

KANSAS LEGISLATIVE RESEARCH DEPARTMENT

68-West-Statehouse, 300 SW 10th Ave.
Topeka, Kansas 66612-1504
(785) 296-3181 • FAX (785) 296-3824

kslegres@klrd.ks.gov

<http://www.kslegislature.org/klrd>

EMINENT DOMAIN

This memorandum addresses the power of eminent domain and its use by the legislative branch, relevant case law at the federal and state level, the intersection of local government and eminent domain and permitted uses, and recent review of this topic by the Kansas Legislature.

Eminent domain, in its simplest terms, is the inherent power of a governmental entity to take private property and convert it to public use. More specifically, it is the power of a public entity to take private property without the owner's consent, conditioned upon the payment of just compensation. Eminent domain is a right founded on the law of necessity, which is inherent in sovereignty and essential to the existence of government.

The power of eminent domain belongs exclusively to the legislative branch and to those entities or individuals authorized by statute to exercise the power.

The government's exercise of the power of eminent domain is subject to several important constitutional limits, including the requirement for payment of just compensation and the requirement that the property owner be granted due process of law, including notice and an opportunity for a hearing.

U.S. Supreme Court *Kelo* Decision

The U.S. Supreme Court on June 23, 2005, ruled in *Kelo v. New London* that the "public use" provision of the "takings clause" of the 5th Amendment of the *U.S. Constitution* permits the use of eminent domain for economic development purposes.

The case involved an economic development plan for the City of New London, Connecticut. The city had been in economic decline for many decades. In 1996, the U.S. Navy closed its Undersea Warfare Center, causing the loss of more than 1,500 jobs. In 1998, Pfizer, Inc., a large pharmaceutical company, announced plans to build a large research facility in New London on a site adjacent to the Fort Trumbull neighborhood. This neighborhood had been characterized as one with a high vacancy rate for nonresidential buildings, old buildings in poor shape, and fewer than half of the residential properties were in average or better condition. The homes of the petitioners in this case, however, did not fall into these categories.

The nonprofit New London Development Corporation (NLDC) was formed to help the city plan for economic development. After the Pfizer announcement, the city council authorized NLDC to formulate an economic development plan for 90 acres in Fort Trumbull. The plan's stated goals were to "create a development that would complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront, and eventually to build momentum for the revitalization of the rest of the city, including its downtown area."

Most people in the Fort Trumbull area sold their property to NLDC, but seven did not. The voluntary sales comprised 100 of the 115 properties in the neighborhood. These landowners held 15 properties in 2 parcels of land being considered for development. They filed suit claiming that the use of eminent domain as contemplated by the plan violated the state and federal constitutions.

The U.S. Supreme Court, in a 5-4 decision, recognized that the *U.S. Constitution* prohibits a “taking” whose “sole purpose” is to transfer one person’s private property to another private person, even if just compensation is paid. It emphasized, however, that this was not the issue before the Court. Rather, “[t]he disposition of this case therefore turns on the question whether the City’s development plan serves a ‘public purpose’.” The decision went on to stipulate that “[w]ithout exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.” In writing for the majority, Justice Stevens noted, in fact, that “[t]o effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development.”

The Court determined that New London’s economic development plan served a “public purpose” under the “public use” provision of the *U.S. Constitution*. Justice Stevens noted that, “Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The city has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue.”

The Court did not preempt additional state action. “We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose ‘public use’ requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.”

Kansas Court Upholds Right of Eminent Domain For Economic Development

The Kansas Supreme Court also has upheld the use of eminent domain to take private property for economic development purposes in two cases.

In the first case, *State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City* 265 Kan. 779, 790 (1998), the Court upheld provisions of the tax increment financing (TIF) law, which authorized special obligation sales tax revenue (STAR) bonds and the use of eminent domain to build an auto race track in Wyandotte County. The Court held that the development of the auto race track facility and related projects were valid public purposes for which TIF and STAR bonds could be issued and eminent domain authority could be exercised.

More recently, in *General Building Contractors, LLC v. Board of Shawnee County Commissioners* 275 Kan. 525 (2003), the Court held that:

- Counties have the power of eminent domain under home rule and related statutes and have the power to condemn real property for purposes of industrial or economic development;

- County power of eminent domain must be exercised by resolution rather than motion; and
- The taking of private property for industrial or economic development is a valid public purpose.

The case involved the condemnation of a private business owner’s property for a Target Distribution Center facility.

Overview of Government Eminent Domain Power in Kansas

The State Legislature has granted the power of eminent domain to several state agencies, listed below.

Secretary of Administration	State Board of Regents
Secretary of Transportation	State Historical Society
Secretary of Health and Environment	State Biological Survey

Local units of government in Kansas may exercise the power of eminent domain if the Legislature has delegated this authority to such unit or where the local government has home rule power. The rule often stated by Kansas courts prior to the *General Building Contractors* 2003 decision was that “the power of eminent domain can only be exercised by virtue of a legislative enactment. The right to appropriate private property to public use lies dormant in the state until legislative action is had, pointing out the occasions, modes, conditions, and agencies for its appropriation.” See *Strain v. Cities Service Gas Co.*, 148 Kan. 393, 83 P.2d 124 (1938).

Kansas statutes contain hundreds of specific sections authorizing the use of eminent domain by a specific unit of government for a specific purpose. See, e.g., KSA 12-1736 (city may use eminent domain to acquire land for public buildings); KSA 19-1561 (county may use eminent domain to acquire land for county fair buildings); and KSA 73-411 (township may use eminent domain to acquire land for a veteran’s monument). In some cases, the unit of government is given general authority to exercise the power of eminent domain.

Local Governments With Power of Eminent Domain That May Engage in Economic Development Projects

- Cities;
- Counties;
- Airport Authorities;
- Industrial Districts; and
- Public Building Commissions.

Eminent Domain Legislation by States in Response to *Kelo*

Thirty-nine states enacted legislation or passed ballot measures during 2005 - 2007 in response to the *Kelo* 2005 decision. The laws and ballot measures generally fall into the following categories:

- Restricting the use of eminent domain for economic development, enhancing tax revenue, or transferring private property to another private entity (or primarily for those purposes);
- Defining what constitutes public use;
- Establishing additional criteria for designating blighted areas subject to eminent domain;
- Strengthening public notice, public hearing, and landowner negotiation criteria, and requiring local government approval before condemning property; and
- Placing a moratorium on the use of eminent domain for a specified time period and establishing a task force to study the issue and report findings to the legislature.

Kansas Eminent Domain Restrictions—Economic Development

The 2006 changes contained in Sub. for SB 323 prohibited the use of eminent domain for economic development purposes, unless the Legislature approves the taking; changed certain eminent domain procedures; and required surveys for lands to be taken through the exercise of eminent domain be performed by a licensed land surveyor or an engineer competent to conduct land surveys.

Takings for Benefit of a Private Entity Prohibition—Exceptions

The law (2006 Sub. for SB 323) provides that on and after July 1, 2007, the taking of private property by eminent domain for the purpose of selling, leasing, or transferring it to another private entity including takings under the tax increment financing law is not to be permitted unless the taking meets one of the following:

- The property is deemed excess real property that was taken lawfully and incidental to the acquisition of right-of-way for a public road, bridge, or public improvement project of the Kansas Department of Transportation or a municipality;
- The taking is by any public utility;
- The taking is by any gas gathering service, pipeline company, or railroad;
- The private property owner has acquiesced in writing to the taking by any municipality;

- The property has defective or unusual conditions of title, or unknown ownership interests in the property and is taken by any municipality; or
- The property is unsafe for occupation by humans under the building codes.

Legislative Approval of Taking for Economic Development

Any taking of private property for the purpose of transferring it to any private entity, except as authorized above, must be expressly authorized by the Legislature on and after July 1, 2007, by enactment of legislation that identifies the specific tract or tracts to be taken. The Legislature is required to consider providing extra compensation to the person whose land will be taken that is at least 200 percent of the fair market value.

Tax Increment Law Change

The tax increment financing law also was amended to provide that on or after July 1, 2007, the power of eminent domain could be exercised only as provided in this act, *i.e.*, legislative approval by passage of a bill approving eminent domain for a specific project is required. Most of the eminent domain provisions had a one-year delay in the effective date to allow tax increment projects to be completed under provisions of prior law.

County Home Rule Exception—Added

The law added another exemption to the county home rule law that on and after July 1, 2007, a county may not exempt itself from or effect changes in this act.

Kansas Eminent Domain Procedure Act Changes

The Kansas Eminent Domain Procedure Act was further amended to allow a defendant ten days to remove personal property from real property that has been condemned; require the district court clerk to notify property owners of this ten-day provision; and provide that an appeal would be deemed perfected upon the filing of a notice of appeal and applying this clarification retroactively to July 1, 2003. The legislation also added definitions of “municipality” and “taking” to the Act. “Municipality” is defined to include cities, counties, and unified governments.

Land Surveyor—Engineers

The legislation amended several statutes to require surveys of land to be taken by eminent domain be conducted by licensed land surveyors or by a professional engineer competent to conduct a land survey.

Effective Dates of Different Provisions of the Act

The effective date for most eminent domain provisions was July 1, 2007, to allow the completion of tax increment provisions. The effective date of the land surveyors projects was July 1, 2006. The effective date of the eminent domain appeals provision was the publication in the *Kansas Register*.

Additional Developments

In 2008, SB 518, now KSA 12-5801, *et seq.*, created the DeSoto/Johnson County Riverfront Authority, the purpose of which is to encourage private capital investment by fostering the creation of recreational, retail, entertainment, economic development, and housing within the riverfront.

The Authority could acquire property and property rights, water rights and riparian rights by purchase, lease, gift or otherwise, but could not take property by eminent domain.

In addition, the 2008 Legislature designated a 2008 interim study to investigate issues concerning the use of eminent domain as it relates to water rights and other issues concerning water rights. The 2008 Special Committee on Eminent Domain in Condemnation of Water Rights reviewed the topic of eminent domain in the condemnation of water rights as was included in the statutory charge in KSA 82a-740. The Committee recommended SB 64 and SB 253. Both bills passed during the 2009 Session.

SB 64 modified several provisions of the Kansas Water Appropriation Act.

The first modification amended the definition of “water right” by striking the word “voluntary” in order to make it clear that a water right passes as an appurtenance with a conveyance of land in either voluntary or involuntary situations.

The second modification clarified that no person would be able to acquire a new water appropriation right without obtaining a water right through the Chief Engineer. Former law spoke to the acquisition of a water right, not a “new” water right. As existing water rights pass with the conveyance of land when sold or transferred, the only time a right is granted from the Chief Engineer is for a “new” water appropriation right.

The third modification amended a section dealing with a person seeking to acquire a new water appropriation right and requires, in addition to the other information, that the person provide to the Chief Engineer a sworn statement or evidence of legal access to or control of the point of diversion and place of use, from the landowner, or his or her authorized representative.

The last modification restated and clarified the law by stating that the date of priority of every water right and not the purpose determines the right to divert and use water when the supply is not sufficient to satisfy all water rights. The bill clarified that when the lawful uses of water have the same date of priority, the order of preference is domestic, municipal, irrigation, industrial, recreational, and water power uses. The only water rights with the same date of priority are vested rights as all other appropriation rights have a date of priority.

SB 253 addressed modification of zoning regulations in cities and counties (*i.e.*, rezoning). In laws applicable to all cities and counties, the bill exempted rezoning related to mining operations, subject to the Surface-Mining Land Conservation and Reclamation Act (or KSA 49-601 *et seq.*), from any super-majority vote requirement of the city or county governing body.