Testimony in Support of HB 5123
Planning and Development Committee

Submitted by Renée D. Flaherty,
Attorney
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320

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Thank you for the opportunity to testify in support of HB 5123, which the sponsor will use to prohibit the state and municipalities from exercising the use of eminent domain for commercial purposes.

My name is Renée Flaherty. I am an attorney at the Institute for Justice (IJ), a national nonprofit organization that, among other things, litigates and lobbies to protect the property rights of homeowners and small-business owners. My colleagues know Connecticut well. We have done two important cases involving eminent domain here.

IJ represented Susette Kelo and other property owners in their litigation in New London, which resulted in the 2005 Supreme Court case *Kelo v. New London*.

In 2016, I represented Bob McGinnity of West Haven in a lawsuit to stop the city from taking his beloved family home and turning it over to a developer to build a luxury shopping mall.

Both the proposed development in *Kelo* and the one in West Haven have not materialized. I respectfully offer that fact for your additional consideration. Regardless of one's view about whether the U.S. Supreme Court's decision in *Kelo* was right or wrong, takings for private development by eminent domain can be very costly but do not always produce their promised results.

I encourage the Committee to support HB 5123 for three reasons. First, it would remedy a historical problem of eminent-domain abuse in Connecticut. Second, that problem continues today, as government is still using eminent domain for private development even after backlash from the infamous *Kelo* case saw eminent-domain reform spread across the country. Third, the Connecticut legislature cannot sit idly by: It must *do* something to stop the state and municipalities from continuing eminent-domain abuse. I will give some guidance on how HB 5123 may be worded to do just that.

First, HB 5123 would remedy a historical problem. Between 1998 and 2002, IJ catalogued over 10,000 abuses of eminent domain (but there were certainly far more; IJ found most of the cases based on news reports and court documents, but many other instances went unreported).[i] This abuse culminated in Connecticut, in the U.S. Supreme Court's 2005 decision in *Kelo v. City of New London*, in which the Court approved the condemnation of perfectly fine homes based on the mere promise of increased tax revenue and jobs. In *Kelo*, the New London Development Corporation claimed it could take Susette Kelo's two-bedroom house and those of

her neighbors in the Fort Trumbull area in order to build a private development to complement the Pfizer Corporation's neighboring headquarters.[ii]

In one of the most widely unpopular rulings in modern history, the Court held that economic development is a "public use" under the Fifth Amendment.[iii] This meant that Susette Kelo, her neighbors, and every property-owning American faced the threat of losing their homes and businesses to a private developer under the guise of raising tax revenue and creating jobs.

And after all that, the Fort Trumbull project has been an expensive failure. Although the government spent close to $80 million in taxpayer money on the project, there has been no new construction whatsoever and the once-thriving neighborhood is now a barren field home only to feral cats. In 2009, Pfizer, the lynchpin of the disastrous economic-development plan, announced it was leaving New London for good, just as its tax breaks were set to expire; the developer followed shortly after.[iv]

And things have not gotten better in Connecticut since *Kelo*. The second reason to support HB 5123 is that it would remedy eminent-domain abuse that continues to this day. In the wake of *Kelo*, eminent-domain reform spread across the country. In the years since *Kelo*, 44 states have reformed their eminent-domain laws, responding to pressure from the public; all but two of these passed reforms in just the first two years after the decision.[v] In many states, these reforms provide greater protections to property owners than the Court would have, had it sided with Susette Kelo on the narrower question before it.

In 23 of the 44 states, legislatures enacted substantive eminent-domain reforms that have eliminated eminent domain for private development almost entirely in those states. In the other 21 states, lawmakers increased eminent-domain protections for property owners to a lesser extent. Yet although more could be done to strengthen those laws, local officials have mostly abandoned eminent domain as a development tool due to how politically unpopular it is.

Eleven of these 44 states passed constitutional amendments that strictly limit the use of eminent domain to transfer property to private developers. And many states now require that properties be individually declared "blighted" according to objective criteria focused on legitimate public health and safety concerns, essentially eliminating the problem of "bogus blight."

In the wake of *Kelo*, courts are also making it more difficult for the government to engage in eminent-domain abuse. Ten state high courts have either rejected *Kelo* or made it more difficult for government to engage in takings for private development by making it harder for government to show a public use for the taking. Supreme courts in three states—Ohio, Oklahoma, and South Dakota—have explicitly rejected *Kelo*. Of the many state courts to consider the question of eminent domain for private development since *Kelo*, only one state high court (New York's) has signed off on anything nearly as expansive as the federal rule.

All told, 47 states have strengthened the rights of private property owners in legislatures and courts in the years since the U.S. Supreme Court's decision. But eminent-domain abuse is alive and well in Connecticut.

For example, the City of West Haven recently joined New London in embarking on ill-advised deals with private developers. In 2016, IJ filed a lawsuit on behalf of West Haven resident Bob McGinnity (along with two of his elderly family members) in a challenge to the government's attempt to condemn his home in order to build a luxury shopping center. The City

of West Haven's redevelopment plan called for land to be acquired, by eminent domain if necessary, and then transferred to a private developer to transform a large chunk of West Haven's waterfront (currently devoted to mixed commercial and residential uses) into an outdoor shopping mall. IJ quickly obtained a preliminary injunction preventing the city from taking Mr. McGinnity's property while the case was pending in the trial court. The case was settled in 2017 when Mr. McGinnity voluntarily sold his home to the developer in order to care for his elderly uncle.

Today, despite the fact that West Haven acquired the land necessary for the project, nothing has been built. Like in New London, land in West Haven remains undeveloped.

Finally, the Connecticut legislature must *act* by passing HB 5123. I would like to give a brief overview of how HB 5123 should be worded. HB 5123 needs three things to ensure that it stops eminent-domain abuse: (1) a clear definition of public use that excludes private development; (2) a clear definition of "blight" that will preclude pretextual takings; and (3) legislative bodies must be required to vote on the record in order to use eminent domain. IJ's model eminent-domain legislation embodies these three concepts. It is attached to my testimony and can be found at https://ij.org/activism/legislation/model-legislation/model-eminent-domain-law/.

In conclusion, this Committee should support HB 5123. It would mean the end of eminent domain for economic development and a return to the principle that one's home is one's castle. I am happy to answer any questions you might have, including questions about IJ's model eminent-domain law, IJ's cases in Connecticut, or what other states have done to reform their eminent-domain laws.

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[i] Dana Berliner, "Public Power, Private Gain: A Five-Year, State-By-State Report Examining the Abuse of Eminent Domain," Institute for Justice, April 2003, available at http://ij.org/wp-content/uploads/2015/03/ED_report.pdf.

[ii] For more background on the case, see Jeff Benedict, *Little Pink House: A True Story of Defiance and Courage*, Grand Central Publishing (2009).

[iii] *Kelo v. City of New London*, 545 U.S. 469 (2005).

[iv] See, for instance, Glenn Harlan Reynolds, *Can the Government Take Your Land? Yup, but the 'Little Pink House' was worth fighting for*, USA TODAY, April 16, 2018, available at https://www.usatoday.com/story/opinion/2018/04/16/littlepink-house-susette-kelo-pfizer-supreme-court-column/519093002/.

[v] "50 State Report Card: Tracking Eminent Domain Reform Legislation Since *Kelo*," published and continuously updated by the Institute for Justice, available at http://castlecoalition.org/50-state-report-card.