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Using Eminent Domain for Economic Re-Development and the Problematic Legacy of *Kelo v. City of New London*

by Jeffrey A. Crossman

Although it is not disputed that the government has the ability to forcefully acquire private property from its owners, the Fifth Amendment was included among the Constitution's Bill of Rights to check this power. The Fifth Amendment's inclusion among the first several amendments had both philosophical and historical origins: the amendment specifically recognized the fundamental importance of private property rights in our Constitutional republic, which had not been the customary practice under British rule prior to the Revolution (the king did not have to compensate for taking property).1 Consequently, the Fifth Amendment attempted to strike a balance between governmental power and private property rights by requiring that a taking be permitted only if the property is dedicated for a "public use" and the land owner is given fair compensation.2 Throughout the development of the law relating to governmental takings and the Fifth Amendment, the United States Supreme Court has always strived to strike an appropriate balance between the competing interests of the government's right of eminent domain and the rights of private property owners. The Supreme Court's recent decision in Kelo v. City of New London has now tipped that balance greatly in favor of the government and weakened the rights of private property owners.

The Background Behind the *Kelo* Case

The facts from *Kelo* are familiar to other cities across the country. New London had experienced a declining tax base and shrinking population from several decades of economic decline.[3] Their unemployment rate was double that of the state of Connecticut, and the federal government's decision to close a local naval facility in 1996 further depressed the city's economy.[4] The state labeled the city a "distressed municipality," and the city sought opportunities to revitalize the area's economy.[5]

In 1998, the pharmaceutical company Pfizer decided to build a $300 million research facility in the Fort Trumbull area of New London, an area that had recently been designated a state park.[6] Intent on capitalizing on Pfizer's new facility as a catalyst for economic development, New London's leaders approved a redevelopment plan for 90 acres in the immediate area.[7] The plan mandated the acquisition of 115 private properties through purchase or condemnation proceedings and involved the development of seven parcels of land in the Fort Trumbull area into a small urban village, with new homes, a marina and boardwalks.[8] The plan also included offices and hotels to accompany the project.[9] Although many of the residents agreed to sell their homes, several others, including Susette *Kelo*, refused to sell and initiated litigation to prevent the city from acquiring their homes after they were condemned by the city.[10] After the Connecticut Supreme Court upheld all of the takings, the homeowners petitioned the United States Supreme Court for review.

The critical question in *Kelo* was whether New London's redevelopment plan constituted a "public use" for which the municipality could justify its condemnation proceedings to take the private properties. The homeowners argued that the city's taking was impermissible because it sought to take property away from one private party specifically to benefit other private parties such as Pfizer (and the other businesses that would later occupy the marina, the restaurants, etc.). The Supreme Court disagreed with the homeowners and approved of the city's use of its takings powers for the purpose of economic redevelopment.

Kelo's Holding and The Resulting Uncertainty in Future Takings Cases

In arriving at its decision, the Supreme Court relied on precedents from two former takings cases: *Berman v. Parker*[11] and *Hawaii Housing Authority v. Midkiff*.[12] The *Berman* decision permitted Washington D.C. to acquire private property deemed blighted pursuant to a redevelopment plan that included public buildings and schools.[13] *Midkiff* permitted takings of private property away from lessors to give to lessees to reduce the concentration of land ownership in the state of Hawaii.[14] The common element in both of these prior cases is that the government used the power of eminent domain to take private land away from owners and rid the area of some type of social harm—blighted properties beyond the point of repair in D.C. and a land oligopoly in Hawaii. However, the Supreme Court determined that New London's redevelopment plan was simply a natural and logical extension of these cases and followed the trend of a more broadened definition of the types of situations constituting a "public use."[15]

The Supreme Court reasoned that the definition of "public use" has steadily eroded over time and that legislative bodies are entitled to "broad latitude in determining what public needs justify the use of the takings power."[16] The Supreme Court also recognized that "promoting economic development is a traditional and long accepted function of government."[17] The Court further reasoned that the municipality's decision should be entitled to deference because New London's redevelopment plan was "comprehensive" in nature and the legislative body that approved the plan thoroughly deliberated over the plan.[18] However, the Court specifically rejected the opportunity to establish any bright line rule to apply in takings cases to assist parties to understand when takings are appropriate or when they exceed the government's authority.

As a result, the *Kelo* decision essentially provides a green light for governments seeking to use its takings power to pursue speculative real estate development projects at the expense of tax payers. Although political leaders often tout the great advantages of seizing property for redevelopment purposes, there are many examples of poor judgment that lead to outlandish promises that have never been delivered and resulted in additional tax payer suffering. For example, in Yonkers, New York, the Otis Elevator Company pressured the city to acquire land for its expansion. The company threatened to leave town if it did not receive the condemned land it desired. After expansion, the company left town anyway and the courts refused to provide the city with any remedy.19 Another example is the city of Detroit. General Motors promised to move its Cadillac assembly plant unless the city pro-

vided G.M. with additional space. Detroit agreed and provided G.M. with 465 acres of land that formerly included 1200 households, a hospital and numerous businesses. G.M.'s plans to consolidate 10,000 workers into one plant actually resulted in a net loss of more than 4,000 jobs in the community.[20] The point is, legislative bodies do not necessarily possess the skill to engage in the entrepreneurial, risk-taking ventures that *Kelo* permits.

More importantly, however, the *Kelo* decision essentially removes a significant protection of individual property rights because, as Justice O'Connor termed it, the majority's holding "wash[ed] out any distinction between private and public use of property" and "effectively delete[d] the words 'for public use' from the Takings Clause."[21] As a result, individual property owners may find it difficult to protect against a governmental entity that deems a particular parcel ripe for taking so that it may be used to generate more lucrative taxes. Justice O'Connor further predicted that, "[n]othing 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."[22] The *Kelo* decision simply extended the *Midkiff* and *Parker* definitions of public use by eliminating the requirement that the government use the taking to extinguish a public harm. Instead, *Kelo* sanctioned takings of private property where political leaders believe that property may be employed for more lucrative purposes.

Unfortunately, *Kelo* fails to provide any further direction for takings cases that are bound to follow. Consequently, *Kelo* practically encourages future litigation over the extent of the government's takings power. Proposed targets of a taking will inevitably question every portion of a redevelopment project beginning with the government's intended purpose. Other open questions persist regarding what constitutes a "comprehensive" redevelopment plan sufficient to justify a taking of private property or the level of deliberation a legislative body must engage in to entitle it to deference over the decision to exercise its eminent domain powers. Each of these questions will likely require resolution by the courts.

Without question, *Kelo* upset the balance between private property rights and the government's taking powers originally imposed by the Fifth Amendment. In its place, the Supreme Court has left an open invitation to legislatures to create more stringent restrictions on the government's newly broadened takings powers. Time will tell if legislatures will accept this invitation and either codify newer restrictions or require voter approval for takings involving redevelopment project. In the meantime, litigation over this issue will likely continue.[23]

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footnotes

[1] See Katherine M. McFarland, Privacy and Property: Two Sides of the Same Coin, 14 B.U. Pub. Int. L. J. 142, 145 (discussing the evolution of the eminent domain doctrine).

[2] U.S. Constitution, Amendment 5.

[3] *Kelo*, at 2658

[4] Id.

[5] Id.

[6] Id. at 2659.

[7] Id.

[8] Id.

[9] Id.

[10] Id. at 2660. Although the homes were condemned, there was never any evidence introduced that the homes were blighted or in poor condition.

[11] 348 U.S. 26 (1954) (permitting takings of private property where the area had been deemed blighted and the development plan included streets, schools, and other public facilities).

[12] 467 U.S. 229 (1984).

[13] *Berman*, 348 U.S. 26, 31.

[14] *Midkiff*. at 235.

[15] *Kelo* at 2662.

[16] Id. at 2664.

[17] Id. at 2665.

[18] Id. at 2665.

[19] See *City of Yonkers v. Otis Elevator Co.*, 844 F.2d 42 (2nd Cir. 1988).

[20] See *Poletown Neighborhood Council v. Detroit*, 204 N.W.2d 455 (Mich. 1981).

[21] *Kelo* at 2671.

[22] *Kelo* at 2676

[23] In October of 2005, the Ohio Supreme Court decided to accept review of a simllar case from the Cincinnati area. See *Norwood v. Horney*