

JAN 22 2007

A BILL FOR AN ACT

RELATING TO EMINENT DOMAIN.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The fifth amendment to the United States
2 constitution provides, in pertinent part: "[N]or shall private
3 property be taken for public use, without just compensation."
4 Article I, section 20, of the Hawaii state constitution
5 similarly provides that "Private property shall not be taken or
6 damaged for public use without just compensation."

7 In a recent decision, *Kelo v. New London*, No. 04-08
8 (June 23, 2005), the United States Supreme Court, relying upon
9 prior court precedent, determined that the public use provisions
10 of the fifth amendment to the United States Constitution allow
11 the use of eminent domain to take private property for economic
12 development purposes. Because of the breadth of the decision
13 and the amount of deference given by the court to governmental
14 determinations to take private property, *Kelo* raised concerns
15 nationwide that there are no longer any meaningful federal
16 judicial restrictions preventing private property from being
17 taken by eminent domain for nonpublic purposes.



1 The Hawaii supreme court, in a previous decision, *Hawaii*
2 *Housing Authority v. Lyman*, 68 Haw. 55, 704 P.2d 888 (1985),
3 indicated that it would not interpret the "public use"
4 provisions of article I, section 20, of the Hawaii state
5 constitution as broadly as the United States Supreme Court has
6 interpreted the corresponding provisions of the fifth amendment.
7 Nevertheless, the Hawaii supreme court in that opinion afforded
8 deference to the governmental right to take property that was
9 almost as great as that set forth in *Kelo*.

10 The United States Supreme Court in *Kelo* recognized that its
11 decision would effectively insulate many takings from review in
12 the federal court system. However, the Court indicated that the
13 states could establish stronger protections against improper
14 governmental takings of private property:

15 "In affirming the City's authority to take
16 petitioners' properties, we do not minimize the
17 hardship that condemnations may entail,
18 notwithstanding the payment of just compensation. We
19 emphasize that nothing in our opinion precludes any
20 State from placing further restrictions on its
21 exercise of the takings power. Indeed, many States
22 already impose "public use" requirements that are



1 stricter than the federal baseline. Some of these
2 requirements have been established as a matter of
3 state constitutional law, while others are expressed
4 in state eminent domain statutes that carefully limit
5 the ground upon which takings may be exercised."

6 *Kelo*, slip op. at 19.

7
8 In reaction to *Kelo*, a substantial number of states and
9 local jurisdictions have taken steps to strengthen the right of
10 their citizens not to have their property taken for the benefit
11 of another private interest, or not to lose their property where
12 the taking is simply for economic benefits such as increasing
13 tax revenue.

14 The legislature finds that the taking of private property
15 for purely public use, such as the development of roads, water
16 and wastewater works, schools and libraries, and other public
17 buildings and improvements is necessary and appropriate. The
18 legislature further finds that the taking of private property
19 and transferring that property to certain private entities for
20 use by the public, such as in the case of railroads and rail
21 transit companies with obligations as common carriers or power
22 and other utility companies that provide direct services to the



1 public and are regulated by the public utilities commission, is
2 necessary and appropriate.

3 However, the legislature finds that other takings of
4 private property for transfer to private entities may be
5 susceptible to abuse. Even under *Kelo*, the taking of property
6 from one person simply to benefit another private person
7 violates the protections of the public use clause. Similarly, a
8 taking that is intended to favor a private party, with only
9 incidental or pretextual public benefits, would not be
10 sustained. Likewise, a taking that is simply for the purpose of
11 providing economic benefits without remedying any harm or public
12 nuisance is not within the meaning of "public use" envisioned by
13 the framers of article I, section 20, of the Hawaii state
14 constitution.

15 The legislature finds that takings in general, and takings
16 that benefit private parties in particular, should be subject to
17 a higher level of scrutiny by our state courts to ensure that
18 the protections afforded by the fifth amendment to the United
19 States constitution and article I, section 20, of the Hawaii
20 state constitution are upheld and enforced.

21 The purpose of this Act is to strengthen the protections
22 afforded to Hawaii's citizens to be safe and secure in their



1 homes and properties, without the fear of taking of their homes
2 and properties for a nonpublic purpose.

3 SECTION 2. Chapter 46, Hawaii Revised Statutes, is amended
4 by adding a new section to be appropriately designated and to
5 read as follows:

6 "§46- No eminent domain for private purpose or economic
7 development. (a) Anything to the contrary in this chapter or
8 other provision of law notwithstanding, no county or any of its
9 departments, agencies, commissions, authorities, or any private
10 entity may take or damage any interest in private property
11 through the use of eminent domain if the taking or damaging:

12 (1) Confers a private benefit on a particular private
13 party through the use of the property;

14 (2) Is for an asserted public use that is in fact merely a
15 pretext to confer a private benefit on a particular
16 private party; or

17 (3) Is for economic development purposes, unless the
18 economic development is a secondary purpose resulting
19 from urban renewal activities to eliminate existing
20 blighted areas pursuant to chapter 53.

21 Such actions shall not be a taking or damaging for public use
22 allowed by article I, section 20, of the state constitution, nor



1 shall they be within the scope of powers granted to the counties
2 under section 46-1.5(6). Notwithstanding the foregoing,
3 property may be taken for other purposes if the owner
4 voluntarily consents to the condemnation.

5 (b) The determination by a county or private entity that
6 an action proposing to take or damage property involves a public
7 use, or alternatively, does not involve an act or circumstance
8 prohibited by subsection (a), does not create any presumption
9 with respect to whether the taking or damaging is indeed for a
10 public use.

11 (c) Except when property is being taken for transfer to a
12 public utility or common carrier, whenever property is condemned
13 and will be used by a private party, the burden of proof shall
14 be on the county to establish, by clear and convincing evidence,
15 that the use of eminent domain complies with this section and is
16 reasonably necessary.

17 (d) Except when property is being taken for transfer to a
18 public utility or common carrier, whenever property is condemned
19 and the acquisition of the property will be paid for, either
20 directly or indirectly, by nongovernmental funds rather than by
21 public appropriation or by grants from another governmental
22 entity, the burden of proof shall be on the county to establish,



1 by clear and convincing evidence, that the use of eminent domain
2 complies with this section and is reasonably necessary.

3 (e) Whenever property is condemned under circumstances
4 other than as set forth in subsections (c) and (d) above, the
5 burden of proof shall be upon the county to prove, by a
6 preponderance of the evidence, the existence of facts necessary
7 to support the finding of public use and necessity.

8 (f) The owner or other person with an interest in the
9 property sought to be condemned shall be entitled to immediate
10 trial pursuant to section 101-34 as to whether a taking meets
11 the requirements of this section. If eminent domain proceedings
12 under chapter 101 have not yet commenced, the owner or other
13 person with an interest in the property sought to be condemned
14 may also file a suit in the circuit court for a declaratory
15 ruling whether the taking meets the requirements of this
16 section. This subsection shall not be construed to limit any
17 other rights the owner or other person with an interest in the
18 property sought to be condemned may have to administrative or
19 judicial review or relief under applicable provisions of law.

20 (g) For purposes of this section:

21 "Common carrier" means any entity that holds itself out to
22 the general public to engage in transportation.



1 "Economic development" means any activity to increase tax
2 revenue, tax base, employment, or general economic health, when
3 that activity does not result in:

- 4 (1) The transfer of property to public possession,
5 occupation, and enjoyment;
6 (2) The transfer of property to a private entity that is a
7 public utility or common carrier; or
8 (3) The use of eminent domain to remove a public nuisance,
9 to remove a structure that is beyond repair or unfit
10 for human habitation or use, to acquire abandoned
11 property, or to eliminate a direct threat to public
12 health or safety caused by the property in its current
13 condition.

14 "Public utility" means any entity subject to regulation by
15 the public utilities commission under chapter 269."

16 SECTION 3. Chapter 101, Hawaii Revised Statutes, is
17 amended by adding a new section to be appropriately designated
18 and to read as follows:

19 "§101- No eminent domain for private purpose or economic
20 development. (a) Anything to the contrary in this chapter or
21 other provision of law notwithstanding, no plaintiff or any
22 private entity may take or damage any interest in private



1 property through the use of eminent domain if the taking or
2 damaging:

3 (1) Confers a private benefit on a particular private
4 party through the use of the property;

5 (2) Is for an asserted public use that is in fact merely a
6 pretext to confer a private benefit on a particular
7 private party; or

8 (3) Is for economic development purposes, unless the
9 economic development is a secondary purpose resulting
10 from urban renewal activities to eliminate existing
11 blighted areas pursuant to chapter 53.

12 Such actions shall not be a taking for public use allowed by
13 article I, section 20, of the state constitution, nor shall they
14 be within the scope of powers granted to the counties under
15 section 46-1.5(6). Notwithstanding the foregoing, property may
16 be taken for other purposes if the owner voluntarily consents to
17 the condemnation.

18 (b) The determination by a plaintiff or private entity
19 that an action proposing to take or damage property involves a
20 public use, or alternatively, does not involve an act or
21 circumstance prohibited by subsection (a), does not create any



1 presumption with respect to whether the taking is indeed for a
2 public use.

3 (c) Except when property is being taken for transfer to a
4 public utility or common carrier, whenever property is condemned
5 and will be used by a private party, the burden of proof shall
6 be on the plaintiff to establish, by clear and convincing
7 evidence, that the use of eminent domain complies with this
8 section and is reasonably necessary.

9 (d) Except when property is being taken for transfer to a
10 public utility or common carrier, whenever property is condemned
11 and the acquisition of the property will be paid for, either
12 directly or indirectly, by nongovernmental funds rather than by
13 public appropriation or by grants from another governmental
14 entity, the burden of proof shall be on the plaintiff to
15 establish, by clear and convincing evidence, that the use of
16 eminent domain complies with this section and is reasonably
17 necessary.

18 (e) Whenever property is condemned under circumstances
19 other than as set forth in subsections (c) and (d) above, the
20 burden of proof shall be upon the plaintiff to prove, by a
21 preponderance of the evidence, the existence of facts necessary
22 to support the finding of public use and necessity.



1 (f) The owner or other person with an interest in the
2 property sought to be condemned shall be entitled to immediate
3 trial pursuant to section 101-34 as to whether a taking meets
4 the requirements of this section. If eminent domain proceedings
5 under this chapter have not yet commenced, the owner or other
6 person with an interest in the property sought to be condemned
7 may also file a suit in the circuit court for a declaratory
8 ruling whether the taking meets the requirements of this
9 section. This subsection shall not be construed to limit any
10 other rights the owner or other person with an interest in the
11 property sought to be condemned may have to administrative or
12 judicial review or relief under applicable provisions of law.

13 (g) For purposes of this section,
14 "Common carrier" means any entity that holds itself out to
15 the general public to engage in transportation.

16 "Economic development" means any activity to increase tax
17 revenue, tax base, employment, or general economic health, when
18 that activity does not result in:

- 19 (1) The transfer of property to public possession,
20 occupation, and enjoyment;
- 21 (2) The transfer of property to a private entity that is a
22 public utility or common carrier; or



Report Title:
Eminent Domain

Description:

Prohibits use of eminent domain for private purpose; defines private purpose; where condemned property is transferred to private entity, not a common carrier or public utility, burden is on condemning authority to prove public purpose.

