

## I. INTRODUCTION

The Senate Eminent Domain and Economic Development Study Committee (ED and ED Study Committee) was created by the Committee on Assignments on July 1, 2005, in response to the United States Supreme Court decision of *Kelo v. City of New London, Connecticut*.<sup>1</sup> The ED and ED Study Committee was charged with studying the role of government and its varying uses of the power of eminent domain and, specifically, the use of condemnation in relation to economic development. The ED and ED Study Committee was further charged with determining how eminent domain is being exercised by development authorities, and to consider and develop legislative remedies that will best protect the citizens of the State of Georgia.

The ED and ED Study Committee was chaired by Senator Jeff Chapman of Glynn County. The following senators served on the ED and ED Study Committee:

- Senator Bill Heath of Haralson County;
- Senator Eric Johnson of Chatham County;
- Senator Kasim Reed of Fulton County;
- Senator David Shafer of Gwinnett County;
- Senator Dan Weber of DeKalb County; and
- Senator Tommie Williams of Toombs County.

## II. EXECUTIVE SUMMARY

Although private property rights have long been an important foundation of this Republic, the *Kelo* decision exposed weaknesses in the protection of private property owners against government condemnation of private property. The weakness turns on the taking of private property when such taking is veiled under the guise of a public purpose when, in fact, the public purpose is derived from the intent to increase the local tax base. Private property ownership should not be undermined to the extent that a government may take property through the power of eminent domain and then convey that property to another private owner for the purpose of economic development. The *Kelo* decision has now clearly opened the door for governments to utilize economic development as a rationale for eminent domain takings provided that such takings adhere to an overall integrated development plan.

The *Kelo* Court simply got it wrong. The good citizens of the State of Connecticut deserved better treatment under the law, and private property owners in the State of Georgia should receive the expected and necessary protection from this elected body.

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<sup>1</sup> *Kelo v. City of New London, CT*, 125 S. Ct. 2655; 545 U. S. \_\_\_\_ (June 23, 2005).

### **III. BACKGROUND**

#### **A. The Fifth Amendment**

"Nor shall private property be taken for public use without just compensation." This last passage of the Fifth Amendment of the United States Constitution is an important protection envisioned by the Founding Fathers against unrestrained government acting and taking by force. The Founding Fathers who drafted the U.S. Constitution during the summer of 1788 in Philadelphia were, for the most part, landholders with a certain mistrust of government power.

The power of eminent domain is an ancient attribute of sovereignty. Simply put, it is the power of the sovereign to acquire private property for public purposes, without the owner's consent. The U.S. Constitution restricts it in two crucial ways:

- (1) The government can only take private property when it is necessary for a "public use"; and
- (2) The owner must be paid "just compensation."<sup>2</sup>

The Fifth Amendment applies only to the federal government, and does not apply to the state governments; however, by Supreme Court interpretation, the due-process clause of the Fourteenth Amendment incorporates the Bill of Rights and thus applies the restrictions of the Fifth Amendment to the states. The "public use" and "just compensation" limitations serve as checks on the power of eminent domain. The power has been increasingly abused over time to the extent permitted under the *Kelo* decision: the taking of private property in order to provide the same property to another private owner, and this is legal because the "just compensation" requirement has been satisfied.<sup>3</sup>

#### **B. Historical Perspective**

The concept of "eminent domain" is hundreds of years old. It derives from Old English common law, under which the King and Lords were allowed to "seize" lands not owned by them when the land was needed by the kingdom for a "legitimate" purpose; affected landowners were powerless to prevent it. This concept was retained by King John under the Magna Carta of 1215, was subsequently brought to the American colonies, and continued to be utilized even after the American Revolution over the last two centuries. The Founders did not create the power of eminent domain in the U.S. Constitution, but sought to limit the sovereign's power to take property against an owner's consent.

The practice of eminent domain has been used, and sometimes abused, throughout U.S. history. When many of the nation's railroads were laid, landowners were often told their properties were

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<sup>2</sup> Jeff Jacoby, October 4, 2004, *Boston Globe*; just compensation is typically determined using the market value of the land, that is, the price for which the landowner could reasonably expect to sell the land to some other buyer.

<sup>3</sup> Jacob Hornberger, April 6, 2005. The Future of Freedom Foundation.

condemned, given a dollar and told to go to court if they wanted their "just compensation." Despite use of such unfair tactics, most eminent-domain condemnations were used for clearly delineated public uses. These uses were either under government ownership and control or as common carriers for public use, such as toll roads and railroads, or for sharing natural resources, such as water in irrigation districts. However, through the years, there have been court cases that have allowed limited deviations from the norm. Modern-day court decisions have often quoted these more unusual cases resulting in increasingly liberal interpretations of "public use," a term that has been broadened to the point of meaning a general public purpose or benefit. This gradual erosion of the term "public use" has predictably led the *Kelo* Court to conclude that eminent domain can be a primary tool in the hands of government for promoting economic development or redevelopment.

In the early 1950s, a landmark case altered the theory of public purpose.<sup>4</sup> It allowed property to be seized from private owners in inner-city Washington, D.C. and sold to new owners for redevelopment. The District of Columbia used eminent domain and condemned the property by arguing that it constituted a public use by eliminating a "blighted" area. The Court held that "public use" encompassed a valid "public purpose" when the District's purpose was to revive a poverty-stricken neighborhood, and that property owners could be forced to yield. The Supreme Court upheld the notion that it is a public good to eliminate blight, but made no determination one way or the other on the appropriateness of handing the property to private developers.<sup>5</sup>

Today, federal, state, and local governments along with quasi-public agencies (such as airport authorities, highway commissions, and community development authorities) and non-governmental organizations such as utility companies are authorized to use eminent domain. In most uses of eminent domain, the general public benefits from public buildings, extra lanes or wider shoulders on the roadways, new schools, a new runway at the world's busiest airport, or an increased supply of utilities to towns and neighborhoods; however, the average citizen might not consider retail centers, office buildings, or casinos to constitute reasonable "public uses," but under the *Kelo* decision, the Supreme Court validated this form of taking. Using jobs and tax revenue as a justification, local governments now have wide latitude to invoke eminent domain and seize private property for public use under the veil of economic development or redevelopment.

### **C. Historical Perspective in Georgia**

Historically, the Georgia Constitution also limited the power of eminent domain to public use. After the Georgia General Assembly passed its first Redevelopment Law in 1946, the Georgia Supreme Court ruled the law unconstitutional.<sup>6</sup> The Redevelopment Law had been passed to clear slum areas using eminent domain, and sell the acquired properties to private entities for private industrial development.<sup>7</sup>

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<sup>4</sup> *Berman v. Parker*, 348 US 26 (1954).

<sup>5</sup> Alexandra Marks, May 9, 2003. *Christian Science Monitor*.

<sup>6</sup> See *Housing Authority of City of Atlanta v. Johnson*, 209 Ga. 560 (1953).

<sup>7</sup> *Ibid.*

The *Johnson* Court, interpreting the public use clause of the 1945 Georgia Constitution, stated: “[p]ublic use means just what it says and means that the power of eminent domain can never be exercised to acquire property to be used by private individuals solely for private use and private gain.” The Court further stated: “[t]he object is to clear away slum or blighted areas and then to have the property redeveloped by private individuals for private purposes in such manner as the city and the Housing Authority determine to be best. The power of eminent domain is to be exercised to accomplish this result. The property is to be sold to people who could have no interest in acquiring the property other than as a means to make money. If the property of one individual can be taken from another for this purpose, where does the power of eminent domain stop? . . . It is argued that the legislation should be sustained for the reason that the public will be benefited. Maybe so, but we can not subscribe to the doctrine that the power of eminent domain may be resorted to and a person deprived of his property every time there may be some public benefit resulting. To so hold would be to cut the very foundation from under the sacred right to own property. One of the benefits which it is urged will result is that it would help to meet and solve the public problem of juvenile delinquency. We think juvenile delinquency exists on both sides of the railroad tracks and, if this should be sufficient reason for the use of the power of eminent domain, some of the most exclusive residential sections of our cities could be razed to make room for industrial development.”<sup>8</sup>

As a result of the Court’s ruling that Georgia’s redevelopment law was unconstitutional, the Legislature passed a constitutional amendment in 1953 to authorize the use of eminent domain for redevelopment. The amendment stated in part: “The General Assembly may provide by law that any city or town, or any housing authority... may undertake and carry out slum clearance and redevelopment work, including the acquisition and clearance of areas which are predominantly slum or blighted areas, ... and the sale or other disposition of such areas to private enterprise for private uses or to public bodies for public uses. Any such work shall constitute a governmental function undertaken for public purposes, and the powers of taxation and eminent domain may be exercised and public funds expended in furtherance thereof.” The amendment was approved by the voters of Georgia in 1954. Following that approval, the Legislature adopted the Urban Redevelopment Law of 1955, granting the power of eminent domain for redevelopment purposes.<sup>9</sup>

The Urban Redevelopment Law of 1955 was first challenged a few years after its passage.<sup>10</sup> With great reluctance, the Court upheld the new law based upon the newly passed Georgia constitutional amendment. The Court stated: “[h]istory teaches us that one of the first steps necessary to be taken in the establishment of a totalitarian form of government is to abolish the right of private ownership of property. One of the most sacred and cherished gifts of the citizens of this State, handed down to us by our forefathers, and until recently protected by the Constitution and held inviolate by the courts of our State, was the right of private ownership of

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<sup>8</sup> *Ibid.*

<sup>9</sup> *Bailey v. Housing Authority of City of Bainbridge*, 214 Ga. 790 (1959).

<sup>10</sup> *Ibid.*

property, subject to be taken by the State or its authority for public purposes only upon just and adequate compensation being first paid.”<sup>11</sup>

In another case, *Allen, et. al. v. City Council of Augusta*, the Court lamented: “[b]y an amendment to the Constitution, art. 16 (Ga. L. 1953, Nov.-Dec. Sess., p. 538), which was ratified by a vote of the people, the historic constitutional protection of private property, except for public purposes, was voluntarily surrendered by the people themselves.<sup>12</sup> The Constitution, as thus amended allows the General Assembly to provide by law that any city or town or housing authority ‘may undertake and carry out slum clearance and redevelopment work . . .’” The Court then warned: “[n]either ‘slum’ nor ‘redevelopment’ is defined in the Constitution. Together they may encompass areas as wide as the individual notions and tastes of city councilmen. This amendment expressly authorizes taking property from private owners by the power of eminent domain and then selling it to other private parties for private use. In keeping with the sweeping powers conferred by constitutional amendment, the legislature enacted a law which is likewise almost limitless in scope... [It] defines ‘slum area’ so broadly that it can apply to almost any area. It provides that either ‘open spaces’ or ‘high density of population’ may constitute a ‘slum area.’ It requires that not all buildings in the area come within some one of the conditions prescribed, but that a ‘predominance’ of the buildings do so. Thus some buildings less than the predominance can not escape no matter how perfect they may be or how important they are.” The Court concluded, ‘However, much as individuals we may deplore the surrender by the people of their rights, as Justices of this court we unhesitatingly follow, and apply the law as the people have written it.’<sup>13</sup>

The applicability of the 1953 constitutional amendment has since continued in all subsequent versions of the Georgia Constitution. Currently, it states in part, “[t]he General Assembly may authorize any county, municipality or housing authority to undertake and carry out community redevelopment, which may include the sale or disposition of property acquired by eminent domain to private enterprise for private uses. ...”<sup>14</sup>

#### **D. *Kelo v. City of New London, Connecticut***

Officials in New London, Connecticut, announced plans to raze fifteen homes and businesses for a riverfront hotel, health club, offices including Pfizer Headquarters, and the Coast Guard Museum. The New London Development Corporation initiated the condemnation proceedings, and the affected homeowners and business owners filed suit to prevent the taking. New London (City) officials claimed that the redevelopment was for the public purpose of boosting economic development that outweighed the homeowners' property rights, even though the area was not blighted.

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Allen, et. al. v. City Council of Augusta, et. al.*, 215 Ga. 778 (1960).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Georgia Constitution*, Art. IX, § II, Par. VII, 1983, 2001.

The *Kelo* Court held that City officials had carefully formulated an economic development plan that will provide appreciable benefits to the community, including, but not limited to, new jobs and increased revenue for the City which would be enjoyed by the City as a whole. The City had adequately determined the area in question to be “sufficiently distressed” to justify an economic rejuvenation program, including condemnation and razing of existing homes. The City pursued the economic development plan under Connecticut law, and the City detailed a comprehensive development plan to complement a land use plan that would benefit the City “as a whole greater than the sum of its parts.”

Therefore, the Supreme Court held that the City’s use of eminent domain by taking private residential property for the purpose of implementing its economic development plan unquestionably served a “public purpose.” The Supreme Court went so far as to say that the homeowners’ and business owners’ challenge that economic development does not satisfy a valid public purpose “defies precedent and logic.” This statement built upon the selected cases the *Kelo* majority chose as precedent.

The Court supported this logic by using as its primary precedents, *Berman v. Parker*<sup>15</sup> and *Hawaii Housing Authority v. Midkiff*.<sup>16</sup> Yet the context of these cases was ignored. In both cases, the Court was allowing remedy for affirmative harm that the Court believed to exist. In the case of *Berman*, it was for slum clearance and in the case of *Midkiff*, it was for a monopoly of land ownership. As Justice Sandra Day O’Connor explained in her *Kelo* dissent:

...in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm. ... In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public -- such as increased tax revenue, more jobs, maybe even aesthetic pleasure.<sup>17</sup>

Justice O’Connor then made the point that the language in *Berman* and the language she wrote in the *Midkiff* decision mistakenly equated the police powers of regulation with the public use doctrine. Justice Clarence Thomas set forth the problem in even clearer terms. He stated:

More fundamentally, *Berman* and *Midkiff* erred by equating the eminent domain power with the police power of States . . . Traditional uses of that regulatory power, such as the power to abate a nuisance, required no compensation whatsoever, see *Mugler v. Kansas*, 123 U.S. 623, 668-669 (1887), in sharp contrast to the takings power, which has always required compensation . . . The

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<sup>15</sup> See *Berman v. Parker*, 348 U.S. 26.

<sup>16</sup> See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229.

question whether the State can take property using the power of eminent domain is therefore distinct from the question whether it can regulate property pursuant to the police power . . . In *Berman*, for example, if the slums at issue were truly “blighted,” then state nuisance Law... not the power of eminent domain, would provide the appropriate remedy. To construe the Public Use Clause to overlap with the States’ police power conflates these two categories.<sup>18</sup>

Justice Thomas pointed out the historical context of the Public Use clause and its purpose. Calling upon the *Kent Commentaries on American Law* of 1827 and on William Blackstone’s legal writings relied upon by the Founders during the Founding Era, Justice Thomas stated the following:

The Public Use Clause, like the Just Compensation Clause, is therefore an express limit on the government’s power of eminent domain.... The term “public use,” then, means that either the government or its citizens as a whole must actually “employ” the taken property.... Tellingly, the phrase “public use” contrasts with the very different phrase “general Welfare” used elsewhere in the Constitution. ... The Constitution’s text, in short, suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking. The Constitution’s common-law background reinforces this understanding. The common law provided an express method of eliminating uses of land that adversely impacted the public welfare; nuisance law. Blackstone and Kent, for instance, both carefully distinguished the law of nuisance from the power of eminent domain.... Blackstone rejected the idea that private property could be taken solely for purposes of any public benefit. “So great ...is the regard of the law for private property,” he explained, “that it will not authorize the least violation of it; no, not even for the general good of the whole community.” ... The Public Use Clause, in short, embodied the Framers’ understanding that property is a natural, fundamental right, prohibiting the government from “tak[ing] property from A. and giv[ing] it to B.”

But beyond ignoring the context of history and the context of its own precedent cases, the *Kelo* majority decision also expanded the reasoning of the language it borrowed from the majority opinions. For example, *Kelo* quoted *Midkiff*, “The Court long ago rejected any literal requirement that condemned property be put into use for the general public.”<sup>19</sup> Void of context, the *Kelo* decision used this quote to justify an economic purpose of a private nature. The background for this *Midkiff* statement was *Rindge Co. v. Los Angeles*, 262 U.S., at 707 and *Block v. Hirsh*, 256 U.S., at 155.<sup>20</sup> The following context of these two cases highlights the gross misapplication of how the *Midkiff* language was used in the *Kelo* reasoning of the majority.

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244 (1984).

For justification of the aforementioned statement, “The Court long ago rejected any literal requirement that condemned property be put into use for the general public,” *Midkiff* had pulled from the *Rindge* case the following quote: “It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.” But, the context of *Rindge* reveals that the California Legislature took property along the coast to build a road. Since the road was along the rugged coastline, it admittedly was not going to be used by the vast public, but it was open to the public at all times.<sup>21</sup>

The borrowed language from *Block v. Hirsh* asserted: “[What] in its immediate aspect [is] only a private transaction may . . . be raised by its class or character to a public affair.” In this case, the context was World War I. Congress had passed a law, limited to two years, to help ensure the availability of rentals in the District of Columbia. Landlords were not deprived of their real property. They just could not enforce contracts terminating renters during that time period.<sup>22</sup>

Even the older cases cited in *Kelo* built the economic takings logic on falsely expanded case law from cases such as *Fallbrook Irrigation Dist. v. Bradley* decided in 1896,<sup>23</sup> and *Strickley v. Highland Boy Gold Mining Co.*, decided in 1906.<sup>24</sup>

In *Fallbrook*, the majority opinion conceded the levy of tax assessments on landowners to fund irrigation districts in arid southern California.<sup>25</sup> In *Strickley*, the Court ruled that an easement for an aerial tram over the plaintiff’s property was necessary in order for the defendant to economically transport mineral ore from his own property to market.<sup>26</sup> In neither case did the Supreme Court strip owners of the use or ownership of their real property for the economic benefit of others. Citing such cases while ignoring their context was a shaky foundation for the Court to build its “economic takings” logic.

Justice Thomas, in his dissent, rightly called upon the Court to “revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property.” He stated: “It is far easier to analyze whether the government owns or the public has a legal right to use the taken property than to ask whether the taking has a ‘purely private purpose’ –unless the Court means to eliminate public use scrutiny of takings entirely.”<sup>27</sup>

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<sup>21</sup> *Rindge v. Los Angeles*, 262 U.S. 700 (1923), 707.

<sup>22</sup> *Block v. Hirsch*, 256 U.S. 135 (1921), 155.

<sup>23</sup> *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896).

<sup>24</sup> *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906).

<sup>25</sup> See *Fallbrook Irrigation Dist. v. Bradley*.

<sup>26</sup> See *Strickley v. Highland Boy Gold Mining Co.*

<sup>27</sup> *Kelo v. City of New London*.

Justice Sandra Day O’Conner stated in the minority dissent:

“Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result ‘[T]hat alone is *just* government,’ wrote James Madison, “which *impartially* secures to every man, whatever is his *own*.”<sup>28</sup> (emphasis added)

This ruling essentially validates that the taking of private property is legal if the purpose is to pursue economic development by increasing the tax revenue or expanding the tax digest; however, the Court did not allow the simple transfer of private property from one owner to another private owner. The difference turns on the whether such takings are part of an overall integrated development plan and if such takings are sanctioned in state law. The *Kelo* Court noted its “longstanding policy of deference to legislative judgments” as to what constitutes a public use and underscored the fact that the states have every right to create laws that restrict the use of eminent domain to a tighter standard than that allowed by the Court.<sup>29</sup>

#### **IV. HEARINGS AND RECOMMENDATIONS**

##### **A. SAVANNAH, GEORGIA**

The ED and ED Study Committee convened on September 27, 2005, at the Coastal Georgia Center in Savannah, Georgia. The ED and ED Study Committee heard testimony regarding the following:

##### **1. City of Savannah, Georgia**

Ms. Edna Jackson, Mayor Pro Tempore for the City of Savannah, provided testimony regarding the use of eminent domain in Savannah. Ms. Jackson noted that the City of Savannah uses eminent domain judiciously and only for public use and public purposes. Ms. Jackson further noted that acquiring property for public use is the most traditional form of eminent domain, and that property taken is owned, improved, and maintained by the local government for use by all citizens.

The City of Savannah does acquire property under the Georgia Urban Redevelopment Act as means of last resort.<sup>30</sup> Properties acquired are sold through the Requests for Proposals process to

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<sup>28</sup> *Kelo v. City of New London*.

<sup>29</sup> “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....”

<sup>30</sup> OCGA § 36-61-1, et.seq.

individuals or non-profits who agree to develop the property in accordance with a locally adopted Urban Redevelopment and Land Use Plan. The City of Savannah has used this for creating affordable housing or neighborhood-benefiting businesses where vacant lots or dilapidated structures used to exist. Ms. Jackson stressed that this is different from the *Kelo* decision in that in New London, Connecticut, the homes and businesses being taken are well-maintained and inhabited. According to Ms. Jackson, benefits from “public purpose” acquisitions include:

- Protection of property values among neighboring properties;
- Clearing title of properties;
- Ridding neighborhoods of vacant lots and structures;
- Reducing blight and crime;
- Facilitating public and private investment in revitalization; and
- Encouraging home ownership.

The City of Savannah has utilized the Urban Redevelopment Act to revitalize the Cuyler-Brownsville neighborhood, and no occupied homes were taken under eminent domain. Ms. Jackson concluded that restricting “public purpose” following the *Kelo* decision could severely damage a city’s ability to revitalize depressed neighborhoods, provide affordable housing, and encourage private investment.

The Honorable Otis S. Johnson, Mayor of the City of Savannah, provided correspondence noting the city has made “just and prudent” use of eminent domain to revitalize distressed neighborhoods, and urges careful consideration of any changes which restrict a local government’s “critical tool which is so essential to [the] community’s quality of life.”

## **2. Chatham County, Georgia**

Mr. Pete Liakakis, Chairman of the Chatham County Board of Commissioners, testified that no county would be in favor of condemning private property for another private purpose, but counties do need the power of eminent domain to eliminate blight and encourage investment. Mr. Liakakis stressed that Chatham County has not exercised eminent domain for the purpose of increasing the tax base, and that redevelopment plans and subsequent condemnation should only be authorized by elected officials. He summed up his remarks by stating: “Our citizens are really concerned about the *Kelo* case, and it is incumbent upon government to protect private property rights.”

## **3. Current Eminent Domain Law in Georgia**

Mr. Charles Ruffin, attorney with Gambrell & Stolz, and Mr. Joey Strength, attorney with Gilbert, Harrell, Sumerford, & Martin, provided testimony regarding the history of eminent domain law and its current status in Georgia (reviewed above, see Historical Perspective in Georgia). Mr. Strength and Mr. Ruffin testified that the Georgia Constitution authorizes the “power to sell or otherwise dispose of property acquired by eminent domain to private enterprise

for private uses,” as authorized by the voters of Georgia.<sup>31</sup> Further, the Georgia Constitution provides that the development of trade, commerce, industry, and employment opportunities is a “public purpose vital to the welfare of the people of this state” and authorizes development authorities to further that purpose. Counties and cities have been authorized to condemn property for private use via four general laws:

1. The Redevelopment Law (O.C.G.A. § 8-4-1, et. seq.);
2. The Urban Redevelopment Law (O.C.G.A. § 36-61-1, et. seq);
3. The Redevelopment Powers Law (O.C.G.A. § 36-44-1, et. seq.); and
4. The Downtown Development Authority Law (O.C.G.A. § 36-42-1, et seq.).

The witnesses further stressed that the use of any power of eminent domain must be used only for public purpose and benefit. Although the Development Authorities Law provided such authorities with broad powers, the General Assembly did not give the authorities the power of eminent domain.<sup>32</sup> However, Mr. Ruffin warned that any lawyer can make an argument for this under certain circumstances. He stressed that a *Kelo*-like situation could occur in Georgia due to the broad powers afforded through redevelopment laws. At a minimum, the recommendations provided were:

- Eminent domain shall not be used for economic development;
- Private owners should have early notice of planning activity which might affect their property;
- Owners shall be provided with a meaningful opportunity to be heard from at the earliest moment;
- Judicial review, without presumption of correctness, should be available in advance of any property acquisition for the project, whether voluntary or by eminent domain (not just at the end of the process when an eminent domain resolution is passed and suit is filed);
- There should be a time limit within which a public authority may condemn property after the announcement of any project (perhaps two years);
- If property is taken for economic development, the jury should be allowed to consider and include the value contribution of the property to the project. The jury should be allowed to consider replacement costs, the loss of business, and attorney’s fees and costs;
- The definition of blight should not be so broad that potentially any property is in its purview;
- The issue of reasonable necessity as a justification for the taking for economic development should not be based on “public desire,” and to overcome a contention of reasonable necessity an owner might demonstrate alternate ways for the public authority to achieve the same or better economic advance, elsewhere or by some other method;
- Jury trials on state and federal eminent domain cases; and

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<sup>31</sup> 1983 Ga. Const. Art IX, § II, Par. VII.

<sup>32</sup> See O.C.G.A § 36-62-6(5).

- Compensation for loss of business for which there is no reasonable mitigation; and reimbursement of the owner's attorney's fees and costs to be on an equal footing with the public authority.

#### **4. Community Rights Counsel**

Mr. Tim Dowling, Executive Counsel for the Community Rights Counsel, provided testimony regarding the role of revitalizing economically distressed communities through eminent domain. Mr. Dowling advocated that eminent domain is essential to revitalizing economically declining communities and placing paychecks in the hands of the unemployed. He suggested that the *Kelo* decision did not break new ground, but only provided a straightforward application of longstanding precedent. Mr. Dowling submitted the premise that the *Kelo* decision is actually more restrictive than prior binding judicial precedents. He also suggested that the decision contains new protections for landowners not found in previous rulings, but offered no examples. Mr. Dowling further noted that municipalities respect property rights and support measures to ensure that landowners are treated fairly. Reasonable proposals to enhance fairness should be at the center of the post-*Kelo* debate rather than blanket prohibitions that will instead condemn neighborhoods and communities to despair and economic decay. Mr. Dowling further noted that the majority in the *Kelo* decision stressed that the City of New London was, and currently remains, in economic distress when city officials adopted the economic development plan. Finally, local governments should revisit their blight definitions to ensure that they are not unreasonably broad.

#### **5. Institute for Justice**

Ms. Dana Berliner, Senior Attorney for the Institute for Justice, testified regarding the effects of *Kelo* at the federal and state level, noting that the Institute for Justice argued on behalf of the Appellant, Ms. Susette Kelo, before the Supreme Court. Ms. Berliner reminded the ED and ED Study Committee that Ms. Kelo lives along the Thames River in New London, Connecticut, where it meets the Long Island Sound, and that all 15 homes being condemned by the City have the advantage of great views along the river. Ms. Berliner noted that this area of the City is not distressed, but, in fact, it is beautiful for its scenic view of this river. Ms. Berliner stated that the City did not need the property along the Thames River, but rather recognized the property for its potential development and thus, increased tax potential.

Ms. Berliner disagreed with the Mr. Dowling's claim that *Kelo* did not break new ground. She submitted that such a view was wrong on two levels: "*Kelo* did change the law, and to the extent that governments were already taking homes and businesses for private commercial development, that's cause for greater concern, not less." She summed up that the most obvious difference is that before *Kelo*, the courts upheld the taking of property in "deeply troubled, almost uninhabitable areas" for transfer to private developers. Now the fact is that "government can take any property and transfer it to private developers." She also disagreed that *Kelo* offered more protections for landowners. "Really, the only restraint imposed is there has to be a plan. And, there is always a plan that removes what is there now and puts something else there."

Additionally, Ms. Berliner stated that in post-*Kelo* Georgia, strengthening the current process for

condemnations is not a solution. She noted that public hearings under the current process are moot if a deal with a developer or other interested group has already been made by the local government. She did agree that there could be some common ground where eminent domain is deemed to be useful: obviously for direct public uses; and depending upon what may or may not be in Georgia Code, other common ground could be the quieting title; abandoned properties; and perhaps dilapidated properties; however, Ms. Berliner stressed that these exceptions should not overshadow instances where eminent domain is used for economic development purposes where ownership is transferred to private interest. She stated there are better methods available for cities and counties to use to encourage economic development or renewal rather than using eminent domain. She suggested options such as Tax Allocation Districts, Main Street Programs, Tax Incentives, Economic Development Districts (Enterprise Zones), homesteading, and streamline permitting. She stressed that Georgia law, in its current form, would allow situations like *Kelo* to occur. She suggested a constitutional amendment would be the final direction to aim for in order to prevent the use of eminent domain for private commercial development.

The four primary recommendations provided by Ms. Berliner were:

- Remove statutory authorizations for eminent domain for private commercial development;
- Explicitly forbid eminent domain for private commercial development and/or require that condemned property be owned and used by government or a common carrier;
- Prohibit “ownership or control” by private interests. In many cases, a government entity will technically own the property but lease it for \$1 per year to a private party; and
- Ensure that the statute or constitutional amendment applies to all entities that engage in eminent domain, using a term like “all political subdivisions.”

There were also recommendations to avoid certain pitfalls such as language that says “solely” or “primarily” for economic development, or creating special project exemptions, or leaving the loophole that allows special lease arrangements, or failing to provide a precise definition of economic development.

## **6. Private Businesses Affected by Eminent Domain**

Mr. Mark Meeks, owner of Stockbridge Florist and Gifts, testified that his business is in an area currently being condemned as a blighted area under the power of eminent domain. The business is located in downtown Stockbridge in Henry County where it has operated profitably for over 22 years. The City of Stockbridge is seeking to rejuvenate its downtown area along the railroad tracks and has already condemned many properties to achieve that objective.

Mr. Meeks claims that the City of Stockbridge is more interested in increasing its tax base through redevelopment than protecting private property owners. Mr. Meeks noted that there are times when government needs to condemn property for specific public uses, but economic development that provides for private profits with only secondary benefits to the public is a perversion of the intent of the Framers and of the Constitution they drafted.

Mr. Meeks stated that the City of Stockbridge acted in bad faith in negotiating with him by repudiating an agreement to exchange properties so that he could continue to operate in the New City Center Development.<sup>33</sup> Mr. Meeks claims the United Retail Development offered a sum for the property to construct a pharmacy, yet the City of Stockbridge immediately rezoned his property without notice as part of an overlay zoning, which is a legally questionable tactic. Mr. Meeks asserts that the City's action made the United Retail Development plan essentially illegal due to the newly zoned space restrictions. The buyer then had to walk away from the sale. Once publicity began to focus on the City of Stockbridge after the *Kelo* case, the City again redrafted its original plan by drawing the new City Courthouse on the location of Stockbridge Florist and Gifts. The condemnation is currently the basis for litigation.

## 7. Public Comment

Mr. Richard Hubert, an Atlanta attorney who represents private property owners, spoke against the "aggregate assertion of power between the development community and the considerable authority and power of government." He denounced Georgia's liberal condemnation laws and the inadequate compensation to property owners. He asked for changes in the law as well as in the boards and commissions, such as the Public Service Commission, that oversee condemnation.

Ms. Laura Devendorf, a Liberty County landowner, reported her concern for rural lands such as agricultural and forest lands. Further, she spoke about inappropriate designs government planners had for her family's property. In February 2005, her daughter, Meredith, attended a Board meeting of the Georgia Department of Economic Development being hosted by The Liberty County Development Authority. She was invited to join their helicopter tour of Liberty County's Mega Industrial Park. Leading the tour was Mr. Dick Knowlton, the Liberty County Authority's development consultant. Meredith sat behind Mr. Knowlton who had no idea who she was. After they flew over the industrial site, they then flew over the Devendorf's property and nearby heritage reserve. As they did, Mr. Knowlton stated, "all this (land), between the road and the river, is available for development." Next, they flew over 5,000 additional acres of Devendorf property surrounding their home. As they flew over the house, Knowlton stated, "This is some of the most pristine, beautiful land I have ever seen, and it is my distinct honor and privilege to be the one to develop it." All this was said in spite of the fact that the Devendorfs, who are nationally recognized conservationists, have no intention of selling these tracts nor have they ever entered into any type of conversation about selling the land to Mr. Knowlton, the Liberty County Development Authority, or the State. It is Ms. Devendorf's contention that there is inappropriate collusion between the government authorities and business developers. She is calling on the legislature to stop all use of eminent domain powers for economic purposes.

Ms. Pam Oglesby, a West Savannah resident of what she described as an industrial area, spoke on her concern about blighted neighborhoods. She thought a blighted community could be described as one where conditions are such that it causes people to want to move out of an area, and where no one wants to move into it or even visit it because they are afraid to do so. She called on the legislature to ensure there were solutions to deal with areas that have abandoned,

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<sup>33</sup> The New City Center Development will contain condominiums, retail and commercial offices, single family homes, a new City Hall and Administration Building, a parking deck, and greenspace.

boarded up houses so that the rest of a community would not be subject to an unsuitable living environment. She called for a balance between dealing with conditions of blight and preventing eminent domain abuse in situations like the Meeks' property. She suggested that eminent domain may be needed to help clear title for some properties when the proper heirs were not easily apparent.

Ms. Olivia Swanson spoke as a resident of the Cuyler-Brownsville neighborhood, which is a revitalized community that has resulted from the partnered efforts of the City of Savannah with residents in an Urban Redevelopment Land Use Plan. Many of the properties were acquired by eminent domain, mainly to clear title. All use of eminent domain purchases were for vacant lots or structures. She stated that before the redevelopment, it was an eerie neighborhood, with blocks of what appeared to be bombed out structures that attracted vagrants and drug addicts. Even though the taxes were paid from a distant property owner, there often were no clear titles to the property. She thought eminent domain used in these circumstances was a blessing. She said the area was beautiful now and well-maintained by people who took pride in their homes.

Ms. Debra Swindall of Brunswick, Georgia said the issue of eminent domain was not as complicated as it was made out to be. It simply came down to respecting a property owner's right to own property as long as the taxes were paid and there was nothing unsafe about its use. She suggested that eminent domain was necessary only in cases for government buildings or for infrastructure. All other problems, such as blight, could be remedied by ordinances, assessments, and other regulatory tools by cities and counties.

## **B. STOCKBRIDGE, GEORGIA**

The ED and ED Study Committee convened on October 14, 2005, in Stockbridge, Georgia. The ED and ED Study Committee heard testimony regarding the following:

### **1. City of Stockbridge, Georgia**

Mr. Ted Strickland, City Manager for the City of Stockbridge, welcomed the ED and ED Study Committee, but took issue with the outside involvement regarding the eminent domain use by the City of Stockbridge in its redevelopment plan. Mr. Strickland stated that the city began its planning in 1999. The city received grants for studies and used considerable monies from the city to develop its plan. The city has also been involved with the Atlanta Regional Commission. Already, the revitalization effort in one section of town has resulted in flourishing new businesses. But, he lamented the fact that there were still 40 empty stores from the east of the city to the western end. He explained that most of the owners were glad to sell their properties since they had tried to sell for years and could not find buyers. Only four owners did not want to sell and protested the use of eminent domain. He asked the following questions rhetorically. Should one property owner prevent 20 owners from selling their properties? Should one property owner prevent the redevelopment of the downtown area that would benefit thousands of the city's residents? Should one property owner prevent the building of the new Stockbridge City Hall, parks, recreation, or parking lots? Without the power of eminent domain, Mr. Strickland said, the city could not work for the majority of its citizens. "We've not exercised any powers not available to us that are not in the Constitution and in Georgia law," he stated.

## **2. Henry County, Georgia**

Mrs. B. J. Mathis, member of the Henry County Board of Commissioners, stated that the current Stockbridge condemnations for its redevelopment plan had created a divisive atmosphere in Henry County, separating the people from their government. She reminded the ED and ED Study Committee that the Georgia Constitution says that protection of persons and property is the paramount duty of government and shall be impartial and complete. She admitted that Henry County has a long reputation of being a place where certain special interest groups or the “good ole boy” system has ruled the political arena. Mrs. Mathis said that the entire area is suffering the consequences of a very unwise and inappropriate action. She stated, “Eminent domain should not be used by government for economic gain.” She told the Committee that no member of the Henry County Board of Commissioners supported the action of the City of Stockbridge.

## **3. Association County Commissioners of Georgia**

Mr. Matt Hicks, Associate Legislative Director for the Association County Commissioners of Georgia (ACCG), testified that ACCG formed a study committee following the *Kelo* decision to look at eminent domain use by counties and to examine the Georgia laws that govern such powers. Mr. Hicks stated that the committee included elected commissioners and county economic development, planning, and public works officials. Some of the counties represented included Dade, Oconee, Cobb, Columbus-Muscogee, and Polk.

Upon completion of the review, the committee made specific findings for key reforms to Georgia laws, specifically:

- County commissioners do not support the use of eminent domain for increasing the tax base of a local government or for economic development purposes alone; and
- County commissioners do believe condemnation may serve a legitimate role for redevelopment purposes and in eliminating threats to the health, welfare and safety of a community – although it should be a tool of last resort.

Mr. Hicks stated that there are four laws authorizing eminent domain in Georgia. The first distinction is that the four laws require and intend for the property to be blighted before eminent domain can be used. Mr. Hicks contrasted the Georgia laws to the Connecticut properties in the *Kelo* case in that those properties were not alleged to be blighted or distressed in any way.

Mr. Hicks continued that the second distinction is that, under Georgia law, the property owner is given the opportunity to rehabilitate his land rather than have it taken by the government. Under three of the four current laws, the property owner has 30 days to notify the local government of his intent to rehabilitate the land in accordance with the redevelopment plan. The law gives him the power to enter into an agreement with the government that will prevent him from losing ownership of his property.

The recommendations proposed by ACCG were:

1. Prohibit the use of eminent domain solely for increasing tax revenues. ACCG recommends barring the use of eminent domain solely or primarily for the purpose of increasing property values and the tax revenues of local government. ACCG identified a specific reference in current law that makes this possible today: O.C.G.A. § 36-44-3(5)(J) explicitly authorizes condemnation for “improving or increasing the value of property.” ACCG recommends repealing this Code section;
2. Establish an objective definition of blight. ACCG recommends that the General Assembly restrict the use of eminent domain for redevelopment purposes to properties that are clearly blighted, a hazard to the community, and are in an area that suffers from pervasive poverty, high unemployment, or general distress that impacts the health, safety, and welfare of a community. The blight should be evidenced by quantitative data;
3. Mandate that only elected bodies can approve the use of eminent domain for redevelopment. ACCG recommends requiring any condemnation proposed by a development authority, downtown development authority, housing authority, or any other non-elected body be approved by the elected governing authority of the county or city within which that property is located;
4. Provide property owners additional notice and meaningful opportunity to be heard. ACCG encourages the General Assembly to establish procedures to give parties affected by condemnation proposals adequate notice, an opportunity to be heard, and sufficient time to respond to such proposals;
5. Establish uniform criteria and procedures for all bodies with condemnation powers. A number of local governments and authorities have been granted redevelopment condemnation powers by local acts or local constitutional amendments. ACCG recommends the same definitions, restrictions, limitations, procedures, and other preconditions apply to the exercise of eminent domain by these bodies as applies to the use of eminent domain by bodies granted the power under general law;
6. Require any condemnation be part of a redevelopment plan. Any proposed condemnation for redevelopment should be consistent with a comprehensive development plan, as required under the Georgia Planning Act, and adopted by an elected county or city governing authority;
7. Continue to allow use of eminent domain for title clearing purposes as part of a redevelopment plan. Counties confirm this is a legitimate and important need.
8. Leave eminent domain at the local level. Local elected officials are best positioned to act in the community’s interest when considering the proposed use of eminent domain and

are most accountable to affected citizens and voters. ACCG would oppose the creation of any independent state level condemnation review panel.

Mr. Hicks noted that while property must be blighted before it can be condemned under Georgia's current redevelopment laws, the definition of blight varies under each Code section. Additionally, Mr. Hicks emphasized that eminent domain is and should be preserved as a law enforcement tool of last resort that allows the leaders of a community to address the issue of crime or persistent poverty or another threat to the health, welfare, and safety of a community when all other existing policies designed to eliminate that threat have failed.

#### **4. Georgia Municipal Association**

Mr. Lamar Norton, Director of Government Relations for the Georgia Municipal Association and Mr. Cam Jordan, the Community Development Director of the City of Fitzgerald, provided testimony regarding the role of eminent domain and its uses to combat blight, create safer communities, and improve quality of life. Mr. Norton stated that prudent use of eminent domain by Georgia cities has resulted in the:

- Elimination of blight;
- Creation of safer, better neighborhoods;
- Improved quality of life; and
- Protection of private property.

Mr. Norton noted that eminent domain is an essential tool used in protecting the health, safety, welfare—and property rights—of the public. Further, without the ability to use eminent domain, cities would not have been able to accomplish important projects, all of which have community-wide support and have proven to be beneficial for residents. Some of the cities benefiting from eminent domain are: Fitzgerald, Thomson, Columbus-Muscogee, and Smyrna. The loss of eminent domain as a tool would have prevented positive projects in these cities.

Mr. Norton stressed that the Georgia Municipal Association (GMA) supports the responsible use of eminent domain provided that restrictions are placed on the taking of non-blighted properties, and that all government entities authorized to use the power of eminent domain should be subject to the same requirements for exercising such power.

GMA supports limited constitutional or statutory enactments that would prevent property from being condemned solely or primarily to benefit another private party while allowing condemnation for legitimate redevelopment and health, safety, and welfare purposes, including state and federally mandated environmental cleanup. GMA seeks legislative language that is supportive of redeveloping declining communities and contends that the marketplace alone cannot adequately deal with redevelopment. GMA supports condemnation of non-blighted properties as long as those owners are fairly compensated and able to relocate. GMA suggests that laws impacting the ability to use eminent domain must extend to all entities, including local and state governments and utilities, and that avoiding interference with local land use and zoning laws will help prevent the need for condemnation.

Mr. Cam Jordan presented the ED and ED Study Committee with the successful efforts of the City of Fitzgerald to revitalize deteriorated neighborhoods. He pointed out a historic church that had fallen into disrepair that was actually saved and restored due to the power of eminent domain. He stated that the City never targets inhabited structures for any use of eminent domain. “That is all done by code enforcement,” he stated. He told the Committee that affordable housing stands in areas that used to be blighted, and that these efforts were not for economic development but for housing improvements. Another benefit of using eminent domain for blighted areas was to protect property values for owners who are surrounded by deteriorating properties, according to Mr. Jordan.

## **5. Georgia Public Policy Foundation**

Mr. Kelly McCutchen, Executive Vice President for the Georgia Public Policy Foundation (GPPF), testified that the GPPF is committed to ensuring that government’s constitutional ability to take private property for public use is never abused. Mr. McCutchen stated that, “We were shocked by the Court’s ruling, which in our judgment, eviscerates the Constitution’s 5<sup>th</sup> Amendment protections against unreasonable taking of private property.” Mr. McCutchen referred to Justice Thomas’ dissent, in which the Justice noted that citizens may be safe, but that their homes are not.<sup>34</sup>

Further, Mr. McCutchen stated that the Constitution clearly allows for the use of eminent domain for valid public purposes such as roads, bridges and schools, but even in these cases, this power can be abused. Additionally, only elected officials who are directly answerable to the people should be given the authority to exercise this power.

The key issue is the constitutional requirement of “public use” and whether economic development, particularly when it results in giving the condemned land to a private party, constitutes a “public use.” He noted that Justice Thomas warned that “extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities.”

Mr. McCutchen stated that this nation is a republic, where “elected officials pass laws by majority vote. However, the Founding Fathers incorporated the Bill of Rights into the Constitution to safeguard certain individual rights from the tyranny of majority rule. In other words, these individual rights are so precious and fundamental that they deserve special protection, particularly for those who lack wealth or public influence. Just like most laws, economic development programs are typically well intentioned efforts by leaders trying to improve their local community, and are usually quite popular. But good intentions and popularity should not be sufficient for sacrificing a person’s home or business for the benefit of another private party.” Finally, Mr. McCutchen stated that “[the] Constitution established a covenant with property owners that their property rights will be protected from unfair takings.”

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<sup>34</sup> “Something has gone seriously awry with this Court’s interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not.”

## 6. Georgia Power

Mr. Steve Ruth, attorney for the Georgia Power Company, testified that Justice John Paul Stevens, writing the majority opinion in the *Kelo* decision, noted that the states would not be precluded from placing further restrictions on eminent domain.<sup>35</sup> Mr. Ruth complimented the efforts of the sponsors of Senate Bill 86 for anticipating the firestorm that could erupt over the taking of private property for economic development. The appropriate use of eminent domain has always had a place in Georgia law, and Senate Bill 86 seeks to balance property rights and legitimate public purpose takings.

Mr. Ruth noted that Georgia Power maintains the power of eminent domain as granted by the General Assembly, and that Georgia Power negotiates with 98 percent of all property owners when transmission line easements and substation sites must be obtained. Georgia Power has an obligation to provide reliable electric service to Georgia citizens, and this is executed through demonstration of respect for private property. Georgia Power must file Integrated Resource Plans with the Georgia Public Service Commission every three years, and this is done to effectuate long-term Transmission Planning and Right-of-Way acquisitions. Long term planning is formulated by locating the need for transmission lines and other needs while causing the least amount of inconvenience for the general public. Georgia Power seeks to find the most reasonable and practical corridor for transmission lines and easements. Mr. Ruth stressed that the company engages in good faith negotiations, and provides interested property owners with as much information as required. Only after negotiations prove unsuccessful, Georgia Power will exercise the condemnation process, and the matter is then heard by a Special Master. Georgia Power rarely has to resort to eminent domain to achieve effectuation of its Integrated Resource Plan. Georgia Power recognizes that availability of electricity is a key component to any form of economic development, but economic development does not drive Georgia Power's service. Mr. Ruth reminded the ED and ED Study Committee that Georgia Power is a private corporation providing a public utility, and has used its right of eminent domain judiciously.

## 7. MARTA

Mr. Charles Pursley, Jr., attorney with Pursley Lowery Meeks, LLP, MARTA general counsel since 1974, and author of *Georgia Eminent Domain* spoke on his concern to retain current condemnation powers for redevelopment and economic development projects. Mr. Pursley began his comments aligning his position with the late Georgia Supreme Court Justice Charles Weltner, whom he quoted as saying, "It cannot be denied that just and adequate compensation must be just and adequate for the owner and the condemning authority as well. Justice is no more done in a case of overpayment than a case of underpayment."

"Justice," stated Pursley, "in terms of what purposes condemnation can be exercised for, should not give more power to one or the other. It should be balanced where both the government's interest and the private property owner's interest are able to be presented, judged, and by some

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<sup>35</sup> "...the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate...[w]e emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."

independent authority a decision is made whether the condemnation is appropriate or not appropriate.”

Mr. Pursley gave the example of his work with MARTA explaining that in each condemnation action, he was required to go to the elected officials of DeKalb County, Fulton County, or the City of Atlanta to get the permission for them to file a condemnation action on MARTA’s behalf. Mr. Pursley stated that in the redevelopment arena, whether a housing authority, a development authority, or a downtown development authority, he could see no problem with requiring them to get the approval of elected officials in their jurisdictions before filing a condemnation case.

Mr. Pursley explained with various examples of his own work (City of Smyrna, Centennial Park in Atlanta, North Yards Business Park, Meriwether County, and school board cases) that there are laws on the books that allow property owners to successfully challenge improper takings. His point in using these examples was to ask the ED and ED Study Committee to forego a bright line rule that would disallow condemnation for economic or redevelopment purposes. He stated, “I believe that you should protect against the abuse of that system, but protection against abuse should not mean throwing out the entire redevelopment process as part of that effort. I think that the redevelopment process, whether it is for slum or blighted properties or for purely economic redevelopment should have protections.”

In the Georgia Constitution, Mr. Pursley explained, public purpose is split in two ways. Public use means the direct use of property for projects such as roads, schools, public buildings, power lines, and transit lines. Public benefit deals with issues such as redevelopment. He expressed his hope that the ED and ED Study Committee would amend the redevelopment law by focusing on amending the process, rather than eliminating it. He gave examples such as: requiring the redevelopment plan to go through an extensive public process, using proper appraisal personnel and methods, providing recourse to contest blight designations, and providing streamlined means to object to appraisal prices.

Mr. Pursley’s major suggestion was for the ED and ED Study Committee to create a process for independent review. He stated that judicial review was far too narrow, being limited only to bad faith and abuse of discretion. He suggested that inserting an independent review process is possible, such as getting a Special Master first, followed with review by a Superior Court judge. Or, he noted it could be an independent review board not affiliated with the local condemning authority. His major concern was that the independent review would take an unbiased look to determine if the condemned property was blighted and if it was truly needed for the project without giving any preference to the decisions made by the local governments.

Additionally, Mr. Pursley suggested two additional items to promote fairness in the process. He mentioned the Attorney Fee Bill of 1998. He stated that the Georgia Supreme Court had ruled, based on this law, that it is possible for a condemnee to have to pay the condemnor’s attorney fees. He told the Committee that the statute should be repealed.

Mr. Pursley also referenced Titles 22-4 and 32-8 of the Georgia Code which are mandated by the Federal government when federally assisted condemnations are in play. He said that the

Uniform Relocation and Real Property Acquisition Policies Act of 1970 should apply across the board to ensure fairness.

## **8. Southeastern Legal Foundation**

Ms. Shannon Goessling, the Executive Director of the Southeastern Legal Foundation and counsel to Mr. Meeks in federal court, provided suggestions for the ED and ED Study Committee. She stated that it would be helpful to put the debate into terms that would eliminate eminent domain for “financial gain either for government entities or the community at large.” In regard to *Kelo*, she said that the reasoning applied in that case, the claim of “economic distress,” was the same claim applied in the City of Stockbridge. In essence, she said, “*Kelo* has come to Georgia.”

Quoting from a 1957 Georgia Supreme Court case, Ms. Goessling made this statement concerning the use of eminent domain: “The right of the humblest individual in the enjoyment of his property must be protected. The right to take private property from the owner for public use often works extreme hardship and savors of oppression. Nothing but a public necessity can justify it and then only in strict conforming to the law.”

As an attorney with expertise in property issues, Ms. Goessling cleared up one concern stated earlier in the Savannah meeting. She stated, “You do not need eminent domain to clear title. You just need to do an action for quiet title. Any citizen can do it.”

Ms. Goessling commended the great reserve the City of Fitzgerald had demonstrated in its use of eminent domain but stated that such integrity does not exist everywhere. She suggested that the Legislature should make eminent domain the last possible option after other steps have been totally exhausted. For example, she said that the Legislature could require code enforcement first, mandating that a nuisance be first identified, and then force the abatement of the nuisance. She suggested the levy of taxes when the local government had to improve the property.

Ms. Goessling identified in Georgia’s redevelopment law the very broad language dealing with slums. Even though the law requires a formal slum declaration before action can be taken, the language is so broad that almost any area could be declared a slum and unblighted properties within such an area could be taken in the process. Overall, Ms. Goessling stated that the law was unconstitutionally vague and arbitrary. Further, she noted that no one gets to review the definition of slum other than the entity defining the slum as such. There is not even judicial review. She summed up by saying that eminent domain was not as hard to fix as it was made to appear. Obviously, eminent domain was needed for the right reasons, of which she named traditional public uses such as schools, government buildings, and roads. Otherwise, Ms. Goessling noted that America has a free enterprise system that can take care of the Targets and the Wal-Marts. “We don’t need our government(s) to be entrepreneurs,” she declared.

In response to a question from Senator Eric Johnson concerning limiting eminent domain to elected bodies and how to deal with the issue of utilities, Ms. Goessling stated that there are approximately 400 entities with the power of eminent domain. She stated that she puts these in three categories. The first is elected bodies such as cities and counties. The second category she

stated as being those providing a public service, such as utilities, which are regulated, indicating that the regulatory agency may be sufficient as oversight. The third category is the one she was most uneasy about, such as those known as development authorities, economic authorities, and industrial authorities. She suggested repealing the Urban Redevelopment Law, Title 36, Chapter 61, 1-18 of the Georgia Code. She also suggested a repeal of language currently in the Georgia Constitution, Article IX, Section II, Paragraph VII (a), to eliminate any use of eminent domain that would transfer property from person A to person B for private enterprise for private uses. Her stated concern was even if the General Assembly repealed statutory laws, the previously enacted constitutional amendment would be a ready vehicle sitting ready for easy re-enactment.

In response to a question from Senator David Shafer about any recommendation she may have concerning blight, Ms. Goessling stated, “It does make sense to remove the ability of government entities to take for blight. This Committee and the General Assembly should reassess the definition of taking for the public health and safety and welfare. Let’s redefine how we think of that . . . opportunity to rehabilitate, tax consequences if you don’t or if you do” (i.e. rewarding with tax breaks). She suggested that the progressive solutions could include the local government providing remedy and putting tax liens on the property to cover the costs. If the liens are not paid, the local government could take the property under its police power, which then would allow a sale. She suggested that separating eminent domain from any cure for blight was a good course of action.

Ms. Goessling suggested the need to define “public use” very narrowly. She further stressed that there must be transparency in the process of eminent domain use, particularly pointing out the unfairness of the appraisal process and the Special Master process. She urged that “just and fair compensation” should be properly addressed. In closing, Senator Tommie Williams asked her for a list of regulatory powers, in sequential order, that could be used for blight, prior to any use of eminent domain. He stated, “If we are going to take away eminent domain powers for blighted property, then I need to know what steps must be carried out, whether code enforcement or whatever it is.”

## **9. Public Comment**

Reverend Dan Edwards, President of the Henry County Branch of the NAACP, stated that his group was obligated to protect the rights of the community in Stockbridge in order to maintain the livelihood of longstanding community businesses and the right of residents to long-term family dwellings. He stated that, “no government entity should have the power to literally pull the rug out from under any family’s source of income or dwelling without demonstrating sufficient cause and providing fair market value to those affected.” Reverend Edwards said that their position was tied to that of the Founding Fathers of the nation and therefore property ownership conferred on the owner certain rights of permanence and self determination. He opposed the imposition of eminent domain. He called upon the ED and ED Study Committee to understand that what they decided would affect the entire nation.

Mr. and Mrs. Gary and Donna Bell Mayo sought the ED and ED Study Committee’s intervention concerning the current taking of their property for the Stockbridge redevelopment project. Mrs. Mayo explained that they were going to be due in court for a hearing concerning their

condemned property. They had been offered only \$56,000 for the property by the city and given only eight days to accept or reject the offer. Down the street, a comparable property had sold for \$115,000 three years prior. Next door, a somewhat larger piece of property had sold for \$180,000. The Mayos had taken their case back to court for a higher assessment; however, they claimed they were not allowed to use the comparable properties as evidence in court. They also could not use the cost of the relocation property they had to buy to provide the same storage capacity as the original dwelling. They were unable to submit to the court any information about the historical value or historical significance of the home. Now, they explained, since the Special Master did not give over a 20 percent increase in the value that was appraised, it appeared they would have to pay the condemnor's (City of Stockbridge) attorney fees for the past two and one-half years. They sought the Ed and ED Study Committee's help. Senator Kasim Reed, on their behalf, asked to be enjoined with their attorney in the hope the court would delay the case upon his request as a legislator.

Mrs. Sarah Clary told the ED and ED Study Committee that her property was being taken by the City of Stockbridge in the redevelopment plan. She stated that she already had a buyer, Eckerd's Drug Store. The overall plan was for Eckerd's to use about 14,000 square feet for its new building. But, after the negotiations were finalized, the city then stepped in to pass a new ordinance that only allowed a 5,000 square foot building at that location. Thus, the city essentially stopped the sale of their property. Mrs. Clary also stated that her tenant in another building, Maytag, was getting letters from the City Attorney informing them of the city's plans to acquire the property; she then lost Maytag as her renters. Mrs. Clary also mentioned that the tenants who operated the Huddle House at another one of her properties, for over 30 years, were informed that the sewer system had to be upgraded. The end result was that those tenants left and the building was boarded up. This area where Huddle House and the Maytag building are located is now considered blighted by the city, and which Mrs. Clary contends resulted from the city's actions.

Mr. John Evans, former County Commissioner of DeKalb County, stated, "Property rights are sacred." He testified that, "All the exceptions are going to cause a floodgate of development. It's bad enough to have eminent domain for public use, and I'm a victim of that. We cannot open the floodgates. All these redevelopment considerations and blight and all of that, these just need to be worked out some other way other than by eminent domain. All you are going to get is these fat cats coming in here making money in the name of public use. That is not going to work. We don't need to include eminent domain in private development anywhere." Mr. Evans said that only public use, in the strict sense, such as roads and bridges, should be proper reasons for eminent domain. He also called upon the ED and ED Study Committee to regulate the many authorities in the state of Georgia noting that such powers should only be exercised by elected officials. Mr. Evans stated, "It's bad enough with them. We don't need any outside forces with this kind of power. Take that back." He also urged the ED and ED Study Committee to give immediate help to the people of Stockbridge who were suffering under the takings power of the City. He stated that he was seeing some intimidation with the use of eminent domain as well in the Wesley Chapel area of DeKalb County. In DeKalb County, he had seen that there was a tendency to take advantage of people who could not protect themselves, who didn't have money for lawyers. He added, "If you give these profit makers an inch, they will take a mile. The Georgia General Assembly just needs to cut it! Public use, public use, public use! No private

development.” He urged the Committee to realize they were the ones who could stop the abuse. “A good strong law will minimize the mess!”

Mr. Alfonzo Mallory of DeKalb County told the ED and ED Study Committee he was most concerned about how people with power could easily take property from people without power. He stated, “It is easy to accomplish this in poor communities because they don’t have the political clout nor the weight nor the influence nor the financial resources to fight developers.” Mr. Mallory noted that developers seem to target poor communities because the properties are cheap. He called upon the ED and ED Study Committee to put more accountability on development authorities. “We have no idea who they are. They meet in secret,” he stated. He asked, how can citizens hold them accountable? How can citizens understand how they designate certain areas as TADs or other such designations? He stated that he did not support eminent domain for private development purposes.

Mr. Bob Phillips, a property owner in Stockbridge, told the ED and ED Study Committee that what was happening in his town should scare every American. He stated the Founding Fathers tried to protect our rights, and it appeared that the *Kelo* decision had negated their intent. He noted that there are other methods for community revitalization. Citizens should not be fearful of their own government. Mr. Phillips questioned why people should have to fear that what they had worked so hard for all their lives could be just snatched from them by the government. He called for legislators to use this opportunity to correct the situation and to help restore confidence in government.

Ms. Jane Askew Rutledge of Stockbridge provided history to the ED and ED Study Committee concerning how she believed her land rights had been violated by the City of Stockbridge in past years, to the point that she finally felt harassed enough to divest herself of her property, handed down to her from her great grandfather, and move. She reviewed instances of threatened condemnation on her mobile home park any time a resident did not have trash properly picked up or a lawn was not mowed. She stated that she was working with the Attorney General of Georgia to get access to all related records. She suggested that there was backroom dealing between developers and the City of Stockbridge that were focused on plans for her property.

Mr. Frank Stanlan of Stockbridge spoke to ask the Committee to ignore the advice of Mr. Charles Pursley regarding his comments on using eminent domain powers.

Mr. James T. Henry, longtime resident of Stockbridge, provided the Committee with the perspective of how things used to be done in a gentlemanly manner in the city when property was needed for public projects. He lamented the way things were being done today. He told the ED and ED Study Committee that the problem facing Stockbridge was the General Assembly’s fault. He said that if the General Assembly had been watching its politics years ago (referring to legislation allowing the current process to take place), then Stockbridge would not be having this problem.

Mr. Mark Meeks, of Stockbridge, expressed disagreement with GMA stating that he had just seen a letter in GMA’s possession during the meeting which indicated coordinated activities with the City of Stockbridge. Mr. Meeks commented that he did not appreciate GMA’s letter that ran

in the press stating that he (Meeks) had misled and misinformed Senator Chapman about the facts in his case. He said GMA was misinformed because it had failed to investigate the matter and never had talked with him. But, the letter he saw today during the meeting certainly indicated that GMA had been communicating with Mr. Buddy Welch of the City of Stockbridge. “If you’d spend your time helping cities grow instead of helping cities steal people’s property, we’d all be better off,” stated Mr. Meeks.

### **C. AUGUSTA, GEORGIA**

The ED and ED Study Committee convened on November 1, 2005, at the Augusta Technical College in Augusta-Richmond County, Georgia. The ED and ED Study Committee heard testimony regarding the following:

#### **1. Georgia Baptist Convention**

Mr. Ray Newman, Specialist of Ethics & Public Affairs for the Georgia Baptist Convention, testified that the Georgia Baptist Convention has a keen interest in the abuse of the power of eminent domain. Mr. Newman stated that the Georgia Baptist Convention appreciates the language of Senate Bill 86 sponsored by Senator Jeff Chapman due to the fact that Georgia churches and houses of worship are under threat. “Without just compensations” can be broad and misleading due to the priceless value that many historical churches bring to communities. For example, Mr. Newman noted that in the State of New York, churches are being razed for economic development on Manhattan Island including a threat to redevelop historic St. Patrick’s Cathedral on Fifth Avenue. In Alabama, churches are forming coalitions to stop continued development attacks on older churches. Mr. Newman reminded the ED and ED Study Committee about the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) which provides stronger protection for religious freedom in land-use and prison issues.<sup>36</sup> Although the federal law is adequate, the law needs to be enacted by the states to protect tax-exempt properties used for religious purposes.

Mr. Newman continued by noting that many prime downtown properties are owned by religious institutions, including churches on town squares, and these properties are ripe for threat under the *Kelo* interpretation of public use and economic development. Mr. Newman stated there are over 3,500 member churches in the Georgia Baptist Convention.

Mr. Newman called upon the ED and ED Study Committee to pass a strong law that would ensure that churches were protected from the abuse of eminent domain, especially in redevelopment projects. He stated that “churches are especially vulnerable and could be targeted as potential tax-producing properties through redevelopment eminent domain powers. Knowing this to be true and in light of *Kelo v. London* we urge that you will be particularly vigilant that this does not happen in Georgia.”

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<sup>36</sup> See 42 U.S.C. §§ 2000, et seq.; in passing this law, Congress found that the right to assemble for worship is at the very core of the free exercise of religion.

## **2. Interstate Equipment Company**

Mr. Paul McCorkle, owner of the McDuffie County-based Interstate Equipment Company, testified about the extent of eminent domain on private businesses. Mr. McCorkle expressed that he has grave concern for private property owners after the *Kelo* decision; he stated that his family property has been the subject of several condemnation proceedings by various government entities over many years. His personal property, where his company is located along Georgia Highway 17 near the intersection with Interstate 20, has been the latest target of the Georgia Department of Transportation. The highway fronting his property was to be widened and each property owner was set to lose 50 feet of land; however, Mr. McCorkle lost over 240 feet to condemnation so that a dead-end roadway could be built, and this new roadway provided ingress and egress to two other private property owners—one to the north and one to the south. The roadway remained nameless, and is primarily used by one of the property owners: an automobile dealership. This roadway then began serving as the dealership’s primary entrance onto Georgia Highway 17 including the depositing of new automobiles being removed off the transportation trucks. Mr. McCorkle asserts that this so-called “public” roadway primarily serves as a private entrance for the private automobile dealership.

Mr. McCorkle recommends that the State of Georgia should provide a simple review process where property owners could appeal to a panel of private citizens in each county to review and determine if the condemnation is truly for the benefit of “public use.”

## **3. Georgia Forestry Association**

Mr. Steve McWilliams, Executive Vice-President of the Georgia Forestry Association, provided testimony regarding Georgia’s private landowners who own large parcels of forest. The Georgia Forestry Association represents over 2,400 persons and groups, and fully supports what Senate Bill 86 seeks to accomplish: protecting private property owners from abuse and attack. Mr. McWilliams stated that there are over 36 million acres of commercial forest in Georgia, and 92 percent are privately owned by non-industrial landowners. The Georgia Forestry Association has concerns over future problems which will arise as metropolitan areas continue to expand and sprawl into once-rural and undeveloped areas. These areas contain large swaths of forest property which could be sought to condemn for expansion and economic development needs whether it is for industrial parks or retail centers.

## **V. FINDINGS AND RECOMMENDATIONS**

The ED and ED Study Committee has found that in order to stem the frenzy of any further eminent domain abuse, the Georgia Senate should move forward quickly with stop-gap moratorium language prohibiting the use of eminent domain for economic and redevelopment purposes. Additionally, this ED and ED Study Committee proposes substitute language for Senate Bill 86 in the hope that the new language will provide clarity as to the proper use of eminent domain. This substitute language will also eliminate the use of eminent domain as a remedy for eradicating blight. The elimination of this purpose results primarily from the *Kelo* dissents written by Justice Thomas and by Justice O’Connor.

Justice Thomas expressed that the traditional uses of regulatory powers are adequate for abating a nuisance. Justice Thomas warned that “[t]o construe the Public Use Clause to overlap with the States’ police power conflates these two categories.” Justice O’Connor stressed the same point in the minority dissent.

The ED and ED Study Committee agrees with Justices Thomas and O’Conner, and finds that any legislation should avoid language which “conflates” the abatement of a nuisance with the exercise of the power eminent domain; therefore, all powers of eminent domain relating with harm should be omitted in substitute language.

Accordingly, the ED and ED Study Committee recommends the repeal of any use of eminent domain as remedy for harm in the following Georgia Laws:

- Chapters 3 and 4 of Title 8, the ‘Housing Authorities Law’;
- Chapter 42 of Title 36, the ‘Downtown Development Authorities Law’;
- Chapter 44 of Title 36, the ‘Redevelopment Powers Law’;
- Chapter 61 of Title 36, the ‘Urban Redevelopment Law’; and
- Chapter 62 of Title 36, the ‘Development Authorities Law’.

After the Georgia General Assembly originally passed expanded eminent domain powers in the form of a constitutional amendment, ratified by the voters in 1954, a redevelopment law was enacted in 1955.<sup>37</sup> The Georgia Supreme Court levied strong warnings against it in the 1959 case, *Bailey v. Housing Authority of the City of Bainbridge*.<sup>38</sup> The Court stated that “[h]istory teaches us that one of the first steps necessary to be taken in the establishment of a totalitarian form of government is to abolish the right of private ownership of property.” Overall, the *Bailey* Court was correct. The “progressive” approach to private property rights has been an unwise experiment with the Fifth Amendment. It is time to end the experiment before more damage to private property rights occur in Georgia. The repeals in the proposed substitute will conclude this experiment in Georgia, and place Georgia’s property owners on firmer ground.

The ED and ED Study Committee recommends a constitutional amendment that will effectively repeal in part and modify in part current constitutional language. Justice Stevens in the *Kelo* decision gave much deference to Connecticut law; therefore, the ED and ED Study Committee believes there is little doubt that the courts would consider a condemnation case first through the interpretation of authority granted by the Georgia Constitution, and courts would look second through a review of the Georgia Code. Regardless of any strong and prohibitive substitute language seeking to protect private property rights in Senate Bill 86, if Georgia’s constitutional language is more permissive, then property rights remain vulnerable and exposed.

The ED and ED Study Committee’s proposed constitutional amendment seeks to return Georgia’s constitutional language to mirror the language drafted by the Founding Fathers in the

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<sup>37</sup> Allowing the use of eminent domain in redevelopment projects.

<sup>38</sup> See 214 Ga. 790 (1959).

United States Constitution. To underscore this legislative intent, it is important to hold fast to the words “public use” rather than the more expansive language of “public purpose.” Consider that in the nation’s formative years, the words “public use” meant “for the use of the public” which included either government ownership or public use by a common carrier, such as railroads or toll roads. This is the intent of the Founding Fathers,<sup>39</sup> yet this intent and interpretation has been liberalized and perverted over the last two centuries by courts and legislatures.<sup>40</sup>

The ED and ED Study Committee further finds that the State Senate should seek to ensure just government for all of Georgia’s citizens, and that any methods by Georgia’s elected bodies should never engage in taking private property for the purpose of conveying the same property to another private entity. It is excessive to exercise eminent domain to remedy blight. It is a grave injustice to take from a citizen and his heirs all rights to his property merely because its current use is substandard due to the fact that local authorities have not used their regulatory authority in a timely and preventative fashion. Regulatory powers should be afforded with full opportunity to take their course and exhaust their remedies.

The ED and ED Study Committee is in agreement that eminent domain should not be exercised for economic development purposes. The free market system should be allowed to work and not be tempted by socialistic shortcuts disguised as the “common good.” The use of eminent domain was never envisioned by the Founding Fathers to become a marketing tool for private enterprise through the strong arm of government. As Justice Thomas noted in the *Kelo* decision, it is ironic that the “sanctity of the home” is more honored under Fourth Amendment than under the Fifth Amendment.

The ED and ED Study Committee finds that the substitute language, pursuant to the concerns of as expressed in the *Kelo* dissents, will separate the issue of regulatory powers from the exercise of eminent domain; moreover, the language will eliminate the ability of government to use eminent domain for redevelopment or economic development purposes.

#### *FINAL COMMITTEE REPORT*

*Prepared by:*  
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*Senate Research Office*

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<sup>39</sup> As James Madison noted in *The Federalist Papers*, No. 10: “The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interest. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results . . .”

<sup>40</sup> In *Federalist*, No. 51, Madison laid out the task of republican government: “It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of society against injustice of the other part.”

**FINAL REPORT  
OF THE  
SENATE EMINENT DOMAIN AND ECONOMIC DEVELOPMENT  
STUDY COMMITTEE**

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Honorable Jeff Chapman  
Senator, District 3, Chairman

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Honorable Bill Heath  
Senator, District 31

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Honorable Eric Johnson  
Senator, District 1

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Honorable Kasim Reed  
Senator, District 35

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Honorable David Shafer  
Senator, District 48

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Honorable Dan Weber  
Senator, District 40

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Honorable Tommie Williams  
Senator, District 19