



NATIONAL ASSOCIATION OF REALTORS®

The Voice For Real Estate®

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Eminent Domain Issue Analysis (June 2005)

Kelo v. City of New London

In 2000, the city of New London, CT approved a 90-acre economic development plan designed to create jobs, increase tax and other revenues, and revitalize an economically-distressed city. In assembling the land needed for the project, the city purchased most of the target property from willing sellers and proposed to use the power of eminent domain to acquire the remainder of the property from nine unwilling owners in exchange for just compensation.

In December 2000, the nine property owners filed suit against the city in New London Superior Court claiming that the taking of their properties would violate the "public use" restriction in the Fifth Amendment of the U.S. Constitution. The court held that an unconstitutional taking applied to some of the properties but not to others. Both sides appealed to the Connecticut Supreme Court. That court held that all of the city's proposed takings were valid.

The property owners then appealed that decision to the U.S. Supreme Court. In a 5-4 decision announced on June 23, the Court ruled, in Kelo v. City of New London, that the city's condemnation of several private residences pursuant to a comprehensive economic development plan did not violate the Fifth Amendment. This is the first time the Court has considered this specific issue – i.e., the taking of non-blighted private land for the purpose of economic development.

Background on Eminent Domain

“Eminent domain” is the power of the government to appropriate private property for its own use without the owner’s consent. The terms “condemnation” and “taking” refer to the act of a government exercising its power of eminent domain. Eminent domain is recognized by U.S. courts as a fundamental power of government. However, this government power is restrained by the Fifth Amendment of the U.S. Constitution, which provides “...nor shall private property be taken for public use, without just compensation.” This restraint on government power applies to state and local governments, and private bodies exercising delegated power, by the Due Process clause of the Fourteenth Amendment of the U.S. Constitution.

Historically, eminent domain was used for such obvious public uses as roads, parks and schools. Over the years, the definition of “public use” has expanded to include projects which have a public “purpose” or “benefit,” although a private party will maintain primary ownership, control, or jurisdiction over the project. Since the 1960s, cities have used their eminent domain power for urban renewal projects. Local governments often create economic development plans which use eminent domain seizures to foster commercial development and generate job creation and tax revenue. Eminent domain is one of several tools for achieving economic development available to government entities.

NAR Policy and Position

NAR's eminent domain policy urges that government entities be required to justify condemnation actions in order to ensure, as much as possible, that under the circumstances they are both necessary and likely to achieve real and substantial community benefits. The government should provide persuasive, objective evidence that the project, and the resulting public purpose or benefit, will in fact be realized. Furthermore, considerations of fairness and reasonableness require that payment of “just” compensation, as directed by the 5th Amendment, must cover the additional costs incurred by property owners affected by condemnation actions above and beyond the loss of the subject property.

Since eminent domain impacts the Constitutional rights of property owners, it should be exercised carefully and only in special circumstances. This is especially true in situations where a condemnation action transfers a property interest from one private party to another.

In an amicus (friend of the court) brief filed jointly with the National Association of Home Builders in the Kelo case, NAR argued that the Supreme Court should provide a framework for an intermediate level of judicial scrutiny that would allow courts in future cases to determine whether eminent domain is appropriate in situations where a private party will maintain primary ownership, control, or jurisdiction over the condemned property. Legislative deference generally is not a proper standard of review for condemnations involving significant private interests, especially those with economic development as the sole justification. A higher level of scrutiny would allow for a more careful review of the use to which the property will be put to determine whether the public use or purpose is primary or incidental. Unfortunately, the Court rejected this argument, determining that it was inappropriate to second-guess the city's comprehensive economic development plan.

State Eminent Domain Laws and Constitutional Provisions

The eminent domain battleground is likely to now shift to the state level. The majority opinion in Kelo notes that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline." Some of these requirements have been established by state constitutional law, while others are provided by state eminent domain

statutes that limit the grounds upon which condemnations may be exercised. Thus, property owners in some states may be legally protected against the type of eminent domain action at issue in the Kelo case.

NAR Resources

NAR has several programs which may be of assistance to state and local REALTOR® associations that are proactively or reactively involved in the eminent domain issue at the state or local level:

Customized State Legislation

NAR's Customized State Smart Growth Legislation program provides assistance to state REALTOR® associations who wish to proactively take the lead in writing and introducing legislation to help the state better address the challenges of growth and improve local communities. The program offers, at a reduced rate to the state association, the services of a nationally-renowned land use law firm to draft state legislation on land use and growth-related issues. CONTACT: Bob McNamara, 202-383-1268, bmcnamara@realtors.org.

Land Use Initiative

NAR's Land Use Initiative program assists state and local REALTOR® associations in their public policy advocacy of land use and property rights issues. Upon request, NAR will provide expert analysis of the legal, planning, economic, and environmental issues surrounding legislative and regulatory land use proposals. The program focuses on proposed rather than existing measures. CONTACT: Bob McNamara, 202-383-1268, bmcnamara@realtors.org.

Issues Mobilization

NAR's Issues Mobilization program supports state and local REALTOR® associations through educational, technical and financial support and enables them to organize and manage effective issue campaigns to promote REALTOR® policy. A principal objective of the program is to provide requesting state and local REALTOR® associations financial assistance to facilitate effective issue campaigns benefiting and promoting REALTOR® public policy. CONTACT: Lisa Friday Scott, 202-383-1270, lscott@realtors.org.

Legal Action

NAR's Legal Action program provides financial assistance (i.e., legal costs and expenses) to support litigation of significance to the Association, including matters relevant to the practice of real estate, the operation of real estate associations, ownership and use of real estate, and private property rights. In appropriate cases, NAR may also prepare and file amicus curiae briefs. CONTACT: Ralph Holmen, 312-329-8375, rholmen@realtors.org.