

EMINENT DOMAIN - BACKGROUND MEMORANDUM

By directive of the chairman of the Legislative Council, in light of a recent United States Supreme Court decision of the United States Supreme Court, the interim Judicial Process Committee was directed to study issues relating to the appropriate public uses for the power of eminent domain. The committee was directed to determine whether any statutory or constitutional changes regarding the power of eminent domain issues are appropriate.

KELO V. CITY OF NEW LONDON

The portion of the Fifth Amendment of the United States Constitution known as the "Takings Clause" provides that "nor shall private property be taken for public use, without just compensation." In *Kelo v. New London*, 73 U.S.L.W. 4552 (U.S. June 23, 2005), the United States Supreme Court concluded that the acquisition of property by the city of New London, Connecticut, through eminent domain for the purpose of commercial development did not violate the public use restriction of the Fifth Amendment of the United States Constitution.

BACKGROUND

Kelo v. New London arose from New London's use of eminent domain to condemn privately owned real property so that the property could be used for economic development. The case was appealed from a decision in favor of the city of New London by the Connecticut Supreme Court, which found that the use of eminent domain for economic development did not violate the public use clauses of the state and federal constitutions. The Connecticut court found that if an economic project creates new jobs, increases tax and other city revenues, and revitalizes a depressed, even if not blighted, urban area, it qualifies as a public use. The court also found that government delegation of eminent domain power to a private entity was also constitutional as long as the private entity served as the legally authorized agent of the government.

The United States Supreme Court granted certiorari to consider questions last raised in *Berman v. Parker*, 348 U.S. 26 (1954). The issue before the Court was whether the Fifth Amendment protects landowners from the use of eminent domain for economic development, rather than, as in *Berman*, for the elimination of slums and blight.

THE CASE

New London's Development Plan

By the early 2000s, the city of New London, Connecticut, had fallen on hard economic times. The city's tax base and population were continually

decreasing, and city leaders sought some form of economic development. In 1998 Pfizer, a pharmaceutical company, began construction of a major research facility on the outskirts of the Fort Trumbull neighborhood of New London. New London reactivated the New London Development Corporation, a private entity under the control of the city government, to consider plans to redevelop the Fort Trumbull neighborhood and encourage new economic activities that might be brought in by the Pfizer plant.

The development corporation created a development plan that included a resort hotel and conference center, a new state park, 80 to 100 new residences, and various research, office, and retail space.

Fort Trumbull was an older neighborhood, approximately 90 acres in size, and included 115 residential and commercial lots. The development corporation offered to purchase all 115 lots; however, the owners of 15 of the properties refused to sell to the corporation. Of the 15 properties, 10 were owned by occupants and 5 by investors. The owners were the petitioners in the case. The lead plaintiff, Susette Kelo, owned a small home on the Thames River in the development area.

The city of New London chose to exercise its right of eminent domain. The city ordered the development corporation, a private entity acting as the city's legally appointed agent, to condemn the 15 holdout owners' lots.

Connecticut Courts

The owners sued the city of New London in Connecticut courts, arguing that the city had misused its eminent domain power. Kelo and the other appellants argued that economic development, the stated purpose of the development corporation, did not qualify as public use. The trial court granted a permanent restraining order prohibiting the taking of some of the properties, but denied relief as to others. Relying on cases such as *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) and *Berman v. Parker*, 348 U.S. 26 (1954), the Connecticut Supreme Court affirmed in part and reversed in part upholding all of the proposed takings.

Appeal to the United States Supreme Court

By granting certiorari in this case, the United States Supreme Court agreed to hear its first major eminent domain case since 1984. In previous cases, states and municipalities had extended their use of eminent domain, frequently to include economic development purposes. The *Kelo* case was different in that the development corporation was a private

entity. In the appeal to the Supreme Court, the plaintiffs argued that it was not constitutional for the government to take private property from one individual or corporation for the benefit of another simply because the other might put the property to a use that would generate higher tax revenue.

The case attracted numerous supporters on both sides. More than 40 amicus curiae briefs were filed in the case, 25 on behalf of the petitioners. Kelo's supporters ranged from the libertarian Institute for Justice to the NAACP, AARP, and the late Martin Luther King's Southern Christian Leadership Conference (SCLC). The latter three groups signed an amicus brief arguing that eminent domain has often been used against politically weak communities with high concentrations of minorities and elderly.

THE DECISION

Majority and Concurring Opinions

On June 23, 2005, the United States Supreme Court, in a 5-4 decision, found in favor of the city of New London. Justice John Paul Stevens wrote the majority opinion. He was joined by Justices Anthony Kennedy, David Souter, Stephen Breyer, and Ruth Bader Ginsburg. The majority found that the city of New London exercised its eminent domain authority to acquire private property for the purpose of a program of economic rejuvenation. The majority also determined that although the petitioner's property was not blighted, the economic rejuvenation plan would serve a public interest and thus satisfy the public use requirement of the Fifth Amendment. Justice Stevens said that local governments should be afforded wide latitude in seizing property for land use decisions of a local nature. In his opinion, Justice Stevens said "The city has carefully formulated a development plan that it believes will provide appreciable benefits to the community, including, but not limited to, new jobs and increased tax revenue." The opinion addressed the possibility that the decision would be abused for private purposes by arguing that "the hypothetical cases posited by petitioners can be confronted if and when they arise. They do not warrant the crafting of an artificial restriction on the concept of public use." Justice Stevens also emphasized the importance of judicial restraint, stating that the Court recognized that condemnation of property would entail hardship and that the states were free to impose restrictions on the use of this power by local authorities. Justice Kennedy's concurring opinion observed that in this particular case the development plan was not "of primary benefit to . . . the developer" and suggested that, if it had been, the taking might have been impermissible.

Dissenting Opinions

Justice Sandra Day O'Connor wrote the principal dissent, joined by Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas.

Justice O'Connor suggested that the use of this power in a reverse Robin Hood fashion--take from the poor, give to the rich--would become the norm, not the exception "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms." She argued that the decision eliminates "any distinction between private and public use of property--and thereby effectively [deletes] the words 'for public use' from the Takings Clause of the Fifth Amendment."

Justice Thomas also wrote a separate dissent in which he argued that the precedents the Court's decision relied upon were flawed and that "something has gone seriously awry with this Court's interpretation of the Constitution." He said the majority was replacing the Fifth Amendment's "public use" clause with a very different "public purpose" test. "This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a 'public use.'" Justice Thomas also made use of the argument presented in the NAACP/AARP/SCLS amicus brief noting "Losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful."

STATE AND FEDERAL REACTION TO KELO

State Reaction

The *Kelo* decision will likely have little effect on those eight states that specifically prohibit the use of eminent domain for economic development except to eliminate blight--Arkansas, Florida, Illinois, Kentucky, Maine, Montana, South Carolina, and Washington.

According to the National Conference of State Legislatures (NCSL), as of September 8, 2005, legislation in response to the *Kelo* case has been introduced in Alabama, California, Delaware, Illinois, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Pennsylvania, and Texas. Additionally, Alabama, California, Florida, Michigan, New Jersey, and Texas are all considering constitutional amendments for the same purpose. The issue is expected to be an issue in the 2006 elections.

The National Conference of State Legislatures has been tracking five types of legislation that state legislatures have either considered or are still considering since the decision in *Kelo* was reported. Each category restricts the use of eminent domain for economic development purposes to some degree, while providing certain exceptions. The limitations may apply to economic development agencies created by

local governments or to municipalities and counties themselves. A broad range of approaches in the various states' legislation includes:

- **Authorization for a public use** - Stipulates that eminent domain may be used only for a "stated public purpose" or a "recognized public use." Delaware enacted this type of approach at the end of its 2005 regular session
- **Restriction of use to blighted properties** - Limits the use of eminent domain for economic development purposes to blighted properties only or to areas where the majority of properties are blighted and the remaining parcels are necessary to complete a redevelopment plan. This approach establishes additional criteria defining what constitutes blight that a local government must satisfy before condemning private property for economic development purposes.
- **Enhanced public notice, hearing, and negotiation criteria** - Requires local governments to hold public hearings before condemning property for economic development purposes, notify affected property owners in advance of a hearing, and negotiate in good faith with property owners before condemning land.
- **Local government approval** - Requires a vote of the locally elected legislative body before a redevelopment agency may initiate eminent domain for economic development purposes. The vote may have to meet a supermajority threshold. In some instances, the use of eminent domain by a local government may require approval by the state legislature.
- **Prohibiting eminent domain for specified purposes** - Prohibits the use of eminent domain for economic development, such as residential, retail, or commercial; for the primary purpose of generating additional tax revenue; or to transfer private property to another private use. This legislation normally includes exceptions for blighted properties. Alabama enacted this type of approach during its 2005 special session and Texas enacted this type of approach during its second special session.

Congressional Reaction

On June 27, 2005, Texas Senator John Cornyn introduced S.B. 1313, known as the "Protection of Homes, Small Businesses, and Private Property Act of 2005," to limit the use of eminent domain for economic development. The language in that bill prohibits the federal government from exercising eminent domain power if the only justifying "public use" is economic development and the bill imposes the same limit on state and local government exercise of eminent domain power "through the use of Federal funds." Similar bills have been introduced in the

House of Representatives by Missouri Congressman Dennis Rehberg, Texas Congressman Tom DeLay, Michigan Congressman John Conyers, and Wisconsin Congressman James Sensenbrenner. It has been noted that as most small-scale eminent domain condemnations are entirely local in both decision and funding, including those in the *Kelo* case, it is unclear how much of an effect a federal bill would have if it were enacted.

NORTH DAKOTA CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 16, of the Constitution of North Dakota provides a similar protection to that granted under the Fifth Amendment of the United States Constitution with respect to the taking of private property. That section provides that private property may not be taken or damaged for public use without just compensation having been first made or paid into the court for the owner unless the owner chooses to accept annual payments. Section 16 also provides that a right of way may not be appropriated to the use of any corporation until full compensation has been made.

North Dakota Century Code (NDCC) Chapter 32-15 sets forth the requirements for the exercise of the power of eminent domain. Section 32-15-01 defines eminent domain as the right to take private property for public use. Section 32-15-02 sets forth public uses for which eminent domain may be exercised. Those uses include:

1. All public uses authorized by the government of the United States.
2. Public buildings and grounds for the use of the state and all other public uses authorized by the Legislative Assembly of the state.
3. Public buildings and grounds for the use of any county, city, park district, or school district; canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county or city, or for draining any county or city; raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels; roads, streets, and alleys, and all other uses for the benefit of any county, city, or park district, or the inhabitants thereof, which may be authorized by the Legislative Assembly, but the mode of apportioning and collecting the costs of such improvement shall be such as may be provided in the statutes by which the same may be authorized.
4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads, railroads and street railways, electric light plants and power transmission lines and canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying

- mines, and irrigating, draining, and reclaiming lands.
5. Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines, outlets, natural or otherwise for the flow, deposit, or conduct of the tailings or refuse from mines and mill dams.
 6. Byroads leading from highways to residences and farms.
 7. Telegraph and telephone lines.
 8. Sewage disposal of any city, or of any settlement consisting of not less than 10 families, or of any public buildings belonging to the state, or of any college or university.
 9. Cemeteries and public parks.
 10. Oil, gas, coal, and carbon dioxide pipelines and works and plants for supplying or conducting gas, oil, coal, carbon dioxide, heat, refrigeration, or power for the use of any county, city, or the inhabitants thereof, together with lands, buildings, and all other improvements in or upon which to erect, install, place, maintain, use, or operate pumps, stations, tanks, and other machinery or apparatus, and buildings, works, and plants for the purpose of generating, refining, regulating, compressing, transmitting, or distributing the same, or necessary for the proper development and control of such gas, oil, coal, carbon dioxide, heat, refrigeration, or power, either at the time of the taking of said property or for the future proper development and control thereof.
 11. Lands sought to be acquired by the state or any duly authorized and designated state official or board, which lands necessarily must be flooded in widening or raising the waters of any body or stream of navigable or public water in the state of North Dakota.

Numerous statutory provisions specifically authorize the state and political subdivisions to exercise eminent domain for specific public purpose or public uses. Among those provisions is NDCC Section 40-58-08, which authorizes a city to exercise eminent domain when necessary for or in connection with a development or renewal project under the urban renewal law. Section 40-58-08 provides, in part:

1. A municipality may acquire by condemnation any interest in real property, including a fee simple title, which it may deem necessary for or in connection with a development or renewal project under this chapter. A municipality may exercise the power of eminent domain in the manner provided by law. Any property already devoted to a public use may be acquired in a like manner; provided, that no real property

belonging to the state, or any political subdivision of this state, may be acquired without its consent.

Other provisions include North Dakota Century Code Chapter 2-06, which grants eminent domain authority to an airport authority; Section 38-14.2-09, which grants eminent domain authority to the Public Service Commission for abandoned surface mine reclamation; Section 40-33.2-06, which grants eminent domain authority to municipal power agencies; and Section 40-39-02, which authorizes municipalities to take private property by purchase or eminent domain for streets or alleys.

In 2003, legislation relating to the powers of a port authority was passed. The law is codified as NDCC Chapter 11-36. Section 11-36-17 provides that the acquisition of land under that chapter is a public and governmental function exercised for a public purpose. The complete language of this section is as follows:

11-36-17. Public purpose. The acquisition of any land, or interest therein, pursuant to this chapter, the planning, acquisition, establishment, development, construction, improvement, maintenance, equipment, operation, regulation, and protection of ports and port facilities and the exercise of any other powers granted to port authorities and other public agencies, to be severally or jointly exercised, are to be public and governmental functions, exercised for a public purpose, and matters of public necessity. All land and other property and privileges acquired and used by or on behalf of any authority or other public agency in the manner and for the purposes enumerated in this chapter must be acquired and used for public and governmental purposes and as a matter of public necessity.

NORTH DAKOTA CASE LAW

A 1996 decision of the North Dakota Supreme Court is somewhat similar to the *Kelo* decision of the United States Supreme Court. In *City of Jamestown v. Leever's Supermarkets, Inc.*, 552 N.W.2d 365 (N.D. 1996), the Supreme Court concluded that the city of Jamestown did not abuse its discretion in finding the taking of private property, which was used as a parking lot, to be in the interests of the public economy, health, and welfare of its residents so that the property could be used for the building of a new grocery store. However, because the trial court made no finding whether the primary object of the development project was for the economic welfare of Jamestown and its residents rather than for the benefit of the private interests, the court stated that a determination of whether the public use requirement had been satisfied could not be made and directed the trial court to make the

necessary finding on that issue. The court stated that if the primary object of the development is for the economic welfare of the city and its residents, rather than the primary benefit of private interests, the trial court should reinstate the judgment of the taking and award just compensation. However, the Supreme Court further stated that if the trial court were to find that the primary object of the development was for the benefit of private interests, it must refuse to allow the taking.

SUGGESTED STUDY APPROACH

The committee, in its study of issues relating to the appropriate public uses for the power of eminent domain, may wish to approach this study as follows:

- Conduct public hearings throughout the state regarding the concerns raised by the *Kelo* decision.
- Monitor the legislation being considered in Congress and in other states.
- Receive information and testimony from various individuals and entities having an interest in this subject regarding the impact the decision may have in the state.
- Develop recommendations and prepare legislation necessary to implement the recommendations.