



Electronic Dispatch

Land Use and Development Information Memo

July 2005

Go to [BS&K Real Estate, Environmental and Finance Home Page](#)

SUPREME COURT RULES THAT TAKING OF PRIVATE PROPERTY FOR ECONOMIC DEVELOPMENT SATISFIES PUBLIC USE REQUIREMENT OF THE FIFTH AMENDMENT

“Nor shall private property be taken for public use, without just compensation.” U.S. Constitution, 5th Amendment.

A well known principle of constitutional law intended to limit the power of government to take private property was recently considered by the United States Supreme Court in the case of Kelo v. City of New London, (June 23, 2005). In a 5-4 decision, the Supreme Court ruled that a taking of private property to promote private economic development served a public purpose and, therefore, satisfied the public use requirement of the Fifth Amendment. The impacts of the decision are far reaching and important to municipalities and industrial development agencies (“IDAs”) statewide.

The Court’s Decision

The facts in the Kelo case resemble fact patterns frequently faced by local municipalities and IDAs. In an effort to revitalize the economy of the Fort Trumbull area of the City of New London, the New London Development Corporation (“NLDC”), a private nonprofit entity established to assist the City with economic development, was reactivated. During the NLDC’s early planning phases, Pfizer, Inc. announced it would build a research facility immediately adjacent to the Fort Trumbull area. Hoping to benefit from Pfizer’s facility, the NLDC continued its planning activities and proposed an integrated development plan that included a waterfront conference hotel, restaurants, shopping, a riverwalk, new residences, office space, a museum, state park and associated parking. The City approved the plan, and authorized the NLDC to implement the plan and to acquire property by exercising eminent domain on behalf of the City.

Nine petitioners challenged the taking of their property claiming that the takings violated the public use restriction in the Fifth Amendment. The Supreme Court of Connecticut upheld the takings under Connecticut’s municipal development statute and under both the State and Federal Constitutions. The United States Supreme Court granted certiorari to determine whether a municipality’s decision to take property for the purpose of economic development satisfies the public use requirement of the Fifth Amendment.

The majority concluded that, although the proposed use of the property was not entirely devoted to use by the general public, the Supreme Court “long ago rejected any literal requirement that condemned property be put into use for the general public.” It noted that the Court, since the turn of the century, has embraced a broader and more natural interpretation of “public use” as a use with a public purpose. Under this broad interpretation, the Court has “eschewed rigid formulas and intrusive scrutiny” and, instead, gives legislatures broad latitude in determining what public needs justify the use of the taking power.

Applying these rules to the facts in the Kelo case, the majority concluded that even though the City was not confronted with the need to remove blight, its determination that the area was economically distressed and required a program of economic rejuvenation was entitled to deference by the Court. Of particular importance to the Court was the existence of a state statute that specifically authorized the use of eminent domain to promote economic development. Since the City determined that the development plan, considered as a whole, would benefit the community by creating new jobs and increasing tax revenues, the majority ruled that the takings unquestionably served a public purpose and, therefore, satisfied the public use requirement.



What the Decision Means

The decision is a victory for municipalities, IDAs, developers (including Brownfield developers), and businesses looking to expand their operations. It effectively allows municipalities to condemn residences and viable businesses for other private economic development projects such as corporate headquarters, shopping malls and hotel complexes to generate jobs and increase tax revenues. Although many would view this as seizing property from one private party to give it to another private party, the decision gives urban municipalities a fighting chance to retain and attract large companies looking to expand or relocate. For example, a large corporation with offices in a city seeking to expand those offices or create a corporate headquarters could either be forced to pay exorbitant prices to buy out neighbors or to relocate to a suburban cornfield far from the city center. Rather than lose a major employer and taxpayer, the city (or IDA) could conceivably implement an economic development plan that would allow the municipality to use its power of eminent domain to take private property to create an office park that will increase jobs and tax revenues, thereby providing a public purpose, while at the same time assisting a private entity.

Despite its benefits to municipalities, many view the Kelo decision as a blow to private property rights. The proponents of private property rights focus on the Supreme Court's dissenting opinions and note that the "beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms." (Justice O'Connor's dissent).

It is also important to note that the Court's decision indicates that under certain circumstances, a municipality's use of its takings power might be so egregious that it would fail the public use/public purpose test. The decision does not authorize municipalities "to take property under the mere pretext of a public purpose, when its actual purpose is to bestow a private benefit." One of the keys to the Kelo case was that the taking was executed pursuant to a "carefully considered" development plan that was not adopted "to benefit a particular class of identifiable individuals." Instead, the City of New London focused on the potential public benefits of the development plan. Therefore, municipalities and IDAs should be cautious when exercising the power of eminent domain and avoid transferring property to a private company under the pretext of public purpose.

It is clear the battle on this issue is far from over. Less than a week after the decision, bills were proposed in both the House and the Senate to "protect homes, small businesses, and other private property rights, by limiting the power of eminent domain." (H.R. 3083 and S.1313). In addition, the House voted to approve an amendment to the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, which would prohibit the use of federal funds available under the Appropriations Act from being used to enforce the decision in the Kelo case. Finally, as noted by the Supreme Court, state and local officials are better able to discern local needs than federal judges. As a result, this debate will now shift to state courts, state constitutional rights, and state laws which authorize the use of eminent domain by municipalities and IDAs.

If you have any questions, please contact:

In the Capital District, call 518-533-3000 or e-mail:

Robert H. Feller	rfeller@bsk.com
Sarah Lewis Belcher	sbelcher@bsk.com

In Central or Western New York, call 315-218-8000 or e-mail:

Kathleen M. Bennett	kbennett@bsk.com
H. Dean Heberlig, Jr.	dheberlig@bsk.com
Paul W. Reichel	preichel@bsk.com
Robert R. Tyson	rtyson@bsk.com