



STATE OF CONNECTICUT  
OFFICE OF OMBUDSMAN FOR PROPERTY RIGHTS

Testimony Re: Raised Bill No. 5636

Senator Coleman, Representative Feltman, Ranking Members, Senators, Representatives, ladies and gentlemen;

I wish to thank the committee and in particular the chairs for raising a bill for the second successive session that has as its aim to pay businesses displaced by eminent domain for loss of goodwill.

Public Act No. 07-207 required the Ombudsman for Property Rights to examine the issue of businesses displaced by eminent domain and the feasibility of calculating the loss or gain of goodwill associated with such displacement.

I assembled a committee that included business and real estate appraisal experts and municipal, state and federal officials with extensive experience in the field of relocation assistance. They volunteered their time and provided a significant public service to the citizens of our state and their duly elected representatives. Each of you has received a copy of the Goodwill Study.

Goodwill is different from other assets covered by the Uniform Relocation Act in that goodwill is an intangible asset. Some businesses have it and others don't. It may be the principal saleable and transferable asset of a business. It usually takes years to develop and it may be seriously impaired or destroyed by a change of location.

To try to limit the payment to only one particular type of business, in this case retail, is not fair to other types of businesses forced out of their existing homes. To limit the payment only to properties taken by municipalities pursuant to redevelopment and economic development statutes but not to properties taken for other uses under other statutes or by state agencies is not fair to all of the other owners of displaced businesses who have provable loss of goodwill.

Connecticut Department of Transportation exercises eminent domain powers more than any other public agency and should not be exempt from the requirement to pay businesses for loss of goodwill. The U.S. Federal Highway Administration has recently changed its practices and guidelines by providing for its continued participation and funding if state law covers a payment otherwise ineligible under federal regulations.

The issue of displacement of occupants who are not owners of the real property or of any leasehold or other vested interest in the real estate requires equal attention with those who are owners of real property. Most businesses rent. Most businesses are small. In fact, according to 2005 U.S. Census statistics, approximately three quarters of all businesses in Connecticut have fewer than 10 employees. What we are talking about is helping the smallest, mom and pop businesses to stay in business and to be fairly compensated for losses resulting from government exercise of an extraordinary power.

The conclusion of the Goodwill Committee is that Connecticut needs to address the amount of money businesses receive when required to move including money to pay for loss of goodwill associated with displacement. The ability of a business

to move and to operate successfully at the replacement site turns on its ability to find such a location, make the new space or property functional, pay new operating expenses, usually greater than at the old site, hold the loyalty of existing customers and employees and attract new customers.

To the extent businesses are able to succeed in the new location, there will be fewer job losses, more state and municipal tax revenues, less unemployment insurance costs and more economic vitality in the municipality and State. Another important benefit will be fewer claims for loss of goodwill.

Connecticut's relocation assistance statutes and regulations have not been updated since the 1970s. Many businesses close that would remain open if the amount of payments for search, reestablishment and other expenses and damages such as loss of goodwill were available and/or increased. Many states including New Hampshire, Maine and Maryland have made recent changes. I have provided information concerning these and other states in the study. The unmistakable trend is for states to authorize payments that exceed their former limits and federal limits, especially reestablishment and in lieu fixed payments.

Specifically, I recommend Section 8-268 be amended to provide for a business operating in 10,000 square feet or more or moving to a site that exceeds its current location by a factor of 1.25 but not less than 10,000 square feet and employs 10 or more full and part time employees or is engaged in manufacturing or has a gross volume of business which exceeds \$1,000,000 or an average net earnings over the last two years of at least \$100,000 should be eligible to receive up to \$25,000 in search expenses, \$250,000 in reestablishment expenses and \$250,000 fixed payments in lieu of moving expenses. All other businesses should be eligible to

receive up to \$10,000 in search expenses, \$100,000 in reestablishment expenses and \$100,000 fixed payments. The capped amounts should be indexed to the U.S. Department of Labor, Consumer Price Index and adjusted annually.

With respect to goodwill, I recommend California's statute and administrative procedures be carefully examined, and where applicable, adopted. This will insure that reasonable steps by property owners to prevent loss of goodwill will be taken and payments made under the Uniform Relocation Act will not be duplicated in payment for loss of goodwill. The business owner will be responsible for proving the loss of goodwill is the result of the taking of the property or injury to the remainder in the case of a partial taking.

I ask the committee to review the study and additional information on goodwill and eminent domain I have previously provided to all of you. I have also submitted today as attachments to the written statement additional materials seeking further changes with respect to the issues of goodwill and eminent domain.

I'm happy to answer any questions you may have.

Robert S. Poliner

Ombudsman for Property Rights

Attachments:

Statement of the Ombudsman with respect to eminent domain

Copy of letter to Planning & Development Committee co-chairs

## **Statement of Robert Poliner, Ombudsman for Property Rights**

### **Re: Eminent Domain**

The Kelo decision rendered by Connecticut's Supreme Court and upheld by the United States Supreme Court has increased the authority and autonomy with which public agencies and legislative bodies can determine what constitutes a public use and when eminent domain can be used. The Kelo decision removes from our trial judges the ability to make independent reviews of public use, of the reasonable necessity of a taking of private property and of the likelihood of the proposed project ever occurring.

Because of the newness of the Kelo decision our courts are not likely, any time soon, to change their thinking with respect to eminent domain or redevelopment or economic development issues without a clear signal from the legislature that a change of course should occur. Our Supreme Court gives great deference to what it calls the legislature's "broad view of the public use clause" and to the administrative actions of public agencies.

The court in Kelo held that "there can be no precise line between public and private uses." This allows for public use to be defined in general terms as a basket of benefits such as increasing the tax base or the general economic welfare of the community. The conclusion one reaches is that under Connecticut law almost any use can be considered a public use. Thus there is justification for using eminent domain, whether the property or area is blighted or not, residential or commercial, useable or not useable. It allows

the use of eminent domain to benefit primarily private developers rather than the public except indirectly and generally. It permits eminent domain even when no developer has been chosen or the agency or developer has less than sufficient funds on hand to carry out the project.

The legislature should give the courts new guidance. The legislature should seek a better balance between the rights of private property owners and government.

The legislature should require government to bear the burden of proving by clear and convincing evidence that the development will, in fact, result in a public use, that there is reasonable necessity for the taking of private property to implement the development plan and there is a reasonable likelihood of the proposed plan occurring.

Why? Because government and developers have greater access to the information involving the development plan, to developer interest in the properties, to the progress of negotiations relating to disposition of the properties, to the reasons for taking particular properties by eminent domain and to the likelihood of the project actually occurring. Government is in a much better position to provide all of this information and should bear the burden of proof. Right now there is no statutory assurance that the public will benefit from any particular development or that the development as proposed will actually occur.

There should be an attempt to define the terms "public use" and "public purpose" in which general benefits of economic development such as

increasing the tax base or tax revenues or improving the general economic health and welfare of the municipality or State do not by themselves constitute a “public use” or “public purpose.”

Properties should be rehabilitated whenever possible. Existing owners should be allowed an opportunity to redevelop their own properties and businesses should be able to remain in the area or near by to mitigate the damage that is done to so many businesses when they are uprooted from locations and neighborhoods in which they spent years building a customer base and a profitable enterprise. Planning and zoning commissions should be more flexible particularly with respect to regulating uses in areas in need of clean up. Municipal legislative bodies should make it possible for owners and developers, even of one property, to obtain permits and approvals quickly and at minimal cost.

The legislation passed in 2007 (P.A. No. 07-141) addresses the role of municipal legislative bodies and their implementing agencies and requires municipalities to take additional procedural steps before taking property by eminent domain but it does not remove or lessen any of the advantages that government has over private property owners or create a better balance between government and property owners.

It does not shift the burden of proof.

It does not call for a heightened standard of judicial review to ensure the constitutional rights of private property owners are protected.

It does not provide for a definition of “public use.”

It does not provide a process for homeowners and other property owners to challenge administrative decisions when their homes and business properties are designated deteriorated or blighted.

It does not grant businesses displaced by eminent domain compensation or relocation assistance for loss of goodwill or much other needed assistance.

It does not stop developers and government officials from engaging in practices that would in any other area of the law be considered unfair and uncompetitive or extortionate.

There is much that can be done to create a better balance between government and private property owners and I respectfully ask this committee to consider how best to accomplish such improvements and create legislation to do so. I am available to assist the committee in any way I can.



STATE OF CONNECTICUT  
OFFICE OF OMBUDSMAN FOR PROPERTY RIGHTS

February 14, 2008

Senator Eric D. Coleman, Co-Chair  
Representative Art Feltman, Co-Chair  
Planning and Development Committee

Dear Senator Coleman and Representative Feltman:

As Ombudsman for Property Rights, I am charged with making recommendations to the General Assembly with respect to eminent domain powers and procedures and associated relocation assistance. The legislature requested the Ombudsman to study the feasibility of calculating goodwill when businesses are displaced as a result of eminent domain. I am requesting that you raise as bills the following recommendations with respect to eminent domain and relocation assistance:

**Recommendation #1:** With respect to Connecticut General Statutes Chapters 130, 132 and 588I, changes should be made to grant last owners of record of real property up to 120 days to remain in occupancy rent free and tenants up to 60 days rent free, both residential and business occupants. **Reason:** Fairness. Occupants need a reasonable amount of time to move and should not be required to pay rent to government agencies when they are trying to relocate. Owners of residential properties displaced by DOT are granted 120 days rent free occupancy. (See Sec. 13a-73(b) last sentence.)

**Recommendation #2:** Loss of goodwill should be compensated as an eligible category of reimbursable moving expense under Connecticut's Uniform Relocation Act. CGS Section 8-268 should be amended to provide that businesses, with at least three years standing prior to the taking of property, that suffer a loss of goodwill caused by the displacement of the business, should receive compensation for the loss. **Reason:** Fairness. Businesses that have been located in one place for at least three years may have invested considerable sums to develop goodwill that will be lost if required to move to another location. Goodwill is capable of being calculated by accredited business valuation appraisers and should be compensated for as a moving expense under the CT Uniform Relocation Assistance Act.

**Recommendation #3:** CGS Section 8-267 "Definitions" should be amended to add, "Goodwill" means "the benefits that accrue to a business as a result of its location, *positive* reputation for dependability, skill, or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage." **Reason:** This is the definition, with the addition of the word "positive," used by California, Wyoming and in the Uniform Eminent Domain Code. Connecticut cases mention words such as location, reputation and patronage.

Recommendation #4: To protect against overpayment, the law should contain the following provisions, "the loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving goodwill," and "compensation for the loss will not be duplicated in the payments otherwise awarded to the owner of the business." **Reason:** Fairness to government agency and taxpayers. Only what is fair and not excessive should be paid. See Goodwill Study, Appendix B Definitions. (California Statute reprinted in its entirety.) See Appendix E California Highway Manual, Loss of Goodwill, Appraisal of Goodwill and Forms.

Recommendation #5: Businesses that do not move, possess goodwill and have as a result of the taking suffered a loss of goodwill should have the loss of goodwill determined as of the date the determination was made by the public agency to take the real property in which the business is located. Businesses that move may file claims for loss of goodwill no earlier than one year and no later than two years from the date the move has been completed. The impact on loss of goodwill should be measured over a period not exceeding two years from the date of the move. **Reason:** There has to be a method to determining when a claim for loss of goodwill can be made. If the recommendations in #6 below are adopted, businesses that move can take a year or two to determine if there has been a loss of goodwill. That would be a "look back" test. Otherwise all businesses should be filing claims as of the time of the taking of the property or when the agency first decided to take the property and there was general knowledge of that fact transmitted to the property/business owner.

Recommendation #6: CGS Section 8-268 should be amended to provide for a business operating in 10,000 square feet or more or moving to a site that exceeds its current location by a factor of 1.25 but not less than 10,000 square feet and employs 10 or more full and part time employees or is engaged in manufacturing or has a gross volume of business which exceeds \$1,000,000 or an average net earnings over the last two years of at least \$100,000 should be eligible to receive up to \$25,000 in search expenses, \$250,000 in reestablishment expenses and \$250,000 fixed payments in lieu of moving expenses. All other businesses should be eligible to receive up to \$10,000 in search expenses, \$100,000 in reestablishment expenses and \$100,000 fixed payments. The capped amounts should be indexed to the U.S. Department of Labor, Consumer Price Index and adjusted annually. **Reason:** To bring the amounts of assistance up to levels where they actually assist a business that moves and is fair to a business that for what ever reason closes.

Recommendation #7: If an expense for repairs or modifications at a replacement site or operating expenses incurred by a displaced business during the first two years at the replacement site could be classified as an actual moving expense or as a reestablishment expense, such expense should be covered as an actual moving expense. **Reason:** Under current law the limit of assistance a business can receive in making renovations to the replacement location is \$10,000. Unless the recommended changes in #6 are made, these types of expenses should be considered moving expenses and not reestablishment expenses. Moving expenses are not subject to the \$10,000 cap.

Recommendation #8: With respect to Connecticut General Statutes Chapters 130, 132 and 588I, changes should be made to require government to carry the burden of proving the development will, in fact, result in a public benefit and is not a pretext for taking the property of one owner to give to another primarily for that owner's use, enjoyment and profit. The public use must be substantial not incidental. The level of proof should be by clear and convincing evidence. **Reason:** Government has greater access to the information regarding developer interest in the properties and the progress of negotiations related to the properties. Government should bear the burden of proving its redevelopment or development plan is for a public purpose.

Recommendation #9: With respect to Connecticut General Statutes Chapters 130, 132 and 588I, changes should be made to require government to carry the burden of proving the specific condemnation of property is reasonably necessary to implement the development plan. The level of proof should be by clear and convincing evidence. **Reason:** Government and the developer know more about why the taking of a private property is needed. It should not be the property owner's burden to disprove the need for the taking.

Recommendation #10: With respect to Connecticut General Statutes Chapters (CGS) 130, 132 and 588I, there should be greater clarity in what "public use" or "public purpose" means. In most states "public use" is defined by statute. Without restricting the ability of municipalities to engage in needed redevelopment or economic development projects but believing there should be a better balance between property owners and government than now exists, I propose enactment of a new law defining "Public Use" or "Public Purpose" to mean "the possession, occupation and enjoyment of real property by the public, public agencies (as defined in CGS Section 1-200) or a public utility; or, the redevelopment of slum or blighted areas as described in CGS Section 8-124; or, municipal and business development projects as described in CGS Sections 8-186 and 32-221. Public benefits of economic development such as increasing the tax base, increasing tax revenues, employment or improving the general economic health and welfare of the municipality or the State of Connecticut do not by themselves constitute a public use or public purpose. The taking of any property by eminent domain for the purpose of transferring the property from one private party to another under the pretext of public benefit is prohibited." **Reason:** Most states define by statute public use and public purpose. Connecticut's courts look to the legislature for guidance in determining what constitutes public use or purpose. Right now just about any reason for condemnation no matter how general will meet the public use test under current statutory scheme.

Recommendation #11: Section 8-125(2) should be amended to provide that a "redevelopment area" is one in which more than fifty per cent (50%) of the properties are deteriorated or deteriorating, substandard or detrimental to the safety, health, morals, or welfare of the community... and 8-125(7) should be amended to provide that at least fifty per cent of the buildings contain at least two or more of the enumerated deficiencies before being designated "deteriorated" or "deteriorating." **Reason:** 20% of buildings and only one deficiency is too few to make a determination of blight as to an area or an individual property. Once an area is called "blighted" or "slum" a swifter decline happens. This is called "condemnation blight."

Recommendation #12: In furtherance of procedural due process, Section 8-127 should be amended to allow each property owner the right to contest the designation of "deteriorated" or

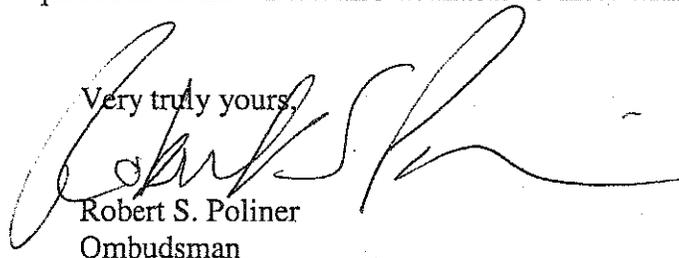
deteriorating” as to the owner’s property and the designation of “blighted” as to the area or neighborhood.

The agency should provide written notice to every property owner within the area. The notice should contain a description of the deficiencies of the owner’s property and the area. The notice should allow the property owner to request a hearing by signing a card or form provided by the agency. The hearing should be scheduled to occur within 30-45 days of receipt by the agency of the signed card or form. The hearing should be held in front of three agency members of whom no fewer than two are public members. Members should be required to view the property. Findings and recommendations should be presented to the entire membership of the agency with written substantiation for any recommendations and the agency should vote whether to accept, reject or modify the recommendations. If the designation of the property or area is not rescinded, the property owner may request a review of the agency’s decision by the legislative body of the municipality. The decision of a majority of the members of the legislative body will constitute a final decision. **Reason:** Fairness. The property owner should be able to contest a designation that stigmatizes his/her property or the area. Such a designation makes it harder to live, work, rent or do normal things property owners do with their property. They still have to pay taxes, insurance, mortgage etc. and there is no certainty when the actual taking will occur.

Recommendation #13: The general statutes should be amended to make it illegal for anyone to threaten to use eminent domain and demand money or participation in a business enterprise as the “price” for allowing a property owner to rehabilitate or redevelop his/her own property and pursue economic opportunities that would not interfere with the implementation of the public agency’s approved plan of development. Such threats by a preferred developer, its employees or agents and by agency officials, employees and agents, whenever occurring, should be deemed an unfair trade practice under CUTPA and a crime punishable by fine and imprisonment. **Reason:** There must be boundaries that developers and government employees and officials can not cross without serious penalties. Demanding money or participation as the price to exempt a property from condemnation or stealing the idea and the contacts that the property owner has developed, should not be tolerated. Such acts constitute unfair trade practices and extortion which should carry criminal penalties..

I plan on attending the Planning and Development Committee meeting on Friday, February 14, 2008, in the event that you have questions of me. I am also available to meet with you at your convenience.

Very truly yours,



Robert S. Poliner  
Ombudsman

RSP/mpb

cc: Senator Leonard A. Fasano, Ranking Member  
Representative Penny Bacchiochi, Ranking Member