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Developers Can't Imagine a World Without Eminent Domain

By [TERRY PRISTIN](#)

Bank of America agreed to join the developer Douglas Durst in 2003 in building a 54-story tower in the heart of Midtown Manhattan, giving a psychological and economic lift to a city that was still reeling from the destruction of the World Trade Center.

Mr. Durst said he would not have been able to negotiate with Bank of America or other prospective tenants had the state not authorized him to use eminent domain, a redevelopment tool that is coming under fire in the wake of a United States Supreme Court ruling last June in a Connecticut case.

Now under construction at 42nd Street and the Avenue of Americas, the Bank of America Tower at One Bryant Park, as the project is known, was decades in the making as the Durst family assembled the site. Ultimately, only two buildings remained, but their owners kept raising the price, Mr. Durst said.

Eventually, the state told Mr. Durst that if he found an anchor tenant the buildings could be condemned even though the site was not in a blighted neighborhood. That threat alone was enough to break the impasse. "Once we had that ability, we were able to quickly come to a resolution on the two properties and meet Bank of America's schedule," Mr. Durst said.

Using eminent domain for private projects has long been a divisive issue, but never more so since the Supreme Court upheld the right of officials in New London, Conn., to condemn homes and businesses to increase the tax base of one of the state's poorest cities.

That decision, coupled with reports of abuses in places like the predominantly African-American community of Riviera Beach, Fla., where plans called for replacing thousands of homes with upscale condos, has prompted a onslaught of legislation, both federal and state.

In November, the House of Representatives approved a bill by F. James Sensenbrenner Jr., Republican of Wisconsin, that would penalize government agencies for using condemnation powers for private projects by denying them economic development funds for two years. Legislation has been introduced in 27 states, and more is coming, said Larry Morandi, the director of the environment, energy and transportation program of the National Conference of State Legislatures.

In California, where eminent domain can be used only in urban areas - and only when there is substantial evidence of blight - four ballot initiatives have been filed with the state attorney general's office to further limit condemnation, said John F. Shirey, the executive director of the California Redevelopment Association, a trade group.

The outcry has given heart to property-rights advocates. "We lost the Supreme Court case, but we're

ultimately going to win in changing the way that eminent domain is going to be used in this country," said Dana Berliner, a senior attorney for the Institute for Justice, the most prominent advocacy group.

But around the country, developers and city officials say weakening or destroying the power to condemn property will seriously undermine efforts to rehabilitate decaying cities and might even hinder the rebuilding of New Orleans. Without eminent domain, the Inner Harbor, which played an essential role in Baltimore's success in building its tourist industry, could not have been redeveloped, said Ralph S. Tyler, the city solicitor.

Yet many developers and politicians have been loath to speak up, said Jeffrey Finkle, the president and chief executive of the International Economic Development Council, a professional group. For example, the Real Estate Roundtable, which represents the nation's largest real estate companies, has refrained from officially opposing the federal bill, said Roger Platt, a senior vice president.

Mr. Finkle also said the International Council of Shopping Centers, a trade group, had not put its lobbying muscle to work on the issue. But Herb L. Tyson, a lobbyist for the council, said he had privately urged lawmakers to preserve eminent domain for economic development. "Our feeling is that land use is a local issue," he said.

Mr. Finkle said that for many politicians, defending eminent domain was as perilous as endorsing gay marriage. "This issue is the third rail right now," Mr. Finkle said. "You step on it, you die."

One business group that has opposed restrictions on eminent domain is the Partnership for New York City, whose members include most of the city's top developers. Kathryn S. Wylde, the president and chief executive of the group, said her members opposed any efforts to alter condemnation procedures through federal or state legislation. "When you add restrictions on development, you are never quite sure what the results are going to be," she said. "We want to avoid political reaction to an issue that adds more problems and obstacles to economic growth."

Some lawmakers and public officials, however, are trying to carve out a moderate position, saying that reform is needed to address legitimate grievances. "What you're seeing is a coherent attack by the right on the power of eminent domain," said [Richard L. Brodsky](#), a New York State assemblyman from Westchester County who is seeking the Democratic nomination for state attorney general. "It does no one any good to pretend that things aren't going to change. If we take that view, we're going to see the extreme position triumph."

Since June, three states have passed bills banning the use of eminent domain for economic development (though a measure in Texas exempts the new Dallas Cowboys stadium in Arlington). Michigan lawmakers have approved a constitutional amendment that is subject to a popular vote.

In a more cautious vein, Ohio has effectively denied state funding for one year to private projects in nonblighted areas that involve condemnation. The state also created a bipartisan task force to study the issue. "Ohio is saying, 'We need some breathing space,' " Mr. Morandi, of the National Conference of State Legislatures, said.

Mr. Brodsky's bills would increase protections for property owners. Homeowners, for example, would be guaranteed compensation equal to 150 percent of the value of their property. An ombudsman would oversee condemnation, which would be limited to projects that were part of a redevelopment plan approved by an elected local government. Government agencies would have to justify the taking of homes by weighing the benefits against the impact.

But Ms. Berliner said that requiring city council approval would not cure the abuses. "Cities know how to jump through their own hoops," she said.

One issue that has divided advocates of eminent domain is whether its use should be limited to blighted areas, as in California and other states. John D. Echeverria, the executive director of the Georgetown Environmental Law and Policy Institute, views eminent domain as a critical weapon in fighting sprawl, but he said that a finding of blight should not be a prerequisite. "Justifying eminent domain on a finding of blight invariably targets low-income communities," he said.

The word "blight" is not mentioned in the Sensenbrenner bill, which does, however, allow condemnation of contaminated land, known as brownfields. The bill has been referred to the Senate Judiciary Committee, but no hearings have been scheduled.

That may be because Congress has already passed stop-gap legislation. A vaguely worded rider to an annual appropriations bill in November restricts use of federal funds to support condemnation that "primarily benefits private entities." The measure also called for the Government Accountability Office to conduct a yearlong nationwide study.

Economic development officials, who contend that property-rights groups have exaggerated the threat from eminent domain, said they welcomed the study. "The public is understandably upset because they've not been told the whole story," said Mr. Shirey of the California Redevelopment Association.