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## *Kelo v. New London* - Profound Implications For Eminent Domain and Urban Redevelopment

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On June 23, 2005, the U.S. Supreme Court decided *Kelo v. New London*, one of the more significant property rights case in decades. The specific question in *Kelo* was whether a local government's condemnation of non-blighted private property for purely economic development purposes is constitutional. That question turned on whether economic development qualifies as a "public use" within the meaning of the Fifth Amendment's Takings Clause (i.e., "[P]rivate property [shall not] be taken for public use without just compensation"). Under the Takings Clause, before even reaching the question of whether a property owner was provided "just compensation" in exchange for his condemned property, a court must agree that the condemnation was undertaken for a "public use." The Court held in *Kelo* that, under the right circumstances, economic development can be sustained as a "public use" under the Fifth Amendment. The *Kelo* decision has broad implications for municipalities, real estate developers, and individual property owners alike.

### Background

*Kelo* arose out of the efforts of the city of New London, Connecticut (the "City") to acquire by condemnation a group of private homes as part of the City's efforts to revitalize the economically distressed area. In 1998, Pfizer, the pharmaceutical company, decided to build a \$300 million research and development facility in the City. This was a major coup for the City, which had just experienced the closure of the U.S. Naval Undersea Warfare Center and the resulting loss of almost 1,000 jobs. Thereafter, the New London Development Corporation ("NLDC"), a non-profit organization established to assist the City in planning economic development, acting with state and local governmental approval, finalized an integrated plan to redevelop a 90-acre area near the proposed Pfizer facility. NLDC developed a plan for a hotel, conference center, marina, luxury condominium units, and commercial buildings with prime office space. In order to implement the development plan, the City Council charged the NLDC with acquiring the necessary property either by purchase or, if necessary, by eminent domain. NLDC succeeded in purchasing most of the property in the 90-acre area, but was unable to acquire the properties owned by Suzette Kelo and a number of other homeowners who refused to sell their homes at any price. Because the acquisition of those homes was necessary

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in order to implement the development plan, NLDC<sup>1</sup> initiated condemnation proceedings to acquire these properties.

The homeowners (“Petitioners”) argued that the Takings Clause does not permit the use of condemnation for the “sole purpose” of private economic development. Under existing U.S. Supreme Court precedent, condemnation of blighted properties had been upheld, even if the property would ultimately be transferred to a private entity to undertake the redevelopment, but the Petitioners here argued that taking property from Owner A to give to Owner B not to eliminate blight, but simply because Owner B would make more economically productive use of that property, stretched the definition of “public use” beyond the constitutional limits. Even if private economic development was considered a “public use,” the Petitioners added that no “reasonable certainty” existed that the economic benefits would actually “trickle down” to the community.

The City countered that the project would spur economic development, significantly increase property tax revenues, and create jobs, all of which were sorely needed by the City. At the time that the condemnation proceedings were first initiated, the City had a small tax base (54% of the City’s land is tax-exempt) and a high unemployment rate. Condemnation of the contested properties was necessary, the City claimed, because of the difficulty in assembling large contiguous parcels that would allow for productive development. The City further argued that U.S. Supreme Court precedent dictated that courts should defer to legislative judgments relative to condemnation as long as a “rational basis” exists for the action.

A Connecticut trial court enjoined the condemnation proceedings with respect to four of the Petitioners, but allowed the other three to proceed. A divided Connecticut Supreme Court (4-3) held that the City could condemn all of the properties as reasonably necessary to its goal of advancing the economic development project. The Connecticut Supreme Court further held that under the United States and Connecticut Constitutions, the taking of land as part of an economic development project qualified as valid “public use.” The court rejected a more stringent test that would have forced the City to provide evidence that the anticipated economic benefits would actually materialize.

In 2004, the U.S. Supreme Court granted *certiorari* on the question of whether taking of private property solely for economic development purposes qualifies as a “public use” within the meaning of the Takings Clause.

### Prior Jurisprudence

The U.S. Supreme Court had previously provided guidance in the eminent domain area in two landmark cases. In *Berman v. Parker*, 348 U.S. 26 (1954), the Court upheld the taking of a department store as part of a community redevelopment project in an otherwise blighted area in the District of Columbia. The redevelopment project was to be carried out, however, by another private entity rather than by the District. The Court upheld the concept of condemnation that

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<sup>1</sup> NLDC and the City are often used interchangeably both in the opinion of the U.S. Supreme Court and in this analysis.



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ultimately results in the transfer of property from one private owner to another where it is necessary to the redevelopment of a blighted area. Justice William Douglas wrote, “[w]e cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.” In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the U.S. Supreme Court upheld Hawaii’s right to use eminent domain to break up a feudal-like concentration of private land ownership which had stifled the state’s housing market.

Many commentators, however, credit a Michigan Supreme Court decision with the increasing use of eminent domain for private development of non-blighted areas. In *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), the Michigan Supreme Court ruled that Detroit could condemn a working-class neighborhood to build a new General Motors plant. Since this decision, similar condemnations have facilitated numerous successful urban redevelopment projects (such as Baltimore’s Inner Harbor area), but have also inspired criticisms that public entities abuse their condemnation powers.

Over time, state courts have rendered conflicting decisions regarding eminent domain. Many states often use eminent domain for economic development, while others specifically ban or discourage it. Shortly before the U.S. Supreme Court granted *certiorari* in *Kelo*, the Michigan Supreme Court overturned its Poletown decision in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), prompting many to speculate that the tides were indeed turning. The *Kelo* case gave the U.S. Supreme Court the opportunity to clarify the ground-rules for condemnations for economic purposes.

### The Court’s Decision

The U.S. Supreme Court, in a 5-4 decision, affirmed the Connecticut Supreme Court’s holding that the exercise of eminent domain by the City and the NLDC was constitutional. Writing for the majority, Justice John Paul Stevens stated that “over a century of case law” dictated that “carefully formulated” economic development projects such as that planned by New London be considered a permissible “public use.” Justice Stevens rejected the property owners’ argument that economic development never qualifies as a public use, because public use jurisprudence “eschew[s] rigid formulas and intrusive scrutiny.” Nor, he added, should takings of this kind depend on “reasonable certainty” that the expected public benefits would actually materialize, because such a “constitutional rule” would “unquestionably impose a significant impediment.” Acknowledging the “hardship” to the property owners in this case, Justice Stevens noted that “the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate,” and he emphasized that nothing in the Court’s opinion “precludes any State from placing further restrictions on its exercise of the takings power.” The Court emphasized that the City had proven that the project was expected to create more than 1,000 jobs in an economically distressed city, the takings were “reasonably necessary” to carrying out the project, and the “comprehensive character” of the City’s plan.

Justice Anthony Kennedy, the critical swing vote in the 5-4 decision, wrote a separate concurrence stating that there may be some occasions when “the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible” that courts could presume an “impermissible private purpose.” In this case, however, the trial court had done a



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“careful and extensive inquiry” and had determined that the development plan was primarily aimed at benefiting the local economy as a whole, rather than just the private economic interests of Pfizer or the project’s developer. In his view, this development plan justified deference to the legislature, and accordingly New London’s proposed exercise of eminent domain was permissible.

In a strongly-worded dissent, Justice Sandra Day O’Connor—who wrote the opinion upholding the large-scale land transfers in the *Midkiff* case—warned that the Court’s *Kelo* decision erased any distinction between “public” and “private” use. The majority’s emphasis on the comprehensive nature of the development plan was misplaced, she argued, because regardless of the particular merits of the City’s plan, the Court had articulated a broad principle that would permit future development plans “generated with less care.” As a result, Justice O’Connor cautioned that, because of the Court’s decision, “[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.” Justice Clarence Thomas added in a separate dissent that the Court should have resolved the tension in this case in favor of the Constitution’s original meaning, which allows the government “to take property only if it actually uses or gives the public a legal right to use the property.” The ultimate tone of the dissenting opinions was that the holding by the majority benefits those “citizens with disproportionate influence and power in the political process, including large corporations and development firms.”

### Conclusion

In applying the *Kelo* decision to development activity today, developers and public agencies should recognize that in order to support the use of eminent domain in an economic enhancement project, which project is to be accomplished in whole or part through the use of eminent domain, the stakeholders must support that exercise of power through a comprehensive redevelopment plan derived through a deliberative process. The *Kelo* Court reiterated that the City of New London had carefully formulated a development plan that it believed would provide appreciable benefits to the City.

Secondly, the decision does preserve a role for lower courts to evaluate challenges to the use of eminent domain for economic development. Judicial scrutiny clearly will be applied in cases where the alleged “public benefit” is pretextual or merely incidental (i.e., where there is evidence that the intended primary beneficiary of the economic development is a private entity). In such cases, lower courts may evaluate the purpose of and motive behind the property transfer.

Lastly, *Kelo* does not mean that economic development can always justify the use of eminent domain. As Justice Stevens explicitly noted, states may enact further restrictions on the exercise of the takings power, and many already have. Under California law, for example, a redevelopment agency may only condemn property in a “blighted area.” Moreover, the close nature of the decision, and Justice O’Connor’s vigorous dissent, beg the question of how a reconstituted U.S. Supreme Court would rule in a future case. In this respect, clients should continue to monitor the legal developments in this area in both the courts and the state legislatures.



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