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Fallout from 'Kelo':
Ruling Spurs Legislative Proposal to Limit Takings

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Abstract: The 2005 Supreme Court decision in *Kelo v. City of New London* has galvanized much unwarranted controversy over governmental authority to condemn private property. A legislative reaction throughout the country has focused on limiting governmental condemnation authority in order to encourage economic development. This article discusses some of the specific pros and cons of reactionary legislation by both the federal and New York legislature.

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In our column in these pages on June 29, 2005, we reviewed the U.S. Supreme Court's decision in *Kelo v. City of New London*.[1] In that case, the U.S. Supreme Court affirmed the long-standing principle that governments can condemn private land in order to carry out area-wide redevelopment projects. We noted that the decision, which affirms the legal *status quo*, has been spun as a grievous invasion of property rights that now threatens every American home. In this column, we review the reaction of legislators at the national and state level to the *Kelo* case.

As a point of beginning, we teach first year law students to carefully analyze cases for what they hold, and require that they pay particular attention to the facts related to the legal question addressed and to understand the holding as the court's answer to that question. In *Kelo,* the question was whether the taking by condemnation of title to unblighted single-family homes for the purpose of transferring ownership to a private developer to accomplish a large-scale waterfront redevelopment project with multiple public benefits constituted a "public use" under the Fifth Amendment. At issue is the critical matter of whether distressed cities, like New London, when specifically authorized by state legislation, can carry out programs to increase jobs, strengthen their tax bases, revitalize neighborhoods, and stabilize property values by condemning the land of private property owners who are not willing to sell to the government at a negotiated price.

The four dissenting justices and much of the media coverage of the decision, making mistakes we try to correct in the first few weeks of law school, read the decision as allowing individual parcels to be condemned and transferred to other private individuals whose development projects involve incidental public benefits.

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."[2] Justice Kennedy, in a concurring opinion, reminded the minority that under the rational basis test, giving due deference to the public use determination, the Court can invalidate a condemnation by finding, in a particular case, that the public benefits achieved by such a suspicious transfer are only incidental to the benefits that will be conferred on the private parties and thus not a public use.

Despite the narrow issue presented and decided by the majority, the case has stimulated a large number of proposals for legislative reform at the federal and state level. Some of the proposals have little to do with the matter decided by the majority., some are palpable public sideshows designed to curry favor with an agitated public, and others suggest helpful reforms. Most of this legislation is designed either to prohibit or limit condemnations for the purpose of economic development, to effect some procedural reform in the interest of greater fairness, or to increase the amount of compensation awarded to condemnees. Some examples follow.

Federal Legislative Proposals and Hearings

House Resolution 340,[3] which had 78 sponsors, was adopted on June 30, 2005. Clearly misreading the majority decision and prior case law, it condemns the holding as "effectively negat[ing] the public use requirement of the takings clause."[4] In fact, *Kelo* rests on precedents that are over 50 years old holding that takings for area-wide redevelopment does pursue a public use. House Resolution 340 admonishes state and local governments to use their condemnation power for the public good (which New London and countless redevelopment agencies carrying out area-wide economic revitalization programs in distressed cities think they are doing); to always provide just compensation (the law requires that the market value of the property be paid); not use eminent domain to the advantage of one private party over another (the case did not address one-to-one transfers for private benefit); and not abuse the power of eminent domain (which is good advice). *Kelo* did not raise the question of whether the formula for determining just compensation, usually expressed as the price a willing buyer would pay a willing seller at the time of the condemnation, is in fact just. Specific proposals to review just compensation formulae should be seriously considered and debated.

House Joint Resolution 60[5] was introduced on July 14, 2005 and is currently before the House Committee on the Judiciary. It proposes a constitutional amendment to "[p]rohibit[] any state or the United States from taking private property for the purpose of transferring possession of, or control over, that property to another private person, except for a public conveyance or transportation project."[6] The problems with interpreting this language are legion (what is a "public" conveyance?), and the possible unintended consequences of its limitations are staggering (how to revitalize fallow urban and older suburban neighborhoods where the owners of many small parcels cannot be found?).

House Resolution 3315[7] proposes denying Community Development Block Grants to states and local governments that do not prohibit the taking of private property for economic development purposes. Is work force housing an "economic development project?" Would a corporation organized under New York's Private Housing Finance Law for the purpose of building work force housing be a "private person?" Was the 42nd Street Redevelopment Project an economic development project, or did it have to do with blight removal? This bill is currently before the subcommittee on Housing and Community Opportunity of the House Financial Services committee. Two similar bills were introduced in the Senate.[8]

New York: Pending Legislation

Numerous proposals were tossed in the state legislative hopper in response to *Kelo*. Senate Bill 5936[9] would limit the use of condemnation to projects in "blighted" areas defined as having a predominance of buildings that are deteriorated or a predominance of economically unproductive lands, the redevelopment of which is needed to prevent further deterioration that would jeopardize the economic well-being of the people. Is "predominance" defined as having numerical superiority or exerting influence over the area, both accepted definitions of the term? If this is a response to *Kelo*, an interesting question is whether the declining Fort Trumbull area in New London, Connecticut, where properties were condemned, would meet this definition. Under current New York law, blight finding requirements give local authorities latitude to define blight according to their unique local circumstances.

Senate Bill 5938[10] would rein in Industrial Development Agencies (IDAs) that decide to use their power of condemnation for eligible projects by requiring, as a condition precedent, that the relevant municipal legislative board vote to approve the taking. This would subject IDAs to greater public accountability: a procedural reform. Assembly Bill 9015[11] requires a similar vote, but only regarding the IDA in Onondaga County where 29 local businesses may be condemned by the IDA for the development of a technology park. Assembly Bill 8865[12] requires a positive vote of the implicated local government body before any land could be condemned when it is to be turned over to a private developer.

Senate Bill 5938 also contains an exclusive list of public projects for which condemnation may be exercised including public buildings, public works, infrastructure, housing, utilities, solid waste management, health, recreation, conservation, swamp reclamation, open space, and historic, environmental and cultural resource protection: a reform that prohibits takings for other purposes. In the future, when new conditions arise and new "public" activities are deemed to merit the use of condemnation, of course, this list would have to be amended by the state legislature. Senate Bill 5938 also requires condemning authorities to reimburse condemnees for their relocation costs incurred in connection with the transfer of their property to the condemnor. Would this provision allow courts to award compensation for the loss of good will, profits lost while moving a business to a new location, or the value of a business that a condemnee, for one reason or other, fails to reestablish?

Seventeen sponsors joined Assemblyman Brodsky in introducing an omnibus eminent domain reform bill[13] that is being discussed in hearings this week by the Assemblyman's Public Authorities subcommittee. It would affect amendments to the public authorities law, not-for-profit law, the general municipal law, and the eminent domain procedure law casting a broad net covering local development corporations, economic development agencies, other public authorities, and, with respect to certain reforms, all condemning agencies at the state, county, and local level. With respect to public, quasi-public, and not-for-profit authorities, local legislative bodies are given the power to approve or disapprove of any use by them of the power of eminent domain. With respect to any economic development project that proposes the condemnation of private homes or dwellings, a comprehensive economic development plan must be created for the affected area explaining the expected benefits of the project and alternatives to the plan. The plan would be subjected to a public hearing and an affirmative vote of the local legislative body. The condemning authority would also be required to prepare a homeowner impact assessment statement assessing the actual harm to affected homeowners and justifying the taking of their properties.

This proposal, A09043, contains a strict requirement regarding compensating both homeowners and "displaced residents." All homeowners whose properties are condemned will receive 150% of market value and all displaced residents will receive 150% of the annual rent they pay in any condemned apartment or home under lease to them. This requirement would render financially unfeasible some redevelopment projects in distressed cities and villages where market forces are not strong. One of the critical functions of urban revitalization is to stimulate an uninterested private market to invest in financially challenging ventures through public investment in site assemblage, infrastructure, subsidies, tax benefits and the like. The sole reason for these investments is to balance the bottom line by public expenditure with the intention of stimulating private sector investment in successful projects that then draw additional private investment to a more secure financial environment. It is hard to imagine that any homeowners would settle voluntarily for market value when they are promised a 50% bonus if their

properties are condemned; this would increase the cost of assembling land by up to half in some areas. The proposal is motivated by a desire to ensure that displaced citizens are "justly" compensated for the full costs imposed on them rather than receive just compensation in the constitutional sense (market value). Nonetheless, a cost benefit analysis of this proposal and a clear-eyed understanding of its practical effect on revitalization projects in marginal areas are needed.

A similar approach with somewhat different details is evident in A09050,[14] introduced in August. A09050 would also require economic development condemnations to be preceded by economic development and relocation plans and subject takings to local legislative approval. It would provide homeowners with compensation at a rate of 125% of the highest approved appraisal and tenants a payment equaling two months rent. Fair and reasonable relocation costs would be paid. Additionally, condemnees would be given 120 days to file for judicial review of a condemnation rather than the 30 days provided in the current law. This is fair when you consider the consequences for the affected owner.

This proposal for amending the procedural aspects of New York's Eminent Domain Procedures Law recalls changes actually adopted by the state legislature in 2004 that corrected the public notice requirements of the law. Under the amended provisions, property owners must be served with notice of the required public hearing on the proposed condemnation and provided with a synopsis of the findings made; offered copies of the full determination and findings; and notified that they have the legal right to seek judicial review of the determination and findings.[15]

The clear benefits of procedural reform of this relatively ancient body of eminent domain law and the possible unintended consequences of reforms that prohibit certain types of takings or render them more costly call for a closer and reasoned look at the law in New York. Assembly Bill A09060[16] would create a temporary state commission to consider all aspects of the eminent domain law to effect a balance between "the constitutional power of government to exercise its eminent domain powers and the constitutional liberty and property rights of the people.[17] This is a good idea.

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[1] 125 S. Ct. 2655 (2005).
[2] *Id.* at 2667.
[3] H.R. Res. 340, 109th Cong. (2005).
[4] H.R. Res. 340, 109th Cong. § 1A (2005).
[5] H.R.J. Res. 60, 109th Cong. (2005).
[6] *Id.*
[7] H.R. Res. 3315, 109th Cong. (2005).
[8] *See* S. Res. 1313, 109th Cong. (2005); S. Res. 1704, 109th Cong. (2005).
[9] S. 5936, 2005-2006 Leg., Reg. Sess. (N.Y. 2005).
[10] S. 5938, 2005-2006 Leg., Reg. Sess. (N.Y. 2005).

[11] Assemb. 9015, 2005-2006 Leg., Reg. Sess. (N.Y. 2005).
[12] Assemb. 8865, 2005-2006 Leg., Reg. Sess. (N.Y. 2005).
[13] Assemb. 9043, 2005-2006 Leg., Reg. Sess. (N.Y. 2005).
[14] Assemb. 9050, 2005-2006 Leg., Reg. Sess. (N.Y. 2005).
[15] N.Y. EM. DOM. PROC. LAW §§ 202(C)(1) & (2) (McKinney 2004).
[16] Assemb. 9060, 2005-2006 Leg., Reg. Sess. (N.Y. 2005).
[17] *Id.*