

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5077-N-01]

Statutory Prohibition on Use of HUD Fiscal Year (FY) 2006 Funds for Eminent Domain-Related Activities

AGENCY: Office of the General Counsel, HUD.

ACTION: Notice.

SUMMARY: The statute appropriating FY2006 funds for HUD and certain other executive departments and agencies includes an administrative provision that prohibits the use of FY2006 funds to support any Federal, state or local project that seeks to use the power of eminent domain, unless that power is sought for certain public uses. With the commencement of allocation of FY2006 funds under HUD's formula funded programs such as the Community Development Block Grant (CDBG) program and publication of HUD's FY2006 Super Notice of Funding Availability (SuperNOFA) on March 8, 2006, this notice advises that this provision may be applicable to certain activities funded by FY2006 HUD appropriations.

FOR FURTHER INFORMATION CONTACT: For further information concerning applicability of the eminent domain provision to HUD's Community Development Block Grant program, contact Stanley Gimont, Director, Entitlement Communities Division, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7282, Washington, DC 20410, telephone (202) 708-1577 (this is not a toll free number). For information concerning the applicability of the eminent domain provision to other HUD programs or for legal questions about the provision, contact Elton Lester, Assistant General Counsel for Community Development, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 8158, Washington, DC 20410, telephone (202) 708-2027 (this is not a toll free number). Persons with hearing or speech impairments may access these numbers by calling the toll free Federal Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

On November 30, 2005, President Bush signed into law the Transportation, Treasury, Housing and Urban Development, the Judiciary, the

District of Columbia, and Independent Agencies Appropriations Act for FY2006 (Pub. L. 109-115) (TTHUD FY2006 Appropriations Act). The TTHUD FY2006 Appropriations Act includes an administrative provision in Title VII (General Provisions of the Act), section 726, which restricts the use of funds appropriated under the act to support any federal, state, or local project that seeks to use the power of eminent domain unless eminent domain is employed only for a public use that does not involve economic development which primarily benefits private entities.

Senator Christopher S. Bond introduced the amendment in response to the June 23, 2005 decision of the U.S. Supreme Court in the case of *Kelo v. City of New London* (125 S.Ct. 2655 (2005)). (Section 726 is also commonly referred to as the Bond Amendment.) The *Kelo* case involved the exercise of eminent domain authority by the City of New London, Connecticut, to condemn privately owned real property (privately owned homes) so that the property could be used as part of a comprehensive development plan that the city submitted would help revitalize its ailing economy. In this case, the Supreme Court held that the power of eminent domain can be used to transfer private property to new private owners in furtherance of an economic development plan without violating the "public use" requirement of the Fifth Amendment.¹

In response to this Supreme Court decision, Senator Bond, Chairman of the Senate Appropriations Subcommittee that appropriates funds for the Departments of HUD, Transportation, Treasury, and certain other executive agencies, introduced an amendment to be included in the TTHUD FY2006 Appropriations Act that prohibits the use of federal funds for certain activities that involve the exercise of the power of eminent domain. The Senator stated "This amendment seeks to put some guidelines in place when it comes to the use of federal funds on projects where eminent domain is used. We need to take a closer look at how the use of eminent domain is effecting our communities." (See http://bond.senate.gov/press_section/record.cfm?id=247420.)

¹ Previous decisions of the Court in *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), had held that a private re-use of property taken by eminent domain constitutes a public use when it is for the public purpose of redeveloping a blighted area, or reducing extreme concentrations of land ownership, respectively.

The full text of Section 726 states as follows:

SEC. 726. No funds in this Act may be used to support any Federal, State, or local projects that seek to use the power of eminent domain, unless eminent domain is employed only for a public use: *Provided*, That for purposes of this section, public use shall not be construed to include economic development that primarily benefits private entities: *Provided further*, That any use of funds for mass transit, railroad, airport, seaport or highway projects as well as utility projects which benefit or serve the general public (including energy-related, communication-related, water-related and wastewater-related infrastructure), other structures designated for use by the general public or which have other common-carrier or public-utility functions that serve the general public and are subject to regulation and oversight by the government, and projects for the removal of an immediate threat to public health and safety or brownfields as defined in the Small Business Liability Relief and Brownfields Revitalization Act (Public Law 107-118) shall be considered a public use for purposes of eminent domain: *Provided further*, That the Government Accountability Office, in consultation with the National Academy of Public Administration, organizations representing State and local governments, and property rights organizations, shall conduct a study to be submitted to the Congress within 12 months of the enactment of this Act on the nationwide use of eminent domain, including the procedures used and the results accomplished on a state-by-state basis as well as the impact on individual property owners and on the affected communities.

II. Applicability of Section 726

A. Applicability of Section 726 Generally

1. *Applicable Only to Certain Federal Departments and Agencies.* Section 726 is not a governmentwide prohibition. Section 726's prohibition on the use of FY2006 federal funds to support projects that involve the exercise of eminent domain authority applies only to the Departments of Transportation, Treasury, HUD and the other executive agencies for which funds are appropriated under the TTHUD FY2006 Appropriations Act.

2. *Applicable Only to Use of FY2006 Appropriated Funds.* Section 726 is limited to the use of FY2006 funds appropriated under the TTHUD FY2006 Appropriations Act. Section 726 does not apply to prior year funds; that is, it is not applicable to funds appropriated prior to FY2006. Section 726 is not permanent law; that is, it does not apply to all fiscal years after FY2006. The restrictions of the section 726, however, will continue to follow and apply to FY2006 funds regardless of the year in which the funds are reserved, obligated or expended.

3. *Certain Projects Categorized as Public Use Projects.* Section 726 categorizes certain projects as serving an otherwise eligible public use and these projects, therefore, are eligible for federal funding even though their development may involve property taken by eminent domain. Section 726 categorizes the following projects as serving a public use: Mass transit, railroad, airport, seaport or highway projects, utility projects which benefit or serve the general public (including energy-related, communication-related, water-related and wastewater-related infrastructure), structures for use by the general public or which have other common-carrier or public-utility functions that serve the general public and are subject to regulation and oversight by the government, and projects that involve the removal of an immediate threat to public health and safety or the removal of brownfields.

4. *Applicability to Eminent Domain Actions.* Section 726 applies to the use of the power of eminent domain after the effective date of the TTHUD FY2006 Appropriations Act, which is November 30, 2005, and only in those cases where funds appropriated under the FY2006 Appropriations Act would, in some nature, be involved in supporting a project that seeks to use the power of eminent domain to acquire real property. This would not include any transfer of title before November 30, 2005, resulting from use of eminent domain authority. It would include any action involving the use of FY2006 funds, on or after November 30, 2005, to initiate condemnation proceedings, permit the continuation of condemnation proceedings (regardless of when they were initiated), or threaten the use of eminent domain, whether or not such action results in a transfer of title.

5. *Self-Implementing Amendment.* HUD considers section 726 to be a "self-implementing" provision. This means that recipients of funds under the TTHUD FY2006 Appropriations Act are expected to comply with the prohibitions of the amendment in the development and execution of activities assisted with HUD FY2006 funds. This Notice is the Department's implementation guidance with respect to section 726 and HUD does not intend to issue any regulations with respect to the provision.

B. Applicability of Section 726 to HUD

1. *Primarily Applicable to HUD's Community Planning and Development Programs, Particularly Community Development Block Grant Program.* Given the very specific and non-

economic development activities funded under the majority of HUD programs, the applicability of section 726 will largely impact programs administered by HUD's Office of Community Planning and Development (CPD), particularly, the Community Development Block Grant (CDBG) program. CDBG funds are allocated annually by formula to states and local governments that have eminent domain authority. CDBG, in this context, also encompasses the section 108 loan guarantee program, Brownfields Economic Development Initiative (BEDI), Indian CDBG program, and the Insular Area CDBG program.

Eligible uses of CDBG, as defined in section 105 of the Housing and Community Development Act of 1974, as amended, include:

- Section 105(a)(1) which authorizes the acquisition of real property;
- Section 105(a)(17) which authorizes the provision of CDBG assistance to for-profit entities to carry out an economic development project;
- Section 105(a)(14) which authorizes the provision of assistance to public or private nonprofit entities for activities including acquisition of real property; and acquisition, construction, or installation of commercial or industrial real property improvements;
- Section 105(a)(11) which authorizes relocation payments and assistance; and
- Section 105(a)(15) which authorizes assistance to community-based development organizations carrying out activities including community economic development projects.

Each of these activities may, in some way, involve the exercise of eminent domain authority at the state or local level. CDBG grantees will have to carefully evaluate the facts of any project proposed to receive FY2006 CDBG funds where the exercise of eminent domain is involved. Grantees are encouraged to consult with HUD field staff on any such project. It will also be important for HUD field staff to be conversant with any changes in state or local laws that may impact the use of CDBG funds for property acquisition pursuant to the exercise of eminent domain authority and in support of economic development projects. To ensure proper implementation of section 726, it is critical that HUD and its grantees have a strong dialogue about these situations and develop and apply common sense solutions where CDBG funding and the exercise of eminent domain and economic development intersect.

2. *Low- and Moderate-Income Housing Development Generally Not*

Economic Development under section 726. Among the eligible uses of funds under the CDBG program are certain activities that support housing development for low-to moderate-income families. It is generally anticipated that such housing development will not constitute economic development within the meaning of section 726. Therefore, it is anticipated that CDBG funds, as well as HUD's housing assistance programs, could be used to support projects in which the sole use of eminent domain is to acquire land exclusively for the development of housing for low-to moderate-income families. Housing developments, however, that are "mixed use" development may raise section 726 concerns. These concerns are heightened where the amount of retail or commercial space is more than incidental in relation to the amount of housing. However, mixed-used housing developments that involve the exercise of eminent domain, even those with a relatively small amount of retail or commercial space, will require careful evaluation.

3. *Limited Applicability to Other HUD Programs.* Funds appropriated for the majority of HUD programs are appropriated for very specific uses that typically do not involve economic development activities, and, therefore, these funds are not likely to be subject to section 726. For example, annual appropriations for HUD include funding for public housing agencies (PHAs) for tenant-based rental assistance, project-based rental assistance, and to meet capital and operating needs for public housing; for commitments to insure loans under the Federal Housing Administration (FHA); and for expenditures pending the receipt of collections under the Manufactured Housing Fees Trust fund, to name a few.

4. *Permissible Activities to Remove Threats to Public Health and Safety or Remove Brownfields.* As noted in section II.A.3 of this notice, several specific types of projects that are expressly identified in the second proviso of section 726 as public uses for which eminent domain may be used without triggering the funding prohibition. Within this listing of permissible public uses, two provisions warrant the attention of CDBG grantees. The first is the reference to projects for the removal of an immediate threat to public health and safety. The second is the inclusion of projects intended to remove brownfields, as they are defined in the Small Business Liability Relief

and Brownfields Revitalization Act.² As CDBG-funded projects are often directed to such purposes, grantees may find that many projects qualify under one or both of these provisions, and are therefore eligible for federal funding.

5. *Staff Salaries and Expenses.* Where a project is determined to be subject to

² Section 211(a) of the Small Business Liability Relief and Brownfields Revitalization Act established a definition for "brownfield site" (not "brownsfield"). The definition, now codified at 42 U.S.C. 9601(39)(A), states that a brownfield site is "real property, the expansion, redevelopment or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant or contaminant."

the funding prohibition of section 726, grantees may not use FY2006 funds to pay for staff time expended on the project. This will require grantees to carefully allocate time in accordance with OMB Circular A-87 ("Cost Principles for State, Local, and Indian Tribal Governments").

6. *Program Income.* Any program income generated by the use of CDBG funds appropriated for FY2006 is not covered by the restrictions of section 726.

III. Summary

With the publication of HUD's FY2006 SuperNOFA on March 8, 2006,

and with the commencement of allocation of FY2006 funds under HUD's formula programs, grantees of these funds, particularly CDBG grantees, are encouraged to carefully evaluate the facts of any project or activity proposed to receive FY2006 HUD funds where eminent domain acquisition is involved, and to consult with HUD staff, as may be appropriate.

Dated: July 6, 2006.

Keith E. Gottfried,

General Counsel.

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