

____.B. No. ____

A BILL FOR AN ACT

RELATING TO EMINENT DOMAIN.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The fifth amendment to the United States constitution provides, in pertinent part: “[N]or shall private property be taken for public use, without just compensation.” Article II, section 20 of the Hawaii state constitution similarly provides that “[p]rivate property shall not be taken or damaged for public use without just compensation.”

In a recent decision, Kelo v. New London, No. 04-08 (June 23, 2005), the United States Supreme Court, relying on prior Court precedent, determined that the public use provisions of the fifth amendment to the United States constitution allow the use of eminent domain to take private property for economic development purposes. Because of the breadth of the decision and the amount of deference given by the Court to governmental determinations to take private property, Kelo raised concerns nationwide that there are no longer any meaningful federal

judicial restrictions preventing private property from being taken by eminent domain for non-public purposes.

The Hawaii Supreme Court, in a previous decision, Hawaii Housing Authority v. Lyman, 68 Haw. 55, 704 P.2d 888 (1985), indicated that it would not interpret the "public use" provisions of article II, section 20 of the Hawaii state constitution as broadly as the United States Supreme Court has interpreted the corresponding provisions of the fifth amendment. Nevertheless, the Hawaii Supreme Court in that opinion afforded deference to the governmental right to take property that was almost as great as that set forth in Kelo.

The United States Supreme Court in Kelo recognized that its decision would effectively insulate many takings from review in the federal court system. However, the Court indicated that the states could establish stronger protections against improper governmental takings of private property:

"In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the ground upon which takings may be exercised."

Kelo, slip op. at 19.

In reaction to Kelo, a substantial number of states and local jurisdictions have taken steps to strengthen the right of their citizens not to have their property taken for the benefit of another private interest, or to lose their property where the taking is simply for economic benefits such as increasing tax revenue.

The legislature finds that the taking of private property for purely public use, such as the development of roads, water and wastewater works, schools and libraries, and other public buildings and improvements is necessary and appropriate. The legislature further finds that the taking of private property and transferring that property to certain private entities for use by the public, such as in the case of railroads and rail transit companies with obligations as common carriers, or power and other utility companies that provide direct services to the public and are regulated by the public utilities commission, is necessary and appropriate.

However, the legislature finds that other takings of private property for transfer to private entities may be susceptible to abuse. Even under Kelo, the taking of property from one person simply to benefit another private person violates the protections of the Public Use Clause. Similarly, a taking that is intended to favor a private party, with only

incidental or pretextual public benefits, would not be sustained. Likewise, a taking which is simply for the purpose of providing economic benefits without remedying any harm or public nuisance is not within the meaning of "public use" envisioned by the framers of article II, section 20 of the Hawaii state constitution.

The legislature finds that takings in general, and takings that benefit private parties in particular, should be subject to a higher level of scrutiny by our state courts to assure that the protections afforded by the fifth amendment to the United States constitution and article II, section 20 of the Hawaii state constitution, are upheld and enforced.

The purpose of this act is to strengthen the protections afforded to Hawaii's citizens to be safe and secure in their homes and properties, without the fear of taking of their homes and properties for a non-public purpose.

SECTION 2. Chapter 46, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§46- No eminent domain for private purpose or economic development. (a) Anything to the contrary in this chapter or other provision of law notwithstanding, no county or any of its departments, agencies, commissions, authorities, or any private

entity may take or damage any interest in private property through the use of eminent domain if the taking or damaging:

(1) Confers a private benefit on a particular private party through the use of the property;

(2) Is for an asserted public use that is in fact 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 urban renewal activities to eliminate existing blighted areas pursuant to chapter 53.

Such actions shall not be a taking or damaging for public use allowed by article II, section 20 of the state constitution, nor shall they be within the scope of powers granted to the counties under section 46-1.5 (6). Notwithstanding the foregoing, property may be taken for other purposes if the owner voluntarily consents to the condemnation.

(b) The determination by a governmental or private entity that an action proposing to take or damage property involves a public use, or alternatively, does not involve an act or circumstance prohibited by subsection (a), does not create any presumption with respect to whether the taking or damaging is indeed for a public use.

(c) Except when property is being taken for transfer to a public utility or common carrier, whenever property is condemned and will be used by a private party, the burden of proof shall be on the condemnor to establish, by clear and convincing evidence, that the use of eminent domain complies with this section and is reasonably necessary.

(d) Except when property is being taken for transfer to a public utility or common carrier, whenever property is condemned and the acquisition of the property will be paid for, either directly or indirectly, by non-governmental funds rather than by public appropriation or by grants from another governmental entity, the burden of proof shall be on the condemnor to establish, by clear and convincing evidence, that the use of eminent domain complies with this section and is reasonably necessary.

(e) Whenever property is condemned under circumstances other than as set forth in subsections (c) and (d) above, the burden of proof shall be upon the condemnor to prove, by a preponderance of the evidence, the existence of facts necessary to support the finding of public use and necessity.

(f) The owner or other person with an interest in the property sought to be condemned shall be entitled to immediate trial pursuant to section 101-34 as to whether a taking meets the requirements of this section. If eminent domain proceedings

under chapter 101 have not yet commenced, the owner or other person with an interest in the property sought to be condemned may also file a suit in the circuit court for a declaratory ruling whether the taking meets the requirements of this section. This subsection shall not be construed to limit whatever other rights the owner or other person with an interest in the property sought to be condemned may have to administrative or judicial review or relief under applicable provisions of law.

(g) For purposes of this section,

(1) "Common carrier" means any entity which holds itself out to the general public to engage in transportation.

(2) "Economic development" means any activity to increase tax revenue, tax base, employment, or general economic health, when that activity does not result in (A) the transfer of property to public possession, occupation, and enjoyment; (B) the transfer of property to a private entity that is a public utility or common carrier; or (C) the use of eminent domain to remove a public nuisance, to remove a structure that is beyond repair or unfit for human habitation or use, or to acquire abandoned property, or to eliminate a direct threat to public health or safety caused by the property in its current condition.

(3) "Public utility" means any entity subject to regulation by the public utilities commission under chapter 269."

SECTION 3. Chapter 101, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§101- No eminent domain for private purpose or economic development. (a) Anything to the contrary in this chapter or other provision of law notwithstanding, neither the State or any county or other entity having the power of eminent domain, or any private entity, may take or damage any interest in private property through the use of eminent domain if the taking or damaging:

(1) Confers a private benefit on a particular private party through the use of the property;

(2) Is for an asserted public use that is in fact 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 urban renewal activities to eliminate existing blighted areas pursuant to chapter 53.

Such actions shall not be a taking for public use allowed by article II, section 20 of the state constitution, nor shall they

be within the scope of powers granted to the counties under section 46-1.5 (6). Notwithstanding the foregoing, property may be taken for other purposes if the owner voluntarily consents to the condemnation.

(b) The determination by a governmental or private entity that an action proposing to take or damage property involves a public use, or alternatively, does not involve an act or circumstance prohibited by subsection (a), does not create any presumption with respect to whether the taking is indeed for a public use.

(c) Except when property is being taken for transfer to a public utility or common carrier, whenever property is condemned and will be used by a private party, the burden of proof shall be on the condemnor to establish, by clear and convincing evidence, that the use of eminent domain complies with this section and is reasonably necessary.

(d) Except when property is being taken for transfer to a public utility or common carrier, whenever property is condemned and the acquisition of the property will be paid for, either directly or indirectly, by non-governmental funds rather than by public appropriation or by grants from another governmental entity, the burden of proof shall be on the condemnor to establish, by clear and convincing evidence, that the use of

eminent domain complies with this section and is reasonably necessary.

(e) Whenever property is condemned under circumstances other than as set forth in subsections(c)and(d)above, the burden of proof shall be upon the condemnor to prove, by a preponderance of the evidence, the existence of facts necessary to support the finding of public use and necessity.

(f) The owner or other person with an interest in the property sought to be condemned shall be entitled to immediate trial pursuant to section 101-34 as to whether a taking meets the requirements of this section. If eminent domain proceedings under this chapter have not yet commenced, the owner or other person with an interest in the property sought to be condemned may also file a suit in the circuit court for a declaratory ruling whether the taking meets the requirements of this section. This subsection shall not be construed to limit whatever other rights the owner or other person with an interest in the property sought to be condemned may have to administrative or judicial review or relief under applicable provisions of law.

(g) For purposes of this section,

(1) "Common carrier" means any entity which holds itself out to the general public to engage in transportation.

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(3) "Public utility" means any entity subject to regulation by the public utilities commission under chapter 269."

SECTION 4. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 6. This Act shall take effect upon its approval.

INTRODUCED BY: _____