

PROTECTING PRIVATE PROPERTY: AN  
ANALYSIS OF GEORGIA'S RESPONSE TO *KELO V.*  
*CITY OF NEW LONDON*

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## I. INTRODUCTION

National attention was focused on the important issue of government taking of private property under eminent domain power in the seminal case of *Kelo v. City of New London, Connecticut*.<sup>1</sup> The strong negative reaction to the Court’s decision flowed from the affirmative response to the issue of “whether a city’s decision to take property for the purpose of economic development satisfies the ‘public use’ requirement of

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1. *Kelo v. City of New London*, 545 U.S. 469 (2005).

the Fifth Amendment.”<sup>2</sup> Much to the horror of the public, private property advocates, politicians and commentators spanning the political spectrum, the 5-4 majority concluded that taking of non-blighted property for economic development met the Fifth Amendment’s requirement of “public use.”<sup>3</sup>

Around the same time *Kelo* was making its way to the highest Court in the land, a similar eminent domain dispute was brewing in Georgia. This dispute ultimately spawned litigation in both state and federal courts attacking the City of Stockbridge’s misuse of its eminent domain powers.<sup>4</sup> These cases touched off a firestorm of public and legislative reaction demanding reform of eminent domain law in Georgia and ultimately resulting in Georgia’s 2006 revision of its eminent domain laws. The question remains however, even in light of the recent reforms, whether the current legislative scheme provides sufficient protection to owners’ of private property in Georgia from government takings.

This article proposes that in the critical and somewhat controversial areas of “public use” and “blight”, further efforts are warranted to truly provide adequate protection to property owners in Georgia. This article starts with a summary of the *Kelo* decision and Georgia’s counterpart litigation, *City of Stockbridge v. Meeks*. Next, the article discusses the enactment and content of Georgia’s legislation designed to neutralize the effects of the *Kelo* decision and comments on the legislation’s effects and whether it favorably compares with legislation in other jurisdictions. After offering a critical analysis of whether the 2006 legislation goes far enough to protect private property rights, the article concludes with proposed legislative enhancements that would provide sufficient protection from “economic development” with respect to the interpretation of “blight” and its relationship with “public use.”

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2. *Id.* at 477.

3. *Id.* at 475, 483, 489-90; *see also* U.S. CONST. amend. V.

4. *Kelo*, 545 U.S. at 469; *see* *City of Stockbridge v. Meeks*, 641 S.E.2d 584 (Ga. App. 2007) (opposing City’s condemnation of the Meeks’ property on state law grounds); *Meeks v. City of Stockbridge*, No 1:05-CV-2422 (N.D. Ga. filed September 16, 2005) (attacking Georgia eminent domain statutes used in this case as unconstitutional under the Fifth and Fourteenth Amendments of the United States Constitution).

## II. THE *KELO* DECISION – FEDERAL IMPETUS FOR EMINENT DOMAIN REFORM

### A. *Factual and Procedural Background of the Kelo Decision*

New London, Connecticut experienced great economic decline from the 1970's through the 1990's.<sup>5</sup> Located on the Thames River at its confluence with the Long Island Sound, the state of Connecticut designated New London a "distressed municipality" in 1990.<sup>6</sup> The economic decline continued after 1990, implicating the Fort Trumbull area of New London, where the United States Navy historically had maintained a presence.<sup>7</sup> The Fort Trumbull area contained neighborhoods, the historic fort area, and the Naval Undersea Warfare Center, which closed in 1996 and had previously employed as many as 1,500 people.<sup>8</sup> With the unemployment rate in New London nearly double that of Connecticut overall, by 1998, New London's population had dropped to just under 24,000 residents, its lowest level since 1930.<sup>9</sup>

In January 1998, these economic conditions prompted Connecticut and the City of New London to target the area, including its waterfront, for redevelopment.<sup>10</sup> The New London Development Corporation ("NLDC"), a local non-profit group, was activated to plan for the redevelopment, and the State authorized a bond issue to underwrite its planning activities.<sup>11</sup> In February 1998, Pfizer, a major pharmaceutical firm, announced its intention to open a \$300 million research facility adjacent to the Fort Trumbull area.<sup>12</sup> This announcement fueled the City's desire to redevelop and economically revitalize the area, resulting in an "integrated development plan focused on ninety

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5. Brief of Respondents at 1, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108 Aug. 18, 2004), 2004 WL 1877787.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Kelo v. City of New London*, 545 U.S. 469, 473 (2005).

11. *Id.*

12. *Id.*

acres of the Fort Trumbull area.”<sup>13</sup> Several state agencies reviewed the plan and commented on its intended effects and concluded that the plan comported with “state and municipal development policies.”<sup>14</sup> The practical effect of the project was to “capitalize” on Pfizer’s presence, increase jobs, the tax base and to use the revitalization of the Fort Trumbull area as a catalyst for growth across the New London area.<sup>15</sup>

The City approved NLDC’s plan in January 2000, and named NLDC as its agent for acquiring property within the development area.<sup>16</sup> The NLDC was successful in negotiating the purchase of most of the property within the development area, but not the property belonging to Susette Kelo and the other property owners who petitioned the Supreme Court of the United States (“Supreme Court”) for certiorari after unfavorable lower court decisions regarding NLDC’s condemnation proceedings against their properties were concluded.<sup>17</sup> The case came to the Supreme Court after the Connecticut Supreme Court held that under state law taking developed land as part of a development project was a “public use,” and further, under *Hawaii Housing Authority v. Midkiff*<sup>18</sup> and *Berman v. Parker*,<sup>19</sup> economic development was a “a valid public use under both the Federal and State Constitutions.”<sup>20</sup> The Supreme Court noted that the majority below found the takings executed were “reasonably necessary” to achieve the “public use,” and the “intended use of the land was sufficiently definite and had been given ‘reasonable attention’ during the planning process.”<sup>21</sup> The dissent stated that although they agreed that the plan served a valid “public use,” they would have prohibited the takings on constitutional grounds because a “heightened scrutiny” requirement should be applied when judging condemnations for

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13. *Id.* at 473-74.

14. *Id.* at 474, n 2.

15. *Kelo v. City of New London*, 545 U.S. 469, 474-75 (2005).

16. *Id.* at 475.

17. *Id.*

18. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

19. *See Berman v. Parker*, 348 U.S. 26 (1954).

20. *Kelo*, 545 U.S. at 476.

21. *Id.* at 476-77.

economic development.<sup>22</sup> The dissent concluded that the city had not proffered clear and convincing evidence that the intended benefits would come to fruition.<sup>23</sup>

During the course of the state litigation, the NLDC had indicated that they would lease Fort Trumbull parcels to private developers who would develop the land according to the integrated plan.<sup>24</sup> The NLDC was negotiating with Corcoran Jennison, a private real estate developer, for a 99-year ground lease with a contemplated rent of \$1 per year, during which time Corcoran Jennison would have sole discretion to develop the land and select tenants.<sup>25</sup> In light of the foregoing facts, the U.S. Supreme Court framed the issue as follows:

Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, 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. Neither of these propositions, however, determines the disposition of this case.<sup>26</sup>

In *Kelo*, the Supreme Court considered a situation where parcels of property owned by the petitioners were not blighted, but simply stood within the boundaries of an area that was intended by the city to undergo economic rejuvenation.<sup>27</sup> In addition, private entities undertook the redevelopment project as a for-profit venture.<sup>28</sup> Thus, the Court was correct in stating that the *Kelo* facts fit neither of the situations described above.<sup>29</sup>

The Supreme Court narrowly affirmed the Connecticut

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22. *Id.* at 477.

23. *Id.*

24. Brief of Petitioners at 6, *Kelo v. City of New London*, 545 U.S. 469, (2005) (No. 04-108 Dec. 3, 2004), 2004 WL 2811059.

25. *Id.*

26. *Kelo*, 545 U.S. at 477.

27. *Id.* at 483.

28. *Id.* at 478.

29. *Id.* at 477-78.

Supreme Court with a 5-4 decision.<sup>30</sup> The holding<sup>31</sup> turned on two concepts embodied in *Berman* and *Midkiff*. In *Berman*, the Supreme Court upheld the constitutionality of an urban renewal plan in Washington, D.C. that called for the demolition of a department store that was not blighted property.<sup>32</sup> Justice Douglas, writing for a unanimous Court, observed that the entire area had to be covered by a single plan to achieve success, deferring to legislative and agency judgment of the plan.<sup>33</sup> He focused on the purpose of the plan and did not require individual consideration of parcels.<sup>34</sup> The key factors in *Berman* were that the plan addressed a blighted area as a whole and that the Court would defer to the legislative prerogative.<sup>35</sup>

In *Midkiff*, the Court again deferred to legislative prerogative in the context of a land redistribution program in Hawaii whose purpose was to promote the alienability of land.<sup>36</sup> At that time, a few fee simple owners held most land in Hawaii.<sup>37</sup> The Ninth Circuit concluded that Hawaii's actions violated the Constitution because they amounted to a taking of property by the State from one private individual so it could transfer it to another private individual for that person's benefit.<sup>38</sup> The unanimous Supreme Court reversed the Ninth Circuit and found a "public use" in making land ownership available to more people. The Court clarified its approach by stressing that in analyzing "public use" it focused on the "taking's purpose, and not its mechanics."<sup>39</sup>

*B. The Supreme Court Holds Economic Development Equates with "Public Use" Under the Fifth Amendment*

Based primarily on the foregoing decisions, the Supreme

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30. *Id.* at 489-90.

31. *Kelo v. City of New London*, 545 U.S. 469, 493 (2005).

32. *Berman v. Parker*, 348 U.S. 26, 35 (1954).

33. *Id.* at 34.

34. *Id.* at 35.

35. *Id.* (In the case of the District of Columbia in 1954, the legislative prerogative belonged to Congress).

36. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244 (1984).

37. *Id.* at 232.

38. *Id.* at 235.

39. *Id.* at 244.

Court concluded that the takings in the Fort Trumbull area met the “public use” requirement, deferring to the City’s judgment as expressed through their redevelopment plan.<sup>40</sup> The *Kelo* Court observed that the City’s judgment in economic matters was entitled to deference, and that the City acted within the authority provided by a state statute authorizing eminent domain for economic development.<sup>41</sup> Significantly, the Court glossed over the fact that the properties involved in this case were not blighted, and the area around Fort Trumbull was not a “blighted” area.<sup>42</sup> The Court made short work of this noteworthy distinction by acknowledging no blight was involved, and then stating that the City’s “determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference.”<sup>43</sup> The critical factor for the Court was that New London “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.”<sup>44</sup>

The five-justice majority dismissed the arguments in opposition. First, the majority replied to the argument that economic development does not qualify as a “public use” by asserting that promoting economic development is an “accepted” function of government.<sup>45</sup> Second, the majority responded to the argument that taking land for economic development blurs the line between public and private takings by stating that private enterprise can sometime do a better job at revitalization than government.<sup>46</sup> Third, the majority dismissed the argument that its decision promoted individual-to-individual property transfer based on an ability to pay higher taxes as speculative and not before the Court.<sup>47</sup>

The majority also responded to the petitioners’ argument that, to meet the Fifth Amendment’s requirements of “public use,”

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40. *Kelo v. City of New London*, 545 U.S. 469, 484 (2005).

41. *Id.* at 483-84.

42. *Id.* at 483.

43. *Id.*

44. *Id.*

45. *Kelo v. City of New London*, 545 U.S. 469, 484 (2005).

46. *Id.* at 486.

47. *Id.* at 486-87.

there should be a “ ‘reasonable certainty’ that the expected benefits will actually accrue.”<sup>48</sup> The Court deferred to the judgment of a city or an agency, expressing concern that judicial oversight of condemnation proceedings, *vis a vis*, judging whether there is a chance that the plan would succeed, would take too much time and frustrate a plan’s chance of success.<sup>49</sup>

*C. Supreme Court’s Invitation to the States to Provide Greater Protections Against Eminent Domain*

Probably the most significant aspect of the expansive majority opinion in *Kelo* is the invitation issued near its close by Justice Stevens to the states.<sup>50</sup> The invitation provided:

In affirming the City’s authority to take petitioners’ properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. 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. As the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court’s authority, however, extends only to determining whether the City’s proposed condemnations are for a “public use” within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.<sup>51</sup>

Thus, the majority decision invited state action to increase

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48. *Id.* at 487.

49. *Id.* at 488.

50. *Kelo v. City of New London*, 545 U.S. 469, 489-90 (2005).

51. *Id.*

protections for private property owners from economic takings, despite the majority's choice not to do so under the federal constitution.

*D. The Dissent in Kelo*

Justice O'Connor's dissent in *Kelo* squarely confronted the majority's finding that condemnation for economic purposes constituted "public use."<sup>52</sup> Justice O'Connor agreed that *Kelo* was a case of first impression, examining whether economic development takings are constitutional.<sup>53</sup> Further, she put the *Berman* and *Midkiff* decisions in proper context.<sup>54</sup> Of the homes in the urban renewal district contemplated in *Berman*, 63.4% were beyond repair and the neighborhood as a whole was a threat to public health.<sup>55</sup> As a result, the Court deferred to Congress' decision to eliminate the harm as a whole and not on a lot-by-lot basis.<sup>56</sup> Thus, despite the fact that the department store that was the subject of the case was not blighted, there was no question as to the blighted nature of the entire neighborhood.<sup>57</sup> In *Midkiff*, the State and Federal governments owned 49% of the State's land, while 47% of the land was in the hands of seventy-two private landowners.<sup>58</sup> Hawaii began a land redistribution program because government officials concluded that the concentration of property was harming the state.<sup>59</sup>

Justice O'Connor observed that both the urban renewal project and the land redistribution condemnation served to provide direct and measurable public benefits.<sup>60</sup> This was not so in *Kelo*. Justice O'Connor concluded:

The Court's holdings in *Berman* and *Midkiff* were true to the

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52. *Id.* at 498 (O'Connor, J., dissenting).

53. *Id.*

54. *Id.* at 498-99.

55. *Berman v. Parker*, 348 U.S. 26, 30 (1954).

56. *Id.* at 34-35.

57. *Id.*

58. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 232 (1984).

59. *Id.* at 233.

60. *Kelo v. City of New London*, 545 U.S. 469, 500 (2005) (O'Connor, J., dissenting).

principle underlying the Public Use Clause. In both those cases, the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society—in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth. And in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm. Thus a public purpose was realized when the harmful use was eliminated. Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use. Here, in contrast, New London does not claim that Susette Kelo’s and Wilhelmina Dery’s well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government’s power to condemn.<sup>61</sup>

Also in dissent, Justice Thomas commented on the foundations of both *Berman* and *Midkiff* that on the subject of “public use,” Courts owe no deference to legislative determinations.<sup>62</sup> He stated:

There is no justification, however, for affording almost insurmountable deference to legislative conclusions that a use serves a “public use.” To begin with, a court owes no deference to a legislature’s judgment concerning the quintessentially legal question of whether the government owns, or the public has a legal right to use, the taken property. Even under the “public purpose” interpretation, moreover, it is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights. We would not defer to a legislature’s determination of the various circumstances that establish, for example, when a search of a home would be reasonable, or when a convicted double-murderer may be shackled during a

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61. *Id.* at 500-01. citing *Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 232 (1984).

62. *Id.* at 514-18 (Thomas, J., dissenting).

sentencing proceeding without on-the-record findings, or when state law creates a property interest protected by the Due Process Clause.<sup>63</sup>

Both dissenters articulated well-reasoned arguments for the proposition that a taking for the purpose of economic development does not meet the “public use” requirement, and thus any such taking is unconstitutional. Justice O’Connor concluded that the authority relied on by the majority did not apply in *Kelo*. She reached this conclusion because both *Berman* and *Midkiff* can be distinguished on the facts. Both contain fact patterns that feature public harms that could be remedied by the government action taken. The distinguishing feature is that taking property for economic development does not result in a public benefit, but instead a speculative benefit that will likely accrue directly to a private party or parties and only accrue to the public in an incidental way.

Justice Thomas asserted that the deference given to legislative bodies in *Berman* and *Midkiff* simply is not warranted under existing case law. This assertion dovetails with his broader point that the current reading of “public use” does not comport with its original meaning and that the majority’s current interpretation of “public use” should be discarded.<sup>64</sup>

### III. *CITY OF STOCKBRIDGE V. MEEKS*: GEORGIA’S HOMEGROWN VERSION OF *KELO*

#### A. *Factual Background*

Before the Supreme Court decided *Kelo* in 2005, a similar factual situation arose in Stockbridge, Georgia. The City of Stockbridge, in an effort to reconfigure its downtown area, sought condemnation of a family business, Stockbridge Florist and Gifts, Inc. run and owned by Mark and Regina Meeks, ultimately leading to state-court and federal-court litigation as

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63. *Id.* at 517-18. citing see, e.g., *Payton v. New York*, 445 U.S. 573, 589-590 (1980); *Deck v. Missouri*, 544 U.S. 622, 161 (2005); *Castle Rock v. Gonzales*, at 756-758; *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 262-263 (1970).

64. *Id.* at 523.

the Meeks fought to retain their property, or in the alternative, receive just compensation.<sup>65</sup> In May 2003, the Meeks were approached by Eckerd drug stores to sell their property for cash and an exchange of property. That same month, the City approached the Meeks, stating it wished to buy the property as well.<sup>66</sup> Eckerd negotiated with the Meeks and two adjoining property owners to buy their properties for the erection of a store. The negotiations went so far as to include the signing of an option contract. The size of the proposed store was 13,000 square feet, and the value of the exchange was approximately \$743,000.00.<sup>67</sup> The following November, the City adopted a zoning law that covered the area of the Meeks property that was entitled “Old Downtown Overlay District.” The ostensible purpose of the overlay district was to “recognize and affirm the function of the existing traditional downtown as the central focus of commercial, artisan, and civic activities within the community.”<sup>68</sup> Critically, the overlay district limited the size of drugstores to 5,000 square feet.<sup>69</sup> In addition, the Meeks and their fellow property owners received no notice of the meeting during which the overlay district was adopted because the published notice was buried in the local newspaper, and not in the legal advertisement section.<sup>70</sup>

As the City of Stockbridge failed to inform the Meeks and their fellow property owners of the overlay district issue, Meeks continued negotiating with Eckerd. When Eckerd learned of the square footage limitation while inquiring with the City about utilities, it notified the Meeks it was canceling the purchase of the property.<sup>71</sup> Soon after the Eckerd deal fell through, the City again contacted the Meeks about purchasing the property. Subsequent negotiations resulted in a verbal agreement that

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65. See *City of Stockbridge v. Meeks*, 641 S.E.2d 584 (Ga. App. 2007); *Meeks v. City of Stockbridge*, No 1:05-CV-2422 (N.D. Ga. filed Sept. 16, 2005).

66. Complaint at 7, *Meeks v. City of Stockbridge*, No 1:05-CV-2422 (N.D. Ga. filed September 16, 2005).

67. *Id.* at 7-8.

68. *Id.*

69. *Id.* at 9.

70. *Id.* at 9-10.

71. *Id.* at 10.

would allow the Meeks to exchange their property for property of equal value within the district.<sup>72</sup>

Shortly thereafter, the City adopted a resolution formally recognizing its intention to use the Urban Redevelopment Law. The City did this in order to exercise eminent domain. The Urban Redevelopment Law (“URL”) was adopted in 1955 by the General Assembly and allowed municipal governments to declare areas within their jurisdiction as “slums” and to clear those areas through the power of eminent domain, so the land could be redeveloped “for public uses and purposes.”<sup>73</sup> The URL’s definition of a slum was very broad.<sup>74</sup> To enact a redevelopment plan, the URL requires a city to pass a resolution that the area covered by the plan is a “slum.” The URL, however, does not require a city to consider evidence before making this finding; rather the city has the sole discretion to make this determination, and at the time of the *Stockbridge*

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72. Complaint at 7, *Meeks v. City of Stockbridge*, No 1:05-CV-2422 (N.D. Ga. filed September 16, 2005).

73. *Id.* at 4.

74. *Id.* at 5; O.C.G.A. § 36-61-2(18) (2008) (“Slum area” means an area in which there is a predominance of buildings or improvements, whether residential or nonresidential, which by reason of dilapidation, deterioration, age, or obsolescence; inadequate provision for ventilation, light, air, sanitation, or open spaces; high density of population and overcrowding; existence of conditions which endanger life or property by fire and other causes; or any combination of such factors is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, or crime and is detrimental to the public health, safety, morals, or welfare. “Slum area” also means an area which by reason of the presence of a substantial number of slum, deteriorated, or deteriorating structures; predominance of defective or inadequate street layout; faulty lot layout in relation to size, adequacy, accessibility, or usefulness; unsanitary or unsafe conditions; deterioration of site or other improvements; tax or special assessment delinquency exceeding the fair value of the land; the existence of conditions which endanger life or property by fire and other causes; by having development impaired by airport or transportation noise or by other environmental hazards; or any combination of such factors substantially impairs or arrests the sound growth of a municipality or county, retards the provisions of housing accommodations, or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its present condition and use).

case, there was no provision for judicial review.<sup>75</sup> As to compensation for the property taken by the city after the area is designated a “slum,” a special master makes this determination; however, a special master may not pass on the appropriateness of the “slum” designation, and only his determination of value is subject to judicial review.<sup>76</sup>

In using the URL, the City declared the area containing the Meeks’ property a slum. However, there was nothing about the Meeks property or the surrounding property that were slum-like. After the slum designation, the City created the “Urban Redevelopment Agency of the City of Stockbridge.” After the activation of this agency, the City passed an Urban Redevelopment Plan, which showed that the area of the Meeks’ property would be developed for light retail.<sup>77</sup> After the passage of the plan, the Meeks received a letter from the City that stated if they could not negotiate for the remaining eight properties in the development area, the City would abandon the project. The letter also contained an offer of \$205,000.00 for the property – approximately one quarter of what was offered by Eckerd.<sup>78</sup> In response to this offer, the Meeks informed the City that they wished to go forward with the property exchange previously agreed to by the City. However, instead of abandoning the project or executing the previously agreed exchange, the City passed a resolution authorizing the redevelopment agency to exercise eminent domain in the redevelopment area that contained the Meeks’ property.<sup>79</sup>

Next, the Meeks received an additional letter asking them to

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75. *See, e.g.*, Meeks v. City of Stockbridge, No 1:05-CV-2422 (N.D. Ga. filed Sept. 16, 2005); Complaint at 5-6, Meeks v. City of Stockbridge, No 1:05-CV-2422 (N.D. Ga. filed Sept. 16, 2005); Allen v. City Council, 113 S.E.2d 621, 624 (Ga. 1960) (holding that decisions regarding what areas are considered slums within a municipality are left up to the discretion of the local governing body).

76. Meeks v. City of Stockbridge, No 1:05-CV-2422 (N.D. Ga. filed Sept. 16, 2005); Complaint at 6, Meeks v. City of Stockbridge, No 1:05-CV-2422 (N.D. Ga. filed Sept. 16, 2005)..

77. Complaint at 12, Meeks v. City of Stockbridge, No 1:05-CV-2422 (N.D. Ga. filed Sept. 16, 2005).

78. *Id.* at 13.

79. *Id.* at 13-14.

cooperate, and telling them that if the City could not acquire the property by negotiation, then the City would indeed abandon the project. Again though, instead of abandoning the project, and in an effort to recharacterize its intended taking as a “public use,” the City amended the plan to show that the new City Hall and adjacent parking would be built on the site of the Meeks’ flower shop.<sup>80</sup>

*B. The State Court Litigation – City of Stockbridge v. Meeks*

*1. Special Master and Trial Court proceedings*

Shortly after the City amended the plan, the Meeks were served with process for condemnation proceedings. The condemnation petition was remarkable in that it did not reference the URL or the plan adopted by the City. In addition, it did not reference that the Meeks’ property was being taken for use as the site of the new City Hall. Rather, the petition broadly described the reason for the condemnation as “for the construction and development of public facilities to provide additional services to the citizens of the City.”<sup>81</sup> Less than two weeks after service of the condemnation petition, a special master conducted a hearing. During the day-long hearing, counsel for the Meeks put up evidence that the City had acted in bad faith by disrupting Eckerd’s acquisition of the property by attempting to force a sale at a much lower price. The City argued that the special master could not consider this evidence. All the while, the City failed to state the public purpose behind the condemnation petition.<sup>82</sup> The special master returned a finding that condemned the Meeks’ property and awarded \$325,000 for the condemned property plus \$96,500 for furniture, fixtures, and relocation expenses, a much lower value than had been offered by Eckerd during prior negotiations.<sup>83</sup>

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80. *Id.* at 16.

81. *Id.*

82. *Id.* at 16-17.

83. *Meeks v. City of Stockbridge*, No 1:05-CV-2422 (N.D. Ga. filed Sept. 16, 2005); Complaint at 17, *Meeks v. City of Stockbridge*, No 1:05-CV-2422 (N.D. Ga. filed Sept. 16, 2005);, *see also* *City of Stockbridge v. Meeks*, 641 S.E.2d 584, 585 (Ga. App. 2007).

The special master made no ruling on the Meeks' bad faith allegations.<sup>84</sup> More litigation followed. The Meeks appealed to Henry County Superior Court. Upon review, the court reversed the Special Master's finding because the City had failed to plead facts in the petition supporting its exercise of the eminent domain power.<sup>85</sup>

## *2. Appeal to the Georgia Court of Appeals*

From the trial court's ruling on April 3, 2006, the City appealed to the Georgia Court of Appeals.<sup>86</sup> As grounds for the appeal, the City asserted that the Meeks did not raise the issue of the City's failure to assert a public purpose before the Special Master, that it was the Meeks' burden to show the condemnation was for something other than a public purpose, and that the City's actions were in bad faith.<sup>87</sup>

On January 31, 2007, the Georgia Court of Appeals rejected the city's arguments. Instead, the court found that the Meeks sufficiently asserted that the City was condemning the property for private and not "public use" in their response to the condemnation petition, in a motion to dismiss, at the Special Master's hearing and in the objections to the Special Master's findings.<sup>88</sup> The Court of Appeals concluded that the grounds for the trial court's dismissal were properly raised.<sup>89</sup> The Court of Appeals also found incorrect the City's argument that, absent a finding of bad faith, there was a presumption that a taking was done for a valid public purpose.<sup>90</sup> The Court observed that there was only a presumption of *necessity* when bad faith was absent.<sup>91</sup> The key factor stressed by the Court, however, was the pleading requirement in O.C.G.A. § 22-2-102.2, which required the municipality to assert facts showing a public purpose in the

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84. Meeks v. City of Stockbridge, No 1:05-CV-2422 (N.D. Ga. filed Sept. 16, 2005); Complaint at 6, Meeks v. City of Stockbridge, No 1:05-CV-2422 (N.D. Ga. filed Sept. 16, 2005).

85. City of Stockbridge v. Meeks, 641 S.E.2d 584, 585 (Ga. App. 2007).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. City of Stockbridge v. Meeks, 641 S.E.2d 584, 586 (Ga. App. 2007).

91. *Id.*

condemnation petition and the right to condemn.<sup>92</sup> The City's exercise of the eminent domain power was predicated on it making this showing, and the City failed to do so.<sup>93</sup> Finally, because of the above-described pleading requirements, the Court of Appeals concluded that the City, and not the Meeks, had the burden to show the taking was for a public purpose, and Stockbridge had not done so.<sup>94</sup>

As noted throughout the facts discussed above, the Meeks sought to privately negotiate a sale of their property in an effort to capitalize on its value while staying in business. Not only did their private efforts not fit within the City's plans, but also the City interfered with the Meeks' sale. The full extent of the City's interference involved city planning that rendered the private sale an impossibility, a designation of useful property as a slum, a sham redesignation and a faulty condemnation proceeding.

### *C. The Federal Court Litigation – Meeks v. City of Stockbridge*

Southeastern Legal Foundation (“SLF”)<sup>95</sup> became involved in this matter when the ongoing litigation came to its attention. SLF recognized that this case fit well into their mission statement of protecting individual private property rights from unreasonable governmental intrusion. Although SLF did not represent the Meeks in state court, SLF did represent them in the United States District Court for the Northern District of

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92. *Id.* at 585-86.

93. *Id.* at 586.

94. *Id.* at 586.

95. SLF is a Georgia-based, constitutional, non-profit, public interest law firm and policy center founded in 1976. SLF is dedicated to protecting individual rights from the overreaching strong arm of government. To that end, property rights have always been at the forefront of SLF's mission. SLF has been directly involved in several major property rights decisions during its existence, including a number of precedent-setting property rights cases before the United States Supreme Court. Additionally, in response to *Kelo*, SLF was asked by legal counsel with Governor Sonny Perdue's office, as well as leaders of the Georgia House of Representatives and Senate, to research and draft a proposed Constitutional amendment and statutory amendments to neutralize *Kelo*'s effects in Georgia.

Georgia to obtain an injunction, preventing Stockbridge from seizing the Meeks' property. SLF moved for the injunction, not only to maintain the status quo until the Georgia Court of Appeals could rule on the case, but also to attack Georgia eminent domain law as unconstitutional under the Fifth and Fourteenth Amendments of the United States Constitution.

Specifically, SLF attacked the URL, asserting that it was unconstitutionally broad in its definition of a "slum," it lacked meaningful judicial review of "slum" designations, and the URL allowed unfettered discretion in its enforcement.<sup>96</sup> In addition, SLF challenged that the URL was invalid because it did not track the Georgia Constitutional amendment that permitted its passage. Specifically, the Constitutional amendment used the term "blight," while the URL used a broad definition of "slum", expanding the reach of the statute beyond its Constitutional mandate.<sup>97</sup>

In the State Court litigation, the Georgia Court of Appeals held in the Meeks' favor on January 31, 2007.<sup>98</sup> As a result, the federal complaint for injunctive relief was rendered moot. However, the General Assembly did not wait for this Court of Appeals decision before enacting legislation protecting private property in the wake of *Kelo* and the bad acts in *Meeks*. Even prior to the Court of Appeals decision in *City of Stockbridge v. Meeks*, interest in remedying the harsh effects of *Kelo* was galvanized by Justice Stevens' invitation to State governments to provide additional protections for their citizens' properties.<sup>99</sup>

#### IV. GEORGIA'S LEGISLATIVE RESPONSE TO THE INJUSTICE OF *KELO* AND THE ABUSE IN *CITY OF STOCKBRIDGE*: HOUSE BILL

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96. Complaint at 18-20, *Meeks v. City of Stockbridge*, No 1:05-CV-2422 (N.D. Ga. filed Sept. 16, 2005).

97. *Id.* at 23. SLF filed its federal complaint for injunctive relief on September 16, 2005. The State case was dismissed in Henry Superior Court in favor of the Meeks, and the City of Stockbridge filed an appeal of the trial court's dismissal. The federal district court entered an order on May 3, 2006, granting the Meeks' motion to dismiss without prejudice, allowing them to refile their action depending on the holding by the Georgia Court of Appeals ruled in the underlying case.

98. *City of Stockbridge v. Meeks*, 641 S.E.2d 584, 585 (Ga. App. 2007).

99. *Kelo v. City of New London*, 545 U.S. 469, 489-90 (2005).

## 1313 AND A CONSTITUTIONAL AMENDMENT

In response to the *Kelo* decision and the abusive treatment of the Meeks by the City of Stockbridge, the Georgia General Assembly, reflecting strong public sentiment, acted aggressively to change State law to protect private property owners. This protection did not only extend to property subject to taking for economic development, but also to private property subject to eminent domain in general. The resulting legislation, House Bill 1313 (“HB 1313”), received substantial bipartisan support.<sup>100</sup> The widespread appeal of this protective measure came from public opposition of the use of eminent domain to take private property for economic development as well as the widespread rejection of Georgia eminent domain law that allowed the government to take property without judicial oversight or accountability - the very issues raised by SLF on behalf of the Meeks in federal court.<sup>101</sup> The strategy employed to protect private property in the legislation was two-fold; it contained a reworking of eminent domain law both through an Amendment to the Georgia Constitution and through House Bill 1313.

*A. The Constitutional Amendment*

The Meeks’ experience in Stockbridge revealed the abuses that can occur when there is a lack of accountability in the use of eminent domain. The proposed Amendment which was passed by the voters of Georgia amended Article IX, Section II, Paragraph VII of the Georgia Constitution, striking previous

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100. Jody Arogeti, Anita Bhushan, Jill M. Irvin & Jessica Kattula, Legislative Review, *Eminent Domain*, 23 GA. ST. U.L. REV. 157, 167-68 (2006) (The House Rules Committee substitute of HB 1313 passed the House by a vote of 173-1 on March 9, 2006 while the Senate Judiciary Committee substitute of HB 1313 passed the Senate by a vote of 50-0 on March 24, 2006. The bill then went to committee where a compromise was reached between the House and Senate versions of the bill.).

101. Early in the process of drafting the legislation, various elected officials contacted SLF to write legislation for use by the General Assembly. As noted above, SLF has a history of assisting the General Assembly in writing legislation, and SLF’s inclusion was appropriate since SLF represented the Meeks in federal court and possessed first-hand knowledge of the Georgia eminent domain law’s unconstitutionality.

language stating the General Assembly could authorize any county, city or housing authority to take property by eminent domain and sell it to private enterprise for private use.<sup>102</sup> The Amendment added accountability to the process by requiring that the “governing authority” of the city or county where the property is located must approve the taking of property for redevelopment purposes. Furthermore, the Amendment provided, “[t]he power of eminent domain shall not be used for redevelopment purposes by any entity, except for public use, as defined by general law.”<sup>103</sup>

Article IX, Section II, Paragraph V was amended to recognize that local governments could use eminent domain for “any public purpose” subject to limitation by “general law.” The Amendment added that any eminent domain use by a non-elected housing authority must be approved by the elected “governing authority” for the city or county in which the property was located.<sup>104</sup> These sections instilled accountability by making elected officials publicly responsible for eminent domain decisions, and recognized the power of the General Assembly to further limit the exercise of eminent domain through the enactment of general law.

#### *B. House Bill 1313: Salient Provisions*

House Bill 1313, which chronologically came before the constitutional amendment, significantly limited the employment of eminent domain, and added several practical features that protected private property from unaccountable economic development activities. The spirit of the effort to protect private property was reflected in the official title of the Act, “The Landowners Bill of Rights and Property Protection Act.”<sup>105</sup> The following provisions were the primary provisions of the Act.

O.C.G.A. § 22-1-1, clarified the meaning of “‘Blighted property,’ ‘blighted’ or ‘blight,’” providing that “blight” could not be based on esthetic conditions.<sup>106</sup> It also indicated that such

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102. GA. CONST. art. IX, §. II.

103. *Id.*

104. *Id.*

105. 2006 Ga. Laws 39, § 1.

106. O.C.G.A. § 22-1-1 (2008).

parcels had to be treated separately with reference to a determination of “blight” and clarified the meaning of economic development as follows:

(4) ‘Economic development’ means any economic activity to increase tax revenue, tax base, or employment or improve general economic health, when the activity does not result in:

(A) Transfer of land to public ownership;

(B) Transfer of property to a private entity that is a public utility;

(C) Lease of property to private entities that occupy an incidental area within a public project; or

(D) The remedy of blight.<sup>107</sup>

As to the meaning of the critical term “public use,” the Act stated:

(9)(A) ‘Public use’ means:

(i) The possession, occupation, or use of the land by the general public or by state or local governmental entities;

(ii) The use of land for the creation or functioning of public utilities;

(iii) The opening of roads, the construction of defenses, or the providing of channels of trade or travel;

(iv) The acquisition of property where title is clouded due to the inability to identify or locate all owners of the property;

(v) The acquisition of property where unanimous consent is received from each person with a legal claim that has been identified and found; or

(vi) The remedy of blight.<sup>108</sup>

In addition, to neutralize the Supreme Court’s holding in *Kelo*, the General Assembly included the following language: “[t]he public benefit of economic development shall not

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107. O.C.G.A. § 22-1-1(4)(A)-(D) (2008); *see also*, Arogeti, et al., *supra* note 100, at 175-76.

108. O.C.G.A. § 22-1-1(9)(A).

constitute an economic use.”<sup>109</sup>

O.C.G.A. § 22-1-2, which relates to the “nature” of eminent domain, was radically altered to provide that no condemning authority “shall use eminent domain unless it is for public use.” The section went further to state that “public use” was a matter of law, and that the burden for proving so remained with the condemnor. The section also provided a method for reclaiming the property or being awarded additional compensation if the condemned property was not put to “public use” within five years.<sup>110</sup>

From a practical standpoint, the eminent domain process was vastly improved with the addition of O.C.G.A. § 22-1-9. The preamble for this section recognizes several of the provision’s practical purposes it is meant to address, such as expediting the acquisition of property, avoiding litigation, consistent governmental treatment of property owners and prompting public confidence in the acquisition process.<sup>111</sup> Although the General Assembly couched the following section in terms of being “guided by the following policies and practices,” “to the greatest extent practicable,” the guidelines are sensible and compelling, and closely match the stated purposes of the section.<sup>112</sup> The new guidelines are examined below.

The guidelines address the process in a linear way, providing a step-by-step template for the acquisition process. First, the condemning authority should work in a concerted manner to acquire the subject property by negotiation.<sup>113</sup> The property shall be appraised before negotiations begin, and the owner of the property under consideration is allowed to accompany the independent appraiser.<sup>114</sup> Also, before negotiations begin, the condemning authority must establish in writing just compensation for the property, and the amount offered cannot be less than the written appraisal.<sup>115</sup> Further, government’s

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109. O.C.G.A. § 22-1-1(9)(B) (2008).

110. O.C.G.A. §§ 22-1-2(a)-(c) (2008).

111. O.C.G.A. § 22-1-9 (2008).

112. *Id.*

113. O.C.G.A. § 22-1-9(1) (2008).

114. O.C.G.A. § 22-1-9(2) (2008).

115. O.C.G.A. § 22-1-9(3) (2008).

strong arm tactics were limited by the section's requirement that the condemning authority cannot make the owner surrender the property unless it first pays into the registry of the court the amount proposed as just compensation or the amount determined as just compensation in the condemnation proceeding.<sup>116</sup> Also, after condemnation, the property owner must not be given less than ninety (90) days to abandon the property.<sup>117</sup> Any rental allowed to a tenant of the property post-condemnation would be at a fair-market rate.<sup>118</sup> In addition, the government was admonished that it shall not act in bad faith to compel an agreement on the price to be paid.<sup>119</sup> Furthermore, the condemning authority must file proceedings to condemn a property interest, and shall not "intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his or her real property."<sup>120</sup> The owner can donate the property to the condemning authority at the owner's option.<sup>121</sup>

This section is practical and intended as a response to ameliorate the bad feelings and mistrust engendered by the *Kelo* decision and the City of Stockbridge's actions against the Meeks. It codifies reasonable requirements, such as written independent appraisal of the property *before* negotiations begin, and allowing all interested parties to be present during the appraisal.<sup>122</sup> Also, the condemnor must offer its opinion of the property's value in writing and cannot offer less than the value set by the independent appraisal. Thus, the mechanics of the appraisal process are not only transparent and eliminate surprise, but the fiscal boundaries established during the process keep negotiations reasonable.

In addition, it is fair in the context of this process to require that the condemnor pay money into the registry of the court before the owner is required to surrender possession.<sup>123</sup> This

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116. O.C.G.A. § 22-1-9(4) (2008).

117. O.C.G.A. § 22-1-9(5) (2008).

118. O.C.G.A. § 22-1-9(6) (2008).

119. O.C.G.A. § 22-1-9(1)-(7) (2008).

120. O.C.G.A. § 22-1-9 (8) (2008).

121. O.C.G.A. § 22-1-9 (9) (2008).

122. O.C.G.A. § 22-1-9 (2008).

123. O.C.G.A. § 22-1-9(3) (2008).

means that there is ready cash available for the condemnee, and it moves the process along because the owner will not have to surrender the condemned property without evidence of payment. This section is also sensitive to an owner's concerns about moving because he will have at least a month and a half to leave the property before the government takes possession. Furthermore, the General Assembly admonishes local governments that they may not intentionally drive people off their land by forcing a bad deal.<sup>124</sup> This paragraph speaks directly to the abuses practiced by the City of Stockbridge on the Meeks.

In addition to the practical guidelines added to the negotiation process by O.C.G.A. § 22-1-9, O.C.G.A. § 22-1-10 increases due process protections for property owners. This section requires sufficient notice to the condemnee by both governmental and nongovernmental condemnors.<sup>125</sup> As to a governmental condemnor, the law requires the property to be posted with a sign at least 15 days before any meeting at which approval of the condemnation may occur.<sup>126</sup> It also requires personal service of the hearing notice, and, as an alternative, service by publication or statutory overnight delivery.<sup>127</sup> In addition, the law requires publication of the hearing notice in the county legal organ, and the meeting for the consideration of the condemnation must commence after 6:00 p.m.<sup>128</sup> O.C.G.A. § 22-2-10 is friendly toward the private property owner because it provides the owner with full procedural due process. It is also significant that the meeting when the condemnation is considered must occur after 6:00 p.m., a time after working hours at which most people can attend.<sup>129</sup>

With regard to a nongovernmental condemnor, such as a public utility, the provisions are similar except that the section requires that the nongovernmental entity establish rules for the exercise of eminent domain, and a system to document the time

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124. O.C.G.A. § 22-1-9(7) (2008).

125. O.C.G.A. § 22-1-10 (2008).

126. O.C.G.A. § 22-1-10(a)(1) (2008).

127. O.C.G.A. § 22-1-10(a)(2) (2008).

128. O.C.G.A. § 22-1-10(a)(1)-(4) (2008).

129. *Id.*

at which it was exercised. Notice is similar; however, instead of a hearing, the property owner is offered a meeting with the individuals having the power of documented approval of the condemnation.<sup>130</sup>

Under O.C.G.A. § 22-1-10, any condemnation notice personally served or mailed to the property owner must inform them of at least their right to “notice, damages, hearing, and appeal of any award entered by the special master.”<sup>131</sup> Furthermore, the notice must inform the property owner that she has the right to file a motion in a pending condemnation action under O.C.G.A. § 22-1-11.<sup>132</sup> This motion is available to the condemnee before the vesting of title and mandates the court, “determine whether the exercise of the power of eminent domain is for a public use and whether the condemning authority has the legal authority to exercise the power of eminent domain.”<sup>133</sup> At the court’s option, it can stay other proceedings related to the condemnation while deciding.<sup>134</sup> The burden of proving “public use” rests with the condemning authority.<sup>135</sup> This section contains significant changes that allow a condemnee a direct challenge to a condemnor’s assertion of “public use.” The possibilities that arise from the existence of this motion should keep governments circumspect about the cavalier articulation of “public use.”

O.C.G.A. § 22-1-12 further provides a measure of accountability of the condemning authority. The section requires the authority to pay the property owner’s attorney’s fees if the condemnor cannot acquire the property by condemnation, or if it abandons the effort.<sup>136</sup> This section also provides additional compensation for moving a household, a business, or the cessation of business or farm operations due to condemnation of the property.<sup>137</sup>

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130. O.C.G.A. § 22-1-10(b) (2008).

131. O.C.G.A. § 22-1-10(d) (2008).

132. *Id.*

133. O.C.G.A. § 22-1-11 (2008).

134. *Id.*

135. *Id.*

136. O.C.G.A. § 22-1-12 (2008).

137. O.C.G.A. § 22-1-12 (2008).

O.C.G.A. §§ 22-2-102.1 and 22-2-102.2 provide for a condemnor to apply for an *in rem* condemnation with judicial supervision throughout the process.<sup>138</sup> These sections allow the condemning authority to avoid the use of a special master under O.C.G.A. § 22-2-102(a) (2).<sup>139</sup>

O.C.G.A. § 22-2-112 clarifies the timeline of the appeal of a special master's award, and specifically provides for a jury trial on the issue of "just and adequate compensation."<sup>140</sup>

O.C.G.A. § 22-2-131 deals with *in rem* condemnations, filed in Superior Court, where the condemnor believes that the title of the subject property is defective in some way, or that there may be unknown persons who have an interest in the property. This section was amended to add a requirement that the condemnor affirmatively state in the petition the necessity to condemn private property, and describe the "public use" intended for such property.<sup>141</sup>

O.C.G.A. § 36-42-8 was amended to clarify that downtown development authorities do not have the power of eminent domain.<sup>142</sup> Also, O.C.G.A. 36-62-6 removed the power of eminent domain from development authorities in general.<sup>143</sup>

O.C.G.A. 36-61-3.1 was added to the URL to clarify that "public use," as defined in O.C.G.A. § 22-2-1, is applicable to the URL, and that any use of eminent domain under the URL must be for a "public use" and must be approved by the respective county or city governing body where the property is located.<sup>144</sup>

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138. O.C.G.A. §§ 22-2-102.1 and 22-2-102.2(1)-(6) (2008).

139. Anecdotally, it has been reported that filing an action under O.C.G.A. § 22-2-131 allows for a motion made under O.C.G.A. § 22-1-11 to be made directly as part of the case rather than shuttling between the special master and superior court. This would save time.

140. O.C.G.A. § 22-2-112(a)-(b) (2008).

141. O.C.G.A. § 22-2-131(a)(6) (2008).

142. O.C.G.A. § 36-42-8(b) (2008).

143. O.C.G.A. § 36-62-6(b) (2008).

144. O.C.G.A. § 36-61-3.1(a)-(b) (2008).

## V. EVALUATION OF THE LEGISLATIVE RESPONSE

A. *Absence of Litigation Since 2006 Enactment of Eminent Domain Reform Legislation*

In the three years since enactment of HB 1313 and passage of the constitutional amendment, the striking feature thus far about the impact of the post-*Kelo* legislation in Georgia is how few reported cases these measures have generated since their passage. There are practical considerations that may indicate why there has been limited litigation. For one, the legislation is relatively new, which indicates that legal challenges may yet appear in court. Additionally, the current economic recession, felt particularly strongly in the development sector, has provided fewer incentives to test the legislation due to dramatic decreases in building activity and due to municipalities reigning in their growth plans.

With regard to the definitions section for Title 22, Eminent Domain, this section specifically states that economic development cannot be a “public use.”<sup>145</sup> This specific provision was referenced in only one reported decision, *Fox v. City of Cumming*.<sup>146</sup> Although the case directly referenced O.C.G.A. § 22-1-1 regarding “public use,” the case focused on the motion available under O.C.G.A. § 21-1-11 to test whether an action constituted “public use”. The Court held that because City of Cumming had not yet initiated a condemnation proceeding, the plaintiff/appellant property owner was not authorized to bring a motion under O.C.G.A. § 21-1-11 seeking a “public use” determination.<sup>147</sup> As such, the Court never undertook the public use analysis. The basis for the holding was the language of O.C.G.A. § 21-1-11, which stated that a determination could be sought, “[b]efore the vesting of title in the condemnor and upon motion of the condemnee, or within ten days of entry of the special master’s award. . . .”<sup>148</sup> The Court inferred from this language that the condemnation action had to be pending before

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145. O.C.G.A. § 22-1-1(9)(B) (2008).

146. *Fox v. City of Cumming*, 658 S.E.2d 408 (Ga. App. 2008).

147. *Id.* at 409.

148. *Id.*

plaintiff had standing to apply for a judicial determination of “public use.”<sup>149</sup> This is the only case referencing this amended code section since the passage of the post-*Kelo* legislation in Georgia.

As to the amended O.C.G.A. § 22-1-2, which covers the nature and right of eminent domain, there has been no reported litigation directly on point. However, O.C.G.A. § 22-1-2 is referenced in the recent case of *William E. Honey Business Interest, LLLP v. Georgia Power Company*.<sup>150</sup> This case dealt with a property owner who sought return of land condemned in 1984 by Georgia Power for a power line easement. The Court of Appeals applied prior law in this case, finding Georgia Power had *not* abandoned its easement because of periodic maintenance, even though it never constructed the transmission lines.<sup>151</sup> The dissent referred to new O.C.G.A. § 22-1-2 to highlight the trend in shortening the time before condemned property should be returned to the condemnee.<sup>152</sup>

Aside from these two cases, *Fox* and *William E. Honey Business Interest*, there are no other reported opinions to date applying the recently amended or enacted statutes under the Landowners Bill of Rights and Property Protection Act.<sup>153</sup>

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149. *Id.* at 410.

150. *William E. Honey Bus. Interest, LLLP v. Ga. Power Co.*, 661 S.E.2d 203 (Ga. App. 2008).

151. *Id.* at 205.

152. *Id.* at 206.

153. There have been no reported cases since the enactment of the post-*Kelo* legislation in the following amended and/or newly enacted provisions: O.C.G.A. § 22-1-9 (2008) (Policies and Practices guiding eminent domain); O.C.G.A. § 22-2-10 (2008) (Duties of condemnor prior to exercise of eminent domain; rights of condemnee; exceptions); O.C.G.A. § 22-1-10.1 (2008) (Time for bringing condemnation action; exceptions); O.C.G.A. § 22-1-12 (2008) (Reimbursement to property owner of reasonable costs and expenses associated with condemnation proceedings); O.C.G.A. § 22-1-13m (2008) (Compensation to condemnee for relocation damages and expenses); O.C.G.A. § 22-1-14 (2008) (Valuation of condemned property); 22-2-84.1 (Appeal to superior court from assessor’s award); O.C.G.A. § 22-2-100 (2008) (“Condemning body” and “condemnor defined”); O.C.G.A. § 22-2-102.1 (2008) (Petitioning superior court for judgment in rem); O.C.G.A. § 22-2-106 (2008) (Compensation of special master; allowance by judge or reasonable time for special master to inspect premises); O.C.G.A. § 22-2-131

However, notwithstanding the dearth of case law resulting from Georgia's post-*Kelo* eminent domain reform, some analysis has been undertaken to compare the results in Georgia with other jurisdictions as to the efficacy of their respective post-*Kelo* legislative efforts.

*B. Comparison with Post-Kelo Reform in Other Jurisdictions*

When compared to other states, Georgia has been characterized as having effective reform in both the enactments of the General Assembly and the amendment to the State Constitution.<sup>154</sup> In addition, the practical aspect of Georgia's laws has been recognized as exemplary because its post-*Kelo* reforms ban economic development condemnations and "roughly speaking restrict blight condemnations to areas that fit the intuitive layperson's definition of the term."<sup>155</sup> Specifically with regard to the Constitutional Amendment, the restrictions on eminent domain enacted by the General Assembly were noted as stronger than the Constitutional Amendment, with the latter adding that "new private-to-private takings be approved

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(2008) (Contents of petition); O.C.G.A. § 22-2-132 (2008) (Order to appear, etc.; directions for notice and service thereof; attachment of process to petition); O.C.G.A. § 22-3-60 (2008) (Authority to lease, purchase, or condemn property or received donations for waterworks and sewage systems); O.C.G.A. § 22-6-63 (2008) (Authority to condemn property for purpose of constructing waterworks, water distribution system); O.C.G.A. § 23-3-73 (2008) (Government power to enforce quiet title actions); O.C.G.A. § 22-4-3 (2008) (Application of new eminent domain definitions to title pertaining to persons displaced by federal-aid projects); O.C.G.A. § 36-42-8 (2008) (Powers of downtown development authorities generally); O.C.G.A. § 36-44-6 (2008) (Delegation of redevelopment powers to redevelopment agencies); O.C.G.A. § 36-61-3.1 (2008) (Urban redevelopment, "Public use" defined; eminent domain to be exercised solely for "public use"); O.C.G.A. § 36-62-6 (2008) (Development authorities, powers of authority generally); O.C.G.A. § 36-82-62 (2008) (Powers as to undertakings and revenue bonds generally).

154. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINNESOTA L. R.EV. (forthcoming June 2009), George Mason Law & Economics Research Paper No. 07-14, 13, available at SSRN: <http://ssrn.com/abstract=976298>.

155. *Id.* at 35.

by local elected officials.”<sup>156</sup>

Even with these positive reports on the protection offered by Georgia’s legislation, one study shows that there were no private-to-private condemnations in Georgia from 1998 to 2002.<sup>157</sup> Professor Somin offered that the figures came from a study undertaken by the Institute for Justice, the law firm that represented the property owners in *Kelo*.<sup>158</sup> These figures were not definitive because they were based on news reports and court filings, and the figures did not differentiate between economic takings and other private-to-private condemnations.<sup>159</sup> Many of these types of cases are unreported.<sup>160</sup> However, Professor Somin acknowledged that the figures present a “rough indication of which states engage in private-to-private condemnations more than others.”<sup>161</sup>

Professor Somin made several observations about the quality of the legislative responses to *Kelo*. He found that several of the states, including Georgia, enacted effective post-*Kelo* eminent domain reforms, despite his allegation that there is little history of such takings.<sup>162</sup> In addition, he found that post-*Kelo* reforms contained in popular referendums were generally stronger than those passed by state legislatures.<sup>163</sup> He credits the strength of the referendum efforts to the involvement of private property advocacy groups that are not beholden to interests in favor of weak eminent domain laws. He maintains that such groups have a genuine interest in successful legislation, and usually acquire detailed information about eminent domain laws when proposing legislation “since they have a real chance of influencing policy outcomes through their actions.”<sup>164</sup>

Although Professor Somin observes that property rights

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156. *Id.* at 41.

157. *Id.* at 16.

158. *Id.* at 15.

159. *Id.* Professor Somin also observes that, “And it is noteworthy that states with a relatively large number of private-to-private takings are not more likely to have enacted effective post-*Kelo* reforms than others.”

160. *Id.*

161. *Id.*

162. *Id.* at 37.

163. *Id.* at 38.

164. *Id.* at 58.

activists do attempt to influence the legislative process, he also notes that such influence is “filtered through the legislative process, where organized interest groups will inevitably get a strong say.”<sup>165</sup> His overall explanation of the phenomena of weak legislative results, as opposed by strong results from popular referendums, is that the public has “rational ignorance” of the contours of the eminent domain issue and are susceptible to placation by weak legislative efforts that appear strong.<sup>166</sup>

Professor Somin could not explain Florida’s strong post-*Kelo* legislation, and he did not examine Georgia’s legislation more than noted above; however, Georgia was experiencing a “perfect storm” at the time of the *Kelo* decision. The center of the storm was the Meeks’ flower shop in Stockbridge, Georgia. This close-to-home example of government acting against private property rights, without accountability in the context of the Supreme Court’s frightening allowance of private property to be taken away for economic development, focused the public and the legislature on an area of the law that Professor Somin acknowledged received little prior scrutiny.<sup>167</sup> The massive public education campaign, courtesy of *Kelo* and the *City of Stockbridge*, created an environment where the SLF could work with the General Assembly to provide effective model legislation, not only to rein in government power to condemn property solely for economic development, but to reform and improve the accountability and functionality of the eminent domain process.

## VI. ADDITIONAL PROTECTIONS ARE WARRANTED FOR

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165. *Id.*

166. *Id.* at 56. Professor Somin observed that, “[t]he publicity surrounding *Kelo* made much of the public at least somewhat aware of the problem of economic development takings. But it probably did not lead voters to closely scrutinize the details of proposed reform legislation. Few citizens have the time or inclination to delve into such matters and many are often ignorant of the very existence of even the most important legislative items.”

167. *Id.*

## PROPERTY OWNERS IN GEORGIA

There is no doubt that the changes made to Georgia's eminent domain law by the General Assembly and by Constitutional Amendment during 2006 were positive in that they provided protections to the private property owner that were not present prior to the *Kelo* and *Meeks* decisions. The Constitutional Amendment, approved subsequent to the passage of the general legislation, has not been tested by court challenge. And as noted above, there have been few reported cases involving the updated eminent domain statutes. Nevertheless, there are some features of Georgia's eminent domain law that could be improved to protect private property owners in the short term and in the future. With the recent emergence of "big government" stimulus packages and renewed emphasis on public works projects, the interests of private property owners are likely to be challenged in the near future by new government works programs.

A. *The Definition of "Public Use" Should Be Incorporated into the Constitution*

The quickest and most effective next step to strengthen private property rights would be for the General Assembly to include a better-defined "public use" provision in the Constitutional Amendment enacted in November 2006. The potential problems with the current provision are clear: wide legislative discretion granted by the Amendment and the breadth of the terms contained in the general law that describes "public use." Although the provision amended Article IX, Section II, Paragraph VII restricting redevelopment, the Amendment went only so far. The adopted paragraph states as follows:

Each condemnation of privately held property for redevelopment purposes must be approved by vote of the elected governing authority of the city within which the property is located, if any, or otherwise by the governing authority of the county within which the property is located. The power of eminent domain shall not be used for redevelopment purposes by any entity, except for public use,

as defined by general law.<sup>168</sup>

The general law provides the proper blueprint for a revised Constitutional provision regarding “public use.” Including the definition of “public use” within the Constitution would remove legislative discretion to change its meaning. This would provide an extra layer of protection that is not available if the definition is subject to political discretion.<sup>169</sup>

*B. The Definition of “Blight” Should Be Tightened or the “Remedy of Blight” Should Be Removed as a “Public Use”*

In addition to moving the definition of “public use” within the Constitution, another area where private property protection could be strengthened, is to tighten the definition of “blight,” or simply to remove “the remedy of blight” from eminent domain law altogether. “Blight” is the broadest term associated with “public use.” It is defined in the code as follows:

“Blighted property,” “blighted,” or “blight” means any urbanized or developed property which:

- (A) Presents two or more of the following conditions:
  - (i) Uninhabitable, unsafe, or abandoned structures;
  - (ii) Inadequate provisions for ventilation, light, air, or sanitation;
  - (iii) An imminent harm to life or other property caused by fire, flood, hurricane, tornado, earthquake, storm, or other natural catastrophe respecting which the Governor has declared a state of emergency under state law or has certified the need for disaster assistance under federal law; provided, however, this division shall not apply to property unless the relevant public agency has given notice in writing to the

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168. GA. CONST. art. IX, § 2, ¶. 7(a).

169. During the 2006 legislative session when both the general legislation and the proposed Constitutional Amendment were being considered, Dana Berliner, a senior attorney with the Institute for Justice, a libertarian public interest law firm, testified about the danger of not placing the definition of “public use” within the Constitution. She testified that, “[t]he point of Constitutional protection is not to leave fundamental rights in the hands of legislators.” She further testified that, “[n]ow, planners and developers will unleash their lobbyists for years to come to press the Legislature to change the definition of public use.” Jason Pye, Commentary, *Eminent Domain Protection’s No Done Deal*, Ga. Pub. Policy Found. (June 29, 2007) (Jason Pye is the former Chairman for the Libertarian Party of Georgia).

property owner regarding specific harm caused by the property and the owner has failed to take reasonable measures to remedy the harm;

(iv) A site identified by the federal Environmental Protection Agency as a Superfund site pursuant to 42 U.S.C. Section 9601, et seq., or environmental contamination to an extent that requires remedial investigation or a feasibility study;

(v) Repeated illegal activity on the individual property of which the property owner knew or should have known; or

(vi) The maintenance of the property is below state, county, or municipal codes for at least one year after notice of the code violation; and

(B) Is conducive to ill health, transmission of disease, infant mortality, or crime in the immediate proximity of the property.

Property shall not be deemed blighted because of esthetic conditions.<sup>170</sup>

This code section is a vast improvement over the section that previously defined “blight.” Even the new section, however, still allows the taking of private property based on distinctions that are open to interpretation. In an urban setting, this definition could allow the taking of any property that is old, contained graffiti, not up to code in some respect, and was “conducive to ill health. . . or crime in the immediate proximity of the property.”<sup>171</sup> Conditions that satisfy these categories are not difficult to articulate with regard to a variety of urban structures. Local governments possess the legitimate interest to foster communities that are not “blighted,” but it does not follow that properties that do not meet a subjective standard possessed by a local government’s code enforcement officer should be taken by eminent domain.

The control of potential negative uses of the “remedy of blight” could be addressed by the General Assembly. One proposal to add language to the Georgia Constitution that provides additional eminent domain accountability has been introduced in this session.<sup>172</sup> The proposed eminent domain Amendment would add a section “(f)” to Article I, Section III,

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170. O.C.G.A. § 22-1-1(A)-(B) (2008).

171. *Id.*

172. H.R. 70, 150th Gen. Assem., Reg. Sess. (Ga. 2009).

Paragraph I of the Georgia Constitution, which deals with eminent domain. The text of the proposed Amendment is as follows:

Condemnation of private property pursuant to the power of eminent domain shall be approved by a resolution or ordinance of the governing authority of the municipality within which the property is located, if any, or otherwise by the governing authority of the county within which the property is located.<sup>173</sup>

The proposed Amendment adds additional accountability for the use of eminent domain within local jurisdictions by requiring local officials vote in a public meeting on any use of eminent domain. Likewise, an additional Amendment should be added to provide that the definitions of “public use” now contained in the code be incorporated into the Constitution and the “remedy of blight” be prohibited as a “public use.” Such a proposal would further demonstrate to the citizens of Georgia that the state government is serious about protecting private property rights.

*C. Adopt the Florida Approach – Prohibition of “Blight” as a Basis for Eminent Domain*

In contrast to Georgia’s approach, Florida does not allow “blight” to serve as a basis for condemnation.<sup>174</sup> As noted above, Georgia’s present statutory language dealing with “blight” is much stronger than the preceding language, and provides the private property owner with a greater degree of protection.<sup>175</sup> In contrast to Georgia’s “strong” statute is Florida’s even “stronger” eminent domain Constitutional provision and legislative limitation on using eminent domain to remedy blight. Florida’s Constitutional provision on eminent domain, which should be read with Fla. Stat. § 73.014, states:

(a) No private property shall be taken except for a public purpose and with full compensation therefore paid to each owner or secured by deposit in the registry of the court and available to the owner.

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173. *Id.*

174. FLA. CONST. art. X, § 6; FLA. STAT. § 73.014 (2009).

175. *See supra* text accompanying note 170.

(b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.

(c) Private property taken by eminent domain pursuant to a petition to initiate condemnation proceedings filed on or after January 2, 2007, may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature.<sup>176</sup>

And the corresponding statute, Fla. Stat. § 73.014. Taking property to eliminate nuisance, slum, or blight conditions prohibited, provides:

(1) Notwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, the state, any political subdivision as defined in s. 1.01(8), or any other entity to which the power of eminent domain is delegated may not exercise the power of eminent domain to take private property for the purpose of abating or eliminating a public nuisance. Notwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, abating or eliminating a public nuisance is not a valid public purpose or use for which private property may be taken by eminent domain and does not satisfy the public purpose requirement of s. 6(a), Art. X of the State Constitution. This subsection does not diminish the power of counties or municipalities to adopt or enforce county or municipal ordinances related to code enforcement or the elimination of public nuisances to the extent such ordinances do not authorize the taking of private property by eminent domain.

(2) Notwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, the state, any political subdivision as defined in s. 1.01(8), or any other entity to which the power of eminent domain is delegated may not exercise the power of eminent domain to take private property for the purpose of preventing or eliminating slum or blight conditions. Notwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, taking private property for the purpose of preventing or eliminating slum or blight conditions is not a valid public purpose or use for which

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176. FLA. CONST. art. X, § 6.

private property may be taken by eminent domain and does not satisfy the public purpose requirement of s. 6(a), Art. X of the State Constitution.<sup>177</sup>

The import of these two sections is obvious. The legislative limitation expressly forbids the use of “blight” as a basis to take private property and references the specific Florida Constitutional provision using the phrase “public use.” In combination with the Constitutional requirement that in order for condemned property to be transferred to a private person that the transfer has to be approved by both chambers of the Florida legislature, the statute demonstrates Florida’s intention—“blight” cannot be used to seize private property in Florida.

Even though the Florida approach expressly prohibits takings under the guise of “blight,” Fla. Stat. § 73.014(1) states that the law is not intended to deprive local governments of the ability to enforce maintenance codes or abate public nuisances, so long as the remedies do not include taking of the property under eminent domain.<sup>178</sup> This section acknowledges that there are effective methods available to local governments to require property owners to meet the minimum code requirements without taking the property.

In contrast, Georgia’s definition of “blight,” although rather narrowly drawn, contains language that is open to subjective interpretation on several different levels.<sup>179</sup> Thus, a local government acting to economically revitalize an area could still, albeit parcel-by-parcel, use the “remedy of blight” to displace private property owners based on a subjective interpretation of the definitions contained in O.C.G.A. § 22-1-1.

*D. Blight Should Be Addressed Through Appropriate Means,  
Not Eminent Domain*

A proposal to eliminate the “remedy of blight” as a basis for eminent domain, however, may be ill-received by local governments desiring to address run down areas within their jurisdiction. A November 5, 2007 editorial in the *Savannah*

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177. FLA. STAT. § 73.014 (2009).

178. FLA. STAT. § 73.014(1) (2009).

179. O.C.G.A. § 22-1-1(1) (2008).

*Morning News* opined that “[t]he state’s eminent domain legislation has had the unintended consequence of making it more difficult to clean up blighted areas.”<sup>180</sup> The editorial’s point was that the General Assembly overreacted to the *Kelo* decision, making it too difficult for cities to deal with blight.<sup>181</sup> As evidence of the perceived problem, the editorial cited the presence in Savannah of dilapidated housing and the neglect by absentee landlords.<sup>182</sup> The editorial advocated amending the laws passed in 2006, stating, “[t]hese amendments could include strict guidelines that nevertheless allowed cities a more expedited avenue for blight removal.”<sup>183</sup> The editorial further advocated that, “[i]n order to keep cities from taking homes solely for the purpose of economic development, the new provisions might also require any seized property to maintain the zoning level it had prior to the seizure.”<sup>184</sup> The editorial is revealing because it not only urges watering down the present legislation with regard to “blight,” which is a persuasive reason for adding those protections to the Constitution, but it also acknowledges the danger that is inherent in the present “blight” definition—it leaves open the possibility that a local government would use “blight” to engineer economic redevelopment. Thus, a local government could do directly what the law will not allow it to do indirectly by using private developers.

The editorial neglected the existing enforcement authorities available now to deal with such problems. Nuisance is an appropriate remedy available to a local government to remedy blight.<sup>185</sup> For example, the City of Savannah has an extensive

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180. Editorial, *Blight Removal*, SAVANNAH MORNING NEWS, Nov. 5, 2007, available at <http://www.savannahnow.com/node/389591>.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. See O.C.G.A. § 41-1-1 (2008) (A nuisance is anything that causes hurt, inconvenience, or damage to another and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance. The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary, reasonable man.); O.C.G.A. § 41-2-10 (2008) (A county or municipality

ordinance dealing with nuisance abatement that would address the problems articulated by the editorial.<sup>186</sup> This ordinance allows for the filing of a complaint by five citizens, or by the Director of Inspections or a like designee, that a building, dwelling or other structure constitutes a nuisance under the code section. The respondent owner is then provided a due process hearing. In addition, a provision governs orders for corrective action. If, after the complaint is sustained, the corrective order is not complied with, the property can be demolished and a lien for the cost of demolition placed against the property. The City can subsequently collect on the lien.<sup>187</sup>

The presence of ordinances such as this, and the due process such ordinances provide, frames the question why would a local government ever have to utilize the “remedy of blight” to do any act concerning code enforcement other than to seize private property? There is no logical answer to this question other than “the remedy of blight” permits a seizure of private property under the heading of “public use.” Thus, the “remedy of blight” serves as a catchall provision that potentially allows a local government to seize private property for possible economic redevelopment while avoiding the statutory prohibition on that activity.

With this in mind, Georgia should move to strengthen the 2006 protections for private property owners, even extending to private property that some might judge as blighted. Doing so would not weaken the power of local governments to deal with the abatement of a dangerous nuisance. Removing the “remedy

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“may determine, under existing ordinances, that a dwelling, building, or structure is unfit for human habitation or is unfit for its current commercial, industrial, or business use if he finds that conditions exist in such building, dwelling, or structure which are dangerous or injurious to the health, safety, or morals of the occupants of such dwelling, building, or structure; of the occupants of neighborhood dwellings, buildings, or structures; or of other residents of such county or municipality. Such conditions may include the following (without limiting the generality of the foregoing): (1) Defects therein increasing the hazards of fire, accidents, or other calamities; (2) Lack of adequate ventilation, light, or sanitary facilities; (3) Dilapidation; (4) Disrepair; (5) Structural defects; and (6) Uncleanliness.”)

186. SAVANNAH, GA., NUISANCE ABATEMENT CODE art. C, §§ 9-2052-9-2064.

187. *Id.*

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of blight” would not only eliminate a potential for abuse, but it would require local governments to utilize existing nuisance abatement tools. If local governments are able to accomplish the core government function of maintaining a safe and healthy jurisdiction through their traditional police power tools, there is no reason for the “remedy of blight.” Its presence in eminent domain law only tempts abuse, even when narrowly drawn.

## VII. CONCLUSION

The decisions in *Kelo* and *City of Stockbridge* focused attention in Georgia on the critical problem of when and to what extent the government’s power to take private property should be controlled. The response was overwhelming: private property should be protected against governmental overreaching, even when that governmental action is taken in the spirit of promoting the greater good under the banner of economic improvement and expansion. The sense was that if protections for private property were not increased, no private property within Georgia would be safe from confiscation. And in the wake of *Kelo* and *City of Stockbridge*, the Georgia General Assembly passed eminent domain reform legislation to provide greater protection to Georgia property owners.

Even though great strides were made to prevent situations like *Kelo* and *Stockbridge*, the question that remains, however, is what greater strength should be given to private property protections now, so that future actions to erode those protections are not successful? The response to this inquiry is that every protection that can be erected should be erected because of the intrinsic importance of this issue – protection of private property against government taking. Even though protective barriers can be removed by political action, the time it will take to effect their removal would cause future generations to consider the wisdom of such an act. Such consideration, and the accompanying debate, will ensure that private property rights will be protected, despite the immense pressure that will arise to make it easier for government to take those rights away.