

# Eminent Domain Section

Winter 2006

Volume 1, Issue 1

State Bar of Georgia 

## Aftermath of *Kelo*

by Joel V. Sherlock  
Sell & Melton, Macon, Georgia

For those who may have been out of the country for the last six months, the Supreme Court in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), upheld the right of government to use its eminent domain power for economic development and redevelopment even when title to the condemned property is eventually ceded to different private owners, namely large developers. Critics of *Kelo* claim that the founding fathers never intended for eminent domain to be used for economic development and certainly not to transfer property from one private owner to another solely for the sake of higher tax revenues. However, supporters of *Kelo* argue that the entire point of eminent domain power is to serve the larger public good and that economic development and redevelopment does so in the same way as new highways, sewers, and public buildings. Regardless of how one views the decision and its implications, there is no doubt that the *Kelo* decision will result in ongoing debate and litigation well into the future.

Since the announcement of what some observers have characterized as a “lightning rod decision,” legislators in more than half of the states in the country have introduced new legislation in response to *Kelo*. Many states have proposed or enacted new laws in an attempt to limit or block the use of eminent domain by state and local governments for economic development purposes, and some states have taken the extra step of proposing constitutional amendments. Georgia legislators have proposed both. As of Jan. 6, 2005, Georgia’s pending *Kelo*-related legislation includes House Resolutions (HR) 1036 and 1037, House Bill (HB) 943, and Senate Bill (SB) 86. What follows is a very limited review of these legislative proposals.

**HR 1037:** This resolution seeks to amend the following three provisions of the Georgia Constitution concerning eminent domain powers:

(i) Article I, Section III, Paragraph I—The resolution proposes a new subparagraph (a) here that would limit the use of eminent domain power only for (1) public road or street purposes or public transportation purposes, (2) ownership by a governmental entity and use in

the performance of one or more governmental functions other than roads and public transportation, and (3) public utility and pipeline purposes. Most importantly, new subparagraph (a) states that “[e]conomic development or redevelopment shall not constitute a public purpose for which private property may be acquired by eminent domain.” In addition, a change to subparagraph (b) would eliminate determinations of public purpose by the General Assembly.

(ii) Article IX, Section II, Paragraph V—The resolution would modify this provision by limiting the authority of each county and municipality to exercise the power of eminent domain only for public purposes authorized under Article I, Section III, Paragraph I.

(iii) Article IX, Section II, Paragraph VII—The resolution would change subparagraph (a) to authorize counties, municipalities, and housing authorities to carry out community redevelopment but to forbid the sale or other disposition of property acquired by eminent domain to private enterprise for private uses.

**HR 1036:** This resolution is a significantly more detailed constitutional amendment than HR 1037. HR1036 proposes changes to Article I, Section III, Paragraph I and seeks not simply to limit the government’s power of eminent domain with respect to economic development issues but to define when such power can and cannot be used. Interestingly, it also provides a time limit for use of condemned property and a buy-back provision for property owners.

HR 1036 includes new subparagraphs (a)(2)(A) and (a)(2)(B) that would limit the exercise of eminent domain power by prohibiting any private property condemned by the state or a local government from being subsequently transferred to any other entity, public or private, and by requiring any property condemned for public transportation services, public utility services, or other public authorities to remain titled in such public entity and to be used exclusively for such service, respectively. Unlike HR 1037, subparagraph (a)(2)(C) of HR 1036 would allow condemna-

See *Kelo* on page 2

# From the Chair

by J. Scott Jacobson

Please give your thanks to Don Janney, section secretary, for preparing this newsletter, which should be coming to you in time for the section's annual seminar, luncheon and meeting on Jan. 19 at The Westin Buckhead Hotel.

This year's seminar features many timely topics and interesting speakers, and we hope that you will make every effort to attend. Our annual Section luncheon and meeting promise to be very entertaining because, in addition to the Section's annual business and elections, we will present the 4th annual Charles N. Pursley Jr. Award to a very deserving member of the Bar, a luminary of eminent domain jurisprudence in Georgia for many years, whose identity will not be disclosed before the luncheon. Finally, our luncheon will have a special guest speaker – Lt. Gov. Mark Taylor. We are looking forward to hearing Lt. Gov. Taylor's remarks relating to eminent domain and how our area of practice likely will fare this year and in coming years in the Georgia Legislature and executive offices.

Please enjoy reading this newsletter, and provide your feedback to Don, Anne Sapp (our chair-elect) or me. We look forward to seeing you soon.

## *Kelo*

Continued from page 1

tions for economic development and redevelopment by state and local governments and even for the ultimate transfer of such condemned properties to private entities but would restrict such use solely for the elimination of "blighted areas."

New subparagraph (a)(2)(C) of HR 1036 contains two subsections that define "blighted areas." Under subsection (C)(i), residential blighted areas are those which by reason of (1) dilapidation, deterioration, age, or obsolescence; (2) inadequate provision for ventilation, light, air, sanitation, or open spaces; (3) high density of population and overcrowding; (4) the existence of conditions which endanger life or property by fire or other causes; or (5) any combination of such factors, are conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime and are detrimental to the public health, safety, morals, or welfare. Subsection (C)(ii) defines non-residential blighted areas as those which by reason of (1) unsanitary or unsafe conditions; (2) deterioration of site improvements; (3) tax or special assessment delinquency exceeding the fair value of the land; (4) the existence of conditions

## Pursley Award Goes to George Dillard

At the 2005 meeting of the Eminent Domain Section, George P. Dillard received the Pursley Award for outstanding service in the field of eminent domain. Dillard attended the Georgia Institute of Technology, the University of Georgia, Emory University, and George Washington University and received his law degree from the Woodrow Wilson College of Law. During his long career of public service, Dillard served as a special agent for the Federal Bureau of Investigation for 13 years, as a Deputy Assistant Attorney General of Georgia, and as the County Attorney for DeKalb County, Georgia for over 25 years. He has also been a faculty member for the National Institute on Trial Advocacy at Emory Law School on several occasions and has lectured at seminars sponsored by the Institute of Continuing Legal Education in Georgia on the subjects of eminent domain, zoning, and local government law. Dillard continues to practice law with his son, Doug, at the firm of Dillard and Galloway in Atlanta, Ga. In addition to his law practice, he enjoys raising vegetables and blueberries at his farm.

which endanger life or property by fire or other causes; or (5) any combination of such factors, constitute an economic or social liability and are a menace to the public health, safety, morals, or welfare in their present condition and use.

HR 1036 includes four additional new provisions. Subparagraph (a)(2)(D) would allow for damage of private property by state and local governments and duly authorized private entities; however, it requires that title to such property remain in the owner. Subparagraph (a)(3) would provide that "only the minimum amount of private property necessary" to achieve the public purposes permitted by subparagraph (a) may be taken or damaged. One of the strongest Kelo provisions in HR 1036 is subparagraph (a)(4), which would prohibit (1) the use of eminent domain solely or primarily for the purpose of improving tax revenue or the tax base and (2) the transfer, lease, or use of condemned property by private developers, corporations, or other entities solely or primarily to expand tax revenues, increase taxable values of property, or to promote economic development except as specifically provided for in the blighted area provisions of subparagraph (a)(2). Lastly, subparagraph (a)(5) provides, among other things, that

See *Kelo* on page 4

# Recent Decisions of Interest

## ***Martin v. Henry County Water & Sewerage Authority*, 279 Ga. 197 (decided March 7, 2005)**

In this condemnation under the special master procedure, the special master awarded the condemnees \$6,500 for the property rights condemned. The condemnees appealed to a jury, and the jury returned a verdict of \$6,900 for the condemnees (an increase of only \$400). The trial court then awarded the condemnor \$3,500 in attorney's fees pursuant to O.C.G.A. § 22-2-84.1, which provides that if a condemnee appeals from an initial award, the condemnee is liable for reasonable expenses incurred by the condemnor in determining just and adequate compensation in the superior court unless the judgment on the appeal is greater than the initial award by at least 20 percent. (The statute also makes a condemnor who appeals from an initial award liable for the condemnee's expenses in the superior court unless the judgment on the appeal is less than the initial award by at least 20 percent.) Challenging the constitutionality of § 22-2-84.1, the condemnees appealed directly to the Georgia Supreme Court and argued that the statute violated their constitutional right to receive just and adequate compensation. The Supreme Court unanimously held that the statute is constitutional and affirmed the award of attorney's fees for the condemnor.

## ***Dept. of Transportation v. Ogburn Hardware & Supply, Inc.*, 273 Ga. App. 124 (decided April 11, 2005; cert. denied Sept. 19, 2005)**

The plaintiffs in this inverse condemnation case (a property owner and his company) operated a hardware store on property adjacent to a public road in Emanuel County and sought compensation as a result of DOT's widening of the road. Before the road-widening, there were ten parking spaces in front of the store; but the road improvements reduced the number of parking spaces from ten to two and restricted access to the store. DOT contended that the widening occurred within its existing right-of-way, while the property owner claimed that the widening encroached on his property. At trial, the jury found for the plaintiffs and returned a verdict in the total amount of \$380,535 (\$2,900 for the property taken, \$160,258 for consequential damages, \$34,000 for loss of business, and \$183,377 for attorney's fees and expenses). DOT appealed and argued, among other things, that the trial court erred in admitting testimony by the plaintiffs' appraiser who used, as a factor in reaching his conclusion on consequential damages, an estimated "cost to cure" the loss of parking spaces and access. The Georgia Court of Appeals decided that the appraiser's testimony was legally sufficient and properly admitted, found no abuse of discretion in the trial court's admission of a surveyor's testimony concerning the loca-

tion of DOT's right-of-way, and affirmed the judgment for the plaintiffs.

## ***Georgia 400 Industrial Park, Inc. v. Dept. of Transportation*, 274 Ga. App. 153 (decided July 1, 2005)**

DOT filed a declaration of taking to acquire less than an acre of land, the right to remove a building partly located on the condemned land, and a temporary work easement to enter the condemnees' adjacent land to remove the building. The condemnees moved to set aside the declaration of taking and asserted that it failed to provide a sufficient description of the temporary work easement. After the trial court denied the motion to set aside, the Court of Appeals granted the condemnees' application for an interlocutory appeal and concluded that the temporary work easement was not sufficiently described in the declaration of taking. In reaching this conclusion, the Court of Appeals relied upon its recent decision in *Mosteller Mill, Ltd. v. Georgia Power Co.*, 271 Ga. App. 287 (decided January 18, 2005). The Court of Appeals also determined that the issue was not moot even though the building had been dismantled and removed while the appeal was pending. On another issue raised by the condemnees, the Court of Appeals held that because neither the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act (42 U.S.C. § 4601 et seq.) nor the Georgia Relocation Assistance and Land Acquisition Policy Act (O.C.G.A. § 22-4-1 et seq.) creates a private right of action, the condemnees could not rely upon an alleged violation of either statute as a basis for setting aside the declaration of taking. Thus, the Court of Appeals reversed in part and affirmed in part the trial court's rulings.

## ***Carroll County Water Authority v. L.J.S. Grease & Tallow, Inc.*, 274 Ga. App. 353 (decided July 12, 2005)**

The condemnor, in connection with its plans to construct a reservoir, brought a special master proceeding to acquire 38 acres of an 80-acre tract of land formerly used as a grease-rendering plant. (Such a plant takes grease collected from restaurants and converts the grease into animal feed, cosmetics, and lubricants.) The special master returned an award of \$140,000 as the value of the property taken, and the condemnee then appealed for a jury trial. Subsequently, the parties consented to have the issues decided by a court-appointed arbitrator, who awarded \$265,000 at the value of the land condemned and \$1,250,000 for business losses. On appeal from the arbitrator's award, the condemnor argued, among other things, that the recovery of business losses was remote and speculative because the grease-ren-

dering plant had ceased operations more than a year before the condemnation. Rejecting the condemnor's arguments, the Court of Appeals concluded that under the evidence presented, the condemnee clearly had an established business on the condemned land and that the impending condemnation had forced the condemnee to close the business before the date of taking. Hence, the Court of Appeals affirmed the judgment based on the arbitrator's award.

***Thornton v. Dept. of Transportation*, 275 Ga. App. 401 (decided Sept. 7, 2005; petition for cert. pending)**

In this declaration of taking case, the condemnee owned a 2.3-acre tract of land with frontage on U.S. Highway 341 in Wayne County. DOT took approximately 6,500 square

feet of the tract to widen the highway and estimated \$1,300 as compensation for the land taken. After the condemnee appealed for a jury trial, DOT filed a motion in limine to prevent the condemnee from offering evidence at trial that he had entered into a written contract to sell a small area (50 square feet) of the condemned parcel for \$10,000 for use as a billboard. The trial court granted DOT's motion and, following a jury trial, entered a judgment for the condemnee in the amount of \$1,300. On appeal from that judgment, the Court of Appeals affirmed and found that the trial court did not abuse its discretion in excluding the written contract but allowing the condemnee to present evidence regarding the value of the property if used for a billboard.

---

***Kelo***

Continued from page 2

condemnors have only three years from the date of taking in which to commence the public use or the property must be offered back to the owner at the same price paid by the condemnor.

**HB 943:** This bill seeks to expand O.C.G.A. § 22-1-2 by adding four new subparagraphs. Subparagraph (b) of HB 943 would limit the exercise of eminent domain power by state and local governments only for public roads, streets, or public transportation purposes, and for public utility and pipeline purposes only by state and local governments, state and local authorities created by law, and private persons specifically authorized by law. Subparagraph (c) would restrict all units of state and local government from using eminent domain for any purpose not specified in subparagraph (b). Subparagraph (d) states that "[e]conomic development or redevelopment shall not constitute a public purpose for which property may be acquired by eminent domain." Finally, subparagraph (e) provides that in the event of any conflict between the new § 22-1-2 and any other law, new § 22-1-2 controls and that all state laws "shall be construed to favor the protection of private property rights over the public right of eminent domain."

**SB 86:** This bill is an attempt to curtail the eminent domain powers of O.C.G.A. § 22-1-2 by limiting them pursuant to the public purpose definitions in the newly added O.C.G.A. § 22-1-9. New § 22-1-9(a) provides in pertinent part as follows: "...in no event shall a public purpose be construed to include the exercise of eminent domain solely or primarily for the purpose of improving tax revenue or the tax base or the purpose of economic development. This shall include condemning property for the purpose of transferring, leasing, or allowing the use of such property to a private developer, corporation, or other entity solely or primarily to attempt to expand tax revenue, increase the taxable value of the property, or promote economic development." New § 22-1-9(b) directs that it is to be construed

in accord with statutes authorizing community redevelopment, however, it limits the use of eminent domain for that purpose by stating, "it is the intent of the General Assembly that the private property rights of residents and businesses should be protected over the interests of private developers and corporations..." that "the power of eminent domain for purposes of community redevelopment be used sparingly; and such laws shall be strictly and narrowly construed for use solely on legitimate redevelopment projects..." and that "this Code section shall control and shall be strictly construed to protect the private property rights of residents and businesses over the interests of private developers and corporations."

While HR 1037 and HB 943 seek to provide the maximum protection for private property owners, it is doubtful they are workable solutions to the *Kelo* problem. Such severe measures would effectively end the power of all levels of state and local government and housing authorities to cure urban blight and provide affordable housing in lower income areas. Seemingly, HR 1036 and SB 86 are the more reasonable and workable solutions. However, while both proposals allow for economic development and redevelopment, the restrictions placed on those powers still need much debate. Additionally, provisions such as the three-year "use it or lose it" rule could have a serious negative effect on the government's ability to make long-range plans for and acquisitions of land for future growth.

Hence, whether you believe that the *Kelo* decision was an enormous power grab by elected officials and wealthy developers or that it simply affirmed necessary and beneficial government powers that existed all along, members of the Eminent Domain Section need to deliberate seriously on this matter before the legislature rushes to cure our headache with hemlock. For those who wish to view the entire text of the above-referenced proposals or any of the other five pending (non-*Kelo* related) eminent domain legislative proposals, visit the Georgia General Assembly website at [www.legis.ga.gov](http://www.legis.ga.gov).

# AGENDA

Presiding: *J. Scott Jacobson*, Chair, Eminent Domain Section, State Bar of Georgia; Holt Ney Zatzoff & Wasserman, LLP, Atlanta  
*Donald W. Janney*, Secretary, Eminent Domain Section, State Bar of Georgia; Troutman Sanders LLP, Atlanta

- 8:15 **REGISTRATION**  
(All attendees must check in upon arrival. A removable jacket or sweater is recommended.)
- 9:00 **WELCOME AND PROGRAM OVERVIEW**  
*J. Scott Jacobson*
- 9:10 **KELO V. CITY OF NEW LONDON, CONNECTICUT: THE DECISION, ITS INTERPRETATION AND ITS IMPACTS**  
*Charles L. Ruffin*, Gambrell & Stolz LLP, Macon
- 9:55 **PENDING AND ANTICIPATED GEORGIA LEGISLATION TO LIMIT THE USE OF THE POWER OF EMINENT DOMAIN**  
*Charles N. Pursley, Jr.*, Pursley Lowery Meeks LLP, Atlanta
- 10:40 **BREAK**
- 10:55 **2005 DECISIONS IN GEORGIA EMINENT DOMAIN LAW**  
*Anne W. Sapp*, Anne W. Sapp, P.C., Atlanta
- 11:40 **RELOCATION: THE LAW AND COMPENSATION**  
*J. Scott Jacobson*
- 12:10 **LUNCHEON** (Included in registration fee)  
Annual Meeting of Eminent Domain Section  
Election of Officers  
Speaker and Presentation of Awards

- 1:30 **SELECTED ETHICS TOPICS**  
*Hon. George H. Carley*, Justice, Supreme Court of Georgia, Atlanta
- 2:00 **TIPS FROM THE APPRAISER TO THE EMINENT DOMAIN ATTORNEY**  
*Gary L. Bernes*, MAI, Bernes and Company, Marietta
- 2:45 **THE CONTINUED VALIDITY OF THE "PRIVILEGE" PROTECTING APPRAISAL REPORTS**  
*William A. White*, Smith, Welch & Brittain, McDonough
- 3:15 **BREAK**
- 3:30 **FOR THE LOCAL GOVERNMENT LAWYER: HOW TO ACQUIRE PROPERTY, AVOID A BIDDING WAR AND NOT VIOLATE THE SUNSHINE LAWS**  
*Michael V. "Van" Stephens, II*, Gwinnett County Department of Law, Lawrenceville
- 4:15 **NEW GEORGIA LAW IMPACTING EXPERT APPRAISAL WITNESSES**  
*Douglas A. Henderson*, Troutman Sanders LLP, Atlanta
- 4:50 **ADJOURN**

**THREE WAYS TO REGISTER:** check the ICLE schedule on the web at [www.iclega.org](http://www.iclega.org)  
**Mail:** ICLE • P.O. Box 1885 • Athens, GA 30603-1885 (make check payable to ICLE)  
**Fax:** 706-354-4190 (credit card payment must accompany fax to be processed)  
**Online:** [iclega.org](http://iclega.org) (credit card payment only)

Duplicate registrations may result in multiple charges to your account. A \$15 administrative fee will apply to refunds required because of duplicate registrations.

© 2005 Institute of Continuing Legal Education in Georgia

**Questions? Call ICLE Atlanta Area: 770-466-0886 • Athens Area: 706-369-5664 • Toll Free: 1-800-422-0893**

## EMINENT DOMAIN • January 19, 2006 • 6214

NAME \_\_\_\_\_ GEORGIA BAR # \_\_\_\_\_  
 FIRM/COMPANY \_\_\_\_\_ OFFICE PHONE (\_\_\_\_\_) \_\_\_\_\_  
 ☆EMAIL \_\_\_\_\_ (for registration confirmation and email notification of seminars, no postcard or brochures will be sent)  
 MAILING ADDRESS \_\_\_\_\_ ZIP + 4 \_\_\_\_\_  
 STREET ADDRESS \_\_\_\_\_ (for UPS) ZIP + 4 \_\_\_\_\_  
 CITY \_\_\_\_\_ STATE \_\_\_\_\_

◆ **EARLY REGISTRATION FEE: \$155**  
**(ON-SITE REGISTRATION FEE: \$175)**

- I am unable to attend. Please send written materials and bill me for the cost of materials only. Sorry, no phone orders!
- I have enclosed a check for the early registration fee OR
- I authorize ICLE to charge the early registration fee to my  MASTERCARD  VISA  AMERICAN EXPRESS\*  DISCOVER

Account #:     /   Credit Card Verification Number: A three-digit number usually located on the back of your credit card; \*AmEx is four-digits on the front of the card.

Expiration Date: \_\_\_\_/\_\_\_\_/\_\_\_\_ Signature: \_\_\_\_\_ ◆ Early registrations must be received 48 hours before the seminar.