MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

2039

2007 SENATE JUDICIARY

SB 2039

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2039

Senate **Judiciary Committee**

☐ Check here for Conference Committee

Hearing Date: January 9, 2007

Recorder Job Number: 802

Committee Clerk Signature Maura L Solberg

Minutes: Relating to Power of Eminent domain.

Senator David Nething, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

Testimony In Support of Bill:

Vonette Richter – Leg. Council Serving on the Interim Committee In (meter :18) Introduced Bill gave out Judicial Process Interim study Att. #1. This committee was ended in Sept and put together this legislation before the measures had been voted on in ND 2006 Election. This is not meant complement or work in conjunction to that legislation. This was independent of the measure.

Sen. Lyson, Dist. #12 (meter 4:27) Part of this committee and realizes that this bill in its current state. Ms. Heitkamp may have some amendments that I am sure that are committee would not have any objection to. He reviewed the history of the bill (meter 1:50)

Sen. Nething, Chm. Asked if we could possible "Hog House" the bill. If we do not get to everyone we will continue this after wed.

Testimony in Opposition of the Bill:

Heidi Heitkamp, Attorney representing self (meter 7:00) Spoke of appearing before the committee. At that time was told that if this measure became Law this would be a house

keeping bill only. This is not that. This bill is in opposition to the constitution of ND State Law. Discussed why (meter 3:30).

The committee discussed Hog Housing vs. killing the current bill. (meter 15:39)

Testimony Neutral to the Bill:

Francis G. Ziegler, ND Dept of Trans. (meter 17:08) Gave testimony – Att. #2 with submitted amendments.

Terry Traynor – Assoc. of Co. (meter 19:17) We have concerns in Section 14.

Committee discussed having time to bring a good clean bill to the table instead of trying to "hog house" this one.

Senator David Nething, Chairman closed the hearing.

Sen. Lyson made the motion to DO NOT PASS SB 2039 and **Sen. Fiebiger** seconded the motion. All members were in favor of the motion. Motion passes.

Carrier **Sen. Lyson**

Senator David Nething, Chairman closed the hearing

Date: /
Roll Call Vote # 1-9-07

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 2039

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass

Motion Made By Sen. Lyson Seconded By Sen. Fiebiger

Senators	Yes	No	Senators	Yes	No
Sen. Nething	✓		Sen. Fiebiger	✓	
Sen. Lyson	✓		Sen. Marcellais	✓	
Sen. Olafson	✓		Sen. Nelson	✓	

Total Yes 6 No 0

Absent _____

Floor Assignment Sen. Lyson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2039: Judiciary Committee (Sen. Nething, Chairman) recommends **DO NOT PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2039 was placed on the Eleventh order on the calendar.

2007 TESTIMONY

SB 2039

Att #1

EXCERPT FROM 2007 LEGISLATIVE COUNCIL FINAL REPORT REGARDING SENATE BILL NO. 2039 - JUDICIAL PROCESS COMMITTEE

EMINENT DOMAIN STUDY

By directive of the chairman of the Legislative Council, in light of the recent United States Supreme Court decision, *Kelo v. City of New London*, 545 U.S. 469 (2005), the committee was directed to study issues relating to the appropriate public use for the power of eminent domain. The committee was directed to determine whether any statutory or constitutional changes regarding the power of eminent domain issues are appropriate.

Kelo v. City of New London

The portion of the Fifth Amendment of the United States Constitution known as the "Takings Clause" provides that "nor shall private property be taken for public use, without just compensation." In *Kelo v. New London*, the United States Supreme Court concluded that the acquisition of property by the city of New London, Connecticut, through eminent domain for the purpose of commercial development did not violate the public use restriction of the Fifth Amendment of the United States Constitution.

Kelo arose from New London's use of eminent domain to condemn privately owned real property so that the property could be used for economic development. The case was appealed from a decision in favor of the city of New London by the Connecticut Supreme Court, which found that the use of eminent domain for economic development did not violate the public use clauses of the state and federal constitutions. The Connecticut court found that if an economic project creates new jobs, increases tax and other city revenues, and revitalizes a depressed, even if not blighted, urban area, it qualifies as a public use. The court also found that government delegation of eminent domain power to a private entity also was constitutional as long as the private entity served as the legally authorized agent of the government.

The United States Supreme Court granted certiorari to consider questions last raised in *Berman v. Parker*, 348 U.S. 26 (1954). The issue before the Court was whether the Fifth Amendment protects landowners from the use of eminent domain for economic development, rather than, as in *Berman*, for the elimination of slums and blight.

Appeal to the United States Supreme Court

By granting certiorari in this case, the United States Supreme Court agreed to hear its first major eminent domain case since 1984. In previous cases, states and municipalities had extended their use of eminent domain, frequently to include economic development purposes. The *Kelo* case was different in that the development corporation was a private entity. In the appeal to the Supreme Court, the plaintiffs argued that it was not constitutional for the government to take private property from one individual or corporation and give it to another simply because the other might put the property to a use that would generate higher tax revenue.

Majority and Concurring Opinions

On June 23, 2005, the United States Supreme Court, in a 5-4 decision, found in favor of the city of New London. Justice John Paul Stevens wrote the majority opinion. He was joined by Justices Anthony Kennedy, David Souter, Stephen Breyer, and Ruth Bader Ginsburg. The majority found that the city of New London exercised its eminent domain authority to acquire private property for the purpose of a program of economic rejuvenation. The majority also determined that although the petitioner's property was not blighted, the economic rejuvenation plan would serve a public interest and thus satisfy the public use requirement of the Fifth Amendment. Justice Stevens said that local governments should be afforded wide latitude in seizing property for land-use decisions of a local nature. In his opinion, Justice Stevens said "The city has carefully formulated a development plan that it believes will provide appreciable

benefits to the community, including, but not limited to, new jobs and increased tax revenue." The opinion addressed the possibility that the decision would be abused for private purposes by arguing that "the hypothetical cases posited by petitioners can be confronted if and when they arise. They do not warrant the crafting of an artificial restriction on the concept of public use." Justice Stevens also emphasized the importance of judicial restraint, stating that the Court recognized that condemnation of property would entail hardship and that the states were free to impose restrictions on the use of this power by local authorities. Justice Kennedy's concurring opinion observed that in this particular case the development plan was not "of primary benefit to . . . the developer" and suggested that, if it had been, the taking might have been impermissible.

Dissenting Opinions

Justice Sandra Day O'Connor wrote the principal dissent, joined by Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas. Justice O'Connor suggested that the use of this power in a reverse Robin Hood fashion--take from the poor, give to the rich--would become the norm, not the exception: "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms." She argued that the decision eliminates "any distinction between private and public use of property--and thereby effectively [deletes] the words 'for public use' from the Takings Clause of the Fifth Amendment."

Justice Clarence Thomas also wrote a separate dissent in which he argued that the precedents the Court's decision relied upon were flawed and that "something has gone seriously awry with this Court's interpretation of the Constitution." He said the majority was replacing the Fifth Amendment's "public use" clause with a very different "public purpose" test: "This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a 'public use.'"

State and Federal Reaction to *Kelo*

The *Kelo* decision will likely have little effect on those eight states that specifically prohibit the use of eminent domain for economic development except to eliminate blight: Arkansas, Florida, Illinois, Kentucky, Maine, Montana, South Carolina, and Washington. According to the National Conference of State Legislatures (NCSL), as of September 2006, eminent domain legislation in response to *Kelo* has been considered in each of the 46 states that have been in session since the decision came down on June 23, 2005. Legislatures, to date, have passed bills as follows:

- Enacted laws in 26 states - Alabama, Alaska, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Missouri, Nebraska, New Hampshire, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, and Wisconsin;
- Passed a constitutional amendment that will go on the ballot for voter approval in Florida, Georgia, Louisiana, Michigan, New Hampshire, and South Carolina (Florida, Georgia, and New Hampshire also enacted statutes); and
- Vetoed by the Governor in Arizona and New Mexico. In Iowa, the legislature overrode the Governor's veto.

The legislation enacted in these states generally falls into seven categories:

- Prohibiting eminent domain for economic development purposes, to generate tax revenue, or to transfer private property to another private entity.
- Defining what constitutes "public use," generally the possession, occupation, or enjoyment of the property by the public at large, public agencies, or public utilities.
- Restricting eminent domain to blighted properties and redefining what constitutes blight to emphasize detriment to public health or safety.
- Requiring greater public notice, more public hearings, negotiation in good faith with landowners, and approval by elected governing bodies.
- Requiring compensation greater than fair market value in those cases in which property condemned is the principal residence.

- Placing a moratorium on eminent domain for economic development.
- Establishing legislative study committees or stakeholder task forces to study and report back to the legislature with findings.

Congressional Reaction

Congress passed legislation in November 2005 which prohibits states from using certain federal funds in economic development projects "that primarily benefit private entities." The legislation exempts mass transit, railroad, airport, seaport, and highway projects and energy, communications, water, wastewater, public utility, and brownfields projects that benefit or serve the general public. The legislation also calls for a year-long study by the Government Accountability Office on the nationwide use of eminent domain.

North Dakota Constitutional and Statutory Provisions

Article I, Section 16, of the Constitution of North Dakota provides a similar protection to that granted under the Fifth Amendment of the United States Constitution with respect to the taking of private property. Section 16 provides that private property may not be taken or damaged for public use without just compensation having been first made or paid into the court for the owner unless the owner chooses to accept annual payments. Section 16 also provides that a right of way may not be appropriated to the use of any corporation until full compensation has been made.

North Dakota Century Code Chapter 32-15 sets forth the requirements for the exercise of the power of eminent domain. Section 32-15-01 defines eminent domain as the right to take private property for public use. Section 32-15-02 sets forth the public uses for which eminent domain may be exercised.

Numerous statutory provisions specifically authorize the state and political subdivisions to exercise eminent domain for specific public purposes or public uses. Among those provisions is NDCC Section 40-58-08, which authorizes a city to exercise eminent domain when necessary for or in connection with a development or renewal project under the urban renewal law.

Other provisions include NDCC Chapter 2-06, which grants eminent domain authority to an airport authority; Section 38-14.2-09, which grants eminent domain authority to the Public Service Commission for abandoned surface mine reclamation; Section 40-33.2-06, which grants eminent domain authority to municipal power agencies; and Section 40-39-02, which authorizes municipalities to take private property by purchase or eminent domain for streets or alleys.

In 2003, legislation relating to the powers of a port authority was passed. The law is codified as North Dakota Century Code Chapter 11-36. Section 11-36-17 provides that the acquisition of land is a public and governmental function exercised for a public purpose.

North Dakota Case Law

A 1996 decision of the North Dakota Supreme Court is somewhat similar to the *Kelo* decision. In *City of Jamestown v. Leevers Supermarkets, Inc.*, 552 N.W.2d 365 (N.D. 1996), the Supreme Court concluded that the city of Jamestown did not abuse its discretion in finding the taking of private property, which was used as a parking lot, to be in the interests of the public economy, health, and welfare of its residents so that the property could be used for the building of a new grocery store. However, because the trial court made no finding whether the primary object of the development project was for the economic welfare of Jamestown and its residents rather than for the benefit of the private interests, the court stated that a determination of whether the public use requirement had been satisfied could not be made and directed the trial court to make the necessary finding on that issue. The court stated that if the primary object of the development is for the economic welfare of the city and its residents, rather than the primary benefit of private interests, the trial court should reinstate the judgment of the taking and award just compensation. However, the Supreme Court further stated that if the trial court was to find that the primary object of the development was for the benefit of private interests, it must refuse to allow the taking.

Testimony and Committee Considerations

The committee studied the appropriate public uses for the power of eminent domain. The committee conducted a series of public hearings around the state to receive testimony from individuals and various organizations and entities that had an interest in the appropriate uses for the power of eminent domain and to determine whether there is a need to enact legislation or a constitutional amendment to address the issues raised in *Kelo*. The committee also received extensive testimony regarding an initiated constitutional amendment measure regarding the power of eminent domain. The chairman of the committee emphasized that the purpose of the study was to review the eminent domain issues raised in recent court decisions and to provide a forum for the public to discuss the issues. The chairman also indicated that the committee would not take a position on the initiated measure. The measure, which appeared on the November 7, 2006, general election ballot, passed.

The committee conducted two public hearings in Bismarck and one public hearing each in the cities of Fargo, Minot, and Dickinson. In addition to the general public, the committee invited to the hearings representatives of state and local economic development organizations, local chambers of commerce, elected city officials, the Department of Transportation, the North Dakota Association of Counties, the North Dakota League of Cities, the North Dakota County Commissioners Association, the North Dakota School Boards Association, the North Dakota Farm Bureau, the North Dakota Farmers Union, the Landman's Association of North Dakota, the North Dakota Stockmen's Association, the North Dakota Association of Realtors, and the sponsoring committee of the initiated measure.

The committee also received information regarding the entities in the state which have eminent domain authority.

Bismarck Hearings

At the hearings conducted in Bismarck, the committee received testimony that emphasized that any change to the Constitution of North Dakota should be done slowly and carefully. According to the testimony, the reaction to the *Kelo* decision should not be to amend the constitution without serious consideration of the effects the amendment could have. It was emphasized that it is important to have faith in local governments and other bodies of elected officials. It was suggested that if eminent domain authority is to be limited, it would be better to have the Legislative Assembly address the issue. Concerns were expressed about how the initiated measure, if passed, would affect urban renewal projects.

Testimony in support of the initiated measure from a member of the initiated measure's sponsoring committee indicated that the constitutional amendment was drafted based upon citizens' concerns about the *Kelo* decision. According to the testimony, the eminent domain issue is a battle between a private citizen's rights and the government's interest. According to the testimony, the initiated measure, which would restrict state or local governments from taking private land for economic development, is the surest way to protect private property from an eminent domain taking. According to the testimony, the decision in *Kelo* is and has been the law in North Dakota since the 1996 *Leevers* decision. It was emphasized that the Constitution of North Dakota and state law allow for a citizen-initiated process to create statutes or to amend the constitution without legislative involvement. It was pointed out that the measure will not affect the ability of the government to build roads or put in a sewer system; rather the measure provides that economic development, an increase in the tax base, or general economic health cannot be used as the rationale for an eminent domain condemnation. According to the testimony, because the United States Supreme Court has been steadily eroding property owners' rights through the eminent domain process since 1954, the *Kelo* decision was not that shocking in light of previous decisions on eminent domain. It also was noted that the measure would allow a governmental entity to condemn property that is blighted if economic development is not the purpose of the taking but rather is only incidental to the taking. According to the testimony, under the language of the proposed initiated measure, incidental economic benefit from an eminent domain taking is allowable. It was also noted that if a governing body takes more land than is needed, the governing body cannot resell the extra property for private use. It was pointed out that if the initiated measure passes, urban renewal law can still exist; however, governing bodies will not be

able to use eminent domain to condemn property. The opinion was also expressed that true blight can be addressed by a city's police powers.

Other testimony in support of the initiated measure indicated that the language of the initiated measure would not affect the continuation of traditional government services. According to the testimony, the initiated measure would not prohibit the taking of property to build a road or to provide any other essential government service to an economic development project. The testimony indicated that on its face, the initiated measure would not prevent the taking of property for public uses, such as a public road, park, or school. According to the testimony, the initiated measure would prohibit the selling or transferring of land taken by eminent domain to another private purpose. However, the opinion was expressed that land that is no longer needed for a public use could be returned to any successor in interest or assignment. It was noted that if the measure passes there may be a need for legislation to address the transferability of property. The opinion was also stated that the restriction in the initiated measure would not prevent the sale of land purchased by the government because the restriction only applies to land taken by eminent domain.

The committee received testimony that one of the criticisms of the initiated measure is that as a result of this measure, unused government property will remain idle and will not be available for development. That argument, it was noted, presupposes that only the government can develop land. The testimony indicated the opinion that the measure would permit residual land to be returned to the original owner who could develop the residual property and put that property to use. Finally, the opinion was expressed that perhaps the greatest complaint about this measure is that if it passes, it will be more difficult for the government to take property. According to the testimony, that was the sponsor's intention.

Testimony in opposition to the initiated measure indicated that eminent domain is used judiciously in this state. The opinion was expressed that although eminent domain is used carefully and rarely, it is an important tool for governments. According to the testimony, Grand Forks used eminent domain authority in the late 1960s, in the late 1970s, and most recently after the 1997 flood. It was noted that the city's flood control project would not be as far along as it is without the use of eminent domain authority. It was also noted that North Dakota's eminent domain law is more stringent than the Minnesota eminent domain law. North Dakota law requires the governing body to adopt a resolution, obtain an appraisal, and negotiate in good faith with the property owner. North Dakota law also allows the property owner to ask for attorney's fees. According to the testimony, if the initiated measure regarding eminent domain passes, it would limit what Grand Forks is doing in terms of flood control. The testimony indicated that the measure would also impact the state's urban renewal law. According to the testimony, if a city uses eminent domain to obtain property under the urban renewal law, the city could not permit commercial interests to relocate in that area. The testimony indicated that the property taken by eminent domain could only be used as city property and the city could not resell the property for private development. According to the testimony, there is not an abuse of eminent domain authority in North Dakota. The testimony indicated that the appropriate place to focus on this issue is in the Legislative Assembly.

Other testimony in opposition to the initiated measure indicated that the state's urban renewal law, which has been on the books for 50 years, allows for the use of eminent domain to obtain underused property, not just blighted property. The opinion was expressed that the proposed initiated measure goes too far in its effort to protect individual rights and that those rights can be protected by making changes and modifications to the state's laws without destroying the intent of the Legislative Assembly for the past 50 years. It was suggested that one of the changes could be made in NDCC Section 40-58-02, which contains the findings and declarations of necessity for urban renewal. This section also states why urban renewal is necessary and requires findings of unemployment, underemployment, and joblessness on a statewide basis. It was suggested one way to address some of the concerns about eminent domain would be to require a finding of unemployment, underemployment, or joblessness in a specific community rather than on a statewide basis. It was noted that another section that could be amended is Section 40-58-05. This section requires a finding that the action is necessary in the interest of the public economy, health, safety, morals, or welfare of the residents of the city. It was suggested that this section could be amended to require the city to prove that the exercise of the urban renewal law powers

could reasonably be expected to alleviate the conditions at issue. Another suggested change was to require that an underutilized or unutilized property must also be blighted. It also was suggested that it may be helpful to amend Section 40-58-06 to more clearly define a development plan. It was emphasized that the initiated measure raises the question of whether a city can ever sell property that it acquires. It also was emphasized that the initiated measure would "gut" the state's urban renewal law.

Other testimony in opposition to the initiated measure expressed concern about the impact the proposed initiated measure would have on projects in McLean County. According to the testimony, the initiated measure raises concerns about the government's ability to get easements because easements are a part of eminent domain. It was noted that easements are necessary to agribusiness and development. It was suggested that any legislation dealing with changes to eminent domain should also address concerns about easements.

Additional testimony in opposition to the initiated measure indicated that the only instance in which eminent domain was used in Minot was for several highway projects. It was noted that the threat of eminent domain works well to speed up the process of acquiring land.

Committee members expressed concerns that using the initiated measure process rather than the legislative process to address this issue did not allow for public input in the language of the legislation.

The committee received a copy of a resolution adopted by the North Dakota League of Cities which indicated support for the eminent domain process to be addressed through the legislative process.

Fargo Hearing

At the hearing conducted in Fargo, the committee received testimony from local city officials, city attorneys, area legislators, and other interested persons regarding the uses of eminent domain and the initiated measure.

According to testimony in opposition to the initiated measure, the concept of eminent domain is one area of potential tension between the rights of individuals to own and control their property and the rights of the people as a whole, the government, to acquire the property for a public purpose. It was noted that any time the government gives itself power, there is a possibility of abuse. The testimony indicated that it is appropriate to work toward a goal of striking a balance between the good of the public as a whole and the rights of the individual. It was noted that the current procedural and substantive elements in the state's eminent domain law provide a fair amount of protection for private property owners and the decision whether additional protections should be inserted into the law is a matter for the policymakers to debate.

The testimony indicated that it was unclear whether the proposed constitutional amendment would prohibit a government from ever selling a parcel of property or a portion of that parcel if the parcel were obtained by eminent domain. It was also noted that the measure does not address the issue of economic development that may be incidental to the public use. The testimony indicated that if the language in the initiated measure had been in the constitution in 1996, the *Leevers* case would have been decided differently.

Other testimony in opposition to the initiated measure indicated that eminent domain and economic development are complicated issues with no easy answers. It was noted that the initiated measure would affect urban renewal and would likely invalidate portions of the state's urban renewal law. According to the testimony, North Dakota's eminent domain law is fair and there have not been any major abuses of eminent domain power in the state.

Additional testimony in opposition to the initiated measure indicated that a major water diversion project in neighboring Moorhead, Minnesota, would not have happened without the power of eminent domain. It was noted that if one landowner had refused to sell, the project would have been halted. It also was noted that eminent domain is a tax-saving tool for taxpayers. Without eminent domain, the project would not have happened or it would have cost two or three times more. According to the testimony, eminent domain is a valuable tool and it would be more difficult to negotiate without the power of eminent domain. The testimony emphasized that the initiated measure will cost the taxpayers a lot of money. It also was noted that it is clear that the measure would prevent a city from reselling remnants of property taken by eminent domain back to a private owner. According to the testimony, if a city took property by eminent domain for a

water tower and 30 years later no longer needed the water tower, the language in the initiated measure would prevent that land from being sold for private use. The testimony indicated that the measure also would prevent a governmental entity from trading property if the property to be traded were acquired by eminent domain. Concern was expressed that the language used in the initiated measure was very broad.

The North Dakota League of Cities provided information to the committee regarding a survey of cities with a population of over 2,500 regarding the use of eminent domain in municipalities. According to the testimony, the survey indicated that eminent domain rarely has been used by cities in the state and that it is a tool of last resort.

Testimony in support of the initiated measure indicated that regardless of the wording of the initiated measure, someone will contest it. It was noted that the initiated measure only prohibits the use of eminent domain when done for economic development purposes. It also was noted that the measure does not prohibit incidental economic development. According to the testimony, eminent domain should be a tool of last resort and the taking of land should not be simple.

Other testimony in support of the initiated measure indicated that the initiated measure would not prevent the taking of land for health or safety reasons. It was noted that as long as a landowner is law-abiding and pays taxes, the government should not be able to take the private property. It also was noted that taking of land to build a road that is to be used by the public would not be affected by this measure. Finally, it was noted that whether there are additional changes that may need to be made upon the passage of the initiated measure is an issue for the Legislative Assembly to decide.

Additional testimony in support of the measure indicated that as long as a city relies on property taxes, the incentive will be there to use eminent domain to increase its tax base. According to the testimony, without the safeguards of the measure, affordable housing will be affected.

Minot Hearing

The committee received testimony from the Department of Transportation regarding the department's use of eminent domain. The department acquired 1,791 parcels for highway purposes between October 15, 2000, and October 15, 2005. Seventy-five of those parcels had to be condemned to be acquired. All other parcels were acquired through negotiation without the need to file condemnation paperwork with the courts. The condemned parcels represented 32 ownerships and an appraised value of $940,220.32. The department did not go to trial to resolve any condemnations in the five-year period. It was noted that the department uses the eminent domain process as a last resort to keep projects on track.

According to the testimony, the Department of Transportation does not know how far-reaching the interpretation of the economic development language in the initiated measure will be. There were concerns from the department that the language of the measure may affect some future local economic development projects that also involve roadways. The department secures federal funding for local roadways leading to facilities that are created for the purpose of economic development. It was noted that the department often uses the term "economic development" in the environmental document that defines the fundamental purpose and need of a project. According to the testimony, the department is aware that the initiated measure is not intended to exclude condemnation for constructing roads and bridges or for conducting a common carrier or utility business, but the department is concerned that public activities, including transportation systems, may be construed as relating to an economic development purpose. It was noted that economic development is a big part of most highway projects.

Testimony in support of the initiated measure indicated that the current law needed clarification. The testimony expressed concerns that a family that finds a perfect home could lose it to eminent domain for economic development. It was noted that the ability of government to take land for economic development may affect whether someone would decide to relocate to North Dakota.

Dickinson Hearing

According to the testimony received at the hearing held in Dickinson, there is a fear that the eminent domain court rulings authorize the taking of one business to give it to another business.

The *Leevers* case required that the taking must be for the benefit of the public and not for the benefit of a private business. It was noted that there are a number of issues with the proposed initiated measure, specifically the second sentence of the measure. This sentence provides that "[p]rivate property shall not be taken for the use of, or ownership by, any private individual or entity, unless the property is necessary for conducting a common carrier or utility business." The *Kelo* decision emphasized that the entity was required to have a plan before the taking could occur. According to the testimony, North Dakota law, through the *Leevers* decision, already contains that requirement. Consequently, the *Kelo* decision was not a drastic change from North Dakota law. It was noted that it is unclear as to the effect the initiated measure would have on transactions, such as long-term leases. It was noted that the measure would apply not only to land acquired by eminent domain in the future but in the past as well.

Testimony in opposition to the initiated measure indicated that eminent domain is a means of last resort for finding land for development and that it is more likely in North Dakota that a county would take land because of the failure to pay property taxes than by using eminent domain proceedings. It was noted that the government does not like using eminent domain because the process is more expensive and time-consuming than negotiation. According to the testimony, the Dickinson City Commission has had one request from a developer to take land by eminent domain, which the commission refused.

Testimony from a representative of a rural water authority indicated that the eminent domain process is important for securing rural easements. It was noted that eminent domain can be used as a threat. According to the testimony, the laying of water pipeline may involve thousands of landowners. It was noted that there are usually one or two landowners per project who refuse to grant an easement and eminent domain must be used. According to the testimony, the passage of the measure could affect an authority's ability to obtain easements. It was noted that the eminent domain process usually results in more money for the landowner than the negotiation process.

Committee Considerations

During the course of the hearings, some committee members noted that there were conflicting opinions in the testimony as to whether the language of the initiated measure would allow excess property taken by eminent domain to be resold for private use. In an effort to gather additional information, the committee requested a meeting of a subcommittee of the committee with the sponsoring committee of the initiated measure to discuss concerns about the wording and scope of the initiated measure and the possibility of withdrawing and amending the initiated measure. Committee members in opposition to a meeting with the sponsoring committee indicated that the language in the initiated measure was what the sponsoring committee intended. According to the committee members in opposition to the meeting, it was not the responsibility of the Judicial Process Committee to question that language. The chairman of the Legislative Council denied the committee's request to form a subcommittee to meet with the members of the initiated measure's sponsoring committee.

Several committee members also expressed an interest in preparing a sheet of facts and concerns regarding the initiated measure for distribution to the public. Committee members in support of preparing a sheet of facts and concerns indicated the information would be a way to make the public aware of the issues that were raised at the hearings. Committee members opposed to the idea indicated that the issues and concerns would be reflected in the report of the committee. Other committee members opposed to the idea indicated that the committee should let the initiated process work and that the initiated measure process is the people's business, guaranteed to the people by the Constitution of North Dakota. It was noted that the Legislative Assembly should take a "hands off" approach with respect to the initiated measure process. It also was noted that the committee should be very careful about providing any kind of fact sheet or opinions or even a committee vote regarding which way the committee is leaning. Another committee member indicated that it is the responsibility of the sponsoring committee to promote the committee's position and it is the responsibility of those who oppose the measure to organize and make their position known. The chairman of the committee indicated that the role of the committee was to conduct hearings and gather information. The chairman indicated that the committee would not be making any statements regarding concerns about the initiated measure.

It was noted that the minutes of the hearing are public records and the public can read the minutes and form opinions regarding the measure. The chairman also noted that individual legislators were free to discuss with others any concerns they may have regarding the measure.

During the course of the study, the committee expressed concerns that there may be a need for a bill draft that would address eminent domain issues in the event the initiated measure failed to get the required signatures to get on the ballot or if the initiated measure failed to pass. According to the committee members, it is appropriate for the Legislative Assembly to review the eminent domain laws of the state and to address any problem raised by the *Kelo* decision. Other committee members expressed concerns that if the initiated measure passes, the Legislative Assembly may want to define the "public benefits of economic development." Other committee members indicated that there may be a need for the Legislative Assembly to address the standard of review for courts in eminent domain cases. It was suggested that courts should have de novo review to allow the courts to look at the merits in eminent domain cases.

The committee considered a bill draft that limits the uses of eminent domain. Testimony in explanation of the bill draft indicated that the bill draft would prohibit private property from being taken for use by a private commercial enterprise for economic development or for any other private use without the consent of the owner; would define economic development as any activity to increase tax revenue, tax base, employment, or general economic health; would provide that public use does not include the public benefits of economic development, including an increase in the tax base or in tax revenues or an improvement of general economic health; would provide that the question of whether a use is a public use must be determined by a court; and would provide that the court is required to try the matter de novo.

Committee members noted that regardless of whether the initiated measure passes, the bill draft would give the Legislative Assembly a vehicle to discuss eminent domain issues during the 2007 legislative session. Committee members also noted that there did not appear to be any provisions in the bill draft which would directly conflict with the language in the initiated measure.

Recommendation

The committee recommends Senate Bill No. 2039 to limit the uses of eminent domain. The bill prohibits private property from being taken for use by a private commercial enterprise for economic development or for any other private use without the consent of the owner; defines economic development as any activity to increase tax revenue, tax base, employment, or general economic health; provides that public use does not include the public benefits of economic development, including an increase in the tax base or in tax revenues or an improvement of general economic health; provides that the question of whether a use is a public use must be determined by a court; and provides that the court is required to try the matter de novo.

AH #2

SENATE JUDICIARY COMMITTEE
January 09, 2007

North Dakota Department of Transportation
Francis G. Ziegler, P.E., Director

SB 2039

Good morning, Mr. Chairman and Members of the Committee. I'm Francis G. Ziegler, Director of the North Dakota Department of Transportation.

First, let me be clear that the department has no problem with section 16 of the bill and the changes being proposed to NDCC section 32-15-01 regarding the taking of private property, and the definitions of the terms "economic development" and "public use." However, we believe the new language proposed in sections 13 and 15 of this bill may create some confusion regarding which provisions apply in particular condemnation cases involving highway right of way. Sections 13 and 15 of the bill would appear to mandate that the department's condemnation authority may only be used "subject to chapter 32-15".

NDCC chapter 32-15 specifies the general state law provisions for the use of condemnation which apply to all condemning authorities. The department, however, has a number of specific state law provisions in Title 24 it may use, in addition to the general provisions in chapter 32-15, regarding the acquisition and condemnation of right of way. Typically, these specific statutes would supersede the general provisions of chapter 32-15. For example and based on Article 1, Section 16 of the North Dakota constitution, NDCC sections 24-01-22, 24-01-22.1 and 24-01-32 specify that the department acquires "fee title" (ownership and control) and has possession of property for right of way 30 days after making a deposit in court of the compensation due the landowner. We call this the "quick take" process.

Sections 32-15-18, 32-15-27 and 32-15-29, however, provide that a civil "complaint" must be filed to initiate any condemnation action and that possession of the property does not occur until the court "authorizes (the condemnor) to take possession of and use the property." In addition, section 32-15-03.2 specifies that the state may acquire only an "easement" interest, as opposed to title and the ownership interest the department acquires when it condemns right of way.

We are concerned that if NDCC sections 24-01-18 and 24-17-09 were changed as provided for in this bill, all of the general provisions in chapter 32-15 discussed above may be applied by the courts rather than the department's more specific condemnation provisions. We believe that if the department had to follow all of the provisions in chapter 32-15, it would create an additional workload on the court system and create unnecessary delays in our project development process.

The specific provisions under which the department has been operating regarding possession and fee title to property acquired for highway right of way have been in place for approximately 50 years. The department often condemns only a small portion or "strip" of property for highway right of way purposes. The department sometimes condemns only a temporary or permanent easement, depending on the circumstances of a particular project. The compensation in these cases is often only a few hundred or a few thousand dollars. In these cases, landowners may simply withdraw the compensation without further action by the courts.

There are a number of situations in which landowners involved in small takings are not interested in a complicated civil court action. We have had cases involving acquiring easements from railroads that had no problem with the taking but the timing and circumstances prevented a negotiated settlement before the department had to certify possession of the right of way. Sometimes it is difficult to locate landowners for a period of time (one being out of the country in a recent case), so a condemnation action is necessary to secure the parcel. Many of these landowners have no interest in participating in a court action and have no problem negotiating a settlement or accepting the amount deposited. In some cases, condemning the parcel is necessary solely to clear up title issues. In a recent case, all of the owners of record were deceased and the estates of these owners had no interest in a court action. In another recent case, the landowner wanted the Department to condemn his small parcel because of a tax issue but there was no interest in a court action.

If the department had to comply with all of the provisions of chapter 32-15, we believe this would unnecessarily complicate our right-of-way acquisition process. To assure that the department can continue with its current process we respectfully request an amendment (attached) to eliminate the reference to chapter 32-15 and replace it with a specific reference to Section 32-15-01. This reference would specifically require the department to comply with the new provisions in section 16 of this Bill.

This concludes my testimony. Mr. Chairman, I would be happy to answer any questions. Thank you.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2039

Page 5, line 9, replace ", subject to chapter 32-15," with "subject to section 32-15-01"

Page 7, line 14, replace ", subject to chapter 32-15," with "subject to section 32-15-01"

Renumber accordingly