

## "PRIVATE" CONDEMNATION FOR ASSEMBLING PROPERTY

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A recent U.S. Supreme Court case has created the prospect of enlisting local government's assistance in using condemnation for assembling property needed for private development.

In *Kelo v. City of New London*, 125 S.Ct. 2655 (2005), the US Supreme Court validated a tool that has been available to local government to promote economic development. The city of New London, Connecticut had experienced significant economic decline in the 1990s. With high unemployment, the loss of a major employer, and a declining population base the City began to investigate redevelopment options. The City secured state funding and issued bonds to finance the redevelopment of a section of the city. At the same time, Pfizer Inc., the pharmaceutical company, announced plans for a \$300 million research facility adjacent to the redevelopment area.

The area targeted for redevelopment comprised 115 private properties, including the homes of long-standing (60-year) residents that were slated for taking - even though the area was NOT blighted or otherwise in poor condition.

The redevelopment plans included a hotel, office and retail space, parking, an unspecified "support" area and, significantly, 80 new residences! Essentially, long-standing residences were being condemned for new residences. Also, at least some of the new uses for this area would be built by a private developer, under a 99-year lease for \$ 1 per year!

The specific question answered by the US Supreme Court was "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment." The Court concluded that taking the property was authorized, as the project "will provide appreciable benefits to the community, including-but by no means limited to-new jobs and increased tax revenue."

Of significance, the Court gave great deference to the City's conclusions that this project was necessary and was for a public purpose: the Court would "decline to second-guess the City's considered judgments about the efficacy of its development plan, [and] we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project." The Court noted that "the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate", but it was not the Court's role to second-guess the City's conclusions on that issue.

**The bottom line is that the Court concluded that a taking for the exclusive purpose of promoting economic development, such as increasing tax revenues and creating jobs, was constitutional.**

Florida has long permitted Community Redevelopment Agencies (CRA) to condemn property to rectify "blight." CRAS have often looked to private developers to develop properties after the CRA assembles them. While requiring a finding of "blight" would seemingly be a significant restriction on exercising eminent domain, in practice the definition of "blight" has been broadly. Lauderdale's central beach area were both found to be adequately down trodden to satisfy the "blight" requirement. Over the past 30 years, Florida courts have given increasingly wide latitude to government's conclusion that eminent domain could be exercised for redevelopment. After the US Supreme Court agreed to hear the pivotal *Kelo* case, the decision would define whether

government had gone too far, or could continue on. Without question, Kelo allows the continued expansion of government's use of eminent domain for the sole purpose of promoting economic development.

### **The Development Opportunity**

*Kelo* provides strong support to a local government's decision to exercise condemnation to allow for economic development. If a business or developer wishes to develop property, but is constrained by the inability to acquire all of the needed land, the involvement of local government may allow the development to proceed. If the item is studied and found by local government to benefit the community, such as by increasing tax revenues or jobs or in other aspects (even aesthetics were cited in *Kelo*), then the City could satisfy *Kelo*'s requirements if the needed property were condemned. The presence of a CRA over the affected area would certainly enhance the speed at which such a taking could occur.

### **Good for a Limited Time Only?**

There has been much press concerning *Kelo*, and a strongly negative public reaction. Both the Federal government, and Florida's State government have responded.

The Florida Legislature, specifically citing *Kelo* and the concerns *Kelo* has created over private property rights, has established the House Select Committee to Protect Private Property Rights "to ensure that, in Florida, eminent domain is only asserted in situations where the public necessity and public benefit are very clear." A bill (H.J.R. 31.) proposing to amend the Florida constitution "to provide economic development shall not be deemed to constitute a public purpose for which private property may be taken by eminent domain" has also been filed.

The U.S. House of Representatives has introduced a bill (H.R. 3405) to prohibit federal funds for economic development assistance to any state that uses condemnation to obtain property for private commercial development. Strengthening the Ownership of Private Property, or STOPP 2005.

Whether these pieces of legislation will move forward, or will wane as other issues take priority, remains to be seen.

Now, businesses and real estate developers looking to put together the land necessary for new development have a new tool that changes the negotiating table, and with the proper local government support, may breathe life into an otherwise stagnant project.