

Institute for Justice

Legislative Backgrounder

Ending Eminent Domain Abuse in Wisconsin: Reforming “Blight” Laws Will Protect Property Rights

Nutshell

In 2010, two cities in Wisconsin attempted to use the power of eminent domain to take private property and transfer it to private developers. While public opposition blocked these efforts, many cities continue to treat eminent domain as a hammer in their “economic development toolbox” that they can use to squash the property rights of home and business owners.

In the aftermath of the *Kelo* decision in 2005, the Wisconsin legislature enacted legislation to restrict the taking of property through eminent domain. Cities have, however, evaded that statute by declaring lands that they seek to take to be “blighted.” These designations are often applied without evidence of any deficiencies in the properties taken. Rather, these pretextual designations allow city officials to take property when they and private developers believe a different use would be more economically beneficial. Moreover, Wisconsin courts have applied a liberal interpretation of “blight,” deferring to the determinations of city officials.

Using these powers, the city of Oak Creek sought to take the farm of a 94-year-old resident merely so that its presence would not discourage adjacent development. The city of Greenfield tried to take a business that had been operating for more than 50 years to “add valuable tax base to the city.” Neither of these properties was a nuisance, derelict or came close to being considered urban blight. But the cities attempted to designate them “blighted” nonetheless.

To protect homeowners and business owners from these officious land-grabs, state Senator Mary Lazich and a broad group of legislators have introduced SB 83 to again reform Wisconsin’s eminent domain law. Senator Lazich’s bill would allow cities to use eminent domain only when the land taken was actually used by government or by the public. Moreover, it would narrow the definition of “blight” and require that the state courts interpret it narrowly with any doubt favoring the property owner.

Wisconsin has become the front line of the battle over out-of-control government power. Here a coalition of legislators, homeowners and small business owners have come together to end the abuse of eminent domain. In doing so, they honor the property rights that the Founders placed at the core of American liberty and the legislature intended to incorporate fully into Wisconsin’s law in 2005.

Introduction

The Wisconsin Legislature reformed the state's eminent domain laws in 2005 following the U.S. Supreme Court's infamous *Kelo* decision. That law explicitly limited takings for so-called economic development but it unknowingly created a huge loophole by not tightening the statute's definition of "blight" and modifying only one of two statutes dealing with the eminent domain powers of municipalities. Exploiting this oversight, municipalities are now making pretextual findings—findings that are false and used as a means to justify the municipalities' real goal, which is not to remove real blight, but rather to clear the way for eminent domain for private gain. These actions by municipalities are inconsistent with the Legislature's intent and undermine the property rights the Legislature enhanced in 2005.

A coalition of legislators has now introduced SB 83, which closes the blight loophole and makes clear that Wisconsin property owners will not lose their land to the disingenuous claims of blight to advance the private interests of politically connected commercial developers and their allies in the planning departments of some municipalities.

Wisconsinites are on the front lines of the battle over the size and power of government workers. The Legislature has now turned its energy to advancing the property rights of all of Wisconsin's residents by reforming the state's blight laws. The Legislature recognizes that nearly every American supports limits on municipalities taking property from A and giving to B for so-called economic development that in truth is merely private profit.

First Round of Reforms in 2005

Wisconsin was one of 43 states to amend its eminent domain laws following the public backlash against the Supreme Court's 2005 ruling in *Kelo v. City of New London*.¹ Assembly Bill 657 was introduced by Representative Mary Williams in 2005 and signed into law in 2006. One of the cosponsors was Senator Mary Lazich.² The two-page bill modified the State's eminent domain laws in Section 32 by preventing transfer of non-blighted land if the condemner intends the property to be transferred to a private entity, defines "blighted property" and provides special protection for residential property.

Although the legislation was a step forward in combating eminent domain abuse, there is still significant need for improvement. The previous reforms did not change anything in the state's economic development statute, Chapter 66, thus still allowing municipalities to transfer property such as homes, farms or small businesses to a private entity so long as the property is deemed "blighted" per the terms of this chapter. The definition provided by the statute is vague and subjective, allowing a city to designate property as blighted when it "is detrimental to the public health, safety, or welfare" because of such factors as "dilapidation, deterioration, age or obsolescence," "faulty lot layout," or "the existence of conditions that endanger life or property."³

New Bill in 2011

Through SB 83, Senator Mary Lazich is seeking to close these loopholes and unify the law across Wisconsin's statutes. In the process, her legislation offers to all property owners the peace of mind that comes with knowing that your land is safe from eminent domain abuse. Responding to an extraordinary abuse of power by a municipality in her district, Lazich committed to fix the state statute's blight definition because it is "a loophole large enough for a herd of animals to jump through."⁴

Among the changes proposed by Sen. Lazich is to allow a property to be condemned only for public *use* by a public agency or the general public, the establishment of a public utility or the elimination of blighted property. Current law allows authorized entities to acquire property for any public *purpose*. The bill narrows the use of the blighted property exception, requiring a condemner who plans to convey property to a private entity to find that the property has been cited for at least one violation of state or local building codes and that the owner has not remedied the violations after at least two notices. The cost of repairs must also be equal to more than one-half the value of the property.

SB 83 would amend the law to expand the ability of property owners to contest the condemnation of their property and requires courts to construe the eminent domain laws narrowly, including the alternative procedures allowed to the city of Milwaukee. The definition of "blighted" would be narrowed, and the extra protection afforded residential properties would be expanded to include all properties.

Finally, SB 83 subordinates the economic development statute, Chapter 66, to the definitions and limits on municipal powers in Wisconsin's eminent domain statute, Chapter 32.

History of Eminent Domain and Blight in Wisconsin

The Wisconsin Constitution provides that: "The property of no person shall be taken for public use without just compensation."⁵ In the 1951 case *Schumm v. Milwaukee County*, the Wisconsin Supreme Court prohibited the taking of property when the land was to be used for a War Memorial Center operated by a private corporation.⁶ Only three years later, however, the court interpreted Wisconsin's Blighted Area Law broadly to allow the city to take non-blighted buildings located in a redevelopment district.⁷

The Wisconsin Court of Appeals continued to apply a liberal interpretation of the Blighted Area Law in *Grunwald v. City of West Allis* in 1996, when it held that the trial court's findings upholding a taking of 5.4 acres of land were not clearly erroneous even though appraisers could not agree on whether or not the land was blighted.⁸ The court further held that although Grunwald's property was only seven years old and was not itself blighted, it could be taken anyhow because it was necessary for the project.⁹

The Wisconsin legislation enacted in the wake of *Kelo* addressed the worst of these abuses by requiring that all property taken under eminent domain and transferred to a private entity be designated as blighted, but it left the definition of “blight” open to broad interpretation, and did not address the question of whether to continue to construe the statute liberally or to construe it conservatively against the condemner, as is customary for condemnation laws.¹⁰ These legislative oversights left the door open for abuses such as those that recently occurred in Oak Creek and Greenfield.

Abuse in Oak Creek

The city of Oak Creek is a community of 35,000 adjacent to Milwaukee.¹¹ Incorporated in 1955, Oak Creek was recently the site of an eminent domain struggle between the City’s Community Development Authority and a 94-year-old farmer. Earl Geifer lived his entire life on his family’s 25-acre farm, which has been in his family since the Civil War. Geifer still farms and keeps cows on the property, and plans to pass the land down to his niece.¹² The City of Oak Creek, however, had other plans.

In 2009 the City purchased 255 acres of land adjacent to Geifer’s farm. One hundred and sixty-nine acres were then sold to Wispark LLC, a Milwaukee-based corporation, for development into a business park.¹³ Doug Seymour, Oak Creek director of community development, said that the city was considering acquiring Geifer’s property because it might discourage development on the neighboring land. Seymour also said that the city had no plans for the property if it was acquired.¹⁴

The City’s Community Development Authority scheduled a public hearing for June 2, 2010 to discuss whether to declare the property blighted, the first step toward seizing the property through the city’s eminent domain power. The City argued that the property was blighted because of “deterioration of structures, significant outdoor storage,” a lack of general maintenance and an unpaved driveway, and because the land use was “no longer consistent with sound growth of [the] community.”¹⁵

Although the city argued that the use of eminent domain would benefit the citizens of Oak Creek by increasing property tax incomes, the public saw through this excuse and rallied behind Geifer.¹⁶ On May 28, 2010, the mayor announced he would urge the Common Council not to pursue its eminent domain plans in the face of “staunch opposition.”¹⁷ One day before the public hearing, the Common Council voted unanimously that it would not continue to discuss declaring the farm blighted, citing “nearly universal” disapproval.¹⁸

Although public opinion won the day, the threat to Geifer’s land has only been postponed. So long as Wisconsin’s eminent domain laws allow cities broad leeway in declaring land “blighted,” farmers like Geifer cannot rest secure in the knowledge that their family land will not be seized by the city the next time officials see the chance to increase tax revenues by handing private land to a private party it considers more worthy.

Abuse in Greenfield

Small business owners in nearby Greenfield understand Giefer's fears. Their properties were declared blighted in 2009. They believe that the city is preparing to use eminent domain to seize property for a mixed-use redevelopment project called Greenfield Commons.¹⁹ Bill Maynard's auto repair business is among those threatened by the blight designation. Like Giefer, Maynard has no interest in selling his land for any price.

Located only 13 miles northwest of Oak Creek, Greenfield is a similarly-sized community of 36,000, incorporated in 1957.²⁰ City officials have championed the \$60 million Greenfield Crossing project for years. Mayor Michael Niezke cited the need to "add valuable tax base to the city."²¹ The city declared the entire area blighted in 2009.

Bill Maynard has been a Wisconsin small business owner since 1963, when he opened Bill Maynard's Auto Service in West Allis, five miles north of Greenfield. He had been in his Greenfield location for 15 years when the city's redevelopment plan threatened the business he calls a dream come true.²²

Wisconsin's eminent domain laws leave small businesses with less protection than residences. In order for a residential property to be designated as blighted, it must be either abandoned or in a high-crime area, in addition to meeting the standard definition of blighted.²³ These protections do not help owners of small businesses or farms, however, which can be designated as blighted for reasons as arbitrary as "dilapidation, deterioration, age or obsolescence," "faulty lot layout in relation to size, adequacy, accessibility, or usefulness," or "deterioration of site or other improvements."²⁴

As was the case in Oak Creek, the city of Greenfield found itself facing sizable public outrage once the threat to Maynard's business became common knowledge. An August 17th meeting of the Common Council was faced with an overflow crowd protesting the redevelopment plan in general, and the plan to relocate businesses in particular.²⁵ The Council scheduled a special meeting for August 19th, where it voted unanimously to stop plans to acquire properties in the Greenfield Crossing area.²⁶

As is the case in Oak Creek, the City could still proceed with its redevelopment plans. The Greenfield Crossing project already faced a three-year delay because the state Department of Transportation has been using a park-and-ride in the proposed site as a staging area for a freeway reconstruction project.²⁷ Once that roadblock is removed, the city could very well come knocking on Bill Maynard's door again.

Eminent Domain Background

The battles in Oak Creek and Greenfield might never have occurred if courts at the state and federal levels had not spent the past 50 years abdicating their essential duty of enforcing constitutional limitations on eminent domain. Instead, they have acted as a rubber stamp.

The demise of the U.S. Constitution's "public use" clause began with the U.S. Supreme Court's 1954 decision in *Berman v. Parker* in which Washington, D.C. used eminent domain to renew what were in those days called "slums."²⁸ Rather than rule narrowly that the city could condemn decrepit tenements that presented a genuine threat to public health, the Supreme Court instead decided that the constitutional term "public use," which had a specific historical definition, actually means "public purpose." Worse yet, the Supreme Court also decided that local governments wielding eminent domain, rather than courts, get to decide what constitutes a "public purpose." Thus, a vital constitutional check on government power was lost.

The erosion of the "public use" clause in the U.S. Constitution culminated in the 2005 ruling in *Kelo v. City of New London*, justly one of the most reviled decisions in U.S. Supreme Court history.²⁹ In *Kelo*, the City of New London, Conn., decided to seize non-blighted homes and turn them over to another private party in the hope that the new owners would use the land in a way that could create jobs and pay higher taxes. The U.S. Supreme Court upheld the taking, ruling that even a mere promise of generating "public benefits," whether those benefits are likely or not, justifies taking someone's home and turning it over to another private party for that party's private profit. Under *Kelo*, a city can measure its citizens' worth in how much they pay in taxes, meaning that a family can be uprooted, cast aside, and its home destroyed if someone richer comes along who can be taxed more heavily. And so, just as "public use" was blurred to mean "public purpose" in *Berman*, "public purpose" was further blurred into "public benefit" in *Kelo*. And with each of these steps, the fundamental right to own property, which was so important to the Founders and has been essential to our liberty and prosperity, was undermined.

In her pointed dissent, Justice Sandra Day O'Connor explained the grave implications of what the majority had done: "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." Justice O'Connor wrote that "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more." The Institute for Justice documented this in a recent study called "Victimizing the Vulnerable: The Demographics of Eminent Domain Abuse" that employed U.S. Census data to show that minorities, the poor and less-educated are disproportionately targeted with eminent domain for someone else's private gain.³⁰

The backlash against *Kelo* was swift and nearly unanimous. Public opinion polls consistently show that more than 80 percent of Americans disapprove of using eminent domain for private gain.³¹ As of this writing, 43 states, including Wisconsin, have reformed their statutes to some degree to afford property owners greater protection against the wrongful seizure of their property.³² Finally, eight state supreme courts have rejected *Kelo*'s use of eminent domain.³³

Conclusion

Despite deep divisions when it comes to other public policy issues, Wisconsin residents and legislators from a wide political spectrum are united in wanting to limit the power of municipalities to engage in eminent domain takings under “bogus blight” claims. Senator Lazich has joined with a group of legislators to end the abuse of the takings power in Wisconsin. SB 83 will go a long way in giving Wisconsin property owners the protection they demand—the protection that is their right.

IJ Involvement

The Institute for Justice is supporting Senator Lazich’s efforts to reform Wisconsin’s eminent domain law. It is part of IJ’s efforts nationwide litigate, lobby and support grassroots activists to better protect private property from eminent domain for private gain.

IJ has provided testimony about eminent domain reform before legislatures in Alabama, Arizona, Arkansas, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Mexico, New York, Ohio, Pennsylvania, Tennessee, Texas, Virginia and Washington, as well as before the U.S. Congress. IJ has provided research about the extent of eminent domain abuse and suggested to legislators how best to craft language to protect property rights.

In the wake of the *Kelo* decision on June 23, 2005, the Institute for Justice’s Castle Coalition launched its “Hands Off My Home” campaign, a grassroots initiative that trains property owners nationwide to fight for what is rightfully theirs. The “Hands Off My Home” campaign helped win significant and substantial reforms of state and local eminent domain laws. The Castle Coalition gives ordinary Americans the tools they need so that they may offer a principled and informed perspective to legislators at every level of government on how to better protect their homes and businesses from misguided government power.¹

Additionally, IJ has litigated eminent domain cases from coast to coast, successfully preserving the rights and properties of the politically and financially disenfranchised. Among IJ’s victories are:

- *Wells v. City of Riviera Beach*—In May 2007, the Institute for Justice successfully defeated an attempt in Riviera Beach, Fla., to displace more than 5,000 residents for a massive private development project that included a yacht marina, luxury condominiums and upscale hotels.
- *City of Norwood v. Horney*—In a resounding repudiation of the U.S. Supreme Court’s decision in *Kelo v. City of New London*, the Ohio Supreme Court unanimously ruled in July 2006 that the city of Norwood acted unconstitutionally by taking the homes of the Institute for Justice’s clients.

- *Brody v. Village of Port Chester*—In December 2005, the 2nd U.S. Circuit Court of Appeals ruled that the Village of Port Chester violated IJ client Bill Brody’s constitutional rights by condemning his property for private development without giving him notice of his one opportunity to challenge the condemnation.
- *City of Tempe v. McGregor*—In October 2005, as a result of the Institute for Justice Arizona Chapter’s legal defense, Arizona courts rejected the city of Tempe’s attempt to condemn private property for the benefit of a private developer.
- *Kelo v. City of New London*—In just a few short years after the landmark U.S. Supreme Court ruling in *Kelo v. City of New London* that allowed private property to be taken for economic development, 43 states have tightened their restrictions on eminent domain. In 2007, IJ client Susette Kelo’s little pink cottage—the home that became a national symbol of the fight against eminent domain abuse—was moved rather than allowing it to fall to the government’s wrecking ball.
- *Saleet v. City of Lakewood*—In 2004, as a result of an IJ lawsuit representing 17 home and business owners, citizens from the city of Lakewood voted down an eminent domain abuse project that would have demolished an entire neighborhood for high-priced condominiums and an upscale mall. Shortly afterwards, Lakewood voters rejected the bogus blight designation, which applied to 93 percent of the city.
- *City of Mesa v. Bailey*—In September 2003, the Arizona Court of Appeals unanimously struck down the city of Mesa’s use of eminent domain for private gain. The city attempted to seize a small car repair shop so that a privately owned hardware store could relocate.
- *Mississippi Major Economic Impact Authority v. Lonzo Archie*—IJ represented the Archie family in their successful fight to save 24 acres of property and several homes they owned since 1941. The state tried to seize the Archie family’s private property in 2001 for the benefit of Nissan Motor Corporation, to which it had already given more than \$290 million in subsidies and tax breaks and approximately 1,300 acres of land.
- *Pittsburgh Fifth and Forbes*—IJ helped save more than 120 small businesses in downtown Pittsburgh in 2000 from the mayor’s plan to use eminent domain to hand the land over to a Chicago developer for private use.
- *Casino Reinvestment Development Authority v. Banin*—In a classic David versus Goliath battle, the Institute for Justice scored a major victory for property rights in July 1998 when the New Jersey Superior Court ruled a state agency could not condemn widow Vera Coking’s home of 37 years and give it to Donald Trump for his private development.

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¹ 125 S. Ct. 2655 (2005).

² 2005 Assembly Bill 657, accessible at <http://legis.wisconsin.gov/2005/data/AB-657.pdf>.

³ Wis. Stat. Ann. 32.03(6)(a).

⁴ Mark Shaaf, “Eminent domain controversy prompts Greenfield to rethink development plan,” *Greenfield Now*, August 17, 2010, <http://www.greenfieldnow.com/news/100918259.html>.

⁵ Section 13, article I.

⁶ 258 Wis. 256 (1951). For a broad discussion of Wisconsin eminent domain history, see Hugh R. Braun, “*Wisconsin’s Response to Condemnation for Economic Development*,” *Wisconsin Lawyer*, September, 2007.

⁷ *David Jeffrey Co. v. City of Milwaukee*, 267 Wis. 559 (1954).

⁸ *Grunwald v. City of West Allis*, 202 Wis. 2d 471 (1996).

⁹ *Id.* at 488, 490-91.

¹⁰ Braun, *supra* note 6, at *63.

¹¹ <http://www.oakcreekwi.org/overview.htm>.

¹² Mark Schaaf, “City threatens to take land from 94-year-old farmer,” *Oak Creek Now*, May 25, 2010, <http://www.oakcreeknow.com/news/94883639.html>.

¹³ <http://dailyreporter.com/files/2010/05/farm-tif-plan1.pdf>.

¹⁴ Sean Ryan, “Blight ruling hangs over Oak Creek farm,” *The Daily Reporter*, May 6, 2010, <http://dailyreporter.com/blog/2010/05/06/blight-ruling-hangs-over-oak-creek-farm/>.

¹⁵ <http://dailyreporter.com/files/2010/05/farm-study1.pdf>.

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- ¹⁷ Mark Schaaf, “City may back down on eminent domain of farmland,” *Oak Creek Now*, May 28, 2010, <http://www.oakcreeknow.com/news/95146789.html>.
- ¹⁸ Mark Schaaf, “City won't use eminent domain to acquire farmland,” *Oak Creek Now*, June 1, 2010, <http://www.oakcreeknow.com/news/95375494.html>.
- ¹⁹ Mark Schaaf, “Business owners say Greenfield wants land to redevelop it,” *Greenfield Now*, August 10, 2010, <http://www.greenfieldnow.com/news/100350799.html>.
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- ²² Mark Schaaf, “Business owners say Greenfield wants land to redevelop it,” *Greenfield Now*, August 10, 2010, <http://www.greenfieldnow.com/news/100350799.html>.
- ²³ <http://castlecoalition.org/about/1378>.
- ²⁴ Wis. Stat. Ann. 32.03(6)(a).
- ²⁵ Mark Shaaf, “Crowd voices opposition to use of eminent domain,” *Greenfield Now*, August 17, 2010, <http://www.greenfieldnow.com/news/100952579.html>.
- ²⁶ Mark Shaaf, “Eminent domain talk quietly dies in Greenfield,” *Greenfield Now*, August 19, 2010, <http://www.greenfieldnow.com/news/101128529.html>.
- ²⁷ Mark Shaaf, “City decides it won't cross that redevelopment line,” *Greenfield Now*, August 23, 2010, <http://www.greenfieldnow.com/news/101344329.html>.
- ²⁸ 348 U.S. 26 (1954).
- ²⁹ 125 S. Ct. 2655 (2005).
- ³⁰ *Victimizing the Vulnerable: the demographics of eminent domain abuse* by Dick M. Carpenter, Ph.D. and John K. Ross (a report of the Institute for Justice) (2007).
- ³¹ See http://www.castlecoalition.org/resources/keho_polls.html for links to various opinion polls. See <http://www.castlecoalition.org> for continuously updated information on eminent domain reform.

³² <http://www.castlecoalition.org/about/1378>

³³ *City of Norwood v. Horney*, 110 Ohio St. 3d 353 (2006); *Bd. of County Comm'rs v. Lowery*, 136 P.3d 639 (Okla. 2006). [See recent case: *Middletown Tp. v. Lands of Stone*, 939 A.2d 331 595 Pa. 607 (PA, 2007) (held that recreational use was not the true public purpose for township's taking as required to condemn farm); *Mayor and City Council of Baltimore City v. George Valasamaki, et al.*, 397 Md. 222, 916 A.2d 324 (MD, 2007) (“while economic development may be a public purpose, it must be carried out pursuant to a comprehensive plan”); *Rhode Island Economic Development Corp. v. The Parking Company*, 892 A.2d 87 (RI, 2006) (holding EDC did not take the garage for a public use, and thus condemnation violated the takings clause, as the condemnation was designed to gain control of the garage at a discounted price.); *Centene Plaza Redevelopment Corp., v. Mint Properties*, 225 S.W.3d 431 (Mo., 2007) (held that evidence was insufficient to support finding that area was a social liability or a blighted area)].