



Condemnation of Private Property for Economic Development: *Kelo v. City of New London*

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Summary

In *Kelo v. City of New London*, decided June 23, 2005, the Supreme Court held 5-4 that the city's condemnation of private property, to implement its area redevelopment plan aimed at invigorating a depressed economy, was a "public use" satisfying the U.S. Constitution—even though the property might be turned over to private developers. The majority opinion was grounded on a century of Supreme Court decisions holding that "public use" must be read broadly to mean "for a public purpose." The dissenters, however, argued that even a broad reading of "public use" does not extend to private-to-private transfers solely to improve the tax base and create jobs. Congress is now considering several options for responding to the *Kelo* decision.

On June 23, 2005, the Supreme Court handed down *Kelo v. City of New London*,¹ one of its three property rights decisions during the 2004-2005 term. In *Kelo*, the Court addressed the City's condemnation of private property to implement its area redevelopment plan aimed at invigorating a depressed economy. By 5-4, the Court held that the condemnations satisfied the Fifth Amendment requirement that condemnations be for a "public use," notwithstanding that the property, as part of the plan, might be turned over to private developers—a private-to-private transfer.

Under the Fifth Amendment, the United States may invoke its power of eminent domain to take private property—known as "condemnation"—only for a "public use."² This public use prerequisite is made applicable to the states and their political subdivisions, as in *Kelo*, through the Fourteenth Amendment due process clause. In addition, states and their subdivisions must comply with state constitutions, which use phrases similar to "public use." The issue in *Kelo* was not whether the landowners were compensated; condemnation, under the federal or state constitutions, must *always* be accompanied by just compensation of the property owner. Rather, the issue was whether the condemnation was not for a public use and thus *may not proceed at all*, even given that just compensation is paid.

Kelo prompted immediate debate whether Congress should respond by protecting property owners from the use of eminent domain for economic development.

Case Law Prior to *Kelo*

The overall issue is this: When does a private-to-private transfer of property through eminent domain, as in *Kelo*, satisfy the constitutional requirement that eminent domain only be used for a *public* use—notwithstanding that the transferee is a *private* entity. For our nation's first century, "public use" generally was construed to mean that after the condemnation, the property had to be either owned by the government (for roads, military bases, post offices, etc.) or, when private to private, by a private party providing public access to the property (as with entities, such as railroads and utilities, having common carrier duties). Beginning in the late 1890s, however, the Supreme Court rejected this public-access requirement for private-to-private condemnations, asserting that "public use" means only "for a public purpose." Even without public access, the Court said, private-to-private transfers by eminent domain, could, under proper circumstances, be constitutional.

In 1954, the owner of a department store in a blighted area of the District of Columbia argued to the Supreme Court that the condemnation of his store for conveyance to a private developer, as part of an areawide blight-elimination plan, failed the public use condition. He pointed out that his particular building was not dilapidated, whatever the condition of other structures in the area might be. The Supreme Court in *Berman v. Parker*³ unanimously rejected the no-public-use argument. The Court declined to assess each individual condemnation, but rather viewed the blight-elimination plan as a whole. So viewed, the plan furthered a legitimate public interest. Indeed, the public use requirement was said to be satisfied anytime government acted within its

¹ 2005 Westlaw 1469529 (No. 04-108) (U.S. June 23, 2005).

² U.S. Const. amend. V: "nor shall private property be taken *for public use*, without just compensation" (emphasis added).

³ 348 U.S. 26 (1954).

police powers. Not surprisingly, the *Berman* decision is heavily relied upon by municipalities across the country engaged in blight removal.

The 1980s saw further extensions of “public use” in the realm of private-to-private condemnations. In 1981, Detroit sought to condemn an entire neighborhood to provide a site for a General Motors assembly plant. Unlike in *Berman*, the neighborhood was *not blighted*; the City simply wanted to improve its dire economic straits by bringing in the plant to increase its tax base. The Michigan Supreme Court in *Poletown Neighborhood Council v. Detroit*⁴ interpreted “public use” in its state constitution to allow the condemnation.

A few years after *Poletown*, the U.S. Supreme Court in *Hawaii v. Midkiff*⁵ dealt with Hawaii’s use of condemnation to relieve the highly concentrated land ownership there. The state’s program allowed a land lessee to apply to the state to condemn the land from the owner, for sale to the lessee. Again unanimously, the Supreme Court perceived a public use, this time in the elimination of the claimed adverse impacts of concentrated land ownership on the state’s economy. As in *Berman*, the Court declared that the public use requirement is “coterminous with the scope of the sovereign’s police powers.”⁶

The effect of *Berman*, *Poletown*, and *Hawaii*, and kindred decisions, was to lead some observers to declare that “public use” had been so broadly construed by the courts as to have been effectively removed from the Constitution. To exploit the new latitude in “public use,” and with *Poletown* specifically in mind, local condemnations assertedly for economic development began to increase in the 1980s—some of them pushing the envelope of what could be considered economic development with a primarily public purpose. Predictably, litigation challenges to such condemnations increased in tandem, property owners charging that even under the courts’ expansive view of “public use,” the particular project could not pass muster. In one of the early property-owner successes, a New Jersey court in 1998 rejected as not for a public use a proposed condemnation of land next to an Atlantic City casino, for the casino’s discretionary use.⁷ A few other cases also rejected “public use” rationales for economic-development condemnations, either because the project’s benefits were primarily private, or because economic development categorically was not regarded as a public use. Most dramatically, in 2004, the Michigan Supreme Court unanimously reversed *Poletown*.⁸ All this set the stage for *Kelo*.

The *Kelo* Decision

In the late 1990s, Connecticut and the city of New London began developing plans to revitalize the city’s depressed economy. They fixed on a 90-acre area on the city’s waterfront, adjacent to where Pfizer Inc. was building a \$300 million research facility. The intention was to capitalize on the arrival of the Pfizer facility. In addition to creating jobs, generating tax revenue, and building momentum for revitalizing the downtown, the plan was also intended to make the city more attractive and create recreation opportunities. The redevelopment would include office and retail space, condos, marinas, and a park. However, nine property owners in the redevelopment area

⁴ 410 Mich. 616, 304 N.W.2d 455 (1981).

⁵ 467 U.S. 229 (1984).

⁶ *Id.* At 240.

⁷ *Casino Redevelopment Investment Auth. v. Banin*, 727 A.2d 102 (N.J. Super. 1998).

⁸ *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

refused to sell, so condemnation proceedings were initiated. In response, the property owners claimed that the condemnations of their properties were not for a public use.

In his opinion for the 5-justice majority, Justice Stevens held that the condemnations, implementing a carefully considered areawide revitalization plan in an economically depressed area, were for a public use, even though the condemned properties would be redeveloped by private entities. The majority opinion noted preliminarily that there was no suggestion of bad faith here—no charge that the redevelopment was really a sweetheart deal with the private entities that would benefit. The case therefore turned on whether the proposed development was a “public use” even though private-to-private transfers with limited public access were involved.

Without exception, said the majority, the Court’s cases defining “public use” as “public purpose” reflect a policy of judicial deference to legislative judgments—affording legislatures broad latitude in determining what evolving public needs justify. While New London was not confronted with blight, as in *Berman*, “their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference.” But just as in *Berman*, the plan was comprehensive and thoroughly deliberated, so the Court again refused to consider the condemnations of individual parcels; because the *overall plan* served a public purpose, it said, condemnations in furtherance of the plan must also.

The property owners argued for a flat rule that economic development is not a public use. Rejecting this, the Court said that promoting economic development is a long-accepted function of government, and that there is no principled way of distinguishing economic development from other public purposes that the Court has recognized as public uses—as in *Berman* and *Hawaii*. Nor is the incidental private benefit troublesome, as government pursuit of a public purpose often benefits private parties. And, a categorical rule against development condemnations is not needed to prevent abuses of eminent domain for private gain; such hypothetical cases, said the Court, can be confronted as they arise. Also rejected was the property owners’ argument that for cases of this kind, courts should require a “reasonable certainty” that the expected public benefits of the project will accrue. Such a requirement, the Court noted, asks courts to make judgments for which they are ill-suited, and would significantly impede carrying out redevelopment plans.

Finally, the majority opinion stressed that it was construing only the Takings Clause of the Federal Constitution. State courts, it pointed out, remain free to interpret state constitutions more strictly, and state legislatures remain free to prohibit undesired condemnations.

Other opinions in *Kelo* warrant mention, as they have echoed in the ensuing congressional debate. Justice Kennedy, one of the majority-opinion justices, filed a concurrence emphasizing that while deference to the legislative determination—“rational basis review”—is appropriate, courts must not abdicate their review function entirely. A court should void a taking, he said, that by a “clear showing” is intended to favor a particular private party, with only incidental or pretextual public benefits.

In dissent, Justice O’Connor, joined by the Court’s three core conservatives, argued vigorously that “[u]nder the banner of economic development,” the majority opinion makes “all private property ... vulnerable to being taken and transferred to another private owner, so long as it might be upgraded.” Justice O’Connor allowed as how private-to-private condemnations without public access could on *some* occasions satisfy “public use”—as in *Berman* and *Hawaii*. But in those cases, she asserted, “the targeted property inflicted affirmative harm on society.” In contrast, in *Kelo* the well-maintained homes to be condemned were not the source of any social harm, so their

elimination to allow a new use produces only *secondary* benefit to the public, something that almost any lawful use of real property does. She also questioned whether Justice Kennedy's test for acceptable development condemnations was workable, given that staff can always come up with an asserted economic development purpose.

Did *Kelo* Change Existing Law?

Property rights advocates assert that *Kelo* marks a change in existing takings jurisprudence, but the reality is arguably more subtle. Very possibly, some of their adverse reaction is attributable to the opportunity lost in *Kelo* to do away with economic-development condemnations in one fell swoop. After *Kelo*, property rights advocates will have to pursue their goal in multiple state courts and legislatures.

The doctrinal crux of the matter appears to lie in the majority and dissenters' divergent readings of the Court's prior public-use decisions. Justice Stevens for the majority finds no principled difference between economic-development condemnations and condemnations the Court has already approved, as in *Berman* and *Hawaii*, while Justice O'Connor for the dissenters does. Justice Stevens' view arguably takes insufficient account of the distinction between projects where economic development is only an instrumental or secondary aspect of the project and those where economic development is the primary thrust. On the other hand, the distinction drawn by Justice O'Connor between projects whose primary thrust is elimination of affirmative harms and other projects, while intuitively appealing, requires a dichotomy between elimination of harm and creation of benefit that the Court has previously critiqued as unworkable. Moreover, Justice O'Connor had to backpedal on the statement in *Hawaii*, which she authored, that "the public use requirement is coterminous with the scope of the sovereign's police powers." Some exercises of that police power, she now would hold, are not public uses.

Of course, what *Kelo* really means will not be known until the lower courts have had a few years to interpret and apply it. It will be interesting to see whether Justice Kennedy's "meaningful rational basis" review has any content, or whether the dissenters' more skeptical view, that a plausible economic development purpose can always be conjured up by competent staff, will ultimately prove correct. In the meantime, frequent efforts can be expected by property owners and like-minded public interest law firms to expand the number of states whose courts find fault under state constitutions with development condemnations.

Congressional Options

The interest group alignment on how to respond to *Kelo* does not break down along stereotypical liberal-conservative lines. A conservative, one supposes, would side with the property owners, but having a states-rights orientation might resist federal constraints on what local governments can do. On the other hand, liberals might be comfortable with municipal efforts to guide the market toward economic development, but resist on the ground that such efforts disproportionately displace minority and low-income communities.

Some options that Congress might consider for responding to *Kelo* are—

Do Nothing

Kelo made plain that it was interpreting solely the Takings Clause in the U.S. Constitution. As in other constitutional areas, state courts remain free to interpret state constitutions more stringently, and indeed some state high courts have read their constitutions to bar condemnation for economic development. Moreover, whatever the state constitution says, state legislatures are free to statutorily prohibit development condemnations, and indeed, once again, at least a few have. In light of the foregoing, Congress might conclude that it was appropriate to let the matter simmer for a few years in the states, and then act only if unsatisfied with their response.

Attach Conditions to the Grant of Federal Funds for State and Local Projects

Proposals have already surfaced in Congress to prohibit the use of federal money for state and local projects with an economic development purpose—usually through conditions on federal grants. There are several ways this could be done. The prohibitory condition could be attached solely to the monies for the particular economic development project involving the condemnation. More broadly, the condition could be applied to a larger pot of money (e.g., Community Development Block Grants) still having some relation to economic development condemnations. Most expansively, the condition could be attached to the largest federal funding program one can find (or *all* federal funding), though this course of action may run afoul of the constitutional requirement that conditions on federal funding must relate to the underlying purpose of the funding.⁹

Direct Federal Mandates

The suggestion has been raised that Congress could direct how states exercise their eminent domain authority for economic development projects, regardless of whether federal funds are involved. Such legislation, however, arguably might exceed congressional power under the Commerce Clause¹⁰ and the Fourteenth Amendment,¹¹ and may even raise Tenth Amendment issues.¹²

Expand the Uniform Relocation Act (URA)

This statute¹³ requires compensation of persons who move from real property, voluntarily or by condemnation, due to a federal project or a state or local one receiving federal money. Its *raison d'être* is that the constitutional promise of just compensation covers only the property taken,

⁹ *South Dakota v. Dole*, 483 U.S. 203, 207-208 (1987).

¹⁰ *United States v. Lopez*, 514 U.S. 549, 560, 564 (1995) (Congress may regulate intrastate activity under the Commerce Clause only when the activity affects commercial transactions or is part of a larger regulatory scheme). Arguably, commercial transactions are consensual exchanges, so that a municipal condemnation may not be seen as commercial. Further, it is not apparent that the proposals contemplated would include a broad regulatory scheme regarding economic development, of which limiting eminent domain would be a part.

¹¹ *City of Boerne v. Flores*, 521 U.S. 507 (1997) (requiring that federal legislation enacted under section five of the Fourteenth Amendment be congruent and proportional to a pattern and history of constitutional violations).

¹² *Reno v. Condon*, 528 U.S. 141, 151 (2000) (reserving the question whether a law that only regulates state activity would comport with the Tenth Amendment).

¹³ 42 U.S.C. §§ 4601-4655.

leaving the condemnee to bear the often substantial additional losses associated with having to move. Some of those losses are compensated under the URA. The statute, however, has long been criticized as inadequate both as to the losses covered and the amounts of compensation available. Moreover, it creates no cause of action allowing condemnees to enforce its terms. Expanding the Act would at least assure that persons displaced by economic-development condemnations receive fuller compensation.

Amend the Fifth Amendment of the U.S. Constitution

This is perhaps the most direct, but logistically difficult, option.

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