

# Debate over eminent domain heats up capitol

*Several 'takings' slated for south metro area*

By Peter Jones  
Staff Writer

Colorado has caught the fever. Call it "eminent domainia."

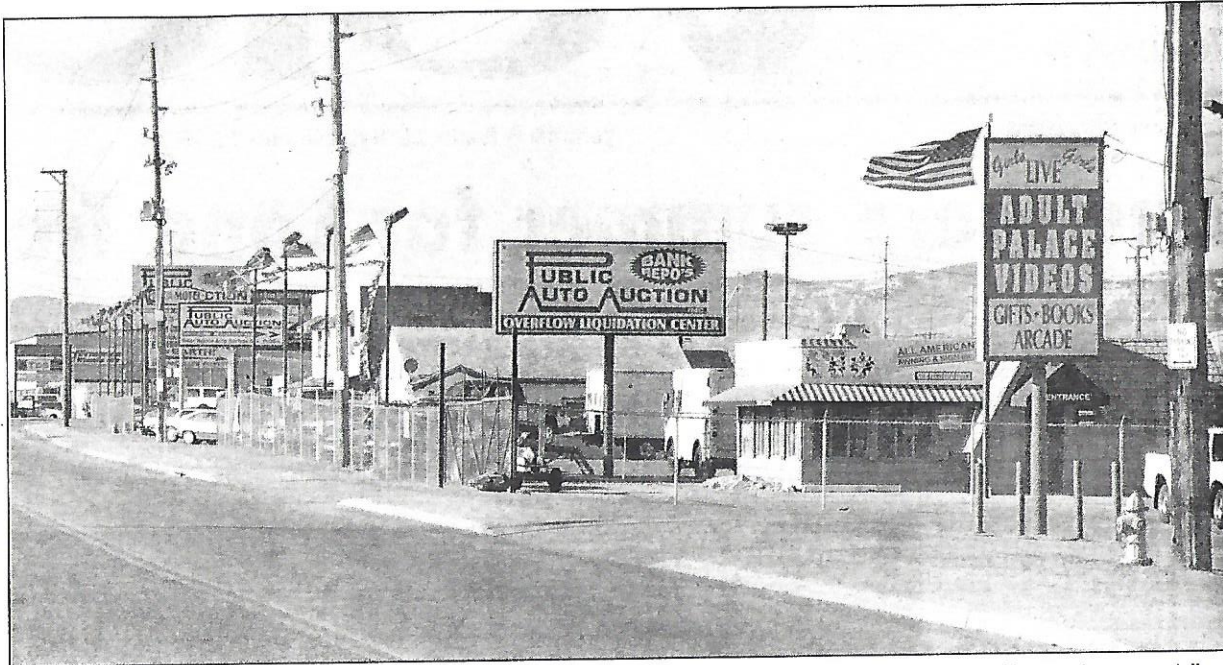
So far this legislative session, as many as 10 proposed bills to curb eminent domain have circulated through the state capitol. Eminent domain is the authority of a government to take private property for public, and in some cases, commercial uses.

Last month, the Senate sent the proposed Front Range Toll Road on a detour that some hope will set up a permanent roadblock to the \$2.5 billion private tollway. It would run from Fort Collins to Pueblo and include a stretch through Arapahoe and Douglas counties.

The bill has bipartisan support, including that of Gov. Bill Owens, who vetoed a similar measure last year. The legislation would bar developers from seizing property for toll roads. The practice had been allowed under a 19th century law that once permitted private interests to build wagon routes to mining camps.

The 21st century bill would not necessarily dead-end all toll roads. Rather, it would require proponents to win approval of the Colorado Department of Transportation, which could then condemn land for such roads under limited conditions.

Other new bills would amend the state constitution to prevent governments from taking land for economic development purposes and



An Arapahoe County judge ruled this week that the City of Sheridan can condemn a 31-acre lot on South Santa Fe Drive, making way for a new retail and entertainment center. The "blighted" area on a former landfill currently houses, among other things, a sexually-oriented business, a mobile home park and a storage facility, all of which will be subject to eminent domain.

would explicitly limit the practice to public uses or for public health and safety. Another measure would require special taxing districts to hold elections before exercising a taking.

Colorado Citizens for Property Rights is circulating petitions to put eminent domain before voters. Campaign organizers cite no less than 130 current cases of threatened seizures across the state.

At least three projects would affect the south metro area — the proposed toll road or "Super Slab," as dubbed by opponents; an entertainment and retail center in Sheridan; and the tout-

ed "new urban" redevelopment of Southglenn Mall in Centennial.

In order to take properties, municipalities must create urban renewal authorities, government entities that have to prove that a given piece of land is "blighted," by the state's definition.

## Supreme Court sets controversial precedent

The new wave of interest in eminent domain can be traced to a U.S. Supreme Court ruling last year that upheld the controversial practice when exercised for private and commercial interests.

In June 2005, the court

sided with the City of New London, Conn., whose redevelopment plans included the displacement of more than 100 homeowners, 15 of whom had refused to sell their properties.

Plaintiffs had argued that having to make way for a hotel, a conference center, a state park and 100 new residences violated the U.S. Constitution's Fifth Amendment, which allows the exercise of eminent domain only for "public use."

The high court ruled that the "natural interpretation of 'public use' is 'public purpose.'" Writing for the majority, Justice John Paul Stevens concluded that local governments should be

afforded wide latitude in such matters and that a proof of greater revenue from a new development should not be required to justify condemnation.

In her dissenting opinion, Justice Sandra Day O'Connor wrote, "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."

In a telling sign of things to come, the court said states could still pass their own laws enforcing stricter property rights.

"We certainly thought that, if we lost, there would

be some sort of reaction, but when we saw the decision, itself, we realized it was going to be huge," said Dana Berliner, an attorney who helped represent plaintiff Susette Kelo in the case. "It was a throw-open-the-floodgates kind of decision. It basically says, if somebody can come up with a public benefit of some sort and they have a plan supporting it, we're done under the U.S. Constitution."

Berliner, who works for the Institute for Justice, a Washington, D.C.-based public-interest libertarian law firm, was at the state



# DOMAIN: Citizens group opposes 'Super Slab' toll road

CONTINUED FROM PAGE 2

capitol last month to brief Colorado lawmakers at the request of the Independence Institute, a conservative think tank in Golden.

"A constitutional amendment is what you're going to have to do to make real change," she told legislators during a lunch briefing. "The legislation does not seem to be having an impact."

According to Berliner, nearly 40 states have already introduced constitutional amendments to limit eminent domain. Interests as varied as property rights advocates, the NAACP, the American Association of Retired Persons, conservative groups and the National Associations of Realtors and Homebuilders have joined the chorus for reform in the nation's state legislatures.

The reason for such broad support from odd bedfellows is clear, according to Denver attorney Allan Hale, who specializes in eminent domain and other property rights issues.

"What the U.S. Supreme Court did was to basically say that a government entity can take your property, your business, your residence, even intellectual property. (The Kelo decision) is not a setback. It's a godsend. It's galvanized public opinion," he said.

## Local court OKs Sheridan condemnation

Hale's clients include Colorado Citizens for Property Rights, the Eastern Plains Citizens Coalition, which opposes "Super Slab," and Painters Supply, a Sheridan retailer whose building sits on a 31-acre site that the city's urban renewal authority has condemned to make way for a new retail and entertainment center.

"The business has been through an urban renewal program already, and now they

**A** constitutional amendment is what you're going to have to do to make real change. The legislation does not seem to be having an impact.

— Dana Berliner, Attorney

al program because it's bigger and better," Hale explained. "Here's a guy who went in, built a better building, got a couple nice businesses in there. They're thriving, yet he's getting eaten up by a bigger fish."

An Arapahoe County judge ruled this week that the city can take possession of the site. Plaintiffs had argued that Sheridan failed to act in good faith, but the city maintains that the area is "blighted" because it sits on top of a former landfill.

By Colorado statute, an urban renewal authority must satisfy four of 10 criteria for a property to be deemed "blighted."

They include a "slum, or deteriorating structures," "unsanitary conditions," or those that "endanger life or property," and "environmental contamination." The statute also defines "blight" as "inadequate layout" and "under-utilization or vacancy."

## Southglenn renters subject to eviction

It was by such legal standards that the Centennial Urban Renewal Authority, composed of city council members, was able to condemn the Southglenn Mall site. Plans are to revitalize it as the \$310 million Streets at Southglenn, a pedestrian-friendly mix of retail, restaurants, entertainment and loft dwellings.

for 20 percent of Centennial's sales tax revenue, but in recent years, the figure has fallen closer to 10.

"We're looking at a declining mall that could end up very similar to Northglenn Mall, when it was fenced off for a number of years because the owner said it's not worth it anymore to us," said the city's Mayor Randy Pye, CURA's chairman.

Centennial is working with Walton St. Capital, the mall's Chicago-based owner, to redevelop Southglenn. But according to Pye and city attorney Robert Widner, CURA may still exercise eminent domain on a few mall tenants whose leases run counter to its plans to demolish much of the current structure this spring.

"It's not that we've got any mom-and-pop businesses that we're saying, you got to get out," Pye explained. "The ones that have not come to some negotiated end game with the owner are a number of national chains. I know it's written in the business plan of most national chains, that they will hold out (in the case of such offers) because they believe they can get a better deal in court."

Still, Hale maintains that even lessors should have property rights because many make considerable investments in their locations.

"It's called letting the market work," he said. "Why

with the urban renewal authority, be able to come in and fundamentally change economic terms I bargained for?"

Hale further argues that the term "blight" is frequently abused to justify takings that have more to do with money than protecting the "health, welfare and morals" of a community.

"Blight is a euphemism for a couple of concepts," he said. "Economic under-utilization, which really means sales tax revenues, economic obsolescence, which allows private-to-private transfers."

Not according to Sam Mamet, executive director of the Colorado Municipal League, a coalition of 265 cities and towns.

"We have 40 urban renewal authorities in the state," he said. "Of those, 31 have never used condemnation. Condemnation has only been used six times in the last six or seven years. So, what's the problem?"

Mamet is concerned about the range of current activity regarding eminent domain in the state legislature.

"Rather than take a rifle and fire it all over the place and see what you hit, let's be a little bit more strategic and thoughtful about this," he reasoned. "If the problem is private toll roads, fine, deal with it in statutes. The challenge is to try to balance logic with emotion."

Regardless of what happens this year in Colorado, it is clear to all concerned that the Supreme Court's Kelo decision has changed the tactics of eminent domain opponents and has largely moved the debate from the courtroom to the legislative chamber.

"A lobbyist friend said to me, 'Why would you spend two years and \$100,000 or more on litigation for an uncertain result, when we can go and get the law fixed?'" Hale recalled.

zens have even used the petition process to seek revenge on Justice David Souter, one of five on the high court to rule in favor of New London, Conn. in the Kelo case. Residents of Wiere, N.H. will vote March 14 on whether the city should evict the judge from his 200-

year-old home to build the "Lost Liberty Hotel."

"This is in the tradition of the Boston Tea Party and the Pine Tree Riot," organizer Logan Clements told the Associated Press. "All we're trying to do is put an end to eminent domain abuse."