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Despite Alarmists, 'Kelo' Decision Protects Property Owners and Serves the General Good

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Abstract: The United States Supreme Court's decision in *Kelo v. City of New London*, has spurred national debate, as many people portray the court's decision as a damaging blow to private property rights. In *Kelo*, the court confirmed local government's ability to condemn property in an area designated as blighted by the state, in order to encourage economic development. This article highlights several positive examples of this sort of condemnation in New York case law, where the public interest was served by economic redevelopment. The article goes further, to distinguish several legal decisions from *Kelo*, where courts invalidated condemnations upon a finding that the condemnations would serve private interests rather than public interests.

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In *Kelo v. City of New London*, 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. No. 04-108, 2005 U.S. LEXIS 5011 (June 23, 2005). The decision, which affirms the legal *status quo*, has been spun as a grievous invasion of property rights that now threatens every American home. *Kelo* would warrant the public attention it is getting if it had gone the other way, if one more justice had sided with the dissent. The *Kelo* facts involve the taking of private land in a designated redevelopment area in a state designated distressed city. It is the prior law and the Court's holding in this limited context that is the subject of this column.

In most states, including New York, had the Court gone the other way, the decision would have muddied clear and long-settled state court precedents; used federal courts to dictate state-defined property rights and public interests; cast a shadow over a procedure that has led to the revival of distressed downtowns, urban neighborhoods, and waterfronts throughout the country; limited one of the few fiscal remedies available to economically distressed cities; and strapped their ability to redevelop dangerous brownfields located in poor neighborhoods – a matter of environmental justice.

The Legal 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 constituted a public use under the Fifth Amendment. The terms of the Amendment allow such takings, but only if they accomplish a public use and require the payment of just compensation to the condemnees. 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.

Public sympathies for Ms. Kelo and her fellow petitioners run high. Their homes are not blighted, two or three of them have lived in the neighborhood for decades, and their futures are clouded by having to use the compensation they will receive to relocate and build new lives among new neighbors. On the other side is the stark reality of life in New London and other cities throughout the country that are struggling to revitalize themselves so that they can provide public services and a decent quality of life for the disproportionately high percentage of homeless, jobless, and income-strapped citizens they shelter.

New York Law

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, using authority to condemn private properties and convey them to private development companies under the strict procedures established in statutes adopted by the New York State legislature. Its brief notes that "despite private benefits, the predominant economic and social benefits have accrued to the public."

In *Rosenthal & Rosenthal Inc. v. The New York State Urban Development Corporation*, 771 F.2d 44 (2d Cir. 1985), 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. 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." It rested its decision on the U.S. Supreme Court's decision the previous year in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), 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." The Supreme Court denied certiorari in *Rosenthal* in 1986. 475 U.S. 1018 (1986).

We heard from the Court of Appeals on the subject in 1986 in a unanimous opinion written by Judge Kaye in a case that also challenged the Urban Development Corporation's (UDC) condemnations in the 42nd Street Redevelopment Project area. *Jackson v. New York State Urban Development Corporation*, 494 N.E.2d 429 (N.Y. 1986). The court noted that, as required by the state Eminent Domain Procedure Law (EDPL), the UDC had made a reasoned determination that the condemnation would serve a valid public purpose and that the scope of the court's review under the statute is narrow. The EDPL is representative of statutes in a number of states that guide and limit the power of government to exercise the power of eminent domain. Under this statute the condemning authority must provide public notice, hold a public hearing, specify the public use, benefit, and purpose of the project. The court cited the U.S. Supreme Court's opinion in *Hawaii Housing Authority* for the proposition that the due process requirements of the Constitution are satisfied where there is a rational relationship to a conceivable public purpose.

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, Inc. v. City of Syracuse IDA*, 625 N.Y.S.2d 371 (N.Y. App. Div. 1995). 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. The court followed the tests outlined in *Jackson* and found that the purpose of the taking was to accomplish a proper use and that this determination was not without a proper foundation. The petitioners' motion for leave to appeal was denied by the Court of Appeals in 1997. 679 N.E.2d 643 (N.Y. 1997).

The *Kelo* Decision

The majority in the *Kelo* case, a 5-4 decision written by Justice Stevens, held that the purpose for the taking was a legitimate public use, clearing the way for the New London Development Corporation to condemn title from nine individual owners who held onto 15 parcels of the 115 private lots in the redevelopment area. Justice Stevens noted: "For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."

The dissenting opinion, drafted by Justice O'Connor, agreed with the petitioners who argued that the Court should establish a new "heightened scrutiny" test for takings designed to accomplish economic development purposes. Such takings

could be classified as invalid *per se*, presumptively invalid, or invalid if the condemning authority could not prove with reasonable certainty that significant public benefits will be accomplished. Interestingly, O'Connor's impassioned dissent argues against the approach she adopted a few weeks earlier in the landmark decision *Lingle v. Chevron U.S.A. Inc*., No. 04-163, 2005 U.S. LEXIS 4342 (May 23, 2005). That decision, which she authored, changed the rules for determining whether governmental regulations constitute a taking of property without compensation under the Fifth Amendment. *Lingle* repealed a 25 year-old standard that invalidated a government regulation as a taking if it fails to substantially advance a legitimate public purpose. In *Lingle*, Justice O'Connor eliminated the test because it requires "courts to scrutinize the efficacy of a vast array of state and federal regulations -- a task for which courts are not well suited. Moreover, it would empower -- and often require -- the courts to substitute their predictive judgments for those of elected legislatures and expert agencies." This aligns squarely with the rationale of *Midkiff* in which the Court noted that "empirical debates over the wisdom of takings – no less than debates over the wisdom of other kinds of socioeconomic legislation – are not to be carried out in the federal courts."

Under existing case law, the Court defers to public use determinations of condemning authorities, regardless of the context. If New London had decided that Ms. Kelo's parcel were needed for a public road or to be conveyed to a utility company for telephone, transportation, or gas line conveyance, both the majority and dissenting justices would defer to the determination that the purpose for which the land was taken was a public one, within the meaning of the Fifth Amendment. The dissenters, however, believe that when the purpose is to further the economic objectives of the community, a stricter test should be used.

The cases cited by the majority involved the validation of takings of private property in order to advance economic development, such as accomplishing the revival of a blighted urban neighborhood in *Berman v. Parker*, 348 U.S. 26 (1954), and eliminating the social and economic evils of a land oligopoly by requiring land transfers from lessors to lessess in *Hawaii Housing Authority*.

In these cases, compensation was paid and the court deferred to the government's public use determination. The majority noted that in *Berman*, taking a nonblighted department store to effect area wide redevelopment of a blighted area was within the scope of the police power. The *Berman* Court noted that "the concept of the public welfare is broad and inclusive. … The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

The minority, apparently content with deference in these prior economic development cases, distinguished them from *Kelo* in that the condemned

property in *Berman* and *Midkiff* "inflicted affirmative harm on society" and the taking, therefore, was necessary to "eliminate the existing property use to remedy the harm." Dismissing the broad description of the police power in *Berman* as "errant language," the dissent approached *Kelo* as if it were a case of first impression. It would limit deference to cases where the condemned property had "veered to such an extreme that the public was suffering as a consequence," thinking, apparently, that the unblighted parcels of Kelo and her fellow petitioners were not harmful to the area redevelopment plan in the same way that the petitioner's unblighted department store in the District of Columbia was harmful to the area redevelopment plan in *Berman*. In both cases, however, the acquisition of all parcels in the redevelopment area was essential to the projects' success.

The city council in New London, a legislative body, determined – in effect – that the petitioners' properties, in fact, were "harmful" to the interest of its citizens. Recall that it was operating under authority of a state statute aimed at promoting economic redevelopment in distressed cities and that New London was designated a distressed city by the state. The city council and the state legislature understood the context of the system of public finance where the real property tax is the balancing factor in the creation of the municipal budget. The median household income of New London's residents is 40% less than the state median; its poverty rate is twice that of the state's; and its unemployment rate 30% higher than the rest of the state.

When the city's redevelopment plan for its waterfront was initiated – with its promise of hundreds of new jobs and greatly enhanced property taxes – the city's population had been shrinking and it had just lost a major employer. Under our system of government, its options were limited; the constraints on its ability to increase municipal revenue seriously affected its ability, like that of most distressed cities, to meet the pressing needs of its poor and moderate income neighborhoods and households. The City needed all the parcels in the area to carry out an area-wide plan. Not securing them, therefore, would be harmful to the city and its residents.

The Parade of Horribles

The petitioners were represented by an advocacy litigation group that raised public awareness of the fact that some public takings are abusive. The specter of corrupt, or misguided, local officials condemning title to property of private property owners primarily to benefit private developers was on the mind of the minority. In response, 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." 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.

The dissent disparages 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 is 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." 237 F. Supp. 2d 1123 (C.D. Cal 2001). In *Bailey v. Meyers*, 76 P.3d 898 (Ariz. 2003), the state court held that the taking of a brake shop for a hardware store to advance economic development lacked the requisite public purpose. 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. *Casino Reinvestment Development Authority v. Banin*, 727 A.2d 102 (N.J. Sup. Ct.1998).

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 redevelopment projects. In cases involving no more than a one-to-one transfer of title between businesses, as a *de facto* matter, the court's suspicion is aroused and, under the rational-basis test, it senses a lack of public involvement and purpose. 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*.

Kennedy's caveat regarding how the rational basis test can be used to invalidate one-to-one transfers is a strong cautionary message to condemning authorities. Reading the 5-4 decision as a reminder to act reasonably, legislatures should, as most do, justify the use of condemnation as a necessary means of achieving clearly stated public goals in redevelopment projects. Where there is little public presence in the development and imprecise means of securing the intended public benefits, there is less evident rationality and more vulnerability to invalidation.

There is a further response to the alarmists. Redevelopment projects don't gestate in back rooms with greedy politicians waiting as midwives to the birth of private wealth. They 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 twenty months – nearly 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 all the economic and environmental consequences of the project.

Public hearings, ULURP 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. When such projects are approved, this public process has mediated the claims of those affected such as Ms. Kelo and her neighbors and the evidence that the greater public will be benefited by jobs, public revenues, and property improvement.