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Testimony of D. Benjamin Barros Before
the House of Representatives State
Government Committee

Hearing on House Bills 1835 and 1836
Concerning Eminent Domain

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Mr. Chairman, members of the Committee, thank you for the opportunity to be here today. My name is Ben Barros, and I am an Associate Professor of Law at Widener Law School in Harrisburg. I both teach and write on eminent domain issues. I am familiar with the issues raised in the Supreme Court's decision in *Kelo v. New London* and with the response to that decision in legislatures around the country.

Kelo sparked a tremendous amount of public outrage over the potential for government abuse of the power of eminent domain. I believe that the legislature should respond to this public outrage and enact measures to protect private property from eminent domain abuse. House Bills 1835 and 1836 are an encouraging step in the right direction. Eminent domain, however, is an important tool for local governments, and the legislature must be careful not to overly restrict local governments' ability to take property for legitimate reasons. Your very difficult task is to determine where to strike the right balance.

My testimony today has two parts. First, I will suggest that you consider giving homes additional protection from being taken by eminent domain. Second, I will address some issues raised by the language of House Bills 1835 and 1836 about striking the right balance between protecting private property owners and maintaining local governments' ability to act in the legitimate public interest.

Protecting Homes

Like most of the bills proposed around the country in response to *Kelo*, House Bills 1835 and 1836 apply equally to all kinds of property. *Kelo* involved New London's

attempt to use the power of eminent domain to transfer private property, including people's homes, to a private developer. New London's justification for taking the property was to spur economic development, and the Court concluded that this type of "economic development taking" satisfied the public use requirement of the Constitution's Just Compensation Clause.

Unsurprisingly, the legislative response around the country to *Kelo* has focused on preventing economic development takings by restricting the scope of the type of public use sufficient to justify an exercise of eminent domain. House Bills 1835 and 1836 fit this mold.

I want to suggest that this broad approach misses a key component of the public's outrage over *Kelo*. My sense from reading reactions to *Kelo* and from talking with many people about the issue is that most people are not particularly worked up about economic development takings in a generic sense. Rather, what seems to be at the core of most people's concern is the possibility that their local governments might take their *homes* to clear land for a private developer, as the town of New London did in the project that gave rise to the *Kelo* litigation.

Focusing on homes would be consistent with the common-sense notion that homes are different from other types of property. People become personally attached to their homes. Homes tie people to their communities. Displacement of people from their homes can separate them from family, friends, schools and jobs.

I therefore suggest that you consider giving additional protection to homes in the eminent domain context. While restricting economic development takings is at the forefront of people's minds after *Kelo*, you also should consider protecting homes from

more traditional exercises of eminent domain. People unhappy about their homes being taken for a shopping mall are likely to be only marginally less unhappy if their homes are taken for something that fits the classic picture of a public use, like a highway.

Many other areas of law treat homes differently than other types of property. Most relevant here, the legal system already gives special protection to people's possession of their homes in a number of contexts, such as making it harder for a lender to foreclose on a home than to repossess another type of property. The law also gives special treatment to homes when interests other than possession are at stake. For example, the government is held to a higher standard when it searches a home than when it searches other types of property, like cars or undeveloped land.

Recognizing that homes are special does not mean that local governments should be prohibited in all circumstances from taking homes. There are times when taking homes is vital to the public interest. But there are a number of approaches that you could take to give homes additional protection and encourage government entities to take homes only as a last resort. For example:

- Responding directly to *Kelo*, you could prohibit the taking of homes for economic development, but allow economic development taking of some other types of property.
- You could permit the taking of a home for *any* type of public use only after a finding, reviewable by a court, that there is no alternative course of action that would serve the same public goal at a reasonable cost.
- You could require governments to pay a premium (say 10% or 15%) over fair market value for a taken home, which would both provide an

economic disincentive to take homes when other types of property are available and compensate the homeowners for some of the personal value they placed in their homes.

These approaches – alone or in concert – would help protect homes while maintaining flexibility for local governments to take other types of property. Common sense tells us that homes are different, and deserve special legal treatment in many contexts. Constituent outrage over *Kelo* is tied in large part to concern about the vulnerability of homes, and it therefore would be appropriate for you to consider including special protection of homes in your legislative response to *Kelo*.

Comments on the Proposed Language

I will now turn to the proposed language of House Bills 1835 and 1836. Because the proposed language of two bills is similar, I will direct my comments to House Bill 1835.

At the outset, I note that the proposed bills apply only to local governments, and do not restrict takings by the State of Pennsylvania. There may be good reasons to apply restrictions on eminent domain on the local level, but not the state level. Many commentators, for example, argue that local governments are more subject to special interest influence than state governments. But to give property owners the maximum amount of protection, it may be worth considering applying the same restrictions to the state. This, of course, would require the input of the state agencies that exercise the power of eminent domain.

Subparagraph (i) of House Bill 1835 prohibits the use of eminent domain to “turn [the taken property] over to a nonpublic interest.” My first observation is that while I understand the intent of the language, the litigator in me sees ambiguities in the phrase “nonpublic interest.” “Private person or entity” might be preferable language.

More broadly, however, there are many circumstances where the use of eminent domain to transfer property to a private person or entity may be appropriate, and the proposed language therefore may be too restrictive. Using eminent domain to transfer property to a private developer to spur economic development may be objectionable, but what about the use of eminent domain to transfer the property to a privately-owned utility? To a private university to expand its campus? To a not-for-profit museum or symphony? To a privately-owned hospital that is greatly needed by the community? To a sports team for a new stadium? I do not mean to suggest that using eminent domain in all of these contexts would be appropriate – I’m particularly suspicious of sports stadium projects myself – but they are all circumstances that you should consider. In some areas, particularly urban areas, it may not be practical to obtain suitable property for these types of projects without using eminent domain.

You should also consider the use of eminent domain to take blighted property and turn it over to a private developer. This type of taking would be barred by House Bill 1835 as it is currently drafted – it would be impractical to expect local governments to put all blighted property that is taken to public use in the classic sense. That may not be a bad thing. The concept of blight has been abused by local governments to justify what are really economic development takings. Clearing blight was also the justification for urban renewal projects that in hindsight destroyed vibrant, if poor, neighborhoods and

replaced them with what many planners now consider to be sterile redevelopment project. (I should note in this context that when I was talking about giving additional protection to homes, I generally meant homes of all sorts, including rented apartments. Except in the context of compensation for taken homes, people in owned and rented homes have similar interests in avoiding displacement.)

On the other hand, local governments should have the power to take truly blighted property. The difficult task is to come up with a definition that separates blighted property from merely economically depressed property. Blighted housing, for example, could be defined to be unfit for human habitation or defined as housing that violates certain housing code provisions. Blighted commercial property could be defined as property that has been vacant for a certain amount of time and has no real prospect of being occupied in the near future. Care also must be given to the treatment of non-blighted property in an otherwise blighted area. The Supreme Court started down the slippery slope towards *Kelo* in the 1954 case *Berman v. Parker*, where the Court permitted the taking of a non-blighted department store as part of a larger clearance of a blighted area.

Defining the circumstances where it is permissible for property taken by eminent domain to end up in private hands is a difficult task, but not an insurmountable one. Beyond tightening up the definition of permissible public use, however, there are a number of other steps that you can take to protect private property owners from abusive uses of eminent domain by making the eminent domain process fairer.

The examples I mentioned before of requiring certain findings to be made or certain premiums to be paid would fall in this category. You also could require some

exercises of eminent domain to be put to a vote by the residents of the municipality. Or you could require a municipality to make a bone fide offer (including a price) to purchase the property before using eminent domain. If the property owner later contests the value of the property, and a court finds that the value is higher than the price initially offered by the municipality, you could allow the property owner to recover attorney's fees or a premium above the court-set value from the municipality. Allowing this type of fee shifting would encourage municipalities to show good faith in their initial offer for the property.

You could also require a reverter clause, as proposed in subparagraph (iii) of House Bill 1835. As drafted, however, the reverter clause has two potential problems. First, it does not account for the fact that the condemnee has already been paid fair market value as compensation for the taken property. Second, it is unlimited in duration, which presents the possibility of the reverter being exercised two hundred years after the property is initially taken. Based in part on a bill that is pending in California, language along the following lines may be preferable: "if the property ceases to be used for a public purpose within five years of the property's condemnation, the condemnee or its heirs or assigns shall have the right to reacquire the property for the compensated amount plus interest or its current fair market value, whichever is less."

This concludes my prepared remarks, and I'm happy to take your questions.