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The Mighty Myths of *Kelo*

By John R. Nolon



The press releases of property rights activists and the media's rapid embrace of their views have perpetuated several myths about the U.S. Supreme Court's decision in *Kelo v. New London*.¹ In the immediate aftermath of this myth making, the legislatures of several states have adopted restrictions on the use of eminent domain with uncharacteristic speed. Wisely,

the New York State Legislature has been more cautious in its reaction.

As it turns out, many of the eminent domain laws in other states have nothing to do with New London's program of area-wide redevelopment or the legal holding of the *Kelo* case. In fact some will have the unintended consequence of crippling state and municipal efforts to direct the redevelopment of inner-city neighborhoods, coastal areas subject to inundation due to climate change, and cities trying to rebuild after devastating natural disasters.

Myth #1: New London's Objective Was Economic Development

New London is a formally designated "distressed city." In Connecticut, a state in which there is a great disparity between haves and have-nots, New London houses mostly the latter. Its 5.5 square miles were carved out of the affluent town of Waterford, which has a property tax rate 40 percent lower than New London's. The city serves, as most older cities do, to house transit facilities, hospitals, colleges, polluting industries, and low- and moderate-income workers: all resources critical to its region's well-being. New London's poverty and unemployment rates are well above the state's average. Because the city lost a naval base and most of its industrial jobs, its tax base declined and it has flirted with municipal bankruptcy.

New London, after much public discussion and debate, adopted an area-wide redevelopment plan for one of the few relatively low-density parcels left, next to the shuttered naval facility and a state-funded public park. The plan envisioned a small mixed-use, tourist-oriented urban village, with public parking, a renovated marina and river walk open to the public, and some restaurants and shopping. These activities would generate 1,000 new jobs, bring tax revenues to the fiscally strapped city, and enable it to provide better services to its low- and moder-

ate-income residents and workers and continued service to the region beyond.

It would be startling news to generations of urban policy makers that this New London program was designed to achieve "economic development." Area-wide redevelopment programs are a response to a tight knot of despair in distressed cities like New London. These cities were called places "from which men turn" by the unanimous U.S. Supreme Court in *Berman v. Parker*,² which upheld an area-wide urban renewal plan in the District of Columbia over 50 years ago. Countless local, state, and federal programs have struggled to restore inner-city regional centers; to obtain the proper balance of housing, industrial, and commercial facilities; and to increase their attractiveness to persons of all incomes to make them desirable places to live, work, shop, and enjoy life and its urban amenities.

Myth #2: *Berman v. Parker* Made New Law

The *Kelo* Court based its decision on the *Berman* case which upheld the constitutionality of condemning the non-blighted property owned by the plaintiff in the interest of area-wide redevelopment of an inner-city neighborhood. It also sanctioned the lease or sale of condemned land to private redevelopment companies whose projects conform to the area-wide plan. According to the myth, that Court confused the narrow concept of public use (for which property may be condemned) with the broader definition of public purpose (which justifies other government functions, such as land use regulations).

The *Berman* Court—all nine Justices—thought that condemnation could be employed to accomplish any objective for which sovereign power can be exercised when it permitted condemnation of private land for a "public use."³ The myth claims that "public use" is limited to a narrower range of objectives: takings for public works projects, public utility projects, or projects that the public at large will actually be able to use, such as a park. There is no evidence of any discussion of this distinction among the Constitution's framers; in fact, the Court had assumed the opposite for over 50 years before the *Berman* decision was handed down.

In 1893, Congress authorized the War Department to condemn private property in and around the Gettysburg battlefield. The Gettysburg Electric Railway Company challenged this act, arguing that the preservation of the lines of battle by preventing the completion of its rail line was not a public use as that term is used in the Fifth Amendment. In *U.S. v. Gettysburg Electric Railway Co.*, the

Court addressed this question: whether “the use to which the petitioner desires to put the land . . . is of that kind of public use for which the government of the United States is authorized to condemn land.”⁴

The Court held that the government “has authority to do so whenever it is necessary or appropriate to use the land in the execution of any of the powers granted to it by the constitution. . . . [W]hen the legislature has declared the *use or purpose* to be a public one, its judgment will be respected by the courts. . . .”⁵ As if anticipating future questions, the Court added, “The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred.”⁶

Myth # 3: Condemned Land Cannot Be Transferred to a Private Entity

What about the *Berman* court’s authorization of the transfer of title to condemned land to the private sector for redevelopment—surely that was a newly minted concept? To the contrary. That complaint was settled by the Court in a 1906 opinion: *Strickley v. Highland Boy Gold Mining Co.*⁷ In *Strickley*, an easement over the plaintiff’s property was condemned and handed over to his neighbor, a private mining company. The complaint was that this was done solely for private benefit and was not, therefore, a public use under the Fifth and Fourteenth Amendments. The condemnation was done under a Utah statute which asserted that the public welfare of the state demanded that mining operations in the mountains have access to rail lines in its valleys.

Justice Holmes wrote the opinion of the Court which addressed the sole question of whether the Utah statute is consistent with the constitutional prescriptions regarding the condemnation of property for a public use. His response follows: “In the opinion of the state legislature and the Supreme Court of Utah, the *public welfare of that State* demands that aerial lines between the mines on its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong.”⁸

For a more modern endorsement of taking private property and transferring it to other private parties where the larger public interest is clearly promoted, see *Ruckelshaus v. Monsanto*.⁹ There the Court upheld a provision of the Federal Insecticide, Fungicide, and Rodenticide Act which “took” the data submitted by private companies to support their applications for a permit to market chemicals. It allowed the EPA to use their private data to evaluate subsequent applications, so long as the later applicants paid just compensation for the data. The public

benefit is in the speedier entrance into the market of valuable chemical products.

Myth # 4: Every American Home and Shop Is Vulnerable to a Taking

The petitioners in *Kelo* were represented by an advocacy litigation group that raised public awareness of the fact that some public takings are abusive. It cited evidence of condemnations of homes and shops of innocent owners whose property was taken primarily to benefit a Walmart, a Ritz Hotel, or even Donald Trump. The specter of corrupt, or misguided, local officials condemning title to property of private owners primarily to benefit developers was on the mind of the Court in the *Kelo* decision. The majority made it clear 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.”¹⁰

The background of the New London case illustrates the extent of the government’s presence in typical area-wide development planning. The state designated New London an economically distressed city. Its area-wide plan was supported by a \$5 million state grant. The state also provided a \$10 million grant to establish Fort Trumbull park. The state authorized the city to establish the New London Development Corporation, a quasi-public body, which was then created by the city council to prepare the plan and implement it as the city’s agent. Such public development corporations are created and governed by the state Municipal Development Statute which authorizes the condemnation of land that cannot be acquired voluntarily and without which the project cannot succeed. Each qualifying project is designated by the state statute as “public use.” Under that statute, a detailed public process must be followed including public input, public hearings, and full transparency. The resulting plan in New London was approved by the city council and by the State of Connecticut. The New London Development Corporation eventually selected one developer out of a group of applicants to which the land is to be leased, not sold, remaining in public ownership. Finally, the city agreed to install some of the needed infrastructure as a contribution to the area-wide project’s success.

Justice Kennedy, in a concurring opinion in *Kelo*, discussed how courts handle one-to-one transfers. He demonstrated that, using the rational basis test that all police power actions must meet, courts can invalidate such condemnations by finding that the public benefits achieved by such a transfer are only incidental to the benefits that will be conferred on the private parties. The dissenters in *Kelo* disparaged Kennedy’s confidence in the rational basis test as sufficient to ferret out privately motivated takings by applying the “stupid staffer” test: suggesting that only the most inept administrations could fail to paper over a private deal and make it appear public in nature.

The dissent was apparently unaware of numerous cases called to the Court's attention in *amici* briefs submitted in *Kelo*. In *99 Cents Only Store v. Lancaster Redevelopment Agency*, for example, a federal district court in California invalidated the condemnation of a store to accommodate the interest of an adjacent Costco's expansion plans; it found that the redevelopment agency's only purpose "was to satisfy the private expansion demands of Costco."¹¹ In *Bailey v. Meyers*, the state court held that the taking of a brake shop for the construction of a hardware store to advance economic development lacked the requisite public purpose.¹² Donald Trump's attempt to get the Casino Reinvestment Development Authority in New Jersey to condemn the parcels of a few landowners who had refused to sell to expand his hotel and casino was thwarted by the state court; it found that the Authority had given Trump a blank check regarding future development on the site.¹³

Under state law, in fact, courts have invalidated condemnations in Arizona, California, Georgia, Illinois, Indiana, Michigan, Missouri, New Jersey, and Virginia. In all these cases, there was no sustaining public presence of the type involved in all area-wide redevelopment projects. In cases involving no more than a one-to-one transfer of title between businesses, as a *de facto* matter, the court can use the rational basis test to look closely at whether the private benefit achieved is dominant and the public benefit incidental. This enables state courts to invalidate such condemnations, saving the homes of average Americans and the businesses of moms and pops, dulling the edge of the hard-cutting rhetoric of those alarmed by the majority's decision in *Kelo*.

Myth # 5: Private Gain was the Motive for the Condemnation in *Kelo*

Reactions to *Kelo* pointed out that developers often drive public decisions to condemn private land. They somehow convince public officials who stand for reelection frequently to exercise public authority primarily for the developers' private gain. In New London, there was no developer on the scene during the entire twenty-month decision-making process. The New London Redevelopment Authority, a publicly created, not-for-profit corporation, was authorized to purchase and condemn land for the area-wide development project. Following acquisition, it was authorized to advertise for private redevelopers, select one, and lease the acquired land to that developer.

Area-wide development projects, under state laws that govern them, are subject to onerous, transparent, and lengthy processes that provide all the details of the project and invite public participation and extensive debate. In New London, the public was asked what it thought about the redevelopment project as the project was debated, shaped, and decided over a period of near-

ly two years. In New York, under the State Environmental Quality Review Act, redevelopment projects generate foot-high environmental impact statements that include a hard look at their impact on community character and neighborhood change, and contain lengthy chapters on the economic and environmental consequences of the project.

Public hearings, Uniform Land Use Review Process proceedings in New York City, reviews of impact statements, open meeting laws, conflict-of-interest rules, and a host of other legal protections ensure that the public knows who is involved, how they were chosen, what the proposed benefits are, and who will suffer. By the time such projects are approved, this public process has mediated the claims of those whose properties are to be taken and the public benefits of urban revitalization: jobs, housing, increased taxes, better services, and a more livable community.

Myth # 6: State Legislation Limiting Eminent Domain Is Clearly Beneficial to the Public

The many state legislative reforms that followed *Kelo*'s discontents can be divided into two categories. The first includes those that in effect needed procedural and substantive reforms: longer notice to affected landowners, more public involvement, more transparency, better area-wide planning, or clearer articulation of the public benefits to be achieved. The second curtails the use of eminent domain in one of several ways: they limit it to public works, public access, or public utility projects; allow it in blighted areas, but define blight narrowly; prohibit it for economic development; prohibit the transfer of condemned land to private redevelopers; or some combination of these.

There are serious doubts about whether the consequences of this second category of reforms are beneficial. If Connecticut statutes, for example, limited condemnation to public works projects or limited it to use in narrowly defined blighted areas, New London would have had great difficulty carrying out an area-wide development project in aid of its revitalization.

Several projects in New York City would have been frustrated if such laws had been adopted in New York. In an *amici curiae* brief filed in *Kelo*, the Empire State Development Corporation noted its success in transforming neighborhoods surrounding the New York Stock Exchange, Seven World Trade Center, and in the 42nd Street Redevelopment Area; it attributed its success, in part, to using its authority to condemn private properties and convey them to private development companies. The Corporation's brief notes that "despite private benefits, the predominant economic and social benefits have accrued to the public."¹⁴

In *Rosenthal & Rosenthal v. The New York State Urban Development Corp.*, the Second Circuit affirmed a District Court decision upholding the taking of the petitioners' unblighted buildings which were needed for the 42nd Street Redevelopment Project.¹⁵ The District Court found that the proposed taking was rationally related to a conceivable public purpose. The Second Circuit noted that "the power of eminent domain is a fundamental and necessary attribute of sovereignty, superior to all private property rights."¹⁶ It rested its decision on the U.S. Supreme Court's decision the previous year in *Hawaii Housing Authority v. Midkiff*, concluding that "courts long have recognized that the compensated taking of private property for urban renewal or community redevelopment is not proscribed by the Constitution."¹⁷ The U. S. Supreme Court denied *certiorari* in *Rosenthal* in 1986.¹⁸

Various industrial companies, including several oil refineries, challenged the City of Syracuse Industrial Development Agency for condemning their properties to further a waterfront redevelopment master plan for an 800-acre area on the south shore of Onondaga Lake known as "oil city." *Sun Company v. City of Syracuse IDA*.¹⁹ The area was located next to several low-income neighborhoods in Syracuse where a disproportionately large percentage of welfare recipients, jobless, and poverty-level households resided. This is a classic environmental justice context, but condemnation could be denied under reform bills that define such projects as "economic development" or that require the city or IDA to develop the project itself, by prohibiting transfer of title or possession to a private redevelopment company. The New York court in *Sun Company* found that the purpose of the taking was to accomplish a proper use. The petitioners' motion for leave to appeal was denied by the Court of Appeals in 1997.²⁰

Property rights advocates oppose condemnation because it victimizes limited-income homeowners. Consider New Orleans, still trying to find the formula for redevelopment long after Katrina. In the absence of an area-wide plan and effective means of implementing it, many lower-income homeowners do not have the financial wherewithal to repair or rebuild their homes. Many of them work for \$10 to 15 an hour. With this income, they can afford a home costing around \$70,000. In the lower Ninth Ward, lower-income homeowners have existing debt, face extremely high costs of repair, and must meet FEMA flood plain elevation requirements which alone can cost \$30,000. The sum of these costs, in many cases, greatly exceeds what they can afford even considering available governmental subsidies, where they can be obtained. As a result, many property owners have sold their properties at 30 percent of pre-hurricane values.

Area-wide development in New Orleans can't work without the use of the power of eminent domain. Some owners cannot be found. Some parcels have no record

owners. Some are slivers of land and not marketable, others are in foreclosure, some are tied up in estates that will never be resolved, others have multiple owners who cannot agree on what to do, and some are owned by individuals who are incapacitated. Although the situation is more dramatic, this confusion of titles is typical of conditions in many inner-city neighborhoods, which are full of small parcels with owners who are not rational actors or cannot be found.

What if a major hotel and entertainment center developer were ready to build a mixed-use project and, at the insistence of the city, to provide an equity position and affordable residences to the lot owners in the area? Would this be an economic development project? Would it be prohibited because some lots will be transferred to a private entity?

If this second category of statutory "reforms" had been adopted by Congress, would the Gettysburg battlefield still have been saved from a railroad's extension at a critical moment? With such reforms, would the state of Utah have been able to extract needed minerals to further the public welfare at a key moment in the state's overall development?

Conclusion

Before corrective legislation is enacted in New York there is more that we need to know about the use of condemnation in redevelopment. How much actual hardship is caused to those whose homes and properties are condemned? Anecdotal evidence shows that most affected owners settle, agree on prices, and relocate. Some are unable to find suitable new quarters and suffer economically as a result. A few actually benefit from being transplanted. What corrective measures are needed to prevent documented hardships? Do we know whether redevelopment projects would be feasible without the availability of condemnation? Again, there is evidence that many property owners would fail to negotiate for a fair settlement with redevelopment agencies if they didn't realize that the agency could take their property if negotiations fail.

If the absence of the power of condemnation would mean that most redevelopment projects would not be feasible, what are the resultant costs to the public? Have redevelopment projects helped distressed cities to the benefit of the public? Here the evidence is mixed: New London's earlier downtown renewal efforts years ago were less than impressive, while recent revitalization projects in many regions today seem to be succeeding.

The unique American approach to land development and urban revitalization is to empower local governments. Seldom are they required to do particular things, like protect wetlands, limit development to certain areas, or provide a certain amount of affordable housing. If cit-

ies want to engage in area-wide redevelopment projects with qualified and eligible private redevelopment companies, the approach has been to let them do so. The state legislature will give them that power, but it will not mandate that they use it.

In reaction to *Kelo*, a few states have passed laws that constrain the power of city legislatures from being the architects of their own revitalization. The speed with which these limitations have been enacted in some states has been breathtaking. New London, New York, New Orleans, and Syracuse, along with other older industrial municipalities, need help. So do coastal cities fearing inundation and other cities as they recover from natural disasters. They get their legal authority to act from the state. They need technical assistance, financial relief, innovative ways to attract private development, tax credits and abatements, help in modernizing needed infrastructure and providing affordable housing, and best practices for working with private firms to provide jobs and housing while protecting community character and environmental resources for future generations.

It is important to be clear about what is at stake here. The *Kelo* decision has been criticized as an assault on middle-class home and business owners in the pursuit of purely private-sector economic interests. This is a serious charge and one that must be addressed where condemnations achieve only incidental public benefits. To say that *Kelo* is about the pursuit of private interests, however, ignores what the case is about more fundamentally. It addresses the critical importance of the revitalization of cities from which more affluent populations have fled. This demographic shift fuels sprawl, diminishes open space in exurban areas, and drains critical regional centers of their financial strength.

In our legislature, any surplus energy and resources should not be siphoned off in an effort to strip challenged cities and older suburbs of their powers. Instead, they should be devoted to the broader urban and development agenda. Without strong regions with stable centers, New York cannot compete in the global economy. State governments should protect private property owners from the abusive use of eminent domain, promote needed area-wide redevelopment, and encourage localities to use all the power they are given to become innovators as

they struggle to regain their role as powerful centers of their economic regions.

Endnotes

1. 545 U.S. 469 (2005).
2. 348 U.S. 26, 33 (1954).
3. *Id.* at 33–34.
4. 160 U.S. 668, 679 (1896).
5. *Id.* at 680 (emphasis added).
6. *Id.* at 683.
7. 200 U.S. 527 (1906).
8. *Id.* at 531 (emphasis added).
9. 467 U.S. 986 (1984).
10. *Kelo*, at 484.
11. 237 F. Supp. 2d 1123 (C.D. Cal. 2001).
12. 76 P.3d 898 (Ariz. 2003).
13. *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. Sup. Ct. 1998).
14. Brief of *Amici Curiae* Empire State Development Corp., at 20, *Kelo v. New London*, 545 U.S. 469 (2005) (No. 04-108).
15. 771 F.2d 44 (2d Cir. 1985).
16. *Id.* at 45.
17. 467 U.S. 229 (1984).
18. 475 U.S. 1018 (1986).
19. 625 N.Y.S.2d 371 (App. Div. 1995).
20. 89 N.Y.2d 811 (1997).

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