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September 28, 2005

To: Representative Michael P. Lawlor and Senator Andrew J. McDonald, Co-Chairmen, Judiciary Committee
Representative Lewis J. Wallace and Senator Eric Coleman, Co-Chairmen, Planning & Development Committee
Members of the Judiciary and Planning & Development Committees

From: Bill Ethier, CAE, Executive Vice President & General Counsel

Re: Eminent Domain and the Kelo decision

On behalf of the Home Builders Association of Connecticut, Inc., I submit these comments for your consideration on the important debate surrounding eminent domain. These comments are not specific to any proposed legislation but we believe offer a reasonable compromise while raising critically important issues for your consideration.

The HBA of Connecticut is a professional trade association with almost one thousand three hundred (1,300) member firms statewide. Our members are residential and commercial builders, land developers, remodelers, general contractors, subcontractors, suppliers and those businesses and professionals that provide services to this diverse industry. We also created and administer the Connecticut Developers Council, a professional forum for the land development industry in the state. Our national organization, the National Association of Home Builders, filed a friend-of-the-court brief before the United States Supreme Court in support of the property owners.

While we represent developers, we fall firmly on the side of strongly protecting private property rights. We are guided by our knowledge and experience that the eminent domain authority of government, while sanctioned by our Constitution, is enormously powerful and harmful to private individuals. It is absolute and final when exercised. Therefore, this ultimate power to destroy private property should be restricted to only certain situations (see below). Moreover, because the ownership of private property serves as bedrock to our freedom, liberty and prosperity, the exercise of eminent domain should be subject to higher judicial scrutiny and should carry with it certain consequences, such as enhanced compensation to property owners in certain cases.

We believe the correct policy for Connecticut is one that imposes a significant limit on the use of eminent domain for economic development purposes but recognizes the need for using that government power for certain traditional and commonly accepted public uses. The key elements of such a policy would allow the exercise of eminent domain only under the following two situations, but in either case its exercise should also be subject to further limitations described below:

1. Eminent domain should be permissible when the government entity exercising the power will maintain ownership and control over the condemned property and such property will be used by or be held for the benefit of all members of the general public (e.g., traditional uses, such as public roads, utilities and government buildings). We recommend that legislation be adopted that either spells out these permissible public uses or otherwise provides definitive guidance on these permissible public uses. However, we recognize that the government "ownership and occupation" provision of this limitation, if left as the only permissible use of eminent domain, would effectively put an end to most redevelopment efforts. Therefore, we offer the following additional permissible use of eminent domain.

2. If the strict public use requirement of the prior paragraph cannot be met, then the exercise of eminent domain should be permissible only when all of the following requirements are met: a. the property being condemned is classified by an agency independent from the condemning authority as blighted under objective statutory standards; b. there is a finding in writing by such independent agency, based on criteria adopted in new legislation, that the public benefits to be served by the condemnation exceed just an increase in tax base and job creation that may result from a redevelopment associated with the condemnation; c. the condemning authority, in attempting to fulfill its public purpose, has exhausted all feasible and prudent alternatives to the condemnation; and d. such condemned property: i. does not contain an owner-occupied residence or viable, ongoing business, or ii. is not subject to an application for development or redevelopment by a private party at the time the government first publicly notices its desire to condemn the property (i.e., the government's planned development or redevelopment activity cannot override a private party's application to develop such property when such application has been filed pursuant to applicable land use or building code regulations).

We further strongly urge you to specifically prohibit the exercise of eminent domain when a government wants to stop the right of private parties to pursue development plans on privately held property. Regulating the use of land should be done through our land use and environmental laws, not by the exercise of government's enormous power to condemn private property, especially when land use regulations would otherwise permit the development. This has happened too many times in Connecticut and destroys the legitimate rights of private citizens to use their property.

In all cases, the exercise of eminent domain should be subject to heightened scrutiny by the courts. We are not at this time suggesting a level of strict scrutiny that is applied to equal protection claims but some mid-level scrutiny is warranted to guard individuals against this government power. It is not sufficiently protective of our individual rights to simply defer to the government's rationale for its own use of such an enormous power.

To paraphrase Supreme Court Justice William Brennan (in his seminal 1982 regulatory takings dissent in San Diego Gas & Electric), since policemen must know the Constitution when exacting liberties from individuals, so should government planners when taking private property. Justice Scalia also stated for the majority in 1994 in Dolan v. City of Tigard (not overturned by Kelo) that the Takings Clause is as much a part of the Bill of Rights as the First and Fourth Amendments and the Court sees no reason why it "should be relegated to the status of a poor relation …." Connecticut should demand that our courts exercise a higher level of scrutiny over the use of eminent domain powers. We do no less for government's restrictions on free speech or its power to search and seize private property.

It is right that the eminent domain power be limited. It is right that private property be better protected in our society. And these things are right regardless of how much of a benefit some, even a majority, may derive from the exercise of eminent domain. We understand the need to redevelop many of our communities and government's desire to facilitate that redevelopment by putting together sufficient land holdings. **But Constitutional rights should never be diminished because it would be convenient for government to accomplish some publicly desired end. We strongly urge you to enact meaningful limitations to government's eminent domain power while preserving such power for the two situations noted above.**

Further, we challenge some of the assertions about the Kelo decision made by the decision's supporters. The US Supreme Court's Kelo decision does change the law on eminent domain. Proponents of eminent domain cite to two older Supreme Court cases to support an erroneous conclusion that nothing has changed, see Berman v. Parker (1954) and Hawaii Housing Authority v. Midkiff (1984). But the facts in those two redevelopment cases are significantly different from Kelo. Berman was a real blight case, one of the country's first true slum clearance plans, while there was no clear blight, if any, in Kelo. Also, of much less significance, in Berman a business entity was condemned while in Kelo private homes were condemned. The property interests of business owners should not receive any less protection than those of home owners, but we merely point this out to show that Kelo did extend the applicability of permissible eminent domain power. The Hawaii case was so odd due to that state's unique land ownership situation it has little relevance to other cases (in Hawaii, most homeowners owned their homes, but were permitted only to lease the land underneath either from the government or the very few private land owners in its system of ownership oligopoly). Kelo could have been decided differently, striking down New London's condemnation plans, without disturbing the holdings of either Berman or Midkiff.

Also, we urge you to not be seduced by the prospects of some enhanced just compensation to resolve the public use issue. Certainly, enhanced compensation over and above traditional measures of payment may be appropriate in a just society in certain situations. Therefore, we recommend that you give serious consideration to adding an

appropriate measure of compensation to what has otherwise been considered just, such as awarding attorneys fees in condemnation cases and awards that assure displaced home owners and businesses are reasonably relocated.

But no amount of just compensation should be able to buy off the government's exercise of such destructive power when there is no real public use of the property taken (as defined by the two proposed acceptable uses of the power above). You need both a public use and payment of just compensation to be Constitutional. If you can merely enhance the compensation paid in order to dismiss adequate consideration of the public use justification, why couldn't you simply enhance the public's use of the condemned property to dismiss consideration of the adequacy of the compensation paid? If you understand the meaning and importance of the Bill of Rights and the place private property has in our history and our freedom, the former is just as ridiculous as the latter.

Finally, some pro eminent domain advocates have said, "Don't worry about it. The public outcry over this issue will ensure that the eminent domain power will not be abused." Whether you believe that or not, that's a dangerous and wrong view of the Constitution. The Bill of Rights exists to protect the individual from the majority's will (i.e., acting through elected legislatures and administrations). Relying on the majority to protect individual rights is antithetical to the existence of such rights. We should not and cannot let our guard down in defending any one of these important rights just because the majority happens to be with us at the moment.

As a merely technical matter, it would be very helpful to all if the myriad statutes in Connecticut on eminent domain were consolidated. We urge you to craft the principles and requirements outlined above into a single statutory source of authority so that all government entities possessing the power to condemn private property will be playing by the same rules. On behalf of the HBA of Connecticut, I hope that you will all strongly defend the property rights that all citizens now fleetingly possess after the Kelo decision. Thank you for this opportunity to participate in this critically important debate and for considering the recommendations we have offered.

cc: The Honorable

Governor M. Jodi Rell
Lieutenant Governor Kevin B. Sullivan
Representative James A. Amann, Speaker of the House
Senator Donald E. Williams, Senate President Pro Tempore
Representative Christopher G. Donovan, House Majority Leader
Senator Martin M. Looney, Senate Majority Leader
Representative Robert M. Ward, House Minority Leader
Senator Louis C. DeLuca, Senate Minority Leader