

# *Kelo's* Unanswered Questions

## Policy Issues Raised By The Use of Eminent Domain For Economic Development

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September 21, 2006

# *Background on the Takings, or Property Rights, Issue*

- ◆ The “Takings Clause” of the Fifth Amendment to the U.S. Constitution: “[N]or shall private property be taken for public use, without just compensation.”
- ◆ Takings Clause implicitly authorizes use of the eminent domain power, subject to two conditions:
  - for a “public use.”
  - payment of “just compensation.”
- ◆ The “other” taking issue is whether regulations restricting or conditioning uses of private property are “takings.”
  - E.g. Inclusionary or rent stabilization laws?
- ◆ Also state constitutional analogs.

# *Kelo v. City of New London*, 125 S.Ct. 2655 (June 23, 2005)

- ◆ Economically depressed city used eminent domain to acquire land for comprehensive redevelopment project.
- ◆ Majority of owners agreed to sale, but several homeowners and investors challenged the taking.
- ◆ Issue: Is taking for a public use? Answer: Yes, in large part because the taking was pursuant to a comprehensive development plan.
- ◆ 5 to 4 ruling a source of heated public and political debate.
- ◆ A model of judicial restraint?

# *Basic Policy Questions*

- ◆ Is Eminent Domain Needed to Accomplish Urban Redevelopment Projects?
- ◆ Does Payment of Just Compensation (and Relocation Assistance) Mitigate Effectively For Taking Property?
- ◆ Does the Use Eminent Domain Improperly Promote Private Interests?
- ◆ Do Exercises of Eminent Domain Target Vulnerable Populations and Properties?

# Is Eminent Domain a Necessary Tool for Urban Economic Development?

- ◆ Is eminent domain necessary for land assembly for urban redevelopment?
- ◆ Does the success of redevelopment projects require the involvement of private developers?

# Is ED a Necessary Tool (2)

- ◆ Basic justification for eminent domain: allows gov't to facilitate efficient reconfiguration of property rights by overcoming "holdouts."
- ◆ Fragmented inner-city ownership patterns resist assembly by private market.
- ◆ City officials claim eminent domain has been instrumental in wide array of urban redevelopment projects: Times Square, Baltimore Inner Harbor, DC Stadium.

# Is ED a Necessary Tool (3)

- ◆ Could cities assemble urban sites without eminent domain?
- ◆ Are better negotiation tactics and more money the answer?
  - Cities already favor private negotiation and offer above-market premiums to avoid need for condemnation.
  - Secrecy appears inconsistent with transparent, inclusive planning process.
- ◆ Can cities build around holdouts?
  - DC Stadium without third base?

# Is ED a Necessary Tool (3)

- ◆ Can cities pursue redevelopments without private developers?
- ◆ Involvement of private developers in economic development projects using eminent domain triggers strong public suspicion.
- ◆ But engaging private enterprise offers important efficiencies in achieving economic goals.
- ◆ Public-private partnerships integral to virtually all large scale mixed-use redevelopment efforts.

# Is ED an Important Tool (4)

- ◆ What are the opportunity costs?
  - lost jobs?
  - lost housing?
  - lost taxes?
  - lost community improvements?
  - do we really know; how do we find out?

# Are Property Owners Fairly Compensated?

- ◆ Just compensation defined as “fair market value.”
- ◆ Relocation costs often covered under federal and state law; are the amounts adequate?
- ◆ Does not include important costs and elements of value for some owners
  - Subjective values
- ◆ But owners often get substantially more than market value in practice (sometimes less, too)
- ◆ Does/would additional compensation overcome the objections to ED?

# Is eminent domain used improperly to promote private interests?

- ◆ Suspicion that eminent domain used to advance interests of powerful companies: Poletown, Costco.
- ◆ One-to-one transfers particularly suspicious.
- ◆ Concern is dignitary harm.
- ◆ Procedural safeguards?: integrated development plan, public involvement, judicial scrutiny

# Does Eminent Domain Target Vulnerable Populations or Properties?

- ◆ Highway and urban renewal programs in 1950s-1970s sometimes targeted minority populations
- ◆ “Blight” theory inherently targets poor inner city neighborhoods
- ◆ But has political culture has changed?
- ◆ And do beneficiaries of economic redevelopment include inner-city residents themselves?
  
- ◆ Concern that cities may target churches and other non-profits
- ◆ But empirical evidence suggests city officials try to avoid taking churches; religious property also protected under First Amendment and federal law.

# Status of Federal-State ED Reform

- ◆ The initial response to *Kelo*:
  - Statements comparing *Kelo* to the *Dred Scott* decision.
  - Nearly unanimous House resolution condemning *Kelo*.
  - Useful policy focus on an unexamined issue.
  - But threat of very serious policy overreaction.
  - Emergence of “the *Kelo* plus strategy.”  
Leonard Gilroy policy study for the Reason Foundation (April 2006).
  - GOTV aspect

# The Federal Response

- ◆ Bond Amendment (November 2005)
- ◆ No Funds in the HUD appropriations bill may be used to support use of eminent domain, “unless eminent domain is employed only for public use.”
- ◆ “Public use shall not be construed to include economic development that primarily benefits private entities.”
- ◆ Various enumerated uses are expressly defined as public uses.
- ◆ General Accounting Office investigation of ED

# The Federal Response (2)

- ◆ Bush Executive Order: “Protecting the Property Rights of the American People.”
- ◆ Issued June 23, 2006, first anniversary of the *Kelo* decision.
- ◆ Limited practical significance, especially for community economic development.

# The Federal Response (3)

- ◆ “Private Property Rights Protection Act,” HR 4128, passed House by a vote of 376 to 38; would impose a two-year cut off on federal financial assistance for economic development assistance for violations; would impose broad and vaguely worded restrictions on use of eminent domain.
- ◆ No action yet on permanent ED legislation in the Senate.
- ◆ Prospects for action in 109<sup>th</sup> Congress dim and becoming dimmer.
- ◆ *Kelo*-plus element: HR 4772, regulatory takings legislation reported by the House Judiciary Committee.

# The State Response

- ◆ In 2005, four states (Alabama, Delaware, Ohio, and Texas) passed some type of ED legislation; Michigan passed a constitutional amendment that will go to voters in November 2006
- ◆ In 2006, all 44 legislatures in session considered the issue.
- ◆ 24 states passed some type of bill
- ◆ Pacific Legal Foundation list of states that have adopted “real” reforms (FL, GA, IND, SD, PA, MN)

# The State Response (2)

- ◆ “Prohibiting eminent domain for economic development purposes, to generate tax revenue, or to transfer private property to another private entity.
- ◆ Defining what constitutes “public use,” generally the possession, occupation or enjoyment of the property by the public at large, public agencies or public utilities.
- ◆ Restricting eminent domain to blighted properties and redefining what constitutes blight to emphasize detriment to public health or safety.
- ◆ Requiring greater public notice, more public hearings, negotiation in good faith with landowners and approval by elected governing bodies.
- ◆ Requiring compensation greater than fair market value where property condemned is the principal residence.
- ◆ Placing a moratorium on eminent domain for economic development.
- ◆ Establishing legislative study committees or stakeholder task forces to study and report back to legislature with findings.”

# The State Response (3)

- ◆ November 2006 Ballots.
- ◆ *Kelo* Ballot Measures:
  - Florida, Georgia, Louisiana, Michigan, New Hampshire, Nevada, North Dakota, Oregon, South Carolina
- ◆ “*Kelo-Plus*” Ballot Measures:
  - Arizona, California, Idaho, Montana
- ◆ Pure Takings Measure: Washington.

# The State Response (4)

- ◆ District of Columbia
  - Nothing, that I know of.
- ◆ Maryland
  - Numerous widely varying legislative proposals.
  - Report of Task Force on Business Owner Compensation in Condemnation Proceedings (December 2005) (various recommendations)
  - Then gridlock and then nothing.

# The State Response (5)

- ◆ New Jersey
  - Again, numerous widely varying proposals
  - Broad coalition – including NJ Future, NJ League of Municipalities, NJ Builders Association, Housing and Community Development Network, and others -- developed a “consensus approach.” Bills introduced in both houses. Relatively modest reforms, including amended blight definition and more procedural protections.
  - Public Advocate, who issued an influential report on ED, weighed in urging further tightening (e.g. shifting of burden of proof).
  - Legislature ended in gridlock over two quite similar but different proposals; next year?

# The State Response (6)

## ◆ Connecticut

- Once again, numerous widely varying proposals.
- Competing proposals -- one sharply restricting the eminent domain power, and one providing new procedural protections
- Debate was dominated by *Kelo*, which was finally settled this summer.
- Legislature ended in gridlock; next year?

# The State Response (7)

- ◆ Georgia
  - H.B. 1313
    - relatively tight definition of blight
    - generally prohibiting ED for ED
    - broad utility exception
    - condemning authority assigned burden of proof on issue of public use
    - reconveyance rights
    - enhanced procedural protections
  - Proposed Constitutional Amendment
    - would require approval by the elected governing body of a local government before eminent domain may be used for a redevelopment purpose, as defined by law.

# Concluding Thoughts

- The laboratories of democracy will surely flourish.
- Public and political interest in *Kelo* remains very high.
- Pressure will probably weaken over time to enact sweeping reforms; good and bad.
- Need to banish “blight” from our vocabulary.
- Need more research/action on (1) relocation assistance standards, (2) enhanced procedural protections, (3) values and functions of planning, (4) housing replacement options, (5) possible compensation reforms.