



At the Crossroads of Condemnation: *The Debate Over the Use of Eminent Domain For Private Development and Open Space*

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EXECUTIVE SUMMARY

- As Colorado moves toward a future that promises significant population growth coupled with an inevitable decline in available undeveloped land, the use of eminent domain as a development tool will become more tempting for local government officials and private corporations eager to transform Colorado's existing neighborhoods into more viable revenue sources or to protect vacant land from development through condemnation for open space.
- Any legitimate cost-benefit analysis of eminent domain must include an evaluation of its long-term implications on America's desire to promote upward class mobility. When government and corporations force people out of their homes and small businesses through eminent domain, families lose hard-earned equity from their most important investment. In this process, society loses a valuable opportunity to uplift our nation's most vulnerable, including those living in our disadvantaged, minority, and elderly communities.
- With urban renewal districts and local governments largely funded through sales tax, large lower-income residential neighborhoods are of little use to government as a viable source of income. This reality will fuel a continued push by lobbyists to allow for condemnation, even when it means the dislocation of dozens, or even thousands, of Colorado residents.
- **Colorado Citizens For Property Rights** has proposed a 2006 constitutional amendment to ban eminent domain as a "public use" when it is attempted for the purpose of an "increase in the tax base, tax revenues, employment, or general economic health".¹ **Rep. Al White**, R-Winter Park, plans to introduce a complementary referred measure, which if passed by two-thirds of the House and Senate, would also send the amendment to the November ballot.
- The 2006 legislative session promises to have many additional bills related to property rights introduced, eminent domain abuse, and private toll roads. **Rep. Cory Gardner**, R-Yuma, filed House Bill 1099, which would prevent government from taking land for economic development reasons or to transfer the land to a private party. **Rep. Lynn Hefley**, R-Colorado Springs, filed House Bill 1096, which would limit the power of eminent domain by special districts. **Tom Wiens**, R-Castle Rock, introduced Senate Bill 78, which would prohibit private developers from forcibly taking land to build a toll road. House Bill 1003, filed by **Rep. Jack Pommer**, D-Boulder, would specify requirements for private entities seeking to build a private toll road or highway. **Rep. Gwen Green**, D-Lakewood, filed House Bill 1116, which concerns a prohibition on actions to divert traffic onto toll roads from roads which do not charge tolls.
- The legislature will also likely consider during the 2006 session at least one bill that would create a workable structure for developing private toll roads or toll highways in the future, specifically utilizing the public-private partnership process to allow for the development of such roads, while still prohibiting private entities from gaining the right to condemn private property for such projects.²
- Property rights advocates are opposing a bill current in draft form by **Sen. Bob Hagedorn**, D-Aurora, which would provide vague language to the Colorado constitution that would complicate efforts to fight eminent domain abuse.

- Sheridan, a small community of 5,600 located in Arapahoe County, is home to what will likely be the defining legal battle over what constitutes an acceptable legal justification for using eminent domain for private development. Specifically, this dispute will force Colorado to decide whether a perceived potential of gains in tax revenue constitutes a “public use”, and therefore, an acceptable justification for condemning private property, under the Colorado constitution.

for the sole benefit of private development.⁵ In her dissenting opinion, **Justice Sandra Day O’Connor** wrote: “The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”⁶

- There is an ongoing debate over whether extraterritorial condemnation undertaken for the purpose of open space is legally permissible. The so-called “Telluride Amendment,” originally passed as part of a larger property rights reform package in 2004, was designed to prohibit condemnation by local governments of private property outside their jurisdictions for the sole purpose of creating open space. Shortly after its passage, however, the statutory change was ruled against by **Judge Charles R. Greenacre** of the San Miguel District Court. This court’s decision is being offered as a possible reason the City of Golden, despite the ban put in place by the legislature, is attempting to condemn extraterritorial private property for open space.³

- In June 2005, the U.S. Supreme Court held in *Kelo v. City of New London*⁴ that government is permitted to take any person’s home or property for the sole purpose of generating more tax revenue through an alternative private use, such as a business park or luxury retail development. In making this decision, the court redefined the concept of “public use” as “public purpose”, instructing that “the more natural interpretation of ‘public use’” is “public purpose”. By altering these definitions, the Court afforded great flexibility in planning and development to local government officials, opening the flood gates nationally to eminent domain

Should government be allowed to forcibly take a family’s home or small business for the sole purpose of generating greater tax revenue through an alternative private use, such as a retail development, or to prevent development of private property altogether, mandating that it instead be preserved as open space?

If Colorado is to answer this essential question—which will be posed before legislators and voters in 2006—it must decide which is more important: protecting the right to own and use private property for all citizens, even when such a decision might mean less tax revenue to line government coffers, or conversely, generating money and aesthetic improvements for our local communities, even when it comes at the expense of constitutionally protected property rights?

The purpose of this Issue Paper is two-fold: First, it is to provide a well-rounded analysis on issues surrounding the current debate over the use of eminent domain for private development or open space. Second, it is to provide data and specific examples of current and recent projects across Colorado that have displaced small business owners and families to make way for open space or private developments perceived to have a greater ability to generate tax revenue. The cases mentioned in this report are not intended to be exhaustive. Rather, they have been selected for their ability to highlight a diversity of key legal challenges and issues relating to eminent domain and economic development. As such, each case can represent dozens of similar cases across the state or around the nation.⁷

As Colorado moves toward a future that promises significant population growth coupled with an inevitable decline in available undeveloped land, the use of eminent domain as a development tool will only become more tempting for local government officials eager to transform Colorado’s existing neighborhoods into more viable revenue sources. Any legitimate cost-benefit analysis of this issue must include an evaluation of its long-term implications on America’s desire to promote upward

class mobility. When government and corporations force people out of their homes and small businesses through eminent domain, families lose hard-earned equity from their most important investment. In this process, society loses a valuable opportunity to uplift our nation’s most vulnerable, including those living in our disadvantaged, minority, and elderly communities.

KELO’S IMPACT ON COLORADO

America’s commitment to property rights first was spelled out in the Fifth Amendment to the U.S. Constitution, with the declaration that private property shall not “be taken for public use, without just compensation.”⁸ The U.S. Supreme Court, in its 1876 *Kohl v. United States* decision, also laid a strong foundation for property rights by adopting a strict interpretation of public use and defining the power of eminent domain as “a right belonging to a sovereignty to take private property for its own public uses, and not for those of another.”⁹

This tradition continued in American jurisprudence until the mid-Twentieth Century, when courts began permitting the use of eminent domain for “slum clearance.”¹⁰ Court decisions over the next five decades endorsed the practice of defining poorer neighborhoods as “blight”, and as such, allowed for their clearance through eminent domain with the transfer of such property to another private owner.¹¹

In June 2005, a slim 5-4 majority of the U.S. Supreme Court held in *Kelo v. City of New London*¹² that government is permitted to take any person’s home or property for the sole purpose of generating more tax revenue through an alternative private use, such as a business park or luxury retail development.

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The Court's decision specifically upheld the City of New London's redevelopment plan, which displaced more than a dozen homeowners to make way for a massive private development that had no other "public use" than the potential to generate more tax revenue for the city. In making this decision, the court redefined the concept of "public use" as "public purpose", instructing that "the more natural interpretation of public use" is "public purpose". In writing for the majority, Justice Paul Stevens further determined that no proof was necessary that the proposed project would actually provide greater revenue than the homes it was replacing.

By transforming "public use" to mean "public purpose", the Court afforded great flexibility in planning and development to local government officials, opening the flood gates nationally to eminent domain for the sole benefit of private development.

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The implications of *Kelo* should not be underestimated. According to a September 2005 report issued by the Institute for Justice, the nationally recognized public-interest law firm that argued the *Kelo* case on behalf of the affected homeowners: "The decision represents a severe threat to the security of all home and business owners in the country. Not only does it give legal sanction to a whole category of condemnations that were previously in legal doubt, but it actually encourages the replacement of lower income residents and businesses with richer homeowners and fancier businesses."¹⁴

PROPERTY RIGHTS IN COLORADO: WHAT THE COURTS AND LEGISLATURE SAY

Colorado's constitution provides that "private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes, or ditches on or across the lands of others, for agricultural, domestic or sanitary purposes."¹⁵ It also articulates that "Private property shall not be taken or damaged, for public or private use, without just compensation."¹⁶

The Colorado Urban Renewal Law allows local urban renewal agencies to take and transfer property ownership only in designated "slum" or "blighted" areas for the purposes of "urban renewal" but not based on a property's "economic performance". According to this statute, a "blighted area" is defined as one that "in its present conditions and use . . . substantially impairs or arrests the sound growth of the municipality . . . or constitutes an economic or social liability."¹⁷

Public outcry over abuse of this statute, as evidenced by many of the cases included in this Issue Paper, has prompted significant legislative action in recent years. From 1999 to 2004, the Colorado General Assembly passed into law a series of reforms that together offer an important first step toward adequate protections.

The most significant reform measure passed, House Bill 1203, was sponsored by then-Representative Shawn Mitchell, R-Broomfield in 2004. The bill amended the standards necessary for designating property as "blighted", requiring the government to satisfy at least four of the following ten often duplicitous factors:

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- (a) Slum, deteriorated, or deteriorating structures;
- (b) Predominance of defective or inadequate street layout;
- (c) Faulty lot layout in relation to size, adequacy, accessibility, or usefulness;
- (d) Unsanitary or unsafe conditions;
- (e) Deterioration of site or other improvements;
- (f) Unusual topography or inadequate public improvements or utilities;
- (g) Defective or unusual conditions of title rendering the title non-marketable;
- (h) The existence of conditions that endanger life or property by fire or other causes;
- (i) Buildings that are unsafe or unhealthy for persons to live or work in because of building code violations, dilapidation, deterioration, defective design, physical construction, or faulty or inadequate facilities;
- (j) Environmental contamination of buildings or property;
- (k) The existence of health, safety, or welfare factors requiring high levels of municipal services or substantial physical underutilization or vacancy of sites, buildings, or other improvements.¹⁸

In addition to being required to meet the above standards, the government now must hold a series of public hearings on whether to allow a condemnation, and ultimately must base its final decision solely on the condition of each property in question, and not, as previously stated, on its economic performance.

Also required is the reimbursement of reasonable attorney's fees to property owners facing condemnation, as well as the prohibition of condemnation of extraterritorial property for the purposes of parks or open space. This prohibition, approved by the legislature through the so-called "Telluride Amendment" was one of the most contentious points of debate in the entire 2004 legislative session.¹⁹

"The constitution says you can't choke the ability of local municipalities to access essential services

like roads, power and water," Rep. Bill Cadman, R-Colorado Springs, a sponsor of the bill, said at the time. "It doesn't say you can steal someone's land because you want to have a pretty park that buffers between you and the next guy who wants to put in some sort of development."²⁰

2004 also brought a significant court victory for those opposed to eminent domain for private development, when in March, the Colorado Supreme Court overruled the Arvada Urban Renewal Authority's attempts to condemn and transfer ownership of a privately-owned lake to a private developer, who wanted to fill it in to make way for a proposed Wal-Mart parking lot.

The Court based its decision on the fact that Columbine Lake, located in the Arvada Urban Renewal District, had already been redeveloped according to the agency's plan and was no longer "slum" or "blighted".²¹ This case was a major catalyst in pushing the above mentioned legislative reforms, specifically the addition to statute that economic performance cannot be made a consideration in determining whether to blight a specific property.

In the years previous to this decision, courts had offered mixed responses with regard to protections for Colorado property owners. While the federal Public Use Clause gives deference to legislative declarations of "public use", the Colorado constitution does not, and in fact, includes an explicit requirement that "public use" be determined judicially. According to Carolynne White of Brownstein, Hyatt & Farber, a Denver-based law firm, Colorado courts have generally "applied a broad view of what constitutes a valid public use. However, if the primary purpose underlying a condemnation is to advance private interests, the existence of an incidental public benefit does not prevent a court from invalidating a condemning

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authority's determination that a particular acquisition is necessary for a public use."²²

In Brownstein, Hyatt & Farber's guide to understanding urban renewal in Colorado, White specifically points to *Denver West Metropolitan District v. Geudner*, where the property owners succeeded in defeating condemnation of their property by a metropolitan district for the purported purpose of relocating a flood control ditch. "Applying the 'primary purpose' test, the appellate court concluded that the 'essential purpose underlying the District's decision to condemn... was to assist (the Corporation) in concluding a commercial transaction and thereby advance the private interests of the District's officers,'" White notes.²³

The Colorado Supreme Court, however, as White points out, ruled in favor of transferring property to private developers in *Rabinoff v. Denver District Court*²⁴, finding that if condemnation is necessary to eliminate "blight" or "slum" conditions, then the subsequent transfer of such private property to a

private developer does not violate Colorado's "public use" constitutional mandate.

In *Rabinoff*, the Court rejected the landowners' argument that "the condemnation of their property for urban renewal purposes did not satisfy the public use requirement since the property taken would be resold to private developers."

Finding that there was a valid public purpose for the condemnation, the Supreme Court explained that "we do not consider the actual use by the public after the taking to be an appropriate test as to whether the

use is a public one. The main object of (the Urban Renewal Act) is to eliminate slum and blighted areas. . .The acquisition and transfer to private

properties is a mere incident of the chief purpose of the act which is rehabilitation of the area."²⁵

In addition to an ongoing dialogue over what constitutes "public use" in Colorado, there is also a debate over whether extraterritorial condemnation undertaken for the purpose of open space is legally permissible, with the 2004 so-called "Telluride Amendment" now the source of legal challenges in at least two municipalities, Telluride and Golden. The amendment, originally passed as part of a larger property rights reform package, was designed to prohibit condemnation by local governments of private property outside their jurisdictions for the sole purpose of creating open space. Shortly after its passage, however, the statutory change was ruled against by Judge Charles R. Greenacre of the San Miguel District Court.

This court's decision is being offered as a possible explanation of why the City of Golden, despite the ban put in place by the legislature, is attempting to condemn extraterritorial private property at a cost of \$1.7 million to taxpayers for open space.

If these past and current cases are an example of what will be seen in Colorado's future, property rights in the aftermath of the U.S. Supreme Court's *Kelo* decision will inevitably be defined by conflicting legal responses to the important questions concerning what constitutes a public use, whether condemned property can be transferred to private developers for the sole purpose of generating additional tax revenue, and finally, whether local municipalities can condemn private property outside of their jurisdictions for the sole purpose of designating it as open space.

With urban renewal districts and local governments largely funded through sales tax, however, one constant is certain: large lower-income residential

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neighborhoods remain of little use to government as a viable source of income streams. This reality will fuel a continued push by lobbyists to allow for condemnation, even when it means the dislocation of dozens, or even thousands, of Colorado residents through the elimination of their property rights.²⁶

CONDEMNATION BY INTIMIDATION

According to the Colorado Court Administrator's Office, 1081 condemnation lawsuits were filed between 1999 and 2005 across Colorado, with 97 of these filed in 2005.²⁷ These numbers do not tell the full story of eminent domain use in Colorado, however. When faced with the prospect of condemnation, many homeowners surrender or sell

out for an unfairly low price without ever taking their cases through formal condemnation proceedings because they simply do not have the financial or emotional resources necessary to fight the drawn out legal battles that often define such interactions with government.

Statistics concerning this process of "condemnation by intimidation" are nearly impossible to find, as its silent victims are forced out of the communities where they live and contact information is extremely limited. The Institute for Justice, however, estimates that between 1998 and 2002, there were more than 10,000 condemnations filed or threatened on behalf of private entities across the nation.²⁸

Roxie Sorrentino, an elderly former Arvada resident was one victim of "condemnation by intimidation."

Sorrentino was forced out of his home through the threat of condemnation by the Arvada Urban Renewal Authority, when it stated in 2000 that it would attempt to purchase Sorrentino's home, along with 31 other properties, but threatened

condemnation if any of the purchase price requests were too high. Sorrentino and his wife, like many faced with this threat, hired an attorney but ended up selling and moving to avoid the cost of litigation and the potential of losing their home at an even lower price after a prolonged legal wrangle.²⁹ Today, the site where his home, the 31 others, and 220 rental units once sat, is a private retail and residential development that includes lofts selling for up to \$250,000.³⁰

"If we hadn't moved out, they would have sued us," he told *Denver Post* reporter Alicia Caldwell in 2003. "With eminent domain, they have the power to do whatever they'd like to do."³¹ Arvada Urban Renewal Authority Director Tim Steinhaus articulated the city's response to Sorrentino's view, saying, "he ended up a hell of a lot better off than he was."

For Sorrentino, forced out of the house he had called home his entire life, having a bigger house in a nicer neighborhood was unimportant. The old house had been in the Sorrentino family for two generations, with Sorrentino and his wife raising their family and an extensive vegetable garden there.³²

2006 LEGISLATIVE SESSION & BEYOND

In the aftermath of the U.S. Supreme Court's 2005 decision in *Kelo v. City of New London*, the continued battle over property rights promises to be at the public forefront in coming years. According to Colorado's Office of Legislative Legal Services, the court's decision does not limit lawmakers and public officials from implementing a legislative or policy response if they should so choose: "In its (*Kelo*) decision, the Supreme Court made a point of noting that individual states are free to place further restrictions on the manner in which the takings power is exercised in each state as a matter of state constitutional or statutory law."³³

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Across the United States, more than 30 state legislatures have already attempted—and some have passed—reform measures in response to the controversial decision.

- Colorado Citizens For Property Rights, a diverse coalition that includes rural ranchers and urban small business owners has banded together to propose a ballot initiative, if passed by voters in November 2006, will add language in the constitution to ban the practice of removing Colorado residents from their homes and property to make way for alternative private developments that have the potential to generate more tax revenue, specifically banning eminent domain as a “public use” when it is attempted for the purpose of an “increase in the tax base, tax revenues, employment, or general economic health”. CCPR members are currently in the process of gathering the required signatures to gain final approval of the initiative from the Colorado Secretary of State.³⁴

- In addition to this initiative, Rep. Al White, R-Winter Park, plans to introduce in the 2006 legislative session a complementary referred measure, which if passed by two-thirds of the House and Senate, would send the amendment to the November ballot.
- Early in the 2006 legislative session, several lawmakers introduced bills geared toward curbing eminent domain abuse. Rep. Cory Gardner, R-Yuma, filed House Bill 1099, which would prevent governments from taking land for economic development reasons or to transfer the land to a private party.

“Colorado law must make it clear that *Kelo* reasoning will not be grounds for taking private property,” said Gardner. “We must protect our private property rights and restore the basic fundamentals of our Constitution.

If we don’t stop the abuse of private property now, what is to prevent the Courts from taking other property, such as water?”³⁵

- Rep. Lynn Hefley, R-Colorado Springs, filed House Bill 1096, which would limit the power of eminent domain by special districts.³⁶
- Senate Bill 78 would prohibit private developers from forcibly taking land to build a toll road such as the controversial “Super Slab,” a private toll road that would run from Fort Collins to Pueblo.³⁷ Sen. Tom Wiens, R-Castle Rock, made good on his promise to bring the bill back after it was passed in the 2005 session but vetoed by Governor Bill Owens. “Senate Bill 78 would make it clear that one private company cannot condemn the property of a Colorado citizen to build a private toll road for its own profit,” said Wiens.³⁸
- At least two other bills will be considered in the 2006 session that address concerns about private toll roads, including House Bill 1003, filed by Rep. Jack Pommer, D-Boulder, which would specify requirements for private entities seeking to build a private toll road or highway. Rep. Gwen Green, D-Lakewood, filed House Bill 1116, which concerns a prohibition on actions to divert traffic onto toll roads from road which do not charge tolls.
- The legislature also will likely consider during the 2006 session at least one bill that would work to achieve a feasible structure for developing private toll roads or toll highways in the future, specifically utilizing the public-private partnership process to allow for the development of such roads, while still prohibiting private entities from gaining the right to condemn private property for such projects.³⁹
- As of January 2006, the Colorado Municipal League, traditionally an active opponent of

efforts to curb eminent domain abuse, had not actively opposed CCPR's initiative or White's referred measure. It is anticipated, however, that CML will likely lend its support to a bill introduced by Sen. Bob Hagedorn, D-Aurora, which would provide vague language to the Colorado constitution allowing for condemnation tied to "economic development" and to "prevent the development of or to eliminate dilapidated or blighted areas as provided under the law."⁴⁰

EMINENT DOMAIN FOR PRIVATE GAIN AND OPEN SPACE ACROSS COLORADO

Sheridan

Sheridan, a small community of 5,600 located in Arapahoe County, is home to what will likely be the defining legal battle over what constitutes an acceptable legal justification for using eminent domain for private development. Specifically, this dispute will force Colorado to decide whether the forced transfer of private property to another private entity for the purpose of generating more tax revenue constitutes "a public" use under the Colorado constitution.

Sheridan residents face a situation typical of what is occurring in many struggling Colorado towns and cities. A decline in sales tax revenue due to a major retailer's departure in 1997 led to the loss of the city's municipal building, and in response, city leaders created the Sheridan Redevelopment Agency, aggressively sought redevelopment opportunities

to generate additional tax revenue, and turned to condemnation of existing businesses to make way for

a private redevelopment project perceived to have the ability to generate greater tax revenue.⁴¹

According to the Mountain States Legal Foundation, the non-profit public interest law firm representing one business targeted for condemnation, Sheridan completed a blight study in 2003 and when creating the SRA, several municipal officials named themselves as the agency's commissioners. Once established, the SRA put a moratorium on building in the "blighted area" and in December of that year, it adopted a "South Santa Fe Drive Corridor Redevelopment Plan."

In January 2004, Sheridan issued a request for proposals for redevelopment of the area, largely comprised of storage facilities and used car lots, and referred to by city officials as "a drag on progress," with Sheridan Mayor Mary Carter telling *The Denver Post* that she only wants to alleviate such conditions, "If you had a dump in your backyard, wouldn't you try to do something about it? That is all I'm trying to do."⁴²

In June 2004, the city awarded the project to the same developer it had begun negotiating with in 2002. And in 2005, Sheridan adopted a development plan that required the removal of existing businesses, subsequently notifying Lochness Properties, MSLF's client, of its intent to condemn its property.

In late 2005, Lochness fought back, responding by filing a complaint against members of the Sheridan City Council and the city's redevelopment agency.⁴³ In its suit, Lochness charges that municipal officials "engineered a citizen petition for the creation of its redevelopment agency, ordered a dubious blight study, and formed an illegal redevelopment authority, all as part of a revenue-enhancing development scheme."

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Lochness says the project was designed specifically to benefit Miller-Weingarten, the development firm selected by Sheridan for the project. This firm, Lockness alleges, originally proposed a “revenue-enhancing, retail development” to city officials in October 2002. Lochness further alleges that Sheridan’s actual purpose for condemning its

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property was “not blight removal” but the advancement of “private interests,” in violation of state law. Miller-Weingarten ended up being the only bidder on the project—in part—Lochness says, because the notice period was very brief.⁴⁴

Lochness also asserts that “Sheridan’s actions violate the Colorado constitution’s ban on ‘takings’ for ‘private use’ and its procedural requirements, the U.S. Constitution’s ‘due process’ requirements, and Colorado statutory requirements

regarding notice, agency composition, competitive bidding and selection, and condemnation powers.”⁴⁵

Lochness is just one of 50 businesses that could be adversely affected by the city’s redevelopment goals. Others have expressed serious concern about the way the city and its redevelopment authority conducted themselves, alleging that officials waited to discuss the proposal with business owners until it was a done deal.

“What surprises me,” Marie Pierce, who owns Pro Flooring Brokers with her husband, raised the following question at a public forum: “How did these developers even know about our land without an insider?” She concluded, “there is somebody under the table doing things. I think it is totally unethical and totally wrong.”⁴⁶

Carter responded by saying any soliciting by a developer before then was speculative and “not a big deal,” adding that city leaders have gone beyond any legal requirements to keep residents informed.⁴⁷

According to Carter, every step made by Sheridan was public knowledge, including the formation of Sheridan’s urban renewal authority, its blight survey, and its meetings regarding the creation of an urban renewal area. If property owners were not paying attention, “that is not our problem. Some of the owners have said we should have done more outreach,” she said. “Government doesn’t always (do) outreach -- the property in question is getting worse, not better.”⁴⁸

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“This is precisely one of the issues — one of the abuses — that was identified and which the legislature was trying to address,” said Hale, who represents several of the Santa Fe landowners in Sheridan. “It is a charade ... when somebody else has already been dealing with the condemning authority for a year.”⁴⁹

Hale said this case could serve as a catalyst for tougher legislation, as evidenced by the plethora of bills introduced in the 2006 legislative session geared toward curbing eminent domain abuse.

“If these guys continue to engage in this blatant abuse, the only remedy is going to be to come back and strip the condemnation power out of the eminent domain statute,” he said.⁵⁰

Golden

Billed by the *Rocky Mountain News* in December 2005 as “one of the most remarkable abuses of eminent-domain power in recent state history,” Golden’s newly announced plan to forcibly acquire 65 acres of land outside of its jurisdiction raises serious questions about the ability of

local governments to conduct extraterritorial condemnation for the purpose of expanding open space.⁵¹

The property in question is owned by the Lake Cedar Group, a consortium of local television stations, and currently houses four broadcast towers. According to Golden Spokeswoman Sabrina Henderson, the city wants to acquire the land at a cost of \$1.7 million to taxpayers, demolish the existing towers, and turn the land into open space so the city can maintain the mountain backdrop—a move she claims has been the city’s intention for several years.⁵²

The city’s announcement comes on the heels of the consortium’s seven-year attempt to obtain zoning approval from the Jefferson County Board of Commissioners for the replacement of the existing broadcast towers and transmitters with a single consolidated digital tower and building. According to Lake Cedar, the process has been marred by turnover on the board, political opposition from local activists, and confusion surrounding federal telecommunications mandates.⁵³

Unfortunately, due to Denver’s unique geography, Lake Cedar says the location on Lookout Mountain presents the only viable place in Denver to build the high definition broadcast tower required to be functioning by 2009 under Federal Communications Commission standards. The new tower would be 100 feet shorter than the tallest tower that would be removed, it would decrease radio frequency levels on the mountain from what is emitted currently from the existing towers, and the new tower would be placed 130 farther down slope. As a result, the tower would be far less visible than the existing towers as part of the mountain backdrop.⁵⁴

As a condition of its ongoing quest for zoning approval in Jefferson County, Lake Cedar has committed in writing to return the approximately 73.5 acres of land on which the existing towers stand to a natural state once the towers are removed. The consortium has also committed to maintain that land

as open space, meaning that Golden’s \$1.7 million offer for 65 acres of open space could be achieved by Lake Cedar’s commitment to create 70 acres of open space in the same location at no cost to the City of Golden.

“It is a waste of taxpayer money to spend a million and a half dollars to acquire open space when comparable open space can be obtained and maintained at absolutely no cost to the taxpayer,” noted Marv Rockford, principal of Rockford Gray, a media relations firm that represents the Lake Cedar Group.⁵⁵

If Golden is successful in condemning the property on which the consolidated tower would be built, the Lake Cedar stations say they will have no choice but to continue to operate from their existing towers, and the residents of Golden, Lookout Mountain, and Jefferson County would not realize any of the benefits of consolidation.

The outcome of this case could have important implications for municipalities across Colorado. In 2004, the legislature passed House Bill 1203, which included the so-called “Telluride Amendment”. This statutory change prohibits local municipalities from condemning land outside of their jurisdiction for the purpose of creating open space. An ongoing legal challenge to this new law in Telluride has brought the statute into question, lending credence to Golden’s efforts. Together, the outcome of these two cases could abolish for all intents and purposes the implementation of the amendment.⁵⁶

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Arvada

Located nine miles from downtown Denver in Jefferson County, Arvada is a bustling community of more than 100,000 residents. One of Colorado's oldest cities, it is almost entirely built out, with expansion opportunities largely limited to in-fill developments. This set of conditions has set the stage for several of Colorado's most contentious property rights battles in recent years.

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In 2004, Arvada drew the national spotlight, including an article in *USA Today*, when the Colorado Supreme Court ruled against the Arvada Urban Renewal Authority in its effort to condemn and pave over a privately-owned lake to make way for a proposed Wal-Mart parking lot. The fight against the proposed condemnation was fueled by a unique coalition that included union members, libertarians, working families, and small business owners.⁵⁷

In its ruling, the Supreme Court expressed concern with the extent of power AURA claimed to have, citing

the testimony of AURA Executive Director Tim Steinhaus, where he said he believed the renewal authority could “go in and buy up any property within the project area and... go in and condemn any property in the project area, no matter what the condition is and no matter if it had just been built.”⁵⁸

The Court also condemned Steinhaus' comments that the authority could condemn a property simply because the authority was dissatisfied with a retailer's economic performance. The Court wrote: “This characterization far exceeds an urban renewal authority's power to act pursuant to a municipality's initial blight determination.”⁵⁹

The Court's decision was significant because it addressed the power held by urban renewal authorities, and specifically whether they can condemn portions of urban renewal districts where blight was previously cured, as was the case of Columbine Lake, where urban renewal plans had already addressed blight conditions years earlier. The Court clearly ruled that authorities cannot condemn specific properties if blight has already been remediated.⁶⁰

The southeast Arvada neighborhood that was home to the lake had, in fact, undergone dramatic urban renewal efforts in the two decades previous to the court's decision, with a nearby water tower became the lightning rod for another contentious property rights battle.

Already blighted as part of the original Arvada Urban Renewal Area, the “Water Tower” neighborhood just west of Wadsworth Boulevard and south of Grandview in “Olde Town” was targeted by AURA with a plan for upscale residential development in 2000. According to one of the citizen groups protesting the plan, the area contained 220 rental units and 32 homes, with approximately 500 to 600 residents, including Roxie Sorrentino, mentioned previously in this Issue Paper as a victim of “condemnation by intimidation”. In early 2000, AURA stated that it would attempt to purchase the properties, but threatened condemnation if any of the sale price requests were too high.⁶¹

Efforts were made to confirm sale dates and prices of the targeted homes, but they were not accessible from the Jefferson County Assessor's Property Search Database. The assessed values were obtained, however, with a total value of homes, businesses, and rental units lost to the project

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estimated to have a value of approximately \$10 million in 2003 dollars.⁶²

The threatened condemnations also drew national attention, and were mentioned in “Public Power, Private Gain,” a report issued by the Castle Coalition, a national property rights organization housed at the Institute for Justice. Local activists

worked aggressively to fight the proposed takeover, but failed in spite of their extensive grassroots campaign and a letter writing effort to legislators from hundreds of local residents.⁶³

The report stated that “although news reports do not indicate how many homes Arvada actually condemned, a letter to the editor a few months after the project was taken indicates that houses were condemned and demolition had begun.”⁶⁴ Arvada authorities assert that not a single home was condemned. According

to AURA Chairman John Boettiger, only two petitions for condemnation were filed, one involving vacant land. “Neither went to trial as AURA and the owners ultimately agreed on a fair price. All other sales were negotiated. The prices paid for the private dwellings were well within, or above market prices.”⁶⁵

For one business owner whose business was located just north of the Water Tower, condemnation destroyed his entire livelihood when his business was condemned. According to Boettiger, this property, commonly referred to as the “Old Carpet Exchange” was the only one condemned by AURA for the new development. Boettiger said this happened “only because of unreasonable owner valuation.”⁶⁶ In other words, the owner was not willing to sell at the price AURA was offering. The property’s owner, Paul Kozik, was unwilling because he was satisfied with his functional operation which brought in \$8,000 in rent per month from his tenant, Carpet Exchange.

Prior to the property’s completed condemnation in 2004, 70-year-old Kozik owned it for nearly 30 years.⁶⁷ In court filings, Kozik contended that Steinhaus told Kozik’s tenant that government purchase of the building was a “done deal” and its destruction was imminent. Steinhaus denies the allegations.⁶⁸

In an Arvada Sentinel article, Bruce Odette, president of the Carpet Exchange, offered his memory of the alleged incident. Odette testified in court “that he did not want to move but that he was part of AURA’s urban demolition program.” Odette said Steinhaus approached him, saying AURA was going to obtain the property and that he should plan accordingly. “He told me that he was giving me a heads up,” Odette testified. “He said it was a done deal and that the building was going to be demolished.”⁶⁹

Elaine Kanatzar, owner of Arvada Stationary on the corner opposite Kozik’s property confirmed a similar story, saying Steinhaus also approached her and referred to the land acquisition as “a done deal.”⁷⁰

Due to the threat of condemnation, the Carpet Exchange ultimately moved to Westminster. From 2001, when the tenants say they were advised by Steinhaus of the proposed condemnation, and 2004, when AURA ultimately took possession of the property, Kozik lost more than 36 months of income, amounting to at least \$288,000 in rent, not including lost sales tax revenue.⁷¹

“They took my livelihood away from me. It’s just the way they operate,” Kozik told the *Arvada Sentinel*. “Somebody has got to stop these people because they are out of control. They think they can do anything because they have their powers. They can take private

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Local activists worked aggressively to fight the proposed takeover, but failed in spite of their extensive grassroots campaign and a letter writing effort to legislators from hundreds of local residents.

property away from a private citizen and give it to another private developer.”⁷²

Currently, where Kozik’s building once sat, is a vacant parking lot with a large sign advertising development opportunities. No sales tax revenue has come from the property since 2000—when Odette says Carpet Exchange was told to leave.

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By October 2003, the Arvada City Council had already moved onto a new development opportunity, unanimously approving a 25-year urban renewal plan to “enhance, redevelop, and revitalize the three major areas that encompass the Ralston Fields district—the former Ridge Home site; the ‘dated’ shopping centers in the vicinity of 58th Avenue and Independence, and the Lutz/Stenger Sports Complex.”

The district stretches from south of Ridge Road to northeast of West 58th Avenue and Garrison Street. It also includes Arvada’s Community Gardens, a public commune where community members come together to grow vegetables and other plants, and the Arvada Plaza, an older shopping center with several small businesses.⁷³

While this urban renewal district, the city’s third, was passed unanimously by the council, not all members were confident about its long term sustainability, with the question never going to the vote of the people. Coverage in the *Arvada Sentinel* noted “[A]lthough Councilmember Aaron Azari said he was in favor of the district, he voiced many misgivings about the vague nature of what he sees as an investment on the part of the city. ‘I just think it’s important to stress-test this financially.’”⁷⁴

The city released a conceptual redevelopment plan for the district in 2003, noting that the final design approval had yet to be granted. The initial design, however, offered sweeping changes for the rundown

Arvada Plaza, noting that AURA’s goal for the area included creating “an attractive, pedestrian-oriented village center. . . a more compact, walkable retail district.” The plan also asserted that “through conversion of some retail property to residential development opportunities, the Triangle can be woven into the neighborhood and additional market for the retail area can be created. Mixed income and affordable housing will be part of the development concept.”⁷⁵ No condemnations had been formally filed in pursuit of this project as of January 2006, although small businesses face the threat in the future.

“In all likelihood a substantial number of the tenants in the Arvada Plaza will be forced to close their doors for good so you’re not just talking about their property rights, you’re talking about the devastation of entire lives,” said one local commercial real estate broker who declined to have his name used for fear of what he said would be retribution from the city council. “These are businesses that provide essential necessities for the community; they have fixed costs and wouldn’t be able to afford the rent of more expensive retail centers.”⁷⁶

Over the last several years, residents affected by various AURA projects have raised questions about the ethics of its executive director and board members.⁷⁷ A lack of oversight and extravagant spending were the source of a KCNC CBS 4 investigation in October 2005 by reporter Brian Maass. Maass’ investigation found that Steinhaus and his seven-member board spent about \$160,000 on travel, training, meals, and retreats from 2002 to 2004, far above what any other Colorado authority investigated had spent.⁷⁸

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Officials initially discounted the significance of the spending reports, saying the costs were justified given improvements made on behalf of the city by

that board that officials say have increased Arvada's tax revenues by \$10 million annually.

One dinner attended by the board and two staff members during a 2005 trip to a conference in Las Vegas saw the tab reach \$2,305.43, or more than \$200 per person. John Boettiger, chairman of the authority's board, who attended the dinner, defended the expense. "It's not like it used to be in Las Vegas," he said. "It's expensive to eat there." Steinhaus, who was also at the dinner, said the restaurant was across the street from their hotel. "So it's convenient to walk across the street to that restaurant," he said. "It doesn't cost us any taxi money." Two nights later, Steinhaus and six board members ate at Drai's on the Strip, ringing up a bill of \$721.⁷⁹

The group routinely charges taxpayers for out-of-town dinners that cost more than \$100 per person, and some that soared to more than \$200 for each diner. On a trip to New York last year

for a conference, Steinhaus, five board members and a developer had dinner at Sparks Steak House. That dinner cost Arvada taxpayers \$1,503, or about \$220 per person. "It's very expensive in New York," said Steinhaus.

The agency, which has four paid staff members, in addition to the volunteer board appointed by the mayor and City Council, spent about \$64,000 traveling to conferences and eating

and drinking in restaurants in 2004. Steinhaus and Boettiger conceded that the consumption of alcohol, which Boettiger said happens "frequently" at authority dinners, might be driving up the cost of these meals. "We have no prohibition against that," he said.⁸⁰

KCNC and Maass also found records showing that for the past three years, executive director Steinhaus and the board members dine out twice a month after board meetings. They frequently go to Luke's,

a steakhouse in Wheat Ridge, where a 20-ounce Porterhouse steak is \$27.95 and a 13-ounce filet mignon runs \$31.95. Those dinner tabs - including drinks and wine - have typically run between \$400 and \$600 for six to eight people. In 2003, the board held its Christmas dinner at The Capital Grille, an elegant Larimer Square restaurant. For the board, four staff members and spouses, the cost was \$4,663.67. The tip alone was \$711.41, according to Maass and KCNC.⁸¹

"It's a glaring problem and a fault and a mistake," said Council member Steve Urban. He attended the Las Vegas conference and dinner at Alize, but told KCNC that he was largely unaware of the way taxpayer dollars had been spent. "You need to correct it and everyone is in agreement." Urban said when he found out about the \$2,305 Alize bill, he voiced his concerns to Steinhaus, however, but did not pay for his own dinner.⁸²

Aurora

Aurora small business owners have found their livelihood under continued attack in recent years by city planners seeking to turn the working class neighborhood surrounding East Colfax and the new \$4 billion health sciences center at Fitzsimons Hospital into a posh, more lucrative development.

Buzz Kilker and his wife, Shirley, faced years of condemnation threats to their family business, Buzz's Auto Body. The 17-year-old business is located two blocks off Peoria on 14th Avenue. "For six years, we went through hell," Buzz said. "After all the waiting and waiting, we had no choice but to start fighting back. We had to let people know that this just isn't right."⁸³

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The Kilkers and several other property owners in the 17-acre urban renewal district say they were treated poorly by the city and were pressured to take low-ball offers for their properties.

John Dare, who owns an auto repair service, told *The Denver Post* in 2004 that the city's selected developer for the project, Daniel Yacovetta, offered him only 40 percent of what it would cost to buy another property and move. Dare also said he resented how he was treated. "(Yacovetta) walked up and sort of tossed his card down and started

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talking about it in front of my customers and employees," he told Caldwell. "What he's said is that we'd better sign or he's going to take (the property) away."⁸⁴

Yacovetta is a partner with grocery plaza developer Regency Centers, a national owner, operator and developer of neighborhood-based retail centers, with more than 265 retail centers across the country and assets of more than \$3 billion.

James Gray, co-owner of a fire sprinkler business, also told *The Denver Post* that he was low-balled with an offer with hidden and objectionable details, including a 3 percent real estate fee, no allocation for his moving expenses, and a clause allowing the buyer 18 months to close the sale. "It was ridiculous," he said. Kilker was offered \$225,000 for his 3,400-square-foot building on three-fourths of an acre, an offer that was far too low, he said. The Kilkers own the property outright and plan to use it as their retirement nest egg. "You just don't think something like this can be done in a free country, that everything you've worked your whole life for can be taken from you, including your business that you bought and paid for, and that you can be given peanuts for all of it," he added.⁸⁵

City officials openly admitted in 2004 that the project would not work without the power to forcibly remove small businesses. Without the power of eminent domain, they told reporters, redevelopment of the surrounding residential and business areas wouldn't work. "There won't be a revitalization of the area," Dianne Truwe, Aurora's director of development services told *The Denver Post*, adding that the economics of the deal weren't attractive to developers without government help.⁸⁶

The city estimated it would cost \$18 million to assemble the 34 properties that Yacovetta and Regency were attempting to buy. But those same estimates show that a developer would be able to afford to pay only \$5 million to make the project financially feasible, Truwe said. "How can you ever get a developer to go out there and assemble that when they're \$13 million in the hole before they even begin construction?" she added.⁸⁷

Fortunately for Kilker, Gray, Dare, and other property owners in the area, the project fell through in 2005 when the city abandoned the project due to rising costs and controversy. Interestingly, Regency did not abandon redevelopment plans in the area, and in fact, in late 2005, the company again approached property owners, including Kilker, about selling their properties to the corporation.

Fortunately for Kilker, Gray, Dare, and other property owners in the area, the project fell through in 2005 when the city abandoned the project due to rising costs and controversy.

According to Buzz Kilker, he and his wife were given a written offer of almost double the first offer made under the threat of eminent domain. "It's amazing what happens when the free market is forced to work," Kilker said. "When they put a blight designation on the area, they know no one will buy it. But when they can't hold that over your head, it's a whole different story. The Kilkers intend on staying put."⁸⁸

Aurora business owners, including the Kilkers, also faced a city council that went a step further

in January 2003, when it voted 6-4 to adopt “amortization” for a 110-acre zone near Fitzsimons. The vote gave businesses 10 years to convert themselves into an approved purpose or risk being shut down.

In response, Sen. Bob Hagedorn, D-Aurora, and then-Rep. Shawn Mitchell, R-Broomfield, introduced a bill that would have prohibited local

governments from engaging in this practice of outlawing specific business uses if such uses were legally permissible at the time the business was established. Fighting against the bill was the Colorado Municipal League, which claimed it was an infringement upon Colorado’s home rule cities. CML also asserted that amortization was a “time-and court-honored tactic for improving neighborhoods. It’s used to get rid of rendering plants or to require mobile home parks to build higher fences.” While CML was successful in killing the bill, the Aurora City Council withdrew its proposal amid complaints and questions about the proposal’s constitutionality.⁸⁹

For now, the Kilkers and his fellow small business owners near

Fitzsimons are free from the direct threat of condemnation; they say they must remain vigilant, however, about future efforts to dislocate them. “They’re not done yet,” Buzz Kilker said.⁹⁰

Centennial

Facing the prospect of an aging demographic, Centennial, through its Urban Redevelopment Authority, is in the process of redeveloping Southglenn Mall. The project, “The Streets of Southglenn,” which will dislocate 116 tenants upon the mall’s closure in February 2006, provides an example of the funding mechanism frequently used for such projects, Tax Increment Financing, as well

as the effects of condemnation on small businesses who lease their storefronts.⁹¹

While Foley’s and Sears, both national chains, are being permitted to stay open during the redevelopment process, all other tenants have been forced to relocate. According to CURA officials “the City Council understands the controversial nature of condemnation actions. However, condemnation of one or more leases could be required in order for the project to proceed.”⁹²

From the Centennial Urban Redevelopment Authority website:

“Before any action to condemn a lease is undertaken, the owner, developer, and CURA will use every effort to negotiate termination of the lease on payment of fair compensation for the lease plus relocation expenses. Such offers are based on an appraisal by a qualified real estate appraiser. If any tenant is unwilling to reach a settlement, the only alternative is to either condemn the lease or abandon the redevelopment project.

The 31-year-old shopping center, located at the corner of East Arapahoe Road and South University Boulevard, will be replaced by a 70-acre, open-air mixed-use developer that city officials say will rehabilitate the struggling area. “People realized that something needed to be done before it wasted away,” Centennial Mayor Randy Pye said. “We’re doing it now.”

Others disagree with the way the city conducted its reforms, saying that they unnecessarily dislocated small businesses in the process. “The city should have considered including more of the small businesses in the redevelopment process,” said Renee Nelson, a Denver real estate broker who

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has spoken out against land use policy trends in Denver over the last several years. “At some point urban redevelopment came to mean kicking out local businesses in favor of national chains. Our small businesses set up shop here, they build their business, and then they are slammed in the face and told thanks for playing.”

Nelson also expressed concern about the ability of the dislocated small businesses to find affordable alternative locations, noting that there was a reason why they chose to set up shop where they did. “Many of these businesses face the risk of not finding an affordable and viable alternative location, even if the city provides initial relocation assistance.”⁹³

The mall’s closure comes as Centennial officials finalize a deal with Greenwood Village-based Alberta Development Partners that could use

up to \$85 million in bonds to help everything from building roads to installing outdoor lighting. In 2002, the mall represented nearly 20 percent of the city’s total sales-tax revenue. In 2005, the figure dropped to less than 10 percent, reflecting the loss of retailers including J.C. Penney, Abercrombie & Fitch and Gap.⁹⁴

The project, like several others discussed in this Issue Paper, including Lakewood’s attempt to redevelop its portion of the Colfax corridor, will utilize Tax Increment Financing. TIF is a real estate redevelopment technique that allows a company to finance land acquisitions or improvements by

borrowing money tax free, thus reducing interest rates, and allowing for the purchase of sites at below-market costs.⁹⁵

Under Centennial’s plan, taxes will not be raised, but it could take 18 years before the city receives its full share of sales tax from the new development,

anticipated to cost \$310 million.

“TIF is a risky move by government because it provides corporate financing without any sort of guarantee that the corporation financed will be around long enough to provide the public revenues projected at the project’s outset,” said Bette Bushell, a Denver attorney specializing in civil litigation. “In addition, it encourages corporations to rely on government, instead of competing in the open and competitive free market.”⁹⁶

In December 2005, as many stores prepared to close at Southglenn, several displayed signs reading, “Shop before the Grinch closes the mall!” and “Store closing, our puppies need homes.”⁹⁷

In addition to modeling its financing mechanism after Lakewood, the project will also resemble Lakewood’s Belmar, a mixed-use development that includes lofts and extensive retail space. Time will tell if the small businesses dislocated will survive and if the public financing mechanism utilized will generate adequate revenue to justify its use, but for now, state and local policy makers have an opportunity to evaluate whether the project could have been conducted in the free market, without government assistance and the dislocation of more than 100 small businesses.

The Front Range Toll Road Company’s “Super Slab” Front Range Toll Road Project

In seven Colorado counties, including Adams, Arapahoe, El Paso, Elbert, Larimer, Pueblo, and Weld, more than 200,000 Colorado residents are being impacted, and approximately 140,000 parcels of land are at risk of being condemned, to make way for a proposed private toll road corridor that would

In seven Colorado counties, including Adams, Arapahoe, El Paso, Elbert, Larimer, Pueblo, and Weld, more than 200,000 Colorado residents are being impacted, and approximately 140,000 parcels of land are at risk of being condemned, to make way for a proposed private toll road corridor that would be 27 miles wide and more than 200 miles long.

TIF is a real estate redevelopment technique that allows a company to finance land acquisitions or improvements by borrowing money tax free, thus reducing interest rates, and allowing for the purchase of sites at below-market costs.

be 27 miles wide and more than 200 miles long. The proposal ignited a statewide debate on the right of private corporations to condemn for the purpose of private toll roads or highways.⁹⁸

Known as “Super Slab” by the activists fighting against it, the push for the project is being led by businessmen William Tolbert of the Meneren Corporation and Ray Wells. Advertised by Wells as a “a safer and less congested I-25 is in the near future... that would eliminate thousands of commercial truck and coal train trips along the I-25 corridor, (it) is a state-of-the art transportation corridor that gives commercial traffic an alternative around Colorado’s often clogged Front Range urban highways.”⁹⁹

The project, slammed by the Colorado Department of Transportation recently for its lack of feasibility, is arguably permissible under an 1891 Colorado statute that grants corporations the right to use eminent domain for the construction of private toll roads.¹⁰⁰

The project, slammed by the Colorado Department of Transportation recently for its lack of feasibility, is arguably permissible under an 1891 Colorado statute that grants corporations the right to use eminent domain for the construction of private toll roads.

“This statute gives complete power to the private entity,” said Robert Hoban, an attorney specializing in land use and public policy with Hale-Friesen, LLP. “From a business perspective, this is good, but from a practical perspective, the toll road simply cannot be executed under this statute. We need to work something out as a matter of public policy that both respects private property and gives private enterprise the amount of freedom it needs to get something done.”¹⁰¹

As a potential vehicle to balance the needs of the private sector with the constitutional obligation to protect the private property rights of Colorado’s citizens, Hoban suggested that a public-private partnership would be one way to achieve this. He noted that the legislature will consider at least one

bill during the 2006 session that would work to achieve a feasible structure for such a partnership, specifically allowing for the development of private roads but not the right of private entities to condemn in the process. This would force interested companies to approach government about any necessary condemnations, allowing greater protections for property owners through a system of oversight and checks and balances.¹⁰²

Residents living in the proposed corridor question why the company needs 27 miles for the project’s width, when its proposal indicates that the actual four-lane road would be 287 feet wide, including an easement of 35 feet on each side.¹⁰³ “If the government really believes this road is necessary, (the company) should only get the right to condemn for the easement for the road and not for anything else, not for gas stations or shopping malls or other developments on the backs of Colorado citizens,” said Marsha Looper, a resident of Peyton in El Paso County. “If they want to develop or use the surrounding land, they should have to buy it just like we had to.”¹⁰⁴

While the proposal has stalled more than 20 years since originally introduced, residents say the proposal continues to have an adverse affect on their property values because potential buyers and investors don’t want to buy in an area that may be ultimately condemned.

Looper, a certified appraiser, says her property has experienced a significant decline in value. “I’d estimate that my property values have gone down between 17 and 25 percent,” she said. Under the toll road proposal, her family’s ranch could become a gas station or a grocery store. Looper has become so outraged that she is now devoting several hours each week to fighting private condemnations across Colorado through her role as executive director of Colorado Citizens For Property Rights, the voice

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behind a 2006 constitutional amendment that would ban condemnation of private property for the purpose of generating more tax revenue through an alternative use.

Looper says her business, Phoenix & Associates, a custom home builder, is no longer building in the corridor because fears over condemnation have driven down sale prices so much that it is no longer profitable to build there. The last house Phoenix &

Looper says her business, Phoenix & Associates, a custom home builder, is no longer building in the corridor because fears over condemnation have driven down sale prices so much that it is no longer profitable to build there.

Associates built was listed at \$525,000 and Looper says they were forced to cut the price by \$51,000 to sell it. “If you were to drive up and down Ellicott Highway in El Paso County, every other home is for sale,” she said. “Citizens in the corridor feel completely unsafe and they believe the state, with its heavy hand, will take their homes and businesses only to turn around and give them to wealthy developers.”¹⁰⁵

Looper added that many corridor residents have stopped doing any type of remodeling or upgrades with their homes, and that in some known instances, people are considering

abandoning their homes altogether because the amount that they owe on their homes is more than what they believe they would be compensated for if the condemnations are approved.

In 2005, Governor Bill Owens vetoed two bills passed by the Colorado General Assembly that dealt specifically with private toll roads and the Front Range Toll Road Company. House Bill 1342 set forth a set of standards for private entities to meet prior to construction could begin on a private toll road or highway, and Senate Bill 230 prohibited a private corporation from using eminent domain to acquire rights-of-way for a toll road or highway and required the state’s transportation legislative review committee to recommend a process by which a private toll road or highway may be constructed.

In an effort to communicate his rationale for the vetoes to the House of Representatives, Owens wrote an open letter to the body, stating that “there is no question that common-sense regulation of private companies’ use of eminent domain is appropriate and necessary, but that these two bills are far too broad and sweeping to effectively address potential problems with eminent domain while preserving the ability of private companies to invest in and build toll roads in Colorado.”

He also justified his support of the private roads because of the declining revenues available for public road construction. “Private investment in Colorado’s transportation infrastructure is needed now more than ever,” he wrote. “Next year’s funding for the Colorado Department of Transportation (CDOT) is expected to be more than 40 percent below what it was in FY 2002-03. Despite these reductions, Colorado’s transportation needs have continued to increase. Private toll roads are one of the tools that can be used to expand Colorado’s transportation infrastructure at a time when state funding for transportation is shrinking.”¹⁰⁶

In response to Owens’ veto, one legislator has already returned with the bill he promised to reintroduce in spite of the governor’s threat to veto it again. Sen. Tom Wiens’ Senate Bill 78 would strike down the law that allows companies to condemn private land for private toll roads. “Senate Bill 78 would make it clear that one private company cannot condemn the property of a Colorado citizen to build a private toll road for its own profit,” Wiens, R-Castle Rock, told the *Rocky Mountain News*. “The law we follow now was placed on the books before the automobile was invented. It’s laughable for people to think that it should be used to build a major highway that gobbles up private property,” he added.¹⁰⁷

“Senate Bill 78 would make it clear that one private company cannot condemn the property of a Colorado citizen to build a private toll road for its own profit,” Wiens, R-Castle Rock, told the Rocky Mountain News.

Lakewood

A debate over the extent to which the government should be involved with efforts to rehabilitate the struggling Colfax corridor has been brewing for more than 25 years, with the core of the conversation centering around how to attract new enterprise while still respecting the rights and needs of existing small businesses. After much recent deliberation, local property rights activists remain split over whether the city may be finally getting it right, with those dissatisfied skeptical about the ability of urban renewal authorities to act as positive or intelligent agents for change in the free market.

In late 2005, the Lakewood City Council voted 8-3 to declare a largely rundown four-mile portion

of Colfax an Urban Renewal Area, with City Councilwoman Cheryl Wise saying that the declaration will address “certain decline in the area.”¹⁰⁸ The zone stretches along Colfax from Sheridan Boulevard west to Simms Street. The 120-block area includes 519 businesses, 103 multifamily structures and 500 residential structures.

By voting for the designation, council members afforded the Lakewood Urban Reinvestment Authority a number of powers, including the ability to use eminent domain to condemn and acquire less desirable properties in favor of alternative private developments. While the council’s vote exempts owner-

occupied residential properties, historical properties, business properties owned and operated by residents of the metro area and recently remodeled or redeveloped sites that remain in good repair, it does allow for eminent domain on properties that stand in the way of flood-control projects, those owned by individuals or corporations residing outside the metro area, those needing improvements, or

those parcels “needed to correct infrastructure deficiencies or environmental contamination”.

In addition, the designation allows for Tax Incentive Financing, similar to the previously discussed Southglenn Mall redevelopment, which includes controversial tax breaks for businesses entering the area as a means of encouraging redevelopment.

It is a method used frequently for Lakewood’s urban renewal projects, including two previous Lakewood developments, the Colorado Mills Mall and the Wal-Mart Supercenter located at Colfax and Wadsworth.

Councilman Doug Anderson, who voted against the plan, raised questions about the wisdom of using TIF, telling *Rocky Mountain News* reporter Charlie Abel that focusing the city’s resources on Colfax means businesses elsewhere in the city will pay the price, losing prime tenants to an area targeted for special treatment by the city.

“While this is only one step down the road, it is a step down the wrong road in the wrong direction,” Anderson said. Chief Don Lombardi of the West Metro Fire Protection District told Abel in late 2005 that he and Lakewood were close to drafting an intergovernmental agreement that would dictate how any TIF proposal would affect the fire district’s property tax revenue. Frequently, fire and police districts are adversely affected by TIF proposals because they require police and fire protection services to be provided for the redeveloped areas but do not provide additional revenue support to make this happen.¹⁰⁹

Doug Stiverson, owner of Westside Cycling & Fitness on Colfax and a well-known property rights activist, publicly presented the results of LRA’s plan for the strip.

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“As a huge opponent of urban renewal and eminent domain abuse, I’m very comfortable with this,” Stiverson said of the standards named in the plan, adding that eminent domain should be avoided when free-market forces will take care of the situation. “There will be times that it gets used, but we should keep it out of the free market,” he said. “Eminent domain is to be used as a tool of last resort only after reasonable attempts to reach a negotiated settlement have failed.”¹¹⁰

Stiverson added that he believes government planners are changing their strategy with regard to urban renewal projects. “I think the URA in Lakewood realizes that the political tide has turned concerning abuses and it intends to move forward with redevelopment without resorting to the heavy-handed abuses we’ve seen around the metro area and throughout the country.” As proof, Stiverson referenced a Home Depot project located east of his store being developed without urban renewal or TIF. “Most of these large companies need to locate where there do, with or without the city’s help. We could avoid a lot of these abuses if the offending URAs would ‘just say no’ to the outrageous demands that companies put upon them.”¹¹¹

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The council’s vote comes nearly 20 years after Lakewood first appointed a Colfax Economic Revitalization Effort steering committee to promote public-private redevelopment efforts, and 15 years after the state designated Lakewood and Denver segments of the Colfax corridor an enterprise zone so state income tax incentives could be offered to foster business relocation or expansion in the zone. After Wal-Mart secured tax incentives from the city in 2003 to redevelop about 30 acres at West Colfax Avenue and Wadsworth Boulevard to accommodate a Super Wal-Mart and other, smaller shops, the city again put West Colfax on its economic-development fast track.¹¹²

Like residents in cities and towns across Colorado, many in Lakewood are concerned about the city’s ability to make good financial decisions. Such concerns aren’t limited to TIF or other financing mechanisms.

Former City Councilmember Dorothy Wisecarver adamantly opposes the city’s plan for Colfax. “The city has so mismanaged and misused our funds that to give this administration any further money would be absolutely insane,” she told the *Rocky Mountain News*. Wisecarver cited a deal city officials cut with Wal-Mart, granting the discount retailer a multimillion-dollar tax break while booking more than \$500,000 in 2005 tax revenue from a Wal-Mart store on Wadsworth Boulevard that closed when a new superstore recently opened on Colfax Avenue.

“We have a store that apparently (City Manager) Mike Rock knew was closing, but the City Council didn’t know it,” she added. “Now we have all this revenue on the books that was supposed to come from that store, but really no money because it’s closed.”

Wisecarver ticked off a list of other grievances, including the decision to build a new city hall/cultural center complex and recreation centers without voter approval. In 1998, the city increased its debt to nearly \$60 million to pay off a lease-purchase finance plan for a \$30 million city hall/cultural center complex. Lakewood added another \$55 million in lease-purchase debt in 2000 for several recreation projects and to renovate the former city hall, currently used by the police department. Payments on those debts cost the city nearly \$6 million per year, according to Wisecarver.¹¹³

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In 2005, Lakewood voters approved a 50 percent sales tax increase after the city threatened to cut

basic services, including street lights. The move followed a 1999 vote to override the revenue retention limits in the Taxpayer’s Bill of Rights, giving the city another \$14.87 million bonus through 2003.

Despite this support, and unexpected windfalls from projects, including Colorado Mills, which delivered \$4.2 million in 2002 to boost tax revenues, from 1985 to 2003, city officials outspent revenues in 10 of the 19 budget years, including a \$4.5 million shortfall in 2003. During the 19-year period of budgets, the city has had a \$1.2 million positive balance, but without the windfalls, the gap between revenues and expenses would be more than \$17 million since 1984.¹¹⁴

Lakewood Mayor Steve Burkholder blames revenue

shortfalls on increased internet shopping, and an overall rise in the costs of goods and services. “We are starting to be impacted by the ‘perfect storm’ of the cost of goods and services going up, the issue of the Internet and, of course, our 2 percent rate,” he told Abel. Burkholder estimates the Internet’s impact on Lakewood at as much as \$2.5 million per year. “Sales tax is what pays for the police and fixing those potholes,” Burkholder said. “Those three issues have really caught up with us, and people are saying to me, ‘You have reached the point where you can’t manage your way out of this problem.’ “

Telluride

In 2004, the scenic ski town of Telluride became the focal point for the battle over whether local municipalities can condemn land outside of their jurisdiction for

the purpose of preventing development when the Colorado legislature took up the so-called “Telluride

Amendment,” legislation that would have prevented such action by government officials.

At the time, then-Senate Majority Leader Mark Hillman, R-Burlington, fought aggressively for inclusion of the amendment, which ultimately passed the Senate 22-13. “This is about a property owner who has owned the land for 20 years and simply does not want to sell regardless of the price,” Hillman told *Telluride Watch* reporter K.C. Mason after the bill’s passage.

“If a property right can be overturned by a simple majority vote of your neighbors, then it really doesn’t mean anything to begin with.”

The bill succeeded in spite of tenacious opposition from the Colorado Municipal League and environmental groups, with Elise Jones, executive director of the Colorado Environmental Coalition telling Mason, “the Senate voted to thwart the will of the people of Telluride in order to satisfy the greed of a single developer. In the process, the legislature has weakened the ability of all Colorado communities to protect their quality of life by safeguarding open space for current and future generations.”¹¹⁵

In 1993, Telluride voters voted to allocate 20 percent of sales and uses tax revenues to acquire the “Valley Floor”, the area of privately-owned land on the eastern outskirts of Telluride, as open space. For several years prior to the 2004 legislative session, Valley Floor landowner Neal Blue and Telluride officials had unsuccessfully attempted to agree on development plans for his 572 acres in the area.

While the 2004 bill passed the legislature, it provided little relief to Blue and his San Miguel Valley Corporation as the town’s council continued in its efforts to condemn the property, which lies south of the Highway 145 Spur between the town limits and Society Turn. In the aftermath of the bill’s passage, Judge Charles R. Greenacre ruled against Blue and the SMVC’s motion to dismiss

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Telluride’s lawsuit seeking acquisition of Blue’s property through eminent domain. Citing Article XX of the Colorado Constitution, Greenacre ruled that the Colorado General Assembly did not have the authority to enact a statute to limit the power of eminent domain to a home rule city like Telluride. “There is simply no authority for the proposition that the General Assembly may regulate, much less prohibit, a home rule municipality’s constitutional eminent domain powers,” Greenacre wrote.

Greenacre specifically disagreed with Blue’s contention that the so-called “Telluride Amendment” pre-empted the town’s powers of condemnation. Greenacre also ruled, contrary to SMVC’s arguments, that the town has a right to condemn for purposes of preserving open space and that the town had not acted in bad faith in its condemnation efforts. Blue and SMVC had argued that Telluride failed to meet the standard of making a “reasonable good faith offer to reach agreement on the price with the property owner” because the town’s offer to buy Blue’s property was less than half of the \$48 million appraisal conducted on behalf of the corporation.”¹¹⁶

Blue and SMVC had argued that Telluride failed to meet the standard of making a “reasonable good faith offer to reach agreement on the price with the property owner” because the town’s offer to buy Blue’s property was less than half of the \$48 million appraisal conducted on behalf of the corporation.”

Telluride Mayor John Pryor told reporters in 2004 that he was committed to litigation at any cost. “I know that litigation is expensive and the outcome is unpredictable,” he said. “If the other party is as aware as we are that litigation is not in either side’s interest, then I’m hopeful we

can reach a settlement. But if not, we’re prepared to go forward with the lawsuit.”¹¹⁷

With much of the last several years spent in a deeply embroiled legal battle, both sides were ordered into mediation in 2005. A condemnation trial was set to begin in January 2006, but was postponed by the Telluride Town Council in late 2005, when it

made the decision to turn the property’s fate over to a town vote that could occur as early as February 2006. If voters give their approval, nearly 800 acres of land will be annexed into the town, with most of the land, including 513 acres of Blue’s property being preserved as open space. The remainder of the property would be used for private homes, a school, affordable housing, retail space and parks.

Newspaper articles indicate local residents remain conflicted about the situation. Cari Mackey, a manager at Jagged Edge, said she would ideally like to see total preservation, but also understands the rights of landowners. “I would like to see it (as) open space, but I think it’s hard to tell people what to do with their land,” she told the *Telluride Daily Planet*.¹¹⁸

With the interpretation of the so-called “Telluride Amendment” in doubt due to Greenacre’s interpretation, the door has been opened to challenges by other local municipalities, as evidenced by Golden’s recent attempt to condemn property outside of its jurisdiction for the purpose of open space.

Wheat Ridge

A Wheat Ridge urban renewal proposal went south in 2004, saving one family business, destroying another family’s source of income, and landing the Wheat Ridge Urban Renewal Authority in court for making false promises.

In 2001, WRURA proposed replacing three productive businesses and a vacant property with a Walgreens drugstore at West 38th Avenue and Sheridan Boulevard. To make room for the proposed store, WURA, a six-member board, declared its eminent domain power for the condemnation of the four properties, including

A Wheat Ridge urban renewal proposal went south in 2004, saving one family business, destroying another family’s source of income, and landing the Wheat Ridge Urban Renewal Authority in court for making false promises.

Casman Automotive and Muffler, Paradise Billiards, and Kitchen Masters.

While met with outspoken opposition by more than 300 residents who signed a petition against the project, it took three years and significant financing disagreements with the developer for WRURA to terminate the project in September 2004.

Upon hearing news of the project's demise, Chuck Mandril, whose family has owned Casman Automotive since 1972, was ecstatic. "I'm elated," he told reporters. "We were scared to death." Mandril spent about \$20,000 to fight the condemnation of his property. Kitchen Masters owner Arthur Fast, who had closed his business and relocated it to Lakewood weeks before the decision to abandon the project was made, was pleased, but said "financially, I'm about to get slaughtered."

In the aftermath of the failed project, the developer of the proposed Walgreens, Cornerstone Group, Inc., filed a lawsuit against WURA and the city for terminating the deal. In late 2004, a court handed down a temporary restraining order that prevented WURA from selling any property or dispersing any money without the court's permission. This

decision had a direct impact on Kelly Zielbauer and her sister, owners of the property where Fast housed his business for more than 20 years before being told to move by government officials.¹¹⁹

The departure of her tenant and the failed project left Zielbauer and her sister with 2,700 square feet of empty retail space and an inability to rent it out or sell it. "I don't have anybody," she told Wheat Ridge Transcript Reporter Neda Raouf in 2005. She

points out that buyers and renters are turned off because the property is in a designated urban renewal area. While WRURA forced Zielbauer's tenant out in anticipation of the project, she

received no support for her damages when it initially fell through.

Terrell Williams, WRURA Chair, told Zielbauer the authority's hands were tied to offer her any compensation for damages because of the court ruling in the Walgreens suit. "(We) have been trying to figure out how to extricate ourselves and ourselves from the mess that has resulted," Williams told Zielbauer. "We will do what we can as quickly as we can to resolve your concerns."¹²⁰

In the meantime, WRURA made clear its intention to maintain the urban renewal designation that Zielbauer says is what continues to hurt her property values and ability to sell. According to a 2005 *Wheat Ridge Transcript* article, WRURA filed a motion for an immediate hearing just so officials could pay bills, including attorneys and utility bills on a property, but that spending would not include financial compensation for Zeilbauer, Fast, or other business owners asking for compensation.¹²¹

CONCLUSION

As Colorado continues to grow in the coming decades, and the amount of vacant land available for development diminishes, eminent domain for the purposes of private development or open space will only become a more tempting development tool for local municipalities and private corporations eager to generate additional tax revenue from new developments or preserve desirable land from development, or conversely, by condemning it to prevent any development whatsoever. As the cases outlined in this Issue Paper illustrate, families and small business across Colorado face the very real threat of eminent domain in their lives every day.

The departure of her tenant and the failed project left Zielbauer and her sister with 2,700 square feet of empty retail space and an inability to rent it out or sell it.

As the cases outlined in this Issue Paper illustrate, families and small business across Colorado face the very real threat of eminent domain in their lives every day.

When government and corporations force people out of their homes and small businesses, families lose any hard-earned equity from their most important investment. In this process, society loses a tool essential to uplifting our nation's most vulnerable, including those living in our disadvantaged, minority, and elderly communities.

While the U.S. Supreme Court's decision in *Kelo v. City of New London* clearly shows a blatant disregard for the traditional "public use" justification for eminent domain, it does not prohibit states or local governments from enacting higher standards in their own jurisdictions, a move which more than 30 state legislatures have already begun. This decision has initiated reforms that otherwise not have been attempted, presenting a unique opportunity to commence an open and honest dialogue about the future of property rights in Colorado.

The Independence Institute recommends the following points of consideration in the debate over the use of eminent domain for the benefit of private development or open space:

- Currently, under Colorado law, there is no mandate that urban renewal authorities or any governmental entity show proof that a proposed private development acquired through condemnation of private property based on the justification of increasing tax revenues, actually meet this objective, either before, during, or after the project's completion. This is a significant point, as many urban renewal projects that use eminent domain as a means to increase tax revenue have marginal—and in many cases—negative revenue effects on their respective communities. An example: the Poletown neighborhood in Detroit was condemned to make way for a General Motors manufacturing plant in 1981. It failed to bring its promised economic growth to the city, and indeed “cost the city millions of dollars and may well have destroyed more jobs than it created.”¹²²

- Local government lobbyists regularly argue that eminent domain is necessary to promote economic vitality in Colorado's poorer neighborhoods and retail centers. Evidence nationwide successfully dispels this argument. Example (from the Castle Coalition): “When the city of Seattle redeveloped part of its downtown in 1996, it did so the old-fashioned way—through private negotiation instead of public force. City officials and developers worked together to create more than one million square feet of new retail space, generating a 15.8% increase in taxable sales and a 4.4% increase in retail jobs. This was a classic case of targeted urban revitalization, and Seattle accomplished its goals while simultaneously respecting private property rights.”¹²³

- Local government lobbyists, particularly those from the Colorado Municipal League, regularly object to the state legislature passing protections for property owners based on the grounds that local governments know best and that Colorado's constitution specifically acknowledges and respects Colorado's home rule cities.¹²⁴ This objection is flawed logic, however, in respect to property rights legislation in an era when local governments frequently abuse the rights of citizens by neglecting basic constitutional freedoms, including the right to own and use private property. The constitution applies against all government action, whether by a home rule city or not. As elected officials of the State of Colorado, lawmakers have an ethical obligation to protect the rights of their constituents and the language affording these rights as laid out in the Colorado constitution.

- With specific regard to Judge Charles R. Greenberg's interpretation that the so-called “Telluride Amendment” is not enforceable because “there is simply no authority for the proposition that the General Assembly may

regulate, much less prohibit, a home rule municipality's constitutional eminent domain powers," he is, simply put, very misguided. The Colorado constitution clearly allows legislators to enact legislation designed to protect all residents from abuses of their most basic constitutional freedoms.¹²⁵

APPENDIX

2006 PROPOSED CONSTITUTIONAL AMENDMENT ON EMINENT DOMAIN REFORM

Be it enacted by the People of the State of Colorado:

Section 15 of article II of the constitution of the state of Colorado is amended to read:

Section 15: Taking property for public use—compensation, how ascertained.

- (1) IN ORDER TO PROTECT PROPERTY RIGHTS, Private property shall not be taken or damaged for a public USE, AS PROVIDED IN THIS SECTION, or for A private use, AS PROVIDED UNDER SECTION 14 OF ARTICLE II OF THIS CONSTITUTION, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the propriety rights of the owners therein divested; and
- (2) Whenever an attempted is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public. IN ORDER TO EXERCISE THE POWER OF EMINENT DOMAIN, A CONDEMNOR SHALL ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT THE CONDEMNATION OF THE PROPERTY IS FOR A PUBLIC USE. AS USED IN THIS SUBSECTION (2), THE PERM “PUBLIC USE” SHALL ONLY MEAN: (a) THE POSSESSION AND OCCUPATION OF THE CONDEMNED PROPERTY BY A PUBLIC ENTITY AND NOTWITHSTANDING THE AUTHORITY OF THE PUBLIC UTILITIES COMMISSION UNDER ARTICLE XXV OF THIS CONSTITUTION; OR, (b) THE ACQUISITION AND DISPOSITION OF PROPERTY IN ORDER TO REMEDY CONDITIONS WHICH ENDANGER LIFE OR PROPERTY AND WHICH ARE DETRIMENTAL TO THE PUBLIC HEALTH OR PUBLIC SAFETY. THE PUBLIC OR PRIVATE BENEFITS OF ECONOMIC DEVELOPMENT, INCLUDING AN INCREASE IN THE TAX BASE, TAX REVENUES, EMPLOYMENT, OR GENERAL ECONOMIC HEALTH, SHALL NOT CONSTITUTE A PUBLIC USE. PRIVATE PROPERTY SHALL NOT BE TAKEN BY A PRIVATE PROPERTY EXCEPT AS BY A PRIVATE WAY OF NECESSITY AS PROVIDED UNDER SECTION 14 OF ARTICLE II OF THIS CONSTITUTION OR FOR USE BY A PUBLIC UTILITY, AS SET FORTH IN THIS SUBSECTION (2).

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ADDITIONAL RESOURCES on this subject can be found at: <http://www.IndependenceInstitute.org> or by contacting the following organizations:

Colorado Citizens For Property Rights, www.TheCCPR.com, (719) 238-5600
Marsha Looper, Executive Director

Hale Friesen LLP,
www.haleFriesen.com, (720) 904-6000
Allan Hale, Robert Hoban, Amanda Bradley, Jason Harms

Mountain States Legal Foundation,
www.MountainStatesLegal.org,
(303) 292-2021
William Perry Penley, President

Institute For Justice's Castle Coalition, www.CastleCoalition.org, (703) 682-9320

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Endnotes

¹ For full language of the proposed constitutional amendment, see Appendix.

² Telephone conversation of author with Robert Hoban, Attorney, Hale-Hackstaff, LLC, 17 January 2006.

³ H.B. 03-1089, "Condemnation proceeding - attorney fees - reimbursement to property owner."

⁴ *Susette Kelo, et al. v. City of New London, et al.*, 125 S. Ct. 2655 (2005)[1], more commonly *Kelo v. New London*, was argued before the [United States Supreme Court](#) on [February 22, 2005](#).

⁵ In the *Kelo* case, Justice Stevens delivered the majority opinion of the Court, which included Kennedy, Souter, Ginsburg, and Breyer. Kennedy filed a concurring opinion. O'Connor filed a dissenting opinion, in which Rehnquist, Scalia and Thomas joined.

⁶ *Susette Kelo, et al. v. City of New London, et al.*, 125 S. Ct. 2655 (2005)[1].

⁷ Cases included in this Issue Paper come from the following communities: Arvada, Aurora, Centennial, Golden, Lakewood, Sheridan, Telluride, Wheat Ridge, and the proposed Front Range Toll Road, which would span Adams, Arapahoe, El Paso, Elbert, Larimer, Pueblo, and Weld Counties.

⁸ U.S. Constitution, Amendment V

⁹ *Kohl v. United States*, 91 U.S. 367, 373-74 (1876).

¹⁰ For information on the Institute for Justice, <http://www.ij.org/index.shtml>.

¹¹ *Berman v. Parker*, 348 U.S. 26 (1954). The Court held that private property, including structures that are not themselves substandard, may be taken to ameliorate or prevent the spread of blight. The Court further held that once an area is determined to be blighted, an urban renewal authority may transfer condemned property to a private entity for redevelopment without running afoul of the "public use" requirement of the Takings Clause of the Fifth Amendment.

¹² *Susette Kelo, et al. v. City of New London, et al.*, 125 S. Ct. 2655 (2005)[1], more commonly *Kelo v. New London*, was argued before the [United States Supreme Court](#) on [February 22, 2005](#).

¹³ *Susette Kelo, et al. v. City of New London, et al.*, 125 S. Ct. 2655 (2005)[1].

¹⁴ "Kelo v. City Of New London: What it Means and the Need for Real Eminent Domain Reform," Institute for Justice, 1 (September 2005).

¹⁵ Article II, Section 14, Colorado constitution.

¹⁶ Article II, Section 15, Colorado constitution, which states "whenever an attempt is made to take private property for a

use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

¹⁷ Colo. Rev. Stat. § 31-25-103(2)(a)-(k5), 9 (2004).

¹⁸ In addition to these stated ten standards, if there is no objection by the property owner or owners and the tenant or tenants of such owner or owners, if any, to the inclusion of such property in an urban renewal area, "blighted area" also means an area that, in its present condition and use and, by reason of the presence of any one of the factors already specified, substantially impairs or arrests the sound growth of the municipality, retards the provision of housing accommodations, or constitutes an economic or social liability, and is a menace to the public health, safety, morals, or welfare. For purposes of this paragraph (l), the fact that an owner of an interest in such property does not object to the inclusion of such property in the urban renewal area does not mean that the owner has waived any rights of such owner in connection with laws governing condemnation.

¹⁹ H.B. 03-1089, titled "Condemnation proceeding - attorney fees - reimbursement to property owner" available at http://www.state.co.us/gov_dir/leg_dir/olls/digest2003a/PROPERTY.htm. HB 04-1203 restricted extraterritorial condemnation of private property for the purpose of parks or open space. HB 04-1203 Section 6 38-1-101, II reads: "no home rule or statutory municipality shall either acquire by condemnation property located outside of its territorial boundaries for the purpose of parks, recreation, open space, conservation, preservation of views or scenic vistas, or for similar purposes, nor provide any funding, in whole or part, for the acquisition by condemnation by any other private or public party of property located outside of its territorial boundaries for the purpose of parks, recreation, open space, conservation, preservation of views or scenic vistas, or for similar purposes except where the municipality has obtained the consent of both the owner of the property to be acquired by condemnation and the governing body of the local government in which territorial boundaries the property is located."

²⁰ KC Mason, "Telluride Amendment Draws Fire But Passes Committee Vote" *The Telluride Watch*, 26 March 2004.

²¹ *Arvada Urban Renewal Authority v. Columbine Professional Plaza Association*, Colorado Supreme Court, No. 03SA329 (2004).

²² *Shaklee v. Dist. Court of County of Weld.*, 636 P.2d 715, 716 (Colo. 1981), rev'd on other grnds, 784 P.2d 314; *Potashnik v. Public Service Co*, 247 P.2d 137 139-40 *Colo. 1952). Rpt. in "Urban Renewal in Colorado" editor, Carolynne White, Brownstein, Hyatt & Farber, P.C., (September 2004).

²³ *Ibid.*

²⁴ *Rabinoff v. District Court*, 360 R.2nd 114 (Colo. 1961) Rpt. in White, page 63.

²⁵ *Ibid.*

²⁶ "Common Goal: Common Vision," Arvada Urban Renewal Authority Annual Report (2003).

²⁷ Telephone conversation of the author with Karen Salvas, Communications Coordinator, Office of the State Court Administrator, on December 29, 2005. Findings available at "Office of the State Court Administrator" home page at <http://www.courts.state.co.us/exec/scaoindex.htm> under civil filings-TABLES 16-17 (condemnation). Condemnation proceedings filed in Colorado for the following fiscal years: 1999-143;

2000-141; 2001-204; 2002-241; 2003-134; 2004- 121; 2005-97.

²⁸ "Public Power, Private Gain," Dana Berliner for the Institute for Justice's Castle Coalition (April 2003),39.

²⁹ Alicia Caldwell, "Land-Seize Reforms on Owens Desk," *The Denver Post*, 5 May 2003.

³⁰ For information on Arvada Water Tower Lofts available at <http://www.internest.com/concertamericanhomes/concertamericanhomes15453.asp>

³¹ Alicia Caldwell, "'Blight' Cases Rise in State," *The Denver Post*, 30 Nov. 30, 2003.

³² "Condemning Character: Property Rights Abuses & Victories in Arvada", Rob and Jessica Corry for Arvadans For Responsive Government (27 June 2004), available at <http://www.JessicaCorry.com>.

³³ Memorandum from the Office of Legislative Legal Services to the Colorado General Assembly: "Subject: Colorado Law on Condemnation for economic development and private toll roads in the wake of *Kelo v. City of New London*, 2005 U.S. Lexis 5011 (18 August 2005).

³⁴ For information on Colorado Citizens for Property Rights, <http://www.theccpr.com>

³⁵ Cory Gardner, State Representative. "Representative Gardner Defends Private Property: First Bill Restricts Government Takings of Property," Press Release (18 January 2006).

³⁶ Denver Post Staff, "Legislature 2006 Briefs" *The Denver Post*, 17 January 2006.

³⁷ April M. Washington, "Vetoed bills returning in new effort to get by Owens," *Rocky Mountain News*, 11 January 2006.

³⁸ April M. Washington, "Bill to block Super Slab back in play," *Rocky Mountain News*, 16 January 2006.

³⁹ Telephone conversation of author with Robert Hoban, Attorney, Hale-Hackstaff, LLC, 16 January 2006.

⁴⁰ LLS No. R-06-0047.01, Short Title: "Eminent Domain"; Bob Lackner for the Colorado General Assembly's Legislative Council. Draft submitted on 12 December 2005.

⁴¹ Mountain States Legal Foundation, http://www.mountainstateslegal.org/legal_cases_category_home.cfm?casecategoryid=3, available as of 28 December 2005.

⁴² George Merritt, "Sheridan Development Plan Roils Property Owners," *The Denver Post*, 7 June 2004.

⁴³ *Lochness Properties v. City of Sheridan*, Colorado District Court, Arapahoe County, No. 05cv5997.

⁴⁴ Al Knight, "Renewal or Takeover" *The Denver Post*, 2 February 2005.

⁴⁵ William Perry Pendley, "Landowner Sues City For Seizure of Non-Blighted Land", Mountain States Legal Foundation Press Release (8 December 2005).

⁴⁶ Merritt, "Sheridan Development Plan Roils Property Owners," *The Denver Post*, 7 June 2004.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Vince Carroll, "On Point: Golden's Rules" *Rocky Mountain News*, 28 December 2005.

- ⁵² Amanda Sutterer, "Tower Fight Becomes A Real Estate Struggle" *Golden Transcript*, 28 December 2005.
- ⁵³ Electronic mail message from Scott Spendlove to author, 3 January 2005.
- ⁵⁴ Electronic mail message from Marv Rockwell to Jessica Corry, 11 January 2006.
- ⁵⁵ *Ibid.*
- ⁵⁶ Colo. Rev. Stat. 38-1-101 Section 5, 38-1-101.
- ⁵⁷ *Arvada Urban Renewal Authority v. Columbine Professional Plaza*, Supreme Court, State of Colorado, No. 03SA329
- ⁵⁸ *Ibid.*
- ⁵⁹ *Ibid.*
- ⁶⁰ *Ibid.*
- ⁶¹ Berliner, 39.
- ⁶² Obtained from the South Central Arvada Neighborhood Action Committee, Renee Nelson, 10 June, 2004. SCANAC was run by Senior Arvada City Planner John Young.
- ⁶³ Berliner, 39.
- ⁶⁴ Electronic mail message from John Boettiger to Jessica Corry, 25 June 2004.
- ⁶⁵ *Ibid.*
- ⁶⁶ *Ibid.* AURA meeting minutes, 5 January 2000: AURA Legal Counsel Mike Polk noted that "a petition of condemnation for immediate possession has been filed on the Carpet Exchange property at 52nd and Wadsworth Bypass. Mr. Polk advised the Board to refer any contacts to him or AURA's outside legal counsel." City Hall, 8101 Ralston Road, Arvada, CO 80002.
- ⁶⁷ Caldwell, *The Denver Post*, 30 November 2003.
- ⁶⁸ Jeff Francis, "AURA Wins Fight For Olde Town Site," *Arvada Sentinel*, 4 March 2004.
- ⁶⁹ *Ibid.*
- ⁷⁰ *Ibid.*
- ⁷¹ According to AURA meeting minutes from February 7, 2001: "The Carpet Outlet Store will be vacating its location on Grandview Avenue effective the first of next month. They will be relocating to the Brookhill Shopping Center (in Westminster)." City Hall, 8101 Ralston Road, Arvada, CO 80002.
- ⁷² Jeff Francis, "Kozik Unhappy with AURA Money, Appeal Planned," *Arvada Sentinel*, 18 March 2004.
- ⁷³ "Common Goal: Common Vision," *Arvada Urban Renewal Authority Annual Report*, 8 (2003).
- ⁷⁴ Jeff Francis, "City Takes Risk on Urban Renewal District," *Arvada Sentinel*, 16 October 2003.
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- ⁷⁶ Telephone conversation of author with commercial real estate broker, 18 January 2006.
- ⁷⁷ These groups include the Save the Lake Coalition, Arvadans For Responsive Government (Jessica Corry is a member), and several others that opposed the "Water Tower" redevelopment project.
- ⁷⁸ Brian Maas, "Arvada board lives high life: Fine restaurants, alcohol put travel costs close to \$160,000 over two years," *Rocky Mountain News/CBS 4 News*, 27 October 2005.
- ⁷⁹ *Ibid.*
- ⁸⁰ *Ibid.*
- ⁸¹ *Ibid.*
- ⁸² *Ibid.*
- ⁸³ Telephone conversation of author with Buzz Kilker, 15 January 2006.
- ⁸⁴ Alicia Caldwell, "Developer's Woes Vex Fitzsimons," *The Denver Post*, 9 February 2004.
- ⁸⁵ Telephone conversation of Kilker/Corry, 14 January 2006.
- ⁸⁶ Caldwell, "Developer's Woes Vex Fitzsimons," *The Denver Post*, 9 February 2004.
- ⁸⁷ *Ibid.*
- ⁸⁸ Telephone conversation of Kilker/Corry, 14 January 2006.
- ⁸⁹ Staff Editorial, "Lawmakers Must Stop Aurora's Grabfest," *Rocky Mountain News*, 14 March 2003.
- ⁹⁰ Telephone conversation of Kilker/Corry, 14 January 2006.
- ⁹¹ City of Centennial home page, 10 June 2005, <http://www.newssouthglenn.com/Documents/2005-10-10-UrbanRenewalOutline.pdf>
- ⁹² City of Centennial "Celebrate Southglenn" website, <http://www.newssouthglenn.com/faqs.htm#Q3>
- ⁹³ Telephone conversation of the author with Renee Nelson, 11 January 2006.
- ⁹⁴ Robert Sanchez, "Centennial Weighs Deal For Mall Replacement," *The Denver Post*, 13 December 2005.
- ⁹⁵ Federal Reserve Bank of Minneapolis, <http://minneapolisfed.org/econed/essay/topics/gloss97.cfm>
- ⁹⁶ Telephone conversation of author with Bette Bushell, 14 January 2006.
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- ⁹⁸ For information available on the Front Range Toll Road Company's "Super Slab" project, <http://www.meneren.com/projects/FRTRC.htm>
- ⁹⁹ The Front Range Toll Road Company, Press Release 31 January 2005, "Front Range Toll Road Would Make I-25 Safer, Less Congested" available at <http://www.cololegislativeinfo.com/TRMediaInfo.html>.
- ¹⁰⁰ For information on CDOT's feasibility analysis of the FRTR, see "Statewide Toll Feasibility Study Second-Tier Analysis" presented to Colorado Tolling Enterprise Board of Directors on 15 December 2004 by the Colorado Tolling Enterprise. Available at <http://www.dot.state.co.us/CTE/Documents/2ndTierAnalysis.pdf>
- ¹⁰¹ Telephone conversation of the author with Robert Hoban, Attorney, Hale-Friesen, LLP, 16 January 2006.
- ¹⁰² *Ibid.*
- ¹⁰³ El Paso County Planning Department, <http://adm.elpasoco.com/Planning/Tri-Lakes/Tri-Transp.asp>, includes specific references regarding distances and measurements of proposed four-lane highways.
- ¹⁰⁴ Telephone conversation of the author with Marsha Looper, 11 January 2006.
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- ¹⁰⁶ Letter to the Colorado House of Representatives concern-

ing veto of HB 1342 and SB 230 from Governor Bill Owens, Released from the Governor's Press Office on June 6, 2005. Available as of December 28, 2005 at <http://www.colorado.gov/governor/press/june05/sb230-hb1342.html>.

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