

The Issue:

The “takings” clause of the Fifth Amendment to the U.S. Constitution states, in part, “nor shall private property be taken for public use without just compensation.” Two important controversies are related to this clause. First, environmental regulations have become so onerous that they often amount to a regulatory “taking” of private property without any offsetting compensation. In addition, the condemnation of private land through eminent domain by local governments is often challenged if the land eventually will be turned over to private developers.

With environmental issues, the application of laws such as the Endangered Species Act and Section 404 of the Clean Water Act (the source of federal regulation of wetlands) often renders private property useless for economic purposes. Private landowners in these situations almost never receive compensation—even for significant reductions in their land values. On the other hand, outright condemnation of private land under eminent domain is always compensated and landowners may challenge any amount they deem insufficient.

Eminent domain has long been used in support of transportation projects, flood control efforts, installation of utility service lines and even to redevelop blighted urban areas. Over the years, the constitutional phrase “public use” has been interpreted to mean “public purpose” or even “public benefit.” In 2005, the U.S. Supreme Court ruled (*Kelo v. City of New London*) that condemnations intended for economic revitalization through private development are valid when there is a legitimate redevelopment plan and appropriate review by state authorities. The economic benefits to society were deemed sufficient to satisfy the “public use/public purpose” test. In response, the House of Representatives passed H.R. 4128, the Private Property Rights Protection Act of 2005. Unfortunately, in its haste to pass responsive legislation, the House failed to fully consider the potential impact of key portions of the bill. The Senate did not vote on the House version although similar proposals continue to arise from time to time. ICSC continues to monitor this situation but does not favor rash Congressional action, preferring that eminent domain properly remain a state and local matter.

Opposing Arguments:

Many environmental regulations are based upon the assumption that private property owners may be required to provide environmental “amenities” to the public—such as habitat for rare plants and animals—without compensating them for lost development values. Courts, generally siding with the regulators, consider this a “slippery slope” situation: if you compensate property owners under one set of regulations, you may soon be required to compensate landowners under all federal regulations. Thus, they have been extremely reluctant to rule in favor of compensation for environmental “takings.” In addition, many argue that eminent domain should never be used to transfer property from one private owner to another, even when the condemnation is carried out by a state or local government. Since 2005, most states have reexamined their condemnation statutes in light of the Supreme Court’s *Kelo* decision.

ICSC’s Response:

ICSC believes that it is necessary to protect private property through compensation under both environmental regulations and traditional eminent domain actions. Specifically, ICSC supports:

- Universal standards by which the value of property may be established;
- An efficient and fair system by which a property owner can seek timely redress for laws and regulations that result in a taking without compensation or that deny the economic benefits of the “highest and best” use of private property;
- Responsible and timely judicial review and/or regulatory rulings on development applications; and
- An “economic impact assessment” of the costs of legislation and resulting regulation.

For more information, contact Kent Jeffreys at kjeffreys@icsc.org or 202-626-1405.