

EMINENT DOMAIN: A LEGAL LOOK AT THE RULING

The recent Supreme Court ruling has far-reaching implications for commercial real estate.

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At the end of its recent term, the U.S. Supreme Court, in *Kelo v. City of New London*,¹ issued a controversial opinion involving eminent domain. The opinion addresses the permissibility of taking private property for the purpose of economic development or redevelopment. Objectors, including the Supreme Court's four dissenting justices,² have assailed the decision as an attack on property rights. Fears of targeted, selective property condemnation or sweetheart deals for developers, however, are likely exaggerated. When viewed in the context of the Supreme Court's trend toward a more expansive interpretation of the Fifth Amendment's public use clause, *Kelo* is more evolution than revolution. The development model approved in *Kelo* provides real estate professionals, including developers and those involved in local planning commission processes, with new methods for redevelopment solutions to several issues facing urban real estate.³

Traditionally, the public use clause has prohibited governments⁴ from exercising their powers of eminent domain unless the property taken was intended for a public use.⁵ In *Kelo*, the Supreme Court settled an unresolved issue that had been raised by the various condemnation procedures of some local governments. Namely, to what extent can a government exercise its power of eminent domain where the result will be a use (i.e., economic development) that is only indirectly linked to a public purpose? *Kelo* authorizes taking of private property so long as it is rationally related to a conceivable public purpose.⁶

The threatened condemnation at issue in *Kelo* occurred when the city of New London, Connecticut, in furtherance of a comprehensive redevelopment plan conceived by the city's development arm, sought to take 90 acres within an economically depressed area for a mixed-use redevelopment⁷ (referred to in this article as the *Kelo* model). Susette Kelo, a homeowner in the target redevelopment area, was one of the holdouts from the city's redevelopment plan. She, and some of her similarly situated neighbors, filed an action against the city of New London seeking a ruling forbidding the city from condemning their properties. Kelo argued that the proposed taking, for economic development, was not intended for a traditional public use. The trial court ruling provided Kelo a partial, though not complete victory, and the ruling was immediately appealed to the Connecticut Supreme Court. That court determined that the comprehensive redevelopment of the economically distressed area was for a valid public purpose and that, therefore, the taking was valid.

The U.S. Supreme Court affirmed the Connecticut Supreme Court's analysis and held that the taking of land, even developed land, as part of an economic development project is a public purpose. The Supreme Court cautioned, however, that governments are prohibited from



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taking property under the mere pretext of a public purpose, where the actual purpose would be to bestow a private benefit. The key test in the Supreme Court's analysis was that the taking in question would be executed pursuant to a carefully considered comprehensive community development plan that would not benefit one class of people over another, but would benefit everyone.

The challenge to real estate professionals will be conforming to the Supreme Court's test in *Kelo*, which requires that a development/condemnation plan be comprehensive, carefully considered, and not tailored to favor any one group over another.⁸ In providing guidance, it is helpful to review the plan and process approved in *Kelo*.

Proponents of the development plan in *Kelo* stated that it would create 1,000 jobs, increase tax revenue and revitalize an economically distressed city. The city of New London was designated a distressed municipality by the state of Connecticut in 1990, and it had an unemploy-

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ment rate of double that of the rest of Connecticut in 1998. In 1998, New London reactivated its dormant development entity, New London Development Commission (NLDC) which set about to study redevelopment in New London. NLDC received preliminary approval from the city council for the redevelopment of a portion of the city known as Fort Trumbull, adjacent to a closed naval-related facility, and then began neighborhood meetings to educate the public about the process. Thereafter, New London authorized NLDC to seek state approval. Various state agencies were involved in reviewing six different plans created by NLDC. After state approval, NLDC finalized one of the development plans and resubmitted to New London for final approval. New London authorized the plan in 2000 and gave NLDC the power to purchase property, including through the use of eminent domain procedures.

Kelo affirms the principle that promoting economic development is valid and legitimate function of government.⁹ With this principle in mind, a few key elements will probably be necessary to apply the *Kelo* model to other locales or situations. First, and perhaps most importantly, there must be a demonstrable, long-standing need for an economic boost to the community. As mentioned above, New London had been mired in economic decay for at least 10 years, with unemployment rates double the state average by the time the economic redevelopment plan was under consideration. Second, the plan must be a large-scale development or redevelopment project tailored to meet the needs of the entire community and not just a single person's or developer's interests.¹⁰ Third, the process must involve substantial input from the community affected by the plan. Local governments must hold multiple open hear-

ings where individuals have the ability to voice objections. Finally, the plan must undergo thorough review for its economic, social and environmental benefits and burdens.

The Supreme Court's rationale in *Kelo* is decidedly pro-developer, favoring large scale, mixed-use development projects. The decision provides a powerful tool to local governments in redeveloping economically distressed areas. 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.¹¹ *Kelo* also seems to endorse big-box retailing and other large-scale uses, at the cost of mom-and-pop type stores, stand-alone strip shopping centers, or even isolated residential owners. These negative effects on individual property rights are a cause for

concern, as is the Supreme Court's concurrent expansion of government's eminent domain powers.

Kelo, however, will probably not result in a significant increase in condemnation starts because the type of development plan endorsed by the Supreme Court has high barriers to entry, including significant investments of time and resources. Voter or legislative reaction may also curb widespread application of the *Kelo* model. Overall, *Kelo* merely seems to embrace a larger trend favoring pro-development views of real estate uses.

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1. No citation to the Supreme Court reporter is yet available, but the opinion can be found at the U.S. Supreme Court website: www.supremecourt.us.gov.

2. Justice O'Connor, joined by Justices Rehnquist and Scalia, wrote a dissenting opinion, as did Justice Thomas, writing for himself.

3. Some of these issues include hyper-divided property, absent owners, and economically depressed neighborhoods.

4. The Fifth Amendment is applied to the states through the Fourteenth Amendment.

5. Until 1954 the only permissible takings were ones intended for a public use, like roads, parks, and government buildings. In 1954, the U.S. Supreme Court recognized, in *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27, that takings for a public purpose, even where subsequent ownership would be private, were also legitimate under the Fifth Amendment. *Kelo* is an extension of this "public purpose" line of reasoning.

6. Justice Kennedy's concurring opinion.

7. The state-approved plan contemplated a mixed-use development with residential, commercial, retail,

and recreational/open-space components.

8. The *Kelo* decision sets the scope of takings that are permissible under federal law, but individual states are free to provide more protection to property rights than federal law. In fact, takings of the kind at issue in *Kelo* might have been barred in some states. Illinois, and other states including Arkansas, California, Florida, Kentucky, Maine, Montana, South Carolina, Washington, have enacted legislation that prevents takings for economic development, unless the taking is to eliminate blight.

9. Justice Stevens' plurality opinion.

10. This facet of the *Kelo* model addresses Justice O'Connor's fears, set out in her dissent, about replacing an existing single parcel containing a business, like a Motel 6, with an upgraded use, like a Ritz-Carlton.

11. Justice Stevens, in writing for a plurality of the Court, seems to employ a balancing of interests calculus whereby the positive effects on the overall community and need for the New London redevelopment outweighed the negative impact on a few individual property owners.