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EMINENT DOMAIN: PUBLIC OR PRIVATE PURPOSES?

INTRODUCTION

Governments have long used the power of eminent domain to acquire private property for public projects such as roads, ports, schools, and a variety of other public facilities. Although the doctrine has a long history for all levels of government, eminent domain has received increased attention following a United States Supreme Court decision, *Kelo et al. v. City of New London et al.* (125 S.Ct. 2655), in which the Court ruled that a local government could use the condemnation power for a private for-profit development project if deemed to advance a “public purpose” of economic development. The decision prompted widespread concern about governments’ powers to seize homes and other private property in the name of economic development.

The exercise of the power of eminent domain is not a new subject of dispute. What is different, however, is that the basis of contention has increasingly changed from the amount of compensation to a property owner when property is taken for public uses, to what many perceive to be an increasing prevalence of condemnations for less obviously “public” uses, such as economic development projects involving private developers. Property rights advocacy groups have expressed alarm over what they see as an increasing trend toward takings of homes or business property for transfer to other private interests. Many state and local officials, however, have found eminent domain to be a tool of last resort for improving blighted, dangerous, and abandoned areas through redevelopment.

The United States Congress and state legislatures in a number of states, including Wisconsin, are considering legislation to restrict the use of eminent domain for economic development.

CONSTITUTIONAL ISSUES

The fifth amendment to the United States Constitution addresses the subject of eminent domain in its final phrase, “...nor shall private property be taken for public use without just compensation.” Forty-nine state constitutions have similar provisions. (North Carolina courts have relied on the state’s due process clause to address issues relating to eminent domain.) Article I, Section 13 of the Wisconsin Constitution, Private property for public use, states, “The property of no person shall be taken for public use without just compensation therefor.”

But the meaning of “public use” varies from state to state, with some constitutions listing specific types of acceptable uses of the condemnation power, and other states not specifically defining it other than in case law or statute. The outcome in *Kelo* was decided on an interpretation of “public use” that included private activities determined to advance a “public purpose” or “public benefit.”

KELO V. CITY OF NEW LONDON

New London, Connecticut, was a city suffering economic decline in the 1980s and 1990s because of job losses following the closure of military facilities. In February 1998, the pharmaceutical company, Pfizer, Inc., announced plans for a waterfront research facility that promised to provide New London with new jobs and tax revenues. In January

2000, the city gave the New London Development Corporation (NLDC) responsibility for a development plan for the area near the research facility, including development of an office complex, hotel, convention center, shops, restaurants, other amenities, and new residential development.

Part of the area slated for development had been occupied by the former U.S. Naval Undersea Warfare Center, but the plan also called for the demolition of the Fort Trumbull neighborhood adjacent to the new Pfizer complex. NLDC was given powers of condemnation to acquire and demolish the homes in the designated area. The homes would be demolished not because they were blighted or otherwise in poor condition – indeed, most agree that the neighborhood was a healthy and stable working class area with a number of long-time residents, including families that had lived there for generations – but instead because they happened to be located in the development area, which was being pursued because of the expected overall benefit to an economically distressed city.

Most of the property owners negotiated purchase offers, but the owners of 15 of the residential properties, including petitioner Susette Kelo, declined to sell and sued to prevent NLDC from taking and demolishing their homes, objecting that the NLDC's proposal was not a constitutional "public use."

In 2004, the Connecticut Supreme Court ruled that the city had not violated Connecticut or federal constitutional protections against taking property for public use without just compensation. The U.S. Supreme Court's 5-4 decision in June 2005 upheld the state supreme court's decision, interpreting the constitutional "public use" requirement broadly to encompass the "public purpose" of an economic development plan that is expected to confer benefits on the community in the form of new jobs and increased tax revenues.

The majority opinion by Justice Stevens reviewed the changing views over time of what constitutes a "public use" and concluded that the fact that the taking benefited private parties to produce the incidental public benefits did not make it unconstitutional. The decision did not, however, rule out the possibility that states could choose to legislate stricter restrictions or prohibitions on the use of eminent domain, and argued for deference to state legislatures in determining local public needs.

A concurring opinion by Justice Kennedy cautioned that courts should scrutinize takings for economic development more carefully than other takings and should reject those that are more for private than public benefit. But the New London case, in Kennedy's opinion, met this test and the concurring opinion rejected contentions that the city had sought the taking only to benefit particular private interests.

Justice O'Connor's dissent offered a more literal interpretation of the public use requirement, rejecting the use of eminent domain to transfer private property to private developers, regardless of any possible incidental benefit to the public. Justice Thomas' separate dissent took an even more literal approach, arguing that a taking is permissible only if the government seeks to own the property or specifically allow the general public to use it. Thomas criticized the Court for substituting the concept of "public purpose" for the "public use" language written in the constitution.

WISCONSIN LAW

Unlike the law in Connecticut, Wisconsin law does not explicitly permit the use of eminent domain to take and transfer property for private economic development. Chapter 32, Wisconsin Statutes, "Eminent Domain," establishes the procedure for condemnation of private property, expressly listing the government entities and types of corporations

that have condemnation powers and for what purposes. The chapter also sets out the procedures for appeal of a condemnation.

Although Wisconsin law generally appears to limit eminent domain to traditional public uses (including some involving private ownership, such as for railroads or public utilities), some of the provisions relating to redevelopment of blighted areas could be interpreted to allow condemnation of non-blighted properties within an otherwise blighted area as part of a redevelopment plan. Other possible ambiguities in the laws relating to eminent domain are left to the courts to resolve.

[The primary constitutional issue in *Kelo* was “public use” rather than that of “just compensation.” For more information about “just compensation” see the Wisconsin Legislative Reference Bureau’s *Constitutional Highlights* publication (January 2005, Vol. V, No. 1) on the Just Compensation Clause.]

2005 WISCONSIN LEGISLATION

In response to the public attention generated by *Kelo*, a number of bills on eminent domain have been introduced through December 2005.

2005 Assembly Bill 657 would prohibit condemnation of property for conveyance or lease to a private entity if the property is not “blighted,” as defined in the bill. The Assembly passed the bill, as amended by Assembly Substitute Amendment 2, by a 88-9 vote on September 27, 2005. The bill is now in committee in the Senate.

2005 Assembly Bill 457 proposes to eliminate the condemnation authority of all nongovernmental entities that are now allowed to acquire property by condemnation, such as railroad corporations and public utilities. (No action had been taken on the bill at the time of publication.)

2005 Assembly Bill 682 and Senate Bill 437 propose to prohibit any condemnation of property that is not expressly authorized by statute. Current law refers to condemnation for “any lawful purpose.” (No action had been taken on the bill at the time of publication.)

FEDERAL LEGISLATION

In the 109th Congress, the U.S. House of Representatives passed House Resolution 340, on June 30, 2005, expressing “grave disapproval” of the majority opinion in *Kelo*.

H.R. 4128, the proposed “Private Property Rights Protection Act of 2005,” introduced by U.S. Representative F. James Sensenbrenner, Jr., of Wisconsin and 97 co-sponsors, passed the House of Representatives on November 3, 2005, and has been referred to the U.S. Senate for consideration. The bill would prohibit the federal government from using eminent domain for economic development, and would withhold certain federal development funds from states that condemn private property for economic development.

H.R. 3058, the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act of 2006, passed by both houses of Congress and signed by the president (Public Law 109-115), prohibits state and local governments from using federal transportation funds on projects involving the use of eminent domain for “economic development that primarily benefits private entities” (Section 726). It also directs the U.S. Government Accountability Office, in consultation with a variety of organizations, to study and report to Congress “on the nationwide use of eminent domain, including the procedures used and the results accomplished on a state-by-state basis as well as the impact on individual property owners and on the affected communities.”

Several other bills on the topic have been introduced in the 109th Congress, but to date have not passed in either house.

LAWS AND LEGISLATION IN OTHER STATES

Connecticut, where *Kelo* originated, is atypical in that it is one of only three states, according to the National Conference of State Legislatures (NCSL), where state statutes explicitly permit the use of eminent domain for economic development purposes (also Massachusetts and North Dakota); NCSL reports that nine states have case law precedent allowing for it.

NCSL also reports that at least 13 states (including Wisconsin) have introduced legislation following *Kelo* to restrict or prohibit the use of eminent domain for private development, and four of them have enacted new legislation in 2005. NCSL has identified six general types of legislation proposed following *Kelo*:

- Limiting eminent domain to only a "stated public purpose" or a "recognized public use." (Delaware enacted.)
- Prohibiting the use of eminent domain for economic development for the primary purpose of generating additional tax

revenue; or to transfer private property to another private use, with some exceptions for blighted properties. (Alabama and Texas enacted.)

- Limiting the use of eminent domain for economic development purposes to blighted properties only, or to areas where the majority of properties are blighted and the remaining parcels are necessary to complete a redevelopment plan.
- Enhancing public notice, hearing, and negotiation requirements.
- Requiring local government approval, sometimes by a super-majority, before a redevelopment agency may initiate eminent domain for economic development purposes.
- Placing a moratorium on condemnations for economic development or establishing study committees on eminent domain. (Ohio enacted.)

FOR MORE INFORMATION

Search for Wisconsin Statutes on "eminent domain" at <http://www.legis.state.wi.us>, hyperlink to "Wisconsin Law" and "Statutes."

LRB "Tap the Power" on Eminent Domain and Property Rights
<http://www.legis.state.wi.us/lrb/pubs/>