MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON ELECTIONS, PROCEDURES, ETHICS, AND CONSTITUTIONAL AMENDMENTS

Seventy-Fourth Session
March 1, 2007

The Committee on Elections, Procedures, Ethics, and Constitutional Amendments was called to order by Chair Harry Mortenson at 3:50 p.m., on Thursday, March 1, 2007, in Room 3142 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. The meeting was also videoconferenced to the offices of the Institute for Justice, 901 North Glebe Road, Suite 900, Arlington, Virginia. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/74th/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Harry Mortenson, Chair
Assemblywoman Ellen Koivisto, Vice Chair
Assemblyman Ty Cobb
Assemblyman Marcus Conklin
Assemblywoman Heidi S. Gansert
Assemblyman Ed Goedhart
Assemblyman Ruben Kihuen
Assemblywoman Marilyn Kirkpatrick
Assemblyman Harvey J. Munford
Assemblyman James Ohrenschall
Assemblyman Tick Segerblom
Assemblyman James Settelmeyer

COMMITTEE MEMBERS ABSENT:

Assemblyman Chad Christensen (excused)

GUEST LEGISLATOR PRESENT:

Assemblyman William Horne, Assembly District No. 34

STAFF MEMBERS PRESENT:

Patrick Guinan, Committee Policy Analyst
Kim Guinasso, Committee Counsel
Bryan Fernley-Gonzalez, Deputy Legislative Counsel
Terry Horgan, Committee Secretary
Trisha Moore, Committee Assistant

OTHERS PRESENT:

Jenifer Zeigler, Castle Coalition Legislative Affairs Attorney, Institute for Justice, Arlington, Virginia
Dennis Johnson, Private Citizen, representing PISTOL (People's Initiative to Stop the Taking of Our Land)
Janine Hansen, State President, Nevada Eagle Forum
Doug Busselman, Executive Vice President, Nevada Farm Bureau Federation
John Wagner, representing The Burke Consortium

Chair Mortenson:
[Roll called and opening remarks made] We will open the hearing on A.J.R. 2.

Assembly Joint Resolution 2: Proposes to amend the Nevada Constitution to prohibit the taking of private property for any private use. (BDR C-22)

Assemblyman James Ohrenschall, Assembly District No. 12:
Assembly Joint Resolution 2 proposes to amend the *Nevada Constitution* by adding one sentence to Article 1, Section 8, paragraph 6, that would read, "Private property shall not be taken for any private use." I do have a PowerPoint presentation to show the Committee (Exhibit C).

In June 2005, the United States Supreme Court rendered its decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). It was a split decision, 5–4, and it really alarmed many people about private property rights and about the power of eminent domain and how broadly it may be used. Traditionally in our country, we believed that pursuant to the takings clause of the Fifth Amendment, government would only take private property for a public use.

The *Nevada Constitution* has a parallel takings clause, Article 1, Section 8, paragraph 6, that has served us well since our statehood. The home I am showing (Exhibit C) is one of the 115 homes in the Fort Trumbull area of New London, Connecticut. The New London Redevelopment Agency decided it wanted to take these homes and redevelop the community because they believed it would shore up the tax base and create better economic development. This home is typical of many of the homes in the area. The home Susette Kelo had, which was on the waterfront, was an older home, but not a blighted home. It was an older home. People had grown up in that home and families had been raised there. A lot of memories were attached to that home. Property can be more than just an investment, it can relate to "personhood" and identify who a person is.

The Redevelopment Agency in New London felt it was a better use to take the 115 homes and create a small urban village with a hotel, 80 homes, and some shopping. It would become a very nice area, but if it is your home, your memories, and the government is forcing you to sell, it is a different story.

The *Kelo* majority opinion was written by Justice Stevens and justifies expansion of the term "public use" to include a taking for economic development. Prior Supreme Court opinion in the *Berman v. Parker,* 348 U.S. 26, 33 (1954) case talked about taking property for blight, but had not extended it as far as this. Even the majority admits that the area was not blighted; just that the Redevelopment Agency had determined that there would be greater revenue gains from the redevelopment project on the Fort Trumbull waterfront. The majority felt that the whole would be greater than the sum of its parts in terms of the 115 homes that had existed there. If this were your home, how would you feel?

Four of the Justices dissented in that opinion, and they dissented very strongly. This quote is very significant:

> Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.
>
> To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash

> out any distinction between private and public use of property, and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment. Accordingly, I respectfully dissent.
>
> When interpreting the *Constitution*, we begin with the unremarkable presumption that every word in the document has independent meaning, "that no word was unnecessarily used, or needlessly added." In keeping with that presumption, we have read the Fifth Amendment's language to impose two distinct conditions on the exercise of eminent domain: "the taking must be for a 'public use' and 'just compensation' must be paid to the owner."
>
> These two limitations serve to protect "the security of Property," which Alexander Hamilton described to the Philadelphia Convention as one of the "great obj[ects] of Gov[ernment]." Together they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will.

If you recall the founding of our country, one of the great objects was protecting minorities from the tyranny of the majority. Even if, perhaps, the New London Redevelopment Agency felt that 115 homes really were not the best use of that land, our country is founded on trying to respect the rights of minorities. This is another excerpt from the dissent:

> In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public.
>
> Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words "for public use" do not realistically

> exclude *any* takings, and thus do not exert any constraint on the eminent domain power. 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 Founders cannot have intended this perverse result. "That alone is a *just* government," wrote James Madison, "which *impartially* secures to every man, whatever is his *own*."

Again, we see the overtones of the majority basically tyrannizing the minority. Here is Justice Thomas's separate dissent:

> Long ago, William Blackstone wrote that "the law of the land ... postpone[s] even public necessity to the sacred and inviolable rights of private property." The Framers embodied that principle in the *Constitution*, allowing the government to take property not for "public necessity," but instead for "public use." When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the *Constitution*'s original meaning.

My proposed amendment would add one sentence in italics to Article 1, Section 8, paragraph 6 of the *Nevada Constitution*, and it does leave a lot of room for the Legislature, through statute, and the State, through Administrative Code, to further define "private use" and "public use." It does reiterate a broad statement concerning how we feel about takings. Mr. Edwards from the Castle Coalition at the Institute for Justice in Arlington, Virginia, told me that since *Kelo*, most states that have enacted new laws or constitutional amendments have not had any rulings that have been Kelo-like in terms of broadening the definition of "public use." Seven states have very similar language to my proposed language in their state constitutions. Here is a good, powerful quote from Justice William O. Douglas: "The Fifth Amendment is an old friend and a good friend. It is one of the great landmarks in men's struggle to be free of tyranny and to be decent and civilized."

Another strong quote is, "The *Constitution* was written to be understood by the voters; its words and phrases were used in their normal and ordinary, as distinguished from technical meaning; where the intention is clear, there is no

room for construction, and no excuse for interpolation or addition." That quote is from Justice Joseph Story speaking on a landmark case, *Martin v. Hunter's Lessee,* 14 U.S. 304 (1816), and it is important because most people, when they read the Fifth Amendment or Article 1, Section 8 of the *Nevada Constitution*, and when told the taking shall be for public use, do not think their homes can be taken for a hotel or a small urban village. I believe most people understand the *Constitution* in terms of Justice Story's words.

I want to add a quote from the father of our *Constitution*, James Madison:

> I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations.

Ronald Coase won the Nobel Prize in 1991 for the Coase Theorem which states that, if you ignore transaction costs, secure private property rights lead to a general benefit to society. I may be over-summarizing the quote, but if private property rights are not secure and if people are not stable in their belief in those rights, it is not good for society and it is not good for the economy. People must have faith in their title, whether it is to land or personal property. I believe passing A.J.R. 2 will benefit the State, benefit the economy, and benefit the people.

Before we go to Jenifer Zeigler in Arlington, Virginia, at the Institute for Justice, I would like to add that the Institute for Justice represented Susette Kelo in her case before the United States Supreme Court.

Jenifer Zeigler, Castle Coalition Legislative Affairs Attorney, Institute for Justice, Arlington, Virginia:

I am the legislative affairs attorney for the Castle Coalition, which is a project of the Institute for Justice. The Institute for Justice is a nonprofit, public interest law firm that litigates across the nation in a number of different issues, one of which is property rights. We were so inundated with property rights cases and requests to represent homeowners in instances of eminent domain abuse that we branched off and started the Castle Coalition, our grassroots activism project through which we try to educate homeowners on their property rights. If they are threatened with eminent domain, we advise them on how to go about challenging that threat. Because we are a small nonprofit we must be highly selective, so we can only take on a few cases a year. We are trying to find a way to reach out to other homeowners as well.

We started over a decade ago. One of our first cases was Vera Coking who was a property owner with a house in the middle of a parking lot in Atlantic City where Donald Trump wanted to build a limousine garage. She did not want to sell so he tried to use eminent domain, and we successfully defended her property. In fact, if you were to go to Atlantic City, her house still sits in the middle of a parking lot next to Trump Tower.

We have since represented several other homeowners as well as filing amicus briefs in other cases including the *Pappas* [*City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 119 Nev. 429, 76 P.3d 1 (2003)] case in Nevada. As mentioned, we represented Susette Kelo and her neighbors in the case that went before the Supreme Court. We were, unfortunately, about as surprised as the rest of the nation with the decision. We thought everyone knew what the Fifth Amendment stood for, what a traditional "public use" was, and were disappointed to discover that the Supreme Court allowed things like "economic development" to be considered a public use.

One thing the Court did get right was they said it was up to the states to determine what a public use was. That is when my position was created as part of the Castle Coalition. While we do not normally get involved with legislation, we knew that it was now up to the 50 states to take a hard look at their state constitutional provisions and statutes in protecting property rights. We have been trying to support the 50 states and help them create strong language. Having this vast experience litigating, we know what the typical loopholes are and how to help draft the strongest language. We provide our expertise testifying and lobbying, and our experience in defending property rights. Last year we helped 34 states pass reform, and are trying to help the few states that were not in session last year in any way we can. Additionally, we will be going back to strengthen laws that were passed last year.

In speaking about the two prongs of the Fifth Amendment, and the *Nevada Constitution* mirrors that language, the issues are "public use" and "just compensation." At the Institute for Justice and the Castle Coalition we focus on the "public use" side, and that keeps us very busy. We do not even get the chance to delve into "just compensation." We are focusing on "public use" and trying to restore property rights so that the only time those can be taken by someone else against an owner's wishes are in cases of a legitimate necessity. In "public use" you traditionally think of bridges, roads, schools, and libraries, not high-rise condos, big-box stores, and things like that. Unfortunately, what we have seen is a trend toward the over-use of eminent domain, which was meant to be a very limited government tool to carry out very limited functions in cases of necessity. Instead, it has grown into this economic development tool

and governments are using it for blight and to encourage their economy, industry, and job growth. That is a really unfortunate trend, not only because it is an improper use, but, as mentioned, when you start undermining property rights, you really run the risk of threatening all our other constitutional rights that are built on that foundation as well.

So, with "public use" we are trying to encourage a definition that ensures that it means what it was intentionally meant to mean—limited to the government owning, occupying, and using the property that it takes by eminent domain. The exceptions to that use would usually be for utilities, and sometimes for incidental benefits, for instance in the situation where you have a government building and you need a portion of land for a coffee shop—those kinds of exceptions should be let in—and also for "blight." If the government feels you could use eminent domain for blight, as opposed to normal public nuisance police powers, then the state needs to ensure that "blight" is narrowly defined so you are only talking about establishing "blight" on a property-by-property basis and for truly unsafe and threatening properties.

In a lot of states, we hear "*Kelo* cannot happen here. We do not allow takings for economic development; or if we do, because of the backlash, the trend is it will not happen." The problem is, abuse does not happen under economic development law, it happens under blight law. Usually the definitions are so broad that an entire area can be blighted for ridiculous reasons. You saw Susette Kelo's house. It was clearly not a blighted or unsafe property. A city did that, took property, turned around and gave it to a developer that would generate a higher tax base.

Seeing Nevada's *Constitution* and the potential for broad interpretation from the Supreme Court, it is so important for the State to step in and take the language a step further. Define what "public use" is, and, similar to the language proposed in A.J.R. 2, let it not be for a private use. A more substantive way to state that would be to prohibit eminent domain from being used to transfer property to a private entity. Then you can make your exceptions for utilities, or after condemnation of an unsafe property. You must use substantive language so that you do not have to worry about your *Constitution* being subject to broad interpretation, and with that, you will truly have protected property rights in your State.

Dennis Johnson, Private Citizen, Carson City, Nevada:
I am here to speak in favor of Assemblyman Ohrenschall's proposed language. I will be speaking from a different perspective, however, because I spent about

30 years in real estate-related matters and property titles, and 22 years enforcing eminent domain.

When someone loses their property because of eminent domain, it is a very stressful situation. It causes anger and frustration and there are a lot of questions. Among the approximately 1,500 properties I am familiar with, some of the worst anger and frustration I have seen occurred when it was known the property will go to a private developer and not to a public use. This past year, I provided assistance to those writing the ballot language for Question 2 and I did so because I believe in that ballot initiative. Putting the language Assemblyman Ohrenschall wants into the *Constitution* will help make the eminent domain process in Nevada a little more palatable to the property owners who may be affected by eminent domain.

Assemblyman Segerblom:
Mr. Ohrenschall, are you aware of any situation in Nevada where private property has been taken for private use?

Assemblyman Ohrenschall:
I am not an expert in the area, but I am familiar with the *Pappas* case Ms. Zeigler mentioned. In that case, the Fremont Street Experience needed to build a garage and used condemnation to take some property that belonged to the Pappases and to former Senator Hecht. There was a lot of litigation and finally, I believe, the Pappases were victorious at the Nevada Supreme Court.

Assemblyman Segerblom:
So the Court did rule that "public use" prevents purchasing private property for private use?

Assemblyman Ohrenschall:
Could I defer to legal counsel?

Dennis Johnson:
It is my understanding that through the trial court, the rights of the property owners, the Pappases, were upheld. When it went to the State Supreme Court, the right of the condemning agency was upheld.

Assemblyman Segerblom:
So in the current state of Nevada law, a public agency can condemn private property and turn around and give it to something like the Freemont Street Experience? Without this constitutional amendment, something like *Kelo* could happen here?

Dennis Johnson:
In my opinion, yes.

Jenifer Zeigler:
With the *Pappas* case, the question ends up being, "was it public use? Is taking that property and giving it to someone else a legitimate public use?" In Nevada, blight is a justified public use and your blight law is broad enough that the area was blighted. That was found to be appropriate and it was considered a legal taking.

You do not hear about the cases where they say, "We are going to take this property and give it to a big developer"; they say, "We are going to blight this property." That, in itself, is a legitimate public use and then the government is allowed to turn that property over to whatever private entity they want once it has been blighted. As a legitimate condemnation of unsafe property, that makes sense. If the government is going to condemn an unsafe building, you do not expect the government to hold on to it forever, but that is usually on a property-by-property basis. Instead, what you are seeing is government blighting an entire block or an entire ten-block area, which in no way appears unsafe or needs to be condemned. Once they do that they say, "Oh, now we have to unload it on someone," and they turn it over to a private party who had probably expressed interest in the property all along.

In front of the court you do not get that question of whether or not there is a private benefit or private use. The court asks if it was condemned for blight and if that was a legitimate public use; and right now, under Nevada law because blight is too broad, it is. If you want the question to be, "Is this a public use?" and to have "public use" be only those things you traditionally think of, you need to require that the government own it, occupy it, and use it. There should be just a few other exceptions that allow property to be transferred out of the government's hands and into the hands of a private individual, and those exceptions would be things like utility easements or blighting one unsafe property that is a threat to public health and safety.

Assemblyman Settelmeyer:
This issue has captivated our nation, and rightly so. There have been abuses such as this in almost every state. I applaud the Institute for Justice, the Castle Coalition, and other organizations that have gone forward with this.

In Las Vegas in 2001 there was a case, the *City of Las Vegas Downtown Redevelopment Agency v. Crockett*, 117 Nev. 816, 34 P.3d 553 (2001), in

which 17 parcels were taken from individuals through blight. I believe a section of that ruling, but not the blight section, is being appealed now.

We do need to do something, but I am concerned that the concept in A.J.R. 2 is a little too specific. I signed on to this bill, but as I read the phrase, "for any private use," I worry about situations where utilities are not private. Would they still be able to utilize this? What about situations like airport concession stands or magazine stands, would this forbid those? We might need to change the bill a little, but I appreciate that it has been brought forward for discussion. We will try to work it out and make it better for all of us in the State.

Assemblywoman Kirkpatrick:
We define blight within our statutes and use it in enterprise districts or redevelopment districts. In my opinion, there is a lot of blight in certain areas of our State and local government accumulates those blighted properties and turns around and uses them for affordable housing or for small businesses. That is a private use because it typically goes back to a nonprofit organization that is putting the project together. Are you saying we would no longer be allowed to do that if we add this language? Along the same line, when you put some of those zoning restrictions in place, if you have a mixed-use driveway to a retail center, would that fall under "private use" because the center is given to a particular person? Are you saying we would be in violation if we had this language in?

Jenifer Zeigler:
Assemblyman Ohrenschall has the exact spirit of what needs to happen; however, I would agree and I think he would probably agree too after some discussion, that tweaking the wording so that it reads right and is going to be clearly interpreted is important. You are addressing an extremely important issue that state after state is facing, which is language that talks about "primary purpose" or "private interest" or "private benefit" because those are all terms that go to intent. Those are extremely hard to prove so you are exactly right. You are running the risk of, "Well, if they put in this road, it increases the property value of the houses around it," and is that not a private benefit? What you want to do is make certain your law does not leave itself open to unnecessary subjective judgment. If you prohibit any transfers to private parties, eminent domain will not be used to take property from an individual and give it to another private entity. You clear up that confusion and then the exceptions to that would be for utilities, for blight, and for incidental needs such as the coffee shop in an airport.

With blight, the after-the-fact transfer is not a problem as long as the taking was legitimate in the first place—it was legitimate blight. As long as the taking is for a property that is legitimately unsafe and needs to be condemned, what the government does with it after the fact is not the issue. The problem right now is that these are not legitimate blight takings; they are taking entire areas. They can take property for anything they want as long as the blight is on a property-by-property basis and only for truly unsafe properties. If there is an unsafe house and they want to tear it down and put in a Home Depot, great, as long as that house was unsafe to begin with. The problem is when the house is in a nice middle-class neighborhood that they are blighting for arbitrary reasons and then transferring to someone else.

Another suggestion would be to include some kind of right of reversion or right of first refusal, so that surplus or unused property that the government did not end up using for whatever they had originally intended would first be offered to the original owner before ownership was transferred. If you do that, you eliminate a lot of abuse because if the government is saying, "We will not take property and give it to another private entity unless we first offer it back to the original owner," that will add a sense of fairness to the proceedings. It would be similar to offering a piece of cake to a friend—one person cuts the cake and the other person chooses which slice. There is no incentive for either side to be greedy.

We do not want to tie the hands of municipalities. There are times they take property that they end up not needing, and you do not want to prohibit them from ever transferring it to a private party. If you have that right of reversion so they first have to offer it back to the original owner, you eliminate a lot of the opportunity for abuse.

Assemblywoman Kirkpatrick:
Could you email Mr. Ohrenschall a definition of blight that you think could be more flexible, but would get to the core of what you are saying?

Jenifer Zeigler:
Yes, and also on our website, castlecoalition.org, we have both constitutional and statutory model language that does just that—has the definition of public use I was speaking of and a definition of blight. There is language that can solve that problem.

Assemblyman Ohrenschall:
Assuming that this one sentence is added to the *Nevada Constitution*, since blight is defined as a public use by statute and case law already, would that

change? Would blight no longer be a public use, since it is already a long-standing, defined public use in Nevada law?

Jenifer Zeigler:
Unfortunately, this constitutional amendment will not change that. The ballot amendment, Question 2 from last fall, would, I believe. As A.J.R. 2 stands now, it would not solve the blight question. To solve that, you would either have to go back in statute and redefine blight, or, what would be the stronger protection, add a sentence to this bill that would define blight in the *Constitution*. That would be even better, then you do not have to worry about the Assembly coming back a couple of sessions later and loosening the definition again.

Assemblyman Ohrenschall:
Is the *Constitution* the proper place for the definitions of private use and public use? Is not statute the better venue? The *Constitution,* as a social contract, is a kind of guide as to what we believe should be a private use and what should be a public use, but the actual definition would be in statute, in administrative regulation, or through our State's case law.

Jenifer Zeigler:
That is an excellent point and you are exactly right. That would be the case if our U.S. Supreme Court would observe the *Constitution*, as written. The problem is, what we traditionally knew and understood as public use is gone. Until now, the details would be in statute. If you are truly going to protect property rights, you need to make certain that those broad interpretations cannot happen. I would like to see things regulated on a more local level and since one of the most fundamental rights has not been protected in the federal *Constitution*, the states need to make absolutely sure that it is protected to the fullest extent in the state constitutions. I would normally say definitions belong in statute; however, this is an important enough right that you need to include as many protections as you can in your State *Constitution*.

Assemblyman Ohrenschall:
There is one slight difference between the U.S. Supreme Court and our state courts in Nevada. In Nevada we elect our judges, so if a Nevada court issued a *Kelo*-like decision, they would be answerable to the electorate.

Assemblyman Cobb:
Mr. Ohrenschall, is it your understanding that this language you are adding to our *Constitution* would mean that property taken by a governmental entity could never revert back to private property?

Assemblyman Ohrenschall:
It is my understanding that this would not place a restriction on that. That could be provided for by statute, but I will defer to our legal counsel.

Kim Guinasso, Committee Counsel:
Was the question whether this provision in the *Constitution* would prohibit property from being returned to a private use after it had been taken for a public use?

Assemblyman Cobb:
That is correct.

Bryan Fernley-Gonzalez, Deputy Legislative Counsel:
I do not think this constitutional amendment would do that. Under this amendment, the statute would further define what could be done or could not be done.

Assemblyman Cobb:
So it is your understanding that it cannot be taken expressly for the purpose of private use, but could be taken for a public use and then, at some later date, revert back to private use?

Bryan Fernley-Gonzalez:
Yes. It cannot be taken for the purpose of benefiting a private party. It can only be taken for the purpose of a public use.

Chair Mortenson:
The public passed a ballot question nicknamed PISTOL (People's Initiative to Stop the Taking of Our Land) that would very drastically change Section 8, Article 1 of our *Constitution*, if it passed a second time. As I look at Mr. Ohrenschall's bill, it is an exact replica of the *Constitution* except for the one last sentence. If Mr. Ohrenschall's bill were to pass and become law, would all the provisions of PISTOL disappear and place us back to the original *Constitution,* with the one extra line?

Kim Guinasso:
The PISTOL initiative needs to pass the public vote again before it becomes law. This provision is a constitutional amendment initiated by the Legislature. The *Constitution* requires such an amendment to pass two subsequent Legislatures and then a vote of the people.

There are a number of intervening events that could take place that are going to determine which version would be implemented. Article 16 of the *Constitution* sets forth a timeline for how amendments are to be brought forth. If two or more amendments that affect the same section of the *Constitution* are ratified at the same election, then, if they can be given effect without contradiction in substance, they both become part of the *Constitution*.

Because the PISTOL initiative has already passed one vote, it will only take the next intervening election to become law. Assembly Joint Resolution 2 would still need to be passed by the next Legislature.

Chair Mortenson:
I understand that PISTOL would be enacted first. If Mr. Ohrenschall's bill was voted in two years later, because the way it is written in the original *Constitution* before PISTOL changed it, will it revert back to the original *Constitution*, but with one additional line on it?

Kim Guinasso:
The *Constitution* would be amended if it were to pass the next election and that would be the way the *Constitution* would exist. I believe a new amendment would need to be proposed which would take into account the new language as implemented by the election.

Assemblyman Ohrenschall:
I want to point out that the PISTOL initiative creates a new section of Article 1. My A.J.R. 2 amends existing Article 1, Section 8. I do not believe they are mutually exclusive. My amendment complements either or both.

Chair Mortenson:
I think you are right.

Kim Guinasso:
That is correct. I did not realize the PISTOL amendment did not affect the same section.

Assemblyman Ohrenschall:
The sentence I would like to add to the *Nevada Constitution* says, "Private property shall not be taken for any private use." It does not mention "private entity" so theoretically, if the Legislature wanted a private entity to be the beneficiary of a taking for a public use as defined by statute or case law, that would be allowed. It just would not be allowed for a private use. In some ways, the constitutional amendment ties the hands of local governments and

redevelopment agencies perhaps less than some of the other proposals in terms of some measure of freedom and trying to balance private property rights with the need to fight blight and the need for open space. Who knows what might be considered a public use in the future? Perhaps it will be high-density housing. In 20 years the Legislature might consider that a public use and the people might agree with that. I believe it strikes a good balance and it is good for the *Constitution*.

Janine Hansen, State President, Nevada Eagle Forum:
We are here to support A.J.R. 2 and we appreciate that it has been brought forward. Across our nation, this issue has mobilized people of all political persuasions who see the erosion of our essential right of property.

Last session, Senator Care and Assemblyman Horne had bills that further defined blight, locking down the definition in a much better way than in the past. With regard to the right of first refusal, that is, if the government is not going to use the property then the person whose property it was has the right to get the property back, I believe that is in a Senate bill this session.

The right to private property is one of the most essential and basic rights we have. Former U.S. Supreme Court Justice George Sutherland said,

> It is not the right of property which is protected, but the right to property. Property, per se, has no rights, but the individual, the man, has three great rights, equally sacred from arbitrary interference: the right to his life; the right to his liberty; and the right to his property. These three rights are so bound together as to be essentially one right. To give a man his life but to deny him liberty is to take from him all that makes life worth living. To give him liberty but to take from him property, which is the fruit and badge of liberty, is to leave him a slave.

Regarding the *Kelo* decision, 30 state legislatures have now passed laws or constitutional amendments to respond to this. In addition, 11 states, including our own, have ballot measures; and the Nevada Eagle Forum, through our Nevada voter guide, did support the PISTOL initiative. The Supreme Court ruling in *Kelo* has endangered the ownership of every home, business, church, and farm. The Supreme Court thought they could morph the *U.S. Constitution*'s words, and I think this is critical, from "public use," which would have included a highway or public building, into "public purpose," which is very different. "Public use" would be defined to include the transfer of the private property of lower income people to higher income people who will pay

higher taxes, and include just about everything else that comes under redevelopment.

Taking private property in order to get more money into government is not authorized by the *U.S. Constitution* or any statute. Justice Thomas wrote in his dissent to *Kelo*, "something has gone seriously awry with the Court's interpretation of the *Constitution.*" Since *Kelo,* more than 5,700 private properties have been threatened or taken by this power of eminent domain, a tremendous increase over the preceding five years; however, the Ohio Supreme Court on July 26, 2006, handed down a stunning and unanimous decision against a $125 million development project in Cincinnati. The city of Norwood had hoped to get $2 million a year in new taxes, but the Ohio Supreme Court said that economic benefits alone, such as increased taxes, do not justify the taking of private property. The Court stated, "Ohio has always considered the right of private property to be a fundamental right" and that "property rights are believed to be derived fundamentally from a higher authority than from natural law."

An issue that needs to be responded to, probably in statute, is to prevent government from taking control of a private property until the appeals process is finished. In that Ohio case, one woman's property sat empty, without utilities, for over a year and a half and was significantly vandalized; yet ultimately, the Ohio Supreme Court decided in her favor. As a result, we should be sure that in Nevada, government does not take possession of property until the appeals are completely finished.

We certainly support the concept of the bill to protect private property and I really appreciated the tutoring we got on the constitutional issue of private property from Assemblyman Ohrenschall. I thought that was very beneficial. Thank you, and I appreciate the opportunity to support this constitutional amendment and others that will support our constitutional, fundamental right to protect private property. I have copies of "Conservatives on the March for Private Property" (Exhibit D) that I was quoting earlier for Committee members. I must add that it is a broad range of individuals from all across the political spectrum who are moving this issue in so many states. It is not just one particular philosophy, but the entire country that was outraged at the *Kelo* decision.

Chair Mortenson:
You mentioned that a situation should exist so that the property that is being condemned, or is under the process of being taken by eminent domain, should

remain in the possession of the person instead of the government taking it over. Is that provision in PISTOL?

Janine Hansen:
I cannot answer that, but I do think it would be well to address that issue in statute. I do not think it needs to be in a constitutional amendment.

Dennis Johnson:
The PISTOL initiative does not specifically address possession. What it addresses are the two elements of an eminent domain action, one being the need and necessity for a proven public project or public use, and the other being just compensation. Generally, there must be a court hearing to grant legal and physical possession of the property to the governmental agency before the property owner has to vacate the property.

Assemblyman Munford:
I am not confused about the Fifth Amendment. I know it has always meant taking property for public use only, but now it has taken another direction in terms of economics. District 6, my district, covers old Las Vegas. We are going through a confusing situation in terms of eminent domain. We might have quite a few properties or areas that might be described as blighted because we have a very large homeless population. They live in structures that might be identified by the City of Las Vegas as nuisance properties and are unoccupied and boarded up.

In some situations and circumstances in my district, the residents would welcome some type of private development of the area. We are looking for economic development and investment to bring about job creation, lifestyle improvement, and to make our district progress. The City of Las Vegas has put out a master plan. They are thinking of expanding and the location of my district is extremely appealing because of its proximity to downtown and the Strip. We have accessibility to the freeway, so it would be very convenient for any business that was located in our area.

As a result, I have mixed feelings about eminent domain. I know if someone were to take your property, the compensation would be much higher from a private company than it would be from a local government. One has more negotiable rights with a private company in terms of what one would receive as compensation because a local government can just come and take the property. Referring to the *Pappas* case, the mayor at the time said, "I would do it again," because she said it led to job creation. That had been her main focus.

I am looking for investors to come into our community. Some of the blighted areas in our community should be removed. There are some people who are sentimental about the area, those older original residents who have lived there for a long time. They do not want to give up their homes even though those homes might be identified as being blighted; however, if any investor was thinking about coming into our community, we would have a town hall meeting and let the people decide. They would have to decide if they were willing to give this up to let a development come in.

I do support the Fifth Amendment with the Founding Fathers' original intent, but economics have changed a great deal.

Assemblyman Ohrenschall:
I would like to restate that my proposed amendment would not prohibit a government agency, a redevelopment agency, from taking a condemnation for blight, because Nevada law defines blight as a public use right now. I do not believe that that would change until such time as the Legislature decided through statute, and perhaps the Executive through administrative regulation, that blight was not a public use. Taking for true blight, as I understand it, would still be permitted if this became part of the *Nevada Constitution*. As you noticed, the house in New London was not blighted, that was purely economic development.

Assemblyman Munford:
Ms. Hansen said there was legislation last session related to blight. I commend you and your efforts to protect people's private property rights.

Doug Busselman, Executive Vice President, Nevada Farm Bureau:
We are opposed to this proposal, not because we do not support the idea within the proposal, but our concern is that A.J.R. 2 does not go far enough in providing necessary protection for private property rights. We were supporters of Question 2 during the last election, and remain steadfast in the belief that that proposal is necessary for the protection of private property rights. We have spoken on other bills so far this session that work at strengthening private property rights, and we continue to support any and all efforts that provide the protection that we believe is necessary for private property owners. From that standpoint, while we respect Assemblyman Ohrenschall's proposal and appreciate his putting it forward, our concern is that we need to go further in Nevada to provide protections for property owners.

Chair Mortenson:
If Question 2 passes a second time it will go into one Article 1 of the *Constitution*. If Assemblyman Ohrenschall's bill passes, it will also be in the First Article, so Mr. Ohrenschall's bill provides protection in addition to that provided by PISTOL.

Doug Busselman:
We need to look at whether the provisions of one proposal somehow offset the provisions of the other. As we listened to the discussion at the hearing, for those who wish to use eminent domain for private use or for public use that turns into private use, the concern seems to be going both ways. Some people look at this as being okay because it will still allow for private use after it takes effect. Others are looking at it as protection saying, "No, it will not." I think we need to compare what the concepts are in the context of one reacting with the other. I am not an attorney so I cannot make that analysis, but it seems to me if it sets up conflict within the *Constitution*, where one section of the *Constitution* says one thing and another section of the *Constitution* says another, there could be confusion.

Chair Mortenson:
I do not think that could happen. I believe our Legislative Counsel Bureau has to remove conflicts of that nature, so Article 1 would have to be modified.

Assemblyman Ohrenschall:
The first sentence of the ballot initiative creates a new section, Section 22, and starts off, "Notwithstanding any other provision of this *Constitution* to the contrary..." so even if my one sentence were construed as being to the contrary of the voters' initiative, it clearly states that it is not to be affected, although I do not believe my one sentence is to the contrary; I believe it complements it. I believe it complements the other proposed amendment, too, but you bring up some good points.

Assemblyman Settelmeyer:
I agree with the speaker that we need to do much more to protect property rights. I like the amendment that is in front of us, yet I also feel it would behoove us to make certain we craft something this legislative session that is so strong that the populace will like it a lot better than PISTOL. It is my desire to see something come out of this Legislative Body, because one of the aspects of PISTOL is that you have five years to complete a project. I am willing to say the Galena Bridge is not going to be done in five years. I am also willing to say there are a couple of projects in Las Vegas that probably will not be done in five years. In that respect, it leaves the State in a dangerous situation, so we have

to put something forward to the populace that shows we understand their concerns and their issues and seek to do something better than PISTOL, but that still leaves us the ability to accomplish our tasks.

Assemblyman Ohrenschall:
I agree with you. I think the more protections for private property rights, the better, but I do believe the proper domain of those very strong protections are in statute. If we add A.J.R. 2 to the *Constitution*, the courts will understand our intent, especially in the post-*Kelo* era; and I think they understand that in Article 1, Section 8, we mean what we say and we say what we mean—public use versus private use—and, hopefully, no Nevada courts will render a *Kelo*-like decision. There are some other bills which, through statute, are trying to strengthen the law concerning a taking for economic development.

John Wagner, representing The Burke Consortium:
Two years ago a bill sponsored by Assemblyman William Horne passed the Legislature and was signed into law. It spelled out blight. At that time, there were ten indicators of what blight was, and the way the law read at the time, if any two of those indicators were present, the property could be condemned. Assemblyman Horne's bill increased the number of items needed to define blight.

Last year as I ran for the Assembly, I was asked what I would do with property such as what Mr. Munford was describing. I replied that I thought there were other ways to take care of property rather than condemning it for eminent domain. If the property was a health problem, my suggestion was to tell the landowner to clean it up. If the owner would not clean it up, the health board should clean it up and place a lien on the property if the landowner refused to pay for the cleanup. The same thing if it is an unsafe building and ready to fall down because that would be a safety hazard. So, there are alternates to taking land by eminent domain.

Property rights are very important. Property really does not have any rights, it is the people who own the property who have the rights, so property rights are basically a human right.

Dennis Johnson:
Just yesterday in another committee meeting, I heard that the limitation on the length of time government can use property has been agreed upon between the interested parties and will remain at 15 years.

Chair Mortenson:
Could you repeat that?

Dennis Johnson:
The PISTOL initiative said if the property was not used within five years it would go back to the property owner. There has been an agreement between the people both for and against PISTOL that the time frame would be 15 years. That language is being clarified in another committee.

Chair Mortenson:
If they change PISTOL's language, it will have to pass two more times.

Dennis Johnson:
It is my understanding that if a bill passes, it would take precedence over PISTOL, but that is still under discussion.

Assemblyman Munford:
Was there an eminent domain issue in Clark County related to NDOT (Nevada Department of Transportation) about building highways? I thought there was something about wanting eminent domain to be a law, because if they were denied eminent domain it would take longer to fulfill their obligations and contracts because they would have to negotiate compensation?

Dennis Johnson:
I am vaguely familiar with it. There were some questions about whether there might be a loss of federal funding if eminent domain was guided by the actions of PISTOL. Don Chairez has received a letter from the chief counsel of the Federal Highway Administration in Washington, D.C., that clearly stated PISTOL would not have an effect on federal funds. A highway or road that NDOT is going to build for the citizens is a public use, and almost all roads are built under federal rules because when federal money is involved, you play by their rules or you give the money back.

Chair Mortenson:
I see we have been joined by Assemblyman Horne. Mr. Horne, we have been discussing blight and its definition. Perhaps you would like to elaborate?

Assemblyman William Horne, Assembly District No. 34:
You are correct. Last session we passed a bill concerning eminent domain that dealt, in part, with redevelopment and blight. In order to define blight, there were a number of indicia in statute, approximately ten, and a government entity only had to find one. Now, they must find 4 or 5 out of the 10 or 11 indicia.

This issue was not in the *Constitution*, and I do not believe blight is an issue in Question 2 which will be on the ballot in the 2008 General Election.

Chair Mortenson:
We were informed that PISTOL goes into a second article in the *Constitution* and Mr. Ohrenschall's bill deals with Section 8 of Article 1.

Assemblyman Ohrenschall:
Looking at the text of the ballot initiative, it creates a new section, Section 22, under Article 1. My proposed constitutional amendment adds one sentence to Article 1, Section 8, paragraph 6—same article, separate sections.

Assemblyman Horne:
Discussing Question 2, there has been a compromise with the stakeholders that this Body will be entertaining this session. If this compromise is passed by this House, there will be a statutory change as well as a constitutional change. If Question 2 passes again it will take effect, but the constitutional change that you do this session, when it takes effect, will supersede Question 2.

Chair Mortenson:
If Question 2 passes the next time, will it become law?

Assemblyman Horne:
Yes, sir. There has been talk about changing Question 2. I do not know of any legal way that can be done because it has to be passed in the exact same form that it was on the 2006 ballot. Should it pass again, Question 2 will take effect. What may happen, should this Body pass the statutory language, is it may mirror language of that constitutional compromise and may take effect prior to Question 2 passing a second time. This session, it is possible that we would have these changes in effect prior to a constitutional change.

Assemblyman Munford:
What are the four points that describe blight?

Assemblyman Horne:
There is a list in statute including hazardous waste from a closed gas station that was not properly cleaned up; unkempt, unsafe, and boarded-up property; and those types of things. Before, they only needed to find one indicia on the list; now they must find more than one to reach the definition, the threshold of blight. This concerns redevelopment.

Chair Mortenson:
I will bring A.J.R. 2 back to the Committee. Is there any further business? [No response] As this hearing ran much longer than expected, we are not having a work session today.

Assemblyman Ohrenschall:
I want to extend the Committee's and my thanks to Jenifer Zeigler of the Castle Coalition and the Institute for Justice in Arlington, Virginia. Thank you for staying late for our hearing and we appreciate your efforts for eminent domain reform in all 50 states.

Chair Mortenson:
With no further business to come before the Committee, we are adjourned [at 5:21 p.m.].

RESPECTFULLY SUBMITTED:

_____
Terry Horgan
Committee Secretary

APPROVED BY:

_____
Assemblyman Harry Mortenson, Chair

DATE: _____

EXHIBITS

Committee Name: Committee on Elections, Procedures, Ethics, and Constitutional Amendments

Date: March 1, 2007 **Time of Meeting: 3:45 p.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
AJR 2	C	Assemblyman Ohrenschall	PowerPoint
AJR 2	D	Janine Hansen, State President, Nevada Eagle Forum	"Conservatives on the March for Private Property" essay