Approved: May 3, 2006
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 A.M. on January 31, 2006, in Room 123-S of the Capitol.

All members were present,
David Haley arrived, 9:35 a.m.
Les Donovan arrived, 9:37 a.m.
Greta Goodwin arrived, 9:38 a.m.

Committee staff present:
Mike Heim, Kansas Legislative Research Department
Jill Wolters, Office of Revisor of Statutes
Helen Pedigo, Office of Revisor of Statutes
Karen Clowers, Committee Secretary

Conferees appearing before the committee:
Jane M. Eldrege, Representative of Westgate Center
Glee S. Smith, Jr., Representative of Westgate Center
Jerry E. Driscoll, Attorney
Kris W. Koback, Professor of Constitutional Law, UMKC
John R. Todd
Bill House
Gene L. Merry, Coffey County Commissioner, & President, Kansas Association of Counties
Donna Martin
Steven Anderson, Castle Coalition Coordinator, Institute for Justice
Senator Dennis Pyle
Allie Devine, Vice President and General Counsel, Kansas Livestock Association
Patrick R. Hubbell, Kansas Railroads
Terry D. Holdren, Local Policy Director for Governmental Relations, Kansas Farm Bureau

Others attending:
See attached list.

The hearing on **SB 398–Eminent domain; appeal perfected upon filing notice** was opened.

Jane Eldrege spoke as a proponent indicating that **SB 398** is a clarification of legislation passed in 2003 regarding the Kansas Eminent Domain Procedure Act (Attachment 1). **SB 398** moves the docket fee requirement to the position suggested by the Supreme Court, making it absolutely clear that only the timely filing of a notice of appeal is required to prefect an appeal and the intent was not to add any new jurisdictional requirements. **SB 398** will make the clarification retroactive to the date of the 2003 Amendment.

Glee Smith spoke in support of **SB 398** stating agreement with Ms. Eldrege's testimony. This bill will correct unintentional consequences resulting from legislation passed in 2003.

Jerry Driscoll spoke as a proponent, stating that it would clarify the intent of the original legislation (Attachment 2).

The being no further conferees, the hearing on **SB 398** was closed.

The hearing was opened on:
SB 323-Eminent domain; restricting government authority to take property
SB 446--Eminent domain; fairness in economic development act
SCR 1612--Eminent domain; proposed constitutional amendment restricting government authority to take property
SCR 1616--Eminent domain; proposed constitutional amendment restricting government authority to take property

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

MINUTES OF THE Senate Judiciary Committee at 9:30 A.M. on January 31, 2006, in Room 123-S of the Capitol.

Note: Due to hearing several eminent domain bills at one time some testimony will appear to be out of place, several conferees opposed one bill and supported other bills at the same time, others chose to simply address the issue of eminent domain.

Kris Kobach spoke as a proponent, and related results of extensive research by his Legislation class (Attachment 3). The State of Kansas does not have a takings clause in its' constitution to offer protection to landowners in the majority of eminent domain cases and suggested three changes to **SCR 1616** to strengthen the rights of landowners.

John Todd spoke in favor of **SCR 1616** and the need for Kansas to have a constitutional amendment to protect private property rights from eminent domain abuse (Attachment 4).

Bill House spoke in support of **SCR 1616** and **SB 323** (Attachment 5).

Gene L. Merry spoke as a proponent of **SB 446** (Attachment 6). The use of eminent domain for economic development requires members of the governing body to balance the private property rights of individuals with the governing board's responsibility to look our for the public interest. While it is important for county commissioners to retain the authority to act in the public interest in behalf of everyone in their jurisdiction SB 446 also enacts safeguards for property owners.

Donna Martin spoke as a proponent of **SCR 1616** and **SB 323** to protect property owners (Attachment 7).

Steven Anderson spoke in support of **SCR 1616** providing background on eminent domain laws across the country (Attachment 8). He stated that **SCR 1616** would provide good protection for Kansas property owners.

Senator Dennis Pyle testified in support of **SCR 1616**. Senator Pyle stressed finding common ground between economic development and property owners (Attachment 9).

Allie Devine spoke as a proponent of **SB 323** and **SCR 1612** as a limitation on the use of eminent domain for economic development purposes (Attachment 10). Ms. Devine indicated that the issues of eminent domain are very complex and raises many issues. While in support of the use of eminent domain for economic development, the rights of private property owners should be protected.

Patrick Hubbell spoke in support of **SB 323** and requested an amendment to allow railroads to be treated in the same manner as utilities (Attachment 11). Mr. Hubbell provided a balloon amendment addressing his request.

Terry Holden spoke as a proponent of **SB 323** and **SCR 1612** stating Kansas Farm Bureau policy states that eminent domain procedures should be used only for legitimate governmental purposes (Attachment 12). Mr. Holdren would like Kansas farms protected from eminent domain abuses.

Written testimony in support of **SB 323** was submitted by:
Mary Jane Stankiewicz, Vice President and General Counsel, Kansas Grain and Feed Association (Attachment 13)

Written testimony in support of **SB 446** was submitted by:
Ashley Sherard, Vice President, Lenexa Chamber of Commerce (Attachment 14)
Carolyn H. Patterson, City Attorney, City of Hutchinson, KS (Attachment 15)

Written testimony in general terms was submitted:
Hal Hudson, State Director, National Federation of Independent Business, (Attachment 16)
John Geither, Shawnee, KS (Attachment 17)

The Chairman indicated that testimony will continue at the next meeting scheduled for February 1, 2006.

The meeting was adjourned at 10:32 a.m.

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PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1/31/06

NAME	REPRESENTING
Steve Johnson	Kansas Gas Service / ONEOK
Jane Eldridge	Westgate Condos
Charles Benjamin	KS Sierra Club
Whitney Damron	City of Topeka
BRAD HARRELSON	KFB
ALAN COBB	Americans for Prosperity
BILL YANEK	Kansas Assn. of REALTORS
Mary Ann Kniebel	Landowner from Morris Co
Debbie Lyons Blythe	Landowner from Morris Co
Bree Norris	
Brent Haddad	KLA
Allie DeVine	KLA
Steven Anderson	Institute for Justice
Erik Sartorius	City of Overland Park
Wes Ashton	Overland Park Chamber
Bethany D Hubbell	KS Realtors
L R Hamm	Self
DICK CARTER	MANHATTAN CHAMBER

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1/31/06

NAME	REPRESENTING
Ron Shaver	City of Olathe
Sandy Jacquot	LKM
Don Moler	LKM
Estelle Montgomery	Hein Law Firm
Terrie Goldwin	City of Wichita
Ron Gaches	Coalition For KS Job Growth
[illegible]	Westgate Center
Terry Holdren	KFB
Kris Kobach	UMKC School of Law
Sally Howard	KDOT
Gene Merry	Kansas Assoc. of Counties
Randall Allen	Ks. Association of Counties
Carol House	KLA
Becky Yocham	City of Lenexa
Ashley Sherard	Lenexa Chamber
Bud Burke	Olathe (City)
Dave Costello	Olathe Chamber
Lara Waldo	Office of Judicial Admin.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-31-06

NAME	REPRESENTING
Mary Jane Stankiewicz	KGFA/ KARA
[illegible]	Sen. Bruce
Christy Caldwell	Topeka Chamber of Commerce
Eric Stafford	Assoc. General Contractors of KS
Mike Hutfles	Hutfles Govt. Relations
Betty Innes	Hutfles Govt Relations
[illegible]	LCR
Eric Arner	Water One
Dan Hoffman	KS Assoc of Wheat Growers
Jennifer Lyon	Praeger, Smith, and Associates
Christopher Zarda	UMKC Law School
Renee Faust	UMKC Law School
Micah Rains	UMKC Law School

LAW OFFICES
BARBER EMERSON, L.C.
1211 MASSACHUSETTS STREET
POST OFFICE BOX 667
LAWRENCE, KANSAS 66044
(785) 843-6600
FACSIMILE (785) 843-8405

JOHN A. EMERSON
BYRON E. SPRINGER
RICHARD L. ZINN
CALVIN J. KARLIN
JANE M. ELDREDGE
MARK A. ANDERSEN*
WILLIAM N. FLEMING*
CHERYL L. TRENHOLM*
TERENCE E. LEIBOLD*
TERRENCE J. CAMPBELL*

*ADMITTED IN KANSAS AND MISSOURI

MATTHEW D. RICHARDS*
LINDA K. GUTIERREZ
MATTHEW S. GOUGH

RICHARD A. BARBER
(1911-1998)

GLEE S. SMITH, JR.
OF COUNSEL

Jane M. Eldredge
E-Mail: jeldredge@barberemerson.com

January 31, 2006

Honorable John L. Vratil, Chairman, and
Members of the Senate Judiciary Committee

Senate Bill 398 is a clarification of 2003 legislative action that amended the Kansas Eminent Domain Procedure Act. *See* 2003 House Bill 2032, **Exhibit A**. Section 2 of House Bill 2032 required that an appeal from an appraiser's award to the District Court be docketed as a new action and a docket fee be paid. *See* Minutes of the House Judiciary Committee, January 23, 2003, **Exhibit B**.

The legislative history indicates that there was no legislative intention to have either the new civil action or the payment of a docket fee be steps that were necessary to be completed, for an appeal to be perfected. *See* Minutes of the Senate Judiciary Committee, March 6, 2003, **Exhibit C**; and Minutes of the Senate Judiciary Committee, March 21, 2003, **Exhibit D**.

However, the Kansas Supreme Court in its December 9, 2005 opinion in *Miller v. Stranger Valley Land Company, L.L.C.* (No. 04-93113-A), held that although the new civil action was not jurisdictional that the payment of the docket fee was a jurisdictional requirement. *See* **Exhibit E**.

In other words, even though the landowner filed his notice of appeal on time, the fact that he did not pay the docket fee within the thirty (30) days that he had to file his notice of appeal, meant that he had no appeal of the appraiser's award to the District Court. The Supreme Court stated that:

> "If the legislature had intended that the payment of a docket fee was not to be jurisdictional, it could easily have amended K.S.A. 2004 Supp. 26-508 by including the requirement of the docket fee in the same sentence (the fourth sentence) as the requirement that the appeal be docketed as a new civil action."

Senate Judiciary
1-31-06
Attachment 1

Senate Bill 398 moves the docket fee requirement from the first sentence to the position suggested by the Supreme Court. It is now in the fifth sentence, rather than the fourth, because of a new second sentence, making it absolutely clear that only the timely filing of a notice of appeal is necessary for the jurisdiction of the District Court to attach.

Just as importantly, Senate Bill 398 operates retroactively to the date the 2003 amendment was effective, as well as operating prospectively. The retroactivity is necessary as clarification of what was intended by the 2003 Legislature.

We respectfully request your support of this bill.

Sincerely,

BARBER EMERSON, L.C.

Glee S. Smith, Jr.
Representatives of Westgate Center

Jane M. Eldredge

GSS/JME/klb

Attachments

Sec. 4. This act shall take effect and be in force from and after its publication in the Kansas register.

Approved April 21, 2003.

Published in the *Kansas Register* May 1, 2003.

CHAPTER 106

HOUSE BILL No. 2032

AN ACT concerning real property; relating to eminent domain; concerning relocation costs; amending K.S.A. 26-506, 26-508 and 58-3502 and repealing the existing sections; also repealing K.S.A. 58-3505.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 26-506 is hereby amended to read as follows: 26-506. (a) *Notice, time, place and manner of hearing.* The appraisers shall, after they have been sworn, and instructed by the judge, make their appraisal and assessment of damages, by actual view of the lands to be taken and of the tracts of which they are a part, and by hearing of oral or written testimony from the plaintiff and each interested party as named in K.S.A. 26-502, *and amendments thereto, appearing in person or by an attorney.* Such testimony shall be given at a public hearing held in the county where the action is pending at a time and place fixed by the appraisers. Notice of the hearing shall be mailed at least ~~ten (10)~~ *10* days in advance thereof to the plaintiff and to each party named in the petition if their address is known or can with reasonable diligence be ascertained, and by one publication in a newspaper of general circulation in each county where the lands are situated at least ~~ten (10)~~ *10* days in advance of the hearing. In case of failure to meet on the day designated in the notice, the appraisers may meet on the following day without further notice~~, but in~~. *In* case of failure to meet on either of ~~said~~ *such* days, a new notice shall be required. A hearing begun pursuant to proper notice may be continued or adjourned from day to day and from place to place until the hearing with respect to all properties involved in the action has been concluded.

(b) *Form of notice.* The notice of hearing shall be in substantially the following form:

In the District Court of _____ County, Kansas.

_____ *Plaintiff, vs.* _____ *Defendant,*

Notice is hereby given that the undersigned appraisers appointed by the court, will, in accordance with the provisions of ~~this act~~ *K.S.A. 26-501 et seq., and amendments thereto,* hold a public hearing on all matters pertaining to their appraisal of compensation and the assessment of damages for the taking of the lands or interests therein sought to be taken by the plaintiff in the above entitled matter covering the following described lands (description of lands). Such hearing will commence at _____ o'clock ____M. on the _____ day of _____, ~~19~~ *(year)*____ at _____, or on the following day without further

EXHIBIT A

1-3

notice, and may be continued thereafter from day to day or place to place until the same is concluded with respect to all properties involved in the action. Any party may *appear in person or by an attorney and may* present either oral or written testimony *by the landowner or other witnesses* at such hearing.

You are further notified that the court has set the ____ day of _____, ~~19~~ *(year)*____, for the filing of the awards of these appraisers with the clerk of the court, and any party dissatisfied with the award may appeal therefrom as by law permitted within ~~thirty~~ *30* days from the day of filing.

_____ _____ _____ *Appraisers.*

Sec. 2. K.S.A. 26-508 is hereby amended to read as follows: 26-508. If the plaintiff, or any defendant, is dissatisfied with the award of the appraisers, ~~he may,~~ *such party,* within ~~thirty (30)~~ *30* days after the filing of the appraisers' report, *may* appeal from the award by filing a written notice of appeal with the clerk of the district court *and paying the docket fee of a new court action*. In the event any parties shall perfect an appeal, copies of such notice of appeal shall be mailed to all parties affected by such appeal, within three ~~(3)~~ days after the date of the perfection thereof. An appeal by the plaintiff or any defendant shall bring the issue of damages to all ~~interest~~ *interests* in the tract before the court for trial *de novo*. The appeal shall be docketed as a *new* civil action and tried as any other civil action~~: *Provided, however,*. The only issue to be determined therein shall be that of just compensation to be paid for the land or right therein taken at the time of the taking and for any other damages allowable by law.~~ *The only issue to be determined therein shall be the compensation required by K.S.A. 26-513, and amendments thereto.*

Sec. 3. K.S.A. 58-3502 is hereby amended to read as follows: 58-3502. Whenever any program or project is undertaken by the state of Kansas, any agency or political subdivision thereof, under which federal financial assistance will be available to pay all or part of the cost of such program by reason of a grant from or contract or agreement with the federal government, and which program or project will result in the displacement of any person by acquisition of real property, or by the direct result of building code enforcement activities, rehabilitation or demolition programs, the state, agency, or political subdivision ~~may~~ *shall*:

(1) Provide fair and reasonable relocation payments and assistance to or for displaced persons as are required under sections 202, 203 and 204 of the federal act;

(2) Provide relocation assistance programs offering to displaced persons and others occupying property immediately adjacent to the real property acquired, the services described in section 205 of the federal act on the conditions prescribed therein;

(3) In acquiring the real property be guided to the greatest extent practicable under state law by the land acquisition policies in section 301 and the provisions of section 302 of the federal act;

(4) Pay or reimburse property owners for necessary expenses as specified in sections 303 and 304 of the federal act;

(5) Share costs of providing payments and assistance with the federal government in the manner and to the extent required by sections 211 (a) and (b) of the federal act; and

(6) Appoint such officers, enter into such contracts, utilize federal funds for planning and providing comparable replacement housing, and take such other actions as may be necessary to comply with the conditions and requirements of the federal act.

New Sec. 4. Whenever federal funding is not involved, and real property is acquired by any condemning authority through negotiation in advance of a condemnation action or through a condemnation action, and which acquisition will result in the displacement of any person, the condemning authority shall:

(a) Provide the displaced person, as defined in the federal uniform relocation assistance and real property acquisition policies act of 1970, fair and reasonable relocation payments and assistance to or for displaced persons.

(b) Fair and reasonable relocation payments and assistance to or for displaced persons as provided under sections 202, 203 and 204 of the federal uniform relocation assistance and real property acquisition policies act of 1970, and amendments thereto, shall be deemed fair and reasonable relocation payments and assistance pursuant to this section.

(c) Nothing in this section shall preclude the voluntary negotiation of fair and reasonable relocation payments and assistance between the displaced person and condemning authority. If such negotiations lead to agreement between the displaced person and the condemning authority, that agreement shall be deemed fair and reasonable.

Sec. 5. K.S.A. 26-506, 26-508, 58-3502 and 58-3505 are hereby repealed.

Sec. 6. This act shall take effect and be in force from and after its publication in the statute book.

Approved April 21, 2003.

CHAPTER 107

HOUSE BILL No. 2068

(Amended by Chapter 158)

AN ACT concerning certain municipalities; relating to the Kansas tort claims act; amending K.S.A. 2002 Supp. 75-6102 and 75-6104 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 2002 Supp. 75-6102 is hereby amended to read as follows: 75-6102. As used in K.S.A. 75-6101 through 75-6118, and amendments thereto, unless the context clearly requires otherwise:

1-5

Jan. 23

Approved: 02/06/03
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE.

The meeting was called to order by Chairman Michael R. O'Neal at 3:30 p.m. on January 23, 2003 in Room 313-S of the Capitol.

All members were present except:
Representative Jim Ward - Excused

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:
Representative Ray Merrick
Robert Krehbiel, Kansas Independent Oil & Gas Association
Representative Jeff Goreing
Kyle Smith, Kansas Bureau of Investigations
Randy Hearrell, Kansas Judicial Council
Jerry Goodell, Kansas Judicial Council, Chairman Eminent Domain Act Advisory Committee
Phil Mellor, Kansas Judicial Council, Eminent Domain Act Advisory Committee
John Hamilton, Kansas Judicial Council, Eminent Domain Act Advisory Committee
Sandy Jacquot, League of Kansas Municipalities
Derenda Mitchell, Kansas Livestock Association
Leonard Hall, City of Olathe

Representative Ray Merrick appeared before the committee with a bill request which provides a process for homeowners to address concerns that they might have with their newly built home. It would allow all parties involved a set amount of time to resolve those problems before an action is brought. Representative Patterson made the motion to have the request introduced as a committee bill. Representative Loyd seconded the motion. The motion carried.

Robert Krehbiel, Kansas Independent Oil & Gas Association, requested a committee bill which would restore the language in K.S.A. 84-9-319, perfecting security interests in oil and gas production. Representative Patterson made the motion to have the request introduced as a committee bill. Representative Pauls seconded the motion. The motion carried.

Representative Jeff Goering requested a bill be introduced which would revise K.S.A. 60-2610, the worthless check statute. Representative Goering made the motion to have the request introduced as a committee bill. Representative Loyd seconded the motion. The motion carried.

Kyle Smith, Kansas Bureau of Investigations, requested a bill dealing with licensure of private detectives renewing their licences two years from when they received their original license. Representative Owens made the motion to have the request introduced as a committee bill. Representative Crow seconded the motion. The motion carried.

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EXHIBIT B

MINUTES OF THE HOUSE JUDICIARY COMMITTEE at 3:30 p.m. on January 23, 2003 in Room 313-S of the Capitol.

Chairman O'Neal turned the committees attention to hearing bills. He opened the hearing on **HB 2031 - Repealing the statute concerning wills containing formula martial clauses.**

Randy Hearrell, Kansas Judicial Council, addressed the committee as a proponent of the bill. He explained that the statute was enacted to address one specific case where an attorney made an inadvertent error that caused him to lose a special use value election pursuant to Section 2032A of the IRS code and could have faced charges of malpractice. The statute is no longer useful and the Judicial Council proposed the repeal of it.

The hearing on **HB 2031** was closed.

Hearings on HB 2032 - Proposed amendments to the Kansas Eminent Domain Act, were opened.

Jerry Goodell, Kansas Judicial Council, Chairman Eminent Domain Act Advisory Committee, explained several sections of the bill.(Attachment 1)

- Section 1 - requires that interested parties must appear in person or by an attorney and that any party can be called as a witness.
- Section 2 - requires each appeal to be docketed as a new action.
- Section 3 - mandates that any condemning authority must pay relocation expenses.

Phil Mellor, Kansas Judicial Council, Eminent Domain Act Advisory Committee, went into more detail on Section 3 of the bill. If the state or a city condemns ones house or business, and the owner receives fair market value, they still have to move and it causes an added expense on the owners that they wouldn't necessarily have. Therefore, the agency condemning the property should be responsible to pay for the relocation expenses. (Attachment 2)

John Hamilton, Kansas Judicial Council, Eminent Domain Act Advisory Committee, informed the committee that the building across the street was condemned by a blend of city & state which did not pay for relocation expenses and therefore, several business were forced to close as a result of not being able to afford to relocate.

Sandy Jacquot, League of Kansas Municipalities, appeared in opposition to the bill because it has a huge unfunded mandate on cities to pay the relocation expenses and it mandates compliance with federal law regardless whether there are federal funds available or not. Paying relocation expenses should be an option, not a mandate. (Attachment 3)

Derenda Mitchell, Kansas Livestock Association, opposed section two, lines 15 & 16 in which the landowner would have to pay a filing fee to implement protections, suggested amending lines 22-26 to state that the compensation and reasonableness of the taking may be determined in the trial de novo and encouraged the committee to add a new section that provides for attorneys fees and costs to the landowner when the condemning authority acts unreasonably or when the appraisal is determined to be too low. (Attachment 4)

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MINUTES OF THE HOUSE JUDICIARY COMMITTEE at 3:30 p.m. on January 23, 2003 in Room 313-S of the Capitol.

Leonard Hall, City of Olathe, appeared in opposition to the bill. He stated that trying to comply with federal regulations is a very time consuming process and encouraged the committee to rethink this portion of the bill.(Attachment 5)

A spokesperson from Kansas Farm Bureau did not appear before the committee but requested their written testimony, in opposition of the bill, be included in the committee minutes. (Attachment 6)

Hearings on **HB 2032** were closed.

The committee meeting adjourned at 4:45 p.m. The next meeting was scheduled for January 27, 2003 at 3:30 p.m. in room 313-S.

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March 6

Approved: April 4, 2003
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairman John Vratil at 9:30 a.m. on March 6, 2003, in Room 123-S of the Capitol.

All members were present.

Committee staff present: Mike Heim, Kansas Legislative Research Department
Lisa Montgomery, Office of the Revisor of Statutes
Dee Woodson, Committee Secretary

Conferees appearing before the committee:
Representative Kathy Decker (written only)
Stuart Little, Kansas Community Corrections Association (written only)
Randy Hearrell, Kansas Judicial Council
Gerald L. Goodell, Kansas Judicial Council
Phil Mellor, Wichita attorney
John Hamilton, Topeka Attorney
Vicky Johnson, Office of the Chief Council for KDOT
Sandy Jacquot, Kansas League of municipalities
Leonard Hall, City of Olathe
Rich Eckret, Shawnee County Counselor
Judy Moler, Kansas Association of Counties (written only)
Erik Sartorius, City of Overland Park (written only)

Others attending: see attached list

HB 2031 - Repealing the statute concerning wills containing formula martial clauses
Chairman Vratil opened the hearing on **HB 2031**. Randy Hearrell testified in support of this proposed legislation to repeal K.S.A. 59-624, and explained the reasons for repealing the outdated statute. (Attachment 1)

Having no other conferees to speak on the proposed bill, the Chair closed the hearing on **HB 2031**.

Senator Goodwin moved to recommend **HB 2031** favorably, seconded by Senator Donovan, and the motion carried.

HB 2032 - Eminent domain; interested parties; appeals; relocation assistance
The Chair opened the hearing on **HB 2032**. Gerald Goodell testified in support of **HB 2032** on behalf of the Kansas Judicial Council. He said that the bill was drafted by the Judicial Council Eminent Domain Advisory Committee, and explained the suggested amendments to the bill as detailed in his written testimony. He stated that the main change to the bill was in drafting a new section 3 relating to relocation expenses which the House Judiciary Committee adopted and the Council supports. (Attachment 2)

Conferee Mellor appeared before the Committee in support of **HB 2032**. He stated that relocation costs are limited to the actual and reasonable costs incurred based upon competitive bids. He gave some

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EXHIBIT C

examples of the expense of businesses having to relocate. He said that it is unreasonable to expect a person whose property is taken and who is forced to relocate because of condemnation to personally bear the cost when it should be spread to the public at large. (Attachment 3)

Committee questions and discussion followed. Chairman Vratil stated that this bill was very difficult to read. He provided additional information to the Committee in order to understand what the current law is in regard to an administrative appeal by the land owner. He explained that the House of Representatives changed this only with respect to procedure and provided that instead of going through an administrative appeal, the land owner could appeal the relocation award to the District Court and get a jury decision as to the amount of the relocation expenses.

The Chairman asked the next conferee, John Hamilton, to clarify how the House change the bill in regard to the relocation awards. He said that the bill as amended does not bring the condemning authority under the Act, but does establish the fact that payments and assistance for displaced persons equal to that provided under the Federal Uniform Act will be deemed reasonable. He stated that he preferred the bill as originally drafted. (Attachment 4)

Vicky Johnson, Acting Chief Council for KDOT, appeared before the Committee in opposition to **HB 2032** as amended by the House Committee on Judiciary. She explained several issues relating to this bill in which KDOT had concerns. Ms. Johnson stated that KDOT preferred the bill as it was originally written. (Attachment 5)

Sandy Jacquot, Kansas League of Municipalities (KLM), testified in opposition to this bill and the requirement of mandatory payments to displaced persons. She explained the problems that LKM saw with the way the bill was changed, and detailed these concems in her written testimony. (Attachment 6)

Leonard Hall, Assistant City Attorney for the City of Olathe, spoke in opposition to the bill as amended by the House Judiciary Committee. He said the bill also refers to sections in the federal laws that are not applicable to relocation assistance and payment. (Attachment 7)

Judy Moler, Kansas Association of Counties, submitted written testimony in opposition to **HB 2032**. (Attachment 8)

Erik Sartorius, City of Overland Park, submitted written testimony in opposition to **HB 2032**. (Attachment 9)

After brief Committee discussion and questions, Chairman Vratil closed the hearing on **HB 2032**.

HB 2017 - Joint committee on corrections and juvenile justice oversight, extending sunset two years

Chairman Vratil opened the hearing on **HB 2017**. Senator Goodwin explained the context of the bill, and the reasons behind wanting to extend the Oversight Committee for two years.

Representative Kathe Decker submitted written testimony in support of **HB 2017**. (Attachment 10)

March 21

Approved: May 1, 2003
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairman John Vratil upon adjournment of the Senate at 10:05 a.m. on March 21, 2003, in Room 531-N of the Capitol.

All members were present except: Senator Allen (E)
Senator Donovan (E)

Committee staff present: Mike Heim, Kansas Legislative Research Department
Lisa Montgomery, Office of the Revisor of Statutes
Dee Woodson, Committee Secretary

Others attending: see attached list

Final action on:
HB 2090 - Scope of agency relationship for inmate work crews defined
Chairman Vratil reviewed **HB 2909**, and explained the purpose of the bill. He said there were no suggested amendments offered on the bill.

Senator O'Connor moved to recommend **HB 2909** favorably, seconded by Senator Schmidt, and the motion carried.

HB 2314 - Kansas juvenile correctional complex
Chairman Vratil reviewed **HB 2314**, and stated it was in the nature of a technical amendment. He said there were no amendments suggested, and no fiscal note on this bill.

Senator Goodwin moved to recommend **HB 2314** favorably, seconded by Senator Schmidt, and the motion carried.

HB 2138 - Forensic examinations; certification procedures
Chairman Vratil reviewed **HB 2138**, and said there were no recommended amendments or fiscal note on this bill.

Senator O'Connor moved to recommend **HB 2138** favorably, seconded by Senator Schmidt, and the motion carried.

HB 2165- Civil liability for worthless checks, definition of giving a worthless check
Chairman Vratil reviewed **HB 2165**, and brief discussion took place on why the original language was included in the statutes.

Senator O'Connor moved to recommend **HB 2165** be passed out favorably, and seconded by Senator Oleen for discussion purposes. Committee discussion followed, with the Chairman explaining that this language was originally included in the statute because some courts would not prosecute a worthless check charge when the check wasgiven in payment of a pre-existing debt. It was noted that writing a worthless check is an attempt to defraud. After further discussion, the Chair called for a vote on the motion. The motion was defeated.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

EXHIBIT D

MINUTES OF THE SENATE JUDICIARY COMMITTEE on March 21, 2003 in Room 531-N of the Capitol.

Sub HB 2294 - Construction defects; contractors right to cure prior to filing a civil action; criminal penalties

Chairman Vratil reviewed **HB 2294**.

Senator O'Connor moved to recommend **HB 2294** favorably, and seconded by Senator Goodwin. After brief discussion, the Chair called for a vote on the motion. The motion carried.

HB 2375 - Criminal procedure; preliminary examination, evidence, chain of custody

Chairman Vratil reviewed **HB 2294**, and Senator Schmidt commented that Mr. Drees, Ellis County Attorney, had provided the Committee with recommended amendments during the hearing. He stated that he believed those amendments were necessary to solve the problems and concerns Mr. Drees raised during the hearing. Senator Schmidt had visited with Mr. Drees about the amendments.

Senator Schmidt made a motion to adopt two sections of Mr. Drees' suggested amendments which included under "B" to correct language within the bill: (1) Line 20 should read as follows: "...evidence seized by law enforcement officers shall be admissible into evidence in the preliminary..."; and (2) Line 22 should read as follows: "..all persons who collected the evidence which gave rise to the forensic test, law enforcement officers who seized said evidence, evidence custodians and forensic examiners...". (Attachment 1) The motion was seconded by Senator O'Connor.

Following discussion, the Chair called for a vote on the motion to amend. The motion carried.

Senator Schmidt made a motion to pass **HB 2375** out favorably as amended, seconded by Senator O'Connor, and the motion failed.

HB 2032 - Eminent domain; interested parties; appeals; relocation assistance

Chairman Vratil reviewed **HB 2032**. He explained that the interested parties had gotten together and worked out acceptable language in the form of a balloon amendment attached to a cover letter from James McLean, Special Assistant to the Secretary/Director, Division of Public Affairs, Kansas Department of Transportation. Chairman Vratil said the parties involved with drafting the language were the Kansas League of Municipalities, the Kansas Judicial Council, and the City of Olathe. (Attachment 2)

The Chairman clarified the proposed amendments which started on page 2, beginning on line 23, which he said would essentially return the language to the way it was before the House amended it. The Chairman added that it would say, *"The only issue to be determined therein shall be the compensation required by K.S.A. 26-513 and amendments thereto."*. He explained that the relocation expenses are covered by the amendments on page 3, which deals with an award of relocation expenses and would require relocation expenses to be paid pursuant to an administrative procedure in all cases where the land owner whose property is being taken is forced to relocate to a different location. He added that it makes no difference whether federal funds are involved in the project or not.

Senator Goodwin made a motion to amend the bill as indicated in the balloon provided by Mr. McLean, seconded by Senator Gilstrap, and the motion to amend carried.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

Senator Gilstrap moved to recommend the bill favorably as amended, seconded by Senator O'Connor, and the motion carried.

HB 2035 - Children in need of care; right to counsel

Chairman Vratil reviewed **HB 2035**, and distributed an amendment he had requested staff to prepare. He explained that this amendment would return the bill to the form originally introduced by the Judicial Council. He stated that it was his belief that the House amendments emasculate the purpose of this bill. Chairman Vratil recalled that Professor Sheila Reynolds testified at the Senate hearing about what happens when a guardian *ad litem* is appointed to represent a minor child in a court case, and the guardian *ad litem* and minor child have a disagreement as to what is in the best interest of the child. He said that the guardian *ad litem* then has a conflict. Professor Reynolds suggested there might be a need for the judge to appoint a second attorney to represent the child when there is a conflict between the child and the guardian ad litem. The Chairman reiterated that the purpose of this bill was to give the judge the authority to appoint a second attorney if good cause were shown to the judge for the appointment. The Chairman explained the House took out the language described, and changed it to require the guardian *ad litem* to advise the judge of the conflict, but then the House didn't say what should happen after that. (Attachment 3)

Committee discussion followed. Senator Oleen made a motion to adopt the balloon amendment, seconded by Senator Schmidt, and the motion to amend carried.

Senator Goodwin moved to pass **HB 2035** out favorably as amended, seconded by Senator Oleen, and the motion carried.

Chairman Vratil called the Committee's attention to **HB 2308**, and said it was a bill he did not intend on working this session. He stated it was a bill requested by the Joint Committee on Corrections and Juvenile Justice, but was suggesting that the bill be used as a vehicle to correct a problem that has come to his attention recently. The Chairman distributed copies of letters from Senate President Dave Kerr to Attorney General Phill Kline bringing this problem to the attention of the Attorney General, and Attorney General Kline's response to Senator Kerr in which he agreed with Senator Kerr's concerns. (Attachments 4 and 5)

After distributing copies of the proposed amendment (Attachment 6), the Chairman called upon Brad Smoot, representing the Kansas University Alumni Association. Mr. Smoot explained that this is a records question and concerns public universities and colleges and their related associations. K.S.A. 21-3904 could be interpreted to prohibit the use of student directory information by state colleges and universities and their affiliated support organizations which may offer students and alumni certain goods or services. Mr. Smoot said this was also an attempt to change the penalty to civil sanctions in accordance with other sections of the open records law instead of the criminal penalties that are currently in this statute.

After discussion, Senator Umbarger made a conceptual motion to change the language in the proposed amendment to **HB 2308** to make it applicable in addition to the Regent's institutions, Washburn University, community colleges and the vocational schools. The motion was seconded by Senator Oleen,

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 93,113

IN THE MATTER OF THE CONDEMNATION OF LAND FOR

STATE HIGHWAY PURPOSES, Deb Miller, Secretary of

Kansas Department of Transportation,

Appellant,

v.

STRANGER VALLEY LAND COMPANY, L.L.C., *et al.*,

Appellee.

SYLLABUS BY THE COURT

A district court acquires subject matter jurisdiction over an appeal from the appraisers' award in a condemnation action only if the appeal is perfected within 30 days "by filing a written notice of appeal with the clerk of the district court and paying the docket fee of a new court action" under K.S.A. 2004 Supp. 26-508. While the timely filing of the notice of appeal and the payment of the docket fee are jurisdictional requirements, the failure to docket the appeal as a new civil action does not defeat subject matter jurisdiction.

Appeal from Russell district court; MIKE KEELEY, judge. Opinion filed December 9, 2005. Reversed and remanded with directions.

Oswald S. Dwyer, staff attorney, Kansas Department of Transportation, argued the cause, and *Sally A. Howard*, chief counsel, was with him on the brief for appellant.

Jerry E. Driscoll, of Driscoll Law Office, of Russell, argued the cause and was on the brief for appellee.

Terrence J. Campbell, Jane M. Eldredge, and *Terence E. Leibold*, of Barber Emerson, L.C., of Lawrence, were on the brief for *amicus curiae* Westgate, L.C.

The opinion was delivered by

LUCKERT, J.: This is an interlocutory appeal in an eminent domain proceeding. The primary issue on appeal is whether the district court acquired subject matter jurisdiction over Stranger Valley Land Company, L.L.C.'s (Stranger Valley) appeal from the appraisers' award when it timely filed the notice of appeal but did not comply with the provisions of K.S.A. 2004 Supp. 26-508 requiring the payment of a docket fee and the docketing of the appeal as a new civil action. We hold that the language of K.S.A. 2004 Supp. 26-508, specifying that a party may appeal within 30 days of the appraisers' award "by filing a written notice of appeal with the clerk of the district court and paying the docket fee of a new court

EXHIBIT E

action," makes the timely filing of the notice of appeal and payment of the docket fee jurisdictional requirements. The manner in which the case is docketed, however, is not jurisdictional.

The underlying facts are not disputed. On January 16, 2004, the Kansas Department of Transportation (KDOT) filed an eminent domain proceeding in Russell County District Court seeking to acquire real property owned by Stranger Valley for highway purposes. The district court approved the petition and appointed three appraisers. On April 16, 2004, the appraisers filed their report fixing the amount of compensation due Stranger Valley. KDOT deposited the stated compensation with the clerk of the district court.

On May 14, 2004, Stranger Valley filed a notice of appeal with the district court. The notice of appeal carried the same caption and case number as the original eminent domain action filed by KDOT. Stranger Valley did not pay a docket fee when it filed the notice of appeal.

KDOT filed a motion to strike Stranger Valley's notice of appeal arguing that Stranger Valley failed to perfect its appeal in accordance with K.S.A. 2004 Supp. 26-508 because it had not docketed the appeal as a new civil action or paid the required docket fee. KDOT also argued that the district court lacked jurisdiction to extend the time for properly perfecting the appeal.

After a hearing, the district court ruled in favor of KDOT. Stranger Valley filed a motion asking the district court to reconsider its decision. The district court granted the motion and found the payment of the docket fee was not jurisdictional. The district court also certified its ruling for interlocutory appeal pursuant to K.S.A. 60-2102(b); see K.S.A. 2004 Supp. 60-2102(c).

The case was transferred to this court on this court's own motion pursuant to K.S.A. 20-3018(c), and this court granted KDOT's application for interlocutory appeal.

Analysis

Procedures for eminent domain proceedings, K.S.A. 26-501 *et seq.*, are controlled by statute. See K.S.A. 26-501(a) ("The procedure for exercising eminent domain as set forth in K.S.A. 26-501 to 26-516, inclusive, shall be followed in all proceedings.") K.S.A. 2004 Supp. 26-508 provides for an appeal from the appraisers' award and specifies the procedures to be followed.

As such, K.S.A. 2004 Supp. 26-508 governs the district court's jurisdiction of such an appeal because Kansas courts have "only such appellate jurisdiction as is conferred by statute, pursuant to Article 3, Section 3, of the Kansas Constitution, and in the absence of compliance with the statutory rules, [a] court has the duty to dismiss the appeal." *Brown v. Brown,* 218 Kan. 34, 38, 542 P.2d 332 (1975). However, "[s]tatutory requirements for an appeal are not always jurisdictional." *City of Wichita v. 200 South Broadway,* 253 Kan. 434, 437, 855 P.2d 956 (1993). Therefore, we must interpret K.S.A. 2004 Supp. 26-508 to determine what is required to perfect an appeal, *i.e.*, which procedural steps are jurisdictional and which are not.

Interpretation of a statutory provision is a question of law subject to unlimited review. *State, ex rel. Slusher v. City of Leavenworth,* 279 Kan. 789, Syl. ¶ 2, 112 P.3d 131 (2005); see *City of Wichita,* 253 Kan. at 436. Our standards for statutory interpretation are well established:

"'The fundamental rule of statutory construction to which all other rules are subordinate is that the intent of the legislature governs if the intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. When a statute is plain and

unambiguous, the court must give effect to the intention of the legislature as expressed rather than determine what the law should or should not be.' [Citation omitted.]" *Pieren-Abbott v. Kansas Dept. of Revenue*, 279 Kan. 83, 88, 106 P.3d 492 (2005).

In this case, KDOT argues that K.S.A. 2004 Supp. 26-508 is plain and unambiguous in stating that the requirements to perfect an appeal are: (1) the filing of a notice of appeal within 30 days of the appraisers' award; (2) the payment of the docket fee for a new civil action; and (3) the docketing of the case as a new civil action. Stranger Valley and the *amicus curiae* argue that the only requirement is that the notice of appeal be filed within 30 days.

K.S.A. 2004 Supp. 26-508 provides:

"If the plaintiff, or any defendant, is dissatisfied with the award of the appraisers, such party, within 30 days after the filing of the appraisers' report, may appeal from the award *by filing a written notice of appeal with the clerk of the district court and paying the docket fee of a new court action.* In the event the parties shall perfect an appeal, copies of such notice of appeal shall be mailed to all parties affected by such appeal, within three days after the date of the perfection thereof. An appeal by the plaintiff or any defendant shall bring the issue of damages to all interests in the tract before the court for trial *de novo. The appeal shall be docketed as a new civil action and tried as any other civil action.* The only issue to be determined therein shall be the compensation required by K.S.A. 26-513, and amendments thereto." (Emphasis added.)

The statute was amended in 2003 to add the phrase "and paying the docket fee of a new court action" and to add the word "new" to the phrase "shall be docketed as a new civil action." L. 2003, ch. 106, sec. 2. The question of whether these new requirements are jurisdictional has not been previously decided.

However, we do have guidance from an earlier decision, *City of Wichita,* 253 Kan. 434, which concerned whether the district court acquired jurisdiction of an appeal from the appraisers' award where the notice of appeal was timely filed and served on the condemner but copies of the notice of appeal were not served on all other interested parties as required by K.S.A. 26-508.

The version of K.S.A. 26-508 then in effect provided:

"'If the plaintiff, or any defendant, is dissatisfied with the award of the appraiser, he may, within thirty (30) days after the filing of the appraisers' report, appeal from the award by filing a written notice of appeal with the clerk of the district court. *In the event any parties shall perfect an appeal, copies of such notice of appeal shall be mailed to all parties affected by such appeal, within three (3) days after the date of the perfection thereof.*'" (Emphasis added.) 253 Kan. at 435.

The landowner argued that the first sentence of K.S.A. 26-508 set forth what a party must do to perfect an appeal, while the second sentence of the statute formed a requirement to be met only after an appeal has been perfected; therefore, the requirement of mailing copies of the notice of appeal was not jurisdictional. This court agreed, holding: "[P]ursuant to the unambiguous language of K.S.A. 26-508, mailing copies of the notice of appeal is not needed to perfect an appeal from the appraisers' award in an eminent domain case and therefore is not jurisdictional to such an appeal." 253 Kan. at 437.

Applying the same reasoning to the instant case, the requirement that an appeal from the appraisers' award be docketed as a new civil action is not necessary to perfect an appeal and therefore is not jurisdictional. The docketing requirement appears in the fourth sentence of the statute and is removed from the first sentence. Furthermore, that requirement follows the second sentence which begins with

the phrase "[i]n the event the parties shall perfect an appeal," and thereby indicates all remaining provisions relate to procedures after an appeal is perfected. By contrast, the requirement that an appealing party pay the docketing fee appears in the first sentence with the requirement that a notice of appeal be filed within 30 days, a requirement which is necessary to perfect an appeal. See *Brown*, 218 Kan. at 37-38. The plain and unambiguous language of the first sentence of the statute requires two things to perfect an appeal: The filing of a notice of appeal within 30 days and the payment of the docket fee. Furthermore, these requirements precede the phrase "[i]n the event the parties shall perfect an appeal," which would indicate any previously stated requirement is jurisdictional.

Despite this clear language, Stranger Valley seeks a determination that appellate jurisdiction is never dependent upon the payment of docket fees; rather, such payment is a nonjurisdictional technicality. In support of its arguments, Stranger Valley discusses two cases: *Legg v. Topeka Halfway House, Inc.*, 7 Kan. App. 2d 669, 646 P.2d 1155, *rev. denied* 231 Kan. 800 (1982), and *Avco Financial Services v. Caldwell*, 219 Kan. 59, 547 P.2d 756 (1976), both of which held that subject matter jurisdiction was not defeated by technical noncompliance with procedures for bringing an appeal. However, the statutes at issue in those cases are distinguishable from K.S.A. 2004 Supp. 26-508.

In *Legg*, a complainant sued his employer claiming race discrimination. The examiner for the Kansas Commission on Civil Rights (KCCR) found that the employer had discriminated and awarded lost wages and damages to the complainant. The employer filed a timely notice of appeal with the district court but improperly served the notice of appeal on the KCCR staff attorney who had prosecuted the complaint rather than on the complainant at his last known address as required by K.S.A. 44-1011 (Ensley 1981).

The *Legg* court concluded that "because the notice of appeal was timely filed and complainant has at no time shown prejudice by virtue of service on the KCCR staff attorney, we hold this technical noncompliance with K.S.A. 44-1011, did not defeat subject matter jurisdiction over the appeal." 7 Kan. App. 2d at 671. In essence, the court ruled that the only requirement to perfect an appeal under K.S.A. 44-1011 was the timely filing of the notice of appeal. The statute provided that judicial review could be obtained "by filing with the clerk of said court within thirty (30) days from the date of service of the order, a written appeal praying that such order be modified or set aside." The next sentence required service on all parties. Thus, service was a technical adjunct to the filing of the notice of appeal. In contrast, K.S.A. 2004 Supp. 26-508 specifies that the appeal may be taken "by filing a written notice of appeal with the clerk of the district court and paying the docket fee of a new court action." Thus, it imposes two requirements for perfecting an appeal: (1) the timely filing of the notice and (2) the payment of the docket fee.

The distinction in statutory language is further illustrated by comparing K.S.A. 2004 Supp. 26-508 to the statutes at issue in the cases relied upon by the Court of Appeals in *Legg* when it drew a distinction between statutory appeal requirements which are jurisdictional and those which are not. Summarizing those cases, the Court of Appeals stated:

"Under Kansas practice, although timely filing of notice of appeal is jurisdictional (*Everett v. Blue Cross-Blue Shield Ass'n*, 225 Kan. 63, 587 P.2d 873 [1978]), failure to strictly comply with other prerequisites for appeal, such as timely payment of the docket fee (*Avco Financial Services v. Caldwell*, 219 Kan. 59, 547 P.2d 756 [1976]), timely designation of the record (*Kleibrink v. Missouri-Kansas-Texas Railroad Co.*, 224 Kan. 437, 581 P.2d 372 [(1978]), certification by a municipal court of the complaint, warrant and appearance bond to the district court on appeal (*City of Garnett v. Zwiener*, 229 Kan. 507, 625 P.2d 491 [1981]), and timely filing of an appeal bond (*In re Estate of Duncan*, 7 Kan. App. 2d 196, 638 P.2d 992, *rev. denied* [231 Kan. 800 (1982)], are not jurisdictional where no prejudice results." *Legg*, 7 Kan. App. 2d at 670.

Each of the statutes at issue in the cases which the Court of Appeals cited as involving nonjurisdictional requirements – *Kleibrink, Zwiener, In re Duncan,* and *Avco* – are distinguishable. In *Kleibrink,* the concern was the failure to timely designate a record. The court noted that a court rule allowed for extensions of time when an appellant was docketing an appeal – as opposed to filing the notice of appeal – and the additional time had been allowed by the district court. As a result, the standard was whether the district court abused its discretion in granting the appellant additional time to designate the record on appeal. Thus, the failure to timely designate the record was not jurisdictional. 224 Kan. at 439-40.

Zwiener interpreted K.S.A. 1980 Supp. 22-3609, which in subpart (2) stated that an appeal from municipal court could "be taken by filing a notice of appeal in the court where the judgment was rendered." The appeal complied with this provision. Subpart (3) of that statute required the court from which the appeal was being taken to certify the complaint, warrant, and appearance bond. The lower court did not certify the record. Clearly, the statute contemplated this action would be a ministerial act of a judge or clerk occurring after the appeal was filed and after "the appellant has complied with the part of the appeal statute which requires him to take action." 229 Kan. at 509. Noting these factors, the court held the lack of certified record was not jurisdictional. 229 Kan. at 510. By analogy, the provision of K.S.A. 2004 Supp. 26-508 requiring the case be docketed as a new civil action, a ministerial act performed by the clerk, would not be jurisdictional. However, the payment of the docket fee stated in the initial provision would be and is jurisdictional.

A third case cited in *Legg, In re Duncan,* involved K.S.A. 1980 Supp. 59-2401 which in subpart (a) required an appeal to be filed within 30 days of the entry of an appealable order, judgment, decree, or decision in a case filed under the probate code. A different subpart of the statute required a bond. K.S.A. 1980 Supp. 59-2401(b). The court held that the only provision which was jurisdictional was contained in subpart (a) and the out-of-time filing of an appeal bond did not defeat appellate jurisdiction. 7 Kan. App. 2d at 198-99. Again, however, the filing of the bond was in a different provision from that establishing jurisdiction.

Avco, the other case cited in *Legg,* is also cited by and relied upon by Stranger Valley and the *amicus* and is the only cited case dealing with the issue of whether payment of a docket fee is jurisdictional. In *Avco,* a magistrate court entered summary judgment in favor of the plaintiff and the defendants appealed to the district court. The defendants filed a timely notice of appeal in the magistrate court but failed to pay the fee required to docket the case in the district court until several months later. The statute governing appeals from magistrate courts required two things to perfect an appeal: timely filing of a notice of appeal and "such security for costs as may be required." K.S.A. 1974 Supp. 61-2102. Another statute provided that once the appeal was perfected, the magistrate judge or clerk was to prepare a complete transcript of the proceedings and transmit them along with all papers in the case to the clerk of the district court who should then docket the appeal. K.S.A. 1974 Supp. 61-2103. A third statute provided no case could be docketed in the district court without payment of a $35 docket fee. K.S.A. 1974 Supp. 60-2001(a).

Because the magistrate court had not required any security for costs pursuant to K.S.A. 1974 Supp. 61-2102, the only issue was whether payment of the $35 docket fee under K.S.A. 1974 Supp. 60-2001(a) was necessary to perfect the appeal. The *Avco* court held it was not. The court concluded that K.S.A. 1974 Supp. 60-2001, which required the payment of the docket fee: "is not concerned with perfecting an appeal. Here the appeal was perfected when the notice of appeal was filed in the magistrate court . . . although the case was not docketed in the district court until [several months later]." 219 Kan. at 61. The court noted that no statute specified when the docket fee was to be paid and that

"[t]he time within which a docket fee is paid is secondary to actual payment [citation omitted] as we construe the conflicting statutes here in question. Since payment of the docket fee affects only the clerk

of the district court, and an adverse party is not affected by the time of the payment of the docket fee, it should not be regarded as jurisdictional. [Citation omitted.]" 219 Kan. at 62-63.

While *Avco* held that the payment of a docket fee was not jurisdictional under the facts of that case, the statutes at issue there were very different from K.S.A. 2004 Supp. 26-508. In *Avco*, the requirement for the payment of a docket fee appeared in an entirely different statute from the one governing perfection of an appeal. In this case, the two requirements for perfecting an appeal in an eminent domain proceeding pursuant to K.S.A. 2004 Supp. 26-508 – the timely filing of a notice of appeal and the payment of the docket fee – are both contained not only in the same statute but in the same sentence. Further, the phrase imposing the 30-day time limitation applies to both requirements.

Stranger Valley points out that, similar to the facts of *Legg* and *Avco*, the district court in this case found there was no prejudice to KDOT in allowing the appeal to proceed. Nonetheless, because the payment of the docket fee is a jurisdictional requirement to perfect the appeal, whether KDOT would suffer prejudice by allowing the appeal to go forward is irrelevant.

Stranger Valley also argues that it is the function of the clerk of the district court to assign a new civil case number to an eminent domain appeal and to collect the docketing fee. According to Stranger Valley, if the clerk had refused to docket the appeal until the docketing fee was paid, the fee would have been paid. Essentially, Stranger Valley is asking that the clerk be responsible for giving legal advice to counsel, which is not the clerk's role. As noted by the district court in rejecting this argument: "[T]he Clerk of the Court has no obligation or responsibility to inform the attorney they must pay the docket fee or that the docket fee could be paid at a later date."

The *amicus*, Westgate, makes a few additional arguments. First, the *amicus* contends that it would be absurd to dismiss an appeal merely because of a typographical error regarding the case number; that docketing is a function of the clerk of the court, not the parties; that the statute does not require that the notice of appeal be docketed as a new civil action, but only that the appeal itself be so docketed after the notice of appeal is filed in the existing administrative case; and that this provision sets up a procedure different from other appeals.

No doubt these arguments are technically correct. However, in making these arguments, the *amicus* focuses on KDOT's contention that docketing an appeal in an eminent domain case as a new civil action is a jurisdictional requirement of K.S.A. 2004 Supp. 26-508. As discussed above, the actual docketing of the appeal as a new civil action is not a jurisdictional requirement; only the payment of the docketing fee is jurisdictional. Further, many of the arguments of the *amicus* and Stranger Valley relate to policy concerns or second-guess whether the legislature really meant to require the payment of the docket fee in order to perfect an appeal. However, our role is not to determine whether sound policy dictates requiring a filing fee to perfect an appeal. Further, we must presume the legislature meant what it plainly stated and apply that unambiguous language and limit jurisdiction to appeals where those requirements are met.

Finally, the *amicus* contends that if the legislature intended to make the payment of the docketing fee a jurisdictional requirement for an appeal, it would have expressly stated that in plain language. The *amicus* again cites *Avco* and also cites cases from other jurisdictions where legislatures did just that, *i.e.*, the statutes or rules at issue expressly provided that the payment of a docket fee was "jurisdictional" or necessary for "perfection" of an appeal by using those exact words.

However, the lack of the exact wording the *amicus* would like to see is not significant because the language of K.S.A. 2004 Supp. 26-508 is clear and unambiguous as written. If the legislature had

intended that the payment of docket fee was not to be jurisdictional, it could easily have amended K.S.A. 2004 Supp. 26-508 by including the requirement of the payment of the docket fee in the same sentence (the fourth sentence) as the requirement that the appeal be docketed as a new civil action. Instead, it chose to include the requirement of the payment of the docket fee in the same sentence (the first sentence) as the requirement that the notice of appeal be filed within 30 days after the filing of the appraisers' report, a requirement that is clearly jurisdictional. The plain and unambiguous language of the first sentence of the statute requires two things to perfect an appeal: the filing of a notice of appeal within 30 days and the payment of the docket fee. Therefore, the requirement of the payment of the docket fee is jurisdictional.

Furthermore, as KDOT argues in a secondary issue, the appeal in this case should have been dismissed. See *Brown,* 218 Kan. at 38. The district court correctly concluded it was without jurisdiction to enlarge the time for filing a notice of appeal in an eminent domain proceeding pursuant to K.S.A. 2004 Supp. 60-206(b) or to permit a filing out of time for excusable neglect as provided by K.S.A. 60-260(b). See *City of Kansas City v. Crestmore Downs, Inc.*, 7 Kan. App. 2d 515, Syl., 644 P.2d 494, *rev. denied* 231 Kan. 799 (1982).

Reversed and remanded to the district court with directions to dismiss Stranger Valley's appeal from the appraisers' award in the underlying condemnation action.

LOCKETT, J., Retired, assigned.[1]

[1] **REPORTER'S NOTE:** Justice Tyler C. Lockett, Retired, was assigned to hear case No. 93,113 pursuant to the authority vested in the Supreme Court by K.S.A. 20-2616 to fill the vacancy on the court resulting from Justice Gernon's death.

DAVIS, J., concurring: I join in the opinion of the court to affirm the district court's dismissal of Stranger Valley Land Company, L.L.C.'s attempted appeal from the appraisers' award in this eminent domain case based upon Stranger Valley's failure to timely pay the docket fee with its written notice of appeal. The statutory language leaves no room for doubt that a party may appeal within 30 days of the appraisers' award "*by filing a written notice of appeal with the clerk of the district court and paying the docket fee of a new court action.*" (Emphasis added.) K.S.A. 2004 Supp. 26-508.

However, since the enactment of the eminent domain statutes into law, K.S.A. 26-101 *et seq.*, to the recent legislative amendment of K.S.A. 2004 Supp. 26-508, appeals from the appraisers' award to the district court have been perfected by the filing of a notice of appeal. A review of the legislative history concerning the amendment provides no rationale for the change. As indicated in *Avco Financial Services v. Caldwell,* 219 Kan. 59, 547 P.2d 756 (1976), a case relied on by Stranger Valley, Justice Schroeder, writing for the court and interpreting statutes which were not entirely clear and in conflict but which seemed to require in an appeal to the district court from the magistrate court the payment of a docketing fee, stated:

"Since payment of the docket fee affects only the clerk of the district court, and an adverse party is not affected by the time of the payment of the docket fee, it should not be regarded as jurisdictional. [Citations omitted.]

. . . .

"While [the] statutes in dispute are conflicting, the appellee has failed to show prejudice by the appellants' failure to pay the $35 docket fee on September 12, 1974, when the papers from the

magistrate court were filed in the district court. [Citation omitted.] Since the delayed payment of the docket fee affects only the public official that is benefitted by the payment, and in no way prejudices the appellee, we hold the appeal was properly perfected on September 3, 1974, when the notice of appeal was filed." 219 Kan. at 62-63.

In this case, there is no conflict in the statutes and the plain language of the legislature is clear in its requirement that the docketing fee be paid at the time a notice of appeal is filed. However, the law favors resolution of cases on their merits. Here, the dispute was resolved upon the failure of Stranger Valley to pay a docketing fee. While the language of the statute compels a ruling of dismissal on jurisdictional grounds, the placement of the docketing fee requirement in the first sentence of K.S.A. 2004 Supp. 26-508 thereby making the payment of the docketing fee jurisdictional may have been unintended. I therefore concur in the court's opinion.

END

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DRISCOLL LAW OFFICE

JERRY E. DRISCOLL
RES: 785-483-4039

JERRY E. DRISCOLL
DRISCOLL BUILDING - 726 MAIN
P.O. BOX 226
RUSSELL, KANSAS 67665
PHONE 785-483-5325
FAX 785-483-3193

JERRY E. DRISCOLL (1882 - 1969)
RICHARD M. DRISCOLL (1919 - 1997)

January 27, 2006

Chairman John Vratil and
Members of the Senate Judiciary Committee

RE: Senate Bill 398

Dear Gentlemen:

My name is Jerry E. Driscoll, and I am an Attorney in Russell, Kansas. I appear today in support of Senate Bill 398.

I represent Stranger Valley Land Company, a local landowner in Russell County, Kansas. Stranger Valley Land Company owns a tract of land adjacent to Interstate 70 in Russell County, Kansas. Two years ago, the Kansas Department of Transportation took a portion of the land owned by Stranger Valley for State Highway purposes. The property, which was condemned, was appraised in an administrative procedure under the Eminent Domain Procedure Act. However, Stranger Valley believed that its appraised value was too low and did not constitute just compensation.

Stranger Valley timely filed its Notice of Appeal from the administrative award, but the Supreme Court recently ruled that Stranger Valley was not entitled to have its just compensation determined in court, by a jury, because the docket fee had not been paid with the Notice of Appeal. Stranger Valley did not pay the docket fee initially, but did so later. In the past, the Supreme Court had consistently stated, that only the timely filing of the Notice of Appeal was required to perfect an appeal, and that the payment of a docket fee was not jurisdictional. However, in its most recent decision involving Stranger Valley, the Supreme Court came to the opposite conclusion with respect to Eminent Domain Appeals.

The proposed Senate Bill 398 would restore the actual intent of the Legislature in amending the appeal provisions of the Eminent Domain Procedure Act in 2003. That intent was to clarify that a docket fee is required to allow court determination of a landowner's just compensation. The intent was not to add any new jurisdictional requirements, although that is how the Supreme Court has recently chosen to interpret the amendment.

Because the proposed Bill would make the present clarification retroactive to the date of the 2003 Amendment, its passage should allow Stranger Valley to have a court and jury determine whether it has, in fact, received the constitutionally required just compensation for the land that had been taken from it by the State.

Thank you for your time.

Very truly yours,

DRISCOLL LAW OFFICE

Jerry E. Driscoll

JED/JM

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Testimony of
Kris W. Kobach
Professor of Constitutional Law, University of Missouri (Kansas City)
Before the Kansas Senate, Committee on the Judiciary
January 31, 2006

Introduction

Mr. Chairman and Members of the Committee, I come before you today in my capacity as a Professor of Constitutional Law at the University of Missouri (Kansas City). During my ten year career as a law professor, I have devoted much of my research to the history and evolution of the Takings Clause of the Fifth Amendment to the U.S. Constitution. That is the first reason that I am so keenly interested in the proposed amendments before you today. The second reason is that one of the proposed amendments—SCR 1616—was the product of hours of research by a team of law students in my Legislation class. The law students in that class exhaustively analyzed all 50 of the state constitutions, studied all of the relevant case law, and put together an amendment that combines the best elements from other states along with new provisions to cope with the fallout of the U.S. Supreme Court's decision in *Kelo v. City of New London*, 125 S.Ct. 2655 (2005). Several of those law students are present today.

Historical Importance of Takings Clauses

Protections against the uncompensated taking of private property by the government lie at the very heart of the Anglo-American legal system. Indeed, in the Magna Carta of 1215, sections 28, 30, 31, and 52 all secure the property rights of Englishmen against such takings by the crown.

This most fundamental of liberties was quickly transplanted to the new world; and when the states declared their independence and drafted their first constitutions, takings clauses were immediately inserted. Massachusetts was one of the first states to do so, in the 1780 Massachusetts Declaration of Rights: "[N]o part of the property of any individual can, with justice, be taken from him, or applied to public uses without his own consent, or that of the representative body of the people . . . and whenever the public exigencies required that the property of any individual should be appropriated to public uses, he shall receive reasonable compensation therefor." The words of the takings clause of the Fifth Amendment were drawn from these state constitutions, as well as from the deeper well of the English common law: "nor shall private property be taken for public use without just compensation."

For more than a century, the original understanding of those words prevailed in the U.S. Supreme Court, particularly with respect to the so-called Public Use Clause, limiting the eminent domain power to cases in which the government or the public actually used the property. As the Supreme Court opined in 1798, the government may not "take[] property from A. and give[] it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it." *Calder v. Bull*, 3 Dall. 386, 388. This fundamental premise of our constitutional freedoms would begin to erode in the 1950s, when the U.S. Supreme Court took a more flexible approach to interpreting the words "public use" in the

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case of *Berman v. Parker*, 348 U.S. 26 (1954), contemplating a definition that encompassed taking property merely for a "public purpose." The erosion of this constitutional liberty was completed in June 2005, when in *Kelo v. City of New London*, a narrow 5-4 majority of the Court approved the taking of property from one private owner to another in the name of redevelopment and higher tax revenues. As Justice O'Connor lamented in one of her last and finest dissents, "the specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." All of those redevelopment uses may be more fashionable and may generate more tax revenue, but Americans long ago decided that the sanctity of property rights was more important that the amount of tax revenue flowing into government coffers.

Kansans' Particular Vulnerability

When a constitutional protection is effectively erased from the U.S. Constitution, Americans are still protected by similarly-defined rights in their state constitutions. The takings clauses of the various state constitutions are now being employed in courts across the country to defend private property owners from uses of the eminent domain power to take property from A. and give it to B.

Except in Kansas. Kansas is one of only two states in the entire country that does not have a takings clause in its constitution. The other state is North Carolina. The closest we have in Kansas is Article 12, Section 4, concerning rights of way for corporations. This offers no protection whatsoever to landowners in the vast majority of eminent domain cases.

This surprising omission in the Kansas Constitution did not endanger property rights significantly when the Takings Clause of the U.S. Constitution provided security against use of the eminent domain power to strip property from one owner and give it to another. But now that that federal protection is gone, Kansas property owners stand unprotected before the power of cities, counties, and the state to do exactly that. It is therefore crucial that this committee act to give Kansans at least as much security in their property rights as that enjoyed in the 48 states that do have takings clauses.

Justification of the Various Provisions of SCR 1616

There are several proposals before this committee. I would like to conclude by describing and defending the various provisions of SCR 1616, which is without question the most robust protection of property rights before you today. First it must be noted that a constitutional protection is vastly superior to a statutory protection. Indeed, statutory rights are only as firm as legislative majorities. They can vanish in an instant, and they offer little in the way of enduring protection that landowners can rely on when they buy property. Second, let me state that SCR 1612 has an elegant and appealing simplicity about it. It is brief and to the point. But one thing we have learned in this era of judicial activism is that wayward courts can easily distort elegantly simple constitutional protections. A strong constitutional right must protect individuals not only against legislative overreaching but also against judicial misinterpretation. SCR 1616 was drafted with this in mind.

Possession, occupation or enjoyment. This language (in subsection a) provides a narrow definition of the phrase "public use." It cannot easily be stretched to include nebulous concepts of "public purpose." This protection becomes ironclad when combined with the negative language in the opening sentence of subsection (c): "The power of eminent domain shall not be exercised to transfer real property from one private owner to another."

Burden of establishing public use. This provision (in subsection b) recognizes that any takings clause containing public use language will be tested in court. Municipalities will try to stretch the concept of public use, as they have done for centuries when confronted with the Fifth Amendment Takings Clause. This language establishes a judicial presumption in favor of the original owner that a taking is not for public use unless the government can meet its burden of showing that it is for public use.

The ten-year clause. This provision (in subsection c) was added to prevent a municipality from circumventing the rights of property owners by simply acting as a middleman, using the power of eminent domain to take property into government possession, but then reselling to a favored developer or private buyer. At the same time, the ten-year provision allows a municipality to divest itself of property validly taken but not ultimately used. In addition it provides another layer of protection to the original property owner, giving him the right of first refusal in repurchasing his property.

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

Senate Judiciary Committee Hearing, 9: 30 a.m., January 31, 2006

Subject: Testimony in **Support for the passage of Senate Concurrent Resolution No. 1616 as a Constitutional Amendment.**

I am a real estate broker and land developer in Sedgwick County. I am also a volunteer coordinator for Americans For Prosperity, and a member of the Wichita Independent Business Association. I am not here to speak for those groups, but as a real estate practitioner who is concerned about the abuse of power that happens when cities, counties and state agencies have the power through eminent domain to force someone to sell their property so that it can be turned over to someone else for economic development. Your passage of Senate Concurrent Resolution No. 1616 would prohibit this abuse and provide important and needed limitations on governments taking of private property for public use.

"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." The Fifth Amendment clearly embodies this precept of justice allowing private property to be taken only for public use and only with the payment of just compensation. The recent Supreme Court ruling Kelo vs. The City of New London strips away this protection on the federal level, making it incumbent on our state government to provide its citizens with private property rights protection.

The Institute for Justice reports that Kansas has one of the worst urban renewal laws in the country, granting government the power needed for eminent domain abuse. Steven Greenhut in his book, "Abuse of Power, How the government misuses eminent domain" quotes a 2003 *Detroit News* article ranking Kansas fifth in its use of government condemnations for the benefit of private owners behind, Maryland, California, Ohio, and Michigan.

Secure private property rights are the bedrock for all of our other rights. They apply to the rich and the poor, "No matter how modest or lowly." Says Greenhut. People who are secure in their property can plan for their future and not worry that a majority vote of a five person city council or county commission can strip their home away for some private developers project, or their small family business for a larger business, or their family farm for a private developers profit. The governments participation in the process of taking private property from one private group for the benefit of another private group is wrong, and by placing governments in a position to choose which groups wins and which fails, flies in the face of freedom.

A quote by Nobel Prize winning economists Milton Friedman, and Gary Becker in Tom Bethell's book "The Noblest Triumph, Property and Prosperity Through The Ages" is: "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. A recent poll indicates that over 90% of Kansans support this type of eminent domain reform. You can seize this opportunity for your constituents and for private property and small business owners in Kansas by supporting the passage of Senate Concurrent Resolution No. 1616 as it is written.

Sincerely,
John R. Todd

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To: Senate Judiciary Committee

From: Bill House

Date: January 31, 2006

Re: Support for SCR 1612 and SB 323

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 5th 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.

KANSAS
ASSOCIATION OF
COUNTIES

TESTIMONY
concerning
SB 446
Fairness in Economic Development Act
Presented by Gene L. Merry
Senate Judiciary Committee
January 31, 2006

Chairman Vratil and members of the committee, my name is Gene Merry, Coffey County Commissioner and President of the Kansas Association of Counties (KAC). I appreciate the opportunity to testify on behalf of the Kansas Association of Counties and our 96 member counties in support of SB 446, the Fairness in Economic Development Act, which would apply to any unit of government in Kansas having the power of eminent domain for economic development purposes.

I want to begin by saying that counties exercise their eminent domain powers infrequently and cautiously. The only two examples of counties' use of eminent domain for economic development of which I am aware is for the Kansas Speedway project in Wyandotte County and for the Target Distribution Center in Shawnee County. I have never voted to use eminent domain for economic development purposes in Coffey County. I know that I speak for my fellow commissioners around Kansas in saying that we view the use of eminent domain as a power of last resort, after totally exhausting all other means of negotiating the acquisition of property.

The use of eminent domain for economic development requires members of the governing body to balance the private property rights of individuals with the governing board's responsibility to look out for the public interest. For many years now, economic development has been one of those functions expected of local government, along with more traditional functions such as roads and bridges, water and sewer service, solid waste planning, *et. al.* SB 446 seeks to extend private property owners' rights to due process in a number of ways. They include:

1) A requirement that the acquiring entity pay 125% of fair market value when owner-occupied residential property or operating farm land outside a city are taken by eminent domain for economic development purposes;
2) A requirement that the condemning authority prepare an economic development plan if, as part of the project, any property is to be acquired through eminent domain;
3) A requirement for the condemning authority to hold a public hearing not less than 30 nor more than 70 days after a governing body adopts a resolution setting the date for such hearing, with publication of the notice of such hearing in a

300 SW 8th Avenue
3rd Floor
Topeka, KS 66603-3912
785•272•2585
Fax 785•272•3585

newspaper of general circulation in the proposed economic development project area; and

4) a requirement of a 2/3 majority vote of the members of a governing board to adopt the project plan and/or to authorize the use of eminent domain to acquire land for the economic development project; and

5) a requirement that the condemning authority first make a finding that the entity, after good faith negotiations, was unable to acquire the property; and

6) a requirement that, in any eminent domain proceeding for economic development purposes, a court determine whether the decision to take the property was unreasonable, arbitrary or capricious, or made fraudulently or in bad faith.

It is certainly in the public interest for as much due process to be built into the process of eminent domain as possible, given the impact of such extreme action. By publicizing the facts of the situation by bringing them to the public's attention, the likelihood of an ill-advised decision to authorize eminent domain for economic development purposes is much reduced. There will still be occasional situations in which a board of county commissioners must weigh its use and even make the decision to move forward, but it will not be without first exercising due caution.

It seems appropriate that boards of county commissioners such as the one I am pleased to serve on are given the authority to, in rare circumstances, exercise the power of eminent domain. As representative of one of the levels of government closest to the people, I find comfort in knowing that commissioners must live with their decisions for a very long time, which surely makes them more cautious in exercising good judgment.

As representative of county governments in Kansas, I urge the committee to retain the authority for county commissioners to act in the public interest in behalf of everyone in our jurisdictions, even when the public interest of economic development is directly pitted against important private property rights. I further urge the committee to consider enacting the important safeguards for property owners that are reflected in SB 446, which will serve to ensure that we as policymakers are truly doing the people's business. Thank you for your attention and for this time to speak with you.

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.

TO: Senate Judiciary Committee
Senator Barbara Allen, Chair

FROM: Donna Martin
18599 Hwy K15
Dexter, Kansas

DATE: January 31, 2006

RE: Support for SCR 1612 and SB 323

Thank you for allowing me to share our situation.

Our story is the epitome of eminent domain abuse. On August 30, 2003 our community in eastern Cowley County learned from the Channel 3 evening news that somebody wanted to build a huge lake over us. A few one-sided newspaper articles appeared. We were told it was because we needed the water. We soon learned it was much more than that. No one came to talk to us. Rumor was our only source of information. We had to search for accurate information and educate ourselves.

Two powerful, Wichita developers wanted to build an 8,000-10,000 acre lake over both Silver and Grouse Creeks. They wanted to create a port authority as the governmental entity to carry this out. They said the development would pay for itself. They loudly touted the economic development value. They said people would move here and make the area economically rich. They called it their "Little Branson". The developer, who was a real estate agent, had pretty maps showing golf courses, housing developments and other businesses near the water's edge. We discovered they had privately approached nearly every elected official of our area during the last five years to explain their lake proposition—but never in a public meeting where records were kept. They finally announced their "Proposal" at the 2003 Prosperity Summit in Hutchinson.

Our local community had not been informed. We began to aggressively search for answers and information. We were told that, under Kansas law, exactly what they proposed could happen. We were told that a port authority could also annex 1-5 miles surrounding the body of water. We found that the Corp of Engineers would probably recommended at least one mile for water quality control, now making the project a 60,000-acre (or more) project. This would have decimated our rural community, taking jobs as well as homes. Many of our community would be forced to move away. There was not that much land on the market in our area and the price would drastically rise. There would be absolute pressure to replace the land in a short amount of time. Land prices had increased in the past on much smaller projects.

We knew other facts. We knew the huge lake would destroy our two unique Silverdale Stone companies, our fertile farms, our extensive native American campgrounds (officially dated centuries before Christ), the Indian burial grounds, the abundant artifacts, the historic 1800s bridges and buildings, the existing watershed lakes, the two pristine benchmark streams, the excellent wildlife and fishing, and the oil production. It

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would intersect the famous Black Dog trail. As the list went on and on, we knew the expense increased. As the expense increased, they would have to develop more…taking more land to pay the bill!

Our community was devastated in 911-proportion. Everything we had believed about property rights and the freedom to maintain what we believed to be ours was shaken. The right to live where we chose to live on land that we had struggled through the years to keep was appeared to be slipping away in a "second taking of the land". Some of our land had been passed down for generations. Money was not the issue. The lake became a secondary issue. Kansas being 2nd only to California in eminent domain abuse had hit home. The developer's well-laid plan caused absolute fear and distrust of anyone from outside of our neighborhood. The lake proponents had greatly minimized the eminent domain part of their plan. Their plan would not have been possible without the use of the power of eminent domain.

There was a total and complete economic shutdown in our area. Real estate deals were halted. Nobody wanted to purchase machinery, build barns, fix fences, expand their business or remodel … a complete shutdown. Why do it if you are going to lose it? This lasted from August 30, 2003 until Senator Goodwin's bill, SB461, was passed in 2004. We all realized this bill was just a Band-Aid for Cowley County. The eminent domain problem was not really fixed. The "black cloud" could move from our county to someone else's.

When the threat of the developers was removed, the community resumed work on being competitive in a global society. They have been successful in accomplishing many things in a short amount of time. Realizing that important strides involved teamwork, we have formed a rural community revitalization group called the ABCD&E. In the past year, we can boast of six new businesses. Twice that number are in the remodeling/building stage and will be completed in the near future. Others are in the planning stage. The group applied and was chosen from 42 state applicants last November to be one of three Kansas Rural Task Force's pilot projects. We look forward to a bright future in our community. Good things are happening again. (www.cowleynet.com)

We have always known that economic development is important for a community, but we learned the hard way that development from within is far more powerful than having it mandated upon us. We know this local development is more sustainable and far more desirable. We know people with roots are not interested in leaving and their vested interest makes them work harder to make a business successful. That is what America is really about.

I am very proud of my community and have always been proud of Kansas. I could not remain proud, however, of a state that would allow the rich and powerful to grab land from the weak or poor for their own advantage. I urge you to pass Senate Concurrent Resolution 1612 and Senate Bill 323 to permanently correct the eminent domain abuse in Kansas. Let us remain proud of Kansas.

TESTIMONY OF STEVEN ANDERSON
CASTLE COALITION COORDINATOR
INSTITUTE FOR JUSTICE

KANSAS SENATE JUDICIARY COMMITTEE

JANUARY 31, 2006

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1-31-06
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Testimony of Steven Anderson
Castle Coalition Coordinator, Institute for Justice
Kansas Senate Judiciary Committee
January 31, 2006

I would like to thank Chairman Vratil and the members of the Senate Judiciary Committee for the opportunity to testify about Kansas' eminent domain law, particularly in the wake of the U.S. Supreme Court's now infamous decision in *Kelo v. City of New London*. Kansas is one of the worst states for protection of property rights, which makes the legislation you are considering today so very important.

My name is Steven Anderson and I am the Coordinator of the Castle Coalition, a project of the Institute for Justice. The Castle Coalition is a nationwide network of grassroots citizens committed to ending eminent domain abuse through outreach and activism. The Institute for Justice is a non-profit public interest law firm dedicated to defending the fundamental rights of individuals and protecting the basic notions of a free society. One of the Institute for Justice's principal issues is private property rights, and to this end, we represent the homeowners of the Fort Trumbull neighborhood in New London, who were the subject of the *Kelo* case. We are the nation's leading critic of and legal advocate against the abuse of eminent domain laws.

I personally work with property owners all over the country to combat eminent domain for private development. In the wake of the *Kelo* decision, we launched our Hands Off My Home campaign, an aggressive and focused initiative to effect real change at the state and local levels. It is that desire to help that prompts me to be here today.

The power of eminent domain is awesome, so awesome that in this country's early days, the U.S. Supreme Court described it as "the despotic power." Quite simply, it is the power to remove residents from their long-time homes and destroy small family businesses. It is a power that must be used sparingly and only for the right reasons. In order to protect property owners, the Fifth Amendment to the U.S. Constitution provides: "[N]or shall private property be taken for public use, without just compensation."

There are two independent and significant protections under the Federal Constitution: public use and just compensation. Most every state in the country has similar language; however, Kansas is one of the few states that have no constitutional limitation upon the taking of private property for public use—and that's the heart of the problem. Article 12, Section 4 of this state's constitution only addresses compensation: "No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation." This provision does not serve as a substantive restriction on the power of eminent domain. Given this fact then, for the citizens of Kansas, the *Kelo* decision took away any hope of real protection from takings for private use.

Historically, public use meant things actually owned and used by the public—roads, courthouses and post offices. Increasingly, particularly over the last 50 years, the notion of public use has expanded to the point that the public use restriction is really no restriction at all. In fact, Kansas case law says "there is no precise definition of what constitutes a valid public use, and what may be considered a

valid public use or purpose changes over time." Without an adequate definition, property is routinely transferred from one person to another in order to build luxury condominiums and big-box stores. And this abuse in happening all over Kansas.

Kansas has some nationally renowned examples of eminent domain abuse. As you know, the Kansas Supreme Court in 1998 held that taking the homes of 150 families to make way for a private racetrack for NASCAR was a "public" purpose. Other cities, including Independence and Topeka, have followed suit, and the City of Merriam condemned a used car dealership for a higher-priced BMW dealership. But there's more:

- Pittsburg—City officials were eager to attract a Home Depot. The site chosen for the store already had seven properties—5 of which the city acquired by April 2004. Two owners, Dang Van Nha, of a group that owned a building that housed China Buffet, and Darrell Trent, a part-time developer, were not pleased with the city's offers. Nha eventually sold under the threat of eminent domain, while city officials filed a condemnation suit against Trent, who was serving as an ambassador in Iraq at the time. His lawyer tried to get the trial postponed until Trent could return but officials pushed ahead and seized the land. He was eventually paid for his land, on which a plumbing business had operated.

- Topeka—Private developers have been unable to acquire four properties—a bike shop, a bar, a home, and a t-shirt store—owned by two people. So they've asked city council members to condemn the "blighted" land. Other property owners decided to sell rather than fight what they considered to be the inevitable, including Robert Asselin, who owned Lane Street Flea Market with his daughter. Developers want to build apartments, town homes and a shopping center in Topeka's College Hill neighborhood near Washburn University. Thus, Jerry Morgan, owner of Jerry's bike shops, has been meeting with state legislators interested in legislation restricting the use of eminent domain.

Other abuses have prompted legislation:

- Dexter and Cowley—Developers proposed a 8,000–acre lake in Dexter and Cowley Counties as part of a 30,000 to 40,000-acre lake and housing development. The plan would have flooded the area where about 40 homes sit and required the acquisition of another 60 properties, including that of Kelly Williamson and Rhea Sloan, whose grandfather was born in a covered wagon on the land she still owns. Senator Greta Goodwin, opposed the project and has introduced one of the bills you are hearing today. It has been reported that Goodwin's office has been swamped with calls, letters and e-mails from residents and landowners who fear their land will be taken if the proposal gains support.

- Manhattan—In July 2003, city commissioners voted to accept a downtown redevelopment project. In December 2003, commissioners decided taxpayers would help shield Dial from financial risk and reimburse the company up to $3 million. Property owners hoping for a straight answer as to the future of the homes and livelihoods in the plan were stonewalled at a January 2004 public meeting. In March 2004, a bill (SB 547) prohibiting the use of eminent domain for economic development that would have kept Manhattan officials from seizing land for the project got voted down in the state Senate. In the end, in January 2006, commissioners unanimously approved the northern piece of the three-phase project.

Between 1998 and 2002, we found more than 10,000 instances of eminent domain abuse across the country—and this is only the tip of the iceberg. We'll be publishing a new report this year with thousands more. Based on our research, Kansas is one of the worst abusers of eminent domain since it, along with New York, is one of the few states in the nation that specifically allows condemnation for economic development. When comparing state eminent domain laws, even California has better protections for homeowners, farmers, and small business owners.

In addition to protecting property from acquisition for economic development, it is important to consider the rampant abuse of "blight removal" as well, a concept is often used to transfer property from one private owner to another. The U.S. Supreme Court long ago gave governments the right to transform private uses into public ones for a variety of reasons other than pure economic development. The most common way cities, including those in Kansas, make this change is to call it "urban renewal," so I'll discuss it in a little more detail.

Historically speaking, this concept grew out of the progressive movement that blossomed after World War I. The prevailing belief among social scientists was that cities were organisms and once they began to fail, if enough planners, academics and consultants got together and determined that an offending cancerous neighborhood should be removed, then the city would ultimately survive and prosper. These notions of civic boosterism and reliance on experts are the same theories ridiculed in this part of the country by Sinclair Lewis in novels like *Babbit* and *Arrowsmith.*

Urban renewal, as "blight removal" is called in Kansas, was given ultimate approval in 1954 by the Supreme Court in *Berman v. Parker.* The neighborhood at issue was in bad shape—houses were literally falling down, they were vermin infested and there were high rates of infant mortality and communicable diseases. It was what anyone would consider blighted.

However, over the last 50 years, "blight removal" has come to mean everything but the common sense meaning of the phrase. What started as a way to removed dilapidated, vermin-infested properties (what were historically considered public nuisances, the abatement of which was always allowed pursuant to the government's police powers) has been perverted into the ability to take away perfect fine middle- and working-class neighborhoods to give to private developers promising increased tax revenues and jobs. "Blight removal" has almost universally been conceded to be an abject failure. Despite this fact, the statutes of most every state, including Kansas', have such vague and amorphous definitions of blight that literally any property can be considered blighted—and, as a result, are subject to being taken away. Kansas uses criteria like faulty street and lot layout, diversity of ownership and economic or social liability, which give municipalities great leverage and leeway to take property from one owner and hand it over to another. This type of abuse must stop.

Unfortunately, in June, the Supreme Court in *Kelo* completed the erosion of rights guaranteed under the Fifth Amendment. As a result of this decision, every home, every church and every small business is now up for grabs to the highest bidder. According to a narrow majority of the Court, the mere *possibility* that private property may make more money as something else is reason enough for the government to take it away. I'm sure you'll hear from the well-paid lobbyists of developers and municipalities that the decision doesn't affect Kansas, since the state already recognizes economic development as a valid public use, and that there's really no problem that needs fixing. They're wrong. The *Kelo* decision signifies a fundamental shift in the sanctity of all our property rights—entire portions of the Federal Constitution have been erased. And since it was the Federal

Constitution that represented the only real protection for Kansans, there is nothing to prevent the abuse from increasing.

Overwhelming majorities in every major poll taken after the *Kelo* decision have decried the result. It's no wonder. Eminent domain, as it always has been, will continue to adversely affect those who have relatively little influence in politics, most typically the poor, minorities and the elderly. It remains a benefit for those with more money and connections.

But there is one important truth in the majority's opinion that's worth heeding. States and localities are free to enact greater protections than those provided at the federal level (which amount to none these days). And that is where this committee and the Kansas State Legislature come in. I am submitting the Institute for Justice's white paper on *Kelo* and legislative reforms along with my testimony, and this document presents general eminent domain solutions. But I'll also offer some specific suggestions.

Legislation strictly prohibiting eminent domain to pure, historically understood public uses would be an important step. Eminent domain should only be used in those situations where the general public, public agencies or public utilities will ultimately use or own the property. The provision could also allow eminent domain for the acquisition of property where there is a public nuisance and where property is truly unfit for habitation or completely abandoned.

This legislature can explicitly prohibit private-to-private transfers of property for economic development to increase tax revenue, tax base, employment, or general economic health, when that activity does not result in (1) the transfer of land to public ownership; (2) the transfer of land to a private entity that is a common carrier, such as a railroad or utility; (3) the transfer of property to a private entity when eminent domain will remove a threat to public health or safety, such as the removal of public nuisances, removal of structures that are beyond repair or that are unfit for human habitation or use, or acquisition of abandoned property; or (4) the lease of property to private entities that occupy an incidental area within a public project.

You can reform the way courts define public use by requiring that any determination of a public use be made by the courts. You can also demand that any claim of public use be shown by clear and convincing evidence.

To the extent blight removal remains a legitimate objective of eminent domain, Kansas should make sure "blighted area" means the presence of a concrete, objective harm, something akin to what it meant in *Berman*, not just what the government pays a consultant to say. It should be reserved for only those situations where properties significantly affect public health and safety, where there are substantial tax delinquencies or property is unfit for human habitation. This redefinition is especially important, given municipalities' fondness for using "blight removal" as a reason to redevelop. It's time to provide a definition of blight that actually means something specific—not everything to everyone. Blight should no longer remain in the eye of the beholder.

I'd like to turn to the specific legislation being considered today. Senator O'Connor's Concurrent Resolution 1616 is an excellent example of the protections Kansas must codify. It establishes a comprehensive constitutional protection that's currently missing, clearly defining public use and prohibiting private-to-entity transfers. By passing a strong bill, like SCR 1616, Kansas would quickly catapult from one of the worst states for property owners, to one of the best.

Alternatively, SCR 1612, introduced by Senators Schmidt and Goodwin, takes important steps toward real eminent domain reform, but could be an even stronger bill with a few simple changes. This bill's prohibition on private takings is tied to the "intent" of government at the time the land is taken. This is a huge loophole, because it is difficult to determine a government's intent. Cities and counties can easily claim one reason, but actually mean another. Further, courts will very rarely look beyond the ordinances allowing eminent domain, so this provision will protect Kansans only if there's fraud or other egregious conduct. Additionally, constitutional protections mean little if there are exceptions "as the legislature may provide by law." Granted, establishing a constitutional protection is better than not having one at all, but this fundamental right is not safe if it can be circumvented at any point by the legislature passing an economic development or urban redevelopment law. This bill is definitely a step in the right direction, but it would offer better protection for Kansas property rights with a few important changes.

On the statutory reform side, Senate Bill 323 is the companion to the Schmidt-Goodwin SCR. This bill includes the same, unfortunate, "intent to or anticipation of" language, which as I mentioned, runs the risk of making an otherwise good bill completely ineffective. Additionally, I would suggest changing the term "public purpose" to "public use." Eminent domain decisions have a long history to morphing terms for broader and broader allowances, and "public purpose" is considered less restrictive than "public use."

Senate Bill 446 establishes the "Fairness in Economic Development Act." I would argue the fact that this bill establishes procedures for the use of eminent domain for economic development makes it inherently *un*fair. In her *Kelo* dissent, Justice Sandra Day O'Connor discussed the three historic reasons for taking private property: (1) transfers of property from private ownership to public ownership; (2) transfer of property to a privately owned common carrier or similar public infrastructure; (3) transfer of property to eliminate an identifiable public harm. She pointed out that "economic development" fits into none of these categories. Now, government may condemn property as long as there is a plan to put something more expensive there.

Finally, Senate Bill 398 deals with the appeal process for compensation appraisals. This is generally outside my area of expertise, as the Institute for Justice focuses on protecting homes and small businesses from eminent domain, not arguing procedure or compensation once it is taken. I encourage you to ensure that the reforms you pass provide real and enforceable limits on the use of eminent domain. It is tempting to compromise for reforms that only deal with compensation or procedural issues. While helpful, those reforms are, by themselves, simply not enough to protect Kansas home, farm and business owners.

We are willing to work with legislators on both sides of the aisle to enact significant and substantial eminent domain reforms—while a narrow majority of the Supreme Court said eminent domain is okay, a vast majority of Americans in every major poll I've seen have said it's not. It's clear the people have spoken.

Eminent domain abuse is not just associated with abstract notions of property rights—it affects real people, in cities and on farms, and far more than I've been able to mention here. Kansas has a historic opportunity to reverse years of exploitation and misuse of the eminent domain power by joining states around the country by passing significant and substantial eminent domain reforms. At last count, over 40 states have either passed or are considering passing laws to stop the abuse of

eminent domain. Even Congress is taking action. Kansas should not be left behind because as its reputation suffers, so does its citizens. It is essential to protect the rights of farmers and home and small business owners. In many ways this state was built by land, and Kansans' creative ability to cultivate it. Respecting the right of citizens to keep what they've worked so hard to own is essential to stabilizing this foundation.

Today, this committee is playing an important role in the reform process and I offer the expertise of the Institute for Justice and Castle Coalition in helping in any way we can. I trust you, the Kansas legislature and Governor Sebelius all recognize the critical importance of private property rights. It's time to make sure that means something.

Thank you again to the committee for allowing me to testify and I'm happy to answer any questions.

Kelo v. City of New London: What it Means and the Need for Real Eminent Domain Reform

In *Kelo v. City of New London*, the U.S. Supreme Court held that the Constitution allows governments to take homes and businesses for potentially more profitable, higher-tax uses. In the aftermath of that decision, the defenders of eminent domain abuse have already begun desperate attempts to keep the power to take homes and businesses and turn them over to private developers. And they are struggling to convince outraged Americans that ordinary citizens shouldn't care. The beneficiaries of the virtually unrestricted use of eminent domain – local governments, developers, and planners – will frantically lobby to prevent any attempt to diminish their power.

Their main message is that nothing has changed and there's nothing to worry about, because local officials always have the best interests of their citizenry at heart. Nothing could be further from the truth. The *Kelo v. City of New London* decision represents a severe threat to the security of all home and business owners in the country. Not only does it give legal sanction to a whole category of condemnations that were previously in legal doubt, but it actually encourages the replacement of lower income residents and businesses with richer homeowners and fancier businesses. The vast majority of Americans understand what is at stake, even if many so-called experts do not.

What the Supreme Court Actually Said in *Kelo*

The Court ruled that 15 homes in the Fort Trumbull waterfront neighborhood of New London, Connecticut, could be condemned for "economic development." There was no claim that the area was blighted. The project called for a luxury hotel, upscale condominiums, and office buildings to replace the homes and small businesses that had been there. The new development project would supposedly bring more tax revenue, jobs, and general economic wealth to the city. Connecticut's statutes allow eminent domain for projects devoted to "any commercial, financial, or retail enterprise." Conn. Gen. Stat. § 8-187.

The Fifth Amendment to the U.S. Constitution states, "[N]or shall private property be taken for public use, without just compensation." Yet in the *Kelo* decision, Justice Stevens explains that the fact that property is taken from one person and immediately given to another does not "diminish[] the public character of the taking." The fact that the area where the homes sit will be leased to a private developer at $1 per year for 99 years thus, according to the Court, has no relevance to whether the taking was for "public use." Instead, the *Kelo* decision imposes an essentially subjective test for whether a particular condemnation is for a public or private use: Courts are to examine whether the governing body was motivated by a desire to benefit a private party or concern for the public. Thus, because the New London city officials intended that the plan would benefit the city in the form of higher taxes and more jobs, the homes could be taken.

The Court's decision allows cities to take homes or businesses and transfer them to developers if they think the developers *might* generate more economic gains with the property. The Court also rejected any requirement that there be controls in place to ensure that the project live up to its promises. According to the majority, requiring any kind of controls would be "second-guess[ing]" the wisdom of the project.

Worse yet, cities do not need to have any use for the property in the foreseeable future in order to take it. In fact, the opinion encourages cities to condemn first and find developers later; the Court claims that it is "difficult to accuse the government of having taken *A*'s property to benefit the private interests of *B* when the identity of *B* was unknown." In the future, then, cities can negotiate a sweetheart deal but wait until after the condemnation to actually sign it. Or they can simply take property first and market it to developers later. Some of the homes in Connecticut were being taken for some unidentified use and others for an office building that the developer had stated it would not build in the foreseeable future.

So, according to the Supreme Court, cities can take property to give to a private developer with no idea what will go there and no guarantee of any public benefit.

If the majority thinks they offered any meaningful protection to home and business owners, they are completely disconnected from reality. The decision suggests some extremely minor limits to the use of eminent domain for private development. Those few condemnors in cities that don't bother to do a plan, fail to follow their own procedures, or actually engage in corruption may still find some hope in federal court. But there is almost always a plan; cities are quite adept at following their own procedures; and most cases of eminent domain abuse do not involve outright and blatant corruption, such as bribes. Consequently, the vast majority of individuals are left entirely without federal constitutional protection.

The Supreme Court's *Kelo* Decision Changes the Law and Threatens All Home and Business Owners.

Some commentators are claiming that *Kelo* didn't change anything and therefore no one needs to worry about it. This statement is wrong on two levels: *Kelo* did change the law, and to the extent that governments were already taking homes and businesses for private commercial development, that's cause for greater concern, not less. *Kelo* threw a spotlight on an already-existing practice that an overwhelming majority of people find outrageous and un-American. More importantly, by declaring that there are virtually no constitutional limitations on the ability of cities to take property from A and give it to B, the Court invited more abuse and thus made the problem of eminent domain abuse much worse.

The law before *Kelo* did sometimes allow condemnation of property that would result in private ownership, but each of these situations was extremely limited.[1] None

[1] *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992) (railroad track transferred to another common carrier); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (land ownership transferred to lessees as part of program to break up remnants of feudal land system dating from Hawaii's pre-state monarchy); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (pesticide research results available to later pesticide producers; obviously related to public health); *Berman v. Parker*, 348 U.S. 26 (1954) (single unblighted building in severely blighted area taken as part of large project to clear slum and redevelop); *Strickley v. Highland Bay Mining Co.*, 200 U.S. 527 (1906) (aerial bucket line for mining ore, available to any user); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1905) (condemnation for construction of irrigation ditch as part of statewide irrigation infrastructure program); *Head v. Amoskeag*, 113 U.S.

necessitated the decision of the majority in *Kelo*.

Indeed, four members of the Court agreed that its prior decisions did not dictate the result in *Kelo*. Justice Sandra Day O'Connor broke those previous cases into three categories: (1) transfers of property from private ownership to public ownership; (2) transfer of property to a privately owned common carrier or similar public infrastructure; (3) transfer of property to eliminate an identifiable public harm. But, as pointed out by Justice O'Connor, "economic development" fits into none of these categories. Now, government may condemn property as long as there is a plan to put something more expensive there.

The text of the Constitution does not change, so the question in any constitutional case is how the Court will apply that law to the facts. How far will it go in either enforcing or ignoring constitutional rights? For example, we know that the First Amendment protects free speech. But how far will the Court go in enforcing that right? The Court has applied free speech protections to everything from advertising and the internet to criticism of the government and Nazi marches. In one sense, of course, the "law" did not change; the Constitution reads the same, and the Court still says that free speech is important. But in fact, each of these decisions did change the law, because they applied it to a new situation. In the same way, in *Kelo*, the Court applied the Fifth Amendment to a different and far more extreme type of use of eminent domain and upheld it. In *Kelo*, the Court went to extraordinary lengths to ignore the constitutional mandate that property only be taken for "public use," and thus went much further than it ever had before.

So when some law professors say that nothing has changed, what they mean is that the Court's general statements about public use have not changed. The Court has said for a number of years that it applies great deference to government decisions that a condemnation served a public use. At the same time, the Court had always said that there was a limit, that government could not take property from A in order to give it to B for B's private use. But in constitutional law, it's the application of general statements to facts that tells how seriously the Court takes constitutional rights. The question in every case, therefore; was whether the particular use of eminent domain fell into the category of deference or whether it went too far and would be held unconstitutional. Before *Kelo*, we knew that government could take property in deeply troubled, almost uninhabitable areas and transfer it to private developers. Now we know that government can take **any** property and transfer it to private developers. Only a lawyer would be unable to tell the difference.

Commentators are right that local governments, as a matter of practice, have been using eminent domain to assist private developers on a regular basis for years. That fact should be a cause for deep concern, not comfort that nothing has changed. More than 10,000 properties were either taken or threatened with condemnation for private development in a five-year period.[2] Because this number was reached by counting properties listed in news articles and cases, it grossly underestimates the number of condemnations and threatened condemnations. In Connecticut, the only state that keeps separate track of redevelopment condemnations, we found 31, while the true

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9 (1885) (riparian rights for private mill; Court explicitly refused to hold that economic benefits justified condemnation).

[2] Dana Berliner, *Public Power, Private Gain: A Five Year, State-By-State Report Examining the Abuse of Eminent Domain* (2003) (available at http://www.castlecoalition.org/report/).

number was 543. Now that the Supreme Court has actually sanctioned this abuse in *Kelo* and refused to provide any meaningful limits, the floodgates to further abuse have been thrown open. Home and business owners have every reason to be very, very worried now. As Justice O'Connor noted in her dissent, "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping center, or any farm with a factory."

So while there may be no change to the general idea of deference to legislative determinations of public use, there has been a different, more far-reaching application of it. That new application will change property ownership as we know it. That is not an overstatement. There had been many condemnations for private use going on before this decision. But cities still knew that there was no case upholding eminent domain for economic development. That provided some restraint or caution. Now, there is no reason to show any restraint.

Eminent Domain Is Not Necessary for Economic Development.

City officials often claim that without the power of eminent domain, they will be unable to do worthwhile projects and their cities will fall into decline.

These claims are at best disingenuous, and at worst outright dishonest. There are many, many ways to encourage economic growth that do not involve taking someone else's property. These include, for example, economic development districts, tax incentives, bonding, tax increment financing, Main Street programs, infrastructure improvements, relaxed or expedited permitting, and small grants and loans for façade improvements.[3] Will a developer be able to put condos and a superstore on whatever piece of prime real estate it selects without using eminent domain? Maybe, maybe not. Will the city be able to have economic development? Absolutely.

Development happens every day, all across the country, without the use of eminent domain. At the same time, projects that do use eminent domain often fail to live up to their promises, and they also impose tremendous costs – both economic and social – in the form of lost communities, uprooted families, and destroyed small businesses. Urban renewal is now widely recognized as one of the worst policy initiatives ever undertaken in our cities, destroying inner cities and displacing thousands of minorities and elderly citizens.[4] But at the time, of course, it was touted as a brilliant tool of revitalization. The condemnation of the Poletown neighborhood in Detroit for a General Motors manufacturing plant in 1981, one of the most infamous economic development condemnations, failed to bring prosperity to the city. Indeed, it cost the city millions of

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[3] *See* Brief *Amicus Curiae* of John Norquist on behalf of Petitioners in *Kelo v. City of New London* (John Norquist is the former mayor of Milwaukee and President of the Center for New Urbanism); Brief *Amicus Curiae* of Goldwater Institute, *et al.* on behalf of Petitioners in *Kelo v. City of New London*. (All of the amicus briefs cited in this paper are available at http://www.ij.org/kelo.)

[4] *See* Mindy Thompson Fullilove, *Root Shock: How Tearing Up City Neighborhoods Hurts America, And What We Can Do About It* (One World 2005); Wendell Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003); Brief *Amicus Curiae* of Jane Jacobs on behalf of Petitioners in *Kelo v. City of New London*; Brief *Amicus Curiae* of NAACP, AARP, *et al.* on behalf of Petitioners in *Kelo v. City of New London*; Brief *Amicus Curiae* of Better Government Assoc., et al. on behalf of Petitioners in *Kelo v. City of New London*.

dollars and may well have destroyed more jobs than it created.[5] Defenders of eminent domain for private development present a false choice between protecting people's rights and economic development. In fact, we can have both.

Eminent Domain Is Not Used as a "Last Resort."

Many municipal officials claim that they use eminent domain responsibly and only as a "last resort." This is simply not true. In most cases, the threat of eminent domain plays an important role from the very beginning of negotiations. Cities know that most home and business owners will be unable to afford the tremendous legal costs associated with fighting eminent domain; this fact gives cities a strong incentive to threaten property owners with condemnation. People are told that if they do not sell, their home or business will be taken from them and they will get even less money. Cities plan projects on the assumption that there is no need to incorporate existing homes or businesses, because they can simply be taken. After cities design and pursue such projects, current owners are told to sell. If they do not, then eminent domain becomes a "last resort." In practice, the power of eminent domain often makes voluntary sales less likely, because owners who would have sold if treated with respect will refuse to once they have been threatened.

Changes to Planning and Hearing Procedures Will Not Stem the Tide of Eminent Domain Abuse.

Various commentators are suggesting that legislators can take a "moderate," "sensible" approach to the *Kelo* decision and just require a process with more public input and better planning. These measures will do nothing to protect the rights of home and business owners. The City of New London had a lengthy process, with studies, plans and public hearings. None of this lengthy process made any difference, however, because a deal had been cut before the process even began. Local legislators typically know the outcome they want and then follow the procedures necessary to get it. City councilors and planning officials don't even need to listen at public hearings, because they already know how they are going to vote.

Better planning is also no solution and will do nothing to protect home and business owners from losing their property to private developers. Planners call for even more of the kind of planning that, if implemented, necessitates forcing some people out of their homes and businesses to make way for other, supposedly better-planned uses. Thus, we hear calls for comprehensive plans that outline every future use of property in the city and integrated redevelopment plans that implement the comprehensive plans for replacing current owners with other ones. While all of this additional planning will no doubt bring lots of money to planners, it will not prevent the use of eminent domain for private commercial development and in practice will probably encourage more abuse.

The Floodgates Are Opening and the Situation Will Only Get Worse If No Legislative Action Is Taken.

In the wake of the U.S. Supreme Court's decision in *Kelo v. City of New London* upholding the use of eminent domain for private development, the floodgates are

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[5] *See* Brief *Amicus Curiae* of Jane Jacobs on behalf of Petitioners in *Kelo v. City of New London*.

opening to abuse. Already, the ruling has emboldened governments and developers seeking to take property from home and small business owners. Despite claims that eminent domain will be used sparingly, there have been a flood of new condemnations and new proposals of eminent domain for private commercial development after the *Kelo* ruling. In the first two months after the decision, more than 30 municipalities began condemnation proceedings for private development or took action to authorize them in the near future. Thousands of properties are now threatened with eminent domain for private commercial development, and those numbers will continue to swell unless state legislatures and Congress listen to their constituents and end the abuse of eminent domain.

Creating an Effective Statutory Protection Against Eminent Domain Abuse

Basic elements of a good law:

The outline below sets forth the basic elements of a law that will genuinely protect citizens from losing their land to other private parties for private development.

- Remove statutory authorizations for eminent domain for private commercial development.
- Explicitly forbid eminent domain for private commercial development and/or require that condemned property be owned and used by government or a common carrier.
- Prohibit "ownership or control" by private interests. In many cases, a government entity will technically own the property but lease it for $1 per year to a private party.
- Ensure that the statute or constitutional amendment applies to all entities that engage in eminent domain, using a term like "all political subdivisions."
- Clearly state any exceptions, i.e., any circumstances where property can be taken for private commercial entities. The main exception that should be made is private entities that are "common carriers" – these include railroads and utilities.
- If blight is an exception, revise blight definitions to clearly define the type of blight required to justify the use of eminent domain and require that the property has serious, objective problems before it can be taken for private development.
- Disentangle the designation of a redevelopment area for funding purposes and an area where property may be taken for private development. This allows cities to still get funding and acquire property voluntarily but prevents the use of eminent domain for private development.
- Require government to bear the burden of showing public use or blight, or at least put the parties on equal footing, with no presumption either way. The current rule typically means that the government's finding of public use or blight is conclusive, unless the owner can prove fraud, arbitrariness, or abuse of discretion.
- If allowing condemnation of unblighted property in blighted areas, require that the property be essential for the project.

Additional useful provisions

- Have blight designations expire after a certain number of years.
- Give owners the opportunity to rehabilitate property before it can be condemned.
- Return property to former owners if it is not used for the purpose for which it was condemned.

Common pitfalls in proposed reform legislation:

- Giving a complete exemption for any property taken under urban development laws and failing to change the definition of blight.
- Forbidding eminent domain for economic development without defining economic development.
- Forbidding condemnation for "solely" or "primarily" for economic development or private benefit. Whether a particular condemnation is solely or primarily for a particular purpose requires a judge to look at the intent of the governmental decision-makers. The legality of eminent domain should not depend on the subjective motivations of city officials, and proving intent as a factual matter is extremely difficult.
- Creating specific exemptions for pet projects. This will set a bad precedent for the future.
- Forbidding only ownership by private parties but not control. This leaves open the common practice of sweetheart lease arrangements.
- Making loopholes or accidentally omitting some of the political entities that engage in condemnation for private development.

MODEL LEGISLATION

State Constitutional Amendment

Since Kansas has no explicit provision regarding public use, the following will provide protection against eminent domain abuse needed by farmers, churches, home and small business owners around the state:

> 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 common carriers, private property shall not be taken for use by private commercial enterprise, for economic development, or for any other private use, except with the 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 private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

State Statute Limiting Eminent Domain Abuse

One simple way to remove the threat of eminent domain for economic development is simply to delete the statutory authorization for such uses of eminent domain. For example, in 2004, Utah simply removed the authorization for eminent domain from its act giving powers to redevelopment authorities. Authorizations for eminent domain for private business generally appear in statutes dealing with economic or industrial development, redevelopment, and municipal powers.

If an outright ban is not desired, a few possible approaches to a statute that would prevent the use of eminent domain for private development appear below. Variations on these themes were passed in Alabama and Texas in 2005 (though both states left large blight loopholes). These are a very effective way to curb abuse.

- **Requiring Eminent Domain for Public Use and Defining Public Use**

> Notwithstanding any other provision of law, neither this State nor any political subdivision thereof nor any other condemning entity shall use eminent domain unless it is necessary for a public use.
>
> Public use: The term "public use" shall only mean the possession, occupation, and enjoyment of the land by the general public, or by public agencies; or the use of land for the creation or functioning of public utilities; the acquisition of property to cure a concrete harmful effect of the current use of the land, including the removal of public nuisances, structures that are beyond repair or that are unfit for human habitation or use, and the acquisition of abandoned property. The public benefits of economic or private

commercial development, including an increase in tax base, tax revenues, employment, general economic health, shall not constitute a public use.

- **Prohibiting Eminent Domain for Private Business**

Notwithstanding any other provision of law, neither this State nor any political subdivision thereof or any other condemning entity shall use eminent domain to take private property without the consent of the owner to be used for private commercial enterprise, except that property may be transferred or leased (1) to private entities that are common carriers; (2) to private entities that occupy an incidental area within a public project, such as a retail establishment on the ground floor of a public building; (3) the use of eminent domain eliminates a threat to public health or safety, such as the removal of public nuisances, removal of structures that are beyond repair or that are unfit for human habitation or use, or acquisition of abandoned property. Whenever property is condemned and will be used by a private party, the condemnor must establish by clear and convincing evidence that the condemnation of the property is necessary.

- **Prohibiting Eminent Domain for Economic Development and Defining Economic Development**

Notwithstanding any other provision of law, neither this State nor any political subdivisions thereof nor any other condemnor shall use eminent domain to take private property without the consent of the owner to be used for economic development. Whenever property is condemned and will be used by a private party, the condemnor must establish by clear and convincing evidence that the condemnation of the property is necessary.

Economic Development—The term "economic development" means any activity to increase tax revenue, tax base, employment, or general economic health, when that activity does not result in (1) the transfer of land to public ownership; (2) the transfer of land to a private entity that is a common carrier, such as a railroad or utility; or (3) the transfer of property to a private entity when eminent domain will remove a threat to public health or safety, such as the removal of public nuisances, removal of structures that are beyond repair or that are unfit for human habitation or use, or acquisition of abandoned property; (4) the lease of property to private entities that occupy an incidental area within a public project.

In addition to the three examples provided above, three other types of provisions that also discourage the abuse of eminent domain are (1) allowing a former owner to regain ownership of condemned property if the government fails to use it within a given period of time; (2) time limits on blight or redevelopment designations; (3) attorneys fees for condemnees challenging the validity of takings.

State Statute Defining Blight

Blight statutes are written with such vague language that the criteria for designating areas as blighted, conservation areas, in need of redevelopment or other similar designations can literally apply to any property. To the extent the removal of blight is still desired, it is best to use objective and quantifiable factors. The following seeks to ensure that only truly harmful properties are subject to the power of eminent domain, not just those neighborhoods with chipped paint, cracked sidewalks or those that provide insufficient tax revenue in the eye of local government.

> Notwithstanding any other provision of law, neither this State nor any political subdivision thereof or any other condemning entity shall use eminent domain to take private property without the consent of the owner to be used for private commercial enterprise, except that property may be transferred or leased:
>
> (1) to private entities that are public utilities or common carriers;
>
> (2) to private entities that occupy an incidental area within a publicly-owned project;
>
> (3) to private entities if the property poses a threat to public health and safety and meets the definition of "condemnation-eligible" property.
>
> Condemnation-eligible property shall include:
>
> (1) Any premises which because of physical condition, use or occupancy constitutes a public nuisance or attractive nuisance.
>
> (2) Any dwelling which, because it is dilapidated, unsanitary, unsafe, vermin-infested or lacking in the facilities and equipment required by the housing code of the municipality, is unfit for human habitation.
>
> (3) Any structure which is a fire hazard, or is otherwise dangerous to the safety of persons or property.
>
> (4) Any structure from which the utilities, plumbing, heating, sewerage or other facilities have been disconnected, destroyed, removed, or rendered ineffective so that the property is unfit for its intended use.
>
> (5) Any vacant or unimproved lot or parcel of ground in a predominantly built-up-neighborhood, which by reason of neglect or lack of maintenance has become a place for accumulation of trash and debris, or a haven for rodents or other vermin.
>
> (6) Any property that has tax delinquencies exceeding the value of the property.

(7) Any property with code violations affecting health or safety that has not been substantially rehabilitated within one year of the receipt of notice to rehabilitate from the appropriate code enforcement agency.

(8) Any property which, by reason of environmental contamination, poses a threat to public health or safety in its present condition.

(9) Any abandoned property.

The finding by a public body that a property is a condemnation-eligible shall not create any presumption with regard to the validity of that finding.

Steven D. Anderson
Castle Coalition Coordinator
901 N. Glebe Road, Suite 900
Arlington, VA 22203
p:703.682.9320 f:703.682.9321
sanderson@ij.org
www.CastleCoalition.org www.ij.org

C A S T L E C O A L I T I O N
...nor shall private property be taken for public use without just compensation. —*U.S. Constitution, Amendment V.*

8-18

November 16, 2005

Think Successful Redevelopment Requires Eminent Domain? Think Again.

When the city of Seattle redeveloped part of its downtown in 1996, it did so the old-fashioned way—through private negotiation instead of public force. City officials and developers worked together to create more than one million square feet of new retail space, generating a 15.8% increase in taxable sales and a 4.4% increase in retail jobs. This was a classic case of targeted urban revitalization, and Seattle accomplished its goals while simultaneously respecting private property rights.[1]

Defenders of eminent domain for private commercial development all too often argue that eminent domain is absolutely necessary for private commercial development. Bart Peterson, testifying before Congress on behalf of the National League of Cities, asserted: "If cities did not have the tool of eminent domain, it would be impractical to undertake large economic development projects."[2] Georgetown Law Professor John D. Echeverria, an outspoken supporter of the U.S. Supreme Court's decision in *Kelo v. City of New London*, argued, "Without the eminent domain power, we would not have...many of our most successful downtown redevelopment projects, like the Baltimore waterfront."[3] They could not be more mistaken.

Many of the most successful economic redevelopment projects throughout history stayed clear of eminent domain. Walt Disney constructed the magic of Disney World without condemning or threatening to condemn a single piece of property. He and his subsidiaries purchased 100% of the land for the Florida amusement park through voluntary negotiation.[4] The Rouse Company created an entirely new city from scratch in Howard County, Maryland, purchasing more than 15,000 acres from 140 different owners in 1963.[5] The Commonwealth Development Group assembled 21 separate parcels of land in Providence, Rhode Island, and built an enormous shopping center—now a vibrant commercial hotspot that's created jobs and tax revenue, attracted hotels to the area, and become a cornerstone of growth and revitalization.[6]

Economic development happens every day without eminent domain. There are countless ways in which cities and commercial developers can improve the aesthetics of a given area, attract private enterprise and even facilitate infrastructure improvements to generate increased tax-revenue and job-growth, none of which require forcibly transferring land deeds from one person to another.

Since the 1970s, Main Street Programs, sponsored by the National Trust for Historic Preservation, have offered grants and loans for façade improvements, facilitated comprehensive grassroots-based economic development and revitalized

entire neighborhood commercial districts.[7] The United States Department of Housing and Urban Development's Dollar Home Program allows local government to purchase abandoned, foreclosed homes that have been on the market for more than six months; the properties are then renovated and often sold to low-to-moderate income families, benefiting the city as well as the new owners.[8] On a much smaller scale, Frank Cassidy, a building inspector in Bonita Springs, Florida, has worked with homeowners to restore the appearance of the exteriors of their homes. Once a property is named for aid under the "Beautify Bonita" project, Cassidy solicits tax-deductible donations and recruits volunteers to do the repairs.[9]

Projects involving land assembly and the transfer of property ownership can and do succeed without threatening eminent domain or initiating condemnation proceedings. In Las Vegas, Nevada, Focus Property Group created a 3,000-acre community called Mountain's Edge. This project, undertaken without eminent domain, has been an exemplary success in developing residential and commercial real estate. Perhaps more significantly, city officials chose not to resort to abusing their eminent domain powers while still accomplishing a major economic development venture that is often touted by development professionals.[10]

This kind of success is not unique to the Nevada desert. In the mid-1980s, two developers in West Palm Beach, Florida, discreetly assembled 26 contiguous blocks of a run-down inner city area by buying over 300 separate parcels of land from 240 different owners. Only nine months later, they broke ground on a major shopping center now known as CityPlace. It is still a vibrant urban district, bustling with retail, dining and entertainment establishments—and certainly a model from which cities and developers can learn.[11]

In contrast, Scottsdale, Arizona, stonewalled $2 billion of successful redevelopment for years by threatening eminent domain. In 1993, Scottsdale designated four redevelopment areas, setting the groundwork for government to seize the homes and small businesses of hardworking Arizonans. When the city removed two of these designations, it reported an influx of billions of dollars. Areas that at one time were thought to need governmental interference have seen unprecedented prosperity and revitalization. Money poured in only after Scottsdale removed the threat of eminent domain.[12]

As these examples indicate, accumulating large parcels of land is clearly possible without condemning homes and small businesses against the will of their owners. Just as George Washington acquired land for the nation's capital by involving landowners in the process and making them partners in economic reward,[13] West Palm Beach, Florida, initiated shared-equity partnerships. And, in the same way that the Disney brothers quietly purchased enough land for one of the nation's most visited tourist attractions, Howard County carefully amassed thousands of acres for an entirely new city. John Norquist, former mayor of Milwaukee and president of the Congress for the New Urbanism, said it best: "The economy of this country was built by the private sector... Today, the same economic incentives which have always attracted private investment and spawned sustainable development continue to draw private real estate developers all over America."[14]

The private sector has the expertise and experience to effectively evaluate risk, to weigh the complexities of real estate development with the likelihood of success, and to ultimately generate the sustainable job and revenue growth that cities and municipalities seek. The remaining defenders of eminent domain abuse scare Americans into believing they must choose between private property rights and economic growth. Fortunately, the evidence is clear and compelling—Americans can have both.

8-20

[1] Mark Brnovich, "Condemning Condemnation: Alternatives to Eminent Domain," *Goldwater Institute Policy Report*, June 14, 2004, 6-8.

[2] Bart Peterson, "Written Testimony of the Honorable Bart Peterson, Mayor, Indianapolis, Indiana," *United States House of Representatives Committee on the Judiciary*, Sept. 22, 2005.

[3] John D. Echeverria, "Some Thoughts on Kelo and the Public Debate Over Eminent Domain," *Policy Paper*, July 22, 2005.

[4] Roger Pilon, "*Kelo v. City of New London* and U.S. Supreme Court Decision and Strengthening the Ownership of Private Property Act of 2005" Testimony before the US House Committee on Agriculture, Sept. 7, 2005.

[5] Howard Gillette Jr., "Assessing James Rouse's role in American city planning; real estate developer," *Journal of the American Planning Association*, Mar. 22, 1999.

[6] See Brief *Amicus Curiae* of John Norquist on behalf of Petitioners in *Kelo v. City of New London* (2005), available at http://www.ij.org/kelo.

[7] "About the National Trust Main Street Center," *National Trust for Historic Preservation*, available at http://www.mainstreet.org/content.

[8] "City Provides Affordable Housing Under HUD's Dollar Home Program," *Associated Press State and Local Wire*, Nov. 9, 2001.

[9] Mark Krzos, "Beautification Help Approved," *The News-Press*, Dec. 19, 2002, at 1H.

[10] "Mountain's Edge Outpaces Sales of All Other Master Planned Communities in Southern Nevada; Mountain's Edge Reports 1,230 New Home Sales," *PR Newswire US*, June 30,2005. Also, see Norquist Brief *Amicus Curiae*.

[11] Jonathon Marmon, "Urban Renewal-West Palm Beach," *South Florida CEO*, May 2002. Also, see Norquist Brief *Amicus Curiae*.

[12] Casey Newton, "Scottsdale plans to end redevelopment designation," *The Arizona Republic*, Oct. 4, 2005; Ryan Gabrielson, "Council ends 'bad idea' unanimously: City to cease aggressive style of redevelopment downtown," *East Valley Tribune*, Oct. 5, 2005.

[13] See Norquist Brief *Amicus Curiae*.

[14] Ibid.

901 N. Glebe Road, Suite 900, Arlington, VA 22203
p 703.682.9320 | f 703.682.9321
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Home Address:
2979 KINGFISHER RD.
HIAWATHA, KANSAS 66434
(785) 742-3780

Capitol Office:
STATE CAPITOL, ROOM 128-S
TOPEKA, KANSAS 66612
(785) 296-7379

STATE OF KANSAS
SENATE CHAMBER

COMMITTEE ASSIGNMENTS
MEMBER: LOCAL GOVERNMENT
NATURAL RESOURCES
UTILITIES
JOINT COMMITTEE ON SPECIAL CLAIMS AGAINST THE STATE

Dennis Pyle

January 31, 2006

Mr. Chairman and members of the committee, thank you for the opportunity to speak on the subject of eminent domain.

We in the legislature have the responsibility of making law. The laws we make should be just. I'd like to share a quote from The Law by Frederick Bastiat, "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!" I believe this is the question before this committee. I ask the committee to remember that many attempt to portray eminent domain and economic development as one issue. They are not. Eminent domain is an issue in and of itself, as is economic development.

John Dickinson stated, "Let these truths be indelibly impressed on our minds-that we cannot be happy without being free-that we cannot be free without being secure in our property-that we cannot be secure in our property if, without our consent, others may as by right take it away."

A wise man once said, "The LOVE of money is the root of all evil".
This love of money or greed is very evident in the property rights debate and more specifically the current struggle over the use of eminent domain by local units of government. Many entities claim the need of keeping eminent domain for the purpose of taking private property for "economic development". They will even argue that the increase in property valuation and subsequent revenue increases justify their argument. If this is true, then government should change the classification on many pieces of property to a "business" classification as they are taxed at a higher rate. After all, is not "raising a family" a business of sorts? Couldn't those in power argue that making a simple definition change is for the public good? Of course we all agree that such an idea is preposterous, we don't want to change the definition of "business" and "residential" I simply use this example to make a point. Eminent domain usage must not be allowed to continue when profit is the motivating force. LEGAL PLUNDER must stop.

Elisa Morgan, president of MOPS International (Mothers of Pre-Schoolers), shared this insight into a child's view of the world.

TODDLER'S CREED

If I want it, it's mine.

Senate Judiciary
1-31-06
Attachment 9

If I give it to you and change my
mind later, it's mine.
If I can take it away from you,
it's mine.
If I had it a little while ago,
it's mine.
If it's mine, it will never belong to
anyone else, no matter what.
If we are building something together,
all the pieces are mine.
If it looks just like mine,
it is mine.

Anyone who has ever known a toddler knows the truth of that creed. We expect to see this trait in toddlers, but we despise it when we see it in adults.

What do we value, "people" or "dollars"? Are we more secure by putting the private property rights in the hands of individual property owners or in the hands of governmental officials? Should government determine the "purpose" for property or should the property owner?

If you recall, I offered an amendment on the senate floor last February, while the "Kelo" case was being heard, to limit the use of eminent domain for public use takings only. My position is still the same. The courts have since spoken. The incriminating finger of injustice is pointing directly at them. The courts have expanded government's authority to condemn property by expanding the definition of 'public use' to include economic development.

This session, we in the legislature have a choice. We can demonstrate our priorities for what is valuable. We can place property rights with the people of Kansas or we can continue to empower government entities. America as a Christian nation has operated on the philosophy of "what's mine is yours". The tsunami in Indonesia and the flood in New Orleans demonstrated this. Americans GAVE. The American people respond to other's needs, Kansans included. By allowing government to take private property for private use/economic development we will be operating on a philosophy of "what's your's is mine". This is a bully's position!

Another quote I'd like to share is by Joseph Story. "There can be no freedom where there is no safety to property or personal rights. Whenever legislation…breaks in upon personal liberty or compels a surrender of personal privileges, it is in its essence tyranny."

I've heard it said that we need to find common ground on this issue. Isn't common ground public ground? I believe Kansas property owners would prefer to keep their personal property rights.

Thank you.

KANSAS LIVESTOCK ASSOCIATION

Since 1894

TESTIMONY

To: Senate Judiciary Committee
Senator John Vratil, Chair

From: Allie Devine, Vice President and General Counsel

Date: January 31, 2005

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 this committee 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 comment on a few key points. We are willing to provide a historical background of the Cowley County issues if the committee wishes.

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 *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. 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 committee.

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Attachment 10

6031 SW 37th Street • Topeka, KS 66614-5129 • (785) 273-5115 • Fax (785) 273-3399 • E-mail: kla@kla.or

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?

SCR 1612 is designed to provide the same Constitutional protections as does the U.S. Constitution. Today, the Kansas Constitution does not have the private property rights protection of the federal constitution. SCR 1612 lines 21-26 give that protection.

SCR 1612 also provides that 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 *EXCEPT as the legislature may provide.* In short, this means that private property may not be taken by the government with the intent to transfer it to another entity except as the legislature determines. This is not a complete and total ban on the use of eminent domain for economic purposes, but outlines that the LEGISLATURE will determine when there is an appropriate use of eminent domain for economic development purposes. What this Constitutional amendment does is force the debate to be had in the most public of forums, the Legislature.

SCR 1616 appears to limit the use of eminent domain by requiring that if private property is taken it must only be for a public purpose and the condemning authority must show that public purpose by clear and convincing evidence. (See SCR 1616 lines 30-33).

SCR 1616 further bans the use of eminent domain for the purpose of taking private property and transferring it to another private entity. If private property is taken and used for public purposes it may not be transferred to another private entity for 10 years from the date of the original taking. If the private property taken is not used, it is to be sold back to the original owner. If the owner does not purchase the property it may then be sold by the condemning authority.

These proposed Constitutional amendments define what "authority" governmental agencies have to act. These are not "process" bills. They define 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 in each of these Constitutional amendments: 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*)

We worked with Senator Schmidt and Senator Goodwin on the drafting of SCR 1612 and believe it to be a workable solution for both government and protection of private property rights.

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.

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.

We support SB 323 as it is a limitation on the use of eminent domain for economic development purposes. It when combined with SCR 1612 sets forth a Constitutional and statutory framework that protects private property rights, bans the unacceptable and intrusive use of eminent domain for the taking of private land from one entity to give to another, necessary legitimate takings, and provides for a very public process to debate future uses of eminent domain for economic development.

KANSAS RAILROADS

PATRICK R. HUBBELL
800 SW JACKSON
TOPEKA, KS 66612
(785) 235-6237

Thank you, Mr. Chairman, for the opportunity to present this short statement on behalf of the Kansas Railroads. I would like the Committee to consider amending SB 323 to allow railroads to be treated the same as utilities.

Railroads need to be excepted from any restrictions imposed on the power of eminent domain. Railroads are recognized in federal and state laws as common carriers of interstate commerce. As such they have constitutional and statutory authority to operate a railroad network over which the nation's freight goods and passenger service operate. The "common carrier" service is universally recognized as a "public benefit". While most of the network was constructed over acquired right of way beginning in the nineteenth century reaching its peak in the mid twentieth century, there is the occasional need to acquire parcels of real estate to accommodate expansion of mainline track, sidings, yards and ancillary facilities. As freight volumes continue to increase railroads will need to meet the demands with added parallel mainline track, new or extended sidings and expanded yards to build trains and sort carloads for routing.

The historical right of railroads to resort to condemnation if unable to negotiate "arms-length" transactions for needed land is recognized in state and federal law. The U.S. Supreme Court in the now famous Kelo decision stated:

"---it is equally clear that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking: *the condemnation of land for a railroad with common carrier duties is a familiar example."* 125 S.Ct at 2661

Even the two dissenting justices in the Kelo decision acknowledged the railroads right to condemn because of the "public good" of their services:

"States employed the eminent domain power to provide *quintessentially public goods*, such as public roads, toll roads, ferries, canals, *railroads* and public parks. 125 S.Ct. 26 2681

Railroads operate lines that traverse many states and strive to be good neighbors with the communities through which they traverse. When expanded capacity is needed, agents negotiate with adjacent landowners for necessary right of way. Condemnation is rarely used but the power is needed as a last resort to insure the nation and states will continue to enjoy the public benefit of a fluid interstate commerce network of rails.

Thank you for the opportunity to present this brief testimony today.

hub@cjnetworks.com

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1-31-06
Attachment 11

Session of 2006

SENATE BILL No. 323

By Senators D. Schmidt and Goodwin, Apple, Barnett, Barone, Haley, Journey, Lee, Ostmeyer, Petersen, Pine, Schodorf, Steineger, Taddiken, Teichman and Wagle

1-4

AN ACT concerning eminent domain; relating to restriction of government authority to take property.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) Private property shall not be taken except for public use and private property shall not be taken without just compensation.

(b) The taking of private property with the intent to or in anticipation of selling, leasing or otherwise transferring such property to any other private entity is not a valid public use and is prohibited except as provided in subsection (c).

(c) The provisions of subsection (b) shall not apply to a taking of private property:

(1) By any governmental entity which demonstrates by clear and convincing evidence that no reasonable alternative to such taking is available to satisfy the public purpose that the taking and transfer is intended to advance; and

(A) such property has been unoccupied for more than five years;

(B) such property is unsafe for occupation by humans under the building codes of the jurisdiction where the structure is situated; or

(C) such property is in a state of disuse sufficient to constitute waste;

(2) by a hospital corporation or hospital association but only to the extent such property is used for operation of facilities necessary to a hospital; or

(3) by a utility corporation ~~or utility cooperative~~ but only to the extent such property is used for the operation of facilities necessary for the provision of utility services;

(d) The provisions of this section shall be part of and supplemental to the Kansas eminent domain procedure act.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

, utility corporation or for railroad purposes

or for railroad purposes.

11-2

KANSAS FARM BUREAU
The Voice of Agriculture

2627 KFB Plaza, Manhattan, Kansas 66503-8508 • 785-587-6000 • Fax 785-587-6914 • www.kfb.org
800 SW Jackson St., Suite 1300, Topeka, Kansas 66612-1219 • 785-234-4535 • Fax 785-234-0278

PUBLIC POLICY STATEMENT

SENATE COMMITTEE ON JUDICIARY

RE: Eminent Domain

January 31, 2006
Topeka, Kansas

Testimony Provided by:
Terry D. Holdren
KFB Governmental Relations

Chairman Vratil, and members of the Senate Committee on Judiciary, 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, 545 U.S. ___, 2005 WL 2000781 (U.S.Conn.), 74 USLW 3113 (2005)* and our thoughts about the state of eminent domain law in Kansas in light of our own state Supreme Court decisions.

I am Terry Holdren and I serve as Local Policy Director for Governmental Relations at Kansas Farm Bureau. As you know 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.

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

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1-31-06
Attachment 12

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 outraged 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 hospitals, utilities and railroads which provided 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 *Kelo* decision. Thanks to the insightful leadership of members of this committee you have proposals before you that provide alternatives

to the current situation in Kansas. SB 323 and SCR 1612 provide the relief sought by Kansas citizens. We proudly offer our support for these measures. We cannot, however, offer our support for SB 446 or other concepts 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.

Kansas Grain and Feed Association
Kansas Agribusiness Retailers Association

Testimony Before the

Senate Judiciary Committee

SB 323

January 31, 2006

I am Mary Jane Stankiewicz, the Vice President and General Counsel for the Kansas Grain and Feed Association (KGFA) and the Kansas Agribusiness Retailers Association (KARA) and we submit this testimony in support of SB 323.

KGFA represents the grain elevators and related industries in Kansas and is proud to represent 98% of the storage capacity in Kansas. KARA is the association for agricultural retailers who sell fertilizer, pesticides, seed, propane and other agricultural inputs and products to Kansas farmers and ranchers.

KGFA and KARA have always lobbied for limited government intervention into the free market. Private property rights are a cornerstone in our state and the nation and any infringement on this right should be done in a cautious and reasoned manner and we think SB 323 strikes this balance between private property rights and lawful government action.

There has been and will continue to be considerable debate over the issue of when it is appropriate for the government to take property. The United States Supreme Court ruling in the Kelo *v. New London* case last year only increased this debate by stating that the job of establishing the rules regarding eminent domain was the job of the state. Therefore, we urge the Kansas legislature to address the issue of when and under what circumstances can a government take property.

We recognize that government has and always should have the right to protect the public and in some cases that means condemning land. However, we believe condemning private property for the sake of turning that property over to a private developer goes beyond the scope of government's authority. SB 323 strives to strike the balance between allowing government to condemn property in a judicious manner while also protecting private property rights. Thus, we urge you to support SB 323.

Senate Judiciary
1-31-06
Attachment 13

Lenexa Chamber of Commerce

The Historic Lackman-Thompson Estate
11180 Lackman Road
Lenexa, KS 66219-1236
913.888.1414
Fax 913.888.3770

TO: Senator John Vratil, Chairman
Members, Senate Judiciary Committee

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

DATE: January 31, 2006

RE: **Support for the Concepts in SB 446 – Process-Based Protections and Limitations on the Exercise of Eminent Domain for Economic Development**

The Lenexa Chamber of Commerce would like to express its support for the concepts embodied in Senate Bill (SB) 446, which create new process-based protections and limitations on the exercise of eminent domain for economic development purposes.

We strongly believe that in appropriate instances the use of eminent domain for economic development can indeed be clearly for the greater good. While most land acquisition is successfully negotiated, in a few instances cities have used eminent domain as a last resort to acquire property for an economic development project significant to their communities – those projects have been highly successful and the facts of those cases do not support claims that eminent domain use has been either widespread or abused.

Nevertheless, 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 right to consider whether new protections or limitations may be appropriate. Much of what has been proposed so far, however, is too narrowly written and focuses primarily on limiting the type of property that can be impacted, creating a poor "one size fits all communities" solution.

We believe instead that efforts to tighten the use of eminent domain should focus on the process – as SB 446 does – rather than the type of property being impacted. Process-based proposals like SB 446 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 this reason, the Lenexa Chamber of Commerce urges the committee to focus on process-based solutions as it considers this important issue. Thank you.

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City of Hutchinson
Pursuing Excellence In Public Service

P.O. Box 1567 / Hutchinson, KS 67504-1567
Telephone: (620) 694-2640
Office Of: Law

TESTIMONY IN SUPPORT OF SENATE BILL NO. 446

To: Members of the Senate Judiciary Committee

Date: January 30, 2006

Re: Senate Bill No. 446 – Proposed legislation concerning eminent domain; relating to fairness in economic development.

Ladies and Gentlemen:

This testimony is offered by the **City of Hutchinson in support of Senate Bill No. 446** and in opposition to Senate Bills No. 323 and 398 and Senate Concurrent Resolutions No. 1612 and 1616. Senate Bill 446, submitted by the League of Kansas Municipalities, reflects the ideas of many cities throughout the state and reflects an intense effort from the cities to address concerns about the use of eminent domain for economic development.

We, at the City of Hutchinson, believe that statutes permitting the establishment of a redevelopment district provide a valuable tool for economic development, and that a key provision of the law is the ability, when appropriate, for a municipality to acquire private property by eminent domain, and then convey that property to a private developer.

A situation in Hutchinson illustrates my point. The Wiley building, an eight story former department store, sits on the corner of 1st and Main – a central point in the Hutchinson downtown. After the department store portion closed, the building still contained offices of numerous businesses and professional groups as well as commercial outlets on the first two floors. In the early 1900s, it was acquired by the Resolution Trust and in 1995, an out-of-state individual purchased the building from that organization for approximately $40,000.

The building owner made many public statements about improving the property, but did not do so. Several years ago, because he still refused to install a sprinkler system above the second floor and to make other required safety improvements, the state fire marshal and the city fire chief shut down the use of the building above the second floor. Since that time, the building continues to remain vacant above the first floor and to deteriorate.

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A local group offered to purchase the building for the appraised price of $400,000. The owner refused, countering that he might sell it for $2 million. Further, he listed the building with a local realtor and then refused to allow him to show the building. It seems he won't sell the building but he also won't do anything with it. He doesn't live in Hutchinson so he doesn't care about the effect on the downtown of his nearly empty property. Acquiring the property in the traditional way is nearly impossible.

The Hutchinson downtown development group believes that a viable Wiley building is a key to revitalizing Hutchinson's downtown. The City has invested nearly five million dollars in a downtown streetscape and yet the status of a key piece remains in limbo.

Senate Bill No. 446 protects owner-occupied residential property owners and owners of farm land outside of the City limit by allowing them 125% of the fair market value of their property should it be subject to an eminent domain action for economic development purposes. This is in addition to the relocation benefits they may be entitled to under separate Kansas and federal statutes. To allow developers more than fair market value would be to unjustly enrich individuals or corporations who do not need the protection of the law, who hold property for speculation and who should not be permitted to benefit from a blanket provision of a statute.

Senate Bill No. 446 provides in Sections 3(b)-(e), due process for individuals involved in economic development eminent domain and requires a 2/3 vote of the governing body in order for a City to move forward with condemnation. Review by the District Court is also included to protect those subject to eminent domain.

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 and therefore supports the passage of Senate Bill No. 446.

Very truly yours,

Carolyn H. Patterson

Carolyn H. Patterson
City Attorney

LEGISLATIVE NFIB TESTIMONY

The Voice of Small Business®

KANSAS

Statement by
Hal Hudson, State Director
National Federation of Independent Business
On Eminent Domain Bills
Before the Senate Judiciary Committee
January 31, 2006

Mr. Chairman and Members of the Committee:

Eminent domain! These are two words that can send property owners into fits of depression, when uttered by someone with authority to use it.

My name is Hal Hudson, and my testimony is representative of the nearly 6,000 small business owners who are members of NFIB, and who have weighed in on this issue.

On our Kansas State Ballot for 2006, we asked: ***"Should the government's power of eminent domain be restricted to use for public purposes and projects?"*** In a resounding response, 91.1% said YES!

It is an accepted tenet of English law, that the government can take private property to use for the "public good" as long as the property owner is justly compensated. What's new is the concept that property can be taken from one citizen and turned over to another private citizen – in the name of economic development – or if the new owner will pay more taxes to the government.

That's a long stretch to "public good."

Proponents of restricting the government's eminent domain powers argue that condemning private property on behalf of private parties gives rise to abuse, and it is generally unfair to those who lose their property Small businesses and small property owners may be disproportionately impacted, and the benefits of condemnation only go to a few people. "Big box" retailers and large developers are free to purchase property on the open market, and shouldn't have the ability to wield the government's power in order to take property against the wishes of the owners. Small businesses cannot afford to defend themselves against condemnation proceedings, and the "just compensation" settled upon rarely equals what the property owners would have gotten had the buyer engaged in a regular real estate deal.

Because there have been so many eminent domain cases and because the number is likely to continue to increase, some action is needed to end the practice of taking private property from some and transferring it to other private parties even with just compensation.

Rather than discuss each of the bills before the committee separately, we believe the issue is serious enough that it should be dealt with through a constitutional amendment. Of the two resolutions before the committee, we believe SCR 1616 might provide the greater protection for small business owner. In the meantime, if legislation can be enacted to protect property owners from abuse, we would support that action also.

Thank you for your consideration of small business interests in this issue.

The National Federation of Independent Business (NFIB) is the nation's largest small-business advocacy group. A nonprofit, nonpartisan organization founded in 1943, NFIB represents the consensus views of its 600,000 members in Washington and all 50 state capitals.

National Federation of Independent Business - KANSAS
3601 S.W. 29th Street, Suite 116B • Topeka, KS 66614-2015 • 785-271-9449 • Fax 785-273-9200 • www.NFIB.

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Testimony Against Eminent Domain

John Geither
13810 W. 53rd 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.

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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 where 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 standout 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 to restore property rights in Kansas. Let us stop stretching the constitution and put a stop to this abuse of government power.