The Ramifications of Post-Kelo Legislation on State Transportation Projects

DETAILS

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THE RAMIFICATIONS OF POST-*KELO* LEGISLATION ON STATE TRANSPORTATION PROJECTS

This report was prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Larry W. Thomas, Attorney at Law, Washington, DC. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

The Problem and Its Solution

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report continues NCHRP's practice of keeping departments up-to-date on laws that will affect their operations.

Applications

In the 2005 United States Supreme Court case of *Kelo v. the City of New London*, the Court held that the use of eminent domain to take nonblighted, private property for a city-approved, privately implemented economic development plan was constitutional. That decision resulted in a great deal of discussion regarding the unfettered use of eminent domain and its implications for property owners. Following these developments, there was considerable pressure on state legislatures to curb the use of eminent domain powers. State transportation officials expressed concern that the backlash against condemnations would significantly affect the price of property needed for transportation projects. Forty-three states enacted legislation that either restricted the use of eminent domain for economic development or restricted the eminent domain process. This new legislation could also significantly impact the acquisition of private property for transportation projects. More importantly, the desire to constrain condemnation for redevelopment purposes has the potential for influencing the cost and timely delivery of state transportation projects.

This digest reports on research that reveals the consequences of new legislation by examining how the new legislation has affected 1) using eminent domain for economic development, 2) condemning blighted and nonblighted property, 3) restricting transfers of condemned property to private parties, and 4) redefining "public use." States and localities considering more confining legislation would benefit from the identification of restrictions that could most significantly or adversely affect the cost and timely delivery of state transportation projects. Transportation officials and attorneys should gain helpful insight in dealing with the overall impacts of such legislation.

The digest should be useful to transportation administrators; attorneys; transportation planners; state, city, and county legislators; property owners; and real estate professionals.

TRANSPORTATION RESEARCH BOARD
OF THE NATIONAL ACADEMIES

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THE RAMIFICATIONS OF POST-*KELO* LEGISLATION ON STATE TRANSPORTATION PROJECTS

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I. INTRODUCTION

This digest discusses the impact on the acquisition of private property for transportation projects as a result of constitutional amendments or new legislation at the state level in response to the United States Supreme Court's decision in 2005 in *Kelo v. City of New London*, hereinafter the post-*Kelo* laws or reforms.[1] In *Kelo,* the Court held in a 5-to-4 decision that the use of eminent domain to take nonblighted, private property for a city-approved development plan for the purpose of economic development was constitutional.[2]

After the decision in *Kelo*, many states enacted legislation that restricted the use of eminent domain or the eminent domain process. The question is whether and to what extent the post-*Kelo* laws have affected the acquisition of private property for highway projects, in particular appraisals, construction, land acquisition, property management, project-planning, relocation assistance, and utility relocation, or affected the cost and timely delivery of projects. The digest seeks to identify the post-*Kelo* changes that have most significantly or adversely affected state highway projects, as well as the overall impact of the post-*Kelo* laws.

In March and April 2011, 29 state departments of transportation (DOTs) responded to a TRB survey seeking information on the effect of post-*Kelo* reforms in their states on the use of eminent domain by transportation departments.[3] Twenty-six departments responding to the survey were in states that enacted post-*Kelo* laws. Of those 26 agencies, 19 departments reported that the enactments had not affected transportation projects in their states.[4] Seven departments reported some significant effects resulting from the post-*Kelo* reforms in their states.[5] The effects primarily concern increased costs and delays affecting transportation projects, with the reforms more significantly affecting appraisals, land acquisition, and project planning and to a lesser extent construction, property management, and relocation assistance. The DOTs' responses are discussed in more detail in Section VIII of the digest.

II. THE *KELO V. CITY OF NEW LONDON* DECISION

In *Kelo*, the city invoked a state statute that authorized the use of eminent domain to promote economic development. The economic redevelopment in dispute included a state park and approximately 115 privately-owned properties designated to be used for a hotel, restaurants, offices, 80 new residences, a museum, and parking. A catalyst for the city's targeting of the Fort Trumbull area of New London for economic development was the pharmaceutical company Pfizer's announcement that it would build a $300 million research facility on a site immediately adjacent to Fort Trumbull. After obtaining state-level approval, a city-authorized agency, the New London Development Corporation (NLDC), finalized an "integrated development plan" that focused on 90 acres of the Fort Trumbull area.[6] In December 2000, as a result of the NLDC's plan to condemn the property of nine private property owners, whose properties were not alleged to be blighted, the property owners brought suit in the New London Supreme Court. The *Kelo* plaintiffs contended that the taking of their properties would violate the Public Use Clause of the Fifth Amendment to the United States Constitution, which permits a governmental taking of private property only for a public use. Although the trial court granted a permanent restraining order prohibiting some but not all of the takings, the Supreme Court of Connecticut held that the planned takings of the properties for the proposed economic development

[1] Kelo v City of New London, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).

[2] Prior to *Kelo* in cases in which the definition of public use was in issue, "federal courts consistently rejected public use challenges to the exercise of eminent domain between 1984 and 2004…." Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORDHAM URB. L. J. 657, 666 (2007), hereafter cited as "Blais." For an analysis of the public use doctrine prior to *Kelo*, *see* Robert G. Dreher & John D. Echeverria, *Kelo's Unanswered Questions: The Policy Debate over the Use of Eminent Domain for Economic Development*, GEORGETOWN ENVIRONMENTAL LAW & POLICY INSTITUTE 3–11 (2006), available at http://www.law.georgetown.edu/gelpi/current_research /documents/gelpireport_kelo.pdf, hereafter cited as "Dreher & Echeverria," last accessed on July 5, 2011.

[3] *See* Pt. II.D, *infra*.

[4] *Id*.

[5] California Department of Transportation (Caltrans); Missouri Highways and Transportation Commission (MHTC); Nevada Department of Transportation (Nevada DOT); Ohio Department of Transportation (Ohio DOT); Oregon Department of Transportation (Oregon DOT); Pennsylvania Department of Transportation (PennDOT); Wyoming Department of Transportation (Wyoming DOT).

[6] *Kelo*, 545 U.S. 473–74, 125 S. Ct. at 2659, 162 L. Ed. 2d at 448.

were constitutional as a valid public use under federal and state law.[7]

The United States Supreme Court affirmed, with Justice Stevens delivering the opinion of the five-member majority of the Court, in which he was joined by Justices Kennedy, Souter, Ginsberg, and Breyer. Justice Kennedy filed a concurring opinion. Justice O'Connor filed a dissenting opinion in which Chief Justice Rehnquist and Justices Scalia and Thomas joined. Justice Thomas also filed a dissenting opinion.

The Court held that the city's development plan would benefit the city by creating jobs and increasing tax revenue and further held that the city's proposed disposition of the property under the development plan qualified as a public use under the Fifth Amendment. Thus, the city could use the power of eminent domain to acquire the unwilling sellers' property.[8]

The *Kelo* Court approved the condemnation of non-blighted properties because the city believed that the properties would be more productive if they were condemned and transferred to a private owner/developer. Justice Stevens' opinion emphasized several features of the process leading up to the NLDC's plan to condemn the petitioners' properties. As held by the Supreme Court of Connecticut when it decided the *Kelo* case, the city's proposed takings were authorized by the state's municipal development statute. The statute "expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a 'public use' and in the 'public interest.'"[9] Moreover, various state agencies had studied the project's economic, environmental, and social ramifications,[10] and, of course, the NLDC intended to capitalize on the expected Pfizer facility and the commerce and tax revenue that it would generate.

The *Kelo* Court agreed with the trial judge and the Connecticut Supreme Court that "the City's development plan was not adopted 'to benefit a particular class of identifiable individuals.'"[11] The Court stated that the case did not involve the payment of compensation for the taking of one person's property "for the sole purpose of transferring it to another private party…."[12] Although "a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking,"[13] the Court recognized in the *Kelo* case that the city was not "planning to open the condemned land—at least not in its entirety—to use by the general public."[14] The proposed takings, nevertheless, were held to be for a public use. The Court explained that its prior precedents were clear, that the Court had "'rejected any literal requirement that condemned property be put into use for the general public.'"[15] Because of the "evolving needs of society," the Court had "embraced the broader and more natural interpretation of public use as 'public purpose.'"[16]

Two precedents relied on principally by the Court for its decision in *Kelo* are *Berman v. Parker*[17] and *Hawaii Housing Authority v. Midkiff.*[18] In *Berman,* the Court upheld the taking of an owner's department store, which was not blighted, because the redevelopment of a blighted area must be planned as a whole, not on a piecemeal basis. In *Midkiff*, the Court upheld a Hawaii

[7] It may be noted that prior to the *Kelo* decision some state courts had defined a public use or purpose to exclude takings for economic development. *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after Kelo*, 15 S. CT. ECON. REV. 183, 187 n.17, hereafter cited as "Somin" (*citing* some of the following decisions: Sw. Ill. Dev. Auth. v. Nat'l City Envtl. LLC, 199 Ill. 2d 225, 768 N.E.2d 1, 11 (2002) (holding that a taking for transfer to a private party to build a parking lot next to a racetrack was not constitutional because a contribution to regional economic growth is not a public use), *cert. denied*, 2002 U.S. LEXIS 6453 (U.S. Oct. 7, 2002); Baycol Inc. v. Downtown Dev. Auth., 315 So. 2d 451, 457 (Fla. 1975) (holding that a public economic benefit is not synonymous with a public purpose); *In re Petition of Seattle*, 96 Wash. 2d 616, 638 P.2d 549, 556–57 (1981) (disallowing a plan to use eminent domain to build a retail shopping center when the purpose was not to eliminate blight); Owensboro v. McCormick, 581 S.W.2d 3, 8 (Ky. 1979) (holding that no public use exists when land of one private party is condemned merely to enable another private party to build a factory); Karesh v. City of Charleston, 271 S.C. 339, 247 S.E.2d 342, 345 (1978) (striking down a taking that was justified only by economic development); City of Little Rock v. Raines, 241 Ark. 1071, 411 S.W.2d 486, 495 (1967) (private economic development project held not to be a public use); Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171, 181–91 (1959) (holding that residential property could not be condemned so that it could be devoted to a higher and better economic use); *Opinion of the Justices*, 152 Me. 440, 131 A.2d 904, 905–06 (1957) (condemnation for industrial development to enhance the economy held not to be a public use); City of Bozeman v. Vaniman, 271 Mont. 514, 898 P.2d 1208, 1214–15 (1995) (holding unconstitutional a condemnation to transfer property to a private business unless the transfer is "insignificant" and "incidental" to a public project). In other states, the courts had permitted such takings. For example, in Missouri, "prior to legislative modification in 2006, economic development could be the sole basis for taking private property…[when] doing so was 'in the public interest' to foster employment or discourage [the] flight of business development to another state." Stanley A. Leisure & Carol J. Miller, *Eminent Domain–Missouri's Response to* Kelo, 63 J. MO. B. 178, 185 (2007).

[8] *See* John M. Zuch, Kelo v. City of New London: Despite the Outcry, the Decision is Firmly Supported by Precedent—However, Eminent Domain Critics Still Have Gained Ground, 38 U. MEM. L. REV. 187 (2007).

[9] 545 U.S. at 476, 125 S. Ct. at 2660, 162 L. Ed. 2d at 449 (citations omitted).

[10] *Id*. at 474 n.3, 125 S. Ct. at 2659 n.2, 162 L. Ed. 2d at 448 n.2.

[11] *Id*. at 478, 125 S. Ct. at 2662, 162 L. Ed. 2d at 451.

[12] *Id*. at 477, 125 S. Ct. at 2661, 162 L. Ed. 2d at 450.

[13] *Id*.

[14] *Id*. at 478, 125 S. Ct. at 2662, 162 L. Ed. 2d at 451.

[15] *Id*. at 479, 125 S. Ct. at 2662, 162 L. Ed. 2d at 451 (citation omitted).

[16] *Id*.

[17] 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954).

[18] 467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984).

statute pursuant to which fee title was taken for just compensation from lessors and transferred to lessees to reduce the concentration of land ownership. The fact that Hawaii "immediately transferred the properties to private individuals" did not "diminish[] the public character of the taking."[19]

In emphasizing that the courts are to be deferential to the judgment of legislatures regarding the public need for redevelopment, the Court stated that its "public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[20]

> Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. …Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.[21]

As for the petitioners' argument that under the circumstances the economic development project did not qualify as a public use, Justice Stevens' response was that the government's promotion of economic development is a traditional government function and that a public use is no less a public use because there is a benefit to a private interest or interests.[22] "Quite simply, the government's pursuit of a public purpose will often benefit individual private parties."[23] Thus, the *Kelo* case was not a matter of taking one private person's property to transfer it to another private party; "a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case."[24]

Justice Kennedy's concurrence emphasized a point made in Judge Stevens' opinion for the Court: a government must not "be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[25] Justice Kennedy agreed that the rational-basis standard of review, rather than a heightened level of scrutiny as argued by the petitioners, was appropriate for the case. One reason was that "the projected economic benefits of the project cannot be characterized as *de minimis*."[26] Nevertheless, Justice Kennedy did not rule out the possibility that in other cases "[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause."[27]

Justice O'Connor's dissent, oft-quoted by opponents of the *Kelo* decision, argues that the Court's interpretation of the Public Use Clause results in an abandonment of a "basic limitation" on government power, because "[u]nder the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded."[28] Justice O'Connor's view of the Public Use Clause is that "[g]overnment may compel an individual to forfeit her property for the public's use, but not for the benefit of another private person."[29] Justice O'Connor agreed that the Court had previously held that "to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use."[30] However, in this case the economic development takings are not constitutional[31] when the petitioners' "well-maintained homes" are not "the source of any social harm."[32] For Justice O'Connor, the Court's decision fails to explain how the courts are to conduct a "complicated inquiry" to ferret out those "takings whose sole purpose is to bestow a benefit on the private transferee."[33] In Justice O'Connor's opinion, the *Kelo* Court expanded the meaning of public use to such an extent that "[t]he specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory. …Today nearly all real property is susceptible to condemnation on the Court's theory."[34]

Finally, Justice Thomas's dissent argued that the urban-renewal project at issue means that if "'economic development' takings are for a 'public use,' any taking

[19] *Kelo,* 545 U.S. at 482, 125 S. Ct. at 2664, 162 L. Ed. 2d at 453.

[20] *Id*. at 483, 125 S. Ct. at 2664, 162 L. Ed. 2d at 453.

[21] *Id*. at 483–84, 125 S. Ct. at 2664–65, 162 L. Ed. 2d at 454 (footnote omitted).

[22] *Id*. at 484–85, 125 S. Ct. at 2665–66, 162 L. Ed. 2d at 454–55.

[23] *Id*. at 485, 125 S. Ct. at 2666, 162 L. Ed. 2d at 45.

[24] *Id*. at 487, 125 S. Ct. at 2667, 162 L. Ed. 2d at 456.

[25] *Id*. at 478, 125 S. Ct. at 2661, 162 L. Ed. 2d at 450.

[26] *Id*. at 493, 125 S. Ct. at 2670, 162 L. Ed. 2d at 460 (Kennedy, J., concurring).

[27] *Id*.

[28] *Id*. at 494, 125 S. Ct. at 2671, 162 L. Ed. 2d at 461 (O'Connor, J., dissenting).

[29] *Id*. at 497, 125 S. Ct. at 2672, 162 L. Ed. 2d at 462 (O'Connor, J., dissenting).

[30] *Id*. at 498, 125 S. Ct. at 2673, 162 L. Ed. 2d at 463 (O'Connor, J., dissenting).

[31] *Id*.

[32] *Id*. at 500, 125 S. Ct. at 2675, 162 L. Ed. 2d at 465 (O'Connor, J., dissenting).

[33] *Id*. at 502, 125 S. Ct. at 2675, 162 L. Ed. 2d at 466 (O'Connor, J., dissenting).

[34] *Id*. at 503, 504, 125 S. Ct. at 2676, 2677, 162 L. Ed. 2d at 466, 467 (O'Connor, J. dissenting) (citations omitted).

is, and the Court has erased the Public Use Clause from our Constitution."[35]

One commentator argues that although the *Kelo* Court rejected a heightened degree of judicial scrutiny of takings for economic development, "the *Kelo* decision…offers meaningful oversight of both the substance and procedure of eminent domain actions for essentially the first time."[36] The reason is that Justice Stevens' opinion emphasized the careful planning process that produced the revitalization plan at issue and recognized that "one-to-one transfers" outside of a careful planning context would call for more intense judicial scrutiny of the public purpose of a taking.[37] Although the subject of much controversy, the *Kelo* decision imposes some substantive limitations on the use of eminent domain by prohibiting the government from taking private property solely for the benefit of another private party and by prohibiting a taking under the pretext of a public purpose when the actual purpose is to confer a private benefit.[38]

The *Kelo* Court made it clear, however, that states were free to impose restrictions on such takings; in varying degrees 43 states did so. Nevertheless, in virtually all states enacting post-*Kelo* reforms, takings are permitted of blighted property or of property in blighted areas. Consequently, because of an exception in the states' laws for the taking of blighted property, it has been argued that the post-*Kelo* reforms will have a limited impact.[39] Nevertheless, a New Jersey court has observed, although New Jersey did not enact post-*Kelo* reforms,[40] that "[s]ince *Kelo* was decided, greater judicial and legislative scrutiny of redevelopment-based takings has occurred."[41] Moreover, the court stated that in New Jersey "the municipal power to pursue redevelopment is 'not unfettered'" and that the state's constitution "'reflects the will of the [p]eople regarding the appropriate balance between municipal redevelopment and property owners' rights.'"[42] This digest addresses the impact of post-*Kelo* reforms on such a balance, especially in regard to takings for transportation projects.

III. TRENDS ILLUSTRATED BY THE POST-*KELO* REFORMS

A. Constitutional and Legislative Enactments in Response to *Kelo*

The holding in *Kelo* proved to be controversial among the public, the media, and the political establishment.[43] For example, a U.S. House of Representatives' resolution expressed strong disapproval of the *Kelo* decision.[44] Forty-three states enacted post-*Kelo* reforms.[45] Thus, transportation departments are unaffected in seven states that did not enact laws limiting the exercise of eminent domain for the purposes of economic development.[46] Although some states amended their constitution in response to *Kelo,* most of the states responding to *Kelo* did so by statutory amendments. Some states made both constitutional and legislative changes. For example, Arizona, Colorado, Florida, Missouri, Oklahoma, Oregon, and Washington amended the state constitution to provide that the courts are to decide when a taking is for a public use.[47] Some states provided by statute that the question of public use is a judicial ques-

[35] *Id*. at 506, 125 S. Ct. at 2678, 162 L. Ed. 2d at 468 (Thomas, J., dissenting).

[36] Blais, *supra* note 2, at 670.

[37] *Id.* at 670 n.87 (citations omitted).

[38] *Id.* at 670 (citations omitted).

[39] Anthony B. Seitz, *The Property Rights Protection Act: An Overview of Pennsylvania's Response to Kelo v. City of New London*, 18 WIDENER L.J. 205, 211 (2008).

[40] Castle Coalition, 50 State Report Card: Tracking Eminent Domain Reform Legislation since Kelo, July 16, 2009, available at http://www.intellectualtakeout.org/research-analysis-reports/50-state-report-card-tracking-eminent-domain-reform-legislation-kelo, hereafter cited as the "Castle Report," last accessed on July 5, 2011.

[41] Harrison Redevelopment Agency v. DeRose*,* 398 N.J. Super. 361, 411–12, 942 A.2d 59, 89 (N.J. App. 2008) (*citing* Franco v. Nat'l Capital Revitalization Corp., 930 A.2d 160, 169 (D.C. 2007) (allowing a condemnee to plead claims that the government's asserted public use for his property was pretextual, noting *Kelo's* admonition that government may not "'take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit'") (*quoting Kelo, supra*, 545 U.S. at 478, 125 S. Ct. at 2661, 162 L. Ed. 2d at 450); Mayor of Baltimore v. Valsamaki, 397 Md. 222, 916 A.2d 324, 334 (2007) (rejecting the city's exercise of "quick take" condemnation power for redevelopment purposes, citing the Supreme Court's "controversial" decision in *Kelo* and the need for judicial scrutiny in enforcing the constitution's public use requirement); City of Norwood v. Horney, 110 Ohio St. 3d 353, 2006 Ohio 3799, 853 N.E.2d 1115, 1138 (2006) (reversing a municipal finding that an area targeted for redevelopment was blighted or deteriorated, noting the courts' "critical" role after *Kelo* in reviewing public use designations with "vigilance")).

[42] 398 N.J. Super. at 412, 942 A.2d at 89 (citations omitted).

[43] Daniel H. Cole, *Why Kelo Is Not Good News for Local Planners and Developers*, 22 GA. ST. U. L. REV. 803 (2006).

[44] H.R. REP. NO. 109-340 (1st Sess. 2005).

[45] Castle Report, *supra* note 40; Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2102 (2009), hereafter cited as "Somin, 93 MINN. L. REV." *See also* Ilya Somin, *Supreme Court Economic Review Symposium on Post-Kelo Reform: Introduction to Symposium on Post-Kelo Reform*, 17 S. CT. ECON. REV. 1, at *1 (2009), hereafter cited as "Somin's Symposium Introduction."

[46] Castle Report, *supra* note 40 (*citing* Arkansas, Hawaii, Massachusetts, Mississippi, New Jersey, New York, and Oklahoma).

[47] ARIZ. CONST. art. II, § 17 ("Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."); COLO. CONST. art. II, § 15 ("[T]he question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."). *See also* MO. CONST. art. I, § 28; WASH. CONST. art. I, §16; and OKLA. CONST. art. 2, § 24.

tion,[48] possibly without regard to whether the legislature has determined that a use is a public use.[49] For instance, Missouri's constitution now provides that "[w]hen an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public."[50]

Although the state legislatures and the public (the latter through referenda for constitutional amendments) expressed opposition to the *Kelo* decision, only about 19 states enacted post-*Kelo* reforms that are generally regarded as being stringent restrictions on the use of eminent domain for economic development.[51] Although the legislative responses varied, the most substantive changes included defining public use so as to restrict (or otherwise including provisions to restrict) takings of private property for economic development and in some states to tighten the definition of blighted property.[52]

B. Impact of the Post-*Kelo* Reforms on Takings for Economic Development

It has been observed that some of the states with the most stringent post-*Kelo* reforms have little or no history of condemning property for economic development.[53] In any case, almost all of the reaction to *Kelo* through constitutional or legislative amendments "stopped short of categorically barring economic development takings."[54]

One study of the constitutional and legislative changes after *Kelo* concluded that there were not enough data to assess the impact of the laws' restrictions on the use of eminent domain for economic development.[55] Nevertheless, the study concluded that there was little evidence that governments use eminent domain "for the primary purpose of favoring private interests."[56]

A more recent survey, published in April 2010, found "that there has been little substantive impact from the state-based laws" enacted after *Kelo*.[57] The study's authors reported that "[b]oth supporters of state-based *Kelo* laws and independent researchers found little change in what local and state governments are actually doing…as a result of the laws."[58]

C. Impact of the Post-*Kelo* Reforms on Takings of Blighted Property

In regard to post-*Kelo* reforms restricting takings of blighted property, the most sweeping changes occurred in Florida and New Mexico, where "all blight condemnations" are banned.[59] Elsewhere, many states prohibited eminent domain for economic development or for the purpose of acquiring property for transfer to a private party but continued to allow takings of blighted property.[60] In some states the post-*Kelo* laws only disallow takings if the *primary* or *sole* reason for a taking is for the purpose of economic development or to expand the tax base or increase tax revenue.[61] Regardless of whether a state enacted post-*Kelo* laws, at least 34 states have a broad definition of blight that is an exception to any prohibition of or restriction on takings for economic development.[62] No transportation depart-

[48] ARIZ. REV. STAT. § 12-1132(A); GA. CODE ANN. § 22-1-2(a) (stating that public use is a matter of law to be determined by the court and that the condemnor bears the burden of proof) and § 22-1-11 (stating that "[b]efore the vesting of title in the condemnor…the court shall determine whether the exercise of the power of eminent domain is for a public use…."); and OR. REV. STAT. § 35.235.

[49] ARIZ. REV. STAT. § 12-1132(A); MO. CONST. art. I, § 28.

[50] MO. CONST. art. I, § 28.

[51] Somin, *supra* note 45, 93 MINN. L. REV. at 2116 (*citing* Alabama, Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Pennsylvania, South Dakota, Virginia, and Wyoming). Moreover, Iowa and Minnesota, for example, narrowed their definition of blight. *See* Nadia E. Nedzel, *Reviving Protection for Private Property: A Practical Approach to Blight Takings*, 2008 MICH. ST. L. REV. 995, 1014 (2008), hereafter cited as "Nedzel." Another source identifies Alabama, New Hampshire, and Virginia as having enacted "meaningful restraints on economic development." James W. Ely, Jr., *Supreme Court Economic Review Symposium on Post-Kelo Reform: Post-Kelo Reform: Is the Glass Half Full or Half Empty?*, 17 S. CT. ECON. REV. 127, 137 (2009), hereafter cited as "Ely." *See also* Castle Report, *supra* note 40 (giving 19 states a grade of "B" or higher on the extent to which their post-*Kelo* laws restrict the use of eminent domain for economic development).

[52] Andrew P. Morriss, *Supreme Court Economic Review Symposium on Post-Kelo Reform: Symbol or Substance? An Empirical Assessment of State Responses to Kelo*, 17 S. CT. ECON. REV. 237, 244–45 (2009), hereafter cited as "Morriss."

[53] Somin, *supra* note 45, 93 MINN. L. REV. at 2105.

[54] Ely, *supra* note 51, at 148.

[55] Dreher & Echeverria, *supra* note 2, at 2, 14.

[56] *Id.* at 33.

[57] Harvey M. Jacobs & Ellen M. Bassett, *After "Kelo": Political Rhetoric and Policy Responses*, LINCOLN INSTITUTE OF LAND POLICY 17 (Apr. 2010), hereafter cited as "Jacobs & Bassett," available at https://www.lincolninst.edu/pubs/dl/1773_992_1773_992_4%20Kelo.pdf, last accessed on July 5, 2011.

[58] *Id*. at 18.

[59] *See* Alberto B. Lopez, *Revisiting Kelo and Eminent Domain's "Summer of Scrutiny*," 59 ALA. L. REV. 561, 591–92 (2008). *See also* Castle Report, *supra* note 40 (*citing* New Mexico House Bill 393 and Senate Bill 401).

[60] Blais, *supra* note 2, at 673, 674 (*citing* as examples the states of Alabama, Kansas, Georgia, and Tennessee); *see* Nedzel, *supra* note 51, at 1014 (*citing* as examples the states of Georgia, Indiana, Iowa, and Minnesota) and Ely, *supra* note 51, at 137 (*citing* as examples the states of Alabama, New Hampshire, and Virginia).

[61] *See* Pt. IV, *infra*.

[62] Somin, *supra* note 45, 93 MINN. L. REV. at 2120–31. *See* Blais, *supra* note 2, at 674 n.112 (*citing*, *e.g.,* as examples, Alabama, Arizona, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, North Carolina, Ohio, Oregon, Pennsylvania, South

ments responding to the survey conducted for the digest reported an instance in which the state's post-*Kelo* laws had affected a taking for a transportation project that involved a designated blighted area or a blighted property.[63]

Because of the broad exception for takings of blighted property, some commentators argue that the post-*Kelo* enactments will not prevent future *Kelo*-type takings and that the constitutional and legislative changes were intended more for the purpose of placating public opinion.[64] Other sources observe, first, that "the qualities that characterize blighted property escape precise definition."[65] Second, the post-*Kelo* laws may not necessarily preclude takings of private property for urban revitalization "even when the primary purpose…is to foster economic development."[66] As an example, New Hampshire's post-*Kelo* laws provide that economic benefits from redevelopment are not sufficient to establish a public use but provide also that it is in the public interest for blighted areas to be acquired by eminent domain and "made available for sound and wholesome development in accordance with a redevelopment plan…."[67]

D. The Impact of Post-*Kelo* Laws on Takings for State Transportation Projects

In March and April 2011, 29 state DOTs responded to a survey seeking information regarding whether their respective state had enacted constitutional or legislative changes in response to the *Kelo* decision, and, if so, what effect the changes have had on transportation projects in their state. First, as shown in Table 1, of the 29 departments that responded, 26 departments were subject to post-*Kelo* reforms; three DOTs were from a state without any post-*Kelo* reforms. Thus, the state transportation departments of slightly more than 60 percent of the 43 states that enacted post-*Kelo* laws responded to the survey.[68]

Table 1. Transportation Departments Responding to the Survey

Transportation departments in states with post-*Kelo* reforms	26 (90 percent)
Transportation departments in states without post-*Kelo* reforms	3 (10 percent)

Nineteen of the 26 departments subject to post-*Kelo* laws reported that there had been no effect on the taking of private property by eminent domain for transportation projects, whereas the transportation departments in seven states (California, Missouri, Nevada, Ohio, Oregon, Pennsylvania, and Wyoming) reported that the post-*Kelo* reforms in their states had affected their projects.

Table 2. Whether Post-*Kelo* Reforms Have Affected Transportation Projects

Transportation departments reporting no effect on transportation projects	19 (73 percent)
Transportation departments reporting some effect on transportation projects	7 (27 percent)

The seven states reported that the cost and timely delivery of projects, as well as appraisals, land acquisition, and project planning, had been affected by post-*Kelo* reforms in their state.[69] The results of the survey, as well as the absence of cases involving *Kelo*-type takings or post-*Kelo* reforms, suggest that most state DOTs have not been affected by the states' constitutional and legislative changes in response to the *Kelo* decision.

IV. THE EFFECT OF POST-*KELO* REFORMS ON PUBLIC USE AND TRANSPORTATION PROJECTS

A. Transportation Projects as a Public Use

In addition to some jurisdictions' laws defining public use to include the opening of roads, the courts have long held that the taking of property by eminent domain for a transportation project is for a public use.[70] Indeed, "the easy cases of public use entail the condemnation of private property for government ownership of public infrastructure, such as roads, schools, and public buildings."[71] As one court has stated, it "can be a daunting task for a party arguing that a taking for a highway project is not for a valid public purpose."[72]

Carolina, Texas, Vermont, West Virginia, and Wisconsin). *See also* Castle Report, *supra* note 40.

[63] Caltrans commented that the laws could have an impact on the planning stage when investigating environmental justice issues on a given alignment. *See* Pt. VIII.D, *infra*.

[64] Seitz, *supra* note 39, at 211; David A. Dana, *The Law and Expressive Meaning of Condemning the Poor after Kelo*, 101 N.W. U. L. REV. 365, 379 (2007).

[65] Lopez, *supra* note 59, at 594 (footnote omitted).

[66] Blais, *supra* note 2, at 684.

[67] N.H. REV. STAT. ANN. § 205:1.

[68] Percentages in the tables are rounded to the nearest whole number.

[69] *See* Pt. VIII.A and B, *infra*.

[70] Morriss, *supra* note 52, at 245.

[71] Blais, *supra* note 2, at 661.

[72] Del. *ex rel*. Sec'y of the DOT v. Teague, 2009 Del. Super. Lexis 132 at *1, 13 (2009) (Unrpt.), *reargument denied,* 2009 Del. Super. LEXIS 160 (2009).

Transportation departments' use of eminent domain should be unchanged in the seven states that did not amend their constitution or state code after the *Kelo* decision.[73] Although 43 states did revise their laws regarding the use of eminent domain,[74] at least 13 states specifically provide that the post-*Kelo* restrictions do not apply to takings for the purpose of constructing, maintaining, or operating streets and highways.[75]

For example, Indiana amended its constitution to provide that eminent domain may be used only to take property for public highways, roads, and streets, as well as other public uses including facilities for the general use of the government or citizens.[76] Pursuant to the state code, a public use in Indiana includes the "possession, occupation, and enjoyment of a parcel of real property by the general public or a public agency for the purpose of providing the general public with fundamental services, including the construction, maintenance, and reconstruction of highways, bridges [and]…intermodal facilities…."[77] A public use also includes the "leasing of a highway, bridge, [or] intermodal facility…by a public agency that retains ownership of the parcel by written lease with right of forfeiture…."[78]

In Tennessee, the term "public use" does not include "either private use or benefit, or the indirect public benefits resulting from private economic development and private commercial enterprise, including increased tax revenue and increased employment opportunity," except, *inter alia*, "[t]he acquisition of any interest in land necessary for a road, highway, bridge, or other structure, facility, or project used for public transportation…."[79]

HTK Management, LLC v. The Seattle Popular Monorail Authority[80] is a case decided since *Kelo* in which there was an issue of whether a taking for a transportation project was for a public use. The court stated that the facts in the *Kelo* case bore no resemblance to HTK's situation inasmuch as the case at bar involved "one of the most fundamental public uses for which property can be condemned—public transportation,"[81] which in Washington State has been ruled to be a public use for "nearly 100 years."[82] Although some post-*Kelo* reforms provide that the determination of public use is a judicial question, the court stated that in Washington, as well as in other states, a decision regarding the type and extent of the property interest necessary to carry out the public purpose historically has been a legislative question.[83]

Although the project was abandoned after the court's decision,[84] the Seattle Popular Monorail Authority (SPMA) sought to condemn a parcel of land for a transit station and other uses. In part, HTK argued that the trial court's adjudication of public use, as well as of necessity for the project, was improper. The plaintiff alleged that although the SPMA "permanently condemned a fee interest in the property comprising the monorail footprint, it should have been limited to a multiyear lease on the remainder."[85] The court held that the legislature's determination of what is a public use is entitled to great weight but that the determination is not dispositive.[86] The court agreed with the

[73] Castle Report, *supra* note 40; *see also* Ely, *supra* note 51, at 133.

[74] Somin's Symposium Introduction, *supra* note 45, at 1.

[75] ALA. CODE § 11-47-170(b); *see also* ALA. CODE § 11-80-1(b); ARIZ. REV. STAT. § 12-1134; CAL. CONST. art. 1, § 19(d) (private property may be condemned for a public work or improvement); CAL. CONST. art. 1, § 19(e)(5) (a public work or improvement includes streets or highways); IOWA CODE § 6A-21(2) (limitation on the definition of public use, public purpose, or public improvement inapplicable to the establishment, relocation, or improvement of a road); KAN. STAT. ANN. § 26-501b(a) (transfer to a private entity permitted when the taking is by the Kansas DOT or a municipality and the property is excess property incidental to the acquisition of right-of-way for a public road, bridge, or public improvement project); KY. REV. STAT. ANN. 416.675(a) (exception for acquisition of property financed by state road funds or federal highway funds); LA. CONST. art. 1, § 4(B)(2)(b)(ii) (public purpose limited, *inter alia*, to continuous public ownership of property dedicated to roads, bridges, and other public transportation); NEV. REV. STAT. § 37.010(2)(a) (permitting transfer to another private person or entity that uses the property primarily to benefit a public service, including a public transportation project owned by a governmental entity); 26 PA. CONS. STAT. § 204(b)(9) (property used for a road, street, highway, trafficway, or access to a public thoroughfare for a property lacking access); R.I. GEN. LAWS § 42-64.12-6(b) (eminent domain permissible for transportation infrastructure including roads, highways, bridges, and associated ramps); TEX. GOV'T CODE ANN. § 2206.001(c); VT. STAT. ANN., tit. 12, § 1040(b)(1) (section does not affect the use of eminent domain for transportation projects such as highways, airports, and railroads); VA. CODE ANN. § 1-219.1(B) (public facilities include highways, roads, streets, and bridges).

[76] Trent L. Pepper, *Originalism and Precedent: Note: Blight Elimination Takings as Eminent Domain Abuse: The Great Lakes States in Kelo's Public Use Paradigms*, 5 AVE MARIA L. REV. 299, 319 (2007).

[77] IND. CODE ANN. § 32-24-4.5-1(a)(1).

[78] *Id.* § 32-24-4.5-1(a)(2).

[79] TENN. CODE ANN. § 29-17-102(2)(A).

[80] 155 Wash. 2d 612, 121 P.3d 1166 (2005).

[81] *Id.* at 616 n.1, 639, 121 P.3d at 1168 n.1, 1180.

[82] *Id.* at 630, 121 P.3d at 1175.

[83] *Id.* at 631, 121 P.3d at 1176 (*citing, e.g.*, Westrick v. Approval of Bond of Peoples Natural Gas Co., 103 Pa. Commw. 578, 581, 520 A.2d 963 (1987); City of New Ulm v. Schultz, 356 N.W.2d 846, 849 (Minn. Ct. App. 1984); Concept Capital Corp. v. Dekalb County, 255 Ga. 452, 453, 339 S.E.2d 583 (1986); St. Andrew's Episcopal Day Sch. v. Miss. Transp. Comm'n, 806 So. 2d 1105, 1111 (Miss. 2002); City of Phoenix v. McCullough, 24 Ariz. App. 109, 114, 536 P.2d 230 (1975); Regents of Univ. of Minn. v. Chi. & N.W. Transp. Co., 552 N.W.2d 578 (Minn. Ct. App. 1996)).

[84] *See In re* Condemnation Petition of Seattle Popular Monorail Auth. v. Rokan Partners, 139 Wash. App. 772, 162 P.3d 1147 (2007) (abandoned pursuant to a resolution by SMP's board of directors after voters rejected a modified proposal).

[85] *HTK Management, LLC*, 155 Wash. 2d at 616, 121 P.3d at 1168.

[86] *Id.* at 629, 121 P.3d at 1175.

SPMA that it needed all of the property for a substantial period of time to build and construct the monorail station.

Although not involving a highway project, in a Minnesota case, also decided after *Kelo*, the City of Granite Falls sought to condemn an easement over a railroad right-of-way for the purpose of developing a recreational trail for public use.[87] The city's intent was to convey the property to the Minnesota Department of Natural Resources (DNR) for the purpose of building and maintaining the trail.[88] The railroad argued that the taking for the DNR was "not necessary to effectuate a valid public use."[89] Although the statute does not provide the DNR with authority to condemn the easement, the statute also "does not prohibit the DNR from acquiring land from another public entity to be used for a lawful public purpose."[90] The court held that because the taking was for a public use, it was not relevant whether the entity developing the property for a public purpose is a public or private one.[91]

B. Requirement of Public Ownership of Condemned Property

At least seven states' post-*Kelo* reforms prohibit the use of eminent domain when a taking will not result in a transfer of property to public ownership[92] or require that a taking primarily benefit a road or other public project.[93] There is some overlap of this section of the digest with the discussion in the previous section as some states' post-*Kelo* laws include both an exception for transportation projects and a requirement of public ownership after a taking.

Delaware defines public use to include "[t]he possession, occupation, or utilization of land by the general public or by public agencies…."[94] Iowa's statute defines a public use, public purpose, or public improvement to include, among other things, "[t]he possession, occupation, and enjoyment of property by the general public or governmental entities."[95]

In Michigan, a taking is not for a public use unless the proposed use of the property is "invested" with one or more "public attributes sufficient to fairly deem the entity's activity governmental," such as when "[t]he property or use of the property will remain subject to public oversight and accountability after the transfer of the property and will be devoted to the use of the public, independent from the will of the private entity to which the property is transferred."[96]

Virginia's statute permits takings for traditional uses, such as allowing property to be "taken for the possession, ownership, occupation, and enjoyment of property by the public or a public corporation"[97] or for the "construction, maintenance, or operation of public facilities by public corporations or by private entities provided that there is a written agreement with a public corporation providing for use of the facility by the public."[98]

Similarly, in Wyoming the term "'public purpose' means the possession, occupation and enjoyment of the land by a public entity."[99]

Some states permit takings for transfer to a private party as long as the latter's use of the property primarily benefits the public. Thus, in Nevada "public uses for which private property may be taken by the exercise of eminent domain do not include the direct or indirect transfer of any interest in the property to another private person or entity."[100] However, certain takings that would result in a transfer of property to another private party are permitted, including when a property is used primarily to benefit a public service such as a public transportation project, road, or bridge or a "facility that is owned by a governmental entity."[101]

In sum, of interest to transportation departments is that at least seven states' post-*Kelo* reforms that restrict the use of eminent domain include provisions permitting takings as long as there is a transfer of the property to public ownership or the taking primarily benefits a road or other public project.

C. Prohibition of Transfers of Condemned Property to a Private Entity

Section IV of the digest discusses post-*Kelo* reforms aimed at prohibiting the use of eminent domain specifically for the taking of private property for economic development, whereas this subpart of the digest addresses state laws prohibiting the transfer to another private party of real property taken by eminent domain.[102]

At least 16 states' laws now provide that a public authority may not condemn private property for the purpose of transferring the property to another person or

[87] City of Granite Falls v. Soo Line R.R. Co., 742 N.W.2d 690 (Minn. 2007).

[88] *Id.* at 693.

[89] *Id.* at 697.

[90] *Id.* at 698.

[91] *Id.*

[92] Delaware, Georgia, Iowa, Louisiana, Michigan, Rhode Island.

[93] Nevada.

[94] DEL. CODE ANN. tit. 29, § 9501A(c)(1).

[95] IOWA CODE § 6A.22(2)(a)(1).

[96] MICH. COMP. LAWS § 213.23(2). Michigan's statute also states that a "'public use' does not include the taking of private property for the purpose of transfer to a private entity for either general economic development or the enhancement of tax revenue." *Id*. § 213.23(3).

[97] VA. CODE ANN. § 1-219.1(A)(i).

[98] *Id*. § 1-219.1(A)(ii).

[99] WYO. STAT. § 1-26-801(c).

[100] NEV. REV. STAT. § 37.010(2).

[101] *Id.* § 37.010(2)(a).

[102] There is some overlap again as some states' laws include both prohibitions.

private entity.[103] Some post-*Kelo* reforms mandate that eminent domain may not be used to transfer private property to a nongovernmental entity,[104] a public-private partnership or business,[105] or a business entity.[106] Thus, the Louisiana Constitution provides in part that except as specifically authorized elsewhere in its constitution, property may not be taken "(a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity."[107]

Another example is the Nevada Constitution, which provides that a "[p]ublic use shall not include the direct or indirect transfer of any interest in property taken in an eminent domain proceeding from one private party to another private party. In all eminent domain actions, the government shall have the burden to prove public use."[108] Nevada amended its state code to provide that property taken by eminent domain may be transferred to another private person or entity if the private person or entity "uses the property primarily to benefit a public service," such as a public transportation project.[109]

New Hampshire's Constitution mandates that "[n]o part of a person's property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property."[110]

In Oregon, a public body may not condemn private real property used as a residence, business establishment, farm, or forest operation if the condemnor intends to convey it to another private party, unless the property is being taken for the maintenance, improvement, or construction of transportation facilities, transportation systems, utility facilities, or utility transmission systems.[111]

The Pennsylvania Department of Transportation's (PennDOT) response to the TRB survey noted that a Pennsylvania statute prohibits the exercise of eminent domain to take private property for private enterprise; however, there is an exception for private property "'used or to be used for any road, street, highway, trafficway or for property to be acquired to provide access to a public thoroughfare for a property which would be otherwise inaccessible as the result of the use of eminent domain or for ingress, egress or parking of motor vehicles.'"[112] PennDOT stated that the provision "carves a large exception for DOT projects and procedures."[113]

Some states have a requirement that a condemnor must wait 10, 20, or 30 years before transferring land taken by eminent domain to a person or private entity, thereby imposing a further restriction on the taking of property by eminent domain for eventual private commercial use or development.[114] In Georgia any condemned property may not be converted "to any use other than a public use for 20 years from the initial condemnation."[115]

In Louisiana the period is 30 years. Louisiana's constitution now provides:

> [E]xcept for leases or operation agreements for port facilities, highways, qualified transportation facilities or airports, the state or its political subdivisions shall not sell or lease property which has been expropriated and held for not more than thirty years without first offering the property to the original owner or his heir, or, if there is no heir, to the successor in title to the owner at the time of expropriation at the current fair market value, after which the property can only be transferred by competitive bid open to the general public. *After thirty years have*

[103] ALA. CODE § 11-47-170(b); *see also* ALA. CODE § 11-80-1(b); ALASKA STAT. §§ 09.55.240(d) and 29.35.030(b); CAL. CONST. art. 1, § 19(b) (state and local governments prohibited from using eminent domain to acquire an owner-occupied residence for the purpose of conveying it to a private person); FLA. STAT. ANN. § 73.013(1) (ownership or control of property may not be conveyed by the condemning authority or any other entity to a natural person or private entity); FLA. STAT. ANN. §§ 73.013(1)(b)(1) (exception for use as a road or other right-of-way or means that is open to the public for transportation) and 73.013(1)(b)(2) (exception regarding provision of transportation-related services); IDAHO CODE § 7-701A(1); IOWA CODE § 6A.22(2)(a)(3); KAN. STAT. ANN. § 26-501a(b) (transfer prohibited except as provided in KAN. STAT. ANN. § 26-501b); KY. REV. STAT. ANN. § 416.675(3) (no transfer to a private owner for the purpose of economic development that benefits the general public only indirectly); LA. CONST. art. 1, §§ 4(B)(1) (property not to be taken or damaged for predominant use by or for any transfer to any private person or entity) and 4(B)(3) (economic development not to be considered in determining a public purpose); MICH. COMP. LAWS § 213.23(3) (public use does not include taking private property for transfer to a private entity for either general economic development or enhancement of tax revenue); NEV. CONST. art. 1, § 22(1); NEV. REV. STAT. § 37.010(2) (public uses do not include the direct or indirect transfer to a person or private entity except, for example, when the entity that took the property exchanges it for other property acquired or being acquired by eminent domain for roadway or highway purposes); NEV. REV. STAT. § 37.010(2)(d); N.H. CONST. pt. 1, art. XII-a; N.D. CONST. art. 1, § 16; OR. REV. STAT. § 35.015(1) and (2)(a); S.D. CODIFIED LAWS § 11-7-22.1; TEX. GOV'T CODE ANN. §§ 2206.001(b)(3) (unless economic development is a secondary purpose) and 2206.001(b)(2).

[104] ALA. CODE §§ 11-47-170(b) and 11-80-1(b); S.D. CODIFIED LAWS §§ 11-7-22.1(1) and 11-7-22.2.

[105] ALA. CODE §§ 11-47-170(b) and 11-80-1(b); S.D. CODIFIED LAWS §§ 11-7-22.1(1) and 11-7-22.2.

[106] ALA. CODE §§ 11-47-170(b) and 11-80-1(b); CAL. CONST. art. 1, § 19(e)(4); S.D. CODIFIED LAWS §§ 11-7-22.1(1) and 11-7-22.2.

[107] LA. CONST. art. 1, § 4(B)(1).

[108] NEV. CONST. art. 1, § 22(1).

[109] NEV. REV. STAT. § 37.010(2)(a); *see id*. § 37.010(2)(d) (permitting an entity that took the property to exchange it for other property that had been acquired for roadway or highway purposes).

[110] N.H. CONST. pt. 1, art. XII-a.

[111] OR. REV. STAT. § 35.015(1) and (2)(c).

[112] PennDOT's Survey Response, dated March 9, 2011 (*citing* 26 PA. CONS. STAT. § 204(b)(9)).

[113] *Id*.

[114] FLA. STAT. ANN. § 73.013(2); *see also* FLA. STAT. ANN. §§ 73.013(1)(g) and (h).

[115] GA. CODE ANN. § 22-1-2(b).

passed from the date the property was expropriated, the state or political subdivision may sell or otherwise transfer the property as provided by law.[116]

Another limitation in some states is that when condemned property is not used for its intended purpose, the condemning authority may be required to offer the property for purchase to the person or persons from whom the property was taken.[117] Thus, in one state, "[i]f property acquired through the power of eminent domain from an owner fails to be put to a public use within five years, the former property owner may apply to the condemnor or its successor or assign for reconveyance" in accordance with the conditions set forth in the statute.[118]

Only a few cases decided after *Kelo* were located for the digest that involved a taking of property for transfer to or for the benefit of a private party. Although Hawaii did not enact any post-*Kelo* laws,[119] a *Kelo*-type feature in a Hawaii case was that property being condemned for a highway project was to be transferred from one private party to another private party with a resulting bypass to be dedicated to the county after completion.[120] The court agreed that private property could not be condemned "for the sole purpose of transferring title to a different property owner,"[121] but the taking of private property for transfer to another private party did "not *a fortiori*, invalidate the taking."[122] The court stated that if "the private character of a taking predominates, it is invalid, regardless of whether it is a 'classic' public use."[123] Merely because a taking is for a road project does not mean that the taking is "*per se* valid";[124] pretext arguments are not confined to economic development cases.[125]

The public use issue is addressed also in a Michigan case decided after *Kelo* but not mentioning *Kelo*. A spur road was to be constructed across the defendants' property that would benefit an industrial entity that had agreed at one point to pay $200,000 toward the funding of the road.[126] The court held that under Michigan law the proposed road qualified as a public use. One factor affecting the court's decision was that the land being condemned would continue to be owned and controlled by the city.[127] The court held that any private funding for the project was not dispositive of the question of public use.[128]

In *HTK Management, LLC v. The Seattle Popular Monorail Authority,*[129] *supra,* the court held that it was not necessary to undertake a public use examination simply because property may be sold to a private party that is outside the footprint of the proposed monorail station.[130] The court stated that it was only after a period of 5 to 10 years when there would be a possibility that the property may be sold and that a condemning authority is not required "to have a public use planned for property *forever*."[131] Therefore the SPMA's determination to condemn a fee interest in the entire property was necessary to the public use of public transportation.[132]

It appears that a transportation department's eminent domain action is unlikely to be affected unless a taking is for the purpose of transferring the property to a private person or entity. However, as noted in an NCHRP *Legal Research Digest*, some state and local highway authorities are concerned that post-*Kelo* legislation may affect their ability to condemn property for public-private partnership (PPP) projects.[133] Of the 26 transportation departments responding to the survey that are subject to post-*Kelo* laws, with the exception of California, the DOTs stated that post-*Kelo* laws in their state had not affected any PPP projects.[134]

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[116] LA. CONST. art. I, § 4(H)(1) (emphasis supplied).

[117] ALA. CODE § 11-47-170(c); CONN. GEN. STAT. § 8-193(c)(1); FLA. STAT. ANN. § 73.013(1)(f)(2) ("The owner from whom the property was taken by eminent domain is given the opportunity to repurchase the property at the price that he or she received from the condemning authority."); *see also* FLA. STAT. ANN. § 73.013(2)(b) (stating that if less than 10 years have elapsed since the condemning authority acquired title to the property, the property may be transferred to another natural person or private entity without restriction if certain conditions are met); LA. CONST. art. 1, § 4(H)(3) (surplus property to be offered for sale to original owner, heir, or successor within 2 years after project completion); NEV. REV. STAT. § 37.010(2)(c); OHIO REV. CODE ANN. § 163.211 (setting forth when appropriated property may be repurchased by the former owner); S.D. CODIFIED LAWS § 11-7-22.2 (no transfer of property taken by eminent domain within 7 years of acquisition to any private party without first offering the property to the person who originally owned the property, or his or her heirs or assigns, at current fair market value, whether the property has been improved or has remained unimproved during the interval, or at the original transfer value, whichever is less); WYO. STAT. § 1-26-801(d) (rebuttable presumption that property acquired by eminent domain but not used for a period of 10 years is no longer needed for a public purpose, thereby permitting former owner or successor to apply for return of the property).

[118] GA. CODE ANN. § 22-1-2(c)(1).

[119] Castle Report, *supra* note 40.

[120] County of Hawai'i v. C&J Coupe Family Ltd. P'ship, 119 Haw. 352, 376 n.28, 198 P.3d 615, 639 n.28 (2008).

[121] *Id.* at 379, 198 P.3d at 642.

[122] *Id.* at 380, 198 P.3d at 643.

[123] *Id.* at 385 n.36, 198 P.3d at 648 n.36.

[124] *Id.* at 385 n.36, 198 P.3d at 648 n.36.

[125] *Id.* at 385, 198 P.3d at 648.

[126] City of Novi v. Robert Adell Children's Funded Trust, 473 Mich. 242, 245–46, 701 N.W.2d 144, 148 (2005).

[127] *Id.* at 250, 701 N.W.2d at 150.

[128] *Id.* at 252, 701 N.W.2d at 151.

[129] 155 Wash. 2d 612, 121 P.3d 1166 (2005).

[130] *Id.* at 633, 121 P.3d at 1176–77.

[131] *Id.* at 634, 121 P.3d at 1177 (emphasis in original).

[132] *Id.* at 638, 121 P.3d at 1179.

[133] EDWARD FISHMAN, MAJOR LEGAL ISSUES FOR HIGHWAY PUBLIC-PRIVATE PARTNERSHIPS 33 (National Cooperative Highway Research Program *Legal Research Digest* 51, 2009).

[134] *See* Pt. VIII.C.3, *infra*. In its response Caltrans stated that the effect was that any PPP projects would have to un-

In sum, of interest to transportation departments is that at least 16 states' post-*Kelo* laws include a prohibition on using eminent domain for the purpose of transferring property to another private party.[135] Based on the post-*Kelo* cases discussed in this section, it appears to be unlikely that a transportation department's eminent domain actions will be affected unless a taking is for the purpose of transferring property to a private interest. As discussed in the next subpart, some states permit such transfers if a private use is incidental to the public use.

D. No Effect on Takings for a Public Use When a Private Use Is Incidental

In at least 10 states, a taking for economic development or for transfer to a person or private interest or entity is allowed if the private use is incidental to the public use of the condemned property[136] or if the private use is "secondary."[137] In Iowa, the definition of a public use, public purpose, or public improvement permits a "[p]rivate use that is incidental to the public use of the property, provided that no property shall be condemned solely for the purpose of facilitating such incidental private use."[138]

Kentucky's statute provides:

> No provision in the law of the Commonwealth shall be construed to authorize the condemnation of private property for transfer to a private owner for the purpose of economic development that benefits the general public only indirectly, such as by increasing the tax base, tax revenues, or employment, or by promoting the general economic health of the community. However, *this provision shall not prohibit the sale or lease of property to private entities that occupy an incidental area within a public project or building*, provided that no property may be condemned primarily for the purpose of facilitating an incidental private use.[139]

As stated, in Louisiana, a condemnor may not take property for the "predominant use by any private person or entity…."[140]

An incidental or secondary purpose was at issue in a Pennsylvania case that involved a taking of property that had been declared blighted 30 years earlier but that was to be conveyed to a religious entity as part of a redevelopment plan.[141] The court held that although the effect of the taking would benefit a religious organization's mission, the effect was "clearly not the *principal or primary* effect," which was to eliminate blight.[142]

In response to the survey, although the DOTs in three states (California, Nevada, and Pennsylvania) reported generally that the new laws had affected takings by eminent domain for transportation projects, no department indicated that an incidental private use exception had affected the use of eminent domain or a taking for a transportation project.

E. Summary of the Effects of Post-*Kelo* Changes on Transportation Departments

Some states' more restrictive definition of public use exempts a condemnation of property for transportation projects.[143] Some statutes also provide that a taking must result in public ownership of the condemned property. Pursuant to some post-*Kelo* laws, a transfer to a private party of a property acquired by eminent domain is prohibited, whereas under some of the new laws, a taking is permissible as long as the public use predominates or any private use is incidental or secondary to the taking.

As a group, at least 22 states have one or more of the foregoing provisions as part of their post-*Kelo* reforms.[144] Of the aforesaid 22 states, the DOTs in 11 of them responded to the survey, with the DOTs in three states, California, Nevada, and Pennsylvania, reporting that post-*Kelo* changes in their state had affected departmental takings. However, the meaning of public use, or one of the other changes noted immediately above restricting the use of eminent domain, was not reported by any department as having affected the department's use of eminent domain.

V. THE EFFECT OF POST-*KELO* LAWS ON THE USE OF EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT

A. Post-*Kelo* Reforms' Prohibitions on the Use of Eminent Domain for Economic Development

Since *Kelo,* at least 21 states have limited or prohibited the use of eminent domain for the taking of private property for economic development,[145] but only Florida

dergo the same schedule impacts and considerations in the post-*Kelo* world as do non-PPP projects.

[135] *See* note 76, *supra*.

[136] CAL. CONST. art. 1, § 19(e)(5); IOWA CODE § 6A.22(2)(a)(3); KAN. STAT. ANN. § 26-501b(a); KY. REV. STAT. ANN. § 416.675(3); LA. CONST. art. 1, § 4(B)(1); NEV. REV. STAT. § 37.010(2)(b)(1); N.H. REV. STAT. ANN. § 205:3-b(I)(d); 26 PA. CONS. STAT. § 204(b)(2)(iii); R.I. GEN. LAWS § 42-64.12-7(a); TEX. GOV'T CODE ANN. § 2206.001(b)(3). *See also* GA. CODE ANN. § 22-1-1(4)(A); LA. CONST. art. 1, § 4(B)(2)(b) (public purpose limited to "continuous public ownership"); R.I. GEN. LAWS §§ 42-64.12-5(e) (defining "public ownership") and 42-64.12-6.

[137] TEX. GOV'T CODE ANN. § 2206.001(b)(3).

[138] IOWA CODE § 6A.22(2)(a)(3).

[139] KY. REV. STAT. ANN. § 416.675(3) (emphasis supplied).

[140] LA. CONST. art. 1, § 4(B)(1)(a).

[141] *In Re: A Condemnation Proceeding in Rem by the Redevelopment Authority of the City of Philadelphia, etc*., 595 Pa. 241, 249, 938 A.2d 341, 346 (2007).

[142] *Id.* at 251, 938 A.2d at 347 (emphasis in original).

[143] There is some overlap in the states' post-*Kelo* changes discussed in Pt. III of the digest.

[144] Alabama, Alaska, Arizona, California, Delaware, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Michigan, Nevada, New Hampshire, North Dakota, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, and Virginia.

[145] ALASKA STAT. §§ 09.55.240(d) and 29.35.030(b); ARIZ. REV. STAT. § 12-1136(5)(b); COLO. REV. STAT. ANN. § 38-1-

and New Mexico have prohibited takings of blighted property for redevelopment.[146] As one source observes, "[m]ost states that passed legislative reforms focused primarily on tightening their definition of public use to exclude development projects or projects aimed at increasing tax revenue while leaving an exception for blighted areas."[147] The exception for takings of blighted property is discussed in Section V of the digest.

Some of the post-*Kelo* constitutional or statutory reforms prohibit the use of eminent domain for economic development, such as for the purpose of enlarging the tax base[148] or increasing tax revenue.[149] Other reforms also prohibit the use of eminent domain for economic development to increase employment[150] or to improve the community's general economic health.[151]

In Iowa, a

> "public use" or "public purpose" or "public improvement" does not mean economic development activities resulting in increased tax revenues, increased employment opportunities, privately owned or privately funded housing and residential development, privately owned or privately funded commercial or industrial development, or the lease of publicly owned property to a private party.[152]

Likewise, in New Hampshire, a public use does "not include the public benefits resulting from private economic development and private commercial enterprise, including increased tax revenues and increased employment opportunities" unless permitted elsewhere in the code.[153]

Other states define public use to exclude the use of eminent domain for economic development, as in Michigan where both the state's constitution and its code prohibit the use of eminent domain for such a purpose. The Michigan Constitution provides that a "'[p]ublic use' does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues." Pursuant to the state code, a "'public use' does not include the taking of private property for the purpose of transfer to a private entity for either general economic development or the enhancement of tax revenue."[154]

Also appearing in some statutes is a provision that the term "public use" does not include, or that eminent domain may not be used for, the development of private housing,[155] retail businesses,[156] or private businesses or enterprises,[157] or for commercial[158] or industrial pur-

101(1)(b)(I); GA. CODE ANN. § 22-1-1(4); IDAHO CODE ANN. § 7-701A(2)(b); IND. CODE ANN. § 32-24-4.5-(a)(3); IOWA CODE § 6A.22(2)(b); KY. REV. STAT. ANN. § 416.675(3); LA. CONST. art. 1, § 4(B)(3); MICH. CONST. art X, § 2 and MICH. COMP. LAWS § 213.23, § 3(3); MINN. STAT. § 117.025, subd. 11(b); MO. REV. STAT. §§ 523.71(1) and 523.71(2); N.H. REV. STAT. ANN. § 205:3-b(II); N.D. CONST. art. 1, § 16; R.I. GEN. LAWS §§ 42-64.12-3, 42-64.12-5(a), 42-64.12-7, 42-64.12-7(c), and 42-64.12-8(a) (authorizing minimum compensation of 150 percent of market value of property taken for economic development); S.C. CONST. art. 1, § 13(A); S.D. CODIFIED LAWS § 11-7-22.1 (not specifically including the term "economic development"); TENN. CODE ANN. § 29-17-101(2); TEX. GOV'T CODE ANN. § 2206.001(b) (including an exception for economic development when it has "a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas"); VT. STAT. ANN. tit. 12, § 1040(a); VA. CODE ANN. § 1-219.1 (not specifically using the term "economic development" but restricting the use of eminent domain use for takings or property for public use or owner for public use and ownership or the elimination of blighted property).

[146] *See* Pt. V, *infra*.

[147] Nedzel, *supra* note 51, at 1014.

[148] ARIZ. REV. STAT. § 12-1136(5)(b); GA. CODE ANN. § 22-1-1(4); IND. CODE ANN. § 32-24-4.5-1(a)(3); KY. REV. STAT. ANN. § 416.675(3); MINN. STAT. § 117.025, subd. 11(b); MO. REV. STAT. § 523.71(2); N.D. CONST. art. 1, § 16; R.I. GEN. LAWS § 42-64.12-5; VA. CODE ANN. § 1-219.1(D).

[149] ALA. CODE §§ 11-47-170(b) and 11-80-1(b); ARIZ. REV. STAT. § 12-1136(5)(b); COLO. REV. STAT. ANN. § 38-1-101(1)(b)(I); CONN. GEN. STAT. § 8-193(b)(1); GA. CODE ANN. § 22-1-1(4); IND. CODE ANN. § 32-24-4.5-1(a)(3); IOWA CODE § 6A.22(2)(b); KY. REV. STAT. ANN. § 416.675(3); LA. CONST. art. 1, § 4(B)(3); MICH. CONST. art. X, § 2; MICH. COMP. LAWS § 213.23, § 3(3); MINN. STAT. § 117.025, subd. 11(b); MO. REV. STAT. § 523.71(2); N.H. REV. STAT. ANN. § 205:3-b(II); N.D. CONST. art. 1, § 16, OHIO REV. CODE ANN. § 1.08(C); S.D. CODIFIED LAWS § 11-7-22.1(2); TENN. CODE ANN. § 13-20-201(a) (in connection with defining blighted areas and welfare of the community); VA. CODE ANN. § 1-219.1(D).

[150] ARIZ. REV. STAT. § 12-1136(5)(b); GA. CODE ANN. § 22-1-1(4); IND. CODE ANN. § 32-24-4.5-1(a)(3); IOWA CODE § 6A.22(2)(b); KY. REV. STAT. ANN. § 416.675(3); MINN. STAT. § 117.025, subd. 11(b); MO. REV. STAT. § 523.71(2); N.H. REV. STAT. ANN. § 205:3-b(II); N.D. CONST. art. 1, § 16, R.I. GEN. LAWS § 42-64.12-5(a); VA. CODE ANN. § 1-219.1(D).

[151] ARIZ. REV. STAT. § 12-1136(5)(b); GA. CODE ANN. § 22-1-1(4); IND. CODE ANN. § 32-24-4.5-1(a)(3); KY. REV. STAT. ANN. § 416.675(3); MINN. STAT. § 117.025, subd. 11(b); MO. REV. STAT. § 523.71(2); N.D. CONST. art. 1, § 16.

[152] IOWA CODE § 6A.22(2)(b).

[153] N.H. REV. STAT. ANN. §§ 205:3-b(I) and (II).

[154] MICH. COMP. LAWS § 213.23, § 3(3). *See also* GA. CODE ANN. § 22-1-(9)(B); KY. REV. STAT. ANN. § 416.675(3).

[155] IOWA CODE §§ 6A.21(b) and 6A.22(2)(b).

[156] ALA. CODE §§ 11-47-170 ("Notwithstanding any other provision of law, a municipality or county may not condemn property for the purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity."); *see also* ALA. CODE § 11-80(b).

[157] 26 PA. CONS. STAT. §§ 204(a) and (b); S.D. CODIFIED LAWS §§ 11-7-22.1 and 11-7-22.2.

[158] ALA. CODE §§ 11-47-170(b) and 11-80-1(b); IOWA CODE §§ 6A.21(1)(b), (c) and 6A.22(2)(b); N.H. REV. STAT. ANN. § 205:3-b(II).

poses.[159] Other states' legislative changes were more "modest,"[160] with some states redefining what constituted blighted property,[161] the remediation of blighted areas usually being an exception to a prohibition of or restriction on the use of eminent domain for economic development.

Of the foregoing 21 states that limit or prohibit the use of eminent domain for economic development, eight of the states' transportation departments responded to the TRB survey.[162] The transportation department in one of the eight states (Missouri) reported that the post-*Kelo* laws had affected the department's acquisition of real property by eminent domain. The Nebraska Department of Roads' response to the survey stated that, although its statute prohibits condemnation primarily for an economic development purpose, the "statute exempts public 'right-of-way projects' from the new prohibition. Therefore, almost all NDOR acquisitions are not impacted by this statutory change."[163] None of the survey respondents indicated that a state prohibition of or restriction on takings for economic development had affected a transportation project.

B. State Court Decisions Since *Kelo*

Several court decisions since *Kelo* are consistent with the foregoing prohibitions on the use of eminent domain for economic development purposes. In a 2006 Ohio case, the court held that "the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of Section 19, Article I of the Ohio Constitution."[164] The court observed that the Ohio legislature had stated that, as a result of *Kelo*,

> "the interpretation and use of the state's eminent domain law could be expanded to allow the taking of private property that is not within a blighted area, ultimately resulting in ownership of that property being vested in another private person in violation of Sections 1 and 19 of Article I, Ohio Constitution."[165]

The court held further that "although economic benefit can be considered as a factor among others in determining whether there is a sufficient public use and benefit in a taking, it cannot serve as the sole basis for finding such benefit."[166]

Furthermore, the court stated that in Ohio the courts should "apply heightened scrutiny when reviewing statutes that regulate the use of eminent-domain powers."[167] The court held that "Norwood's use of 'deteriorating area' as a standard for appropriation [was] void for vagueness" and that "the use of the term 'deteriorating area' as a standard for a taking [was] unconstitutional because the term inherently incorporates speculation as to the future condition of the property to be appropriated rather than the condition of the property at the time of the taking."[168]

In an Oklahoma case involving the taking of right-of-way easements for a future, private generation plant, the court held that the general eminent domain statute did not authorize the use of eminent domain for the sole purpose of economic development.[169] The court noted that there was no statute in Oklahoma authorizing the use of eminent domain for economic development in the absence of blight.

The effect of post-*Kelo* reform may be seen in *Western Seafood Co. v. United States,*[170] in which the city of Freeport, Texas, sought to condemn a portion of Western Seafood's property along the Old Brazos River for the purpose of economic development. The city planned to take and thereafter transfer Western Seafood's property to Freeport Waterfront Property, a private entity, to build a private marina. When the city sought a permit from the U.S. Army Corps of Engineers, Western Seafood sued for injunctive relief to prevent the United States and the city from building marina piers in front of Western Seafood's property.[171] The plaintiff also sought to enjoin the city's condemnation suit in state court. In both actions Western Seafood alleged that the defendants would be violating the Texas Development Corporation Act and the Taking Clauses of the United States and Texas Constitutions.[172]

As for the federal constitutional claim, particularly in light of the *Kelo* decision, the court held that the proposed taking did not violate the Fifth Amendment. Indeed, the court stated that "[t]he facts in *Kelo* bear a strong relationship to the circumstances in this case."[173] The court rejected Western Seafood's argument that the *Kelo* case was distinguishable because in *Kelo* "the beneficiaries of the transfer of property were not identified prior to New London's exercise of eminent domain."[174]

However, because of a change in the Texas code after the *Kelo* decision, the court reversed the district court's entry of judgment for the city on the state law claims. As a result of the enactment of Texas Government Code § 2206.001 pursuant to the Limitations on Use of Eminent Domain Act, Texas law provides in part that

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[159] ALA. CODE §§ 11-47-170(b) and 11-80-1(b); IOWA CODE §§ 6A.21(1)(b) and 6A.22(2)(b).

[160] Lopez, *supra* note 59, at 592 (*citing* as examples Kentucky and Missouri).

[161] *Id*. at 593 (*citing* as an example Pennsylvania).

[162] Idaho, Iowa, Missouri, North Dakota, Rhode Island, South Carolina, Tennessee, and Virginia.

[163] Nebraska Department of Roads' Survey Response, dated Feb. 18, 2011 (*citing* NEB. REV. STAT. § 76-710.04).

[164] City of Norwood v. Horney, 110 Ohio St. 3d 353, 356, 853 N.E.2d 1115, 1123 (Ohio 2006).

[165] *Id.* at 355, 853 N.E.2d at 1122.

[166] *Id.* at 378, 853 N.E.2d at 1141.

[167] *Id.* at 356, 853 N.E.2d at 1123.

[168] *Id.*

[169] Bd. of County Comm'rs of Muskogee County v. Lowery, 2006 Ok. 31, *P12, *18, 136 P.3d 639, 648, 650 (2006).

[170] 202 Fed. Appx. 670 (5th Cir. 2006).

[171] *Id.* at 671–72.

[172] *Id.* at 672.

[173] *Id.* at 674.

[174] *Id.* at 675.

> (b) A governmental or private entity may not take private property through the use of eminent domain if the taking:
>
> (1) confers a private benefit on a particular private party through the use of property;
>
> (2) is for a public use that is merely a pretext to confer a private benefit on a particular private party; or
>
> (3) is for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas….[175]

The court noted that Texas courts have held that the scope of public use must be ascertained in part by reference to a legislative determination of public use.[176] The court remanded the case for consideration of Western Seafood's claim in light of Section 2206.001, which "places new limitations on the use of eminent domain for economic development purposes, or where the taking confers a benefit on a particular private party."[177] Although the foregoing section did not explicitly narrow or redefine the term "public use," the section not only "addresses the uses to which the taken property will be put" but also "was passed in response to *Kelo*, which turned on the interpretation of the public use clause in the United States Constitution."[178] Under Texas judicial precedent, the section may be "construed as [an] effort to narrow or redefine 'public use'…."[179]

VI. THE EFFECT OF POST-*KELO* LAWS ON TAKINGS OF BLIGHTED PROPERTY

A. Post-*Kelo* Reforms and Blighted Property

Based on the transportation departments' responses to the survey, it does not appear that a prohibition on the use of eminent domain for economic development or any exceptions thereto for blighted property have had an impact on the departments' acquisitions of private property for highway projects. All 26 transportation departments subject to post-*Kelo* laws that responded to the survey did not report any effect of the reforms in their state on a highway project in a designated blighted area or involving a taking of blighted property.

Nevertheless, post-*Kelo* changes affecting condemnation of blighted property may be of interest to transportation departments. In the 43 states[180] that enacted post-*Kelo* reforms, at least 38 retained or amended their law permitting the condemnation of blighted property for redevelopment.[181] Florida and New Mexico[182] apparently are the only states since the *Kelo* decision to prohibit the use of eminent domain for the taking of property to eliminate blight or a nuisance. (Utah initially removed eminent domain authority for blight but later reinstated "limited blight authority" and now allows condemnation by a majority vote of the neighborhood.[183]) As for Florida, the statute provides that "taking private property for the purpose of preventing or eliminating slum or blight conditions is not a valid public purpose or use for which private property may be taken by eminent domain and does not satisfy the public purpose requirement of s. 6(a), Art. X of the State Constitution."[184]

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[175] *Id.* at 676 (*quoting* TEX. GOV'T CODE ANN. § 2206.001(b)).

[176] *Id.*

[177] *Id.*

[178] *Id.* at 676–77.

[179] *Id.* at 676.

[180] Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See* citations in note 154, *infra*.

[181] ALA. CODE §§ 11-47-170(b), 11-80-1(b), and 24.2-2(c); ALASKA STAT. § 18.55.950(2)(2); ARIZ. REV. STAT. §§ 12-1136(5)(a)(iii) and (iv); CAL. CONST. art 1, § 19(c); COLO. REV. STAT. ANN. § 38-1-101; CONN. GEN. STAT. § 8-193; 29 DEL. CODE ANN. § 9501A(c)(3)(a.1); GA. CODE ANN. § 22-1-1; IDAHO CODE § 7-701A(2)(ii)(1)-(3); ILL. REV. STAT. § 5111-74.4-3(a)(1)(A-M); IND. CODE ANN. § 32-24-4.5-7; IOWA CODE § 6A.22(2)(5)(a); KAN. STAT. ANN. § 26-501b(e); KY. REV. STAT. ANN. §§ 99.340 (1) and (2) and 99-370(6); LA. CONST. art. 1, § 4(B)(2)(c); ME. REV. STAT. ANN. §§ 5101, 5102, and 5201(5); MICH. COMP. LAWS § 213.23(8); MINN. STAT. §§ 117.025 subd. 6 and subd. 7; *see also* MINN. STAT. § 117.025 subd. 11; MO. REV. STAT. § 523.274(1); MONT. CODE ANN. § 7-15-4206(2); NEB. REV. STAT. § 18-2103(11); NEV. REV. STAT. § 279.388; N.H. REV. STAT. ANN. § 205:3-b(I)(c); N.C. GEN. STAT. §§ 160A-503(2) and 160A-515; OHIO REV. CODE ANN. §§ 303.26(F), 1.08(A), and 1.08(B); OR. REV. STAT. § 35.015(2)(a); 26 PA. CONS. STAT. §§ 204(b)(3) and 205; R.I. GEN. LAWS §§ 42-64.12-6(d), 45-31-6, 45-31-8(2), 45-31-8(3), 45-31-8(6), and 45-31-8(18); S.C. CONST. art 1, § 13(B); TENN. CODE ANN. § 13-20-201; TEX. GOV'T CODE ANN. § 374.003(3); VA. CODE ANN. § 1-219.1(A); W. VA. CODE ANN. §§ 16-18-3(c), (d), and (t); WIS. STAT. ANN. § 32.03(6)(a); WYO. STAT. § 1-26-801(c).

[182] Castle Report, *supra* note 40. *See* UTAH CODE ANN. § 17C-2-601.

[183] UTAH CODE ANN. §§ 17C-2-601(2)(c)(i) and (ii)(A) (stating that

> [a]n agency may not acquire by eminent domain single-family residential owner occupied property unless: (i) the owner consents; or (ii) (A) a written petition requesting the agency to use eminent domain to acquire the property is submitted by the owners of at least 80% of the owner occupied property within the relevant area representing at least 70% of the value of owner occupied property within the relevant area….).

[184] FLA. STAT. ANN. § 73.014(2). *See* FLA. STAT. ANN. §§ 73.014(1) (providing that any "entity to which the power of eminent domain is delegated may not exercise the power of eminent domain to take private property for the purpose of abating or eliminating a public nuisance" and that "abating or eliminating a public nuisance is not a valid public purpose or use for which private property may be taken by eminent domain and does not satisfy the public purpose requirement of s. 6(a), Art. X of the State Constitution"); FLA. STAT. ANN. § 73.014(2) (providing also that any "entity to which the power

In its response to the survey, Caltrans observed that there "are certain areas along major freeways that are currently being widened that perhaps have been designated blighted by the local jurisdiction" but there was no "specific knowledge of a 'blighted' designation [with respect to] communities."[185] The department's response observed that the processes for its right-of-way activities do not change in regard to blighted versus non-blighted designations but that the involvement of blighted property "may have an impact…in the planning stages when investigating environmental justice issues on a given alignment."[186]

As for cases involving post-*Kelo* reforms and takings of blighted property, a Louisiana case concerned an amendment of the Louisiana Constitution;[187] the court held that the property at issue had "not been taken for the predominant use of a private party nor for the purpose of transferring the property to a private person."[188] The court held that Louisiana's constitutional proscription that

> "property shall not be taken…(a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity"…merely prevents expropriations initiated with the goal of transferring private property to a specific recipient, rather than as a bar to expropriation with a legitimate basis that may include a subsequent transfer.[189]

No cases were located for the digest since the *Kelo* decision or post-*Kelo* reforms that involved a transportation department and a taking of blighted property.

B. Definition of Blighted Property

Unlike Florida and New Mexico, it does not appear that other states prohibit the use of the taking of blighted property for transfer to another person or private entity for redevelopment.[190] In response to the *Kelo* case, some statutes have been amended to narrow the definition of blight. Thus, some states revised their definition so that property may be designated as blighted and subject to redevelopment when it is shown that the property is unsafe[191] or when it presents a threat to the health and safety of the community.[192]

In New Hampshire, although a public use does "not include the public benefits resulting from private economic development and private commercial enterprise," the term "public use" does include "[t]he acquisition of real property to remove structures beyond repair, public nuisances, structures unfit for human habitation or use, and abandoned property when such structures or property constitute a menace to health and safety."[193]

Oregon's response to the survey stated that in Oregon, "[i]n the realm of using condemnation for urban redevelopment, the definition of 'blighted property' was modified to include actual physical deterioration of target properties."[194]

Under some states' statutes that permit takings of blighted property, the condition of streets is a factor that may be considered in determining whether an area is blighted and whether the use of eminent domain is permissible.[195] In an Illinois case, the court upheld a village's determination of blight in connection with a redevelopment project based on various statutory factors. One of the factors was deterioration, which was defined by the statute to include the condition of roadways, alleys, curbs, gutters, sidewalks, and off-street parking, as well as the presence of crumbling pavement, potholes, depressions, and loose paving material.[196]

C. Designation of Blight on a Property-by-Property Basis

One of the most pervasive post-*Kelo* reforms in states authorizing the taking of blighted property is to require that a condemnor make a determination of blight on a property-by-property basis.[197] As a result of post-*Kelo* reforms, Georgia limits takings of blighted property to one property at a time so that it is no longer

of eminent domain is delegated may not exercise the power of eminent domain to take private property for the purpose of preventing or eliminating slum or blight conditions").

[185] Caltrans' Survey Response, dated Mar. 18, 2011.

[186] *Id.*

[187] LA. CONST. art. 1, § 4(B).

[188] New Orleans Redevelopment Auth. v. Johnson, 16 So. 3d 569, 583 (La. App. 2009).

[189] *Id.* at 584 (emphasis supplied).

[190] Castle Report, *supra* note 40.

[191] ALA. CODE § 24.2-2(C)(c)(1); GA. CODE ANN. § 22-1-1(1)(A)(i); KAN. STAT. ANN. § 26-501b(e).

[192] DEL. CODE ANN. tit. 29, § 9501A(c)(3)(b); N.H. REV. STAT. ANN. §§ 205:1(b) ("menace to the health and safety") and 498-A:2(VII(a)(3)); WYO. STAT. § 1-26-801(c).

[193] N.H. REV. STAT. §§ 205:3-b(I)(c) and 498-A:2(VII)(a)(3). *See also* OHIO REV. CODE ANN. § 1.08(C) (stating that in "determining whether a property is a blighted parcel or whether an area is a blighted area or slum for the purposes of this section, no person shall consider whether there is a comparatively better use…or whether the property could generate more tax revenues if put to another use").

[194] Oregon DOT's Survey Response, dated Mar. 10, 2011.

[195] N.H. REV. STAT. ANN. § 205:1(d) (street layouts as a factor preventing proper development of the real property). *See* Fulmore v. Charlotte County, 928 So. 2d 1281 (Fla. 2d DCA 2006) (stating that although "roads and roadways are synonymous, a substantial number of deteriorated or deteriorating roads is a different concept than a predominance of defective or inadequate roadways").

[196] Capital Fitness of Arlington Heights, Inc., v. Village of Arlington Heights, 394 Ill. App. 3d 913, 923, 915 N.E.2d 826, 835 (Ill. App. 2009) (*citing* 65 ILL. COMP. STAT. 5/11-74.4-3(a)(1)(C)), *appeal denied*, 234 Ill. 2d 518, 920 N.E.2d 1071 (2009).

[197] Alabama, Arizona, Georgia, Iowa, Kansas, Louisiana, Michigan, Missouri (until a preponderance are blighted), North Carolina, Oregon, Texas, West Virginia, Wisconsin (each specific property must be blighted), and Wyoming. *See* Castle Report, *supra* note 40.

possible "to condemn property just because the area it is in is predominately blighted."[198]

Likewise, in Missouri, the statute now requires that when there is a determination that an area is blighted, the condemning authority must "individually consider each parcel of property in the defined area."[199] The condemning authority may proceed with condemnation if it finds that a "preponderance of the defined redevelopment area is blighted…."[200] As construed by a Missouri appellate court, although the statute requires a condemning authority to evaluate each parcel, there is "nothing in the statute that requires the authority to make a specific finding for each parcel."[201] The court held that the condemning authority must determine whether a defined redevelopment area is blighted based on a consideration of total square footage rather than on whether a preponderance of the individual parcels is blighted.[202]

Finally, since the *Kelo* decision, a Maryland court has held that a Maryland statute permits municipal corporations to condemn blighted properties within areas that are generally nonblighted.[203]

D. Other Changes Affecting Takings of Blighted Property

1. Requirement of a Vote or a Vote by a Super-Majority

Various states require a vote by the governing body before the use of eminent domain or the transfer to a private person or entity of property taken by eminent domain. In Florida, where takings of blighted property are prohibited, private property taken by eminent domain "may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature."[204] In Georgia, a resolution by the appropriate governing body may be required a specified number of days prior to the condemnor being permitted to bring an action for condemnation.[205]

Some states require a vote by a super-majority of the applicable governing authority before property may be designated as blighted.[206] In Connecticut,

> [n]o parcel of real property may be acquired by eminent domain under this section except by approval by vote of at least two-thirds of the members of the legislative body of the municipality or, in the case of a municipality for which the legislative body is a town meeting or a representative town meeting, the board of selectmen.[207]

Even so, "the benefits to the public and any private entity that will result from the development project" must be considered, and it must be "determined that the public benefits outweigh any private benefits…."[208]

2. Requirement of Clear and Convincing Evidence

In some states the burden of proof is on the public agency to establish by clear and convincing evidence that a taking is necessary for the eradication of blight.[209] For example, in Michigan, the state's constitution requires that in a condemnation action to take property "for the eradication of blight…the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use."[210]

3. Time Limit for Commencing Condemnation of Blighted Property

One reform since *Kelo* has been the requirement that a condemnation proceed within a designated number of years from the date the property is designated as blighted. Condemnors, for example, may be required to proceed within 4 or 5 years of authorization.[211] A post-*Kelo* change in Missouri is that an action to acquire property by eminent domain in a redevelopment area must be commenced no later than 5 years from the date of the determination that the property is blighted.[212] However, a Missouri court has held that the post-*Kelo*

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[198] Jody Arogeti, Anita Bhushan, Jill M. Irwin & Jesica Kattula, *General Provisions and Condemnation Procedure: Provide a Comprehensive Revisions of Provisions Regarding the Power of Eminent Domain*, 23 GA. ST. U. L. REV. 157, 188 (2006).

[199] MO. REV. STAT. § 523.274(1).

[200] *Id*.

[201] Allright Props. Inc. v. Tax Increment Fin. Comm'n, 240 S.W.3d 777, 779 (Mo. App. 2007).

[202] *Id.* at 780.

[203] City of Frederick, Md. v. Pickett, 392 Md. 411, 897 A.2d 228 (Md. Ct. App. 2006) (stating that MD. CODE ANN. art. 23A, § 2(b)(37) was "clear and unambiguous").

[204] FLA. CONST. art. X, § 6(c).

[205] GA. CODE ANN. § 22-1-10.1 (30 days).

[206] CONN. GEN. STAT. § 8-193(b)(3)(A); INDIANA CODE § 32-24-4.5-11(c)(2) (two-thirds); IOWA CODE § 6A.22(5)(a) (two-thirds); KAN. STAT. ANN. § 17-1773(a) (requiring two-thirds vote to condemn property in a redevelopment district); *see also* KAN. STAT. ANN. § 12-1773 (requiring two-thirds vote of the governing body for any transfer by the developer of real property acquired pursuant to this section).

[207] CONN. GEN. STAT. § 8-193(b)(3)(A).

[208] *Id*. *See also* KAN. STAT. ANN. § 12-1773(a) (providing that if a redevelopment project plan has been adopted and if two-thirds of the members of the governing body approve, eminent domain may be used to acquire real property that the governing body deems necessary for a project that is located within the redevelopment district); UTAH CODE ANN. §§ 17C-2-601(2)(c)(ii)(B) and (2)(d)(ii)(B) (the sections providing that that an agency may not acquire by eminent domain either a single-family residential, owner-occupied property or a commercial property unless two-thirds of all agency board members vote in favor of the acquisition by eminent domain).

[209] COLO. REV. STAT. ANN. § 38-1-01(2)(b). *See also* ARIZ. REV. STAT. § 12-1132(B); IDAHO CODE § 7-701A(2)(b)(ii); DEL. CODE ANN. tit. 29, § 9501A(d); IDAHO CODE ANN. § 7-701A; MICHIGAN CONST. art. X, § 2; MICH. COMP. LAWS § 213.23(4).

[210] MICH. CONST. art. X, § 2.

[211] MD. CODE ANN. § 12-105.1(a).

[212] MO. REV. STAT. § 523.274(2).

laws did not nullify a redevelopment authority's prior finding of blight.[213]

4. Pre-Condemnation Hearing

A public hearing may be required before proceeding with the condemnation of blighted property. In Minnesota, "[i]f the taking is for the mitigation of a blighted area…a public hearing must be held before a local government or local government agency commences an eminent domain proceeding…."[214]

5. Requirement of Additional Compensation

A post-*Kelo* requirement in some states is that a condemnor must pay additional compensation,[215] that is, more than fair market value, when property is taken purely for economic development (if allowed) or if blighted property is taken for redevelopment.[216] In Rhode Island, when property is taken for economic development, a property owner must be compensated for a minimum of 150 percent of the fair market value of the real property, as well as for incidental expenses, such as the charge for prepaying a mortgage entered into in good faith and "actual, reasonable, and necessary" relocation expenses.[217]

In Kansas, the legislature may authorize the use of eminent domain for private economic development purposes, but "the legislature shall consider requiring compensation of at least 200 percent of fair market value to property owners…."[218]

6. Federal Highway Administration Reimbursement of "Supercompensation"

Although a few DOTs responding to the survey indicated having to pay increased acquisition costs because of post-*Kelo* reforms, the responses did not raise any issue of reimbursement by the Federal Highway Administration (FHWA) of the additional costs. It is because of some states' post-*Kelo* reforms that "mandate just compensation payments in amounts that exceed fair market value" that FHWA chose to issue its "Policy and Guidance on Supercompensation Payments Incurred for Acquisition of Real Property on Projects Eligible for Federal Funding" (Guidance).[219] FHWA's Guidance responds to "questions…concerning eligibility for reimbursement of that portion of the payment in excess of fair market value" and confirms that that there is federal-aid participation for "supercompensation" payments.[220]

Supercompensation "refers to legislatively mandated eminent domain damage payments that are based on [the] payment of 100 percent of fair market value plus some additional percentage for inconvenience, sentimental value, or some other type of personal imposition." FHWA points out that in Missouri, for example, "recent legislation addressing compensation associated with acquisition of property by [the] exercise of eminent domain defines 'Just Compensation' to be [Fair Market Value or FMV] multiplied by 125 percent (homestead taking) or FMV multiplied by 150 percent (heritage taking)."[221]

FHWA's Guidance advises that a payment in excess of fair market value is reimbursable as part of a property's acquisition cost.

> Like other costs of acquisition that exceed fair market value (i.e. cost of administrative settlements, court awards, and costs incidental to the condemnation process (See 23 CFR 710.203 (b)), where appropriately documented, the amount by which just compensation exceeds fair market value, is a direct eligible cost if all other requirements are met.[222]

As for Replacement Housing Payments (RHP) and supercompensation payments, FHWA states:

> Considering supercompensation payments, defined by state law, as a component of "acquisition cost" for purposes of an RHP calculation is not only consistent with the provisions governing reimbursement, it is also consistent with the manner in which other acquisition costs eligible for reimbursement (such as administrative settlements, legal settlements, or court awards) have been treated in determining the eligibility for, and the amount of, any RHP authorized by the Uniform Act and regulations at 49 CFR Part 24.[223]

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[213] Land Clearance for Redevelopment Auth. of the City of St. Louis v. Inserra, 284 S.W.3d 641, 644 (Mo. App. 2009) (the court noting that after the reforms took effect the redevelopment authority's resolution affirmed the previous finding of blight and that a second study concluded that the landowner's property in particular was blighted).

[214] MINN. STAT. § 117.0412, subd. 2(a).

[215] R.I. GEN. LAWS § 42-64.12-8(a) (applicable to takings for economic development).

[216] *See also* IND. CODE ANN. §§ 32-24-4.5-8(2)(A) (150 percent of the fair market value of real property occupied by the owner as a residence) and 32-24-4.5-11(d)(1) (requiring that for acquisitions of property in certain project areas a payment to an owner equal to 125 percent of fair market value); MICH. CONST. art. X, § 2 (not less than 125 percent of the property's fair market value); MICH. COMP. LAWS § 213.23, § 3(5).

[217] R.I. GEN. LAWS §§ 42-64.12-8(a)-(c) and 42-64.12-8.1 (the latter section applicable to tenants).

[218] KAN. STAT. ANN. § 26-501b(f).

[219] FHWA Memorandum, Policy and Guidance on Supercompensation Payments Incurred for Acquisition of Real Property on Projects Eligible for Federal Funding, dated Jan. 27, 2007, available at: http://www.fhwa.dot.gov/realestate/supercompguid.htm, last accessed on July 5, 2011, hereafter cited as "FHWA Guidance," at 1. *See also* Federal Highway Administration, Office of Real Estate Services, Accomplishments and Activities Report, dated Nov. 14, 2008, available at http://www.fhwa.dot.gov/realestate/accompact08.htm (supercompensation payments reimbursable as a direct cost of acquisition pursuant to 23 C.F.R. 710.203), last accessed also on July 5, 2011.

[220] FHWA Guidance at 1.

[221] *Id*. at 2.

[222] *Id*. *See also* Federal-Aid Policy Guide (FAPG) Nonregulatory Supplement for Part 24, Subpart B, § 24.102 ¶ 8.

[223] FHWA Guidance at 3.

FHWA cautions that states must monitor supercompensation payments and practice because state-mandated payments exceeding traditional concepts of just compensation could "prove to be inconsistent with the stewardship of Federal-aid highway funds."[224]

VII. POST-*KELO* REFORMS' PROCEDURAL CHANGES AFFECTING TRANSPORTATION PROJECTS

A. Introduction

Some post-*Kelo* changes have been procedural in nature. According to one source, procedural protections may have been included in the belief that they would help to deter "abusive condemnations" or would increase property owners' "bargaining leverage."[225] However, the source submits that "it is the taxpayers who…bear the costs of additional hearings, preparation of reports…, and any extra compensation paid to property owners" and that although such protections may "deter relatively small-scale condemnations," they do not deter "larger ones."[226]

The DOTs responding to the survey provided examples of the post-*Kelo* requirements in their states and the effects thereof. Caltrans' response drew attention to three bills enacted into law in California. First, SB 1210 changed the prejudgment possession process.[227] Although under prior law an *ex parte* hearing was sufficient, the law now requires an Order of Possession Hearing that is attended by both parties, which is when the property owner may identify a hardship that, depending on the evidence, could delay possession "indefinitely."[228] The law requires a condemning agency to pay the reasonable cost of an appraisal (up to $5,000) if the owner so chooses.[229]

Caltrans noted that the second bill, SB 1650, changed the prior law to require that the department offer to sell back property to the original owner if Caltrans does not use the property within 10 years and lease it back if the department will take longer than 2 years to go to construction.[230]

Third, as a result of the enactment of AB 1322 an owner is entitled to receive a full copy of the department's appraisal.[231] Prior to passage, an Appraisal Summary Statement was all that was required. The department is entitled to receive a copy of any appraisal for which it pays, including those provided under SB 1210.[232] Prior to the enactment of AB 1322, appraisal efficiencies existed because the department could combine a number of appraisals in one report that shared comparable properties.[233] Caltrans advises that because of the need to craft one appraisal for each property, the combined reports are no longer as expeditious.[234]

In Missouri, as a result of post-*Kelo* reforms, there are several new eminent domain requirements: a landowner must be given an opportunity to propose alternate locations; a condemnor must provide a pre-condemnation notice of the intended acquisition; a condemnation petition may not be filed within 30 days of the written purchase offer; there must be co-signature of a certified appraisal on appraisal reports; and a condemnor must offer the statutory homestead or heritage bonus when it applies.[235] Furthermore, the department's view is that the new law, which statutorily redefined the concept of fair market value, will increase a condemnor's costs.[236]

Nevada stated that the state's recent amendment of its constitution "open[s] the door" for payment of legal fees in eminent domain actions; allows for challenges to necessity; necessitates that all appraisals be provided to every property owner; mandates that interest that is paid must be compound interest; and requires that the DOT "must use the property within 5 years of obtaining it in a condemnation action."[237]

The Wyoming DOT reported that the post-*Kelo* reforms have affected the "process used to acquire property for highway projects."[238] The changes did not affect "what could be acquired," but they did affect "how the state acquired the property."[239] Wyoming's response, moreover, stated that the "greatest impact was to the 'good faith negotiation' requirements. These changes added several steps to the process [that] complicated

[224] *Id*.

[225] Somin, *supra* note 7, at 218.

[226] Somin, *supra* note 7, 15 S. CT. ECON. REV. at 219.

[227] SB 1210, effective Jan. 1, 2007, unless otherwise noted, amended §§ 1250.410, 1255.040, 1255.410, 1255.450, and 1255.460; added § 1263.025; and repealed §§ 1255.420 and 1255.430 of the Code of Civil Procedure, as well as added § 1091.6 to the Government Code and amended §§ 33333.2 and 33333.4 of the Health and Safety Code. *See* eBULLETIN, Legislative Amendments for 2007 to California Community Redevelopment Law, hereafter cited as "eBULLETIN," available at http://extranet.bbklaw.com/news/IndivArticle.cfm?NEAMID=1255, last accessed on July 5, 2011.

[228] Caltrans' Survey Response, dated Mar. 18, 2011.

[229] *Id*.

[230] *Id*. SB 1650, effective Jan. 1, 2007, unless otherwise noted, amends § 1263.510 of, and adds §§ 1245.245 and 1263.615 to, the Code of Civil Procedure. *See* eBULLETIN, *supra* note 229.

[231] *See* CAL. STS. & HWY. CODE § 102(b). *See also* Caltrans Memorandum, Office of Appraisals and Local Programs and Office of Right of Way Project Delivery, Implementation of AB 1322, dated Dec. 21, 2007, available at http://www.dot.ca.gov/hq/row/localprog/docs/ImplementationofAB1322.pdf, last accessed on July 5, 2011.

[232] Caltrans' Survey Response, dated Mar. 18, 2011.

[233] *Id*.

[234] *Id*.

[235] MHTC's Survey Response, dated Mar. 10, 2011.

[236] *Id*.

[237] Nevada DOT's Survey Response, dated Mar. 14, 2011.

[238] Wyoming DOT's Survey Response, dated Mar. 22, 2011.

[239] *Id*.

and added significant time to right-of-way acquisitions under the threat of eminent domain."[240]

B. Attorney's Fees and Other Expenses

If a condemnation proceeding is abandoned or if the court determines that the condemnor may not acquire the property, the owner may be entitled to recover fees and expenses for the services of an attorney, appraiser, and engineer.[241] A property owner may be entitled to "relocation damages."[242] In some states, a property owner may be able to recover reasonable attorney's fees and costs if a taking is found not to be for a public use.[243] Oregon's statute provides that a court, first, must "independently determine whether a taking of property complies" with the law's requirements "without deference to any determination made by the public body."[244] Second, if the court determines that the taking is not compliant with the requirements, the property owner is "entitled to reasonable attorney fees, expenses, costs and other disbursements reasonably incurred to defend against the proposed condemnation."[245] As explained in Section VIII.A.1, two DOTs stated that their costs had increased because of post-*Kelo* provisions having to do with a property owner's recovery of attorney's fees.

C. Notice Requirements

Although it is beyond the scope of the digest to discuss the various provisions of state codes applicable to the eminent domain process, it may be noted that several states' post-*Kelo* reforms went beyond defining public use, prohibiting or restricting the taking of property for transfer to another private person or entity, or limiting the definition of blighted property. States that appear to have significantly revised their eminent domain procedures in the wake of the *Kelo* decision include, for example, Georgia, Indiana, Louisiana, Minnesota, and Tennessee.[246] Whether in connection with takings by eminent domain generally or takings specifically of blighted property, some post-*Kelo* reforms provide for increased notice for property owners.[247] For example, state law may require the posting of a notice near the property a specified number of days before the exercise of eminent domain.[248] After the *Kelo* case, the Tennessee legislature, among other changes, revised its quick-take method for takings from a 5-day notice that existed prior to 2006 to a 30-day notice before public agencies may take possession of a property.[249]

D. Right of First Refusal

If property is condemned but not used for the purpose for which it was taken, before the public agency may sell the property, state law may require that the property first be offered for sale to the one owning the property prior to condemnation.[250] If the prior owner does not accept within a certain period the public agency's offer, such as the amount of the price paid for the property or the current fair market value, whichever is less, the property may be sold to any other private party.[251] The duration of the right of first refusal of the former owner, or his or her heir or successor in interest, varies from state to state, such as 5 years in

[240] *Id*.

[241] GA. CODE ANN. § 22-1-12.

[242] *Id*. § 22-1-13(1)-(4) (stating that a condemnee may recover actual reasonable moving expenses, actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, other relocation expenses authorized by law, and, with the condemnee's consent, the condemnor may provide alternative site property as full or partial compensation).

[243] ARIZ. REV. STAT. § 12-1135(B); IND. CODE ANN. § 32-24-4.5-7 (recovery if condemnor does not establish blight in accordance with the statutory elements); OR. REV. STAT. § 35.015(6)).

[244] OR. REV. STAT. § 35.015(6).

[245] *Id.*

[246] GA. CODE ANN. § 22-1-1, *et seq*.; IND. CODE ANN. § 32-24-4.5, *et seq*.; LA. CONST. art. 1, § 4; MINN. STAT. § 117.102, *et seq*.; and TENN. CODE ANN. § 29-17-101, *et seq*. *See also* Castle Report, *supra* note 40.

[247] WASH. REV. CODE ANN. § 8.25.290(2)(a)(1) (providing that notice of a planned final action must be sent by certified mail at least 15 days before the final action).

[248] GA. CODE ANN. § 22-1-10(a)(1) (providing that no less than 15 days before any meeting when a resolution approving the exercise of eminent domain is to be considered, a condemnor must post a sign, if possible, in the right-of-way adjacent to each property stating the time, date, and place of the meeting).

[249] TENN. CODE ANN. §§ 29-17-903(c) and (d) (stating that a notice of the filing of a petition must be given to the owner at least 30 days prior to the taking of any additional steps in the case and that after 30 days from the giving of notice, if the right to take is not questioned, the condemner shall have the right to take possession of the property). *See* Beau Pemberton, *Reforming Eminent Domain in Tennessee after Kelo: Safeguarding the Family Farm*, 4 TENN. J. L. & POL'Y 73, 93 (2008) (*citing* TENN. CODE ANN. § 29-17-903(c) (Supp. 2007)).

[250] ALA. CODE § 11-47-170(c); *see also* ALA. CODE § 11-80-1(c); FLA. STAT. ANN. § 73.013(2)(b)(2); GA. CODE ANN. § 22-1-2(c)(1) (former owner has to apply for a reconveyance); MICH. COMP. LAWS § 117.226(a); OHIO REV. CODE ANN. § 163.211 (right of repurchase extinguished after 5 years); S.D. CODIFIED LAWS § 11-7-2.2 (applicable to any transfer of the property within 7 years of acquisition).

[251] ALA. CODE § 11-47-170(c) (90 days); *see* ALA. CODE § 11-80-1(c); FLA. STAT. ANN. §§ 73.013(2)(a) and (b).

Georgia and Ohio,[252] 7 years in South Dakota,[253] or 10 years in Florida and Wyoming.[254]

For example, in Alabama, if the property that was condemned is not used for the purpose for which it was condemned or for some other public use and is to be sold, the property must be offered first to the person from whom the property was taken or his or her heirs or assigns at the price the condemnor was paid for the property, less whatever amount the former owner can show was paid in income and transaction taxes in connection with the property.[255] If the offer is not accepted within 90 days the property may be sold to any other person after notice at a public sale.[256]

In Georgia,

> [i]f property acquired through the power of eminent domain from an owner fails to be put to a public use within five years, the former property owner may apply to the condemnor or its successor or assign for reconveyance or quitclaim of the property to the former property owner or for additional compensation for such property….[257]

In Minnesota,

> [t]he offer must be at the original price determined by the condemnation process or the current fair market value of the property, whichever is lower, except to the extent that a different value is required for a property interest obtained with federal highway funding under United States Code, title 23, or transit funding under United States Code, title 49.[258]

In Ohio, if 5 years have not elapsed since the property was appropriated, and the agency decides not to use the property for the stated purpose, "the prior owner…may repurchase the property for its fair market value as determined by an independent appraisal…."[259] However, the prior owner's right of repurchase is extinguished in several situations, including when "[a] plan, contract, or arrangement is authorized that commences an urban renewal project that includes the property" or when "[t]he agency grants or transfers the property to any other person or agency."[260]

Finally, as was discussed in Section IV.C of the digest, under some state laws when eminent domain was used and the property acquired was conveyed as a consequence thereof to a person or private entity, after the passage of a certain period of time, the property may be transferred to another person or private entity.[261] For example, in Florida, if 10 years have elapsed since the condemning authority acquired title to the property and the property was conveyed to a natural person or private entity, "the property may subsequently be transferred, after public notice and competitive bidding unless otherwise provided by general law, to another natural person or private entity without restriction."[262]

VIII. POST-*KELO* REFORMS AND PRETEXTUAL TAKINGS

Prior to *Kelo,* some takings were challenged successfully on the basis that the stated public purpose for the project was pretextual.[263] The *Kelo* Court held that a local government is prohibited from taking "property under the mere pretext of a public purpose[] when its actual purpose [is] to bestow a private benefit."[264] As one source states,

> *Kelo* imposes a substantive limitation on the use of eminent domain…. According to the *Kelo* Court, the Public Use Clause not only prohibits a government actor from taking the private property of one citizen for the personal benefit of another, but also prohibits the taking of private property under the pretext of public purposes when the actual purpose is to bestow a private benefit.[265]

The post-*Kelo* reforms in some states prohibit pretextual takings. The burden of proof is on the owner to

[252] GA. CODE ANN. § 22-1-2(c)(1); OHIO REV. CODE ANN. § 163.211(E).

[253] S.D. CODIFIED LAWS § 11-7-22.2 (prohibiting any transfer of the property acquired by the threat or use of eminent domain within 7 years of acquisition to any private person, nongovernmental entity, or public-private business entity without first offering to sell the property to the person who originally owned it or to the person's heirs or assigns at the property's current fair market value or at the original transfer value, whichever is less.)

[254] FLA. STAT. ANN. § 73.013(b)(2) (10 years or less); WYO. STAT. § 1-26-801(d) (stating that if a public entity fails to make substantial use of the property for a period of 10 years there is a rebuttable presumption that the property is no longer needed for a public purpose and the previous owner or his successor may apply to the court to request that the property be returned to the previous owner or his successor upon repayment of the amount originally received for the property in the condemnation action).

[255] ALA. CODE § 11-47-170(c); *see also* ALA. CODE § 11-80-1(c).

[256] *Id.* § 11-47-170(c); *see also id.* § 11-80-1(c).

[257] GA. CODE ANN. § 22-1-2(c)(1).

[258] MINN. STAT. 117.226(a).

[259] OHIO REV. CODE ANN. §§ 163.211 and 163.211(E).

[260] *Id.* §§ 163.211(C) and (D).

[261] FLA. STAT. ANN. § 73.013(2)(a) (after 10 years); GA. CODE ANN. § 22-1-2(b) (20 years); INDIANA CODE § 32-24-4.5-1(c) (chapter inapplicable after 30 years from the acquisition of the real property); LA. CONST. art. I, § 4(H)(1) (no restriction after 30 years have elapsed).

[262] FLA. STAT. ANN. § 73.013(2)(a).

[263] Blais, *supra* note 2, at 668 (*citing* Se. Ill. Dev. Auth. v. Nat'l City Envtl. L.C.C., 199 Ill. 2d 225, 768 N.E.2d 1, 10–11 (2002) (invalidating a quick-take condemnation to expand the parking lot of an adjacent business and holding that the court did not "require a bright-line test to find that this taking bestows a purely private benefit and lacks a showing of a supporting legislative purpose"), *cert. denied*, 2002 U.S. LEXIS 6453 (U.S. Oct. 7, 2002); Casino Reinvestment Dev. Auth. v. Banin, 320 N.J. Super. 342, 727 A.2d 102, 111 (1998) (rejecting proposed condemnation of private land for transfer to a casino developer to hold for future development when "the primary interest served here is a private rather than a public one," because the developer's future uses of the property were unrestricted)).

[264] *Kelo*, 545 U.S. 469, 478.

[265] Blais, *supra* note 2, at 670 (footnotes omitted).

prove that a taking is pretextual.[266] In Idaho, eminent domain may not be used to take private property for an "alleged public use which is merely a pretext for the transfer of the condemned property or any interest in that property to a private party."[267] Elsewhere, states have declared that a public use does not include a taking "that is a pretext to confer a private benefit on a known or unknown private entity."[268] In a condemnation proceeding in Virginia, a "property owner may challenge whether…the stated public use is a pretext for an unauthorized use…."[269]

Since *Kelo,* several courts have considered a challenge to a taking on the basis that it was pretextual.[270] In a case decided by the Supreme Court of Hawaii, the property being condemned was to be transferred from one private party to another private party, but with a bypass to be dedicated to the county after completion.[271] The county sought to condemn property belonging to the C&J Coupe Family Ltd. Partnership for use as the bypass, which was to be built by Oceanside Partners, a development company, through an agreement with the county. The court addressed the question of whether the use of eminent domain to take property to build a road is always a public use.

Two condemnations were in dispute. The first condemnation had been dismissed, but the second condemnation had been allowed. The court observed that under the Hawaii Constitution the courts could consider the validity of the public purpose that had been asserted in the condemnation proceeding.[272] Although a pretext claim may not be based "'on mere suspicion,'"[273] the court stated that "the character of the proposed public use, *i.e*., a public road, is itself strong evidence mitigating in favor of the presumption of validity. Indisputably, public roads have long been recognized as a public purpose for which private property may be condemned."[274]

The county's resolution was *prima facie* evidence of the bypass's public purpose; nevertheless, the resolution "need not be taken at face value where there is evidence that the stated purpose might be pretextual."[275] The fact that a project involves a "'road does not *per se* make it a public road.'"[276] The court remanded the case for a determination of whether the second condemnation was for a public purpose and not pretextual.[277] In a later proceeding, the Supreme Court of Hawaii affirmed the circuit court's conclusion that the second condemnation was not pretextual, upheld the circuit court's determination of just compensation for the property, and affirmed the lower court's denial of Coupe's request for prejudgment interest.[278] The court remanded for a decision on Coupe's request for attorney's fees associated with the preparation of billing records and Coupe's fee petitions in connection with the first condemnation.

Although not involving a post-*Kelo* reform, a taking was held not to be pretextual in a New York case.[279] The court rejected a claim that the town's condemnation of property to preserve it as farmland did not serve a public purpose but was a pretext to confer benefits on private persons. The court held that "the mere fact that [the] condemnation will provide incidental benefits to private individuals does not invalidate the condemnor's determination as long as the public purpose is dominant…."[280] Moreover, "the possibility that the Town may sell or lease the land to a farmer does not make the proposed condemnation a pretext for improperly conferring a private benefit."[281]

Although not involving a highway or a post-*Kelo* change in the law, a New Jersey court remanded a case in which the property owner alleged that the township's taking to preserve open space near an airport was pretextual. The property owner claimed that the condemnation's "true purpose [was] to exert unlawful, *de facto* zoning control over airport operations."[282] The court, citing the *Kelo* decision and other authority,[283] remanded the case because "the objective factors surrounding the township's adoption of the condemnation ordinance impugn[ed] its validity."[284] The court agreed that there was a public purpose for some aspects of the taking,[285] but held that "the decision to condemn development rights to the airport was tainted by the Town-

[266] Nedzel, *supra* note 51, at 1007.

[267] IDAHO CODE ANN. § 7-701A(2)(a).

[268] MICH. COMP. LAWS § 213.23, § 3(6). *See also* TEX. GOV'T CODE ANN. § 2206.001(B)(2) (similar).

[269] VA. CODE ANN. § 1-219.1(E).

[270] R.I. Dev. Corp. v. The Parking Co., LP, 892 A.2d 87 (R.I. 2006); 49 WB, LLC v. Village of Haverstraw, 44 A.D. 3d 226, 243, 839 N.Y.S.2d 127, 141 (N.Y. App. 2d Dep't 2007); Franco v. Nat'l Cap. Revitalization Corp., 930 A.2d 160, 168 (D.C. App. 2007) (condemnee not precluded from demonstrating that the stated reason for a condemnation was pretextual).

[271] County of Hawai'i v. C&J Coupe Family Ltd. P'ship, 119 Haw. 352, 376 and n.28, 198 P.3d 615, 639 and n.28 (2008).

[272] *Id.* at 375, 198 P.3d at 638.

[273] *Id.* at 379, 198 P.3d at 642 (*quoting* Goldstein v. Pataki, 516 F.3d 50, 62 (2d Cir. 2008)).

[274] *Id.* at 380, n.32, 198 P.3d at 643 n.32 (citations omitted).

[275] *Id.* at 381, 198 P.3d at 644 (citation omitted).

[276] *Id.* at 380, 198 P.3d at 643 (citation omitted).

[277] *Id.* at 389, 198 P.3d at 652 (citation omitted).

[278] County of Hawaii v. C&J Coupe Family Ltd. P'ship, 124 Haw. 281, 284, 242 P.3d 1136, 1139 (2010).

[279] Aspen Creek Estates, Ltd. v. Town of Brookhaven, 47 A.D. 3d 267, 268, 848 N.Y.S.2d 214, 215 (N.Y. App. 2d Dep't 2007).

[280] *Id.* at 275, 848 N.Y.S.2d at 220 (citations omitted).

[281] *Id.* at 277, 848 N.Y.S.2d at 222.

[282] Township of Readington v. Solberg Aviation Co., 409 N.J. Super. 282, 308, 976 A.2d 1100, 1115 (N.J. App. 2009).

[283] Riggs v. Township of Long Beach, 109 N.J. 601, 538 A.2d 808 (1988).

[284] *Township of Readington*, 409 N.J. Super. at 312, 976 A.2d at 1117.

[285] *Id.* at 316, 976 A.2d at 1120.

ship's desire to control airport operations."[286] The court held that the purpose of a condemnation must be examined when the record suggests "discriminatory or illegal" purpose.[287] On remand, the trial court would have to consider whether there was a public purpose that was sought to be achieved by the condemnation.[288]

In sum, although several takings since *Kelo* have been challenged on the basis that they were pretextual, the courts for the most part have held that the takings were not pretextual, especially when a highway project was involved. As seen, however, a case may be remanded to the trial court if a pretext claim has not been examined carefully in light of evidence suggesting that a taking was for other than a public purpose.

IX. THE EFFECT OF POST-*KELO* LAWS ON TAKINGS FOR TRANSPORTATION PROJECTS

A. Post-*Kelo* Reforms' Effect on Cost and Timely Delivery of Projects

1. Cost of Projects

As for whether any post-*Kelo* reforms have affected the cost of transportation projects, the DOTs in California, Iowa, Missouri, Nevada, and Oregon stated there has been some post-*Kelo* impact.

Table 3. Post-*Kelo* Reforms' Effect on the Cost of Transportation Projects

Transportation departments reporting no effect on the cost of transportation projects	21 (81 percent)
Transportation departments reporting some effect on the cost of transportation projects	5 (19 percent)

California stated that "[b]ecause of greater potential for project delays the effort to avoid eminent domain has increased somewhat. The Department has seen a rise in costlier administrative settlements."[289] California's experience is that "[t]he Department has a greater pre-disposition to settling [right-of-way] matters rather than risk potential schedule delays going through an eminent domain process and is willing to pay higher administrative settlement amounts than 'pre-*Kelo*' days."[290] Moreover, when "eminent domain is necessary, the [Order of Possession] hearing process has caused some project delays that ultimately result in higher project costs as well."[291]

In Missouri, the Missouri Highways and Transportation Commission (MHTC) "continues to use eminent domain but the post-*Kelo* laws have affected its use. The condemnation process now takes additional time and costs significantly more money."[292] Missouri reported that between fiscal year 2008 and fiscal year 2011 to date, the Missouri DOT has spent an additional $7.8 million in heritage[293] and homestead[294] payments as provided in the new post-*Kelo* statutes.[295] "[T]he new post-*Kelo* laws statutorily redefined the concept of 'fair market value' in a manner that will increase property acquisition costs."[296]

Nevada reported that its post-*Kelo* laws have made the department "consider potential settlements that we may have rejected in the past, thereby increasing acquisition cost. We are also experiencing several inverse condemnation cases…."[297] The full effect of the changes in Nevada are not known because the amendments were added recently and because the downward trend in real property prices has reduced right-of-way program costs.[298]

Wyoming also cited higher costs as an effect of post-*Kelo* reforms because of increased steps and time needed for an acquisition, including more attorney time by staff and consultant attorneys.[299]

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[286] *Id.* at 315, 976 A.2d at 1119.

[287] *Id.* at 320, 976 A.2d at 1122.

[288] *Id.* at 320, 976 A.2d at 1123–24, *cert. denied*, 2010 N.J. LEXIS 123 (Jan. 19, 2010).

[289] Caltrans' Survey Response, dated Mar. 18, 2011.

[290] *Id*.

[291] *Id*.

[292] MHTC's Survey Response, dated Mar. 10, 2011.

[293] A "heritage value" is "the value assigned to any real property, including but not limited to real property owned by a business enterprise with fewer than one hundred employees, that has been owned within the same family for fifty or more years, such value to be fifty percent of fair market value…." MO. REV. STAT. § 523.001(2).

[294] A "homestead taking" is

> any taking of a dwelling owned by the property owner and functioning as the owner's primary place of residence or any taking of the owner's property within three hundred feet of the owner's primary place of residence that prevents the owner from utilizing the property in substantially the same manner as it is currently being utilized….

MO. REV. STAT. § 523.001(3).

[295] MHTC's Survey Response, dated Mar. 10, 2011.

[296] *Id.* The Missouri statute provides that "fair market value" is

> the value of the property taken after considering comparable sales in the area, capitalization of income, and replacement cost less depreciation, singularly or in combination, as appropriate, and additionally considering the value of the property based upon its highest and best use, using generally accepted appraisal practices. If less than the entire property is taken, fair market value shall mean the difference between the fair market value of the entire property immediately prior to the taking and the fair market value of the remaining or burdened property immediately after the taking….

MO. REV. STAT. § 523.001(1).

[297] Nevada DOT's Survey Response, dated Mar. 14, 2011.

[298] *Id*.

[299] Wyoming DOT's Survey Response, dated Mar. 22, 2011.

One cost factor specifically mentioned in Nevada's and Oregon's survey responses was attorney's fees. In Oregon the most significant impact was the amendment of the attorney's fee provisions in Oregon Revised Statutes (ORS) Section 35.346(7)(a). The amendment required

> that attorney's fees were due if the final judgment at trial was greater than the "initial" written offer provided by the condemnor. The result of this change was to greatly reduce the incentive for property owners to settle with ODOT or any other condemnor in the state. If the verdict at a condemnation trial exceeded the amount of the initial written offer, a condemnor was required to pay the property owner's attorneys fees. Thus a written offer made one to two years before the verdict was the amount the property owner had to "beat" at trial to have all attorney's fees paid. This was true even if the condemnor received new information and increased its offer of just compensation.[300]

According to the Oregon DOT, the amendment resulted in public bodies having to pay larger settlement amounts solely because of the likelihood of having to pay a significant sum of attorney's fees at trial. The DOT reported that in one case a settlement was reached with a property owner prior to trial. After the settlement, the department received an attorney's fee bill in the amount of $60,000. Although the department contested the bill, the court ruled that the settlement amount had been higher than the initial written offer.[301]

However, the attorney's fee issue was addressed in the Oregon 2009 legislative session. The legislature

> modified…ORS 35.300 to add the ability of a condemnor to make an "Offer of Compromise" up to 10 days prior to trial. If this offer was rejected, and the property owner did not achieve a higher result at trial, a condemnor only had to pay attorney's fees up to the day of the offer.[302]

The legislature

> also modified…ORS 35.346(7)(a) to require attorney's fees [to] be paid only if a property owner received a jury verdict higher than 'the highest written offer' made by a condemnor prior to filing for condemnation. This highest written offer prior to filing is now incorporated into the Department's negotiation process and is routinely used in situations where it is likely that we will be forced to file for condemnation.[303]

As discussed in Section V.D.6, even if post-*Kelo* reforms result in payments exceeding fair market value, FHWA's policy, as long as the costs are "appropriately documented," is to reimburse for the increased costs.

2. Timely Delivery

Twenty-three departments reported that the post-*Kelo* constitutional or legislative changes in their state had not affected the timely delivery of projects, whereas the departments in three states (California, Missouri, and Wyoming) reported that there had been an effect.

Table 4. Post-*Kelo* Reforms' Effect on the Timely Delivery of Transportation Projects

Transportation departments reporting no effect on timely delivery of transportation projects	23 (90 percent)
Transportation departments reporting some effect on timely delivery of transportation projects	3 (10 percent)

When summarizing the effects of post-*Kelo* laws in California, Caltrans explained that since the *Kelo* decision California has enacted three laws affecting the use of eminent domain that have affected highway projects,[304] all of which are discussed in Section VII.A. As noted, one new requirement is for an Order of Possession (OP) hearing that is attended by both parties where the property owner may identify a hardship that may "delay possession indefinitely depending on what the judge determines from the testimony."[305]

In addition to the comments of the MHTC that were noted previously, the MHTC stated that additional time is now required prior to filing a condemnation petition.[306] Moreover, "the new post-*Kelo* laws allow property owners additional time to vacate residential property," as well as "provide landowner's attorneys new statutory means to delay condemnation cases."[307]

Wyoming stated that there have been occasions when the department chose not to acquire property if the owner did not want to sell because of the time constraints in using eminent domain.[308] The reforms' additional steps "have caused projects to be late."[309]

B. Post-*Kelo* Reforms' Effects on Appraisals, Land Acquisition, and Project Planning

1. Appraisals

Some states require that a condemnor must have the property being acquired appraised before initiating negotiations with the property owner;[310] that a condemnor make reasonable efforts to acquire the subject property

[300] Oregon DOT's Survey Response, dated Mar. 10, 2011.

[301] *Id*.

[302] *Id*.

[303] *Id*.

[304] Caltrans' Survey Response, dated Mar. 18, 2011 (*citing* SB 1210, SB 1650, AB 1322).

[305] *Id*. (*citing* SB 1210).

[306] MHTC's Survey Response, dated Mar. 10, 2011.

[307] *Id*.

[308] Wyoming DOT's Survey Response, dated Mar. 22, 2011.

[309] *Id*.

[310] GA. CODE ANN. § 22-1-9(2); MINN. STAT. § 117.036, subd. 2.

by negotiation;[311] or that a condemnor's offer be no less than the condemnor's independent appraisal.[312]

Nevertheless, in response to the survey, 22 state DOTs reported that there had been no effect on appraisals. Although the DOTs in four states, California, Iowa, Missouri, and Nevada, said that the laws have affected appraisals, the Iowa DOT commented that any impact has been minimal.[313]

Table 5. Post-*Kelo* Reforms' Effect on Appraisals

Transportation departments reporting no effect on appraisals	22 (85 percent)
Transportation departments reporting some effect on appraisals	4 (15 percent)

California's response to the survey noted that, prior to the post-*Kelo* reforms, "appraisal efficiencies" existed in that the department could combine a number of appraisals on comparable or similar properties in one report. Now, because of the need to craft one appraisal for each property, "the combined reports are no longer as expeditious."[314] Moreover, California law now requires a "condemning agency [to] pay the reasonable cost of an appraisal (up to $5,000) if the owner so chooses."[315] An owner is entitled to receive a full copy of the department's appraisal; prior to the change in the law an appraisal summary statement was all that was required.[316]

In Iowa, although the reforms "included the payment of the cost of one appraisal in addition to reasonable attorney fees if the compensation award exceeds 110 percent of the final offer," as noted, the Iowa DOT reported that the reforms had had little impact.[317]

According to the MHTC, there has been an effect in Missouri because a "condemnor's appraisal reports now must be co-signed by a state-certified appraiser" and because the statutory redefinition of fair market value "will require additional appraisal resources to address previously restricted appraisal techniques."[318]

A recent Missouri case was located for the digest concerning the post-*Kelo* reforms and appraisals with respect to a redevelopment plan. One issue in the case was the appraisal that was made a part of an offer prior to an eventual taking by eminent domain.[319] In rejecting the condemning authority's argument, the court held that that the post-*Kelo* 2006 amendments to the applicable statute did affect a condemning authority's requirement to negotiate in good faith.[320] In affirming the circuit court's judgment and its award of attorney's fees,[321] the court held that "[b]lind acceptance of an appraiser's testimony…would permit the condemning authority to provide landowners with 'slipshod or incompetent appraisals,' the precise evil the legislature sought to avoid" by the amendments."[322]

In a Minnesota case, a condemning authority failed to comply strictly with the state's appraisal and negotiation requirements in Minnesota Statute Section 117.036.[323] The statutory provision was amended post-*Kelo* in 2006 "to govern *all* condemnation petitions filed under chapter 117."[324] The court held that the state's failure did not deprive the district court of subject matter jurisdiction because substantial compliance was sufficient.[325] Moreover, notwithstanding the intended transfer after the taking, the taking was held to serve a public purpose, the latter determination being a judicial issue in Minnesota.[326]

2. Land Acquisition

Twenty-two departments reported that their state's post-*Kelo* reforms have had no effect on land acquisition, but the DOTs in four states, California, Missouri, Nevada, and Wyoming, said that there has been an effect with one state reporting that one of the state's post-*Kelo* reforms actually benefited the department.

Table 6. Post-*Kelo* Reforms' Effect on Land Acquisition

Transportation departments reporting no effect on land acquisition	22 (85 percent)
Transportation departments reporting some effect on land acquisition	4 (15 percent)

According to Caltrans, some property owners will delay making a settlement while waiting for their ap-

[311] GA. CODE ANN. § 22-1-9(1); MINN. STAT. § 117.036, subd. 3; R.I. GEN. LAWS § 42-64.12-7(b) (property being acquired for redevelopment purposes).

[312] GA. CODE ANN. § 22-1-9(3); *but see* MINN. STAT. § 117.036, subd. 3 (requiring only that the appraisals be considered).

[313] Iowa DOT's Survey Response, dated Mar. 11, 2011.

[314] Caltrans' Survey Response, dated Mar. 18, 2011 (*citing* AB 1322).

[315] *Id.* (*citing* SB 1210).

[316] *Id*. (citing AB 1322).

[317] Iowa DOT's Survey Response, dated Mar. 11, 2011.

[318] MHTC's Survey Response, dated Mar. 10, 2011.

[319] Planned Indus. Expansion Auth. of Kan. City v. Ivanhoe Neighborhood Council, 316 S.W.3d 418 (W.D. Mo. App. 2010).

[320] At trial the court found that the appraisers demonstrated "an inability to explain…drastic adjustments" resulting in a devaluated appraisal of the subject property. 316 S.W.3d at 422.

[321] *Id.* at 423.

[322] *Id.* at 427 (citation omitted).

[323] City of Granite Falls v. Soo Line R.R., 742 N.W.2d 690 (Minn. Ct. App. 2007).

[324] *Id.* at 695 n.2 (emphasis in original).

[325] *Id.* at 697.

[326] *Id.* at 697, 698.

praisal to be completed.[327] Additionally, by giving owners a full appraisal rather than an appraisal summary statement, "owners have more to complain and/or argue about, thus delaying settlements.[328] Knowing that [Order of Possession or OP] hearings are now part of the process, reduced negotiation time occurs to make up for the added time it takes to get an OP."[329]

One effect on land acquisition in Missouri is that "[o]ccupants of acquired residential property now have 100 days to vacate the premises, instead of the 90 days provided by federal law."[330] Furthermore,

> [u]nder Missouri's new post-*Kelo* statutes, a "Notice of the Intended Acquisition" must now be provided to affected property owners at least 60 days prior to filing a condemnation petition. The petition cannot be filed within 30 days of MHTC's written purchase offer. In addition, MHTC offers the new statutory homestead or heritage bonus as an administrative settlement during pre-condemnation negotiations if the property owners qualify.[331]

The Nevada DOT stated that, regardless of size, all acquisitions may need an appraisal if condemnation is possible. Therefore, in planning projects, it is necessary to consider the time and effort needed to prepare each acquisition for the possibility of a condemnation action.[332] The cost and time necessary to prepare appraisals must be taken into account.[333] The DOT stated that the law has "[c]hanged our definition of fair market value to the 'highest price in terms of cash' instead of 'most probable price….'"[334] The change "may have an impact on the dollar amount paid to the property owner, but [it] is hard to measure the impact."[335] If the department acquires property by eminent domain, the department "must use it within 5 years of the acquisition. Therefore, we must keep track of these acquisitions…."[336]

In contrast, in 2006, Pennsylvania enacted the Property Rights Protection Act[337] as part of a reenactment of Pennsylvania's Eminent Domain Code.[338] Because the post-*Kelo* changes apply mostly to redevelopment, PennDOT reported that the changes have not affected any PennDOT projects.[339] "In fact, the only provision directly impacting PennDOT bolsters PennDOT's ability to condemn private lands to lessen the impacts of access restrictions on land remaining after a condemnation."[340]

3. Project Planning

As discussed in Section VI of the digest, some states' post-*Kelo* reforms include new procedural requirements. However, 22 of the 26 transportation departments in states having post-*Kelo* reforms reported that the laws had not affected the agency's planning for projects. The DOTs in four states, California, Missouri, Nevada, and Wyoming, reported that there had been an impact on project planning.

Table 7. Post-*Kelo* Reforms' Effect on Project Planning

Transportation departments reporting no effect on project planning	22 (85 percent)
Transportation departments reporting some effect on project planning	4 (15 percent)

California stated that the changes since *Kelo* have necessitated longer lead times to acquire property because of the OP hearing process and because of having to craft a "property owner-ready" appraisal.[341] Similarly, in Missouri, "[a]dditional time now has to be added to project schedules to comply with the new statutes," and "each potentially impacted property owner has a pre-condemnation option to propose alternate locations."[342]

C. Other Post-*Kelo* Laws' Effects on Transportation Projects

1. Construction

Only California advised that because of the new requirements, "construction has greater impetus to 'turn dirt' lest the Department has to get into a lease back or buy back situation with impacted property owners."[343]

2. Property Management

The transportation departments in two states, California and Nevada, said that property management had been affected. Caltrans, for example, observed that the new "requirements have the potential of adding workload to property management to find the owners, then craft either the leases or the selling of property that has not yet been used as part of a construction project."[344]

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[327] Caltrans' Survey Response, dated Mar. 18, 2011.

[328] *Id*.

[329] *Id.*

[330] MHTC's Survey Response, dated Mar. 10, 2011.

[331] *Id*.

[332] Nevada DOT's Survey Response, dated Mar. 14, 2011.

[333] *Id*.

[334] *Id*.

[335] *Id*.

[336] *Id*.

[337] 26 PA. CONS. STAT. §§ 201–07.

[338] *Id*. § 101, *et seq*.

[339] PennDOT's Survey Response, dated Mar. 9, 2011.

[340] *Id*.

[341] Caltrans' Survey Response, dated Mar. 18, 2011.

[342] MHTC's Survey Response, dated Mar. 10, 2011.

[343] Caltrans' Survey Response, dated March 18, 2011 (*citing* SB 1650).

[344] *Id*.

3. Public-Private Partnerships

More than 20 states have enacted PPP-enabling legislation that may be invoked to establish that a taking for a PPP project is for a public use; thus, there is "significant statutory authority" for PPP projects.[345] As seen in the *Kelo* decision, the tendency is for the courts to defer to the legislature regarding the need to take private property for a public use. In *Kelo*, the city invoked a state statute that authorized the use of eminent domain to promote economic development in New London. The *Kelo* Court relied on the statute in part to support its decision that the planned economic redevelopment was for a public use even though a private interest may be benefited by the takings.

With the exception of California, the DOTs reported that their states' post-*Kelo* reforms have not affected PPP projects in their states. Although not reporting a specific instance involving a post-*Kelo* effect on a PPP project, Caltrans commented that "[a]ny PPP projects have to undergo the same schedule impacts and considerations in the post-*Kelo* world as non PPP projects."[346] It may be noted that in California the state code authorizes local government use of PPPs for the design, construction, or reconstruction by private entities of commuter and light rail, highway or bridge, tunnel, airport and runway, and other projects.[347] Under California Government Code Section 5956.7, a "governmental agency may exercise *any power* possessed by it with respect to the development and construction of infrastructure projects pursuant to this chapter."[348] Although neither the state nor a state agency may use the authority granted in California Government Code Section 5956 *et seq*. for a state project such as a toll road or state highway, other authority exists for PPP projects. For example, the California Streets and Highway Code Section 143 authorizes PPPs for certain qualified state transportation projects.[349]

4. Relocation Assistance

Of 26 departments responding to the survey that are subject to post-*Kelo* laws, only the MHTC reported an impact on relocation assistance. The MHTC stated that "[o]ccupants of acquired residential property now have 100 days to vacate the premises, instead of the 90 days provided by federal law."[350]

[345] Seth Eaton & William D. Locher, *Give PPPs a Chance*, LOS ANGELES LAWYER, Jan. 2009, available at http://www.lacba.org/Files/LAL/Vol31No10/2556.pdf, hereafter cited as "Eaton & Locher" (*citing* Federal Highway Administration, State P3 Legislation, available at http://www.fhwa.dot.gov/ipd/p3/state_legislation/state_legislation_key_elements.htm), last accessed on July 5, 2011.

[346] Caltrans' Survey Response, dated Mar. 18, 2011.

[347] CAL. GOV'T CODE § 5956.4.

[348] *Id.* § 5956.7(a) (emphasis supplied).

[349] CAL. STS. & HWY. CODE § 143 is applicable to Caltrans and regional transportation agencies. *See also* Eaton & Locher, *supra* note 347, at 25.

[350] MHTC's Survey Response, dated Mar. 10, 2011.

5. Utility Relocation

All 26 departments stated that there had been no effect of post-*Kelo* laws on utility relocation.

D. Post-*Kelo* Effect on Takings of Blighted Property for Transportation Projects

All 26 DOTs in states with post-*Kelo* laws reported having no specific project, whether alone or in cooperation with another agency, in a designated blighted area that has been affected by post-*Kelo* reforms. Nevertheless, in its response Caltrans stated, first, that the post-*Kelo* laws could affect "certain areas along major freeways that are currently being widened that perhaps have been designated blighted by the local jurisdiction." Second, the laws "may have an impact…in the planning stages when investigating environmental justice issues on a given alignment."[351]

E. Transportation Departments' Providing of Guidance Regarding Post-*Kelo* Laws

Six DOTs reported having provided guidance to planners, engineers, attorneys, or other requestors regarding takings for transportation projects because of post-*Kelo* laws. In California, "[v]arious memoranda have been released" regarding the required appraisal "reimbursement."[352] Moreover, the Caltrans legal department has provided internal guidance on the OP hearing process, and the right-of-way project delivery and appraisal offices have issued joint memoranda on the implementation of the various laws.[353] Alerts have been provided to engineers and project managers regarding the effects of the new laws.[354]

The Ohio DOT reported that in addition to providing training and amending its Real Estate Manual to include the state's "*Kelo* laws" in the acquisition process, the department's staff provides guidance as requested.[355] The MHTC also stated that it has provided training and guidance "to attorneys, engineers and right of way staff regarding the additional time and steps now required under the new law…."[356]

Some of the guidance has been to the effect that the changes since *Kelo* generally do not affect takings for highway and other transportation projects. The Delaware DOT stated that it periodically has explained that its "projects and any property acquisitions made for them are not subject to *Kelo*-type restrictions, largely because the agency's actions are not of the type of economic development takings challenged in [the *Kelo*] case."[357]

The Nevada DOT stated that under its stewardship program in working with local public agencies, the de-

[351] Caltrans' Survey Response, dated Mar. 18, 2011.

[352] *Id*. (*citing* SB 1210).

[353] Caltrans' Survey Response, dated Mar. 18, 2011.

[354] *Id*.

[355] ODOT's Survey Response, dated Mar. 2, 2011.

[356] MHTC's Survey Response, dated Mar. 10, 2011.

[357] Delaware DOT's Survey Response, dated Feb. 15, 2011.

partment has had discussions regarding right-of-way acquisition and that it is "looking hard at potential settlements as opposed to filing a condemnation action. This had been done on a project by project basis and not as training."[358]

The Wyoming DOT reported that it has "had discussion with everyone involved in project delivery" regarding the changes in the law.[359]

X. CONCLUSION

In response to the *Kelo* decision, 43 states enacted constitutional and legislative changes restricting in varying degrees the use of eminent domain for economic development. In many of the states having such reforms it does not appear that the constitutional or legislative changes have affected state transportation departments' use of eminent domain for highway and other transportation projects. Some states' post-*Kelo* reforms specifically or effectively exempt takings for transportation projects. In addition, transportation departments are unaffected by the post-*Kelo* laws in states that require that any property acquired by eminent domain must be transferred to public ownership or that prohibit the use of eminent domain to acquire private property for transfer to another person or private entity. No state DOT responding to the survey reported that the definition of public use under its state's post-*Kelo* laws has affected the use of eminent domain for a transportation project. No department responding to the survey reported that a prohibition on takings for economic development or a restriction on the taking of blighted property had affected the department's use of eminent domain.

[358] Nevada DOT's Survey Response, dated Mar. 14, 2011.

[359] Wyoming DOT's Survey Response, dated Mar. 22, 2011.

APPENDIX A: SURVEY QUESTIONS

NCHRP 20-06, STUDY TOPIC 17-05:

THE RAMIFICATIONS OF POST-*KELO* LEGISLATION ON STATE TRANSPORTATION PROJECTS

1. Since the United States Supreme Court's decision in 2005 in *Kelo v. City of New London* has your state amended its constitution or state code, hereinafter referred to as the "post-*Kelo* laws," to restrict the use of eminent domain? If your answer is yes, please answer questions 2 through 9.

(Please circle) YES NO

2. Have the post-*Kelo* laws had any effect on the taking of private property by eminent domain for highway projects?

(Please circle) YES NO

If your answer is yes, please explain.

3. Have the post-Kelo laws affected your agency's use of eminent domain?

(Please circle) YES NO

If your answer is yes, please explain.

4. Have the post-*Kelo* laws affected the cost of state highway projects?

(Please circle) YES NO

If your answer is yes, please explain.

5. Have the post-*Kelo* laws affected the timely completion of state highway projects?

(Please circle) YES NO

If your answer is yes, please explain.

6. Has your agency provided any guidance to planners, engineers, attorneys or others regarding takings for highway projects because of the *Kelo* case and/or the post-*Kelo* laws?

(Please circle) YES NO

If your answer is yes, please explain.

7. Have the post-*Kelo* laws had any effect on your agency's use of eminent domain with respect to any one or more of the following:

(a) project-planning?

(Please circle) YES NO

(b) appraisals?

(Please circle) YES NO

(c) land acquisition?

(Please circle) YES NO

(d) utility relocation?

(Please circle) YES NO

(e) relocation assistance?

(Please circle) YES NO

(f) construction?

(Please circle) YES NO

(g) property management?

(Please circle) YES NO

If your answer is yes to any of the questions in 7(a) through 7(g), please explain.

8. Have the post-*Kelo* laws had any effect on public-private partnerships involving highway projects in your state?

(Please circle) YES NO

If your answer is yes, please explain.

9. Has your department either alone or in cooperation with another agency had a project in a designated blighted area that has been affected by the post-*Kelo* legislation?

(Please circle) YES NO

If your answer is yes, please explain.

****

Please return your completed survey, preferably by e-mail, to:

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1701 Pennsylvania Avenue, NW
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Washington, D.C. 20006
Tel. (202) 280-7769
lwthomas@cox.net

APPENDIX B: TRANSPORTATION DEPARTMENTS RESPONDING TO THE SURVEY

Alabama Department of Transportation
Arkansas State Highway and Transportation Department
California Department of Transportation
Connecticut Department of Transportation
Delaware Department of Transportation
Idaho Department of Transportation
Iowa Department of Transportation
Kansas Department of Transportation
Maryland Department of Transportation
Missouri Department of Transportation
Montana Department of Transportation
Nebraska Department of Roads
Nevada Department of Transportation
New Jersey Department of Transportation
New Mexico Department of Transportation
New York State Department of Transportation
North Carolina Department of Transportation
North Dakota Department of Transportation
Ohio Department of Transportation
Oregon Department of Transportation
Pennsylvania Department of Transportation
Rhode Island Department of Transportation
South Carolina Department of Transportation
Tennessee Department of Transportation
Utah Department of Transportation
Virginia Department of Transportation
West Virginia Department of Transportation,
Department of Highways
Wisconsin Department of Transportation
Wyoming Department of Transportation

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JO ANNE ROBINSON provided liaison with the Federal Highway Administration, and CRAWFORD F. JENCKS represents the NCHRP staff.

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