

## ASK THE EXPERT

By Bryan Mitchell, Consultant, McCallum Sweeney Consulting

### The Reality Backlash

**The 2005 U.S. Supreme Court decision allowing a controversial use of eminent domain has ironically led to more local legislation restricting its use.**

**Q. A community has offered a site to my company that would be partially reclaimed from private residents under eminent domain. The site seems perfect for us, but given the controversy around the use of eminent domain, should we be wary? —Anonymous reader**



**The Expert Says:** The Kelo v. City of New London decision handed down in June 2005, by the Supreme Court of the United States allows the transfer of land from one private owner to another in order to further economic development. This new use of eminent domain allows a community or legally appointed agent (private entity under the control of the government) to condemn land if the general public will benefit.

"Local governments should be afforded wide latitude in seizing property for land-use decisions of a local nature," wrote majority opinion author Justice John Paul Stevens. But the reality is that a majority of the public and politicians do not hold the same opinion. This has caused an already limited tool of local communities to become even more restricted in its use.

This ruling has unleashed a backlash from states' legislatures, which are granted the role of establishing the framework for the exercise of this power in their state. This allowance to place further restrictions upon the takings power has yielded a flood of legislation during the past two sessions. According to the National Conference of State Legislatures, the 2005 and 2006 sessions saw legislation enacted in 30 states in response to the decision. In all, 34 states now have laws in place, either through state legislation or citizen-initiated referendums, restricting eminent domain.

Today, companies like yours have such short timeframes from proposal to start-up that the lengthy eminent domain process would more than likely place the site out of contention. The other central consideration should you use eminent domain is the poor public image that is sure to follow your company to its new home. The result of all these events is that eminent domain is no longer a viable option.

So what is the best way to avoid this struggle? The first way is to be prepared. The community and stakeholders should be prepared when clients like you come knocking, and they must prove to you that there is minimal risk in locating in their community.

Communicate early and often the importance of having sites ready. Enough cannot be said about a community that has quality product under control and ready to market.

The best land control option is, of course, outright ownership. The next alternative is to have the land under option-long-term, assignable, and renewable provisions to the options are best. Lastly, land for

sale or a letter of willingness from the owner to consider sale are the weakest of the land control options, but still acceptable.

Achieving one of the above results and avoiding the pitfalls of eminent domain is best accomplished by making landowners into stakeholders. Instead of pressuring landowners to sign on the bottom line, which can cause turmoil and damage relationships, companies and communities should make them feel like part of the process of bettering the community. The Kelo case shows us that the key to unlocking the deal may lie in keeping the relationship between the company, community, and landowner positive by making the landowner part of the team rather than an obstacle.