

RESOLUTION NO. 24-36

BREMER COUNTY BOARD OF SUPERVISORS

A RESOLUTION OBJECTING TO THE IOWA UTILITIES BOARD'S AUTHORITY TO ENACT EMINENT DOMAIN AUTHORITY WITHIN BREMER COUNTY FOR PRIVATELY OWNED AND OPERATED CARBON DIOXIDE PIPELINES

WHEREAS, Pursuant to Iowa Code § 479B.7 and Iowa Administrative Code rule 199-13.5, any person, including a governmental entity, whose rights or interests may be affected by a proposed pipeline may file a written objection with the Board not less than five days prior to the hearing scheduled on the pipeline company's application for a permit.

WHEREAS, Bremer County submitted a brief objecting to the Summit proceedings and requested that the IUB deny the use of eminent domain for carbon dioxide pipelines.

WHEREAS, "The power of eminent domain has ancient origins... From early times to the present, property owners have argued that this power should be exercised only in limited circumstances."¹ The philosopher John Locke argued that the "great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property."²

WHEREAS, for this reason, the framers of the Constitution sought to limit the government's use of the power of eminent domain in two important ways.³ First, they included in the Fifth Amendment a requirement for the payment of "just compensation."⁴ Second, they required that any taking of private property must be for a "public use."⁵

WHEREAS, the United States Supreme Court has considered the issue of eminent domain many times. In the landmark case of *Kelo v. City of New London*, the Court

¹ See generally Mary Massaron Ross, *The Debate Over the Meaning of "Public Use", Eminent Domain Use & Abuse: Kelo in Context* at s 1.1.

² See *id.*

³ See U.S. CONST. Amend. V ("nor shall private property be taken for public use, without just compensation").

⁴ See generally William Michael Treanor, "The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment," 94 *Yale L.J.* 694 (1985).

⁵ See Lauren A. Wiggins and Timothy Sandefur, *A Bibliography of Sources on Public Use in Eminent Domain*, 10 *Chap. L. Rev.* 235 (2006). See also David Schultz, *What's Yours Can be Mine: Are There Any Private Takings After Kelo v. City of New London?*, 24 *UCLA J. Envtl. L. & Pol'y* 195 (2006).

discussed the federal constitutional requirements for determining “public use.” The Court noted that there are two opposing rules involved in making the determination. On the one hand, the Court said, it is clear that the government may not take one person’s property for the “sole purpose” of transferring it to another person. On the other hand, the Court also said it is “equally clear” that the government may transfer property from one person to another if future “use by the public” is the purpose of the taking.

WHEREAS, if the “public use” requirement of the Fifth Amendment means anything, it means that the government should not arbitrarily take one person’s private property and transfer it to another person simply for private economic gain. In this docket, Summit is seeking eminent domain over 1,035 parcels. Through this process, Summit is seeking private gain through a taking of private property that doesn’t provide public use.

WHEREAS, the reason is that this pipeline is fundamentally different from a road or a highway project that the general public can use. It’s fundamentally different from a railroad that carries the general public as passengers. And it’s fundamentally different from an electric or gas line that a utility uses to serve retail or wholesale customers. Essentially, Summit is justifying the use of eminent domain because it claims the project will create economic benefits for Iowans, but whatever ancillary benefits will accrue from construction of the project, it’s clear they are not the primary purpose of the project and are in fact subjective at best. The primary purpose is clearly private economic gain.

WHEREAS, the driving force behind this project is climate change policy. Since 2008, Federal tax law has provided tax credits for the sequestration of carbon. Known as “45Q Credits” after the relevant tax provision, these tax credits were created to encourage the private sector to reduce the amount of carbon released into the atmosphere. In the recently passed Inflation Reduction Act, Congress significantly increased the value of these 45Q Credits. These credits represent a substantial public subsidy for private profit as it is. Taking yet more private property for Summit’s private gain only compounds the problem.

WHEREAS, The *Kelo* case turned on the question of whether the City’s economic development plan served a “public purpose.” And the Court explained that its prior eminent domain cases had defined that concept broadly due to a longstanding policy of deferring to “legislative judgments” in the area of public use.

WHEREAS, “Viewed as a whole,” the Court said, “our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as

they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the ‘great respect’ that we owe to state legislatures and state courts in discerning local public needs.”⁶

WHEREAS, In other words, the Supreme Court was unwilling to place obstacles in front of state legislatures in the form of rigid judicial interpretations of the Constitution, and it instead preferred to allow a broad range of purposes to meet the “public use” test.

WHEREAS, However, after announcing that it wouldn’t adopt a strict federal standard, the Court in *Kelo* went on to state that “nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”⁷

WHEREAS, even before the *Kelo* case was decided, many states had imposed “public use” requirements that were stricter than the more flexible federal minimum standard, and many states since then have imposed additional restrictions in the wake of the *Kelo* decision. These additional restrictions on the use of eminent domain can take the form of either state constitutional requirements or state statutory requirements. Iowa has adopted additional restrictions.

WHEREAS, Like the Fifth Amendment to the United States Constitution, Article I, section 18 of the Iowa Constitution also contains a “takings” clause, and like the Fifth Amendment, it also requires that private property not be taken “for public use” without “just compensation.”

WHEREAS, The Iowa Supreme Court is the final authority on the interpretation of the Iowa Constitution, and while it generally considers Federal interpretations of the Takings Clause to be persuasive, it is not required to interpret the Iowa Takings Clause in the same flexible way as the Supreme Court interprets the Federal Takings Clause.

WHEREAS, The Iowa Supreme Court recently considered the issue of constitutional authority for eminent domain in the case of *Punttenney v. Iowa Utilities Board*, which involved an oil pipeline being built by Dakota Access, LLC. In considering the issue, the Iowa Supreme Court thoroughly reviewed the *Kelo* case and decided not to follow the majority opinion, which had found economic development to be a valid public purpose. Instead, the Iowa court announced that Justice O’Connor’s dissenting opinion, which a number of other states follow, was

⁶ *Kelo v. City of New London*, 545 U.S. 469 (2005)

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the better interpretation for purposes of the Iowa Constitution because it provides stronger protection against the abuse of eminent domain.⁸

THEREFORE, BE IT RESOLVED, that the Board of Supervisors of Bremer County, under the authority of IA Code 331.301(1), shall “*exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the county and its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents.*” Based on the findings of the Iowa Supreme Court in *Puntenney v. Iowa Utilities Board*, the Bremer County Board of Supervisors finds in fact they are not limited by IA Code 331.301(1), to be “*inconsistent with the laws of the general assembly*” in protecting and preserving private property takings utilizing eminent domain due to the lack of public purpose where in this case the sole purpose is private economic gain by Summit Carbon Solutions and affiliates. Therefore, the Bremer County Board of Supervisors objects to the use of eminent domain for private economic gain and urges the Iowa Utilities Board not to grant Summit the use of eminent domain for this project.

Resolved this 21st day of May, 2024

⁸ *Puntenney v. Iowa Utilities Board*, 928 N.W.2d 829 (2019).