Kelo v. New London

A Different Perspective

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The fallout from the U.S. Supreme Court decision of Kelo v. City of New London will be around for some time. That is usually the case in pivotal decisions that clarify or complicate governmental practices. The history of planning and development in the United States can assist in placing the eminent domain issues revolving around the Kelo decision into perspective.

At one time, the constitutionality of zoning was in question. It is now recognized that zoning is a legitimate form of regulating private property when associated with planning responsibilities. Various tools are required to implement planning programs, and zoning represents one of the major tools.

The authority to regulate land use was in question until the 1926 U.S. Supreme Court ruling in Euclid v. Ambler Realty. In that case, the Court recognized that the increase and concentration of population had caused problems and would require additional restrictions. The Court found that creating zoning districts was not arbitrary and unreasonable. In addition, zoning represented a rational execution of a rational plan, and there is a need to protect the public health, safety, morals or general welfare. Protecting property values was also an argument to allow zoning, especially in the pursuit to avoid the creation of external impacts or harms on other property owners and the public. It was argued that zoning was needed to enhance the economic, social and physical environment.

As with zoning, eminent domain is one of the powers of government that allows plans to be implemented. However, there are limits to government powers — including restrictions on the use of zoning regulations. One of the underlying principles of zoning is that each person forgoes rights to use their land as desired in return for the assurance that the use of neighboring property will be similarly restricted. This process of foregoing rights must be done within the framework of being reasonable. The concept of being reasonable is an elastic concept that leaves significant amount of latitude. While zoning can restrict the use of private property, there are limits that prevent a regulatory taking to occur.

Consider the U.S. Supreme Court case Dolan v. Tigard. In 1991 John Dolan applied for a permit to his A-BOY Electric and Plumbing Supply store, to raze the 9,700 sq. ft. store and replace it with a 17,600 sq. ft. store. Since the property was in a redevelopment area, the city insisted that 7,000 sq. ft. of the 1.67 acre parcel be dedicated for a bike path and drainage improvements made to an adjacent creek. It was anticipated that the expansion would generate 937 vehicle trips per day to the 6,800 daily trips along the frontage street. In addition, the city imposed a $14,256 traffic impact fee. A storm water impact fee was to be determined at a later date. The Dolans applied for a variance and were denied by the city council. It was felt that the city's findings were based on "mere speculation and conjecture." This case went all the way to the U.S. Supreme Court, which concluded that requiring a bike path was a taking. There must be a proportional relationship between the use and the restrictions imposed. There must be an "essential nexus." A bike path has no relation to a hardware store. Justice Oliver Wendell Holmes wrote in the 1922 Supreme Court decision, Pennsylvania Coal Company v. Mahon, "while property may be regulated to a certain extent, if regulation goes too far it will recognized as a taking."

In the 1987 case of Nolan v. California Coastal Commission, the U.S. Supreme Court ruled those exactions and other conditions of approval placed on development projects must be directly related to the project. In other words, there must be a nexus.

In California there is an additional layer of land use regulatory authority called the "Coastal Commission." The Nolans owned a beachfront lot that was improved with a small single-story residence. The property was located in the Faria Beach area of Ventura, and it was the owner's intent to build a two-story house on the same building footprint. As it had done numerous times before, the Coastal Commission approved the project subject to an easement permitting public access along the beach in front of the proposed house. This would help connect a trail between two public beaches. The Nolans sued the Coastal Commission arguing that there was no reasonable relationship between the beach access and a taller house. Coastal Commission lawyers argued that there was a relationship (nexus) between the height of the residence and the public's ability to walk along the beach because of the "psychological barrier" the house caused. The U.S. Supreme Court ruled that no nexus or relationship existed between the project and exaction.

The relative burden to the landowner must be considered in regulating property. In the Nolan case, the burden was determined to be excessive. Historically, takings occur if a landowner loses all economic use of the land. Now, it includes unreasonable conditions.

Operationally speaking, land use is what land use controls restrict and what land use planners plan. It is a fundamental concept that land use controls cannot be arbitrary in operation. They must be based on a comprehensive plan. Therefore, zoning must be necessary and reasonable in its objects and be a legitimate exercise of police power. In other words, zoning must not be arbitrary and discriminatory. It must be reasonable and promote the public morals, health, safety, or general welfare and prosperity of the community. Zoning is a police power and therefore must be impartial. An ordinance will not be declared invalid unless there is no reasonable relation between the regulation and the exercise of the police power. Clearly, zoning — whether or not it is for a particular purpose — may be invalid or unconstitutional if its use is beyond the scope of the police power.

Just as zoning has evolved, there must be limits on the use of the government's power of eminent domain. Those limits must be based on a balance between private and public interests. The overall interests of communities may include redevelopment or changes of land use that creates efficient use of land resources and public improvements. Old land use patterns may not make sense to promote economic development. Consider that the value of property is based on Highest and Best Use considerations. Communities, in a practical sense, have Highest and Best Use considerations in a comprehensive sense. This may be evident as market forces change purpose and function of a community. In such cases, existing parcel configurations and uses may be considered interim. Redevelopment may reduce barriers to change.

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The problem is how to value property when the Highest and Best Use is part of a redevelopment project that takes advantage of market forces. Typically, an opinion of value for property, to be acquired for governmental purposes, cannot take into consideration the increase in value based on the project. However, many redevelopment projects may include private participation. This public/private partnership should be analyzed in the context of the benefits received to the overall community. Analysis should also consider basic real estate development and feasibility analysis. Public officials should consider real estate feasibility analysis prior to public/private partnerships so there is full knowledge and disclosure of the benefits received by the developers. It is usually preferred to have voluntary acquisitions with win/win negotiations. Nonetheless, one fundamental question should be asked: Should the owners, who are being forced to sell, receive a price above pre-project values? This should be considered if the developer benefits from the use of eminent domain to consolidate property for a project to acquire land at a bargain.

Development projects typically require an amount of equity investment as part of a development project. This equity investment is usually a fraction of the mortgage financing, as part of the total project cost. The return of and return on the equity is an indicator of the attractiveness of an investment. Land acquisition costs are part of the feasibility formula. A community may subsidize land costs to promote development and receive other benefits such as an improved tax base and encourage private redevelopment on surrounding properties. A feasibility study may indicate that the value of the consolidated property exceeds the acquisition price. In those cases, should the owner, who is being forced to sell, be able to receive an amount higher than the pre-project value?

A proportionate relationship can be made between the benefits of the private development and the owners that were compelled to sell. As with zoning regulations, development benefits can be quantified to establish the essential nexus between the condemning agency and the owners.