



THE SUPREME COURT'S DECISION IN *KELO V. CITY OF NEW LONDON*: A LANDMARK DEVELOPMENT REGARDING THE GOVERNMENTAL POWER OF EMINENT DOMAIN

The Takings Clause of the Fifth Amendment of the U.S. Constitution says that the government may condemn private property by eminent domain only for “public use.” For more than a century, the United States Supreme Court has grappled with what kinds of uses qualify as a “public use.” The Court has held that takings necessary to build railroads, public utilities, and highways are for public use. The Court also has held that takings necessary to eliminate slum or blighted conditions are for public use, and it even has held that takings necessary to break up the concentration of land ownership in Hawaii and restore normal order to the local real estate market there are for public use.

On June 23, 2005, the Supreme Court issued its most recent ruling on the public use issue in *Kelo v. City of New London*. The question in that case was whether

it is a “public use” for a city to condemn property and then turn it over to a private developer to use in an economic redevelopment project intended to increase tax revenue and improve the local economy. The Court held that it is and upheld the condemnation. After *Kelo*, any business interested in pursuing or participating in a development project (particularly in an economically depressed area) may have an easier time bringing the plan to fruition with the assistance of the state’s eminent domain power. At the same time, businesses existing in an area that may be considered economically depressed may face a greater risk of property condemnation. The reach of the Court’s decision, however, may be limited by existing and proposed legislation that restricts how local governments may use their eminent domain power for development purposes.

BACKGROUND

The City of New London (“the City”), located in southeastern Connecticut, once was a center of the whaling industry and later a manufacturing hub. More recently, however, New London had suffered decades of economic decline, which, in 1990, led a state agency to designate the City a “distressed municipality.” By 1998, the City’s unemployment rate was close to double that of the rest of the state, and its population had dwindled to just under 24,000—its lowest since 1920. Among the hard-hit areas of the City was Fort Trumbull, which sits on a peninsula that juts out into the Thames River (and previously was home to the Naval Undersea Warfare Center), and which suffered from high vacancy rates, substantially distressed properties (with at least two-thirds of nonresidential buildings in fair to poor condition), and very low tax revenue.

To remedy what the City considered to be an “untenable economic situation,” in early 1998, the City reactivated the New London Development Corporation (“NLDC”), a statutory, non-stock, nonprofit development corporation with no independent power of eminent domain. The City also authorized a \$5.35 million bond issue to support the NLDC’s planning activities and a \$10 million bond issue toward the creation of a Fort Trumbull State Park. A month later, Pfizer Inc. announced its plan to build a \$300 million global research facility immediately adjacent to Fort Trumbull, and construction on that facility began a few months later.

Local planners hoped that Pfizer would draw new business to the area and jumpstart New London’s revitalization. The NLDC prepared an integrated development plan for a 90-acre section of Fort Trumbull, which the city council approved. The City designated the NLDC as its development agent in charge of implementation and also authorized the NLDC to purchase property or to acquire it through exercise of the City’s power of eminent domain. The NLDC negotiated the voluntary sale and purchase of most of the real estate in the 90-acre area, but nine property owners refused to sell voluntarily. These owners held 15 parcels in the Fort Trumbull area, 10 of which were occupied by the owner or a family member and five of which were investment properties. The City and the NLDC did not claim that any of these properties were blighted or otherwise in poor condition. They just happened to be located in the development area.

In November 2000, the NLDC brought condemnation actions against the hold-out owners pursuant to state law. A month later, the owners sued in the New London Superior Court to block the taking of their properties. The suit was ultimately rejected by the state court. The owners then took their case to the United States Supreme Court, which agreed to decide whether the City’s decision to take property for economic development qualified as a “public use” within the meaning of the Takings Clause.

THE SUPREME COURT’S DECISION

By a 5-4 margin, the Supreme Court held that the City’s “carefully formulated . . . economic development plan” for the Fort Trumbull area—which would, at a minimum, create new jobs and increase tax revenue—“unquestionably serve[d] a public purpose” and therefore satisfied the public use requirement.

Public Use is Synonymous With Public Purpose. In analyzing what constitutes a legitimate public use, the Court acknowledged that this was not a case where the condemned land would be opened for “use by the public” (as would be the case in a condemnation for a railroad), which obviously would satisfy the constitutional requirement of public use.

The Court explained, however, that, beginning in the late 19th century, the narrowly drawn “use by the public” test proved to be impractical and “steadily eroded over time” in favor of a “broader and more natural interpretation of public use as ‘public purpose.’” The Court noted that the shift to a public-purpose standard was essential to the economic development of the West through mining and irrigation, and to otherwise respond to the “diverse and always evolving needs of society.” Thus, the Court reasoned that its focus must rest with whether the City’s development plan served a public purpose, not whether the taken land was subject to use by the public.

Economic Rejuvenation May Constitute a Valid Public Purpose. Although the property owners argued for a bright-line rule that economic development does not qualify as a public use (even as broadly defined as including public purposes), the Court rejected their proposal, stating that

"[p]romoting economic development is a traditional and long accepted function of government." In addition, the Court stated that there was "no principled way of distinguishing economic development from the other public purposes we have recognized." The Court referred to decisions in which takings were upheld for agriculture and mining, removal of blight in favor of a "well-balanced" community, and elimination of land oligopolies that otherwise interfered with the normal function of the residential real estate market. The Court concluded that "[i]t would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests."

Relatedly, the Court also rejected petitioners' contention that "using eminent domain for economic development impermissibly blurs the boundary between public and private takings." Again, the Court referenced several cases in which "the government's pursuit of a public purpose . . . often benefit[ted] individual private parties." The Court reiterated its holding from one such case: "The public end may be as well or better served through an agency of private enterprise than through a department of government—or so Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."

Legislative Determination of Public Purpose is Entitled to Deference. The Court also rejected the property owners' argument that the City was required to prove that the redevelopment project would be successful and actually produce the hoped-for economic benefits. Relying on precedents dating back more than a hundred years, the Court noted that "our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." Consistent with that history, the Court concluded that the City's "determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference." The Court found that, after "thorough deliberation," the City had "carefully formulated" a "comprehensive plan" that the City believed would provide "appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue."

In deferring to the City's determination that a public purpose would be served by the takings, the Court rejected the property owners' urgings for a heightened standard of judicial review. The Court acknowledged that "the City would no doubt be forbidden from taking petitioners' 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." But the Court concluded that, absent an evident basis for suspicion, the government's determination that a public purpose would be served is entitled to significant deference.

Justice Kennedy's Concurring Opinion. Justice Kennedy filed a separate concurring opinion stating that he would likely apply a more stringent test under a different set of facts: "My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review . . . might be appropriate for a more narrowly drawn category of takings." Without detailing what kinds of takings may justify a more demanding standard, he explained that "a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits" should be prohibited. Because Justice Kennedy's vote was necessary to form the 5-4 majority, his views likely will be a focus of future takings litigation, with property owners seeking to bring themselves within the test he describes.

What the Court Did Not Decide. Several tangential issues were raised in the Court's opinion, but were not directly decided.

First, responding to petitioners' argument that "nothing would stop a city from transferring citizen A's property to citizen B for the sole reason that citizen B will put the property to a more productive use," the Court stated that "[s]uch a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case." The Court noted some lower court decisions blocking condemnations that would have transferred land to private businesses such as Costco. Thus, not only has the Court left the door open to such a challenge, but it also suggests that the Court's decision is limited to "comprehensive" development plans and does not encompass ad hoc condemnations.

In addition, the Court emphasized that its decision related only to the public use requirement under the Fifth Amendment: “Nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.” The Court noted that many states already impose public-use requirements that are more strict than the federal standard.

Finally, although the Court acknowledged the “hardship that condemnations may entail, notwithstanding the payment of just compensation,” questions concerning the fairness of the measure of just compensation were “important,” but “not before us in this litigation.” Thus, challenges to this aspect of a federal takings claim remain viable, including the notion (as raised by *amic*) that “just compensation” should factor in the property owners’ sentimental attachment to the property.

CONCLUSION

The long-term impact of the *Kelo* decision is far from known at this point. Local governments like the City of New London may well be emboldened to condemn property for development purposes more aggressively. Doubtless in anticipation of that effect, on June 27, Texas Republican U.S. Senator John Cornyn introduced legislation, entitled the Protection of Homes, Small Businesses, and Private Property Act of 2005, that would prohibit federal takings aimed solely at private economic development or similar state or local government takings that are effectuated through the use of federal funds. The Act intends to clarify that governmental exercise of eminent domain should be reserved for “true public uses.”

And, at the state level, several states (including Connecticut, Oklahoma, Illinois, and Texas) have announced that they are considering similar limiting legislation; doubtless other states will respond likewise. In the interim, continued litigation can

be expected over the issues not directly addressed by the Court’s decision in *Kelo*—including the applicable standard for ad hoc condemnations that are not part of integrated development project and the measure of just compensation.

On a broader scale, the *Kelo* decision and Senator Cornyn’s proposed legislation are both reflections of a national controversy regarding economic-development incentives. Various populist, anticorporate appeals take exception to the government affirmatively helping corporate interests—either through the exercise of eminent domain designed (at least in some sense) to assist corporate land acquisition, or through tax incentives designed to encourage corporate land development in depressed areas of the state. On this latter example, see the Sixth Circuit Court of Appeals’ recent decision in *Cuno v. DaimlerChrysler* and the *Jones Day Commentary* entitled “National Movement Against Economic-Development Incentives Makes Inroads in the Sixth Circuit and Raises Questions About Similar Incentives Elsewhere” (February 2005).

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