Kelo v. New London – What's to Follow?

The Kelo v. The City of New London Supreme Court decision affirmed Connecticut's lower court ruling that eminent domain could be used for the purpose of economic redevelopment.

During IRWA's Annual International Education Conference, held in Toronto on June 13-16, 2005, a panel of right of way professionals debated the case prior to the recently published Supreme Court decision. In this article, those same panelists answer questions regarding the reactions and anticipated consequences of the decision.

The panel was lead by moderator, William (Bill) Busch, SR/WA, and included Scott Noya, who represented the public agency position, Bert Gall, representing the property owner position and Eric Finn, who provided relative consequences in Canada.

What positive and negatives effects do you predict the decision will have for public agencies and private owners?

Scott: The Supreme Court's decision affirms over a century of case law. It gives certainty to the so-called "separation of powers" doctrine – the theory that the executive, legislative and judicial branches of government must not tread outside their areas. It reaffirms that the courts are to give "great deference" to legislative determinations about a project's economic, environmental and social ramifications. The decision affirms that the "wisdom" of socioeconomic legislation is not for the courts to decide but, rather, is a debate that takes place within the local body of elected officials. This case really keeps the status quo in place for legal analysis of legislative condemnation decisions, as opposed to a change in the law.

On the other hand, public perception, fueled in part by media hyperbole, may have a downside effect on public agencies. Widespread perception is that the decision is an expansion of the government's condemnation power. As a result, restrictions on legislative authority may be introduced in response. In some cases, this may restrict a city or other agency's ability to adequately respond to deteriorating economic conditions through large-scale revitalization efforts.

While private property owners may fear rampant abuse of eminent domain powers, the decision has certainly drawn attention to such potential. Public backlash and resistance to condemnation may result, especially where residential properties are affected. Elected officials are clearly under a spotlight focused by the attention drawn to the issue as a result of the Kelo case.

Bert: The floodgates have opened for eminent domain abuse. Under the Court's rationale, any property can be taken from one owner and transferred to another on the theory that the second owner might produce more jobs and taxes than the first. As Justice O'Connor wrote in dissent for four members of the Court, "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more."

Do you think this will differ in Connecticut where there is specific legislation (at least for now) authorizing eminent domain for economic redevelopment?

Scott: Connecticut's house and senate have already debated new legislation to forbid the taking of private homes for private economic development, except in the case of blight. The bill initially failed, but plans are afoot to widen legislation to include takings of all private property. It is uncertain whether such opposition efforts will ultimately abolish both the economic development authorization within Connecticut's legislative scheme, as well as the separate scheme for redevelopment of "blighted" areas. Again, public perception that this has been a "sea change" in the law may have a backlash effect extending far beyond economic development. Such misunderstanding of the true status quo of the law may cause an outcry for state or local restrictions on all types of eminent domain, other than for traditional public uses such as roads, schools and other public facilities.

Bert: The decision's impact will be lessened in those states that already prevent, under either state law or their constitutions, the use of eminent domain for economic development. For example, Michigan, Illinois, and South Carolina have all recently ruled that economic development is not a public use under their constitutions, and those holdings won't be affected by the Kelo decision. As the majority held, states are free to provide a higher baseline of protection to home and business owners than the Court chose to provide. Already, legislators from about 25 states are considering legislation that would reduce or eliminate the ability of local governments and agencies to use eminent domain for economic development.

The reason that you see all of this legislative activity is that people are absolutely outraged that the Court ruled the way that it did; flash polls taken after the decision indicated that upwards of 96% of Americans thought that the Court got it wrong. You almost never see that kind of unified opposition to a Supreme Court decision. Clearly, everyone — with the exception of land-hungry developers and local governments that think eminent domain is the cure for solving all their fiscal problems — understands that this decision pulls the rug out from underneath the American dream.

What specific language in the majority opinion do you think will be most useful to public agencies and challengers to the right to take?

Scott: Public agencies will take some comfort in the fact that the majority opinion continued its deferential approach to review of legislative determinations of necessity for condemnation takings. In addition, the Supreme Court refused to intrude upon the legislative branch by declining to adopt a higher scrutiny standard. The majority opinion specifically acknowledged that the court's role is not to make specific factual determinations of whether the stated purpose of condemnation will actually accomplish its objectives.

Likewise, the court used rather expansive language in affirming that it has a limited role in reviewing only the taking's purpose, not its mechanics, in determining public use. The court specifically declined to "second-guess" a city's determination as to which lands need to be acquired in order to effectuate the project and achieve the goals of the development plan. The decision states that a court's role is not to "oversee the choice of the boundary line nor to sit in review on the size of a particular project area." Agency decisions will not be subject to court analysis of comprehensive plans based on individual parcel owners or on a piecemeal basis.

Also useful to public agencies is the Supreme Court's acknowledgment that more than 50 years of case law approved the government's "pursuit of a public purpose" despite incidental benefits to individual private properties. It rejected the concept that public ownership is the sole method of promoting the public purposes of community redevelopment projects.

Challengers to the right to take, while not comforted by the court's decision, will likely focus on the Supreme Court's emphasis that the New London development plan was "carefully considered" and based upon a specific legislative determination that taking of land as part of an economic development project is a public use and furthers a "public interest." Challengers will likely declare that without a specific statute in place, and more importantly, without substantial factual determinations, feasibility and economic analysis, such condemnations do not pass muster. Similarly, due process rights will be emphasized, demanding full opportunity for public input on such plans.

Also, challengers will likely focus their attention on state constitutional standards, in addition to the statutory basis for the taking, as opposed to the U.S. Constitution's Fifth Amendment. The Supreme Court's decision clearly acknowledged that nothing in its opinion precludes any state from placing further restrictions on its exercise of the takings power. The decision noted that many states already impose public use requirements that are stricter than the federal baseline, some established as state constitutional law while others are expressed in state eminent domain statutes that "carefully limit the grounds upon which takings may be exercised."

Additionally, challengers may attack condemnations where private owners will enjoy the "re-use" of the condemned property when not a part of an "integrated development plan," since the decision acknowledged such takings may raise suspicions and implicate other constitutional guarantees. Finally, the concurring opinion of Justice Kennedy leaves open the issue of challenge based upon condemnation benefiting private entities with "only incidental or pretextual public benefits," implying a higher standard of review may apply.

Bert: Unfortunately, the majority opinion offers cold comfort to home and business owners. In his concurrence, Justice Kennedy (who joined the majority) says that, under the majority opinion, property owners can still be protected from private-to-private transfers if there is evidence of improper motivation to bestow a benefit on a single private party. But, as Justice O'Connor points out, that protection is illusory: "The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, mutually reinforcing. In this case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in jobs and taxes." As noted above, the majority does explain that states can provide more protection to home and business owners than the Court chose to do, but as Justice O'Connor noted: "This is an abdication of our responsibility. States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution . . . is not among them."

Justice O'Connor quotes James Madison, who wrote, "[T]hat alone is a just government which impartially secures to every man, whatever is his own." Madison and the other Founding Fathers never intended that the "public use" clause would allow private property to be taken from one owner and given to another for a private use, so long as the private use would generate more tax revenues. In turning the Fifth Amendment on its head, the Court has exposed every single American to the abuse of eminent domain. That threat is very real. Indeed, almost immediately after

the Court issued its decision, cities across the country rushed to condemn property for the benefit of private parties in the name of economic development.

What specific language in the minority opinion do you think will be most useful to public agencies and challengers to the right to take?

Scott: While there is not much in the dissenting opinions to support public agencies interested in economic development plans, at least the minority affirmed that prior cases were correctly decided. The landmark decisions in Berman v. Parker and Hawaii Housing Authority v. Midkiff would not be overturned by the minority, but rather distinguished from the circumstances of the City of New London's economic development plan. Those prior cases made clear that the court's role in reviewing a legislature's judgment of what constitutes a public use is "an extremely narrow one."

The minority attempts to distinguish these prior cases by asserting that condemnation in those situations constituted a public use because a "harmful property use" was eliminated. Thus, even the minority will acknowledge that revitalization of a community is justified as a public use when a "harmful condition" of property is eliminated. Because the minority opinion acknowledged the existence of a public use in those situations, such as redevelopment, those that may call for broad reforms and legislative restrictions on all types of private property takings would find little support in the dissenting opinions' rationale.

Challengers to the right to take will hardily embrace the minority opinion's belief that the majority's holding expands the meaning of public use to the point of collapsing any distinction from private use. Challengers will contend that the "public use" clause as interpreted in the majority decision does not realistically exclude any takings and, therefore, does not exert any meaningful constraint on eminent domain power.

Challengers will also focus on the minority's assertion that the "careful, deliberative process" employed in the New London plan has no legal significance to allow a court to effectively review and prohibit property transfers that are "less comprehensive" or "less elaborate" and which only project higher taxes.

How does the Canadian law make this decision moot for Canada? Have there been any effects in Canada?

Eric: Having read the decision of the Supreme Court in the Kelo case, the question should not be whether the legislation in Canada renders the decision moot but whether, in spite of the legislative differences, there is anything in the statements of the court which might assist Canadian municipalities and their residents in the development and implementation of community improvement plans. Considering the fact that the approach to the acquisition of land for community improvement purposes starts from somewhat polar opposites in that a provision the same as, or similar to, the property protection that we see in the Fifth Amendment does not appear in the Canadian Constitution, the result in the Kelo case and the reasoning of the U.S. Supreme Court is remarkably similar to the approach taken in Canada.

The strongest example of this arises out of deference that the U.S. Supreme Court applies to the objectives of the municipality. The court specifically states that it will "second-guess" neither the city's "judgments about the efficacy of its development plan" nor its "determinations as to what lands it needs to acquire in order to effectuate the project." Compare these comments with a statement approved by an Ontario Court in the leading case in our jurisdiction: "The objectives are presumed to have been appropriately determined by elected officials and the remedy for any complaint is to replace the policy-making elected officials at the ballot box."

In addition, the state legislation that was used to carry out the project in New London bares some resemblance to the legislative regime in the province of Ontario which permits a municipality to develop a community improvement plan pursuant to which property can be acquired (either with or without the consent of the owner) and disposed of to a third party so long as such acquisition and disposition carries out the purposes of the plan. Thus, for example, property acquired pursuant to a community improvement plan can be transferred to a developer to build a multi-screen theatre complex.

Decisions of the U.S. Supreme Court, by themselves, have no precedential value in Canadian courts. However, from time to time, Canadian courts do adopt statements and reasoning from American decisions which support the view that the court wishes to develop in responding to a case it has to decide. At this point, there has been no judicial reference to the decision in Kelo but in light of the similarity of the legislative regimes and the judicial reasoning that has occurred to date, in all likelihood, there will be opportunities to apply some of the statements in the Kelo decision in the Canadian context.

Do you think this decision will prompt states to press for state specific legislation to put limits on eminent domain takings?

Scott: As indicated earlier, public perception that the decision constitutes a major shift in eminent domain will undoubtedly prompt demands for legislative constraints on condemnations. Some states have already done so. However, because even the minority decision upholds, although distinguishes, prior decisions in redevelopment settings, sophisticated observers will be alert to such overreactions.

What is more likely to occur are more specific statutory schemes which require an exacting process for integrated development plans. The focus of more restrictive legislation may be on setting exact criteria, minimum number of public hearings and notices prior to adoption, as well as substantive economic and other feasibility support for proposed plans. Other areas of possible revision may

include opportunity for participation or "re-entry" in the plan area by prior property owners. While the wisdom of such limitations is a matter of "legitimate public debate" in the words of the majority opinion, the court's decision has essentially invited such review.

Bert: As mentioned above, those efforts are under way — and understandably so. For home and business owners, much is riding on their success.

Eric: I would agree that a strong statutory scheme that provides for significant input from stakeholders is imperative for the acceptance by the courts of community improvement plans developed by local municipalities. If it were not for the ability of stakeholders, including property owners and others with economic interests, to have a venue to express their concerns and desires, we would not see the type of judicial deference that the court in Kelo exercised.

Should the Federal Government take any action to further define the appropriate context for eminent domain?

Scott: This decision is consistent with case law as it has existed for decades. In fact, the majority opinion's justices voiced great concern during oral argument that the new rules proposed by the property owners for a higher standard of review would essentially require that prior landmark decisions be overturned. As such, the decision only affects review under the Federal Constitution's Fifth Amendment Clause. No further federal government action need be taken to define eminent domain powers in light of the deference given to local legislative bodies. As the court noted, nothing in the opinion precludes any state from placing further restrictions on its exercise of condemnation powers or to impose public use requirements that are stricter than the federal baseline.

Bert: Certainly, the federal government can prevent itself from using eminent domain to benefit private parties, and it can prevent federal funds from being used in economic development projects that involve the use of eminent domain. Indeed, Congress is currently considering several pieces of legislation that, through these and other means, seek to restrain the abuse of eminent domain.

If the decision had been reversed, what do you think would have been the repercussions?

Scott: Obviously, economic development plans that involved transfer to private parties would have been impermissible. While the minority opinion would still allow takings cases under redevelopment and other situations whereby "harmful property uses" were eliminated, revitalization efforts would suffer greatly.

As the majority opinion acknowledged, promoting economic development is a traditional and long accepted function of government. Had the decision been reversed, the government's police power to regulate economic, environmental and social conditions through means such as creating jobs and increased tax revenue basis would have been severely hampered. In other words, the government's ability to improve economic conditions for the good of the whole would have been more difficult with one of its tools removed from the condemnation tool box.

Bert: A reversal would have ensured that no person's home or business could, under the banner of "economic development," be taken so that another wealthier and more politically connected person can make more money with it. An American's home would truly have been their castle -- not a place that is susceptible to condemnation at any time just because someone else wants it. Of course, developers and several local politicians will tell you that a reversal would have removed their ability to address slum or blight conditions, or that it would have been disastrous for economic development projects. Both statements couldn't be more wrong. First, Kelo did not involve the existence of actual slum or blight conditions; thus, their removal was not at issue and would not have been affected by a reversal. Second, economic development happens all over the country and all the time without the use of eminent domain. The undisputed and unmitigated failure of urban renewal policy in the '50s and '60s (documented by urban sociologist Jane Jacobs) should have told us something about the problems with clear-cutting whole communities to make way for shopping malls and other development projects.

How do you see this decision affecting public agencies outside the context of redevelopment?

Scott: Cities and other public agencies will have the ability, assuming they are empowered with specific state or local statutory legislation, to effectively implement integrated, comprehensive development plans. In those jurisdictions that presently have no such powers, or are limited to redevelopment of already "blighted areas," there may be some efforts to adopt legislation to specifically authorize economic development eminent domain use.

It is doubtful that the decision is the harbinger of rampant, uncontrolled eminent domain. Remember, our elected officials remain subject to being recalled or simply voted out of office in the event the overall "public good" is not carried out.

Eminent domain is a powerful tool for providing an economic engine for cities in need of rejuvenation, not only in areas that have already become blighted or otherwise dilapidated. The tool of economic development is extremely useful for areas sliding toward decay, but has not yet reached complete meltdown.

Bert: The Court's "economic development" rationale is so broad and easy for cities to apply that I suspect many of them will simply use that as an all-encompassing justification for eminent domain. Thus, in the context of eminent domain, there really is not an effect outside "economic development" because that term is an all-encompassing excuse for the abuse of eminent domain for private benefit.