Perception v. Reality

A Commentary on Media Bias and Eminent Domain

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The Supreme Court's ruling on eminent domain in Kelo v. City of New London was the country's most highly publicized recent taking of private property for the greater public good. This landmark case effectively changed the rules for eminent domain in many states, but was widely derided as taking from the poor and giving to the rich. The media played a large part in the negative coverage, concocting a false narrative of community and camaraderie in the Fort Trumbull area in order to solicit public sympathy for the seven property owners that were plaintiffs in the case. In reality, these houses represented a tiny fraction of properties in a largely non-residential redevelopment area. Most were not owner occupied, a number of them were blighted, and the locations of the structures on their parcels created traffic and sidewalk hazards that could not be remedied without a complete taking of each of the properties. In this article, we will explore some of the consequences of the ruling, and the ways in which we believe the media did its best to skew public opinion of the facts.

THREE YEARS LATER

Since the Kelo ruling, the public has benefited from the Fort Trumbull Project in many ways. The City of New London, Connecticut, acting through the New London Development Corporation (NLDC) is proceeding with redevelopment following the Supreme Court decision, published in August 2005, that the property acquisition was for the greater public good as determined by the state. Significant to their decision was the affirmation that states could allow eminent domain for economic development purposes. Like several other cities in Connecticut, New London was an economically depressed area with some of the highest unemployment in the state. The closure of a 32-acre U.S. Navy research installation and the consequent loss of more than 1,500 jobs provided the impetus for a major redevelopment plan of the Fort Trumbull area. The plan involved acquisition of significant fallow land (including a closed railroad yard and former oil terminal), removal of the obsolete buildings (especially on the closed Navy base), remediation of the soil (costing more than $25 million), and installation of significant new public infrastructure to the area ($15 million in new streets, sidewalks and utilities). It also included public amenities, such as the creation of a new state park around the historic Fort Trumbull (state investment of more than $25 million), and a new public access waterfront walkway to enhance the redevelopment area. The development parcels created will provide space for additional job–creating businesses to spur economic recovery, as well as for residential and hotel development and a site for the new National Coast Guard Museum. This article looks at how the redevelopment is progressing and whether it is accomplishing its revitalization goal.

MEDIA RESPONSE TO THE TAKING

A frustrating aspect to the Fort Trumbull eminent domain litigation, from the standpoint of the City of New London and NLDC, was the way the public was persuaded (and in many cases, duped) by media distortion of the particulars of this case. While we are actually quite sympathetic to those with concerns for property rights abuse, the Kelo case makes a rather poor poster child as an abuse case. Ms. Kelo's

This view of Parcel 4A shows how the lawsuit properties impact the corner intersections and ability to improve East Street in front of Fort Trumbell State Park. The former Kelo house appears in the lower left corner.

property was not being taken simply to benefit a private developer for residential or hotel use (which are actually being developed on former Federal government land). The media consistently got that fact wrong. She had to move so that the street in front of the new Fort Trumbull State Park could be made safe, and brought up to regulations for right of way width and design. In its prior condition, the street had no curbs or sidewalks, and her house's location (projecting into an intersection) created a narrow blind corner that prohibited safe two-way access. The new street design now conforms to city and state regulations for lane width, curbs, sightlines and sidewalks.

Had the house been left in place following the Supreme Court decision (as some had requested), none of code-required improvements could have been properly made to the street. The first instance of a child getting hit by a car as a result of the lack of a curb, sidewalk or safe sightline would easily have led to a flood of litigation against the City and State – especially since a new street design had been completed, reviewed, approved and taken all the way to the U.S. Supreme Court.

The Fort Trumbull project did not displace more than a handful of homeowners. At the time of the Supreme Court case, no homeowner had been evicted or displaced by eminent domain. Almost all of the 115 parcels of land in the project area were sold voluntarily, and several parcels were obtained from the Federal and municipal government. Only a few of the properties (other than the litigated properties) had been taken by eminent domain for the project, and only four of these were residential properties – all of which were investor owned. Those four locations were already under completed streets at the time of the Supreme Court case. The six takings that resulted in the Supreme Court case were filed in November, 2000, but the previous owners retained possession of the properties through the litigation.

The local newspaper did some sloppy reporting, producing a local reaction that divided the community and, in some ways, mirrored the national reaction to the story. One such example, repeated at least five times, involved photographs of houses undergoing demolition with misleading captions. These captions invariably suggested that the demolished buildings were owner-occupied houses taken by eminent domain, when in fact the property had been investor-owned property voluntarily sold to the NLDC.

Even in the aftermath of the ruling, the media challenges were significant. It was virtually impossible to communicate a balanced view of the case – even regarding the location of the litigant's properties in the overall project. Ms. Kelo and the other litigants (seven of 90 property owners in the area) had owned properties that contained buildings that were primarily in the way of new streets and infrastructure – not the planned hotel, conference center, new housing or other development.

The media also skewed public perception regarding which former owners or residents were actually affected by the ruling. The terms "homeowner," "resident" and "property owner" were often used interchangeably, thereby inferring equality of status. In actuality, most of the few residents in the area at the time of the Supreme Court case were tenants who had moved in after the Connecticut Supreme Court decision in favor of the City in 2003. These tenants were paying cash

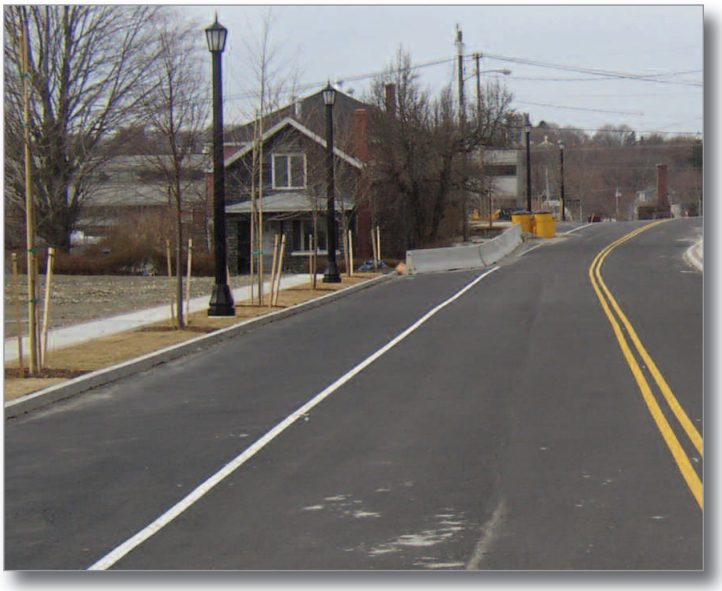
rent to the former property owners, who retained possession of the properties during the litigation period and beyond, while paying no real estate taxes, and in some cases, paying no sewer bills, water costs or other utility charges. Some of these short-term tenants were actually interviewed to get their perspective on the "distress" and "injustice" of having to relocate due to the U.S. Supreme Court decision!

The Fort Trumbull "neighborhood" concept was a myth that was recited over and over as gospel. In reality, many of the anecdotes about neighborhood ball games and such were from the 1940s and 50s – one half century prior to the redevelopment project. Sadly, blight and crime had crept into the area, which had become a chronic problem for local law enforcement. Based on the media reports about the area at the time of the Supreme Court's hearing of the case in 2005, one would have guessed that dozens of homeowners had been displaced by eminent domain as a result of the Fort Trumbull Project. At the time, people were always shocked when they heard that the number of displaced homeowners was actually zero.

THE ROLE OF BLIGHT AND ECONOMIC DEVELOPMENT

The press asserted that findings of blight were not cited at the time of the takings, and implied that blight therefore did not exist. This is wrong. Findings of blight were entered into the record at the Public Hearing for the project in January 2000. All standards of blight for the area were met, even if some of the litigants' individual properties were not blighted. The takings could have been made for transportation or infrastructure reasons for all but one of the property owners, since the properties were in the way of curb/sidewalk installation. The location of buildings on the properties made strip takings impossible, as they had no front setbacks.

In the Fort Trumbull case, economic development was used as the explicit taking justification, because it was and is still, as a result of the Kelo ruling, legal in Connecticut. That being said, in Connecticut, the Municipal Development Plan (MDP) process governing economic development takings is a complex, transparent, comprehensive and lengthy environmental and infrastructure planning process. In most cases, a developer is not even known or identified until well into implementation phase. It is not a process that involves taking an intact piece of land from "A" to give to "B." The lack of "firm plans" and detailed development agreements for the development parcels was cause for some angst, with some conspiracy theorists imagining a giant unseen hand manipulating the process for the benefit of a still unnamed party.



This photo depicts the view to the west from the south side of Chelsea Street. The house pictured to the left was the last occupied house at Fort Trumbull (now clear).

The Institute for Justice was the libertarian property rights advocacy group that brought the case to the Supreme Court. They suggested that no takings could be justified unless there was a detailed development ready to drop into place (including a development agreement, plans, zoning approvals and financing), while at the same time, stating that if any such plans exist (including solely municipal conceptual infrastructure and use plans that may result in future private development), that such plans would represent prima facie evidence of a constitutional law violation against private property, and no takings could therefore be justified.

As of 2008, all the property owners have moved on. Only three of the six litigants subject to the eminent domain proceedings were Fort Trumbull homeowners in the first place. Ms. Kelo already had another home by 2005, although she continued to use her Fort Trumbull residence as a second home at the time. All six former property owners who litigated their takings received substantial settlements for "hanging in there" through the litigation process and for refusing to move when the Supreme Court decision was announced. One non-resident investor owner, for example, received $150,000 for the original taking in 2000, and an additional $355,000 to surrender possession of his property in late 2006. The final resident – who lived in a property that formerly belonged to his mother – left the Fort Trumbull area in late April 2007 for a newer house in a nearby town. The house he was living in literally "stuck out" into the improved Chelsea Street. That house was demolished, and the street was completed within 45 days of his move.

At the former Kelo property, although the house is gone, the foundation remains for now. The street has not yet been rebuilt in accordance with the approved plans, as the project is waiting for additional funding to complete the final "Phase III" infrastructure. The foundation sits almost 10 feet into the new City right of way corner radius, and approximately one-half of the foundation is within the 25-foot clear sightline requirement of the city's zoning regulations.

A LOOK AT THE COMMUNITY NOW

The cost of the negative media attention to Kelo may still be affecting the City of New London to this day. While projects and site plan approvals are in place for about half of the development parcels, there are still parcels available, and funding is tight for the remaining public investment required to complete the project. There is no question that the delays due to litigation have been costly in terms of financial exposure and loss of momentum. We believe that some of this can be attributed to the media attention given the case. There are many theories regarding the usefulness of name recognition, regardless of the source. In this case the name recognition has definitely come at a cost, since the media coverage was primarily very negative, and we have really been unable to "manage" it in any sense.

At this stage in the Fort Trumbull Project, the New London employment rate and annual local property tax revenues have not yet been directly impacted by the redevelopment effort. The annual real estate tax revenue for the Fort Trumbull Project area is currently at or slightly below that which was generated prior to the start of the project. This does not tell the whole story, as it does not include the scope of environmental work or new public infrastructure the City has received and is primarily the result of cleared acreage currently awaiting new development. Overall, City property tax receipts are significantly up, reflecting a turnaround in values as well as the impact of more than $2 million (and rising) in annual revenue from the adjacent Pfizer facility. While property values in nearby towns began to swing upward in the late 1990s, it was only after the initiation of the Pfizer and Fort Trumbull Projects that New London property values began to recover from the recession prices of the early 1990's.

The Fort Trumbull Office project at 1 Chelsea Street, currently under construction, will bring approximately 160 employees of the US Coast Guard Research and Development Center to the site within a year. There is space within that project for another tenant of equal size. The adjacent Pfizer Research and Development facility, which opened in 2001, resulted in 2,000 jobs. A new residential project with 80 units has permits and is working on financing. The National Coast Guard Museum is in the master planning stage, as is a small conference hotel. A quarter-mile of shoreline has been restored and environmentally remediated, and a public access river walk has been constructed. Connecticut has invested $25 million in the new 16-acre Fort Trumbull State Park. The regional waste water treatment facility has received an $11.5 million upgrade, and other acres of future development parcels are now ready for development. There are larger economic forces within the region that are driving unemployment rates, but steady progress on the Fort Trumbull Project is now within view for the community.

ALTERNATIVE OUTCOMES

We find it compelling to imagine what would have occurred had the Supreme Court's ruling gone in the other direction. Only nine of the fairly blighted properties would have remained in the project area. This represents a relatively small number awaiting a decision for future

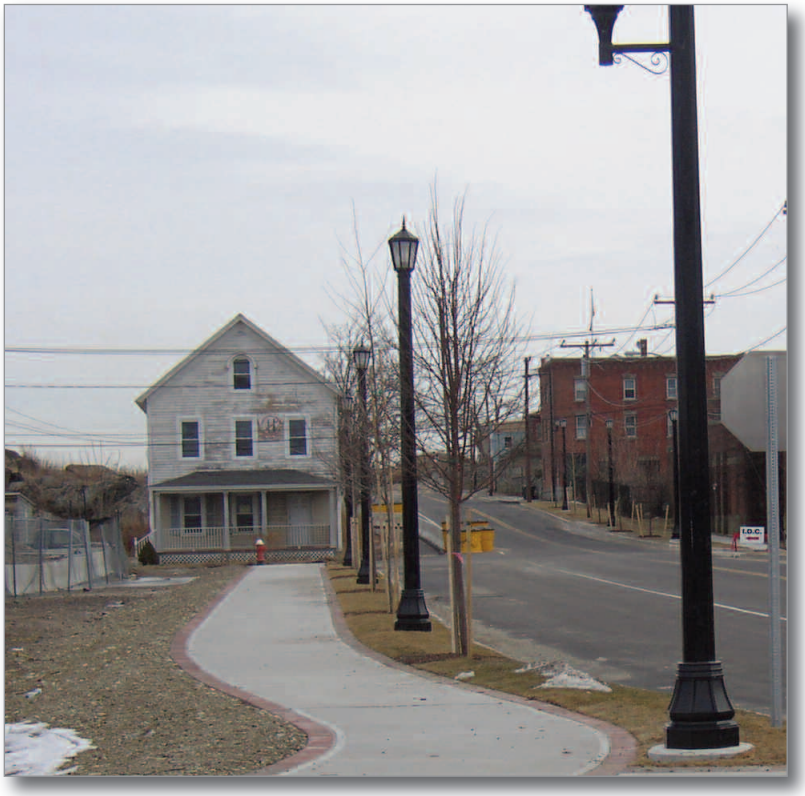
This shows the current East Street block in front of a State Park (double yellow line extends from the "new" infrastructure portion). Note how the cars are parked diagonally – the absence of curbs and sidewalks created an unsafe environment.

action that could have led to either the abandonment of infrastructure improvements, including curbs and sidewalks designed to provide safe pedestrian access to and around Fort Trumbull State Park, or the condemnation of seven properties for transportation improvements/street widening and sidewalks, leaving two properties isolated with no frontage, as the Goshen Street closure was approved by the project.

Some of the property owners would have been incensed at the loss of "value" to their properties; others may have been overjoyed that they might be able to sell for even more money as part of a possible project land assemblage. There also would have been significant ambiguity regarding the ability of a municipality to improve streets and rights of way, with the Supreme Court essentially arguing that, regardless of what traffic engineering says, private property rights trump street engineering and design. It is not hard to imagine that some communities might develop future MDP's that are oriented around traffic improvements or eradication of blight, instead of economic development, even if economic development is a primary reason.

Some have speculated that the new development could have been redesigned around the properties, but creating any type of redesign around the existing properties would have caused a "hodgepodge effect" as all of the lawsuit properties were not contiguous. Since the lawsuit properties on Parcel 4A were corner properties, they would have (like the former Kelo property) still blocked sight lines and interfered with the installation of curbs and crosswalks. These facts were often omitted in media coverage of the case.

Following the Supreme Court decision in August 2005, all of the litigants were encouraged by the Institute for Justice to refuse to surrender possession of their former properties. Alternate Dispute Resolution was used in a limited but effective role in relocating owners who refused to surrender possession of the properties, but only after the U.S. Supreme Court ruling. The City held legal title, but the state was unwilling for the City/NLDC to take any legal action against the former owners or eviction procedure against the current tenants. Note that only a few of the former owners were living in the area at that point.



This photo features the house that spilled over onto Walbach Street. This house was a gutted shell several years prior to the Fort Trumbull Project and remained so until demolition in 2007.

The "standoff" lasted about seven months, when a consultant was hired to negotiate brokered "settlement agreements," resulting in payola. As mentioned in the case of one investor owner, the $150,000 house taking resulted in a total settlement in excess of $500,000. In the case of Kelo, the $123,000 taking amount became $392,000.

To put the numbers in perspective, the original taking amounts were the higher of two certified appraisals in mid-2000, and higher than the City's full-value tax appraisals at that time. When the project began in 1998, some neighboring properties in the Fort Trumbull area were on the market for less than half of the City's tax appraisal amount – with no takers. Those property owners that sold to NLDC for appraised value (plus closing costs and relocation benefits of more than $15,000 if the property was owner occupied) felt that they were fairly compensated. Although it took six years, the Fort Trumbull eminent domain holdouts made out financially, as they paid no taxes on the properties during the contested period, and they did not pay for their litigation.

The final occupant left his severely blighted property in late April 2007 - almost 21 months after the Supreme Court decision in favor of the City, and nine months after his mother, the formerowner of the property, promised he would move in the post-Supreme Court decision settlement agreement.

THE CURRENT POLITICAL LANDSCAPE

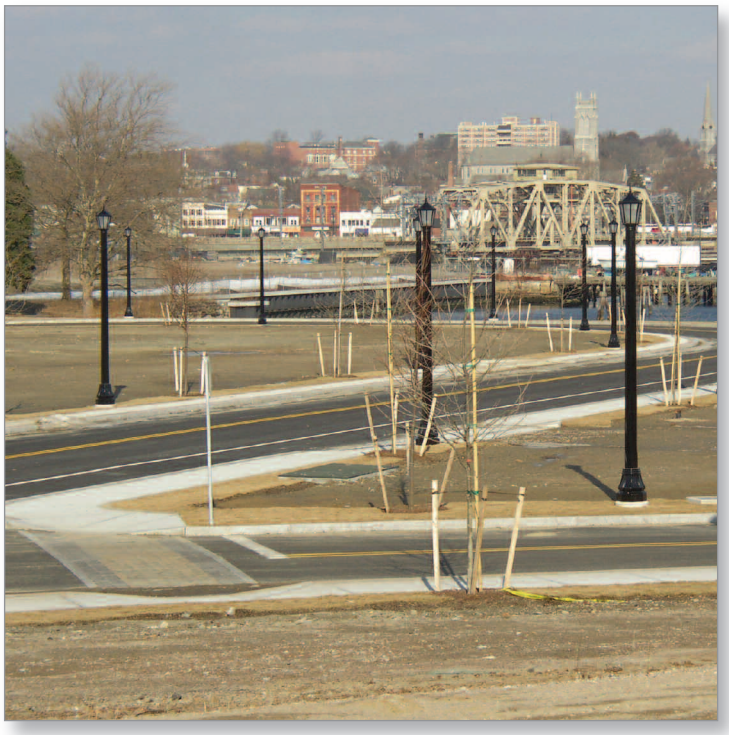
In part due to the negative media attention, public resistance to eminent domain efforts is now viewed as something of a noble cause. The case has also definitely "upped the ante" on what property owners might demand for properties in a voluntary settlement prior to eminent domain. The lesson, now commonly known on the streets, is that if you holdout, you could strike it rich in the end. Some of the Kelo litigants ultimately received in excess of 300% of their property's market value, even though few of them actually wanted to retain ownership. In some municipal cases which might involve eminent domain, projects may have to be redesigned or infrastructure re-routed by the City, to avoid a potentially unwilling seller. We may see an increase in the use of third-party buyers, instead.

Since the conclusion of the Kelo case, there have been no written changes made to any City or State plans or procedures. That being said, it is highly unlikely that the City of New London – or the New London Development Corporation - will undertake any large-scale redevelopment plans (allowing use of eminent domain) for several decades as a result of the controversy drummed up by this case. The only significant change made to Connecticut state law as a result of the Kelo case was the appointment of a property rights ombudsman, who will review takings and attempt to resolve compensation issues in hopes of preventing court involvement. Interestingly, a number of eminent domain "reforms," have been debated, but not passed. The Fort Trumbull project and takings could have followed a virtually identical course even under the "reform" legislation that has been proposed. Of course, this supports my contention that the Kelo case was a poor poster child for the issue, and did not in fact constitute eminent domain "abuse."

Despite all this, we do believe that once the Kelo stigma has been shaken, the future of New London is very bright. The Fort Trumbull project will serve as a catalyst for a revitalization of the City and will facilitate some imaginative redevelopment. This will lead to high paying jobs, residents to patronize downtown businesses and contribute spillover potential for privately supported redevelopment in areas of the city that, unlike Fort Trumbull, already have adequate infrastructure, but inadequate office and business space to meet the demands of a 21st century employer.

POSTSCRIPT: By John Brooks

Interestingly, when the case first arrived at the Connecticut Superior Court, that court rendered a divided judgment, stating that some development agreement for that parcel at the time.



This view of a residential development area (former U.S. Navy land) shows the new streets, lights and trees (all the utilities are underground). Significant demolition and environmental remediation had to occur to reach this point.

The New London Development Corporation made an offer to the Institute for Justice to accept the Superior Court's decision and not appeal. If this offer had been accepted, this would have ended the case (and resulted in stalling the Phase III portion of the Fort Trumbull redevelopment) in 2001. The Institute for Justice emphatically refused, appealing to the Connecticut Supreme Court instead.

Following the U.S. Supreme Court decision in August 2005, the Institute for Justice pled openly in the media that a compromise was possible - specifically leaving the Parcel 3 takings, but reversing the action on Parcel 4A, and leaving those properties intact as a sort of memorial to the case and a demonstration of commitment to property rights. To date, no article or analysis has tried to explain this. In my opinion, they took the wrong case to the U.S. Supreme Court –possibly because genuine cases of "eminent domain abuse" are resolved at the state level, and they had no other case that was ready for such an examination. It is possible that they knew all along they were trying to make a square peg fit a round hole - but someone was funding their litigation for the Kelo case, which is most likely why they undertook that effort.