

June 5, 2008

Senator Andrew J. McDonald, Co-Chair
Representative Michael P. Lawlor, Co-Chair
Judiciary Committee

Dear Senator McDonald and Representative Lawlor:

In my letter of May 21 I provided the legal basis for the legislature to shift the burden of proof to municipalities with respect to takings associated with municipal development projects and the rationale for the level of proof to be clear and convincing evidence. In doing so I explained how that would allow the courts to give greater judicial scrutiny to takings by municipalities and hopefully avoid another New London/Kelo type controversy. In this letter I will show that in matters dealing with real estate and other forms of property our courts and the legislature have already accorded many Connecticut citizens greater rights than granted to those citizens whose property is taken by eminent domain. They do so by requiring the party asserting the claim to prove its case by clear and convincing evidence.

To briefly review, clear and convincing evidence is a stricter standard of proof than a mere preponderance of the evidence but less strict than beyond a reasonable doubt. In a civil matter such as an eminent domain proceeding in which the property owner has defended on the basis that the taking fails to carry out a legitimate public use or purpose and the subject property is not reasonably needed to effectuate the approved plan of development, the responsibility of the court is to decide which party should bear the greater risk of factual errors. The case law strongly suggests that the courts are heavily influenced by the statutory language and intent expressed by such language. That is why I asked the committee to draft amendments to existing statutes in which the clear intent of the legislature is respect for the rights of property owners.

There are many examples where the court and/or the legislature have required in civil matters a higher standard of proof requiring greater judicial scrutiny. Adverse possession, imposition of a conservator over one's estate (2007 session), undue influence in the making of a will, claims against estates for personal services by a close family member, fraud, termination of parental rights, and numerous disciplinary actions that result in a loss of license or other state certification and livelihood are all examples where the standard of proof is clear and convincing evidence.

Greater judicial scrutiny of protections enumerated in the Declaration of Rights of the Connecticut Constitution would seem the norm rather than the exception and yet in

eminent domain cases our courts have consistently deferred to the sovereign authority of the state, to legislative pronouncements and to municipal administrative decisions. The individual deprived of property finds him/herself bearing most of the burdens in cases involving municipal development. To enjoin the public agency from taking one's property, the individual must prove by a high standard of proof that the public use is not primarily for public benefit and one's own property is not reasonably needed under an approved plan that the individual property owner has had little and, more probably, no part in developing or adopting.

As I pointed out in my prior letter nowhere do the statutes (CGS, Chapters 130, 132 and 588I) indicate legislative intent to place a high degree of importance on protecting private property interests sufficient to warrant the risk of error being carried by the government. I also pointed out the statutes so broadly define the scope of municipal authority as to leave a clear impression in the mind of the court that the power to take property through eminent domain should not be restrained.

Clearly, the weight of opinion throughout the country is moving quickly and decidedly to the side of property owners and not government in these instances. The opinions of Connecticut's Supreme Court are consistent with the interpretations of federal constitutional provisions and law enunciated by the United States Supreme Court but inconsistent with those of most state Supreme Courts when interpreting their respective state constitutions and statutes.

In **Michigan** the state Supreme Court overturned the infamous *Poletown* decision (cited in the body of the *Kelo* decision) where over 3500 residences and businesses were taken displacing thousands of people on the promise that General Motors would build a new plant and employ thousands of Detroit citizens. The plant was built but the thousands of new jobs for Detroit's out of work citizens never materialized. The Michigan Supreme Court put an end to the "minimal standard of review" and said the court must make "an independent determination of what constitutes a public use for which the power of eminent domain may be utilized." In **New Jersey** municipalities have been thwarted by its appellate courts in recent decisions based on a tighter reading of New Jersey's constitution and statutes. In 2007, New Jersey's Supreme Court decided that land determined by local officials to be "not fully productive" and "underutilized" even though necessary to the intended redevelopment project could not be taken without a clear showing of blight.

In **Ohio** the Supreme Court stopped a municipality from taking properties for an economic development project, reversing prior decisions and ending what it called "an artificial judicial deference to the state's determination" of public use. The court said "defining the parameters of the power of eminent domain is a judicial function."

In my view, the law works best when it seeks to protect individual liberties and balances fairly the social and economic costs between government and private citizens. The risk of erroneous, factual determinations in redevelopment and economic development matters should be borne by the party who asserts its power in order to carry out its plans for development. It is government and developers not the individual property owner that has greater access to the information on which factual determinations are made and it is the public agency and its preferred developer that have in most instances engaged in protracted negotiations and lengthy written agreements detailing mutual promises including properties subject to eminent domain. Under these circumstances, is it fair to require a property owner to bear the burden of proving by a high standard of proof that stated public purposes do not satisfy constitutional requirements of public use or that properties in a designated area are not reasonably necessary to accomplish the approved plan and should not be taken by eminent domain? I don't think so. Clearly, the burden and level of proof should be the responsibility of the public agency and the developer not the property owner.

In the words of Justice Borden in the *Rizzo* case cited in my prior letter to you:

“Moreover, we have held that in the area of fundamental civil liberties - which includes all protections of the declaration of rights contained in article first of the Connecticut constitution - we sit as a court of last resort. In such constitutional adjudication, our first referent is Connecticut law and the full panoply of rights Connecticut citizens have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but they are to be followed by Connecticut courts only when they provide no less individual protection than is guaranteed by Connecticut law.... Recognizing that our state constitution is an instrument of progress ... is intended to stand for a great length of time and should not be interpreted too narrowly or too literally ... we have concluded in several cases that the state constitution provides broader protection of individual rights than does the federal constitution.”

I am asking the legislature to treat owners of property taken by eminent domain the same way the court and the legislature treat other owners of property. I refer you to the examples listed above, all civil matters in which a higher standard of proof requiring greater judicial scrutiny is required. The legislature should enact changes to the general statutes (Chapters 130, 132 and 588l) shifting the burden of proof to municipalities and establishing the level of proof as clear and convincing evidence. Then Justice Borden and the three other justices who constituted the majority in *Kelo* will be able to offer “the full panoply of rights Connecticut citizens have come to expect as their due” to property owners facing eminent domain as a result of municipal redevelopment and economic development projects, the same as they offer to other property owners.

Please refer to my letter of May 21 for specific suggestions for additions and other amendments to the existing statutory scheme. I am available to discuss these and any other issues concerning the law of eminent domain with you.

Respectfully submitted,

Robert S. Poliner, Ombudsman

cc: Senator John A. Kissel, Ranking Member
Representative Arthur J. O'Neill, Ranking Member
Senator Mary Ann Handley, Vice Chair
Representative Gerald M. Fox III, Vice Chair
Senator Eric D. Coleman
Senator Edward Meyer
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