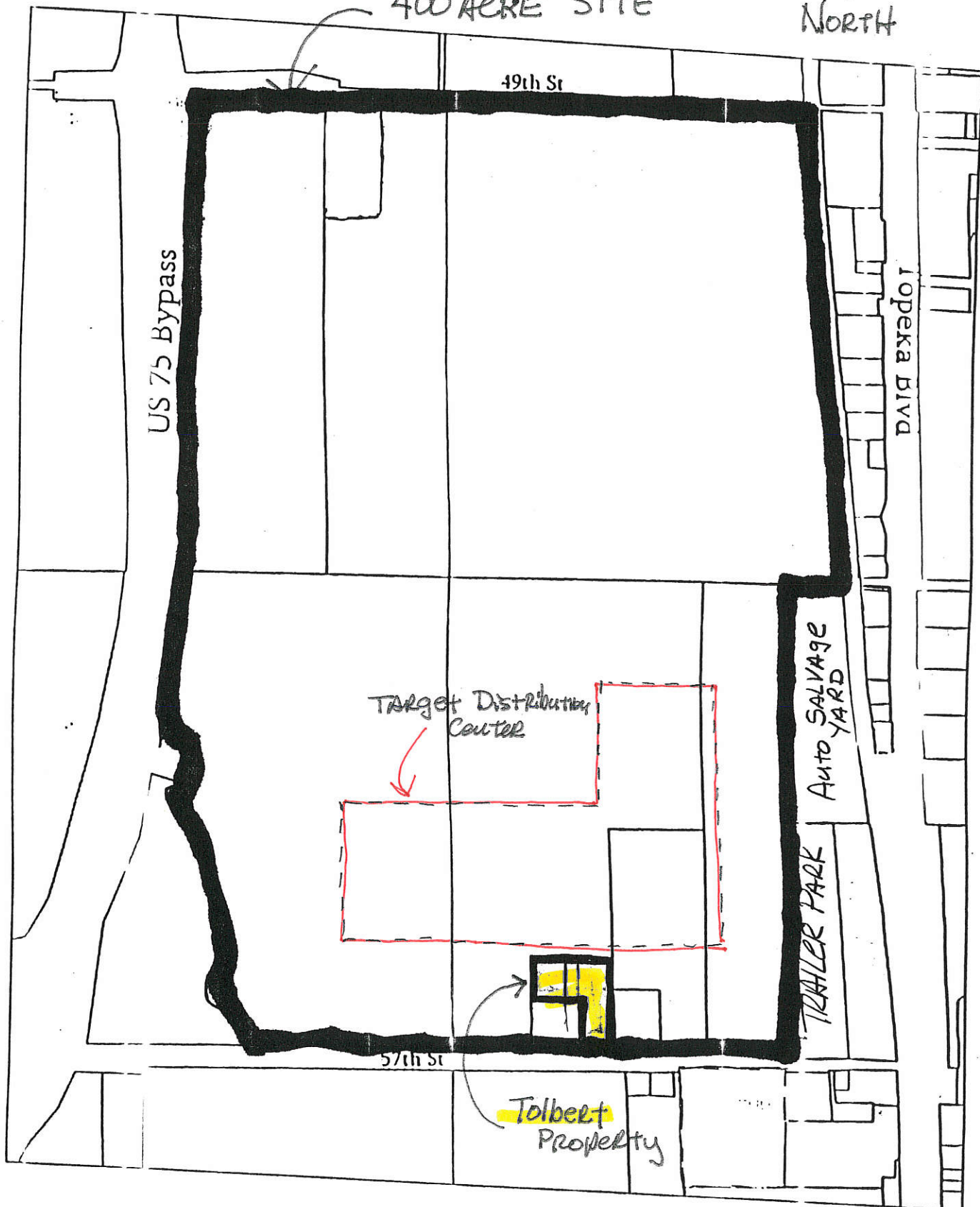
You now have the opportunity and responsibility to save others in Kansas from my fate, and I urge you to curtail the indiscriminate use of the eminent domain power for economic development within the state.

I have suffered from lost business opportunities, have been inconvenienced and burdened with extra expenses to my business, developed hard feelings, and have lost profits because of the violation of my individual property rights.

Robert D. Tolbert

400 ACRE SITE

4  
North



## Testimony in favor of HCR 5025

John Geither  
13810 W. 53<sup>rd</sup> St.  
Shawnee, KS 66216  
913-710-2852

Eminent domain, I thought eminent domain was used for building roads and cleaning up high crime, blighted areas. It never really occurred to me that one day a small City government could take my business to give it to a wealthy developer. I thought if anyone ever wanted to do that they would have to come to me and ask me my price. How naive was I? I found out the hard way all anyone needs to do to take you property, as it stands now, is to convince a City Council that they can generate more tax dollars than the previous owners.

I am here today to tell you how eminent domain has impacted my life . In the summer of 2004 I owned my own business a was making a good living to support my wife and six small children. Then I received notice that my business was going to be torn down to make room for a large grocery store. I would have to relocate my business to another location or I could relocate to a new strip mall within the new shopping center. The business would be closed for a year and there was not going to be any compensation for the year lost business . The business I owned for 14 years was now going to be taken away.

The developer recently purchased the strip mall in which I was renting and they were also going to own the new center. I had one and a half years left on my lease. The developers met with me and told me that there was no money in the project to pay for my relocation and I would have to pay a higher rent in the new center and pay for my own relocation. I had no other place to go because there was no other suitable commercial space available in Roeland Park and I could not move outside the City because this is a franchise business and it would have encroached on another store.

The City of Roeland Park contracted the developer to handle the relocation of the businesses. The City awarded the developer 9 million dollars in TIF money. Part of this money was supposed to go to relocating the displaced businesses. The developer was supposed to comply with the Uniform Relocation Act. Under this law a developer can acquire land at the same price a government entity would pay if they were having to acquire the property for a highway. This act does not cover any compensation for lost business and excludes many of the most costly expenses involved in a relocation. In my case if this act were followed to the letter it would have covered only a fraction of my losses. There were no checks and balances in place to see that I was informed of all my rights and that I received all the compensation I was due. In essence the City paid the developer and that was the end of their responsibility. After repeated attempts of asking the City for help they continued to tell me that the developer was in full control. Since the developer has refused to pay me anything the only way to collect the money due is to sue. Litigation is expensive and could cost more than the relocation, unfortunately the URA does not cover legal fees. If there were federal money in this project HUD would be responsible for enforcing the Act. There is no such protection when a City is using this same Act.

Relocating a restaurant is very expensive, especially in Johnson County where every restaurant is required to put in a 1000 gallon grease trap. I was forced to take on a large amount of debt to reopen the restaurant. I was already a year without any income from the store.

The store is reopened now and I am trying to rebuild the business. With the new rent in addition to the new debt payment it will take many years to get back to where we were. The developer and the City promised this location would do much better business than the last. So far the sales have been less than the old store. I can only hope and pray that the biggest financial disaster of my life time doesn't become



even bigger.

How can we call this public use? There was clearly no public use in this project. I think the words of Justice Sandra Day O'Connor describe this best, "It is stealing from the poor to give to the rich". Is this what our founding father's meant? This is exactly the kind of government action that they were trying to prevent. I think any lawmaker that thinks this is just does not understand what America is about.

Why should a developer be able to use the same laws to acquire land that a government agency uses for necessary projects? I understand these projects are being done "for the greater good". As a business owner I understand the economic impact of these redevelopments. The racetrack is a perfect example. When I look at that project and see the millions of dollars that must be being generated, much of the money going into the pocket of one of the worlds wealthiest people, it makes me sick to think of all the people who were forced out of there homes for 125% of there value. For many they could not even replace there homes for the compensation they received. This should stand out as one of the darkest days in Kansas history.

How can we fix this problem? If a project is worthwhile and makes economic sense for a developer then why does eminent domain have to be used? In my case I never received a buyout offer before eminent domain was used. The only way we can be assured that home owners and business owners are getting a fair buyout is to not exercise eminent domain. How can we assure that corrupt governments are not taking pay offs from developers. The media reported about government corruption on the racetrack project. Perhaps someone should look into corruption on the Roeland Park Redevelopment.

Successful redevelopment does not require the use of eminent domain, I have attached an article that lists many successful projects across the United States that have been accomplished without the use of eminent domain.

Please vote for HCR 5025 and to restore property rights in Kansas. Let us stop stretching the constitution and put a stop to this abuse of government power.

To: House Committee on Federal and State Affairs

From: Bill House

Date: March 6, 2006

Re: Support for HCR 5040

Eminent domain was the name given to the right of a king to take possession of any land in his kingdom for his own use and pleasure, and without compensation.

In England in the year 1215, the feudal barons, angered by the corrupt practices of King John, joined their armed forces and together forced him to sign and seal a written document called the Magna Carta (Great Charter) which restricted his right to seize their land or to tax them without their consent.

Years later both restrictions found their way into English Parliamentary law.

The colonists carried these ideas of legal and political rights to America and in 1789 they were written into our Constitution.

The 5<sup>th</sup> Amendment to our constitution reads, "No person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public "use" without just compensation.

For years our courts consistently held that eminent domain could only be exercised by any governmental unit if it was necessary for a public use, and that any attempt to transfer one man's property to another man for his benefit was unconstitutional.

In more recent years state and federal courts began to broaden the term "public use" to "public good" or even "economic development". The average citizen soon found it was difficult to protect his property when the courts "preferred" that the ownership be in some other party (public preference).

State courts became prolific authors of ownership changes when requested by developers. Property owners became the victims of progressive takings.

In 2005 an unusual case developed and reached the US Supreme Court in a case named Kelo v New London, a city in Connecticut. A private developer wanted to raze several well-kept waterfront homes to build an office block and some posh apartments.

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The Supreme Court upheld the taking of these homes by a 5 to 4 vote. Justice John Paul Stevens, in his written opinion, said that it was enough that the seizer should serve some good public purpose, such as new taxes.

Justice Sandra Day O'Connor objected, saying, "The spectre of condemnation hangs over all property." Justice Thomas added, if such economic development takings are for a public use, any taking is a public use.

In Justice Stevens' opinion he noted "nothing in our opinion precludes any state from placing further restrictions on its exercise of taking power." This is an open invitation for state's to write their own rules.

When the opinion in the Kelo case was reported there was an explosion of opposition. The House of Representatives passed a resolution disagreeing with the decision by a vote of 10 to 1 (365 to 33). A recent poll shows 89% of the voters oppose taking one man's property to give to another. Ten states had already prevented such action, 38 states have legislation pending. The US Senate invited M. Kelo to testify about being victimized by the city of New London.

A California developer has petition the town of Weare, New Hampshire to seize the home of Justice David Souter in order to build an inn called "Lost Liberty Hotel." Another group is planning to seize Justice Breyers home for some purpose.

Kansas is one of the six states that express by allows private property to be taken for private economic development. Under Justice Stevens' opinion the Kansas Legislature has the authority to re-write its own rules for condemnation under the power of eminent domain.

## Don't Kelo My House

**B**elieve it or not, the Supreme Court's decision in *Kelo v. City of New London* may yet unite red and blue America in at least one common cause. The 5-4 ruling, handed down last June, gives government more or less unlimited power to seize private property.

The latest blow-back comes from South Dakota, whose Governor this month signed a law prohibit-

ing the state from using its power of "eminent domain" to take private property for private economic development. No exceptions. No loopholes. The bill passed by unanimous vote in the state senate and 67-1 in the house.

Two-thirds of Americans own their own homes, which is perhaps one reason few seem to share the view of the five Justices who ruled that New London, Connecticut, was justified in evicting homeowners so that private developers could put up a hotel and condominiums that would bring in more tax revenue. Some elites on the political left endorsed the ruling. But the overwhelming, immediate reaction on both the grassroots left and right was: How do I keep the government's hands off my house?

It didn't take long for the political response to get rolling. The sponsors of the South Dakota law said they started work the next day. At the time of the *Kelo* ruling at least nine states already had outlawed the use of eminent domain to evict homeowners for private devel-

opment. Nearly every other state has since come up with some sort of anti-*Kelo* effort via legislation, a constitutional amendment or citizen initiative.

In Michigan, the legislature decided not to leave so important an issue to the vagaries of future legislatures and

approved an amendment to the state constitution outlawing the taking of private

property for private use. The vote was 106-0 in the house and 31-6 in the senate; it goes to the voters in November. Constitutional amendments are also moving forward in Georgia, New Hampshire, Florida, Oklahoma, South Carolina and Alabama.

Initiatives are under way in Colorado, Missouri, California, Arizona, Nevada and Montana. In Washington, D.C., the U.S. House of Representatives passed a bill in November that would withhold economic development aid for two years from state or local governments that use private economic development as a rationale for eminent domain. The Senate will soon take up somewhat less sweeping legislation.

In his majority opinion in *Kelo*, Justice John Paul Stevens wrote, "Nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power." It's good to see voters taking the Justice at his word and throwing the Supreme Court a brush-back pitch.

*South Dakota sticks it to the U.S. Supreme Court.*

To: House Federal and State Affairs  
Chairman John Edmonds

From: Donna Martin

Date: March 6, 2006

Re: Support for HCR 5040

As General George Patton once said, "Never tell people **how to** do things. Tell them **what** to do and they will surprise you with their ingenuity". Isn't that a wise approach? Give them the tools and help them find the motivation, then stand back. That is exactly what happened to us in Eastern Cowley County.

We neither needed nor wanted the lake that was being imposed on us by powerful, greedy, property-coveting Kansas people. They wanted OUR LAND! The excuse was *economic development*. The tool was *eminent domain*. We fought that eminent domain Abuse battle with the Cowley County Lake in 2004 and you, here in the House, helped us stop it with Bill 461 and I thank you. We continue to be grateful. But, this abuse is still legal and, like a train, can top the next hill and happen all over again in the next valley.

In 2004 Eastern Cowley was similar to many rural Kansas communities. We were invisible. We were disintegrating year by year with buildings, in the four small population centers and rural areas, regularly falling down or being demolished. New businesses were not being started. Schools were left in only two of the four small towns. Youth and adults both felt hopeless and many were moving away to look for new hope. (Hope is a necessity of life, you know!) The ones who left were wished well, but most who left secretly wished they could be the ones who stayed. We were so vulnerable when the Lake Panacea came. But, we all knew the lake proposal was not right and we refused to be trapped...again. This was our home. We cared. We lined up in the most unified line of battle I have ever seen in our community. It was as if the 911-proportion incident had thrown us into a tightly bonded unity.

We quickly realized our Lake MONSTER had two heads. The heads were "*the proposed lake*" and "*the lack of area economic development*". What was economic development? We honestly did not know. A few of us began to educate ourselves. We all believed that true sustainable economic development should come from within and be acceptable to the people. While we were fighting the battle of the unwanted eminent domain abuse with the proposed lake, we continued to be hard at work arming ourselves with all the knowledge we could wrap ourselves around. There was not a workshop or educational meeting within driving distance that we did not attend. We wanted to be ready to offer sound judgment calls for the future of our community. It was win-win if we were as right and we believed we were.

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We used the networking we had developed with the lake battle and continued to build more networking among those who were interested in our economic success. This networking proved invaluable. When we asked questions, we received excellent advice and aid. Community resources were behind us all the way and cooperation was infectious.

We knew that an individual rural business had no more chance of thriving than an ice cube on the 4<sup>th</sup> of July in the Kansas sun. We had to join with each other to form a cooperating, larger, working community and come up together. The ABCD&E Group (Atlanta (pop. 250), Burden (pop. 550), Cambridge (pop. 100), Dexter (pop. 350) and agricultural Eastern Cowley) was born. The County Commission and Western Cowley took us under their wing and our SKT telephone company also began offering organizational support. Other help ensued. We applied and were chosen as one of the three Kansas Rural Task Force Pilot projects in November. We were no longer invisible. During the past few months, hope has worked its magic. The Cowboy Station opened on the Williamson Ranch along with the CT Bryant Cutting Horse Complex. The Stone Barn Mercantile & Pumpkin Patch opened. The Burden Museum, the Holy Cow BBQ and CJ's Pizza opened in Burden. There have been new Festivals and numerous economic fund raisers with music, good food and great neighbors coming together. A program for demolishing dilapidated houses in the small town population centers provided removal costs that did not exceed \$500. A new newspaper called the Eastern Cowley Advocate and a website ([www.cowley.net](http://www.cowley.net)) was started.

Dexter School's fte count has recently gone from about 182 to 234. Mojack, a manufacturer of small equipment jacks, has begun production in Atlanta. A new, holy rock, landscaping stone company is now delivering semi-truckloads of surface rocks. Two bed and breakfasts are nearly ready and one is already in operation. The Grouse Valley Trading Company with a café will open Saturday. A Professional Grant Writing business has just moved into Dexter's main street area. The new Dexter Opry will have its first performance on April 1<sup>st</sup> with Martina McBride's father performing and offering valuable expertise.

We are learning to leverage our historical tourist attractions and cultural amenities also. We know that the covetous historical heritage of our area is both marketable and pride-building. We have trained a group called the Blackdog Story keepers (local group of historical entertainer/educator/promoter performers) who have already presented more than 35 times since last April. Dexter can boast of being helium's discovery place, the Black Dog Trail, and the site of the last successful Dalton Gang robbery before their Coffeyville Demise. We have an 1800s Cabin on Grouse Creek and we are looking for authentication of the 1801 date that is scratched on it. We boast of the James Gang, Belle Star Cave, the Ron Howard family home, 1800 Stone Bridges and Cellars, and Indian artifact sites.

More and more businesses keep coming to light as do people with dreams to spend. Most of this has all happened in the past year. At this point I could not call in the dogs if I tried. An action has turned into a movement and our community of Eastern and now Western Cowley County is excited and hopefully proud!

It is important that you do your part to allow this American Spirit to once again thrive in our rural areas. Please give us all the chance to develop in the right way. Stop the eminent domain abuse. Protect our irreplaceable agricultural land for Kansas' future. We can have both! Passing HCR 5040 will give us the opportunity to use our integrity with the ingenuity that General Patton so admired.

1559 Payne  
Wichita, Kansas 67203  
(316) 312-7335 cell

March 6, 2006

To: Members of the House Federal and State Committee, March 6, 2006 hearing.

**Subject: Testimony in Support for the passage of House Concurrent Resolution No. 5025; conditional Support for the passage of House Concurrent Resolution No. 5040; and unconditional Support for the passage of Senate Concurrent Resolution No. 1616; all involving Eminent Domain reform.**

I am a real estate broker and land developer in Sedgwick County, and a Volunteer Coordinator for Americans For Prosperity, and a member of the Wichita Independent Business Association. I am not here to speak for these groups, but as a real estate practitioner and private citizen.

You should not allow cities, counties and state agencies the power through eminent domain to force someone to *involuntarily* sell their home, their business, or their farm so they can give it to other private owners for their own *private use*. Under redevelopment law, city councils can essentially become the *agent* for the powerful, politically connected developers that tell city councils, "condemn this persons home, business, or farm, and through our development process, the tax revenue for the city will go up, and in the process you can look like *visionaries*." (See attached testimony presented by Tim Sandefur, attorney for the "Pacific Legal Foundation" to a California legislative committee) Until the recent Kelo decision, the Fifth Amendment to our Constitution has allowed government to take private property for "public use" only, but now "public use" means anything a governmental unit decides will "benefit" the public, including increased tax revenues. That is why Steven Greenhut in his book, "Abuse of Power: How Government Misuses Eminent Domain" explains why cities in some parts of the country are taking non-taxed church properties through the eminent domain process and turning them over to tax-paying private developers in order to increase tax revenues. A chapter in his book entitled, "God Doesn't Pay Taxes" explains that abuse in detail.

"Government is instituted to protect property of every sort," wrote James Madison, and for this reason, "that alone is a just government, which impartially secures to every man, whatever is his own."

Our opponents argue that eminent domain is used only as a last resort, and that it isn't used very often. Tell that to the small business owner who now has local government involved in his business as an "unwanted" partner with no financial interest in the business demanding that he vacate the location he has spent a lifetime building up to a larger competitor. Is there really any amount of money that will satisfy the "just compensation" argument for such a forced involuntary move that it has taken this business owner decades to build?

Another argument we hear is that eminent domain is a valuable tool for economic development. I believe just the opposite is true. Eminent domain abuse damages people's faith in their own government, and people who are not secure in their own

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possessions cannot plan for their own future. A healthy economy is best achieved when individuals are free to use their own resources as they see fit. When government decides how the individual uses his property, the resultant system works poorly because it necessitates the use of coercion. The protection of private property rights is therefore essential to a healthy economy.

Nobel Prize winning economist Milton Friedman says, "In an economically free society, the fundamental function of government is the protection of private property and the provision of a stable infrastructure for a voluntary exchange system. When a government fails to protect private property, takes property itself without full compensation, or establishes restrictions (and follows policies) that limit voluntary exchange, it violates the economic freedom of its citizens."

We need a Constitutional amendment in Kansas to protect private property rights from eminent domain abuse. I support the eminent domain reform contained in House Concurrent Resolution No. 5025, with conditional support for House Concurrent Resolution No. 5040. However, I believe you can best serve the citizens and property owners of this state by setting the goal for eminent domain reform higher through the passage of Senate Concurrent Resolution No. 1616. A poll commissioned by Americans For Prosperity shows that a resounding 90% of the Kansans polled favored eminent domain reform. I would ask you to give the people what they want!

Sincerely,



John R. Todd

(316) 312-7335 cell

[john@johntodd.net](mailto:john@johntodd.net) e-mail

EMINENT DOMAIN RESOURCES:

Books:

“Abuse of Power, How the government misuses eminent domain.”, by Steven Greenhut.

“The Noblest Triumph, Property and Prosperity Through the Ages.”, Tom Bethell

“Property and Freedom”, Richard Pipes

“The Law, The Classic Blueprint for a Just Society”, Frederic Bastiat

Organizations:

Institute For Justice: [www.ij.org](http://www.ij.org) (Castle Coalition, Citizens Fighting Eminent Domain Abuse)

Pacific Legal Foundation: [www.pacificlegal.org](http://www.pacificlegal.org)

Foundation for Economic Education: [www.fee.org](http://www.fee.org)

## *Kelo*'s Impact on Eminent Domain in California



On August 17, Pacific Legal Foundation attorney Timothy Sandefur testified before the California Senate Local Government Committee on the impact of the U.S. Supreme Court's decision in *Kelo v. City of New London*, which granted local governments the authority to use the power of eminent domain to condemn private property and sell it to private interests and corporations.

Mr. Sandefur is a leading authority on eminent domain law and authored PLF's friend of the court brief on behalf of property owners in the *Kelo* case. He also has written briefs in eminent domain cases in the California, Ohio, and Mississippi Supreme Courts, and is currently involved in a number of eminent domain cases in California.

### **DOWNLOAD TESTIMONY**

Click [here](#) to download Mr. Sandefur's written testimony.

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## PACIFIC LEGAL FOUNDATION

*Rescuing Liberty from The Grasp of Government*

Chairman Kehoe and members of the Committee,

Thank you for asking me to speak to you today about eminent domain and the effect that the Supreme Court's recent decision in *Kelo v. New London*<sup>1</sup> will have on property owners in California. As you know, in *Kelo*, the Supreme Court held that local governments may seize the homes and business properties of citizens and transfer this property to private developers to use for their own profit. Of course, the U.S. and California Constitutions only allow government to take property through eminent domain for "public use."<sup>2</sup> But recent court decisions have held that "public use" means anything at all that the legislature decides will "benefit" the public. If city officials decide that greater tax revenue would benefit the public, therefore, they can seize property and give it to private owners for their own *private use*, and call this a "public use." As Abraham Lincoln once said, that's the sort of logic that would say a horse chestnut is the same thing as a chestnut horse.<sup>3</sup>

Unfortunately, the impact of this decision will be hardest on the poor, members of minority groups, older Americans, and mom-and-pop businesses. They tend to be found in areas most often targeted for redevelopment, and they lack the money and political influence necessary to persuade their local governments to respect their property rights. Too often, in cases across America, and right here in California, eminent domain is used to kick lower-income people out of their homes to make way for more expensive developments. In one case I worked on in Mississippi, for instance, 23 acres of land in a black neighborhood was condemned to make way for a Nissan car factory.<sup>4</sup> In Florida, when the city of Boynton Beach was considering using eminent domain against a minority neighborhood, the Pacific Legal Foundation sent an attorney to attend a community meeting to ask a few questions. At the next city council meeting, the head of the city's redevelopment agency gave a presentation called "Why Are We Doing This"? In that

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<sup>1</sup> 125 S. Ct. 2655 (2005).

<sup>2</sup> U.S. CONST. amend. V; CAL. CONST. art I, sec. 31.

<sup>3</sup> First Debate at Ottawa, Ill., Aug. 21, 1858, in 1 LINCOLN: SPEECHES AND WRITINGS 511 (1989).

<sup>4</sup> I discuss this in my article, *A Natural Rights Perspective on Eminent Domain in California*, 32 SW. U. L. REV. 569, 598-99 (2003).

presentation, he explained that although the cities of Boynton Beach and Delray Beach have almost the same population, “when comparing median household incomes, Boynton Beach ranks lower at \$39,845 than Delray at \$43,371. Boynton Beach ranks higher in median household income than West Palm Beach at \$36,774. . . . The purpose of this redevelopment, is to compensate for the loss of one of the City’s major taxpayers. Our property tax values are meager compared to other cities and this redevelopment is our attempt to enhance property values within this City. Our choices are to expand our tax base, raise property taxes or reduce services to our citizens. . . . In Boynton Beach, there is a significant amount of property that pays little or no taxes. Given that reality, we must do other things to compensate for that loss of tax dollars.”<sup>5</sup> In plain English: throw poor folks out of their homes, and the city’s median income will be higher. Well, that is undeniably true.

The problem is just as severe in California. When Dodger Stadium was built in Los Angeles, eminent domain was used to demolish a large portion of the minority neighborhood known as Chavez Ravine.<sup>6</sup> In 1998, the city of Garden Grove condemned several properties owned by lower income residents, destroying a mobile home park occupied by senior citizens and an apartment building rented mostly to hotel workers—to make way for a private developer to build a Hampton Inn.<sup>7</sup> San Jose—where the Redevelopment Agency has declared over a third of the city to be blighted—has decided to condemn the Tropicana Shopping Center, a popular shopping area for Hispanic merchants, to give the land to a private developer.<sup>8</sup>

Eminent domain hurts those who have the least political influence. But the Constitution was written to *protect* people who don’t have political influence. Companies like Costco, Ikea, or Home Depot (regular beneficiaries of eminent domain) can afford fancy lawyers in expensive suits to dazzle a city council and convince them to take property. But average citizens can only rely on the Constitution to protect their rights to the property they’ve earned and that they’ve come to love.

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<sup>5</sup> Minutes of Boynton Beach City Council Meeting, Apr. 29, 2003 at 1-2 (<http://weblink.ci.boynton-beach.fl.us/Index.asp?DocumentID=19751&FolderID=14493&SearchHandle=12868&DocViewType=ShowImage&LeftPaneType=Hidden&dbid=0&page=1>).

<sup>6</sup> <http://caot.lacitycollege.edu/112/FinalChavezRavine/index.htm>

<sup>7</sup> Nick Schou, *More Freebies for The Rich*, OC Weekly, June 29, 2001 at 12.

<sup>8</sup> DANA BERLINER, *PUBLIC POWER: PRIVATE GAIN* 35-36 (2003).

## Myths About Eminent Domain

I would like to point out some myths about eminent domain. The first is the myth that the *Kelo* case doesn't really affect Californians because California law only allows condemnations of property that's been declared blighted. Now, first of all, the legal standards for declaring property "blighted" are extremely vague. For example,

Factors that...substantially hinder the economically viable use...of buildings...[including] substandard design, inadequate size given present standards and market conditions, lack of parking, or other similar factors.

Adjacent or nearby uses that are incompatible with each other and which prevent the economic development of...the project area.

The existence of subdivided lots of irregular form and shape and inadequate size for proper usefulness and development that are in multiple ownership.<sup>9</sup>

Under these standards, which were likely adopted years after the properties were built on, a local government can declare virtually any property blighted.

Second, a blight designation doesn't expire. It can remain on the books for decades afterwards. If property is declared blighted in, say, the 1980s, it can be condemned today, even if in the intervening time, the property has improved.

Third, it is *not* true that *only* blighted property can be condemned. Any property *in a blighted area* can be condemned, even if that property is not itself blighted.<sup>10</sup> If a neighborhood is considered blighted, even perfectly fine property can be taken. In Chula Vista, the Rados brothers lost three acres of land when the government decided, under a 30-year-old blight designation, to give their land to the B.F. Goodrich tire company instead. Their property was not blighted, but the Court of Appeal said that even unblighted property can be taken to facilitate a redevelopment area.<sup>11</sup> "Collateral damage," so to speak.

Now let's consider a real-life case that I worked on earlier this year: *Mesdaq v. San Diego*

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<sup>9</sup> Cal. Health & Safety Code § 33031.

<sup>10</sup> See Cal. Health & Safety Code § 33321: "A [redevelopment] project area may include lands, buildings, or improvements which are not detrimental to the public health, safety or welfare, but whose inclusion is found necessary for the effective redevelopment of the area."

<sup>11</sup> *Redevelopment Agency v. Rados Brothers*, 95 Cal. App. 4th 309 (2001).

*Redevelopment Agency*.<sup>12</sup> Ahmad Mesdaq, an immigrant from Afghanistan, owned the Gran Havana Cigar Factory in the fashionable Gaslamp District of San Diego. The area had been declared blighted long ago, but now his store was an expensive, clean hangout for yuppies to smoke expensive cigars and drink expensive coffee. Nevertheless, the city condemned the store to make way for a hotel. He went to court to present evidence that the property was not blighted. The city replied that if they were not allowed to condemn the land, the following catastrophes would occur:

The number of rooms [would be] reduced from 334 rooms to 237.

The on-site parking [would be] reduced....

Loss of 150 linear feet of street footage.

Reduced ballroom size....

Substandard lobby and arrival area.<sup>13</sup>

The trial court held that Mr. Mesdaq was not legally allowed to introduce new evidence to challenge the city's declaration that the property needed to be taken. The Court of Appeal agreed, and the State Supreme Court refused to hear the case. On June 12, he closed his store for good.

This is a terrible shame on California and the United States. Mr. Mesdaq came here from Afghanistan for an opportunity to earn an honest living in a country that would respect his property rights. But under the current, broad interpretation of the eminent domain power, government can take property and transfer it to any private party if the government decides that doing so will benefit the public in some way. This means that powerful lobbyists, such as Costco, Ikea, or Home Depot, routinely persuade local governments to seize property for their own profit, using as their excuse that doing so will ultimately increase economic activity. *The problem is that this rationale would allow the condemnation of anyone's property at any time for any purpose that officials decide is important.* In Lancaster, California, in 2001, Costco persuaded the city council to condemn a 99 Cents Store and give it to Costco even though Costco already had a store in the same minimall. *Give the property to us to expand, said Costco, even though the property is not blighted now, because it might be blighted, some day in the future.* Fortunately, a federal court did not allow that. But it found that the city council had been "willing to go to any lengths—even so far as condemning commercially viable, unblighted real property—simply to keep Costco within the city's boundaries."<sup>14</sup> The abuse of eminent domain has turned many city councils into a perverse kind of realty business, able to sell other people's land whether they like it or not.

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<sup>12</sup> Fourth Appellate District, Division One No. D045874, California Supreme Court No. S132386.

<sup>13</sup> See Answer to Petition for Writ of Mandate, *Mesdaq v. Superior Court*, Civil Case No. GIC829293-A (Cal. App. 4th Dist. Feb. 25, 2005) at 8.

<sup>14</sup> *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001).

Another myth I hear a lot is that eminent domain is “only used as a last resort.” This is something the redevelopment elite say a lot. But this is just like the robber who says *if you give me your property, nobody will get hurt*. They use eminent domain whenever people decide that they don’t want to sell their property. In the years between 1998 and 2003, California “resorted” to eminent domain 5,583 times. 223 of those were condemnations to transfer property to another private owner for development and profit.<sup>15</sup>

Another myth is that eminent domain is needed to revitalize areas where economic development is failing.<sup>16</sup> This is simply false. As the Goldwater Institute’s Mike Brnovich points out in a recent study,<sup>17</sup> there are many effective ways to foster economic development without stealing people’s land. Tax breaks, enterprise zones, better police services, loosening the restrictions and the regulatory burdens on businesses, such as occupational licensing requirements, all can do wonders to improve struggling areas. Brnovich points out that Seattle, Washington, has successfully revitalized its downtown district without the use of eminent domain. Most importantly, protecting private property rights is essential to a healthy economy. Allowing private parties to benefit from eminent domain means that property rights become mere permissions, which can be revoked whenever government decides to revoke them. If government can take someone’s home to give to Costco, what’s to stop the government from taking away the Costco in a few years, and giving the land to someone else instead? A healthy city economy can and should be achieved without the use of eminent domain.

One last myth: it’s often said that property owners are “included in the process” when a city engages in economic redevelopment. It’s true that cities are required to hold public hearings before condemning land. But many people don’t know about these hearings, and don’t know how important they are until it’s too late. You often only find out about these hearings if you read the bulletin board at the city library or the tiny announcements in newspapers nobody buys. And citizens who do attend are often allowed only a few minutes to speak. In a case I worked on, *Evans v. San Jose*, over a hundred people attended a hearing, and each was only allowed two minutes to speak.<sup>18</sup> City council members often just ignore what the people at these hearings say, because they are too focused on building some new shopping center. And often they mislead citizens, telling them, for example, that eminent domain will only be used as a last resort. Most importantly, average citizens don’t have the time and resources to fight a condemnation in many

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<sup>15</sup> Dana Berliner, *Public Power, Private Gain*,  
<http://www.castlecoalition.org/report/reportStates/California.shtml>

<sup>16</sup> See, e.g., Editorial, Pasadena Star-News, July 31, 2005  
(<http://www.pasadenastarnews.com/Stories/0,1413,206~11851~2989866,00.html>) (“In short, you can’t make omelets without breaking some eggs.”)

<sup>17</sup> Mark Brnovich, *Condemning Condemnation: Alternatives to Eminent Domain*,  
<http://www.goldwaterinstitute.org/pdf/materials/454.pdf>.

<sup>18</sup> 128 Cal. App. 4th 1123 (2005).



cases. Simply saying that property owners get notice and a chance to be heard is an empty and cynical excuse for taking one person's property and giving it to another.

### Some Other Examples

Here are some examples of redevelopment eminent domain cases that have occurred in California in recent years.

- In *Cottonwood Christian Center v. City of Cypress*,<sup>19</sup> the city redevelopment agency sought to condemn property belonging to a church and give the land instead to a Costco for development. The federal district court found that the city's "planning efforts here appear to consist of finding a potential landowner for property that they did not own, and then designing a development plan around that new user."
- The San Jose Redevelopment Agency, has declared 60 miles—almost a third of the entire city—to be "blighted."<sup>20</sup> In its relentless pursuit of real estate, the RDA has engaged in highly questionable tactics. For example, it accepted a report by its consultants, Keyser Marston Associates, which was largely based on "windshield surveys" of neighborhoods to investigate the possibility of economic "blight." A windshield survey is an examination of a neighborhood by an assessor who merely *drives through* the area, without getting out of the car. In one case, the RDA declared the comfortable neighborhood of Naglee Park (home to Congresswoman Zoe Lofgren) blighted, due, among other things, to the presence of wet leaves on Congresswoman Lofgren's tennis court, visible garbage cans sitting on the curb on trash day, and the presence of security bars on home windows—which actually turned out to be decorative Victorian ironwork.<sup>21</sup>
- In Alhambra, a successful doctor's office and art gallery are being threatened with condemnation under a blight designation that is at least 25 years old, even though the area is commercially productive and not blighted. The city simply wants to build a shopping area that will compete with Pasadena's successful "old town" development.
- Here in Sacramento, successful developer Mo Mohanna—a well-known figure in the community who helps run Loaves And Fishes to feed the homeless—has been told that his

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<sup>19</sup> 218 F. Supp. 2d 1203, 1229-30 (C.D. Cal. 2002).

<sup>20</sup> Sharon Simonson and Timothy Roberts, *Blight Ruling Won't Stop City*, Silicon Valley/San Jose Business Journal, April 8, 2005, <http://seattle.bizjournals.com/sanjose/stories/2005/04/11/story1.html>

<sup>21</sup> Carol Lloyd, *A Blight on Urban Renewal*, SFGate.com, Mar. 4, 2005, <http://www.sfgate.com/cgi-bin/article.cgi?file=/gate/archive/2005/03/04/carollloyd.DTL>

property on the K Street Mall, including the Men's Warehouse, will be taken from him and given to Joe Zeiden, owner of Z Gallery, which already has a store in the Downtown Plaza. When Mohanna complained, city officials told him that they would be happy to condemn someone else's property and give it to him in exchange.<sup>22</sup>

There are many other examples cited in Dana Berliner's report, *Public Power: Private Gain*.<sup>23</sup>

### The Damage of Eminent Domain

What these examples show is that eminent domain tends to work this way: powerful private developers go to a city council and tell them, "condemn this property and give it to us, and we will build a store there, and we'll make money; you'll look like visionaries for creating a new shopping area; the tax revenue for the city will go up—and the only people who lose will be the property owners who can't speak for themselves." Property owners are like William Graham Sumner's "forgotten man": "As soon as A observes something which seems to him to be wrong, from which X is suffering, A talks it over with B, and A and B then propose to get a law passed to remedy the evil and help X. Their law always proposes to determine what C shall do for X.... [W]hat I want to do is to look up C. I want to show you what manner of man he is. I call him the Forgotten Man."<sup>24</sup>

President Eisenhower once warned us of the "military-industrial complex." But today, citizens are threatened by the "Costco-Ikea-Home Depot-Redevelopment Agency" complex, a system that abuses government power and enriches developers at the expense of other people's rights. *Mother Jones* magazine recently described the situation as "privatized eminent domain."<sup>25</sup> The victims of this system are primarily politically unpopular or weak groups who have little time and money to spend on lobbying. They are busy trying to make a living for themselves and their families and do not have time to ask the government to do them favors. When threatened with eminent domain, they usually just take the amount government offers them, and go somewhere else—if they can afford to, considering the amount of "just compensation." In the few cases when they do sue, they almost invariably lose. They are forgotten, therefore, and their rights

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<sup>22</sup> Anthony J. Gilbert, *The Redevelopment Game*, Sacramento Union, Dec 4 2004;  
Mary Lynne Vellinga, *Court Ruling Muddles K Street Plan*, Sacramento Bee, Aug. 1, 2005.  
[http://www.sacbee.com/content/news/courts\\_legal/story/13334963p-14177001c.html](http://www.sacbee.com/content/news/courts_legal/story/13334963p-14177001c.html);  
Ryan Rose, *Eminent Revolt*, Sacramento News And Review, Aug. 11, 2005  
<http://www.newsreview.com/issues/sacto/2005-08-11/news3.asp>.

<sup>23</sup> <http://www.castlecoalition.org/report/reportStates/California.shtml>

<sup>24</sup> [http://prawo.uni.wroc.pl/~kwasnicki/EkonLit/Sumner\\_Forgotten.html](http://prawo.uni.wroc.pl/~kwasnicki/EkonLit/Sumner_Forgotten.html)

<sup>25</sup> Gary Greenberg, *The Condemned*, *Mother Jones* Jan./Feb. 2005  
[http://www.motherjones.com/news/feature/2005/01/01\\_407.html](http://www.motherjones.com/news/feature/2005/01/01_407.html)

disregarded, while wealthy developers and visionary officials use the excuse of economic “underperformance” to raze neighborhoods and build cookie-cutter minimalls with no personality, no distinctiveness, no neighborhood feeling. *Eminent domain destroys communities*—or, rather, destroys everything that makes a community a community.

Also, as I explain in my article, “They’re Coming To Take Your Land,”<sup>26</sup> eminent domain abuse severely damages people’s faith in their own government. The idea that “good fences make good neighbors” is a vital insight into how government ought to operate. People get along best when they feel secure in their possessions, and when they can be confident that their earnings will be secure from their neighbors’ desires. The Bugryn family of Connecticut, whom I represented in the *Kelo* case, had their 32-acre farm and their two homes taken from them to give to an iron works business. Frank Bugryn, an 80-year-old immigrant who escaped the Nazis in Poland, and fought for the United States in World War II, told reporters “I’m a veteran of WWII, I fought for our freedom, democracy. But it seems 60 years later it doesn’t work.”<sup>27</sup> That sort of cynicism is the real effect of eminent domain.

### Possible Reforms

What can be done? Several things. The first, and most important thing, is not something that this committee, or any committee, can do directly. That is, Californians, and particularly our government officials, must come to see the vital importance of property rights to any free country. There can be no other rights without property rights—you cannot have freedom of the press without owning a press; you cannot have freedom of religion when government can condemn your churches; you cannot have a right to pursue happiness when your earnings can be taken from you and given to someone else. These are not just flag-waving platitudes. A civilized political system simply *cannot survive* when government can take away people’s property and give it to whatever group has the most political influence. The Constitution is designed to put limits on government, and those limits must be supported by a general understanding of political principles. I would strongly recommend that our political leaders study some of the important research on property rights, starting with Richard Pipes’ 1999 book, *Property And Freedom*, and Steven Greenhut’s newly published *Abuse of Power: How the Government Misuses Eminent Domain*.

As for what can be done by law:

- **Clarify the definition of “public use”**: it means *public* use, not private use. This could be done by defining these terms more clearly, or by simply requiring that government own and continue to possess, whatever property it takes, rather than allowing government to act as a real-estate agent. Amending the state Constitution is the only way to *really* rein in

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<sup>26</sup> *Liberty*, March 2005,

[http://www.libertyunbound.com/archive/2005\\_03/sandefur-land.html](http://www.libertyunbound.com/archive/2005_03/sandefur-land.html)

<sup>27</sup> WFSB Bristol, *Bristol Seeks to Evict People for Industrial Park*,

<http://www.wfsb.com/Global/story.asp?S=954365>

eminent domain abuse.

- ***Tighten the legal definition of “blight”***: This would help ensure that eminent domain is only used for truly unsafe property, not just property that fails to produce enough tax revenue. Starting in the 1950s, eminent domain was widely used to demolish slums where the structures themselves were dangers to the community. This was unfortunate because even poor people have the right to their property, and using eminent domain to kick them out of their property soon turned into what was called “urban renewal,” which simply kicked poor, racial minorities out of their property to make way for middle class and white residents and shoppers instead. The current situation is, if possible, even worse. Now, the definition of “blight” is so loose that even clean, profitable property like Ahmad Mesdaq’s cigar store can be declared blighted.

- ***Reform the civil procedures to allow property owners a realistic chance in the courtroom***: In California, once a city council passes a resolution of necessity (which authorizes them to take property) a property owner may not introduce new evidence in a trial court to challenge that resolution. He or she can only rely on the evidence that was provided at the hearing where the resolution was adopted. See, e.g., *Evans v. City of San Jose*<sup>28</sup>; *Inland Valley Development Agency v. Patel*.<sup>29</sup> And a trial court will uphold a city’s resolution of necessity if there is what lawyers call “substantial evidence” to support that conclusion. Unfortunately, “substantial evidence” does not mean much evidence at all. In Mr. Mesdaq’s case, the court held that it means any evidence whatsoever, no matter how flimsy. Under California law, “the trial court is required to apply a very deferential, section 1085 standard of review, in assessing the validity of the...agency’s public necessity finding.” *Id.* This should not be the case. Courts should exercise an independent review, without deference, of a city’s decision to condemn property. And the burden of proof should be on the condemning agency, not on the person who earned that property.

- ***Make blight designations time-limited***: Under current law, a blight designation can sit on the books like a bomb waiting to go off.<sup>30</sup> Often, city officials don’t even remember if there

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<sup>28</sup> 128 Cal. App. 4th 1123, 1136 (2005).

<sup>29</sup> 2005 WL 1693683, \*3 (Cal. App. 4 Dist. 2005).

<sup>30</sup> In *Boelts v. City of Lake Forest*, 127 Cal. App. 4th 116 (2005), the Court of Appeal held that a 14-year old blight designation was no longer valid. “In doing so, however,” the court said, “we stress that *our decision today is grounded in the particular facts* before the trial judge.... The area was originally part of the unincorporated area of a county,

is a blight designation on a piece of property or not, and they have to thumb through their archives even to find out. Not only does this mean that a property owner may discover only too late that the land is a potential target of eminent domain, but it also *perpetuates* blight. Blight, often as not, is created by government. Would you invest in property that could be condemned at any time? Because blight designations can sit on the books for a long time, investors are understandably wary of investing in precisely those neighborhoods where investment is so necessary.

These reforms would all be positive steps, but none of them will be as effective as amending the state Constitution to prohibit the government from condemning property and selling or leasing it to private companies. Lesser steps have been tried in the past— the definition of “blight” was narrowed some years ago, but that did not solve this problem. So while these other recommendations would improve the protections for California’s homeowners, only amending the state Constitution will really protect the victims of eminent domain against the Costco-Ikea-Home Depot-Redevelopment Agency Complex.

Eminent domain is one of the most extreme forms of government coercion. I have never met someone who said, “Well, thank goodness they took my home or business away through eminent domain!” The unfairness under California and federal eminent domain law needs serious attention now.

Thank you.

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and it was the county that adopted an original redevelopment plan focusing on traffic improvements.... [T]he original redevelopment plan did not include the power of eminent domain. Then, 14 years later and after the area had been incorporated into the city of Lake Forest, the city adopted an amendment to the 14-year-old redevelopment plan adding the power of eminent domain, and the focus of the city’s amendment was no longer traffic improvement, but the upscale remodeling of two local shopping centers.... Our opinion *should not, however, be read to establish an automatic rule to the effect that any time a power of eminent domain is added to a redevelopment plan, a new finding of blight is ipso facto ‘warranted.’* We need not, and do not, go that far in this decision.” *Id.* at 122-23 (emphasis added).

Testimony for House Federal & State Affairs Committee  
HCR 5040  
David Pfrang  
March 6, 2006

My name is David Pfrang. I am a farmer and rancher from Nemaha County where I live with my wife and our 3 little girls. As a past victim of eminent domain from a watershed board, I'm here today because of our concerns of the potential abuse of eminent domain.

Several years back Walter Adams, Jr. near Salina had his property taken by the threat of eminent domain. The watershed district in that area took far more land than was needed to build a lake on the property. Then they gave it to a realtor to sell as a hunting and fishing area for a profit to 3 bankers.

Lloyd Doherty in Jackson County was coerced by the area watershed district to sell approximately 290 acres of his land. This is far more land than what is normally needed to put in an approximately 90 acre watershed pond. Doherty's land was bought by a doctor in Kansas City.

Jim Donahue of Donahue Corporations was willing to donate 70 acres of his land if the watershed board would move the structure up so that he and his cattle could have access to the other side of the pasture. The watershed board refused, and then they wanted 160 acres~~90 acres more than what was requested originally.

A watershed dam was proposed 30 yards from Bev Nelson's 100-year old home near Lincoln, KS. The watershed board harassed Bev's father for 30 years to donate his easements of 120 acres. Following his death the board continued to harass Bev. Once again, 120 acres far exceeded the amount needed to build the structure.

Marc Marcoux in Pottawatomie County had around 300 acres taken by eminent domain by the watershed district board. The structure was built and is now the Pottawatomie State Fishing Lake. The remainder of land **that was not needed** for the structure was sold to a different landowner, and the rest was given to the State Lake & Park #3. Due to health reasons, Marcoux sold his share of the land. My brother and I now own the land, and to this day the pasture is still landlocked. This means that in order to get our cattle out, we must go through the neighbor's pasture. It still makes me sick to think about the abuse of property rights in this situation.

Jeffrey Energy Center requested 12,000 acres for its facilities. Eminent domain was used for some of this acreage, and now what wasn't needed is being used as a hunting and fishing preserve.

These are just a few cases that we stumbled upon in our 4 year fight against eminent domain. We are still against eminent domain. Our concern today is the **abuse** of eminent domain~~when more acres are taken than are needed.

We learned much from *our* experience with eminent domain. It's like having a loaded gun pointed at your head. They say, "You either donate your land to us, or we'll take it. **OR WE CAN TAKE IT ALL!!**"

In our situation we proved that the engineer involved in the project beefed up the numbers to make the project appear feasible. After all, an engineer is paid to *build* and not to *not build*.

Basically it all boils down to one thing~~ Someone has something that someone else wants. How far will some people go to get what they want??!! You as a committee alone have the opportunity to protect the rights of the owner.

While the issue of eminent domain is on table, let's clean up the entire thing. It doesn't matter if it's economic development or the abuse from watershed districts. Right now Kansas needs to do a better job of protecting individual property rights.

FEDERAL AND STATE AFFAIRS

Date 3-6-06

Attachment 14

*PUBLIC POLICY STATEMENT*

HOUSE COMMITTEE ON FEDERAL & STATE AFFAIRS

Re: HCR 5040—Concerning Eminent Domain

**March 6, 2006  
Topeka, Kansas**

**Testimony provided by:  
Patrick D. Wilbur  
Libertarian Party of Kansas**

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Chairman Edmonds and members of the House Committee on Federal and State Affairs, thank you for the opportunity to share my opinion regarding eminent domain powers. My name is Patrick Wilbur and I serve as Vice Chairman of Libertarian Party of Kansas. I am a resident of Lawrence.

As you know, the Libertarian Party has been a staunch defender of property rights since its creation. The Kelo v. New London decision has brought the issue of property rights to the forefront of public policy. While I disagree with the U.S. Supreme Court decision, this year's session provides an opportunity for the legislature to provide property owners the protection that they have lacked in Kansas for too long.

I am writing to express my support for HCR 5040. I believe this bill can effectively provide the protection needed against private-to-private transfer and eminent domain abuse. I would suggest that the following revisions be implemented to the current text. First, that the legislative approval feature for private-to-private transfer be removed. I believe that while this is a stringent safeguard the amendment can be stronger if it simply states that the private parties involved in the transaction will negotiate their own price. Secondly, I suggest a requirement that any transfer that includes the use of eminent domain be reviewed by the court. This would help ensure that land transferred for public use is actually used in the public interest.

The 5<sup>th</sup> amendment of the U.S. Constitution clearly states that the power of eminent domain will be used only for public use projects. This is the time to guarantee protection for Kansas property owners. It is the legislature's responsibility and duty to ensure that this is accomplished during the 2006 session. I will support any constitutional amendment or statute that provides effective protection. I cannot support

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legislation that contains loopholes which could allow continued abuse. I urge you to pass legislation that contains the strongest language possible and protect your constituents. The middle ground on this issue is very scarce. Again, thank you for your time.





**GACHES, BRADEN, BARBEE & ASSOCIATES**  
PUBLIC AFFAIRS & ASSOCIATION MANAGEMENT

825 S. Kansas Avenue, Suite 500 ♦ Topeka, Kansas 66612 ♦ Phone: (785) 233-4512 ♦ Fax: (785) 233-2206

**House Federal and State Affairs Committee  
HCR 5040 – Concerning Eminent Domain  
Comments of Coalition for Kansas Job Growth  
Submitted by Ron Gaches  
Monday, March 6, 2006**

Thank you Chairman Edmonds for this opportunity to share with your committee the concerns of the Coalition for Kansas Job Growth regarding the constitutional amendment HCR 5040.

The Coalition was formed to protect the use of eminent domain for economic development purposes. Our members recognize there is broad-based support in the legislature and among the general public for some sort of restrictions on the use of eminent domain. Although Kansas communities have exercised great restraint in the use of eminent domain, there remain concerns about its future use. At the same time, most legislators seem to understand that key projects like the Manhattan downtown mall, Kansas Speedway, Target Distribution Center and Merriam Town Center are all worth having and we need to maintain the tools to make those projects possible.

In an effort to find a workable solution, our Coalition members have agreed to support prohibitions and restrictions on the use of eminent domain for economic development and additional protections and compensation for affected property owners. For the past several weeks, the Coalition has been in ongoing negotiations with representatives of major property rights groups, the Kansas Association of Realtors, the League of Municipalities, and others in an effort to develop a proposal that the needs of all participating organizations. We believe we are close to finalizing that effort and are waiting now for the bill draft that incorporates the principals where we have formed a consensus. That proposal will limit use of eminent domain and increase landowner rights in several ways including:

- Total prohibition of use of eminent domain for economic development purposes to acquire agricultural land outside of city limits.
- Total prohibition of use of eminent domain for economic development purposes to acquire feedlots or stockyards.
- Prohibit entities other than cities and counties from exercising eminent domain for economic development purposes. Port Authorities, municipal airports, improvement districts, etc. would not have the authority.

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Date 3-6-06  
Attachment 16

- Increase compensation to landowners whose property is acquired through eminent domain for economic development purposes, based on a sliding scale that increases compensation based on length of ownership.
- Agree to neutralize the presumption under the law that says any acquisition of land by eminent domain for economic development purposes is a legitimate use.
- Agree to requirement of a super majority two-thirds vote of the city council for approval of a development plan for a project utilizing eminent domain for economic development purposes and a second two-thirds vote for actual approval of the acquisition.
- Agree to a judicial review that would take place automatically at the time an acquisition by eminent domain is approved. This would not infringe on the landowners right to separately file an appeal of any compensation amount they might receive as result of eminent domain.
- Agree to a minimum economic development project size when eminent domain is used, of either 1% of assessed value of the jurisdiction exercising eminent domain, or \$10,000,000.
- Agree to the process and administrative protections included in Senate Bill 493, which has passed the Senate Commerce Committee.

We believe the statutory protections afforded landowners by a bill with this content will actually provide property owners with stronger protections than those proposed in HCR 5040.

HCR 5040 proposes to leave to a super majority vote of the legislature the responsibility for approving use of eminent domain for economic development purposes. But it provides none of the added procedural and process burdens on the local unit of government envisioned by our bill. Nor does the proposed constitutional amendment provide agricultural land, stockyards and feedlots the level of protection as our draft bill. Further, the constitutional amendment does not ensure landowners the increased level of compensation guaranteed by our proposal.

A final concern we have about the proposed constitutional amendment is that it would actually usurp the authority and responsibility of the local unit of government to make a decision about use of eminent domain in the best interest of its landowners and voters. For example, under HCR 5040, an economic development project that it totally opposed by the local city and county and area landowners could be approved by a two-thirds vote of the legislature. This leaves open the possibility that the legislature could approve a new destination, recreational reservoir and associated residential and commercial development that was opposed by both the affected county and nearby cities. While that

outcome may seem remote with the current makeup of the legislature, that is a possibility if HCR 5040 were to become part of our constitution.

The Coalition for Kansas Job Growth agrees that new limits need to be imposed on the use of eminent domain for economic development purposes, and further agrees that landowners deserve additional protections. It is our expectation that we will be able to bring use such a proposal shortly and that passage of constitutional amendments such as HCR 5040 will not be necessary.

The Coalition for Kansas Job Growth was formed to ensure local chambers of commerce and economic development organizations have the tools needed to create jobs and grow their communities. Members of the Coalition include:

Butler County Economic Development  
Coffee County Economic Development  
DeSoto Chamber of Commerce  
Emporia Chamber of Commerce  
Ellis County Coalition for Economic Development  
Gardner Chamber of Commerce  
Great Bend Chamber of Commerce  
Greater Kansas City Chamber of Commerce  
Hutchinson Chamber of Commerce  
Junction City Chamber of Commerce  
Kansas Association of Realtors  
Kansas Chamber of Commerce Executives  
Kansas Economic Development Association  
Lawrence Chamber of Commerce  
Leawood Chamber of Commerce  
Lenexa Chamber of Commerce  
Manhattan Chamber of Commerce  
McPherson Industrial Development Co.  
Merriam Chamber of Commerce  
Newton Economic Development Council  
North East Johnson County Chamber of Commerce  
Olathe Chamber of Commerce  
Ottawa/Franklin County Economic Development  
Overland Park Chamber of Commerce  
Overland Park Economic Development Council  
Pittsburg chamber of Commerce  
Pittsburg Economic Development  
Regional Development Association of East Central Kansas  
Salina Chamber of Commerce  
Shawnee Chamber of Commerce  
Topeka Chamber of Commerce  
Winfield Chamber of Commerce



League of Kansas Municipalities

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**To:** House Federal and State Affairs Committee  
**From:** Don Moler, Executive Director  
**Re:** Opposition to HCR 5040  
**Date:** March 6, 2006

First I would like to thank the Committee for allowing the League to appear today in strong opposition to HCR 5040. The League appears today in opposition to HCR 5040 as we believe it is simply a device to make any use of eminent domain for economic development purposes virtually impossible as a matter of law, and therefore effectively end this practice in Kansas. As a bit of a background, the use of eminent domain for economic development purposes has been used very sparingly in Kansas over the years, and in the few instances it has been used there have been very positive results. I have attached to my testimony today a copy of a League Legislative Briefing paper providing information on the six principal uses of this power in Kansas over the past 20 years.

While this bill purports to not ban the power, it would effectively end it's use in Kansas. It would prevent cities and counties, and our citizens, from utilizing this power for effective economic development projects. It also sets such a high bar that the chances of an economic development eminent domain project passing the Kansas legislature, with the required 2/3 majority of both Houses, would seem a virtual impossibility. I should also point out that the League has provided the House with what we believe to be a reasonable piece of legislation concerning the use of eminent domain for economic development purposes. HB 2741, the Fairness in Economic Development Act, is currently residing in this Committee, and we would urge the Committee to seriously consider it as a reasonable alternative on this issue.

HB 2741 strengthens the rights of private property owners while at the same time preserving the power of eminent domain for economic development purposes for the benefit of the public at large. We believe this balance is essential to helping maintain economic development in Kansas. As a result, we would urge the Committee to reject HCR 5040. I would once again like to thank the Committee for allowing the League to testify today, and will be happy to answer any questions the Committee may have.

FEDERAL AND STATE AFFAIRS

Date 3-6-06

Attachment 17



# Legislative Briefing

## Eminent Domain

This briefing sheet was designed to answer some of the many questions that have been posed recently regarding the use of eminent domain authority for economic development purposes.

### Legal Issues

- The *Kelo v. City of New London* case was NOT an expansion of government's authority to condemn property. In fact, the U.S. Supreme Court upheld a long line of precedent which says that economic development is a legitimate public use. In addition, the Court NARROWED the power to some degree by indicating that there must be a comprehensive plan for revitalization in place for the area where the use of eminent domain is proposed.
- It has always been, and it is still the case, that it is unconstitutional to take private property from one land owner and give it to another for a private use. There must always be a finding that there is a public use where there is a benefit to the public.

### LKM Position

"Support legislation which continues to allow for the use of eminent domain for economic development purposes, and strengthens the process which balances private property interests and the welfare of the community at large."  
*2006 Statement of Municipal Policy*

### Components of Such Legislation Include:

- Increased level of compensation for landowners when the project is for economic development purposes;
- Judicial review of the project to determine whether there is a public use.

### Major Uses of Eminent Domain in Kansas

Cities and counties in Kansas have used eminent domain for economic development purposes only in a few cases. Each time, it has been for a major project of local and statewide importance. The expansion in each of these areas represents growth in the thousands of percent and a significant increase in jobs and taxes generated.

The following is some basic information about six major projects in Kansas:

- Kansas Speedway and Village West Development in KCK.

Appraised Value Before Project	\$ 10,316,408
Amount Paid to Landowners	Multiple owners were paid 125% of value plus relocation costs.
Present Appraised Value	\$240,015,200
Difference	\$229,698,792
Percent Growth	2226%

Other Benefits include 4,000 new jobs, \$7 million in new property taxes, \$2.8 million in new state income tax. Before the project, the area generated a total of \$208,409 in property taxes annually. In 2005, the same land generated \$6.4 million in property taxes.

# Eminent Domain (continued)

- Baron BMW in Merriam.

Appraised Value Before Project	\$1,425,960 (5 properties)
Amount Paid to Landowner	4 of the 5 properties were purchased outright by BMW. Only 1 had to be condemned and that landowner received \$1,000,000.
Present Appraised Value	\$7,640,160
Difference	\$6,214,200
Percent Growth	436%

The only property which had to be condemned had a long history of municipal code violations. It had a history of vacancy, interrupted by short-lived businesses. Still, that landowner received \$1,000,000 in the eminent domain proceeding.

- Merriam Town Center.

Appraised Value Before Project	\$ 3,804,180 (135 properties)
Amount Paid to Landowner	\$1.25 per square foot plus \$1,000 for every year the owner occupied the house. All but 8 landowners accepted the developer's offer.
Present Appraised Value	\$57,373,330
Difference	\$53,569,150
Percent Growth	1408%

Other benefits include an increase in jobs from 24 before the project to 862 after the project. Annual property taxes paid before the project were \$119,030. After the project, annual property taxes total \$1,405,374. Annual sales taxes generated in the area prior to the project were estimated at \$10,000. Currently, \$8,088,895 in sales taxes are generated annually in this area.

- Target Distribution Center, Shawnee County.

Appraised Value Before Project	\$ 243,970
Amount Paid to Landowner	\$ 329,000
Present Appraised Value	\$43,331,000
Difference	\$43,087,030
Percent Growth	17,661%

Other benefits include a increase from 0 to 620 jobs in year 1. Also, annual property taxes paid prior to project were \$7,779.66 and current property taxes collected in this area total \$1,402,103.95.

- Home Depot, Pittsburg

Appraised Value Before Project	\$ 361,890
Amount Paid to Landowner	\$1,032,000
Present Appraised Value	\$5,052,600
Difference	\$4,690,710
Percent Growth	1296%

Other benefits include an increase from 12 to 100 jobs. In addition, annual property taxes generated before the project were \$11,957 and are currently \$173,695.

- Manhattan Town Center

Appraised Value Before Project	\$10,754,592
Amount Paid to Landowner	80 parcels were needed, only 9 had to go to condemnation.
Appraised Value in 2003	\$46,805,832
Difference	\$36,051,240
Percent Growth	355%



KANSAS BAR  
ASSOCIATION

**Testimony in Opposition to  
House Concurrent Resolution No. 5040**

Presented to the House Federal and State Affairs Committee on March 6, 2006

James W. Clark, Legislative Counsel, Kansas Bar Association

The Kansas Bar Association is a voluntary professional association with over 6,700 members, most licensed to practice law in Kansas. Its membership is as diverse as the spectrum of the practice of law, and also includes members of related professions, such as banking, insurance and real estate. Consequently, the KBA has taken no position on the exercise of the power of eminent domain as it relates to economic development. We do recognize, however, that a recent ruling by the United States Supreme Court on taking private property for economic development, while controversial, is consistent with established Kansas law.

However, the Kansas Bar is opposed to restricting or otherwise modifying the existing law of eminent domain by amending the Kansas Constitution. The position of the KBA is that this is a matter which is properly left to the discretion and collective wisdom of the Legislature in the decades to come to serve the best interests of all the citizens of Kansas. Without constitutional restrictions, the Legislature will be better able to retain the flexibility required for economic development as Kansas continues its efforts to compete in a global economy.

The restrictions contained in HCR 5040, while expressing the sentiments of many current legislators and their constituents, creates restrictions on the eminent domain powers of state and local governments that will significantly impair their abilities to react to changing economic conditions in the future.

The Kansas Bar Association urges the Committee to take no action on the proposed amendment.

FEDERAL AND STATE AFFAIRS

Date 3-6-06

Attachment 1B

Testimony: HCR 5040  
House Federal and State Affairs Committee  
March 6, 2006  
By: Doug Kinsinger, President & CEO  
Greater Topeka Chamber of Commerce

Good afternoon, Chairman Edmonds and members of the committee:

The Greater Topeka Chamber of Commerce would like to express our opposition to HCR 5040, a constitutional amendment to eliminate the use of eminent domain for economic development purposes unless 2/3s of the legislature and the governor approve of the action. Although we do agree that legislation providing additional protection for land owners should be implemented, we do not believe the necessity for virtually prohibiting the use of eminent domain by constitutional amendment is necessary. We do not believe the power of eminent domain has been abused or misused in our community or throughout the State of Kansas. Quite the contrary, local governments have been quite measured in their use of eminent domain powers. Eminent domain for economic development purposes is a tool of last resort in situations that have resulted in providing communities like ours with public benefits.

In 2001, GO Topeka, our chamber's economic development division, began a preliminary investigation of potential large sites suitable for a mixed use industrial commerce park. After much research, we began focusing on property located south of the city. In the spring of 2002, GO Topeka began optioning this property for the development of a new publicly-owned commerce park. Due to an inquiry by a company looking to locate a large regional distribution center, timing of assembly of the commerce park became critical. Representatives of the company made it clear that if Topeka were to be considered for the project, the land had to be under control of one owner.

Purchase agreements were reached with the owners of 460 acres; except the owner of 3.8 acres. His parcels of land were critical to the location of the regional distribution center. Without these parcels secured, the distribution center would not locate their facility in Topeka/Shawnee County. The specific location decision was determined by the company because of the level terrain, saving construction costs of millions of dollars and valuable time, the ready utilities, and as a result of the efforts of the local community partnering with the company to complete construction of the facility within the company's timeframe.

On the 3.8 acres was a metal building added by the owner for use by his construction company. The land had been purchased by the owner at an auction in December, 2000 for \$12,000. The metal building was added in October, 2001 and was valued at \$180,000. The parcel was zoned for industrial use.

The owner of the 3.8 acres initially was offered \$250,000 to purchase his building site and the 4000 sq. ft. building, and an additional \$50,000 for an adjoining 60,000 sq. ft. of land. There were counteroffers back and forth, including an offer to relocate the company to another site within the industrial park and infrastructure cost paid by the buyer in addition to a cash payment. Agreement was not reached; eminent domain proceedings were initiated. Prior to a decision from the Kansas Supreme Court, after both sides had presented their case, the property owner approached GO Topeka and asked for a \$1.2 million settlement while awaiting the decision of the Court. The offer was declined.

The eminent domain proceedings were initiated by Shawnee County in March, 2002 after all efforts to negotiate a fair price had been exhausted. During the eminent domain process the panel of three appraisers agreed on a total value of \$329,000, which the owner ultimately was awarded. The owner appealed to the Kansas Supreme Court the legality of taking his property by the County. The Court upheld the County's authority to take the property for the public purpose of economic development.

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The 1.4 million sq. ft. Target Distribution Center (the size of 25 football fields) was built on the 142 acre site. The project resulted in \$80+ million in capital investment and an initial 550 to 600 new jobs; over 9000 Kansans applied for those initial jobs. The first year of payroll was \$17+ million. Eventually the workforce will grow to 1000. There are approximately 500 inbound and outbound trucks utilizing the 238 docks at the center daily. These jobs were welcome news in Topeka/Shawnee County after suffering several job reductions in the early 2000's.

It is our strong belief that the decision to utilize eminent domain in securing the Target Distribution Center has benefited our community and the state of Kansas. If HCR 5040 would have been in effect at the time we were approached by the Target Distribution Center, these jobs and this facility would not be in Topeka, Kansas. The timeframe the company was working under would not have allowed us to wait for the legislature to meet, debate, and vote for approval. The fact that we were competing with other communities in other states would not have allowed us to divulge much information to the legislature regarding this prospective company – we would have provided our competitors with sensitive information; the legislature would have not been as familiar with our local economic situation as our own locally elected officials, even though you are our guests each year.

In a time when we all are working to grow our Kansas economy to provide good quality jobs for Kansans, local government is an active partner with business to create jobs and income for Kansas citizens. Decisions regarding locating large companies are based upon many factors including the acquisition of an appropriate site and financial incentives that make the investment “pencil out” in our state vs. another. Additionally a quality workforce, appropriate infrastructure, and a “can do spirit” are critical.

Eliminating the use of eminent domain will also stifle projects in areas of cities that are challenged because of deterioration. If cities are able to assemble all but one, or a few, hold-out properties in order to re-develop an area of the community that is strangled because of run-down properties, crime, and lack of quality infrastructure, and condemnation is not an option of last resort, then these depressed urban areas will remain as they are and drive more development and population to the fringes of our cities. Citizens will lose out to reclaiming blighted neighborhoods and commercial areas if they cannot utilize every tool to build anew.

Both of these scenarios are about bettering our communities for the entire local citizenry; this is the most important reason to retain the power of eminent domain for economic development purposes in the state of Kansas. Statutory legislation can be crafted to provide enhanced protections for property owners and heightened requirements to assure eminent domain remains a tool of last resort in these few cases. There have been ongoing efforts among various interests to craft legislative language to accomplish this goal. We ask that you remain committed to Kansas economic growth by opposing this constitutional amendment and any other legislation that either eliminates or virtually eliminates eminent domain for economic development purposes.

Thank you.



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Testimony Before The  
House Federal and State Affairs Committee  
Regarding  
House Concurrent Resolution 5040  
By  
Erik Sartorius

March 6, 2006

The City of Overland Park appreciates the opportunity to appear before you in opposition to House Concurrent Resolution 5040.

Unlike the migration of birds, the 4<sup>th</sup> of July, or the legislative session, economic development does not occur at a particular time of the year. Whether it is business retention, growth, or attraction, economic development occurs when conditions are right. Most developers and businesses have their own schedules for growth, and if opportunities do not match up with their timelines, they will usually select a different destination.

We believe that the process contained within the proposed constitutional amendment is wholly unworkable and will effectively end the use of eminent domain for economic development purposes. Interjecting the legislature into what are already challenging negotiations will not benefit the state or its citizens.

For every instance when an economic development project's creation comes at the same time as the legislature is in session, there will too many other instances when Kansas loses out. Opportunities will not wait four months, six months, or eight months until the legislature comes to Topeka to consider a project.

It is vital to the continued economic strength of the City of Overland Park that it retain numerous methods for securing solid development within the City. Although Overland Park has never utilized eminent domain for economic development, and would consider such use in the future only if all negotiations failed, loss of the ability to condemn for economic development purposes could hamstring the City in the future.

The development of the Sprint headquarters in Overland Park is a good example for illustration. Sprint was able to obtain all of the property it needed for development through negotiation. But if there had been a single holdout among the owners of the 191 acres, that campus and the 14,500 jobs and economic growth it has brought to the City, the County and the State of Kansas and their citizens might have been lost. Would the legislature seriously have expected a company the size and stature of Sprint to "cool its heels" for a few months

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and wait for the legislature to bless the City of Overland Park's use of eminent domain, had it come to that?

The City of Overland Park understands there is frustration in the legislature regarding the use of eminent domain for economic development. This tool has been used sparingly in the history of the state, a fact that should not be easily forgotten. Although the City would prefer that the eminent domain law for economic development remain as it is today, it realizes that compromise is a critical component of democracy. We therefore have been actively engaged in negotiations in an attempt to reach a balanced compromise.

We request that you not recommend House Concurrent Resolution 5040 favorably for passage.



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TO: Representative John Edmonds, Chairman  
Members, House Federal and State Affairs Committee

FROM: Ashley Sherard, Vice-President  
Lenexa Chamber of Commerce

DATE: March 6, 2006

RE: **Opposition to HCR 5040 – Legislative Approval of  
Eminent Domain for Eco Devo Purposes**

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The Lenexa Chamber of Commerce would like to express its opposition to HCR 5040, which puts forth a state constitutional amendment prohibiting the use of eminent domain for economic development purposes except as approved by law enacted by a 2/3 vote of the House of Representatives, a 2/3 vote of the Senate, and the signature of the Governor.

Eminent domain cannot and should not be taken lightly when used as a tool to acquire private property for economic development. As such, it is correct to consider whether new protections or limitations may be appropriate. We believe, however, that HCR 5040 is a poor solution and better alternatives are being considered to ensure adequate protection of private property rights.

Specifically, we believe HCR 5040 needlessly subjects a local issue to statewide politics, where action or inaction may not always be determined by merit. Further, the uncertainty and significant timing issues raised by HCR 5040 would discourage major projects from even considering locating here, potentially costing communities and the state thousands of jobs and millions of dollars of investment. We do not accept these results as being in the best interests of Kansans. These concerns are heightened in the context of a state constitutional amendment, as in HCR 5040, where it would be difficult to make changes or exceptions down the road.

Instead, we believe efforts to tighten the use of eminent domain should focus primarily on heightened process at the local level. Proposals that primarily increase procedural requirements at the local level increase private property protections and still allow communities the flexibility to continue to judge potential opportunities on a case-by-case basis, leaving decisions as to the exercise of those powers primarily with locally-elected officials and their constituents who can best weigh the values, needs, desires, and circumstances of their individual communities.

For these reasons, the Lenexa Chamber of Commerce urges the committee not to recommend HCR 5040 favorable for passage because we believe there are far better approaches being considered. Thank you for your time and attention.

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**WRITTEN TESTIMONY**  
**concerning**  
**HCR 5040**  
**Submitted by Randall Allen**  
**House Federal and State Affairs Committee**  
**March 6, 2006**

Chairman Edmonds and members of the committee, my name is Randall Allen, Executive Director of the Kansas Association of Counties. I appreciate the opportunity to submit written testimony on behalf of the Kansas Association of Counties and our 96 member counties in opposition to HCR 5040, which would totally remove the ability of county governments in Kansas to exercise eminent domain for economic development purposes.

Counties have exercised their eminent domain powers infrequently and cautiously. The only two examples of counties' use of eminent domain for economic development of which we are aware is for the Kansas Speedway project in Wyandotte County and for the Target Distribution Center in Shawnee County. Both are huge successes in terms of the creation of jobs for Kansans. We realize that the use of eminent domain for economic development can only be justified on the basis on a real public benefit, i.e. something of value that accrues to the citizens at large. Both projects met and continue to meet that criteria.

We object to HCR 5040 because it would entirely remove this authority from elected county commissioners. Who is more qualified than locally elected county commissioners to make the extremely difficult decision to exercise eminent domain for economic development purposes? Locally elected officials are visible to local constituents. They are seen at and are accessible at work, in shops and restaurants, at churches or synagogues, and throughout our communities. They have not made nor will they in the future make any of these difficult decisions without first exhausting all other possibilities.

Further, as economic development projects go, what would happen if the timing of site selection and land acquisition related thereto meant that a decision was needed between sessions of the Legislature? Would projects of major benefit to Kansans be at the mercy and vulnerability of the legislative calendar?

The record of counties shows that county officials have not been careless in their use of eminent domain. We urge the committee to turn its attention to other improvements in the Kansas eminent domain law, and instead consider proposals such as HB 446, which balance the competing interests of private property rights with economic development for the public good.

The Kansas Association of Counties, an instrumentality of member counties under K.S.A. 19-2690, provides legislative representation, educational and technical services and a wide range of informational services to its members. Inquiries concerning this testimony can be directed to Randall Allen or Judy Moler at the KAC by calling (785) 272-2585.

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Date 3-6-06  
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