

# NATIONAL ASSOCIATION OF REALTORS<sup>®</sup>

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## WORKING PRINCIPLES ON USE OF EMINENT DOMAIN TO GUIDE STATE REALTOR<sup>®</sup> ASSOCIATIONS IN EVALUATING PROPOSED EMINENT DOMAIN LEGISLATION

### PURPOSE OF WORKING PRINCIPLES

In *Kelo et al v. City of New London*, 125 S. Ct. 2655 (2005), the United States Supreme Court upheld the use of eminent domain power by the City of New London, Connecticut, for the purpose of implementing an economic development plan for approximately 90 acres. The decision concerned the extent to which the Constitution of the United States limits governments' authority to take private property by eminent domain solely for economic development purposes without regard to whether the property is blighted. In its decision, the Court invited state legislatures to pass statutes that restrict the use of eminent domain to a greater extent than the federal Constitution does.

The legislatures in the various states have taken up the Supreme Court's invitation and are considering various legislative proposals, the majority of which are directed at restricting the factual circumstances under which eminent domain may be exercised and/or addressing such issues as factors for determining just compensation and landowner recovery of costs incurred in defending against condemnation proceedings.

The Working Principles outlined below are designed to help Realtor<sup>®</sup> associations evaluate eminent domain legislative proposals as they are introduced in their state legislatures and decide, based upon their particular state circumstances, how to position themselves with respect to the proposed legislation. For this reason, the Work Principles are grouped into two categories: (1) General Working Principles and (2) Working Principles Applicable to Use of Eminent Domain for Economic Development.

The first category includes those Principles that Realtors<sup>®</sup> should take into account in considering all types of proposed eminent domain legislation. For this reason, the Principles in this category make reference, as appropriate to the particular Principle, to local government prepared redevelopment plans.

The second category of Principles is for use by Realtors<sup>®</sup> in addressing the specific use of eminent for economic development purposes in those states where the policy position of Realtors<sup>®</sup> supports the use of eminent domain for the purpose of economic development, but with substantive and procedural restrictions designed to limit the potential for abuse

of the use of the eminent domain power in such circumstances.

Each Working Principle is followed by (1) bullet points that explain and give context to the particular Working Principle (2) a statement of rationale for the Working Principle.

## **WORKING PRINCIPLES - GENERAL**

### **PRINCIPLE NO. 1: AVOIDANCE (OF USE OF EMINENT DOMAIN)**

Require *alternatives analysis* similar to analysis required for environmental impact analysis that considers all reasonable alternatives to the use of eminent domain.

Consider all alternative approaches/tools, as appropriate, including:

- Alternative design of site plan, or location of road or infrastructure facility
- Acquisition through “voluntary” sale
- Adaptive reuse
- Tax Increment Financing (TIF)
- Tax Incentives

If use of eminent domain is for redevelopment, give the property owner the opportunity to rehabilitate property or participate in development/redevelopment.

***Rationale for Principle:*** Eminent domain should be a means of “last resort.” The National Environmental Protection Act (“NEPA”) and the Council on Environmental Quality (“CEQ”) regulations provide a model that has meaningful applicability to such an important issue as whether or not the taking of private property is necessary to achieve public benefits. By analogy to the environmental impact statement (EIS) that must be prepared by a federal agency, a local government would be required to rigorously explore and objectively evaluate all reasonable alternatives to achieving a public purpose that would “avoid” the taking of private property. The alternatives analysis would require the government’s good faith consideration of all reasonable alternatives to the use of eminent domain.

### **PRINCIPLE NO. 2: INCLUSIVE PROCESS**

Hold public hearing(s) on the avoidance analysis (required by Working Principle No. 1).

If, after public hearing(s) on the avoidance analysis of a proposed use of eminent domain, the use of eminent domain is still determined by government to be the preferred alternative, hold public hearing(s) on any revisions made to the plan for the takings of private property.

Require legislative body approval of use of eminent plan by super majority.

If use of eminent domain involves a redevelopment plan, define the legislative plan approval process as *administrative*, allowing greater judicial scrutiny of decision.

***Rationale for Principle:*** One of the objections of landowners whose properties are made the target of an eminent domain action is that the procedures required by state law are not adequate to ensure meaningful opportunity for those landowners, and citizens generally, to be heard. By tying the public hearing process to the step of reviewing the results of the avoidance analysis before an eminent domain plan is formally proposed, there is a greater opportunity for landowners and citizens to ensure that government will either avoid the use of eminent domain altogether, or revise its plan so as to minimize the use of eminent domain. Because the courts traditionally have shown great deference to “legislative” determinations of public purpose, a statutory change that expressly characterized such determinations as “administrative”— requiring findings of fact and conclusions — would allow for greater judicial scrutiny and probing of the record in each case.

### **PRINCIPLE NO. 3: (TRULY) JUST COMPENSATION**

Define just compensation to include:

- Fair market value
- Attorneys fees
- Temporary housing
- Lost business revenue
- Severance damages
- Relocation costs

*In cases of eminent domain for economic development:* Provide that just compensation include value beyond fair market value based on a reasonable percentage of the value of the future use of the property taken by eminent domain.

***Rationale for Principle:*** The rationale for this principle flows from the logic of recognizing that fair market value (based on the willing seller/willing buyer rule) is not sufficient to adequately compensate owners whose properties are condemned. NAR’s Statement on Property Rights states that “just” compensation to affected property owners should cover not only the value of the property condemned but also all other reasonable and necessary costs generated by the condemnation action. Working Principle No. 3 defines just compensation in this manner and further supports the possibility in the case of takings for economic development of an “add on” to the final just compensation figure based on the value of the future use of the condemned property.

### **PRINCIPLE NO. 4: (POST TAKING) ACCOUNTABILITY**

Public benefits identified in a proposed taking must be realized.  
Implementation of plan involving eminent domain must include mechanisms to ensure that public benefits are realized.

**Rationale for Principle:** The potential for “abuse” in the use of eminent domain is government’s failure to put in place mechanisms that ensure that there is sufficient public control to ensure that the stated public benefits will, in fact, be realized. State law should require that such mechanisms (whether by contract, public retention of fee interest or other method) be included

for the exercise of eminent domain to be valid. One other method would be to provide that if a proposed taking involves transfer of property to a private entity, and the property is not developed in accordance with the stated public purpose of the taking, the property reverts to public ownership, with the accompanying obligation to carry out the stated public purpose of the taking.

## **WORKING PRINCIPLES – ECONOMIC DEVELOPMENT**

The following Working Principles are directed specifically at existing or proposed legislation that allows for the use of eminent domain to achieve economic development purposes. As used here, the term *economic development* means the devotion of land in a community to commercial and/or industrial uses for the purpose of increasing the tax base, increasing employment, increasing tax revenues or improving the general economic health of the community.

### **PRINCIPLE NO. 1: GOVERNMENT – COMPLEMENTARY ROLE IN REAL ESTATE MARKET**

Government should not act as a public land speculator.

Government should limit its role to providing regulatory relief and infrastructure and tax incentives.

Government should intervene in the market place to assemble land only where the private market has refused to do so (e.g., “blighted” properties (properly defined – See Working Principle No. 4 below); brownfields).

**Rationale for Principle:** As professionals who play a critical role in helping to facilitate property transfers and land assembly in the real estate market, Realtors<sup>®</sup> do not want government to act as a real estate broker in the private market and use eminent domain in an attempt to achieve speculative ends. As NAR’s Position on Property Rights states, eminent domain should be used “only when necessary to materially advance a real and substantial public use,” and government should provide “persuasive, objective evidence that the project, and the resulting public use, will in fact be realized.”

However, there are circumstances (e.g., properties that are “blighted” or are brownfields), when the private market does not always act to redevelop specific parcels or assemble land, where land assembly is necessary. These are the limited circumstances when it is proper for government to use its power of eminent domain to intervene in the market to help to assemble land or provide opportunities for redevelopment of parcels so as to induce the private market to start to work again in these areas, developing property and

producing needed housing and economic activity (jobs).

**PRINCIPLE NO. 2: DEFINITION OF PUBLIC NEED**

Government should define and establish public need for a development plan through a comprehensive planning process.

The comprehensive planning process should include specific studies that document public need.

Public need should be affirmed by the local legislative body.

***Rationale for Principle:*** Comprehensive land use plans may, at times, be used by government to justify regulatory actions that Realtors<sup>®</sup> believe will negatively impact the real estate market. However, requiring that public need for a development plan be established through the public planning process is an important step that should precede any conclusions about the “public benefits” that are expected to flow from a proposed development plan. A required public process that involves preparation and scrutiny of studies that document the public need(s) that will potentially be served by a development plan will increase the likelihood that true public need(s), if any, will be identified and supported by the community. If local legislative bodies, in turn, are required to formally ratify the judgments made in the plan, the local citizens can ensure that there is political accountability to decisions that are made on the basis of the development plan that emerges from the comprehensive planning process.

**PRINCIPLE NO. 3: DEFINING PUBLIC BENEFIT**

Require analysis of all alternatives to taking of property under the development plan (based on Working Principle No. 2 above).

Require cost-benefit analysis of development plan and of possible takings of property identified in the plan.

Require that specific public benefits be identified that include more than projections of additional tax revenue.

***Rationale for Principle:*** One of the important issues raised in the *Kelo* case was how private benefit and “incidental public benefit” can meaningfully be separated. Realtors<sup>®</sup> may reasonably insist that the government identify and explain in concrete terms the public benefits that are expected to flow from a development plan. This should be done in terms of the generally well established principles and methodologies for economic impact analysis, including cost-benefit analysis and multiplier analysis. The government has the burden to make sure the record adequately explains the expected economic impacts of a development plan.

**PRINCIPLE NO. 4: MEANINGFUL DEFINITION OF BLIGHT**

Blight should be narrowly defined to include certain basic concepts such as:

Public nuisance  
Attractive nuisance  
Tax delinquency greater than property value  
Threshold standard for extent of blight required in area of multiple parcels

***Rationale for Principle:*** In the *Kelo* case, the state statute in question declared that economic development is a public purpose and authorized the use of eminent domain to achieve that purpose. Most states do not have this type of pure economic development statute. However, every state does have statutory enactments that permit the exercise of eminent domain by municipalities for the elimination of “blight,” sometimes also described as “slum clearance”. When this form of eminent domain is exercised, the condemning authority acquires private property and eliminates the blight and then must put the property to a productive use, frequently transferring the property to private developers or entities for development. The state cases that address the constitutionality of blight statutes uniformly hold that the act of elimination of blight itself constitutes a public purpose, and a public use, even though the property may ultimately be transferred to a private property owner or development entity.

Because under many state statutes the definition of blight includes vacant or unproductive property, and government may declare an area blighted that may include certain parcels that are not blighted, these statutes may result in the use of eminent domain for economic development purposes. Proposed eminent domain legislation or constitutional amendments that simply declare that eminent domain may not be used for economic development purposes, or forbid the transfer of condemned property to a private entity if the intention of the condemnation is for private economic development purposes, but do not address definitions and provisions in the existing state blight statutes, may only create more uncertainty or loopholes in the eminent domain law of the state. Realtors<sup>®</sup> should seek meaningful reform of the definition of blight under their state’s blight statutes in order to ensure that such statutes do not serve as an indirect means to achieve economic development of properties that are not truly blighted and reasonably should be excluded from any municipal economic development or redevelopment plan.