

---

## Much Ado About Kelo: Eminent Domain and Farmland Protection

In the case of [\*Kelo v. the City of New London\*](#), the Supreme Court ruled that the Connecticut city could acquire land by eminent domain to make way for a private commercial development project that implements the city's economic development plan. Regardless of how this controversial decision is applied, the case has raised public awareness about, and legislators' willingness to address, eminent domain. Against this backdrop, there is an opportunity for farmland protection advocates to curb condemnation that could result in, or spur, farmland conversion.

### WHAT IS EMINENT DOMAIN?

Eminent domain is the power of the government to acquire private property for public purposes. Eminent domain is authorized by Article I of the U.S. Constitution and limited by the Fifth and Fourteenth Amendments. The Fifth Amendment, which applies to the federal government, states that "...private property (shall not) be taken for public use, without just compensation." The Fourteenth Amendment extends this limitation to state governments. The *Kelo* case was about how expansively "public use" should be interpreted.

Individual states may adopt constitutional amendments and statutes to clarify and narrow the power of eminent domain beyond the federal baseline but only as applicable to states and their political subdivisions. States cannot bind the federal government. State authorities typically specify which public entities have the power of eminent domain, for what purposes, and how they must exercise it.

The term "condemnation" describes the act of a public entity exercising its power of eminent domain.

Agricultural landowners are concerned about eminent domain. Countless public projects, including highways, utility lines and schools, have converted productive land and/or split farm tracts into parcels that are no longer viable. More insidious than direct conversion is that some public projects—particularly infrastructure projects—drive new residential and/or commercial development on surrounding acres, accelerating farmland loss.

### KELO HAS CREATED AN OPPORTUNITY FOR NEW PROTECTIONS

In the wake of *Kelo*, lawmakers in at least 28 states and the U.S. Congress have filed legislation that addresses eminent domain. Most bills seek to limit the scope of eminent domain or to set new procedural requirements that ensure public input. Kentucky lawmakers are considering a bill that would create an eminent domain task force to study the use of eminent domain by the state and local governments and to assess the need for safeguards to protect private property owners and the environment.

Lawmakers are responding to pressure from their urban and suburban constituents—property owners now fearful that their land could be taken and converted to a more lucrative use in the name of economic development. *Kelo* has forced the public to reexamine, and carefully weigh, the tradeoffs inherent when land is taken by eminent domain.

Against this backdrop, farmland protection advocates could make a case for limits that favor farmland. Most states already have laws in place to support agriculture and protect agricultural land. Every state has laws to protect the right to farm and provide tax relief to farm operations, and 27 states have authorized purchase of agricultural conservation easements. Local governments have included farmland protection or open space goals in their comprehensive plans and adopted land use regulations or incentive programs to support agriculture and stabilize the land base. In addition, more than 100 communities have conducted Cost of Community Services studies that show how agricultural land makes a net positive fiscal contribution to local coffers.

Curbing condemnation of farmland would align land use decisions made by public entities at the state and local levels with other public policies. Such controls would acknowledge the importance of, and benefits bestowed by, agricultural land.

#### **POLICY MODELS ALREADY EXIST**

Lawmakers and farmland advocates can look to field-tested policies in dozens of states that curb eminent domain on agricultural land or head off the likelihood that agricultural land will be considered for condemnation. These policies recognize the tradeoffs inherent in eminent domain and tip the scale in favor of farmland.

#### ***Agricultural Districts***

Agricultural districts are special areas formed by willing landowners where commercial agriculture is encouraged and protected. In exchange for enrollment, farmers receive a package of benefits that varies from state to state. To date, there are [18 agricultural district laws](#) in 16 states.

Districts are meant to be a comprehensive response to the challenges facing farmers and ranchers in developing communities. For example, district laws may help create a more secure climate for agriculture by preventing local governments from passing laws that restrict farm practices and by providing enhanced protection from private nuisance lawsuits. To reduce operating expenses, several district laws offer either automatic eligibility for differential assessment or property tax credits to farmers who enroll.

To help stabilize the land base, 12 laws limit the use of eminent domain on land enrolled in agricultural districts. The degree of protection varies from state to state. New Jersey prohibits eminent domain in municipally approved districts unless the governor declares that the action is necessary for the public health, safety and welfare and there is no feasible alternative.

Utah requires entities with the power of eminent domain to seek prior approval from the applicable legislative body and the advisory board for the agriculture protection area (i.e., district). The legislative body and advisory board have the authority to reject the proposed condemnation. For highway projects and the disposal of waste materials, they may approve the condemnation only if there are no feasible alternatives. For other types of projects, approval may be granted only if there are no feasible alternatives or the proposed condemnation would not have an unreasonably adverse effect upon the preservation and enhancement of agriculture within the agriculture protection area.

California, Kentucky, Minnesota, Minnesota-Metro, New York, Ohio, Tennessee and Virginia statutes do not prohibit eminent domain in agricultural districts but mandate prior notification, agricultural impact statements, alternative proposals and/or public hearings. These requirements assert the importance of agriculture and may encourage entities with the power of eminent domain to choose better alternatives.

In addition, seven district laws limit or discourage public investments for non-farm development and/or the construction of certain types of public improvements in established agricultural districts. For example, California law states “It is the policy of the state to avoid, whenever practicable, the location of any federal, state, or local public improvements and any improvements of public utilities, and the acquisition of land therefore, in agricultural preserves.” The law requires prior notification and project review. In addition, the law stipulates that no entity can locate a public improvement in an agricultural preserve—the area within which a city or county agrees to enter into district contracts—unless the director of conservation and the local governing body find that the decision to locate the improvement in the district is not based on relatively lower cost of the land AND, if the land is under a district contract, there are no feasible alternatives. A provision for farmers willing to enter into farmland security zone contracts—expanded district contracts—prohibits school districts from acquiring land in farmland security zones. These provisions help head off eminent domain.

### ***Mitigation Policies***

Farmland mitigation policies attempt to compensate for the conversion of agricultural land to another use by requiring permanent protection of “comparable” agricultural land. In 2004, Connecticut lawmakers adopted [Public Act No. 04-222](#), which requires municipalities, towns, cities, boroughs and districts to mitigate the loss of active agricultural land taken by eminent domain. Local governments may either purchase an agricultural conservation easement on comparable land within its jurisdiction OR pay a mitigation fee to the state’s farmland protection program to protect similar land elsewhere in the state subject to the approval of the state’s farmland preservation program and the Commissioner of Agriculture.

### ***Executive Orders and the Farmland Protection Policy Act***

State executive orders are policy statements issued by governors to accomplish specific purposes. They may be advisory or carry the full force and effect of law, depending on the state. Governors from at least nine states have issued executive orders directing state agencies avoid contributing to the conversion of agricultural land. Some orders identify a

lead agency, typically the state department of agriculture, to review state agency activities that may result in farmland conversion. These policies may help head off condemnation and/or may be used to justify mitigation.

Massachusetts Executive Order 193, issued in 1991, has been used by the Department of Agricultural Resources (DAR) to negotiate mitigation for farmland loss. The DAR seeks mitigation for projects involving state funds and privately funded development projects subject to the state's environmental permitting process. Mitigation options include permanently protecting equivalent agricultural land by granting an agricultural preservation restriction to the Commonwealth or by making a financial contribution to its farmland protection program, a municipality or a qualified conservation organization.

These state-level policies mirror the federal Farmland Protection Policy Act (FPPA). The FPPA was enacted as a subtitle of the 1981 Farm Bill to "...minimize the extent to which Federal programs contribute to the unnecessary conversion of farmland to non-agricultural uses..." The FPPA requires federal agencies to examine the impact of their programs before they approve any activity that would convert farmland. Federal agencies fill out a Farmland Conversion Impact Rating Form, which is based on a Land Evaluation and Site Assessment system, to rate the relative impact of projects on sites subject to the FPPA. The FPPA, however, is an ineffective deterrent because the law does not *require* federal agencies to alter projects and there are loopholes in program implementation.

#### ***Agricultural Land Condemnation Approval Board***

Perhaps the most comprehensive policy approach is found in Pennsylvania. The Agricultural Lands Condemnation Approval Board (ALCAB) was created in 1979 to review requests for condemnation for highway projects and waste disposal facilities. ALCAB is an independent administrative board made up of four state agency representatives and two active farmers appointed by the governor.

Act 43 of 1981 expanded ALCAB's authority. Entities with the power of eminent domain were required to seek prior approval for condemnation for any type of project if the land was within an agricultural security area (ASA), i.e., an agricultural district. In addition, the law required review and prior approval by the board and the appropriate local advisory board for all state funded development projects that might affect land in ASAs. In the case of highway and waste disposal projects, the law stipulates that approval can only be granted if the board determines there is no feasible alternative. For other projects, approval can be granted if the board and other applicable entities determine that the condemnation would not have an adverse affect on the preservation and enhancement of agriculture or upon the environmental or comprehensive plans of the county OR there is no reasonable alternative.

The board's role has been reaffirmed by Executive Order 2003-2 that directs agencies to "...seek to mitigate and protect against the conversion of prime agricultural land." The order establishes priorities for protection and directs the board to consider these priorities when making its determinations. Permanently protected agricultural land is the highest priority.

### ***What About Agricultural Conservation Easements?***

Twenty-seven states and more than 50 local governments have established public programs to buy agricultural conservation easements (ACEs). And, dozens of land trusts acquire or accept donated ACEs on working lands. However, ACEs do not, in and of themselves, protect land from condemnation. In fact, easements could make land more vulnerable by reducing its value. To guard against this, American Farmland Trust and other land trusts and agencies require that the value of the easement be repaid in the event of condemnation. Some states provide for explicit protection for lands under conservation easements. New Jersey law states, "...no public body shall exercise the power of eminent domain for the acquisition of land...from which a development easement has been conveyed...." Pennsylvania requires review by the ALCAB for easement protected properties enrolled in ASAs, and Executive Order 2003-2 directs the ALCAB to consider permanently protected farmland as the state's most important farmland. Finally, the relative "rank" of the public entity that has acquired the easement can preclude relatively "minor" public entities from taking protected land. For example, agricultural conservation easements acquired with matching funds from the federal Farm and Ranch Lands Protection Program are afforded a degree of protection from eminent domain. Neither state nor local governmental entities can condemn a federal interest. In these cases, prior review and approval from the USDA Natural Resources Conservation Service is required.

In short, policy options for curbing condemnation on farmland do exist. While *Kelo* may seem threatening, the case has raised public awareness and lawmaker interest in eminent domain. There is an unprecedented opportunity to argue for new protections for farmland—a chance to bring land use decisions made by public entities in line with existing public policies and programs that envision a future with farmland and farming.