

**COMMENT:** There is no question that the U. S. Supreme Court decision in the KELO case had a chilling impact on property owners and raised concerns about the practices surrounding the use of eminent domain by government. During the 2005 regular session, (before the KELO decision was issued) the Legislature addressed a number of issues involving the use of eminent domain in SB 326 and AB 143. Anyone who was involved in or followed the progress of the legislation is aware that the issue of eminent domain is very complex. The complexity of the issue and the specificity of the language in this proposed amendment to the Constitution, make it certain that there will be unintended consequences if this initiative is qualified and subsequently approved by the voters. If property owners believe there are still issues surrounding the use of eminent domain by Nevada state and local governments, it is the 2007 Legislature that should be called upon to address those issues.

Please Note that the fiscal note issued by the fiscal division of LCB says the fiscal impact of this initiative cannot be determined.

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*Initiative Petition*

*State of Nevada*

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**Nevada Property Owners' Bill of Rights**

Explanation - Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

THE PEOPLE OF THE STATE OF NEVADA DO ENACT AS FOLLOWS;

Section 1. Article 1 of the Constitution of the State of Nevada is hereby amended by adding thereto a new section to be designated section 22, to read as follows:

***1. All property rights are hereby declared to be fundamental constitutional rights and each and every right provided herein shall be self-executing.***

**COMMENT:** This section states that the rights enacted are "self-executing". In theory, that means that a property owner need do nothing or perform any act to perfect the rights granted by the constitution. It is unclear why this section is needed.

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***2. Public use shall not include the direct or indirect transfer of any interest in property taken in an eminent domain proceeding from one private party to another private party. In all eminent domain actions, the government shall have the burden to prove public use.***

**COMMENT:** This precludes the use of eminent domain in any case where there is a taking that results in the property ending up in the hands of a private party. It effectively eliminates redevelopment projects that include private development. Further, it precludes what has been enacted by AB 143 of the 2005 Session which tightened up the use of eminent domain. This section also begs the question: "What constitutes an indirect transfer?"

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***3. Unpublished eminent domain judicial opinions or orders shall be null and void.***

**COMMENT:** District Court opinions and jury verdicts are not published in the sense that Supreme Court decisions are published. Since there is a question if any opinion of a lower court would be considered published, this provision could potentially be used to say that the District Court has no power to issue a decision in the first place since its decision is not "published". Also, it appears that this provision is retroactive. If that is the correct reading, wouldn't this tell a litigant who prevailed in District Court (which could be a private citizen as well as the government) that their victory will be "null and void". Again, if this is the correct reading would that then require all cases to be tried by the Supreme Court, because that Court has the authority to publish its decisions?

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***4. In all eminent domain actions, prior to the government's occupancy, a property owner shall be given copies of all appraisals by the government and shall be entitled, at the property owner's election, to a separate and distinct determination by a district court jury, as to whether the taking is actually for a public use.***

**COMMENT:** Under this proposal, trials would have to take place BEFORE occupancy. This would cause major delays. Under present law, most individual cases are usually settled either (1) before a suit is filed, or (2) after the suit is filed (during construction), but before trial. In the meantime the project moves forward.

Depending on how "separate and distinct determination" is read it can mean that the property owner is entitled to a completely separate trial on the issue of public use. If that is the case it would take two jury trials in order to perfect the taking. Under any circumstances, from a practical perspective, it means that all eminent domain cases will be tried by jury as the right to a jury trial is "self-executing." (See Section 1.)

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***5. If a public use is determined, the taken or damaged property shall be valued at its highest and best use without considering any future dedication requirements imposed by the government. If private property is taken for any proprietary governmental purpose, the property shall be valued at the use to which the government intends to put the property, if such use results in a higher value for the land taken.***

**COMMENT:** This section requires a forward looking appraisal based on the use the property will be placed, and if higher than the current appraisal, the higher value must be used. Since it is unknown what is meant by "proprietary government purpose." would that phrase require the government to pay an amount greater than "highest and best use". It seems this provision would be unfair to the government and hence the taxpayers to the extent the purchase price to the government could potentially exceed the purchase price that a non-governmental entity would pay.

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***6. In all eminent domain actions, just compensation shall be defined as that sum of money, necessary to place the property owner back in the same position, monetarily, without any governmental offsets, as if the property had never been taken. Just compensation shall include, but is not limited to, compounded interest and all reasonable costs and expenses actually incurred.***

**COMMENT:** This will increase the cost of takings; resulting in increased costs to all taxpayers because it eliminates the caps and sharing mechanisms currently provided in NRS 37.190. These increased costs can be substantial. At the present time, attorneys typically take these cases on a contingency basis, with the percentage based upon the difference between the amount the government originally offered, and what the property owner finally gets with the lawyer's assistance.

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***7. In all eminent domain actions where fair market value is applied, it shall be defined as the highest price the property would bring on the open market.***

**COMMENT:** In this section "fair market value" is defined as the "highest price" the property would bring. Currently "fair market value" is considered to be the most probable price a property would bring on the open market. It would appear that highest price would allow outliers to be used to inflate the price, the cost of which is ultimately borne by the taxpayer. How would an appraiser would apply a "highest price" standard?

**8. Government actions which result in substantial economic loss to private property shall require the payment of just compensation. Examples of such substantial economic loss include, but are not limited to, the down zoning of private property, the elimination of any access to private property, and limiting the use of private airspace.**

**COMMENT:** This provision applies to ANY government action NOT just eminent domain and would create numerous actionable offenses. This section would define as a taking, among other things, “the elimination of any access to private property”, and “limiting the use of private airspace” This is too broad as limiting “any” access to property may not have a detrimental effect if other means of access remain available.

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**9. No Nevada state court judge or justice who has not been elected to a current term of office shall have the authority to issue any ruling in an eminent domain proceeding.**

**COMMENT:** This is an odd provision. Senior (retired) judges can hear cases where sitting judges disqualify themselves, because of a conflict. A pro tem judge, or a judge who is appointed by the Governor to fill a vacant judicial position, would be prohibited from ruling in an eminent domain case. Senior judges who routinely assist the courts, but who are not currently elected may no longer hear these cases. In turn, the workload of currently sitting judges will increase.

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**10. In all eminent domain actions, a property owner shall have the right to preempt one judge at the district court level and one justice at each appellate court level. Upon prior notice to all parties, the clerk of that court shall randomly select a currently elected district court judge to replace the judge or justice who was removed by preemption.**

**COMMENT:** This provision is one-sided as it does not allow government the same right to “shop”. It would appear this section gives trial lawyers an advantage which doesn’t appear elsewhere in the law. This is a substantial change from current law which allows the removal of a judge at the district court level for payment of a one-time fee. It also extends the removal process to Supreme Court judges who are now only removed for bias or conflict of interest by motion and supporting affidavits. (Supreme Court Rule 35.)

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**11. Property taken in eminent domain shall automatically revert back to the original property owner upon repayment of the original purchase price, if the property is not used within five years for the original purpose stated by the government. The five years shall begin running from the date of entry of the final order of condemnation.**

**COMMENT:** This provision would create a very small window for the government to do a major project. It is not uncommon for major projects which require obtaining multiple parcels of land, such as major road building projects to take longer than 5 years to acquire, design, go through environmental hearings before construction ever starts. This could provision could effectively stop major road and highway projects. Examples of this are the I-215 beltway in Southern Nevada and the 395 Project in Northern Nevada. If this provision were currently in place, neither project could have even been considered.

Additionally, what does “use” mean. Is it enough if the government just parks some cars on the property? Also, if the government doesn’t “use the property within five years but in the sixth year constructs improvements, can the property owner wait for improvements to be constructed and then demand to buy back the property at the original purchase price? While the term “use” might be clarified by legislative action, this provision doesn’t appear to work as drafted.

*12. A property owner shall not be liable to the government for attorney fees or costs in any eminent domain action.*

**COMMENT:** Eliminating an award of attorneys' fees to the government invites Litigants to advance frivolous claims in eminent domain proceedings, which are defended at the expense of taxpayers. Without a provision to address "frivolous claims" this section is an incentive to contest an action every time a government uses eminent domain regardless of merit.

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*13. For all provisions contained in this section, government shall be defined as the State of Nevada, its political subdivisions, agencies, any public or private agent acting on their behalf, and any public or private entity that has the power of eminent domain.*

**COMMENT:** Presently, utilities and mining companies also have power of eminent domain. This power has been used historically, and has been considered to be in the public interest. This section then makes all actions by private entities subject to the same conditions as imposed on government, including the "right" to be subjected to "frivolous claims". In fact private entities could have more to be concerned about because they are generally viewed as "deep pockets".

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*14. Any provision contained in this section shall be deemed a separate and freestanding right and shall remain in full force and effect should any other provision contained in this section be stricken for any reason.*

**COMMENT:** Self-explanatory

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Note: This following appears after the above language.

**DESCRIPTION OF EFFECT**

*The following constitutional provisions shall supersede all conflicting Nevada law regarding eminent domain actions.*

- Property rights are fundamental constitutional rights.
- Transfer of land from one private party to another private party is not public use.
- Before the government may occupy property, it must provide appraisals and prove the taking is for public use.
- Property must be valued at the use which yields the highest value.
- Government actions causing economic loss to property require the payment of just compensation.
- Only currently elected judges may issue eminent domain decisions, and such decisions must be published to be valid.
- In each action, the property owner may disqualify one judge at each judicial level.
- Just compensation is the sum of money including interest compounded annually necessary to put the owner in the same position without offsets as if the property was not taken.
- Property taken but not used within five years for the purpose for which it was taken must be returned to the owner.
- Fair market value is the highest price the property would bring on the open market.
- Property owners shall not be liable for the government's attorney fees or costs.