



THE NON-TRUTH ABOUT KELO

In Response



BY WILLIAM BUSCH, SR/WA

The July/August 2008 issue of Right of Way magazine included a rebuttal article by Scott Bullock, attorney for the Institute for Justice entitled, "The Truth About Kelo." In my judgment, it is far from the truth and clouds the more significant issues of the Kelo case by using emotional and generalizing rhetoric as a substitute for facts. The fact remains that the media distorted the nature of the case by characterizing it as the big, insensitive government taking property from poor, defenseless people and giving it to a greedy developer so the developer could make money. Rarely did media tell the true story of Kelo. The case was, in its simplest form, a States Rights case asserting that the State was better suited for determining what is the greater public good for its citizens than the federal government, and that the planning done by the City of New London was sufficient to pass the constitutional threshold of determining a greater public need.

In addition to several factual errors in his rebuttal, Mr. Bullock fails to address the truth that the media rarely, if ever, reported the actual facts of the case. The media did not report that New London was declared an economically depressed area by the State of Connecticut due to the excessive unemployment, caused in part by the closing of its U.S. Naval Undersea Warfare Center.

In response to those depressed conditions, the community rallied around the redevelopment plan that was presented as a means to escape a deteriorating economic condition. And while the community's elected legislative body, the New London City Council, approved the plan, these facts were typically overlooked by the media.

As in other states, the state law in Connecticut provides for the use of eminent domain in redevelopment provided, in situations like New London, the greater public good can be achieved through the redevelopment.

According to John Brooks, Project Manager for the New London Development Corporation, which is responsible for some of the New London redevelopment projects, *"The neighborhood around the takings was deteriorating as evidenced by unemployment, higher crime rates, graffiti and crumbling infrastructure. Sewer and water lines were obsolete, streets were in terrible condition with few sidewalks, and there were no public recreational spaces."*

While the Kelo decision was being derided by the media, the public was rarely provided pictures of the deteriorating neighborhood.



“... A TAKING IS CONSTITUTIONAL WHEN IT IS FOR THE GREATER PUBLIC GOOD”

In the unanimous opinion of the Supreme Court, both the majority opinion (held by Justices Stevens, Kennedy, Souter, Ginsburg and Breyer), and the minority opinion (held by O'Connor, Rehnquist, Scalia and Thomas), eminent domain simply to take property from one party to convey a benefit to another party *is not constitutional*. The distinction amplified in the Kelo case by the majority opinion is that a taking *is constitutional* when it is for the greater public good, such as the subject case for redevelopment, providing it is a part of the orderly implementation of a comprehensive plan involving all interested parties. The media overlooked this distinction in its zest to portray the issue so negatively.

The “ill-fated development plan,” as Mr. Bullock refers to it, was a plan embraced by the community through a fully disclosed process that included public outreach and community meetings. To deny the community the right to put together such a plan for economic recovery would be to deny its constitutional right to exist. The plan is not ill-fated but ongoing, and will likely achieve its economic revitalization goal. It was the thoroughness of the plan and the public involvement in its formulation that swayed the majority of Supreme Court Justices to agree that the constitutional planning threshold had been passed. The redevelopment agency admits that it may take more time than anticipated to implement due to non-local and broader economic concerns like credit woes and the abrupt rise in the cost of materials and fuel. These are causing a delay in the implementation of many projects (both public and private), but there has not been a cancellation of the New London plan, and the delay cannot be attributed to an ill-conceived plan.

The Supreme Court decision upheld that the State, not the Supreme Court or federal government, was better suited to determine what constitutes the greater public good for its citizens; a finding necessary in any eminent domain action provided the constitutional thresholds stated above are cleared. This was the pivotal issue that swayed the majority opinion.

So why did the media de-emphasize the key rationale from the courts majority opinion as expressed by Judge Stevens? *“Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the ‘great respect’ that we owe to state legislatures and state courts in discerning local public needs.”*

The alleged “fierce backlash of public opinion” appears to be a half truth. The public reacted to the perception created by the media that private property could be taken carte blanche and given to private developers on a whim of a public entity. In fact, takings for redevelopment are not whimsical nor pursued without careful planning and considerable public input to the process, a fact conveniently avoided (or understated) by the media. Most states have carefully defined limitations on determining blight and other foundational reasons for taking of property for redevelopment. The “unmistakable voice of the American public” has not been universally evident in eminent domain reform. California, which is typically very liberal, defeated the purported eminent domain reform twice.

If Mr. Bullock wants to offer a rebuttal, he should at least clarify the position he is against. Is his issue the use of eminent domain as a tool to implement redevelopment of struggling communities in general? Is it whether or not the specific redevelopment plan was adequate? The Supreme Court has already defeated his arguments on these two points. Is it whether or not the redevelopment plan in New London will likely achieve its intended goal? Only time will tell.

The opportunity for debate exists only when there are clearly defined issues supported by facts and expressed free of emotionally charged rhetoric.

Perhaps one day this issue will be written in a fair and balanced way, under a heading like, “Supreme Court Upholds State’s Right to Help its Communities Escape Economic Ruin.”