

Eminent Domain After *Kelo*: The Battle Continues

BY DAVID B. SNYDER, ESQ.

IN *KELO V. CITY OF NEW LONDON*, THE U.S. SUPREME COURT issued one of its most controversial opinions when it ruled that a local government has the power, under certain circumstances, to condemn private property for the sole purpose of economic development. The decision generated strong reactions as well as misconceptions about the case and the power of eminent domain in general.

Many local governments, developers and others in the real estate community cheered when the court announced the decision. But the backlash that followed has been passionate and widespread. Though the government side of the issue may have won the battle, it is clearly losing the war.

Legislators in Congress and most states have passed or introduced legislation in response to the decision. And on June 23—the first anniversary of the *Kelo* decision—President Bush issued an executive order seeking to restrict the extent to which federal agencies can seize private property “for the purpose of benefitting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken.”

The power of eminent domain, also known as condemnation, authorizes the government to take private property only after meeting two general requirements outlined in the Fifth Amendment of the U.S. Constitution. First, the condemning authority must show that the property is being acquired for a public use; second, the owner of the condemned property must receive just compensation.

An important tool for local governments since colonial times, the power of eminent domain permits a government to acquire properties to achieve important goals such as establishing schools, firehouses and other public facilities. A government also can use the power as an urban planning strategy to redevelop blighted areas.

Yet some observers say that in recent years, governments have gone too far in certain cases and have used the power of eminent domain as a tool for economic development. In *Kelo*, the city of New London tested the boundaries of the power of eminent domain.

IS ECONOMIC DEVELOPMENT A PUBLIC USE?

In 2000, New London approved a large-scale development plan intended to create more than 1,000 jobs, increase tax and other revenues, and revitalize an economically



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distressed city, including its downtown and waterfront areas. The plan—designed to derive maximum benefit for the city from a \$350 million research center that pharmaceutical company Pfizer Inc. built nearby—would replace a residential neighborhood (which was not blighted) with office space for research and development, a conference hotel, new residences and a pedestrian riverwalk along the Thames River. Private developers would build and lease portions of the project.

In assembling the land needed for this project, the city's development agent purchased properties from willing sellers. But several property owners were unwilling to sell, so the city initiated condemnation proceedings. The property owners fought the condemnations, arguing the city was vio-

ect was spurring economic development largely through private-sector development and use.

In a 5-4 decision, the U.S. Supreme Court ruled that the city's proposed disposition of the acquired property for private development and use under its approved development plan qualified as a public use within the meaning of the Fifth Amendment. Justice John Paul Stevens wrote the opinion for the majority, restating the principle expressed in previous opinions that the term "public use" should not be read literally. Rather, the court "has embraced the broader and more natural interpretation of public use as 'public purpose.' ... Promoting economic development is a traditional and long-accepted governmental function,"

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—U.S. Supreme Court Justice John Paul Stevens,
writing for the majority in *Kelo* vs. City of New London

lating the Fifth Amendment's public-use requirement. When the Connecticut Supreme Court upheld the proposed condemnations, property owners appealed to the U.S. Supreme Court.

Many interested groups filed *amicus curiae* briefs expressing their opinions about the merits of the case. The National League of Cities, National Conference of State Legislatures, U.S. Conference of Mayors, developers and individual governments, such as the City of New York and states from Vermont to Hawaii, were among those who filed briefs in support of New London. The National Association of REALTORS®, National Association of Homebuilders, National Association for the Advancement of Colored People and American Association of Retired Persons were among those who filed briefs in support of property owners.

The *Kelo* case required justices to consider the federal constitutional limits of a government's power of eminent domain in a context the court had not previously addressed. This case was not about taking properties to eliminate blight. Instead, the sole purpose of the city's proj-

Stevens wrote. Therefore, the condemnations were for a public purpose and met the public use requirement.

MAJORITY OPINION DEFERS TO LEGISLATURES AND STATE COURTS

One of the fundamental bases for the decision was the court's broad deference to local governments. Stevens wrote that it was not the court's role to second-guess the city's judgment regarding the "efficacy of its development plan" or "what lands it needs to acquire in order to effectuate the project." The court noted that the city had carefully formulated a development plan that it believed would provide appreciable benefits to the community, including new jobs and increased tax revenue.

In response to arguments that this holding would have the potential for abuse, the court stressed that there was no evidence of an illegitimate purpose in the *Kelo* case, and cases involving illegitimate purposes would not be permitted. This illegitimacy, of course, may be difficult to prove.

Finally, the court threw the ball back to state courts. The majority stated: "We emphasize that nothing in our opinion

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precludes any State from placing further restrictions on its exercise of the takings power. ... the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate."

Defenders of the *Kelo* decision assert that the holding was consistent with principles outlined in previous court decisions. For example, the *Kelo* court cited *Berman v. Parker*, a 1954 U.S. Supreme Court case that upheld a redevelopment plan targeting a blighted area in Washington, D.C.

Justices in the minority disagreed strongly, and Justice Sandra Day O'Connor issued a particularly stinging dissent. "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random," O'Connor wrote. "The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms," she added. "The specter of condemnation hangs over all property. 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."

The practical impacts of the *Kelo* decision remain to be seen. Advocates on both sides of the debate continue to parse the language of the majority opinion—as well as the Justice Anthony Kennedy's concurring opinion—in an attempt to identify legal and factual matters that either support or diminish the justices' positions.

Another factor to consider is that in addition to satisfying any state constitutional requirements, the power to condemn for a particular purpose must appear in a statute. At the time of the ruling, most states did not have a statute permitting condemnation solely for economic development in the absence of a blight determination.

However, many states have redevelopment statutes that give local governments the power to condemn property for redevelopment projects to eliminate blight, which often has been defined very broadly and, in addition to unsafe or unsanitary conditions, can include "economically ... undesirable land uses." Thus, though *Kelo* expressly did not involve a blighted area, a redevelopment authority may be able to use its redevelopment laws to achieve some of the same goals that were at the heart of *Kelo*.

DEBATE RAGES ON IN CONGRESS AND STATE LEGISLATURES

The post-*Kelo* dialogue will continue on the federal and state levels. As the court acknowledged, Congress as well as state legislatures and courts are within their rights to pass laws restricting condemnations. Within days of the *Kelo* decision, legislators began introducing bills to prevent *Kelo*-type condemnations.

According to information reported by the National Conference of State Legislatures in mid-June, 43 of the 44 states that have gone into session in 2006 are considering eminent domain legislation in response *Kelo*. To date, 27 states have enacted laws restricting the use of eminent domain for economic development. And of those, 18 were signed into law, three were vetoed, three are sitting on the governor's desk, and voters in three states will decide the issue through constitutional amendments on the ballot. Florida and Georgia also will have measures on the ballot because those states require approval not only from lawmakers and the governor, but also from voters.

Alabama and Texas were among the first states to pass legislation. The Alabama statute prohibits condemnation "for the purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity." But it also states that the prohibition does not apply if there is a "finding of blight." Similarly, the Texas statute prohibits condemnations "for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate ... blight."

More recently, Pennsylvania enacted legislation that prohibits "the exercise by any condemnor of the power of eminent domain to take private property in order to use it for private enterprise." The exceptions to this prohibition include condemnations to cure blight or to otherwise remove dangerous or abandoned properties. The statute also expressly narrows the definition of blight.

Many of the statutes address issues beyond those covered in *Kelo*. For example, some measures stipulate fair compensation for property owners, provide additional procedural rights for challenging condemnations and establish committees to address eminent domain issues.

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Legislation pending in Congress has the most sweeping potential. In late 2005, the U.S. House of Representatives passed HR4128, which prohibits state and local governments from using the power of eminent domain for economic development, which is defined in the bill as: "taking private property ... and conveying or leasing such property from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health." The bill includes exceptions to that definition such as "removing harmful uses of land," "acquiring abandoned property" and "redeveloping of a brownfield site."

A controversial aspect of the federal legislation is its penalty provision. According to HR4128, any state or

local government that violates the statute is "ineligible for any Federal economic development funds for a period of 2 fiscal years." A similar bill is pending in the U.S. Senate, though it is unclear whether the momentum behind the legislation will continue—especially considering President Bush's recent executive order.

Clearly, eminent domain will be a hot issue in the years to come. The Institute for Justice, a group that represented the property owners in *Kelo* and opposes condemnations nationally, has begun a campaign called Hands Off My Home to combat the types of condemnations permitted in *Kelo*. In contrast, local governments likely will experiment with using the power of eminent domain to achieve economic goals. The clash of these two forces will play out across the country as the debate continues. ■