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**From New London to Telluride and Beyond:**  
*Legal Developments Surrounding Eminent Domain  
in Colorado from 2004-2009*

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## A GENERAL OVERVIEW

Despite state-level legal reforms implemented over the last five years in Colorado, property owners still face scenarios where they are losing—or fear losing—their homes, small businesses, or development rights in the name of public good or necessity. In some cases, the takings may

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be justified. In others, however, the condemnation efforts can be attributed to government greed and bad municipal planning.

The U.S. Supreme Court shocked many Americans in 2005 by its ruling in *Kelo v. City of New London*, 545 U.S. 469 (2005).<sup>1</sup> Through its 5-4 decision, the Court established a controversial precedent under which states are permitted to consider economic development or the generation of tax revenue as permissible justifications for the condemnation of private property.<sup>2</sup>

The *Kelo* case arose when officials in New London, Connecticut, attempted to condemn and forcibly acquire the modest home of Suzette Kelo in New London's Fort Trumble neighborhood. City leaders intended to transfer ownership of the property to a private pharmaceutical company, with the larger goal of helping facilitate the company's future redevelopment aspirations.<sup>3</sup> While the Court's decision ultimately allowed New London officials to move Kelo's house to an alternative location, the proposed development never materialized. A gaping hole remains where the home of Kelo and others once stood.<sup>4</sup>

The Institute for Justice, a Virginia-based public interest law firm, represented Kelo in her legal battle to save her home. In June 2008, marking the three-year anniversary of the decision, the Institute had this to say:

Like so many other projects that use eminent domain and rely on taxpayer subsidies, New

London's Fort Trumbull project has been a failure. After spending \$78 million in taxpayer dollars, the city of New London and the private developer have engaged in no new construction since the project was approved in 2000.

Indeed, since the property owners disputing the takings owned less than two acres in a 90-acre project area, the city has always had a vast majority of the land available for development. Yet, no new development has occurred. The preferred developer for part of the site, Corcoran Jennison, recently missed its latest deadline for securing financing for building on the site and was terminated as the "designated developer."<sup>5</sup>

Larger national consequences of the case still linger. As Justice Sandra Day O'Connor articulated in her dissent, "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."<sup>6</sup>

Under *Kelo*, however, states were permitted to adopt stricter condemnation standards than the one permitted in the case.<sup>7</sup> As Colorado's Office of Legislative Legal Services noted at the time, "In its 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."<sup>8</sup>

In the aftermath of the case, respected legal minds sounded off. Some, including federal appeals court judge Richard Posner, characterized the political response to *Kelo* as "evidence of [the decision's] pragmatic soundness."<sup>9</sup> And according to Illy Somin, who wrote on the limits of anti-*Kelo* legislation in 2005's *Harvard Law Review*, "Judicial

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action would be unnecessary, Posner suggested, because the political process would take care of the problem.”<sup>10</sup>

Indeed, many states including Colorado, did respond. Prior to *Kelo*, only a handful of jurisdictions specifically prohibited eminent domain for economic development purposes.<sup>11</sup> But by 2007, 42 states had enacted some level of protection against such condemnations, including 21 that severely limited such takings.<sup>12</sup>

Colorado’s legislative response fell somewhere in the middle by prohibiting eminent domain for private economic development purposes, while also passing statutory language that left attorneys and land use policy analysts questioning the reforms’ actual utility for property owners facing condemnation proceedings in the future.<sup>13</sup>

Recent history demonstrates an eagerness by public officials, particularly at the municipal and regional levels, to continue condemnation efforts defended under questionable or untested public use justifications. While the Fifth Amendment requires that public property be taken only for public use, and that ownership of such property shall only be transferred to the government upon just compensation, government officials continue to use aggressive strategies to take private property.

Over the last three years, Colorado’s debate over what should constitute permissible uses of eminent domain has often featured the plight of Kim Foster and Galen Snyder,

a Lakewood couple and co-owners of Pro-Tint Windows for the last two decades.

In their case, the Regional Transportation District (RTD) sought their property, which also houses their home, a second business selling totem poles,

and a Doberman Pincher rescue. The property, located a block from a planned light rail station, was sought to house part of a larger parking structure. In addition to Galen and Foster, owners of nearly 200 other local property owners in the path of RTD’s westward light rail expansion received condemnation notices, with many complaining of a lack of communication between RTD officials and those receiving notices.<sup>14</sup>

While the couple, represented by attorney Bob Hoban (a co-author of this issue paper), ultimately reached an out-of-court settlement with RTD, larger issues surrounding transit-related condemnations remain to be litigated both in Colorado and across the nation, including:

- While state statute allows for condemnation of property adjacent to rail stations to provide commuter services, including parking spaces, how far will courts go in defining such permissible services? Put another way, is it acceptable to condemn property to make way for a privately-owned coffee shop that would serve commuters? What about condominiums?
- Next, is a transit authority permitted to take title to property permanently if the property is sought for a temporary construction staging zone?
- And finally, how will air rights be treated in future cases where property owners seek compensation not just for any dwellings, structures, and land on their condemned property, but also for the air space above it—an area frequently sought for high-rise residential developments adjacent to rail or bus stations?

Under existing state statute, RTD is not permitted to acquire property through eminent domain for

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any purpose other than for the operation of a mass transit system; permissible takings do not include those for transit-oriented-development (TOD).<sup>15</sup> Furthermore, state law specifically states that RTD may not use any of its property in a manner that may compete with neighboring business, or in a manner that will attract non-transit users.<sup>16</sup> The devil remains in the details, and savvy property owners are not willing to face the risk the potential of an adverse court decision that could destroy their entire livelihood.

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Analysis in this issue paper is limited to recent state legislative efforts and case law relating to four specific sub-areas of eminent domain law, including transit-oriented development, the role of assessed values in condemnation cases, and extraterritorial condemnation. Given the sheer volume of litigation, legislation, and advocacy surrounding property rights in Colorado currently, however, this report is not intended to be exhaustive. Rather, it provides a guide map for those seeking to better understand recent developments.

In addition, this paper primarily focuses on developments over the

last three years since the Independence Institute's Property Rights Project released the following two issue papers, including *At the Crossroads of Condemnation: The Debate Over the Use of Eminent Domain For Private Development and Open Space*, and *Tower Tussle: The Colorado Battle Over Extraterritorial Condemnation*.

## **LEGISLATIVE DEVELOPMENTS CONCERNING EMINENT DOMAIN & URBAN RENEWAL SINCE 2004**

Largely in response to Kelo, 2006 served as an active legislative session for property rights in Colorado, with state legislators passing three of eight eminent-domain related bills proposed that year.<sup>17</sup>

Lawmakers acted after it became clear that a citizen-led ballot initiative backed by Colorado Citizens For Property Rights and other grassroots organizations would not make the November ballot. The initiative specifically sought to amend the state constitution to prevent local governments from taking any land for economic-development purposes, including redevelopment of a property by a private developer with the objective of generating more tax revenue through an alternative use or design.<sup>18</sup>

The legislature's most notable response came through House Bill 1411, which maintained the ability of urban renewal authorities to take property to eradicate blight. The bill also stated that such condemnation efforts must be solely related to a valid public purpose, of which the generation of tax revenue or economic development would not be considered sufficient justifications.<sup>19</sup>

Key language included "public use" shall not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue. Private property may otherwise be taken solely for the purpose of furthering a public use."<sup>20</sup>

The bill benefitted from the support of a powerful bipartisan coalition led by Rep. Al White, R-Winter Park, and Sen. Lois Tochtrop, D-Thornton.<sup>21</sup>

House Bill 1411 also raised the evidentiary standard required in related condemnation cases to "clear and convincing," shifted the burden of proving a true public use to the condemning authority, and required an affirmative showing by the condemning authority that the parcel sought would be necessary for the eradication of blight.<sup>22</sup>

The practical effect of the legislation, however,

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remained in heated dispute. Sam Mamet and Erin Goff of the Colorado Municipal League told the *Denver Business Journal* at the time that “we are fortunate that a majority of the members of our state Legislature understand and appreciate the need to maintain the ability of urban renewal authorities to use eminent domain, when absolutely necessary, to alleviate slum and blight.”<sup>23</sup>

But property rights advocates, including Jessica Peck Corry (a co-author of this issue paper) disagreed with Mamet and Goff’s conclusions. “If history is any lesson, cities will attempt to exempt themselves from the constitutional protections provided by the bill by claiming ‘home rule’ status. The litigation that will arise will prove prohibitively costly for the families and small businesses trying to save their properties.”<sup>24</sup>

Indeed, Colorado municipalities have continued to aggressively rely on their home rule status to exempt themselves from larger property rights protections (see section on extra-territorial condemnation later in this issue paper for more information on home rule issues).

Other notable land use bills passed during the 2006 session included Senate Bill 154, which listed all entities with the power of eminent domain, and Senate Bill 78, which prohibited private toll road

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companies from engaging in eminent domain. Again, the efforts benefitted from bipartisan support.<sup>25</sup>

Senate Bill 78, known as the “Super Slab” bill, was championed by Sen. Tom Wiens, R-Castle Rock, and Rep. Jack Pommer, D-Boulder. The legislation required “public-private initiatives” for condemnation efforts related to private toll roads. Under the former system, which dated back to the 19th century, private road

developers had a right to condemn private property. Under the new system, as established under the bill, only the Colorado Department of Transportation

retained the power to condemn for roads.<sup>26</sup>

According to Wiens, “the bill [removed] the cloud that’s been hanging over all of Colorado, especially the nearly 100,000 property owners who live along the 12-mile-wide path that is Super Slab.”<sup>27</sup>

Wiens says he introduced the bill in response to concerns from hundreds of property owners who believed their land would become the target of Super Slab developer Ray Wells, whose \$2.5 billion proposed private highway sought to span from Fort Collins to Pueblo.<sup>28</sup> The bill’s victory came in spite of opposition from CDOT and other governmental entities. While Wells declined to accept defeat at the time of the bill’s passage, his highway remains in the planning stages more than 20 years into development.<sup>29</sup>

Senate Bill 154, sponsored by Sen. Ron May, R-Colo. Springs, and Rep. Jack Pommer, D-Boulder, provided clarity to state statute concerning condemnation powers, specifically creating a central statutory reference for all laws that authorize the power of eminent domain. The bill was signed into law by Gov. Bill Owens, a Republican, in April 2006.<sup>30</sup>

As the bill’s language articulated, “it is necessary and appropriate to ensure that Coloradans can easily determine which governmental entities, corporations, and other persons may exercise the power of eminent domain and to further ensure that Coloradans can easily identify the procedural requirements that entities, corporations, and other persons must follow when exercising the power of eminent domain.”<sup>31</sup>

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2009 town hall meeting attended by legislators and RTD representatives, nearly 100 property owners expressed concern about the extent of condemnation RTD would pursue as a result of its planned light rail expansion.<sup>32</sup>

FaceTheState.com, a conservative Colorado political news site, reported about the gathering. “While questions were cut off after an hour and a half, many [property owners] mulled around afterward, consoling each other or planning for the future.

‘I did not feel that the questions were answered in a layman’s term whereby most people could understand them,’

Tom Wambolt, a longtime leader of the Colorado Property Rights Coalition, said. “There were a lot of angry people there that wanted more answers that could not be addressed in [such a short time].”<sup>33</sup>

RTD, for its own part, has attempted frequently over the last few years to communicate its position that it abides by all legal requirements when pursuing properties. In March 2008, RTD Chairman Lee Kemp posted a letter to the public on the agency’s Web site. “Recently, some facts have gotten muddled about how RTD is pursuing property acquisitions under the eminent domain process. I would like to stress that RTD follows all applicable federal regulations and state laws for our property acquisition.” Kemp then listed the specific state and federal statutes the agency said it was abiding by.<sup>34</sup>

The year’s three successful bills built on the previous efforts of Senate Majority Leader Mark Hillman, R-Burlington, and Sen. Shawn Mitchell, R-Broomfield, to reform the state’s urban renewal law and its accompanying statutes to end overly aggressive or bogus takings.

In 2004, Hillman and Mitchell sponsored House Bill

1203, sweeping eminent domain reform legislation that amended Colorado law to state that “no private property acquired after the effective date of this subsection ... shall be subsequently transferred to a private party.”<sup>35</sup>

Notable exceptions to the new standard continue to exist, however.

The prohibition does not apply:

- If the owner consents to the acquisition;
- If the governing body determines that the property is no longer necessary for the purpose for which it was acquired (and the urban renewal authority first offers to sell it from the original owner);
- If the property acquired has been abandoned; or
- If, as part of the eminent domain proceedings, the owner requests that the urban renewal authority acquiring the remainder property also acquire the property not essential to the urban renewal project.<sup>36</sup>

Furthermore, the rule does not apply if each of the following conditions are satisfied: (1) if the governing body has made a determination that the property is blighted or is in a blighted area and the project will be commenced within seven years of the blight determination; (2) before the commencement of negotiations for the redevelopment of such property, the authority provides notice and requests proposals for the redevelopment from all property owners, residents and business owners on the property; and (3) if one parcel owner, among a set of parcels sought by the urban renewal authority, refuses to permit the acquisition of that parcel and that parcel is required for the urban renewal project.<sup>37</sup>

After addressing procedural concerns, the bill clarified the statutory language of “blighted area,”

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increasing the number of factors required to be met for a property to be classified as blight.<sup>38</sup>

In spite of its exceptions, the legislation led to a handful of indisputable victories for property owners facing condemnation disputes. First, it provides that successful challenges to a blight determination will result in an award to the property owner of all reasonable attorney fees. Second, it requires

relocation assistance for displaced property owners and a “business interruption payment” to be paid by the condemning authority to any displaced business owners, with limits capped at \$10,000, or one-fourth of the average annual taxable income of the business.<sup>39</sup>

Opponents to the 2004 and 2006 reforms claimed the measures cumulatively would cause the

demise of urban renewal authorities, eliminating the ability of local governmental entities to pursue redevelopment within their own communities.

In reality, however, Colorado’s urban renewal authorities remain active and viable, due in large part to a favorable tax structure.

Under state statute, urban renewal authorities are funded through local sales taxes to the tune of millions of dollars each year.<sup>40</sup> In addition, when a redevelopment district is being proposed, the urban renewal authority (URA) in that municipality typically provides tax breaks to developers through the use of “tax increment financing.” The structure drives revenues into public coffers or into funds providing for the reimbursement of costs to the developer associated with project and infrastructure expenses.<sup>41</sup>

In many cases and in spite of the nation’s current economic recession, spending remains lavish by some Colorado URAs. Two independent investigations into spending by the Arvada Urban Renewal Authority, one in 2006 and one in 2009, reveal that board members have charged taxpayers to stay in luxurious hotels, including a \$410-a-night

stay in New York’s Waldorf Astoria hotel, as well as tens of thousands of dollars annually for meals, parties, and other entertainment.<sup>42</sup>

## **TRANSIT-ORIENTED DEVELOPMENT**

In 2004, Denver-area voters approved RTD’s FasTracks light rail expansion plan. At the time, the project was given a \$4.7 billion price tag. By March 2009, cost estimates showed the project as \$2.2 billion over budget.<sup>43</sup>

Prior to FasTracks’ passage, much of the public debate surrounded the general feasibility of light rail, as well as direct costs associated with RTD’s own proposal. Missing from the conversation was how or whether RTD would pursue eminent domain for private transit-oriented development (TOD). According to the FasTracks Web site, “RTD’s TOD mission is to help facilitate TOD opportunities that increase ridership or enhance transit investments throughout the District through station design and close coordination with local jurisdictions and developers.”<sup>44</sup>

On the site, RTD also promotes TOD as “a pedestrian-oriented environment that allows people to live, work, shop and play in places accessible by transit. The primary benefits of TODs include: reducing sprawl and protecting existing neighborhoods; reducing commute times and traffic congestion; improving environmental quality and open space preservation; encouraging pedestrian activity and discouraging automobile dependency.”<sup>45</sup>

Under existing Colorado law, RTD is forbidden from acquiring property through eminent domain for any purpose other than for the operation of a mass transit system.<sup>46</sup> Furthermore, current state law specifically states that RTD may not use any of its property in a manner that may compete with neighboring business, or in a manner that will attract non-transit users.<sup>47</sup> Put more simply, RTD cannot

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condemn property for TOD, but even if it could, it would still not be able to use such property in such a way to compete with already existing private businesses or encourage use by non-commuters on their way to a transit station.<sup>48</sup>

In spite of statutory prohibitions, RTD’s critics allege that eminent domain for TOD-related purposes has always been part of the authority’s expansion aspirations. According to Foster and Snyder, RTD had developed long-term proposals demonstrating its aspirations to use the couple’s property not only for a parking garage, which is what RTD claimed publicly, but also as part of a larger private mixed-use residential and commercial development.<sup>49</sup>

that would include a multi-story mixed use building.<sup>53</sup> RTD maintained that its attempt to acquire the Pro-Tint property was justified under state law authorizing RTD condemnations. But the couple’s attorney, Bob Hoban, concludes that such a taking for TOD purposes—rather than purely for the public purpose of operating a mass transit system—is illegal because the primary purpose behind the attempted taking is to put in a retail-residential complex on the property, of which the parking garage would be just one small portion.

Confident that state law was on their side, Foster and Snyder publicly said they would take their case all the way to the Supreme Court, if required to save their property. They expressed outrage that in addition to forcing them to move their business, RTD also was taking away their long-term goal of redeveloping the corner property themselves.<sup>54</sup>

As the major part of their case strategy, they planned to challenge RTD’s right to acquire the property for non-transit uses. Just weeks before an immediate possession hearing (in which the propriety of the proposed taking was to be challenged) was slated to take place in March 2009, however, RTD expressed a commitment to not implementing TOD surrounding the planned Wadsworth station.<sup>55</sup> Specifically, they were informed that the RTD Board of Directors had directed RTD General Manager Cal Marsella to refrain from implementing or offering any TOD on any land acquired by RTD for parking and transit uses at the proposed Wadsworth Station. According to RTD officials, Marsella agreed to this directive. However, because this allegedly took place in executive session, no record or formal documentation has been produced by RTD.<sup>56</sup>

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The couple’s property, located on a busy commercial intersection, is unique in that it has served as both their home and their business for more than 20 years. As the Independence Institute reported in 2008, Foster frequently talked of the “love affair he had built with Snyder

on their property, not only with each other, but also with their land.”<sup>51</sup> Though the parcel is located a full block from the proposed light rail line station, RTD said it wanted the property to put in a parking garage for RTD customers using the station.

Foster and Snyder disagreed, alleging that their property has always been part of a joint effort by Lakewood and RTD to transform the area into a larger high-density neighborhood, one that Mayor Bob Murphy described as the “crown jewel of Lakewood.”<sup>52</sup>

An interactive 3-D proposal created by the Boulder-based planning firm Winston Associates, and available online, suggests a future use of the property

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and ability to relocate were adequately addressed. According to Foster and Snyder, the case had taken a severe emotional toll on them, and they did not want to be subjected to the risks associated with a trial.<sup>57</sup>

RTD's TOD efforts are headed up by its director Bill Sirois, who is charged with helping to effectuate and implement transit-oriented-development throughout the various FasTracks corridors. In slides he prepared for a speech at the October 2008 national "Railvolution" conference in San Francisco, Sirois detailed RTD's surprise and lack of preparation in dealing with opposition to the prospect of RTD taking property for TOD purposes.<sup>58</sup>

The presentation, titled "Eminent Domain—Tool or Trouble for TOD," included PowerPoint slides telling the story of how dozens of grassroots activists rallied around Foster and Snyder. According to Sirois, the activists inundated the agency with "voluminous open records requests."<sup>59</sup>

During the presentation, Sirois also discussed 2008 legislation, successfully killed by RTD's team of paid lobbyists, and which sought to "limit RTD's eminent domain authority."<sup>60</sup>

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In its original form, House Bill 1278 prohibited RTD from using eminent domain to condemn private property for the express purpose of transferring ownership to a private developer for development not related to operation of a transit system.<sup>61</sup> An amended version only required that if RTD didn't use the property for such purposes, it would have to sell the land back to the power at a price equal to or less than what RTD paid for it. The bill languished in the Senate Local Government Committee until 10 days before the end of the 2008 session,

when bill sponsor Rep. Lois Tochtrop, D-Thornton, agreed to postpone it indefinitely out of concerns that it would be killed or adversely amended.<sup>62</sup>

Foster and Snyder were devastated. As one news reported chronicled, "Wearing a t-shirt reading 'Kindness Regardless,' Lakewood business owner Kim Snyder broke down in tears at the Capitol Thursday afternoon shortly after a state Senate panel postponed indefinitely a bill that sought to limit the use of eminent domain by [RTD]."<sup>63</sup>

Between early 2008, when the legislature began considering House Bill 1278, and March 2009, when the Pro-Tint case settled, RTD dramatically transformed its public message with regard to whether it would pursue private commercial developments as part of its transit station plans. According to a January 2008 *Rocky Mountain News* article, "RTD says it ought to be able to allow commercial redevelopment on station sites if local zoning permits it."<sup>64</sup> The article referenced testimony of RTD General Manager Cal Marsella, who according to reporter Kevin Flynn, told RTD board members that turning condemned property over to private developers could save taxpayers money, "as FasTracks, which is over budget is built out. Developers can build the transit garages for less than RTD if they are permitted to include other development in the deal."<sup>65</sup>

Lakewood City Councilwoman Vicki Stack maintains that the Pro-Tint case continues to weigh heavily on many area property owners. "There are several upset property owners, many seniors, but they are afraid to come forward with complaints because of the treatment the Fosters received prior to settlement," she said. "Some [property owners targeted for condemnation] are going as far as accepting RTD appraisals because they cannot afford their own and do not believe they will be reimbursed."<sup>66</sup>

According to Stack, concerns over RTD's negative interactions with property owners led the city to recently hire an outside intermediary to deal with complaints. "We have had so many problems with

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the project to date that Lakewood has hired an ombudsman,” she told Face The State.<sup>67</sup>

While in 2008, Marsella defended the concept of turning over property to private developers as a cost-savings measure, an RTD spokeswoman speaking with a reporter in April 2009 claimed that RTD

has no goal to engage in TOD along FasTracks western corridor.<sup>68</sup>

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“We follow the federal process [for transit-related condemnations], which is based on fair market value and due process,” FasTracks public information officer Pauletta Tonilas told a reporter in April 2009. “We are not in the development business. We are the ‘T’ in TOD and that’s all.”<sup>69</sup>

Sorois’ assessment of RTD’s TOD aspirations fell somewhere between that of Tonilas and Marsella. In defending his 2008 presentation recently, Sorois advocated alternatives to eminent domain for TOD, but stopped short of ruling it out entirely.

“The purpose of the presentation was to indicate to people who are thinking about TOD around transit stations not to look at using eminent domain, necessarily, as a tool to acquire property, because there are all these issues out there,” he said in April 2009.<sup>70</sup>

Many landowners might not be so lucky, as it took nearly two years and hundreds of hours of lobbying and legal efforts to provide a settlement Foster and Snyder felt they could live with. In the future, there is nothing to stop RTD from lobbying state legislators for a change to its eminent domain powers that would permit for condemnation related to TOD. While Colorado legislators responded to *Kelo* and other notable high-profile cases by restricting condemnation powers in 2005 and 2006, RTD’s lobbyists could argue in the future that eminent domain used to encourage higher density housing promotes a greater public good. As Kent Kammerer,

a Seattle-based writer and leader of the Seattle Neighborhood Coalition, notes, “We need to remember that [*Kelo*], 2005 US Supreme Court decision that allowed a city or transit authority to acquire private property and resell it to another private party. If eminent domain was pursued in areas designated for transit area development, it could force homeowners to lose their homes and have the property resold to private developers.”<sup>71</sup>

Given the response to *Kelo* by the majority of state legislatures (see General Overview), which entailed implementing at least some level of prohibition on eminent domain for economic development purposes, municipal governments and transit authorities are feeling the constraints. Time will tell whether they will attempt to carve out exceptions to these prohibitions by allowing for eminent domain when it is pursued for TOD purposes. Thus far, various transit agencies around the nation have spent millions of dollars to study and implement TOD in conjunction with mass transit efforts.<sup>72</sup>

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As previously referenced, TOD presents its own specific issues as part of a larger conversation about eminent domain. Most notably, the following questions remain.

1. Under what scenarios is a transit authority permitted to condemn property with the objective of transferring ownership of such property to a private developer? While Colorado law allows for condemnation of property adjacent to rail stations to provide commuter services, including parking spaces, how far will courts go in defining such permissible services? Put another way, is it acceptable to condemn property to make way for a privately-owned coffee shop that would primarily serve commuters? What about condominiums?
2. Next, is a transit authority permitted to take title to property permanently if the property is sought for a temporary construction staging

zone? This issue was recently addressed in a landmark Washington State Supreme Court case; however, the issue has not been addressed in Colorado. The litigation may include case specifics that would also mean that it could not be appropriately applied to cases like those seen recently relating to RTD's expansion efforts.<sup>73</sup>

3. How will air rights be treated in future cases where property owners seek compensation not just for any dwellings, structures, and land on their condemned property, but also for the air space above it—an area frequently sought for high-rise residential developments adjacent to rail or bus stations?
4. And finally, in the case of a partial taking for purported transit uses, whether a condemning authority's decision that the remainder of a property is "unmarketable" should be given deference in both the pre-litigation and litigation condemnation processes. Many times, the condemning authority seeks to acquire only a portion of property for alleged transit uses; however, the condemning authority often deems the remaining portion unmarketable and seeks to take that as well, which results in a complete taking. The issues remains as to whether the condemning authority should be making these decisions and whether or not this is an avenue for eminent domain abuse.

## ASSESSED VALUES & JUST COMPENSATION

Under the Takings Clause of the Fifth Amendment, no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."<sup>74</sup>

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But in practice, it is often said that "just compensation" is never equitable. This is because a property acquired through eminent domain cannot be valued based upon its future earning potential, either as a result of possible improvements that could have been

made by the displaced owner, or though any benefit gained from redevelopment initiated or subsidized by government.

Under the "Project Influence Rule," landowners cannot be compensated for the added value that proposed redevelopment will allegedly bring upon their property.<sup>75</sup> In other words, Pro-Tint can never be compensated for the value of its property as if it were located next to RTD's transit station. It can never be compensated for the upward development potential air rights that it is losing to RTD.

*Under the "Project Influence Rule," landowners cannot be compensated for the added value that proposed redevelopment will allegedly bring upon their property.*

While the majority of American courts (including those in Colorado) uphold the rule, its implementation in modern condemnation cases raises serious questions about equitable treatment of property owners. This fact is due to the increasingly aggressive role governments are playing in redeveloping neighborhoods, either as part of larger urban renewal efforts, TOD, or transit projects.

Prominent Denver appraiser Wayne Hunsperger represented Pro-Tint in its evaluation of the Pro-Tint's land valuation. In a recent letter to Hoban, Hunsperger articulated the position that future development of the property would not be a factor in determining the property's value.

The basis for just compensation is of course what the property would sell for on the open market as of the date of possession. Prices paid for comparable properties are usually the best measure of value. Buyers' expectations are inherent in those prices. Thus, to the extent that any value is ascribed to the potential for a multi-use, 8-story building, on this date, we have captured it within the West Colfax Overlay District neighborhood comparables. However, the market has not recognized or been willing to pay for the full extent of air rights allowed within the District.<sup>76</sup>

The letter came in response to Pro-Tint’s attempt to have its property valued in comparison to other local redevelopment projects that benefitted from government subsidies. “We recognize that Belmar is an example of a mixed use project in Lakewood, but prices were influenced not only by government financial involvement but also by the creation of a regional shopping environment,” Hunsperger

added.<sup>77</sup> Under current law, appraisers are instructed with the following: “In determining the market value of the property taken, you are not to take into account any increase or decrease in value caused by the proposed public project.”<sup>78</sup>

While the project influence rule prohibits consideration of future property value in appraisals, Colorado law offers a different formula in partial takings cases where only a portion of an individual owner’s land is acquired.<sup>79</sup> Specifically, if the government can prove that the remaining property (the non-acquired parcel) will benefit from future improvements made to the parcel acquired, the value provided to the owner can be decreased.<sup>80</sup>

### Highest & Best Use in Re-Zoned Areas

As local governments and master planning agencies continue to adhere to principles of dense urban “smart growth,” property owners face the growing risk they will not be fully compensated for the entire “highest and best use” of their property. This

scenario is most likely for properties located adjacent to districts rezoned to allow for higher-density uses, such as Lakewood’s Transit Mixed Use Zone District.<sup>81</sup>

Under Colorado statute, land sought for condemnation is always valued, in part, based on

its “highest and best use.” According to Albert N. Allen, a nationally recognized real estate appraiser who frequently appears as an expert witness in real property cases, “[Highest and Best Use] is probably the single most important appraisal principle and is fundamental when estimating market value.”<sup>82</sup> As Allen writes, property is always appraised based on its highest and best use, “theoretically vacant and available for development at the date of the appraisal.”<sup>83</sup>

While this standard is designed to ensure that an existing use of a property is not the only factor in determining its value, it does not also factor in consideration of uses that are perceived as not being “reasonably probable.”<sup>84</sup> Such uses would exclude consideration of uses not allowed under current law, including those prohibited by existing zoning. Lakewood’s TMU zone was approved by the Lakewood City Council in 2007, and according to its Web site, “The zone district allows for a mix of uses on individual properties, such as retail shops on the first floor of a building with residential units on the upper floors. The zone district also allows for a mix of residential dwelling types within the station areas, with densities that are intended to support the future light rail transit infrastructure.”<sup>85</sup>

For properties located outside the zone, even if in the zone’s immediate vicinity, a “highest and best use” evaluation does not allow for a property’s most lucrative use to be considered as part of a future mixed-use development. Under the current standard, there is also nothing to stop a government agency from rezoning a property located in a lower-density zoning into a higher-density zone after condemnation. In addition, and as previously referenced, the standard does not allow for properties located outside the zone to be compared to properties inside the zone for the purposes of accurate valuation. Ultimately, without a valid

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### Assessed Values

Under current Colorado law, there is no guarantee that property owners being condemned will be compensated at the same level at which they are taxed.<sup>86</sup> A property's taxable value, calculated annually as a "current year active value," is more commonly known as a property's assessed value.<sup>87</sup>

While the Fifth Amendment requires "just compensation" for property takings, its calculation involves an extremely complex analysis, often riled in political considerations. According to a May 2008

*Rocky Mountain News* analysis, "a down real estate market has found the Regional Transportation District making some eminent domain offers to land owners along its West Corridor light-rail line that in some cases . . . are lower than the county assessors' values."<sup>88</sup> In one situation chronicled by *Rocky* reporter Kevin Flynn, business partners Terry Smith and Robert Guy were offered \$160,000 for property that was assessed [by Jefferson County] at a value of \$173,500."

A *Rocky Mountain News* editorial elaborated on possible inequities. "This is simply not right. Why should government be able to offer less for a property than the value on which that property owner is being taxed by government?"<sup>89</sup>

In good economic times, the lack of a statute ensuring a minimum compensation baseline equal or above assessed value is ignored. In a bad market, its absence can have devastating consequences, leaving property owners without any viable opportunity to purchase a similar property.

"Under normal circumstances, most property owners who want to sell would wait out a depressed real estate market," the editorial continued. "They'd hold out for an improved economy where they might make a profit on the sale, or at least break even. But eminent domain procedures - despite regulations calling for offers of 'fair market value' - leave sellers little choice about when their property is sold."<sup>90</sup>

During the nation's current tough economic conditions, legislators now maintain an opportunity to protect property owners facing condemnation from further losses associated with a down real estate market. The language of such a legislative effort would be clear and simple: the government cannot compensate property owners at a dollar value lower than the one assessed by any governmental entity.

### EXTRA-TERRITORIAL CONDEMNATION

In June 2008, the Colorado Supreme Court returned a controversial 6-1 decision that provides municipal governments wide latitude when it comes to pursuing condemnation for open space outside their territorial boundaries.<sup>91</sup>

Specifically, the court held in *Town of Telluride v. San Miguel Valley Corp.*, that the state legislature had overstepped its authority when attempting to limit the ability of municipalities to pursue such condemnations. While permitting the taking, a separate court case determined that the town would have to pay the landowner \$50 million for the land plus all legal fees.<sup>92</sup>

Behind the decision was a two-decade old legal battle that brewed between San Diego defense contractor Neil Blue and Telluride town leaders and environmental activists who objected to various proposals to turn his 572-acre property into a low-density development that could have included luxury homes and a golf course. Blue's opponents raised more than \$1 million to stop his plans, and

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Hollywood actors, including Daryl Hannah, lent their voice in opposition.

While Blue was vulnerable to public rebuke for his wealth, his case raised larger questions about whether home rule municipalities should be allowed to condemn property located outside their jurisdictional boundaries.

Blue initially took his dispute to court, but he also fought to be heard at the state legislature. In 2004, as part of House Bill 1203, lobbyists representing Blue, together with a diverse grassroots coalition of property rights activists, fought successfully to include a provision in the legislation referred to as the “Telluride Amendment.”

At the time, Senate Majority Leader Mark Hillman, R-Burlington, characterized Blue’s struggle as

follows: “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. If a property right can be overturned by a single majority vote of your neighbors, then it really doesn’t mean anything to begin with.”<sup>93</sup>

The new language mandated that no municipality could acquire property through eminent domain outside its territorial boundaries, nor provide any funding for such acquisition.<sup>94</sup> This rule did not

apply to condemnation for water works, light plants, power plants, transportation systems, heating plants, any other public utilities or public works, or for any purposes necessary for such uses. Furthermore, under the provision, no such municipality could acquire property by condemnation outside its boundaries for purposes of constructing or maintaining parks, recreation, open space, conservation, preservation of views or scenic vistas, or for similar purposes, except without the prior consent of the property owner and the local municipality.<sup>95</sup>

Environmentalists were not pleased. Opposing the change at the time was Elise Jones, who served as executive director of the Colorado Environmental Coalition. “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.”<sup>96</sup>

Jones was referring to a 1993 vote by Telluride residents who voted to allocate 20 percent of sales and use tax revenues to acquire Blue’s property (referred to as the “Valley Floor”) as open space.<sup>97</sup> While the 2004 legislation was signed into law by Republican Gov. Bill Owens, opponents quickly launched a sophisticated court challenge questioning its constitutionality. They found a responsive ear in San Miguel District Judge Charles R. Greenacre, who held the legislation unconstitutional.<sup>98</sup>

Greenacre specifically 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.<sup>99</sup>

Colorado’s “Home Rule” cities are defined under Article XX of the Colorado Constitution as having a population of 2,000 or more residents and having the power to “make, amend, add to, or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.”<sup>100</sup> Under the Constitution, “such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.”<sup>101</sup>

Greenacre defended the decision, writing, “There is simply no authority for the proposition that the General Assembly may regulate, much less prohibit, a home rule municipality’s constitutional powers.”<sup>102</sup>

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In his ruling, Greenacre rejected Blue’s contention that the legislation pre-empted the town’s powers of condemnation.<sup>103</sup>

Prior to the Colorado Supreme Court’s ruling in the case, Greenacre’s decision emboldened at least two Colorado municipalities to pursue aggressive extraterritorial condemnation efforts. Most notably, Golden attempted to forcibly acquire 65 acres of land outside of its jurisdiction for the purposes of prohibiting the development of a high definition

broadcast tower, to be built by a consortium of television stations called the Lake Cedar Group. Lake Cedar maintained that the location atop Lookout Mountain provided the best signal quality in the metropolitan area.<sup>104</sup>

Congressional leaders, including both of Colorado’s U.S. Senators, stepped in and thwarted Golden’s efforts in December 2006, introducing legislation mandating construction of the tower.<sup>105</sup>

The tower, now built, ensures that 600,000 metro-area residents who rely on free broadcast television can continue to receive this service in the aftermath of FCC changes

to broadband distribution.<sup>106</sup> It is important to emphasize that while the extraterritorial condemnation was stopped, it was not stopped due to concerns about improper acquisition.

The distinction was noted by Golden City Manager Mike Bestor, who told the *Denver Post* at the time that the Congressional action “doesn’t impact our ability to use eminent domain.”<sup>107</sup>

Further, in 2007, the Parker Town Council sought to condemn an 80-acre parcel of property outside of Parker town limits owned by Linda and Gary Smith.<sup>108</sup> The couple used the land to operate their small business, American Design and Landscape. Parker wanted to acquire the property for use as

open space and parkland. The Smiths and town officials discussed the sale of the property for years, but negotiations fell apart in 2006 when the two sides could not agree on a purchase price.<sup>109</sup> Shortly thereafter, Parker began condemnation proceedings, citing its home-rule charter as authority. The charter asserts, “The Town shall have the right of eminent domain for all municipal purposes whatever, either within or without the limits of the Town.”<sup>110</sup>

Prior to the 2009 legislative session, Colorado lawmakers expressed an interest in reevaluating extraterritorial condemnation; such efforts failed to materialize. Given the high profile nature of extraterritorial condemnation cases, however, it is likely that the legislature will revisit this issue in the near future.

## CONCLUSION

While high-profile eminent domain cases over the last four years, including *Kelo* and *Pro-Tint*, have raised legislative and public awareness about the need for greater land use protections in Colorado, much work remains to be done. In the current era, marked by aggressive government intervention into the commercial, residential, and transit-related real estate sectors, ousted property owners risk losing out not only on long-term property appreciation, but also short-term compensation and access that could destroy their personal and business livelihoods.

In moving forward, advocates for greater land use protections should prepare themselves for sophisticated lobbying efforts by municipal governments and transit agencies seeking greater eminent domain powers through an expanded “public use” definition. In addition, constitutional scholars should be concerned about the ability of “home rule” governments to exempt themselves from basic Fifth Amendment protections.

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*In moving forward, advocates for greater land use protections should prepare themselves for sophisticated lobbying efforts by municipal governments and transit agencies seeking greater eminent domain powers through an expanded “public use” definition.*

While property owners targeted by eminent domain face an uphill battle, they should take heart in knowing that thousands of displaced property owners across the nation, including Suzette Kelo in Connecticut, and Galen Foster and Kim Snyder in Colorado, continue the fight to ensure that others like them are protected to the fullest extent of the law in the future.

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