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The United States Supreme Court Authorizes Taking Private Property for Economic Development: New London, But Old Rules?

David B. Cosgrove, Esq.
Rutan & Tucker LLP

On June 23, 2005, the United States Supreme Court issued its long-awaited decision on the limits of the government's powers of eminent domain. It decided Kelo v. City of New London, 545 U.S. ___ (2005), Docket No. 04-108, a case which tested the government's ability to condemn private property for economic development purposes. The Court ruled that the government could acquire private property, then convey it to another private entity. It found the requisite "public use" in the implementation of a comprehensive urban development plan, despite the fact than none of the condemned properties was blighted.

The U.S. Constitution has been interpreted to allow a public agency to take private property by eminent domain only when it does so for a "public use" and pays "just compensation." The Kelo case questioned whether a taking of unblighted private property, with the purpose of transferring it to other private property owners to promote "economic development," was a public use sufficient to support appropriation by condemnation.

Kelo's close 5-4 decision reflects a sharp division regarding the deference courts offer to legislative bodies authorizing eminent domain. Indeed, the Court was so divided

it could not even decide whether it was following old rules regarding what constitutes "public use," or announcing new ones.

Kelo arose from the efforts of the City of New London, Connecticut, to implement a development plan to renovate a 90-acre area in economic decline. In January 2000, the City Council adopted the plan, contemplating construction of hotels, museums, residences, and a "river walk" area. The City delegated its eminent domain power to a non-profit development corporation, to implement the plan. Voluntary acquisitions failed to secure all required properties, and in November 2000, the corporation brought condemnation proceedings against 15 parcels, 10 of which were owner-occupied residences.

The owners originally challenged the taking in state court, arguing that condemnation for transfer of property from one private party to another, even if for economic improvement purposes, lacked the "public use" required to justify eminent domain. The Connecticut Supreme Court disagreed, holding the takings were valid, and rejecting the owners' calls for a heightened standard of judicial review for takings justified solely by economic development.

The majority of the U.S. Supreme Court affirmed. In so doing, it first distinguished the Kelo situation from traditionally unquestioned exercises of condemnation for "public use," such as acquisitions for public buildings, or for transfer to a private party for use by the general public, as with railroads. Kelo, on the other hand, involved a plan to transfer property held by one private party to a different (although at the time of the taking, unidentified) private party, with no assurance the land would be kept open to the public.

The majority opinion held this was permissible, deferring to the Connecticut statute declaring the taking of land, even developed land, as part of an economic development project was a "public use," and in the "public interest." (Slip Op. at 5.) In so doing, the Court relied on earlier precedent affording broad deference to state governments, and their individual determinations of what "public use" would support the use of eminent domain.

The majority cited extensively from two cases: Berman v. Parker, 348 U.S. 26, and Hawaii Housing Authority v. Midkiff, 467 U.S. 229. In Berman, the Court upheld condemnation of a department store property in a blighted area by Washington, D.C., pursuant to a plan for area-wide redevelopment. In Midkiff, the Court approved the State of Hawaii's use of condemnation to effectuate transfer of large tracts of property from lessors to lessees, to decentralize land ownership and eliminate the "social and economic evils of a land oligopoly." (467 U.S. at 241-242) Both cases found sufficient public use from the program being implemented by the government through the takings, even though private parties also benefited.

The majority also placed great emphasis on the comprehensive nature of New London's development plan, It refused to adopt a rule that condemnation for economic purposes had to be supported by showing a "reasonable certainty" that the intended economic benefits would occur. The Court noted orderly implementation of redevelopment plans requires the rights of interested parties to be established long before construction actually begins, and that postponing approval of condemnations until the likelihood of the entire plan's success was assured would be an undue impediment. (Slip Op. at 18.)

The dissent read Berman and Midkiff quite differently. It argued those cases allowed "private-to-private" property transfers through condemnation only when the pre-condemnation use was actually inflicting harm on society (i.e., urban blight in Berman, oligopoly in Midkiff). The dissent viewed Kelo's question regarding the constitutionality of takings for economic development as one of first impression. It charged that the majority was announcing a new rule, which permitted government to exchange one private user of property for another, merely on the perception of more productive economic use. The dissent argued this eroded any meaningful "public" restriction on the concept of "public use," and warned that, "the government now has license to transfer property from those with fewer resources to those with more." (Slip Op. at 13; O'Connor J., dissenting.)

The divisions the Kelo decision created in the U.S. Supreme Court reflect recent soul-searching in the eminent domain field generally, regarding condemnations motivated purely by economics. The practical impact of the Kelo decision in California is easy to underestimate, since California's redevelopment law already requires findings of blight and adoption of comprehensive redevelopment plans before redevelopment agencies can condemn. Cities or other public entities are not so constrained, however, and Kelo points up that these agencies can use eminent domain to accomplish whatever purposes fall under their jurisdiction, including economic development.

The balance Kelo will strike between public benefit incidental to overall economic growth, and preferential treatment of private interests selected for preferential treatment, remains to be seen. Nevertheless, the narrow 5-4 decision reflects the erosion of trust courts have recently shown toward legislative judgments, concerning when the interests

of using eminent domain to advance economic progress outweigh private property rights.

The practical, short-term impacts of Kelo are likely to be two. First, as suggested by Justice Kennedy in his concurring opinion, courts are likely to conduct a stricter, "meaningful rational basis review" of local governments' decisions to condemn. (Slip Op. at 3, Kennedy J., concurring.) The majority apparently took great comfort in the extensive administrative record attending New London's adoption of its economic development plan. Local courts are likely to follow suit, and begin looking for more evidentiary support in decisions attending future condemnations, or whether the professed public benefits are "only incidental or pretextual[.]" (Slip Op. at 1, Kennedy J. concurring.) The opinion offers little in the way of guidance on how this inquiry is to proceed, however.

Second, all states are likely to begin reexamining statutory authorization of the use of eminent domain for economic development. The majority opinion essentially invited this review, admitting the use of eminent domain to promote economic development was a matter of "legitimate public debate." (Slip Op. at 19.) Just because the U.S. Supreme Court permits local governments to pass and implement laws to condemn private property for economic development does not mean they will (or continue to) do so.

Indeed, over 40 California Legislators have already banded together to coauthor proposed Senate Constitutional Amendment 15, introduced July 13, 2005, to amend California Constitution Article I, Section 19, in response to Kelo. SCA 15 specifically provides, "Private property may not be taken or damaged for private use." The

amendment also allows condemnation of private property for any stated public use only upon “an independent judicial determination on the evidence that the condemnor has proven that no reasonable alternative exists.”

Such language will essentially turn on its head existing language in Code of Civil Procedure section 1245.250(a), giving conclusive effect to the condemning agency’s findings of necessity leading to condemnation, as well as the “gross abuse of discretion” standard of review for challenging those findings, under Code of Civil Procedure section 1245.255(b). The amendment also requires condemned property to be owned and occupied by the condemnor, or leased only to utilities regulated by the Public Utilities Commission, a provision that has already drawn fire from redevelopment and affordable housing advocates.

Regardless of how Senate Constitutional Amendment 15 fares through the legislative process, the legislative mood it reflects is unmistakable The era of broad political deference to agencies’ use of eminent domain is passing. It remains to be seen whether the law follows suit.

Given the perception that the Supreme Court’s decision in Kelo heralds a new expansion of the government’s condemnation power, there is little surprise that a battle over responsive legislation restricting that power now follows closely behind. So too will the debate whether *any* public benefit is sufficient to meet the public use requirement, even if the sole purpose of the underlying project is to create a boon to the economy, and if so, whether that leaves any meaningful restriction on the government’s power of eminent domain.

The author is the Co-Chair of Rutan and Tucker's Condemnation and Property Valuation Practice Group, and has specialized in eminent domain representation of both condemning agencies and condemned landowners for over twenty years. Any comments or question regarding this article may be addressed to him at dcosgrove@rutan.com

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Seven Attorneys Join Rutan & Tucker, LLP

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Rutan & Tucker, LLP, California's largest law firm based in Orange County, has announced the addition of Michael David Adams, Jennifer Brown, Matthew Z. Chang, Scott Cwiertny, Bob Hagle, William Ihrke, and Shawn M. Larsen as attorneys with the firm.

"We welcome these talented attorneys to our growing ranks and are confident they will further enhance the broad scope of legal services available to our clients," said Tom Crane, the firm's managing partner.

Adams is a member of the firm's Trial Section. He represents technology companies in matters involving trade secrets, copyright infringement, business torts, and license disputes. He received his law degree in 1996 from Stanford Law School. He received his undergraduate degree in 1993 from the University of California at Santa Cruz.

Brown is a member of the firm's Public Law Section. Her experience includes serving as an assistant regional counsel for the Commonwealth of Massachusetts, Department of Social Services, where she litigated care and protection, adoption and guardianship cases. She received her law degree in 1998 from Boston College Law School. She earned her undergraduate degree in 1995 *magna cum laude* from the University of California at Santa Barbara.

Chang is a member of the firm's Corporate/Securities Section. His experience includes advising emerging growth companies, private equity financing, mergers and acquisitions, registered securities offerings under the Securities Act of 1933, periodic reporting under the Securities Exchange Act of 1934, and general securities law compliance. He received his law degree in 1998 from Northeastern University School of Law. He earned his undergraduate degree in 1993 from the University of Redlands, and a Masters Degree in 1991 from Boston University.

Cwiertny is a member of the firm's Real Estate Section. His experience includes advising clients on the development of master planned communities, planned developments and condominium projects, as well as state laws and regulations concerning new home sales, compliance with state and local development conditions, and all aspects of homeowner associations. He is a graduate of Loyola Law School.

Hagle is also in the firm's Real Estate Section. He is experienced in real estate and commercial finance, including the development and implementation of loan organization, and restructuring and liquidation strategies involving diverse industries and loan products. He received his law degree from the University of California, Hastings College of Law.

Ihrke is a member of the firm's Public Law Section with a practice emphasis that includes land use and redevelopment. He has litigation and transactional experience in several areas affecting both public and private clients, including federal and state environmental and toxic tort claims, eminent domain cases, employment and anti-discrimination laws, and general municipal zoning and regulatory matters. He graduated from the George Washington University Law School with honors. He received his undergraduate degree from Claremont McKenna College, graduating *magna cum laude* and Phi Beta Kappa.

Larsen is a member of the firm's Labor & Employment Department. He is experienced in all areas of employment law, including harassment, workplace discrimination, terminations, employment agreements, leaves of absence, wage and hour issues, trade secrets, accommodating disabilities, and employment policies and procedures. He earned his law degree in 1999, *magna cum laude*, from the Case Western Reserve University School of Law. He received his undergraduate degree in 1996 from Brigham Young University.

About Rutan & Tucker, LLP

Rutan & Tucker is California's largest full-service law firm headquartered in Orange County, California. The firm also has offices in the Silicon Valley. Its primary practice areas include corporate and securities law, business and real estate litigation, labor and employment law, intellectual property, real estate, municipal and government agency law, land use law, bankruptcy, condemnation and property valuation, environmental law, and taxation and estate planning.

For more information:
Bruce Allen, marketing director, (714) 338-1838
Tom Crane, managing partner, (714) 641-3464