Kelo v. The City of New London: What Does It Really Mean?

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INTRODUCTION

MUCH INK AND AIR TIME WAS SPENT ON THE PRONOUNCEMENT OF THE UNITED STATES SUPREME COURT that local governments have the right to acquire private property for redevelopment purposes with the ultimate intent to convey it to another private enterprise for a private use. While the ruling seems to have taken many by surprise, a number of state supreme courts have long held that the proposition of local governments taking private property for the purposes of private redevelopment was not only legal but should be encouraged. What are the ramifications of this decision and what should be the public policy when it comes to redevelopment?

THE CASE

On June 23, 2005, the United States Supreme Court in a 5-4 decision re-ignited a long-standing legal dispute over private ownership rights. In *Kelo, et al.v. City Of New London, Connecticut, et al.*,[1] the majority opinion approved the taking of private property by local government for redevelopment purposes and turning it over to another private use. The case, while settling the legal issue of the constitutionality of such a taking, also fueled a public policy controversy.

The facts in *Kelo* are not uncommon across the country. In the *Kelo* case, the City of New London, Connecticut, gave final approval to a development plan that "was projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront area." The city was attempting to redevelop a 90 acre tract of land known as the "Fort Trumbull" area. The area was located on a peninsula in the Thames River. The area contained approximately 115 privately owned residences. Plans for the redevelopment of the area included approximately 80 new residences in a planned community. The redeveloped area would also include a small "urban village" containing

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hotels, shops, museums, a river walk, and a new facility for the Pfizer company.

As is usually the case in large redevelopment projects, the City acquired many parcels of property from willing buyers, while a few other owners refused to sell for various reasons. In order to complete the project, the city decided to force the sale of the balance of the properties needed by the use of eminent domain. *Kelo* owned a private home in the area and did not desire to sell the property because of the expansive water view. Another landowner, Dery, had lived in her house since 1918 and did not want to leave the property. In all, nine landowners challenged the legal right of the city to acquire the property. The city admitted that the area involving the nine residences was not "blighted" but maintained its right to acquire the property purely for redevelopment purposes.

Eminent domain proceedings were instituted under the authority of a Connecticut state statute that gave authority to local government for eminent domain taking as "part of an economic development project" and determined that an economic development project is a "public use" and "in the public interest." In the action, the landowners claimed that the statute violated the Fifth Amendment to the U.S. Constitution that requires, "Nor shall private property be taken for public use, without just compensation." At the heart of the issue before the Supreme Court was whether the city's proposal to redevelop the property under that state statute would qualify as a public use sufficient to pass Constitutional muster.

In its majority opinion, the Supreme Court said that the taking of the property for "redevelopment" purposes satisfies the public use requirement even though the ultimate owner of the property will be a private owner. The Court did indicate that under some circumstances a government agency may not take property for a purely private use but declined to clearly enunciate the standards defining a purely private use. The Court stated:

> Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future use by the public is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case. As for the first proposition, the City would no doubt be forbidden from taking petitioner's land for the purpose of conferring a private benefit on a particular private party. Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a carefully considered development plan.

The Supreme Court points out that historically a requirement that property taken must be used by the general public has been rejected by the courts, and accordingly the Supreme Court argues that Courts have been encouraged to afford, "legislatures broad latitude in determining what public needs justify the use of the takings power."

The Court rejects the establishment of a "bright line" rule that "economic development does not qualify as a public use," arguing that "promoting economic development is a traditional and long accepted function of government."

Moreover, the Court refused to require judicial approval of condemnations before construction begins. The majority held that:

> . . . orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced. A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans. Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project.

The majority opinion was quick to emphasize that the opinion does not prevent any state from placing further restrictions on the public use requirements under a state statute regarding taking for public use. Clearly under the majority opinion, the use of eminent domain proceedings to acquire private property for the purposes of commercial redevelopment will be allowed so long as it is consistent with state law.

STATE LAW BACKGROUND

In many states, the decision in *Kelo* should not come as a surprise. Over the last 50 years,[2] the courts have been sup-

portive of economic redevelopment. In Kansas for example, the issue has been well-settled law for a few years. In *General Building Contractors, L.L.C. et al. v. Shawnee County, Kansas*,[3] the Kansas Supreme Court was faced with a very similar factual question but reached a more far-reaching conclusion than *Kelo*. Kansas recognized a Kansas county's power of "home rule" in 1974. Home rule in essence is the power of a local government to assume power and authority where no state law prohibits the action or where the state law does not apply uniformly to all Kansas counties or cities. Prior law known as "Dillon's Rule" held that local governments may exercise "only those powers specifically granted by the state legislature." The Shawnee County Commissioners passed a "home rule" resolution granting them the power to exercise eminent domain "when necessary in the public interest for lawful purposes including economic development." An area of approximately 400 acres of land in Shawnee County was targeted for "redevelopment" as an industrial park with the title to the redeveloped area to be ultimately in the hands of private business. All of the area slated for redevelopment had been acquired by voluntary sale except for the plaintiff's property. It was estimated by the county that the new project would include "thousands of jobs, increased payroll, an increased standard of living, more opportunities for many people in the community, plus a greatly enhanced tax base." The plaintiff resisted attempts to condemn the property by challenging the validity of the home rule ordinance. The Kansas Supreme Court held that not only can Kansas counties assume the power to acquire property for economic development purposes by "home rule," but also that the acquisition of such property for economic development meets the "public purpose" test by restating an earlier Kansas Supreme Court decision of *State ex rel. Tomasic v. Unified Gov't of Wyandotte County/Kansas City, 265 Kan.* 779, 962 P.2d 543 (1998). The *Tomasic* decision may well have acted as a model for the majority opinion in Kelo, although not directly cited.

The decision of the Kansas Supreme Court is certainly prophetic. In *Tomasic*, the local government for Wyandotte County/Kansas City, Kansas, established a plan for the development of a large area of land into an auto racetrack facility with a financing scheme known as tax increment financing or TIFF. After plans were announced, the Kansas Legislature amended portions of the urban redevelopment statutes to allow for the use of TIFF financing for such a purpose. The local government ultimately commenced eminent domain procedures to acquire parcels of privately held property that could not be purchased by private sale. A challenge was made of the authority of the local government on private use grounds. The Kansas Supreme Court held in *Tomasic* that, "This court has held that there is no precise definition of what constitutes a valid public use, and what may be considered a valid public use or purpose changes over time. Further, this court has noted that as long as a governmental action is designed to fulfill a public purpose, the wisdom of the governmental action generally is not subject to review by the courts." The Court endorsed the view that "the development of recreational facilities and the facilitation of economic development in partnership with private enterprise have been considered legitimate public purposes for the exercise of eminent domain and the expenditure of public money." The Court in *Tomasic* went on to hold that:

> It is elementary that the legislature possesses no power to authorize the appropriation of one's property for a private use or purpose, but it is equally well-settled that the right to take private property for a public use is inherent in the state, and that the legislature may authorize the acquisition and appropriation of private property for a public use provided the owner is compensated therefore. The difficulty often encountered lies in the inability of courts comprehensively to define the concept of a public use or purpose, due, no doubt, to the exigencies shown by the facts and the diversity of local conditions and circumstances in an everchanging world… The mere fact that through the ultimate operation of the law the possibility exists that some individual or private corporation might make a profit does not, in and of itself, divest the act of its public use and purpose.

As a result of *Tomasic*, the Unified Government of Kansas City Kansas/Wyandotte County went on to build the Kansas Speedway that has attracted some NASCAR races and the Village West Entertainment and Shopping District. The Unified Government claims that this development attracts over 10 million visitors a year to an area that was once farms and pasture land. The 400-acre Village West development is located at the intersections of Interstates 70 and 435. The Unified Government claims that with recent expansions and future planned expansions it will become one of the "largest tourism districts in the country, and most certainly the largest in the Midwest."[4]

The effect of *Tomasic* may be more than coincidental. The National League of Cities filed a brief amicus curia

(friend-of-the-court brief) in support of the action taken by the City of New London in the *Kelo* case. In the brief, The National League of Cities called, "eminent domain often indispensable for revitalizing local economies." The Kansas Speedway project was used as an example of economic development that can generate "tens of millions of dollars in economic activity" on land that had been held by private landowners.

Other states have traveled in a totally different direction from Kansas. In *Wayne County v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), the Michigan Supreme Court in 2004 overruled a previous decision and held that the use of eminent domain by Wayne County to secure land to create a 1,500-acre business and technology park that would ultimately be privately held violated the public use doctrine. In the decision the Michigan court framed the issue. The Court said, "We are presented again with a clash of two bedrock principles of our legal tradition: the sacrosanct right of individuals to dominion over their private property, on the one hand and, on the other, the state's authority to condemn private property for the commonwealth." It was acknowledged by the Michigan Court that the project would help the "struggling economy of southeastern Michigan by attracting businesses, particularly those involved in developing new technologies, to the area." The Michigan court simply held that the use of eminent domain under these circumstances violated the "public use" doctrine under the Michigan constitution. The Court held that Article 10 Section 2 of the Michigan Constitution provided for the use of the power of eminent domain for a "public use" only, and that the proposed business and technology park did not qualify because the ultimate title to the property would be held privately. It should be noted that the state of Kansas has no language similar to Michigan in its state Constitution. However, the Michigan Constitution is similar in scope to the Fifth Amendment of the United States Constitution interpreted by *Kelo*. *Kelo* may also not be dispositive of Hathcock. The U.S. Supreme Court clearly announced that the effect of state law was to be different in each state. Some states have no decisions to act as a guide in interpreting the *Kelo* doctrine and have relied on the Attorney General's opinions. According to the Washington Attorney General, Washington has a fairly clear constitutional prohibition against the use of eminent domain for private purposes. Washington's Attorney General A.G. McKenna issued an opinion soon after the decision in *Kelo* was reached. In the opinion, McKenna pointed out that "The Washington State Constitution prohibits the use of the power of eminent domain to condemn private property for private use and reserves to the judiciary the role in determining what constitutes a public use." McKenna pointed out that the Washington Supreme Court "has defined the 'public benefit' limitation in a narrow way." McKenna questioned the effect of *Kelo* on property owners in Washington.[5] Certainly, *Kelo* will not have universal effect in each of the 50 states. The effect of *Kelo* will be state-law dependent.

IMPLICATIONS

Propelled largely by an emotional and sharp dissent by Justice O'Connor, the aftermath of *Kelo* has been a glut of anti-*Kelo* legislation initiated around the country as well as passionate campaigns by public interest groups. The rallying cry of many of these groups is Justice O'Connor's often-quoted passage, "Nothing 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." According to Tresa Baldas, writing in the *National Law Journal*, 28 states have seen a total of 70 bills introduced to reverse the effects of *Kelo*.[6] Several bills and resolutions have been introduced in Congress. The Castle Coalition, a group of citizens against eminent domain abuse, has instituted a "Hands Off My Home" program backed by a $3 million financial commitment. The premise of "Hands Off My Home" is to initiate legislation reversing the effects of *Kelo* by legislation or constitutional amendment in every one of the 50 states.[7] The issue will remain a topic of national discussion for some time to come. Some estimate there are approximately 10,000 reported eminent domain cases pending.[8]

Almost before the ink was dry on the Supreme Court Decision, the House of Representatives of the United State Congress leaped into the breach with a resolution that expressed "the grave disapproval of the House of Representatives" of the *Kelo* opinion. The resolution, which lacks the force of law, was passed on a roll-call vote of 365 in favor and 33 against. The resolution claims that the *Kelo* determination "renders the public use provision in the Takings Clause of the Fifth Amendment without meaning." The House resolution cites with approval the dissenting opinion in *Kelo* and concludes that the majority opinion, "justifies the forfeiture of a person's private property through eminent domain for the sole benefit of another private person." The resolution recited the prerogative of Congress to "address through legislation any abuses of eminent domain by State and Local government."[9]

In light of such Congressional disdain for the *Kelo* policy, one would expect enforceable legislative action to be swift and sure. Such has not been the case to date. While this article does not attempt a detailed review of proposed federal legislation, some of the bills currently in Congress may be of interest. One approach is to prohibit the states from using eminent domain for economic development projects if federal funds are involved.[10] A variation of that approach would be to prohibit eminent domain from being used where federal funds are involved unless it was to acquire real estate for a utility, roadway, pipeline, prison, hospital, or property taken during a national emergency or disaster.[11] Another is to redefine "public use." Under a Senate bill now under consideration, "public use" would not include economic development.[12] A bill introduced in July 13, 2005, would exclude from gross income gain from the forced sale of property by eminent domain.[13]

An analysis of the current status of the interpretation of the "public use" doctrine in each of the 50 states should be undertaken as the subject of another research project once an opportunity to evaluate these legislative efforts has been reached. Currently, anyone practicing in the field should be attuned to developments in the state where their real estate is sited. While each state debates the public policy of eminent domain, perhaps of interest may be a rather novel approach to moderating the effects of eminent domain that has been proposed in the Kansas legislature. The bill specifically authorizes the use of eminent domain for economic development purposes; however, it requires the government to pay 125% of the fair market value for owner-occupied residential property and operating farms located outside of a city. The bill also requires that the government prepare an economic development project plan that provides the public with information about how the proposed project will generally benefit the community as a whole and that the size and scope of the project is reasonably necessary. The plan would have to be approved by a 2/3 majority vote of the governing body desiring to take the action and only after a finding that the property could not have been acquired through good faith negotiations.[14]

Finally, it should be pointed out that nothing in *Kelo* changes the basic process for eminent domain procedures. Land owners are to be awarded "just compensation" for the land taken.

CONCLUSION

Before governments are too quick to "fix" the so-called abuses of eminent domain, they should evaluate what happened in Wyandotte County. The Amicus brief of the National League of Cities provides the opportunity for that insight. The National League of Cities related, "In 1997, Kansas City, Kansas, and Wyandotte County had been struggling economically for almost fifty years." The National League of Cities argued that the speedway, made possible through eminent domain, created "wealth that has been spread throughout the region." In the League's brief, a study was cited that found "$89.3 million flowed into the local economy on race days at the track during the first season, and the larger metropolitan area reaped $150 million in economic activity, including $70 million in local workers' wages and $10 million in increased business tax collections." The League went on to say that:

> The most important economic impact of the speedway has come from the retail development that the speedway sparked, a 400-acre retail project called Village West that is headed toward 10 million visitors a year. Village West probably would not have been possible without the speedway. The Village West tourism district will create approximately 4,000 new jobs. Within the next several years, the state and local governments will receive $53 million in annual tax revenue from the development. The once moribund housing market has revived, with single-family housing starts increasing by 146% between 2000 and 2003. In the last seven years, tax rolls have swelled with $700 million worth of new real estate development. None of these benefits would have occurred without the use of eminent domain. Before the speedway existed, there were no market forces swirling around the 400-acre Village West site, which had previously been 'in the middle of a demographically barren nowhere. [15]

The Wyandotte County story may never have been written without the use of eminent domain. Will other communities be able to create similar "success" stories if the anti-*Kelo* backlash becomes a reality across the country? Some may argue that the *Kelo* case really only impacts the real estate professional engaged in large scale, mixed-use developments. As Jay Gitles and Scott Buser point out in a recent article:

> The *Kelo* model presents governments with a pragmatic approach to address the problems facing decaying urban communities. Some such communities have been left behind in favor of suburban or

> ex-urban development, which lately has been the path of least resistance for investment. There are valid concerns, however, that this powerful tool will come at the expense of small-scale developments or residential owners that stand in the way of economic development.[16]

Some may argue that the *Kelo* decision enables the so-called "big box" retailing to the detriment of small family retailing. The Wyandotte county example does feature two very large retailers, but they, in turn, attracted some smaller retailers and services establishments in recent additions to the area. So called "reforms" of the power of eminent domain may be a "slippery slope" because as with all regulations, unexpected consequences often result. In this case, the Supreme Court left the power to make the ultimate policy decision on the use of eminent domain with the states and local government. This appears to be the most responsible and reasonable place to make this public policy decision rather than some federal statute that sets policy for the entire nation.■

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