This Land is Your Land . . . *No More*

BY LINDSAY F. NIELSON

"Nor shall private property be taken for public use without just compensation . . ."

Fifth Amendment to the United States Constitution

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean – neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

Alice's Adventures in Wonderland
Louis Carroll

The recent Supreme Court decision regarding the law of eminent domain in Kelo v. City of New London directly brings to the fore the two quotes above.

For many years, the U.S. Constitution's Bill of Rights acted as a restriction and limitation on the powers of the government against its citizens. The Founding Fathers were quite concerned that the long arm of the Federal government should have its limits.

That the above clause is written into the Fifth Amendment (most people only believe that someone "Takes the Fifth" when requested to testify against themselves) is a little known fact. For those of us that study real property law, the above referenced quote is an underpinning of private property rights.

The Founding Fathers realized that for a nation to grow, it had to have infrastructure. It needed streets. It needed post offices. It needed schools. It needed parks. It needed facilities to be used by the citizens in common if the nation had any chance of surviving and growing.

For over 200 years, the concept that government could exercise its right to reach out and take someone's private property – but only so long as it was for "public use" – was understood. There was a common understanding of the terms "public use," and it could be clearly defined by perhaps 99% of the people. It had always meant that whatever was acquired was to be used in common by the general public. No one had ever had any qualms about that type of use.

Now the U.S. Supreme Court, in a split 5 to 4 decision, has taken the term "public use" and expanded it to mean any "public benefit."

As Humpty Dumpty indicated, words mean exactly what I say they mean. The Supreme Court, above all courts in the United States, has the distinct ability to precisely say what the words of the Constitution mean. And we, the people, are not to be restrained or controlled by meanings other than what the wisdom of the Court interprets as their meaning.

In my experience, only an unimaginably weak local government (such as a city council or other quasi-legislative agency like redevelopment agencies) would not be able to find a public benefit in an activity that would generate greater revenue for the public treasury than current property taxes.

Until this decision, the Courts have upheld the concepts of redevelopment. The test, however, for redevelopment was that an area had to be deemed "blighted" – a somewhat subjective standard which, however, could be tested in Court by objective standards.

With the new public benefit rule, however, such a low standard is established for the use of eminent domain that it virtually eliminates any restriction or restraint against over-reaching, which the Fifth Amendment granted to the citizens. With years of experience in this field, both as a lawyer who has handled eminent domain cases, as well as a real estate appraisal expert who has testified in more than 50 eminent domain cases, I have never witnessed a case in which the sole motivation by the condemning authority was strictly based upon taking private property from one person to give to another private party.

This concept – that government can now be utilized to acquire private property to give to another private citizen so the government can collect higher taxes – is a terribly slippery slope!

While there have been very few abuses where I live in Ventura County, CA (or the cities located within the county), it cannot be far behind that some economic advisor to some city some place will demonstrate that, if we only eliminated these older residential properties, we can put in a new parking lot for a new big box store which will, of course, generate terrific property tax revenue for the benefit of the local government.

"...there is an "X" factor which is not compensated for, and that is the little bit of liberty that is lost..."

Justice Sandra Day O'Connor in her dissent, ably points out that this ruling in the Kelo case empowers the powerful and well-connected over the interests of the ordinary citizen.

Much effort is written into the statutory scheme of things to protect a person who is subject to an involuntary conversion (government speak for "taking your property"). The statutes require that the property is appraised independently; they require efforts to help relocate the affected landowner and efforts to help in starting a business at another location for determination of just compensation.

All of the above is written into California law.

What is not compensated for in the concept of "just compensation" for the taking of your property is the anxiety, the loss of security and the loss of familiarity that results from having a property you have lived in for a long period of time stripped from you. Further, the upheaval in relocating and trying to once again establish either a life or a business at a new location is never justly compensated.

I have always contended that, although efforts are admirably made for the payment of just compensation in eminent domain, there is an "X" factor which is not compensated for, and that is the little bit of liberty that is lost each time private property is taken for public use, err, make that public benefit.