

## INSIDERS OUTLOOK

# Taking a closer look at the controversial Kelo case

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In the closely-watched case of *Kelo v. City of New London*, a sharply divided U.S. Supreme Court ruled 5-4 that the use of eminent domain for economic development constitutes a valid public purpose and therefore is permissible under the Fifth Amendment to the U.S. Constitution.

The decision vests state and local governments with broad power to enact laws allowing for acquisition of private property by eminent domain as part of a comprehensive redevelopment initiative, even where the property to be acquired is not blighted or in need of redevelopment.

The *Kelo* case presented the U.S. Supreme Court with a unique set of facts to test the parameters of the use of eminent domain to promote economic development.

Faced with a litany of declining economic conditions which led to it being designated as a “distressed municipality” by the State of Connecticut, the City of New London (the “City”) desired to see its Fort Trumbull area developed in

a more economically productive manner.

To facilitate this objective, the City — as allowed by Connecticut law — designated the New London Development Corporation (“NLDC”), a non-profit corporation without the power of eminent domain, to act as the City’s agent for implementing the project. The City then authorized the NLDC to exercise the power of eminent domain for the purpose of acquiring property within the redevelopment area.

***“State courts and legislatures will become the new battleground for economic development condemnations.”***

The Court concluded that the City’s determination to embark upon a redevelopment initiative was entitled to deference, in part because it both was comprehensive in nature and benefited the public rather than an individual property owner. Thus, the Court ruled that the project “unquestionably” serves a public purpose.

Connecticut, like many other states, has an urban renewal statute which requires a finding of blight before the power of eminent

domain can be utilized to acquire property by eminent domain. However, that statute was not at issue.

The NLDC sought to acquire the properties in question under a different statute, one which authorizes use of eminent domain to acquire property for a “business purpose,” which is defined as “any commercial, financial or retail enterprise.”

Alleviation of conditions warranting redevelopment therefore was not at issue, and there had been no finding that the existing development was in disrepair. Instead, the Court was presented with a situation where the property was designated for acquisition by eminent domain *solely* to promote economic development, with the objective of providing a potential increase in tax revenue to the City.

*Kelo* forced the Court to juxtapose Connecticut’s virtually unlimited power of eminent against the Fifth Amendment’s “public use” requirement, which provides “nor shall private property be taken for public use without just compensation.”

The question before the Court centered on whether the exercise of eminent domain to acquire private

property for the purpose of facilitating a private development project constitutes a “public use” within the meaning of the Fifth Amendment, particularly where the economic benefits were uncertain.

Under an established series of precedents spanning half a century, the Court recited a variety of situations in which takings have been held to constitute valid public purposes which meet the constitutional “public use” requirement, such as slum clearance and reduction in concentration of land ownership.

Use of eminent domain for economic development, the Court concluded, was fully consistent with these precedents.

In a strongly worded dissent, four justices asserted that the majority’s decision subjects all private property to eminent domain.

According to the dissenters, an economic development condemnation amounts not to a public use, but one for the benefit of private persons.

In their view, condemning one private use solely to allow development of another does not constitute a public purpose and is therefore unconstitutional.

As a result of the *Kelo* decision, state courts and legislatures will become the new battleground for economic development condemnations.

*Kelo* gives states a green light to

enact laws like the one in Connecticut which, if consistent with the respective state’s constitution, allow the taking of private property for redevelopment, even where no blight or similar findings has been made.

At least one state, Michigan, enacted such a law which initially was upheld by its Supreme Court in the early 1980’s, only to be overruled as unconstitutional last year.

Over time, a patchwork is likely to develop among states like Connecticut that have both a constitution and state laws which permit economic development condemnations, and those like Michigan, that do not. ■