

Real Estate

NEW YORK

A Real Estate Media Publication

June 2005

On Board

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Development Hinges on Supreme Court

A captivating case heard by the US Supreme Court in late February 2005 has wide-ranging implications on the entire real estate development industry. *Kelo v. City of New London* presented the court with the question of whether private property may be taken by eminent domain for economic development, and if so, under what conditions.

Real estate developers are sharply divided on this issue. On one hand, broad eminent domain powers can lead to lucrative projects and the quick elimination of holdout property owners. On the other hand, if cities can use condemnation to substitute one private property use for another—just because it provides more economic development for the community or it can get the property to the developer for less money—then cities will have the power to severely curtail residential development and/or existing uses in favor of commercial ventures. In a market already fraught with housing shortages and anti-competitive forces, this potential for abuse is distressing.

Under the Takings Clause of the Fifth Amendment to the Constitution, a local government may take private property for public use by paying just compensation. Over the last hundred years there has been much debate in the courts as to which actions constitute a “public use” appropriate for a taking. It is fairly well established that parks, roads, schools and the redevelopment of blighted areas are appropriately defined and have been upheld as a “public use” in most states.

There has been a recent trend by local governments, however, to attempt to take private property using economic development (i.e., higher tax revenue and more job opportunities) as the sole indicator of public use. The state courts are splintered on whether this type of condemnation is constitutional.

The courts seem to have a broad view of public use. In cases within the past 40 years, New York courts have tried to weigh public benefit (substituting the concept of “benefit” for “use”) against the private benefit of a non-blighted condemnation project to determine whether a legitimate or a conceivable public purpose is related to the condemnation.

In *Kelo*, the City of New London, CT sought to redevelop approximately 90 acres of land that was in a non-blighted area. The parcels of land are located adjacent to a Pfizer global research facility. The city sought to transfer control over the property to private developers to build a business and technology park. By way of justification, the city estimated substantially increased revenue in property taxes, claimed that the plan would complement the Pfizer complex and provide employment in the area. While there may be a public “benefit” here, the question is whether or not there is a public “use.”

Several affected property owners, whose well-maintained

homes are the subject of the proposed condemnation proceedings, claim that it is an unconstitutional transfer of land from one private property owner to another unconstitutional. That is the case before the court.

The National Association of Home Builders and the National Association of Realtors filed an amicus brief in support of the property owners. However, the housing industry’s argument primarily focused not on the alleged injustice to property owners, but on the appropriate test to be applied by the courts in public/private takings situations.

The position of the housing industry is that there needs to be a heightened level of scrutiny applied to these situations, so that when eminent domain moves forward it based on a careful and detailed examination of the facts that meet the public use requirements.

Housing will rarely afford a community the same economic benefits that a commercial development will. If economic benefits are allowed to stand as a sole justification for defining a public use, then the door is left open for local governments to abuse their eminent domain powers, take non-blighted homes from homeowners and to take developable, residentially-zoned land from builders.

The long standing objective of the NAHB is to protect private property rights from abuses by local government. The key to the *Kelo* case is the opportunity for the Supreme Court to establish parameters that will curb abuses in the use of eminent domain powers, while allowing it to be used where appropriate.

The Supreme Court is expected to hand down its decision this month. That decision may shape the ways local governments use their eminent domain powers for decades. —RNL

The views expressed in this article are those of the author and not those of Real Estate Media or its publications.

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“*Kelo v. the City of New London* could allow the court to set parameters that would curb abuses in the use of eminent domain powers.”