

## FINAL COMMITTEE REPORT

### SPECIAL HOUSE COMMITTEE TO STUDY EMINENT DOMAIN ISSUES

**September 6, 2005**

Per your memo dated July 28, 2005, the Special House Committee to Study Eminent Domain Issues convened and deliberated. The Committee reviewed numerous documents, including but not limited to the recent U.S. Supreme Court decision in Kelo v. City of New London; the 1985 New Hampshire Supreme Court decision in Merrill v. City of Manchester; Article 12 of Part I of the New Hampshire Constitution; Chapters 498-A, 120, 121, 122, and 371 of the New Hampshire revised Statutes Annotated; and numerous articles and memoranda.

On August 16, 2005, the Committee heard from and asked questions of Attorney Charles Douglas, III; Attorney Eugene Van Loan; and Attorney Mark P. Hodgdon of the Attorney General's office. Attorneys Douglas and Van Loan explained the recent evolution of the interpretation of the "takings" clauses of the Fifth Amendment of the Federal Bill of Rights and of Article 12 of the New Hampshire Bill of Rights from strict "public use," as set forth in their texts, to "public purpose," and, most recently, to "public benefit." They agreed that, under current law, both as written and as interpreted by our Supreme Court, this state may be vulnerable to a Kelo-like outcome. Attorney Hodgdon explained the process by which the eminent domain power has been practiced in New Hampshire.

On August 25, 2005, the Committee heard from Attorney Dana Berliner of the Institute of Justice in Washington, DC, whose organization represented the Plaintiffs in the Kelo case; Bill Janelle of the Right-of-Way Department of the New Hampshire Department of Transportation; and Maura Carroll, General Counsel to the Local Government Center of the New Hampshire Municipal Association.

As a result of our findings and research, we respectfully submit the following recommendations to you:

1. Since the term "public use" is not defined in the statutes, we recommend codifying this definition in RSA 498-A:2 with the following language: *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 development, including an increase in tax base, tax revenues, employment, general economic health, shall not constitute a public use.*

Additionally, we recommend that every statute mentioning the term “public use” refer to this statutory definition.

**This section was approved by a vote of 6-3. See Minority Reports on page 5.**

2. The term “public purpose” is used throughout the statutes relative to eminent domain. We propose replacing the phrase “public purpose” with “public use,” in order to be consistent with the language of Part I, Article 12 of the New Hampshire Constitution.

**This section was approved by a vote of 9-0.**

3. The Committee has determined that there are numerous issues related to eminent domain that must be thoroughly studied and researched. We recommend that the House and Senate work together through a formal joint committee to study in depth the following specific issues by November 1, 2006:
  - a. What guidelines must a taking authority follow before a taking is appropriate? Should a public hearing be required in all instances of a contemplated eminent domain taking? If so, where in the statutes should a hearing requirement be codified?
  - b. What should the criteria be to establish the proper balance between the probable benefit of an economic development project to a community through the eminent domain process, and the probable harm to the concept of the sanctity of private property?
  - c. Do state statutes relating to eminent domain need to be consolidated, specifically those contained in RSA Chapters 203 and 205?
  - d. Should we consider the award of enhanced compensation; that is, payment in excess of fair market value, for property taken by eminent domain?
  - e. Should the terms “public good” and “incidental benefit to the public,” which have increasingly appeared in feasibility studies and court decisions in which the exercise of the power of eminent domain has been considered, be precisely defined by statute?
  - f. Should the term “blighted,” and derivative and related terms, be explicitly defined by statute in the context of eminent domain when dealing with so-called “urban renewal” and “redevelopment” projects? Should the proposed RSA 498-A:2 language “*the acquisition of land*

*to cure a concrete harmful effect of its present use, including the removal of public nuisances or structures that are beyond repair or that are unfit for human habitation or use; or the acquisition of abandoned property”* be included when defining “blight?” Should, and if so, how should appraisals and other similar measures be used to determine “blight?”

- g. Should land taken by eminent domain always be offered for resale first to the owner from whom it was taken, if the purpose for the taking is not fulfilled within a set timeframe? More specifically, should RSA 498 A:12 be revisited?
- h. Should attorney’s fees be awarded to property owners who either successfully challenge an eminent domain taking, or who secure a damages award higher than the initial offer made by the taking authority?
- i. Should a permanent legislative commission be established whose sole purpose and function would be to review and make recommendations to the full Senate and House of Representatives concerning any proposed eminent domain taking whose objective is economic development or enhancement of the tax base, or where it is contemplated that the property taken, or any portion of it, would be transferred, whether or not for value, to a private person or entity? If so, what criteria should this commission apply in its consideration of such a proposed taking, and how should it interface with the Board of Tax and Land Appeals in order to avoid duplication of effort?
- j. Does the limited scope of our proposed definition of public use in any way unduly burden communities in greatest need of economic development?
- k. Should legislation authorizing and establishing the scope of the exercise of the power of eminent domain by a Housing Authority be passed?

**This section was approved by a vote of 9-0.**

This Committee recognizes that the right to own and enjoy property is a fundamental right guaranteed by our state and federal constitutions. We firmly believe in protecting privately owned property from the unreasonable or oppressive use of the eminent domain power. While we recognize that New Hampshire has existing safeguards to protect property rights, we believe that in light of the Kelo decision and our own state case law precedents, these recommendations are necessary, and, if implemented, would further protect this fundamental constitutional right.

Respectfully Submitted,

**From Judiciary:**

Rep. Maureen C. Mooney, Chair  
Rep. Gregory M. Sorg  
Rep. Robert H. Rowe  
Rep. Cynthia J. Dokmo  
Rep. Stephen J. Shurtleff  
Rep. James E. Wheeler

**From Public Works and Highways:**

Rep. Gene G. Chandler  
Rep. James B. Rausch  
Rep. Franklin T. Tilton  
Rep. John R. Cloutier

**From Ways and Means**

Rep. Peyton B. Hinkle

## **MINORITY REPORTS REGARDING PROPOSAL #1**

The undersigned agrees with the committee's report but with reservation. If the recommendation is to be introduced as a bill to define "public use", certain words and phrases in the recommendation must be defined in order to insure a precise judicial interpretation of statute. The following phrases are ambiguous and subject to multiple interpretations unless specifically defined: "concrete harmful effect", "structures beyond repair", "unfit for human habitation or use", and "abandoned property." These phrases must be defined in this proposed bill or include a referenced to other statutes where they are defined.

Robert H. Rowe

While I am in overall agreement with most of the Special Eminent Domain Committee's Final Report, I am opposed to it for one important reason. That is because of the wording of the last sentence in Section 1 of the report, which says, "The public benefits of economic development, including an increase in tax base, tax revenues, employment, general economic health shall not constitute a public use." I believe the present wording of this sentence might unduly hamper the efforts of communities like my resident community of Claremont to promote economic development. Such development is needed not only to create jobs for a still economically-disadvantaged community, but also to broaden the property tax base. With this broadening Claremont should be able to increase property tax revenues so as to spread around the overall tax burden more equitably to all property owners. I decided to oppose this Final Report after consulting with the Claremont City Manager who said eminent domain for economic development has not been used recently. Furthermore, he said that the city has no plans to use eminent domain in the near future. Because of the manager's concerns, I am opposed to the overall Final Report, but I will do my best to remain open-minded to further restrictions on the use of eminent domain for economic development in particular, if I find that it could be abused in the future. But at this time I believe most New Hampshire communities are not abusing such power for economic development purposes.

John R. Cloutier