

JAN 25 2006

A BILL FOR AN ACT

RELATING TO EMINENT DOMAIN.

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

1 SECTION 1. The legislature finds that the fifth amendment
2 to the United States Constitution provides, in part, the
3 following: "[N]or shall private property be taken for public
4 use, without just compensation." Similarly, section 20, article
5 II, of the Hawaii state constitution provides the following:
6 "Private property shall not be taken or damaged for public use
7 without just compensation."

8 In a recent United States Supreme Court decision, Kelo v.
9 New London, (04-108) June 23, 2005, the court determined that
10 the "public use" provision of the taking clause of the fifth
11 amendment to the United States Constitution allowed the use of
12 the powers of eminent domain for economic development purposes
13 to be carried out by a private entity.

14 In that landmark case, the city of New London, Connecticut,
15 following decades of economic decline, targeted an area of
16 ninety acres in the municipality for a planned economic
17 redevelopment. Following public meetings, the state of
18 Connecticut authorized a private nonprofit entity to proceed



1 with the redevelopment that would eventually include a
2 waterfront conference hotel, restaurants, retail shops, offices,
3 residential units, and a marina for recreational and commercial
4 uses. The stated purpose of the project was to create new jobs,
5 generate increased tax revenues, and revitalize that section of
6 the municipality. In proceeding with the project, the private
7 entity vicariously utilized the city's power of eminent domain
8 to condemn certain parcels within the redevelopment area that
9 were privately owned by persons not willing to voluntarily sell
10 their property in lieu of condemnation, thereby resulting in the
11 case. The state of Connecticut trial court ruled partially in
12 favor of the exercise of the power of eminent domain by the
13 city. The trial court decision was appealed to the supreme
14 court of Connecticut, which upheld the trial court, in part, and
15 reversed, in part, resulting in a full condemnation of the
16 subject development project. The United States Supreme Court
17 affirmed the decision of the supreme court of Connecticut.

18 This United States Supreme Court decision raised many
19 dismayed voices, including many in this State, clamoring that
20 private property should in no case be taken by the powers of
21 eminent domain from one private entity to be then transferred to



1 another private entity for whatever stated public purpose or
2 good.

3 With some irony, the Supreme Court, in support of its
4 decision, cited Hawaii Housing Authority v. Midkiff, 467 U.S.
5 229 (1984) several times, in which case the court considered a
6 Hawaii statute through which fee title was taken from lessors
7 and transferred to lessees. The court concluded that "the
8 State's purpose of eliminating the 'social and economic evils of
9 a land oligopoly' qualified as a valid public use. (cite
10 omitted)" Kelo at p. 11. In further support of both Hawaii
11 Housing Authority and Kelo, the court went on to state, "[f]or
12 more than a century, our public prudence has wisely eschewed
13 rigid formulas and intrusive scrutiny in favor of affording
14 legislatures broad latitude in determining what public needs
15 justify the use of the taking power." Kelo, at p. 13.

16 However, it is this latter point, the upholding of
17 legislative policy, that is of interest at the present time. In
18 its closing, the majority opinion of the United States Supreme
19 Court stated, "[w]e emphasize that nothing in our opinion
20 precludes any State from placing further restrictions on its
21 exercise of the takings power. Indeed, many States already
22 impose 'public use' requirements that are stricter than the



1 federal baselines. Some of these requirements have been
2 established as a matter of state constitutional law, while
3 others are expressed in state eminent domain statutes that
4 carefully limit the grounds upon which takings may be
5 exercised." Kelo, at p. 19.

6 The legislature also finds that the taking of private
7 property for purely public use, such as the development of
8 roads, airports, water and wastewater works, schools and
9 libraries, and other public building and improvements is
10 necessary and appropriate. The legislature further finds that
11 the taking of private property and transferring it to another
12 private party for use by the public, such as in the case of
13 railroads and rail transit companies with common carrier duties
14 or other public power and utility companies serving the public
15 as public utilities, is also necessary and appropriate.
16 However, the legislature believes that the exercise of the power
17 of eminent domain to take private property and transfer the
18 property to another private entity for a purported economic
19 development purpose is not a taking for a public purpose.

20 The purpose of this Act is to prohibit the exercise of the
21 power of eminent domain to take private property and transfer



1 the property to another private entity for economic development
2 purposes.

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- Eminent domain for economic development purposes;**
7 **prohibited.** No county or any of its departments, agencies,
8 commissions, authorities, or any private entity may take any
9 interest in or damage any private property through the use of
10 eminent domain under section 46-1.5 if the taking is for the
11 purpose of urban or economic development that would result in
12 the development of any nongovernmental retail, office,
13 commercial, residential, or industrial development or use."

14 SECTION 3. Section 101-2, Hawaii Revised Statutes, is
15 amended to read as follows:

16 **"§101-2 Taking private property for public use; disposal**
17 **of excess property[-]; public use.** (a) Private property may be
18 taken for public use. Private property may also be taken by the
19 State or any county in excess of that needed for [~~such~~] the
20 public use in cases where small remnants would otherwise be left
21 or where other justifiable cause necessitates [~~such~~] the taking
22 to protect and preserve the contemplated improvement, or public

1 policy demands [~~such~~] the taking in connection with the
2 improvement, in which case the condemning authority may sell or
3 lease [~~such~~] the excess property, with [~~such~~] restrictions as
4 may be dictated by considerations of public policy in order to
5 protect and preserve [~~such~~] the improvements; provided that in
6 the disposal of [~~any such~~] the excess property, if [~~such~~] the
7 property [~~is less~~]:

8 (1) Is less than the minimum lot size requirements of the
9 applicable zoning regulations[~~is~~];

10 (2) Is of a configuration or topography which, in the
11 judgment of the appropriate county zoning authority,
12 cannot be put to a reasonable use in accordance with
13 the applicable zoning regulations[~~lacks~~]; or

14 (3) Lacks proper access to a street[~~lacks~~];

15 it shall be offered to the owner or owners of the abutting land
16 for a reasonable price based on an appraisal; provided further
17 that if [~~such~~] the excess property conforms to [~~said~~] the
18 minimum lot size requirements, is of a configuration and
19 topography [~~which~~] that, in the judgment of the appropriate
20 county zoning authority, can be put to a reasonable use in
21 accordance with the applicable zoning regulations and has proper



1 access to a street, then the State or the county, as the case
2 may be, may sell [~~such~~] the property at public auction.

3 (b) If there is more than one abutting owner who is
4 interested in purchasing [any ~~such~~] the excess property [~~which~~
5 ~~is~~] that

6 (1) Is less than the minimum lot size requirements of the
7 applicable zoning regulations[~~is~~];

8 (2) Is of a configuration or topography [~~which~~] that, in
9 the judgment of the appropriate county zoning
10 authority, cannot be put to a reasonable use in
11 accordance with applicable zoning regulations[~~is~~]; or
12 [~~lacks~~]

13 (3) Lacks proper access to a street[~~is~~];

14 it shall be sold by the condemning authority by sealed bid to
15 the abutting owner submitting the highest offer above the
16 appraised value; provided [~~further~~] that if [any ~~such~~] the
17 excess property abuts more than one parcel, the condemning
18 authority may make application for subdividing [~~such~~] the
19 property so that a portion thereof may be sold to each abutting
20 owner at the appraised value, if the public interest is best
21 served by [~~such~~] the subdivision and disposal.



1 All moneys received from the sale or lease of [~~such~~] the
 2 excess property shall be paid into the fund or appropriation
 3 from which money was taken for the original condemnation and
 4 shall be available for the purposes of [~~such~~] the fund or
 5 appropriation.

6 (c) For purposes of this chapter, "public use" does not
 7 include any use of property that is for urban or economic
 8 development that would result in the development of any
 9 nongovernmental retail, office, commercial, residential, or
 10 industrial development or use."

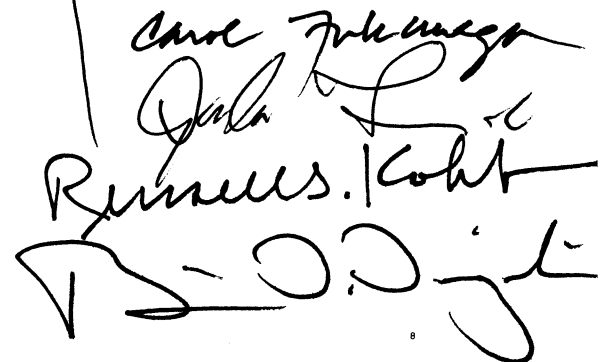
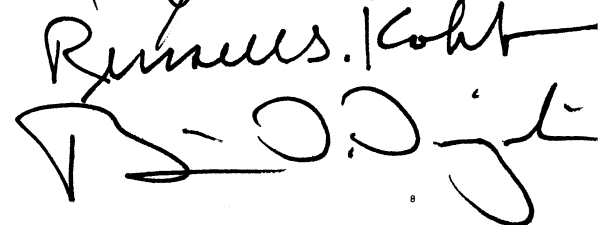
11 SECTION 4. This Act does not affect rights and duties that
 12 matured, penalties that were incurred, and proceedings that were
 13 begun, before its effective date.

14 SECTION 5. Statutory material to be repealed is bracketed
 15 and stricken. New statutory material is underscored.

16 SECTION 6. This Act shall take effect upon its approval.
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INTRODUCED BY: _____

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Report Title:

Eminent Domain; Economic Development

SB. NO. 2939

Description:

Prohibits the exercise of the powers of eminent domain by the State and counties for economic development resulting in the development of nongovernmental improvements.

