Georgetown Environmental Law & Policy Institute

Overview and Analysis of S. 3873,
the "Private Property Rights Protection Act of 2006."

On September 7, 2006, Senator James Inhofe, R-OK, introduced a bill in the Senate, S. 3873, that is essentially identical to H.R. 4128, passed by the House of Representatives on November 3, 2005. This memorandum (1) describes the basic elements of the bill and (2) outlines some major concerns raised by this proposed legislation.

I. Basic Elements of S. 3873.

Key Provisions. Section 2 contains the primary operative provisions of the bill. Section 2(a) establishes a broad prohibition on the use of eminent domain for "economic development" by any State or local government:

> "No State or political subdivision of a State shall exercise its power of eminent domain, or allow the exercise of such power by any person or entity to which such power has been delegated, over property that is subsequently used for economic development, if that State received Federal economic development funds during any fiscal year in which it does so."

Section 2(b) specifies the consequences for violations:

> "A violation of subsection (a) by a State or political subdivision shall render such State or political subdivision ineligible for any federal economic development funds for a period of 2 fiscal years following a final judgment on the merits by a court of competent jurisdiction that such subsection has been violated."

Section 2(c) provides an opportunity for a State or local government to avoid or terminate ineligibility for federal funds if it "returns all real property the taking of which was found by a court of competent jurisdiction to have constituted a violation of subsection (a) and replaces any other property destroyed and repairs any other property damaged as a result of such violation."

Section 8 provides the definition of "economic development" and thereby identifies the prohibited uses of eminent domain. The section provides that economic development "means taking private property, without the consent of the owner, and conveying or leasing such property from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health." It then lays out ten relatively narrow, but sometimes vaguely worded exceptions. In summary, the exceptions authorize the continued use of eminent domain for:

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1. public ownership, "such as for a road, hospital, airport, or military base;"
2. use by "an entity, such as a common carrier, that makes the property available to the general public as of right, such as a railroad or public facility;"
3. a road or other transportation right of way;
4. use "as an aqueduct, flood control facility, pipeline, or similar use;"
5. "removing harmful uses of land provided such uses constitute an immediate threat to public health and safety;"
6. leasing property that is "an incidental part" of public property or a public facility;
7. acquiring abandoned property;
8. clearing defective title;
9. use by a public utility; and
10. redevelopment of a brownfield site.

Other Notable Provisions. Section 3 extends the prohibition on the use of eminent domain for economic development to the federal government.

Section 4 authorizes "injured" private property owners to bring enforcement actions. This section expressly states that a State is barred from raising the Eleventh Amendment as a bar to a lawsuit under the bill. The section also assigns the burden of proof in litigation to the government, and states that the defendant must show "by clear and convincing evidence" that the taking is not for economic development. In addition, it authorizes a plaintiff to seek "any appropriate relief," including a preliminary injunction or temporary restraining order. The section provides that a suit may be brought up to seven years after the property has been condemned and redeveloped. Awards of attorneys fees and costs are authorized for prevailing plaintiffs (but not prevailing government defendants).

Section 5 requires the Attorney General to publicize the bill in various ways, and to compile a list of the federal laws under which federal funds are distributed that trigger its application. Section 6 requires the Attorney General to report annually to Congress on States and local governments that have committed violations.

Section 7, entitled "Sense of Congress Regarding Rural America," includes a general statement about the "fundamental importance of property rights" and, more specifically, the importance of property rights in rural America. The section identifies eminent domain for economic development as a threat to rural America. Section 10 states that it is the policy of the United States "to encourage, support and promote the private ownership of property and to ensure that the constitutional and other legal rights of private property owners are protected by the Federal Government." Section 11 provides that the bill shall be construed "in favor of broad protection of private property rights, to the maximum extent permitted by the terms of this Act and the Constitution."

Section 13 prohibits the Federal Government, or any State or local government that receives federal economic development funds, from exercising the power of eminent domain to take property of a religious or other non-profit organization "by reason of the nonprofit or tax-exempt status of such organization, or any quality related thereto."

Section 15 states that "It is the sense of Congress that any and all precautions shall be

taken by the government to avoid the unfair or unreasonable taking of private property from survivors of Hurricane Katrina who own, were bequeathed, or assigned such property, for economic development purposes or for the private use of others."

II. Major Concerns Raised By S. 3873.

The States Have Already Addressed the *Kelo* Issue. The bill is unnecessary because the States have already responded to the Court's 2005 *Kelo* decision. 43 of the 44 State legislatures in session this year considered bills on eminent domain, and over half adopted new restrictions on eminent domain. In November 2006, voters in 13 states will consider additional restrictions through ballot measures. There is simply no demonstrable need for Congressional action.

S. 3873 Would Trump Diverse State Policies. The bill would override the diverse policies States have adopted on eminent domain and replace them with a single, national rule. The States, within constitutional limits, are better positioned than Congress to craft policies on eminent domain that address the values and priorities of their citizens. In fact, States have adopted widely varying types of restrictions that reflect their unique circumstances, including their different levels of urbanization, degrees of property fragmentation, and economic development goals. The bill would supplant the States' tailored solutions with a one-size-fits-all rule.

S. 3873 Would Limit Eminent Domain Even More Than the Dissenters in *Kelo*. The bill would impose even stricter restrictions on the use of eminent domain than Justice O'Connor and other dissenters in *Kelo* believed was appropriate. Justice O'Connor stated that elimination of property uses that "inflict[] affirmative harm on society," such as the elimination of blight in *Berman v. Parker*, and concentrated land ownership in *Hawaii v. Midkiff*, was a legitimate public use. The bill, on the other hand, would only permit the use of eminent domain to remove harmful uses that constitute "an immediate threat to public health and safety." In addition, Justice O'Connor cited sports stadiums as an example of a development project city officials should be permitted to pursue using eminent domain. The proposed legislation would apparently bar use of eminent domain for stadiums.

S. 3873 Would Severely Penalize Local Governments for Minor, Good Faith Errors. The bill would impose the draconian penalty of a two-year cut off in federal financial assistance for economic development if a State or local government's use of eminent domain to acquire a single property violated any of the prohibitions in the bill, even if the error was made in good faith. In some cases, the penalty could be imposed many years or even decades after the initial condem-nation. Furthermore, the bill language is so vague and confusing that it would be difficult for States and local governments to predict how courts might interpret it. See, for example, section 8(1)(A)(ii) (permitting use of eminent domain by "an entity, *such as* a common carrier, that makes the property available to the general public as of right, *such as* a railroad *or public facility*"); section 8(1)(A)(iv) (permitting the use of eminent domain to convey property "for use as an aqueduct, flood control facility, *or similar use*") (emphases added). Also confusing is section 13, prohibiting the taking of property "by reason of the non-profit or tax-exempt status" of the owner, "or any quality related thereto;" it is unclear if this section prohibits all condemnations of non-profit or tax-exempt property, or simply restricts such condemnations. While the bill purports to provide State and local governments an opportunity to "cure"

violations and avoid a cut-off in federal funding, it is unclear whether this is a realistic option. For example, if a few owners subject to an illegal condemnation elected to keep their compensation award rather than receive the return of their properties, would the government be unable to cure because it could not return "all real property" affected by the condemnation?

S. 3873 Would Impose Unfairly Selective Limitations on Eminent Domain. The bill promotes a highly selective approach to eminent domain reform by targeting use of eminent domain for economic development in urban centers and inner suburbs, but giving a free pass to the use of eminent domain by public utilities. In 2005, Congress passed the Energy Policy Act of 2005 giving power companies controversial and far-reaching new powers to use eminent domain to run electrical transmission lines across private farms and ranches. Despite the serious public concerns created by this new law (see **"**Power Line Could Undo Open-Land Conservation**,"** The Washington Post, C1, September 10, 2006), S. 3873 does nothing to regulate or control eminent domain for energy development. Ironically, while recognizing eminent domain "as a threat to agricultural and other property in rural America," the bill fails to address the use of eminent domain that represents the most serious threat to rural landowners.

S. 3873 Ignores the Valuable Public Benefits of Judicious Use of Eminent Domain. Eminent domain has served as an invaluable tool for assembling fragmented properties and preparing sites for redevelopment. Successful developments completed with the aid of eminent domain include the Texas Rangers Stadium in Arlington, Texas, Lincoln Center in New York City, and the Baltimore waterfront. These projects have generated jobs, economic growth, and revitalization of economically depressed urban areas. As the National Conference of Black Mayors stated in a recent resolution, "eminent domain is a pivotal tool for municipalities to institute prudent land use, revitalize stressed communities, address contaminated parcels, construct new infrastructure, treat workforce issues, and seek solutions for economically stagnated areas." The significant public benefits of economic redevelopment projects should be taken into account in developing a balanced policy on eminent domain.

S. 3873 Represents Unwise Land Use and Energy Policy. The bill would create new obstacles for urban centers and inner suburbs to promote in-fill development, and lead to more development in rural areas on the urban fringe. The results would include more decay of our urban centers, more sprawl development, worse traffic congestion, and greater energy use.

S. 3873 Raises Serious Constitutional Concerns. According to a report by the Congressional Research Service, the bill raises serious constitutional concerns. See CRS, "Condemnation of Private Property for Economic Development: Legal Comments on the House-Passed Bill (H.R. 4128) and Bond Amendment" (January 20, 2006). The report states that the Supreme Court has indicated that Congress does not have unlimited authority under the Spending Clause to coerce States and local governments to comply with federal policies. CRS suggests that the bill's severe penalties might be unconstitutional because they are so disproportionate to the types of minor violations that could trigger sanctions.

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