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The Kelo Paradox

On June 23, 2005, the U.S. Supreme Court delivered what was arguably its most controversial land use decision in recent memory. By upholding a Connecticut Supreme Court ruling that the City of New London and its Development Corporation had not violated the Public Use Clause of the Fifth Amendment after initiating takings proceedings against Susette Kelo and eight other property owners, the Court unwittingly politicized one of the most important instruments of local land use planning. The decision, while a seeming victory for local authorities involved in community development efforts, produced an immediate and vehement public backlash, which would ultimately yield far greater changes than the ruling itself.

The following morning's front-page headlines suggested that the decision was suffused with monumental meaning for every American homeowner. "Seizing Land for Private Use OK'd," lead the USA Today. "Homes Up for Grabs" exclaimed the Daily News, while the Christian Science Monitor informed its readers that the Court had widened the scope of "property seizure." The Houston Chronicle noted that the "home seizure ruling" had already produced an intense backlash from property rights advocates. The editorial pages were equally alarmist in their condemnation of the ruling, suggesting that every home was now a potential target for rapacious local authorities in constant search of greater revenue streams, ever beholden to profit-minded developers.

While the decision was narrowly split five to four, the commentary did reflect that fact that the public was not so equally divided. By uniting politically conservative property rights activists with politically liberal advocates of the poor and marginalized, opposition to the decision cut an unusually broad swath across the American political landscape. Dana Berliner, a senior attorney with the Institute for Justice, a conservative property rights group who had represented Susette Kelo and the other plaintiffs, said, "It's a dark day for American homeowners. While most constitutional decisions affect a small number of people, this decision undermines the rights of every American." Within hours, state and national politicians seized on the popular backlash to the decision, proposing a range of corrective legislative measures, some benign, others extreme.

In the wake of *Kelo*, urban planning decisions have come under increased scrutiny, especially from state legislative bodies. Paradoxically, what had seemed in June 2005 like a green light for local authorities has, in many places, become a flashing yellow light. In our own region, many localities have responded to constituent pressure and passed ordinances restricting their use of eminent domain. Other communities have continued to move forward on redevelopment projects involving condemnation that had been in the works prior to the Kelo decision, but have found the new political landscape less hospitable. In New York City, despite the negative attention it has received from opponents of several large-scale redevelopment projects, eminent domain has been a critical tool for community development. As evidence of its import, the Bloomberg Administration has made opposition to changes in federal and state eminent domain statutes one of its top lobbying priorities in the current fiscal year.

Trimming the Takings

Despite the visceral reaction to the *Kelo* decision, many legal scholars note that the legal outcome was largely in line with existing precedents, most notably *Berman v. Parker* (1954) and *Hawaii Housing Authority v. Midkiff* (1984). In the former, the Court upheld a plan that sought to redevelop a severely blighted neighborhood in Washington, D.C., despite the fact that not every property being taken was itself blighted. The latter decision, while not predicated on a finding of blight, resulted in the breakup of a small cartel of landowners which had been preventing the constitution of an efficiently

functioning land market on the Island of Oahu. In both of those cases, the Court was very clear in noting that its role in reviewing legislative judgment is extremely narrow.

In addition, the majority agreed that *Kelo* was not a case where one private property owner was being favored at the expense of another. The municipal development plan that framed the condemnation actions, as the Court saw it, was a reasonable attempt to improve the general public welfare in a city whose economic fortunes were in steep and persistent decline. While the end result of the plan may benefit some private individuals over others, that, in and of itself, does not invalidate the Public Use Clause. Justice Stevens, in his majority opinion, did, however, make it clear "that nothing…precludes any State from placing further restrictions on its exercise of the takings power."

Justice O'Connor viewed the New London takings as unconstitutional and delivered a rhetorically forceful dissenting opinion. She claimed that *Kelo* was the first case in which takings proceedings were centered on economic development ends. In addition, she made a distinctive break from the Court's historically coterminous understanding of eminent domain and the state police power, instead proposing that regulatory takings be dependent upon an initial police-power violation such as a finding of blight or other public nuisance. Without this, she warned, all private property would be at risk of condemnation.

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The combination of Justice Stevens' open-ended majority opinion and Justice O'Connor's powerful dissent made it highly predictable that state legislative bodies would respond quickly to constituent concerns. Of the 46 states that have held legislative sessions since June 2005, 42 have taken up legislation and 31 have approved measures related to eminent domain. The reforms fall into two primary categories: those that seek to prohibit all takings for economic development and those that enable, but limit the scope of eminent domain by more specifically defining public use. A few states have pursued legislative remedies that have sought to redefine porous definitions of blight and implement process reforms including, but not limited to, compensation of greater-than-market-value requirements.

After the *Kelo* decision, both the New York State Senate and Assembly held public forums throughout the state. During the subsequent 2005-2006 legislative session, 27 bills and resolutions dealt with eminent domain reform. Among those that advanced past the Senate Judiciary Committee was S5961, a resolution to amend the state constitution. S5961 would have significantly narrowed the definition of public use, stating that land taken by eminent domain must be possessed of and occupied by the government. It did not receive a final vote in the Senate, but its sponsors plan to reintroduce the bill in the upcoming session.

In New Jersey, where localities have relied heavily upon the use of eminent domain, state legislators were quick to take up the issue. In the current session, 18 bills addressing eminent domain practices have been introduced. A3257/S2088, which passed in the Assembly and has been referred to the Senate Community and Urban Affairs Committee, does not address economic development, but does seek to more carefully define the definition of blight and to introduce new measures of transparency and openness. A competing bill, S1975, would increase compensation and specify that governments can only take an additional twenty percent of un-blighted land in a blighted redevelopment area.

Ten states plan to put the issue directly before voters in November. The most notable of these constitutional referendums and ballot measures is California's Proposition 90. Building on anti-*Kelo* sentiment, it goes significantly beyond reforming eminent domain practice. The measure would require local governments to compensate property owners when future land use actions such as a downzoning or historic preservation cause economic harm; or, alternatively, would require governments to waive the obligation of existing owners to comply.

Limiting the ability of local government to regulate private property has the potential to make long-term land use planning much more difficult. Additionally, the fiscal implications of Proposition 90 could rival those created from the passage of Proposition 13 in 1978, which capped property tax rates, and by some accounts led to an increased use of eminent domain as cities sought to expand limited tax bases. While property rights activists see the inclusion of Proposition 90 on the California ballot as a victory for all property owners, public financiers and others have expressed concern over the fiscal uncertainty that would result with passage of the measure.

Finally, both the executive and legislative branches of the federal government have challenged the practice of eminent domain. President Bush, who as a Texas baseball franchise owner benefited from eminent domain through the construction of a new stadium in the name of economic development, was relatively absent from the debate initially. In June, however, he issued an executive order barring federal agencies from using eminent domain for all purposes except public works projects. The order also sent a message to Congress where the House was considering a bill that would cut economic development aid to states and localities for two years if eminent domain is used for economic development purposes. That measure was later passed and is awaiting action in the Senate.

Community Development Concerns

For many, Robert Moses represents the public face of condemnation in New York City. Over a span of forty years, he successfully used eminent domain to assemble vast amounts of land for projects ranging from the Cross-Bronx Expressway to Lincoln Center. In many cases, these projects resulted in significant private and public housing development, but often such gains came at the expense of heavy displacement and upheaval for existing residents. More recently, the process has been scrutinized in the context of large-scale redevelopment projects such as Forest City Ratner's Atlantic Yards development project, Columbia University's expansion plans for the Manhattanville neighborhood, and the City's attempt to redevelop the Willets Point neighborhood.

In its amicus brief in support of the City of New London, New York City's Corporation Counsel cited the 13 acres in and around Times Square that were condemned in order to create a destination that now draws over 10 million visitors annually. Another positive example cited was the development of MetroTech, which revitalized downtown Brooklyn and spurred numerous private development projects in the area. The brief also noted that the World Trade Center, one of the most important economic developments in the City's history, relied heavily upon eminent domain. Without it, such large-scale redevelopments would have been nearly impossible to achieve.

Yet, while the city, often through state agencies and authorities, does rely upon condemnation in large-scale plans such as those, for community development and affordable housing, it is the small-scale use of eminent domain that is most important. Often these takings occur across individual lots scattered through Urban Renewal Zones in the boroughs. The Department of Housing Preservation and Development (HPD), working in conjunction with community boards and other local stakeholders, condemns individual vacant and blighted lots, helping to create assemblages that will then allow private and non-profit housing investment.

The Melrose Commons neighborhood in the South Bronx is one notable example. Originally the 35-block area was slated for nearly complete demolition, to be replaced by a series of large high-rise residential towers. Many residents of the neighborhood opposed such development and organized Nos Quedamos, one of the most successful community development entities in the city. Following the defeat of the original plan, a decade passed before a revised plan for the neighborhood was agreed upon. The new plan would feature more low-rise residential construction so as to foster greater homeownership opportunities and a mixed income community. It also sought to accommodate those willing to stay and invest in the neighborhood.

As a result of tax foreclosures, the city owned nearly three-quarters of tax lots in the neighborhood. Those remaining, sometimes called the missing teeth, represented the biggest challenge. Many of these lots were vacant, abandoned, or occupied by marginal businesses, many operating within the informal economy. Without these sites, very few assemblages would have been possible. HPD, along with Nos Quedamos, systematically surveyed the neighborhood, probing owners' intentions and willingness to stay or sell. In 1998, the city formally initiated takings proceedings to acquire around 100 parcels of land. The actions were undertaken through the Uniform Land Use Review Procedure, thereby giving the community ample chance for public input and owners ample time to negotiate the sale of their properties.

Today Melrose Commons is home to 1,200 mixed-income ownership and rental units. As private development continues to expand northward in the neighborhood, it is expected that in total, 3,000 units of new housing will have been created. Compared to other more media-focused projects, condemnation in the South Bronx had been small

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and relatively uneventful, characterized by a large amount of community consensus, yet just as important in reviving a community as it was in creating Times Square, MetroTech, or the World Trade Center.

Property Seizure

In many respects, property rights activists have used the *Kelo* decision as a focal point in their ongoing opposition to eminent domain and other forms of land use regulation. Their tactics have often appeared very similar to those used by opponents of the estate tax who successfully lobbied for a phased-out repeal of that tax beginning in 2001. First and foremost, a name change was in order; the estate tax was branded in more threatening terms—the death tax.

Following *Kelo*, a similar rechristening took place in the political discourse surrounding the takings process. Eminent domain, in all its elegant Latin obscurity, would be much more easily identified by the general public as property seizure, an imposing term which calls to mind black-clad agents swooping down upon unsuspecting homeowners. As evidenced by the headlines, the term caught on quickly. In the year preceding the decision, property seizure appeared in fewer than 30 major news articles, while in the year following the decision, it appeared in over 200.

A second oppositional strategy that resembles oppositional maneuvering over the estate tax has been to identify individual cases that, at least on the surface, appear to be highly unjust or arbitrary. Often longtime homeowners, the elderly and infirm, and other disadvantaged groups have been singled out as victims of eminent domain abuse. In Lodi, New Jersey, residents of several trailer parks have even referenced biblical prophecy in their fight to prevent the borough from taking their land in order to construct 242 new housing units and 12,000 square feet of adjacent retail space. Individual examples, while often dramatic, often obscure the larger picture more than they reveal it.

From a policy perspective, the larger question still remains: To what degree did *Kelo* change the landscape for local land use governance? The sheer amount of legislative measures dealing with the subject, the prevalence of upcoming ballot measures, and even several recent court decisions have undoubtedly reduced the ability of local governments to use eminent domain as a planning tool. For urban localities that have little or no room to expand outward, that contraction could ultimately represent a significant setback in improving the quality of life for current residents. For local economic developers, competing with communities that have ample greenfield sites available on the fringes, such outcomes make attracting and retaining businesses to the center even more difficult.

Despite such potentially detrimental outcomes, the discourse surrounding land use has focused attention on the subject in a way that it rarely has been. *Kelo* has inspired a greater level of awareness of local land use policies. For every community intent on preserving its existing powers of condemnation, the goal must be to channel that heightened awareness into greater public involvement, rendering the process more open and accountable. Local officials must better articulate community economic development needs in a way that goes beyond simply stating the need to expand the tax base.

Many levels of government have failed to adequately communicate the interconnected needs of economic development, and how they relate to housing, jobs, and land use planning. That failure has resulted in hostility to local planning processes, which has served to limit the ability of local governments to effectively plan for current and future needs. In some instances, legislative measures have done very little to correct the potential for abuses but have created nearly insurmountable barriers that essentially remove eminent domain from the repository of land use tools. Several referendums to be voted upon in November make it acutely clear that more than just eminent domain is at stake.

In New York City, with its burgeoning population and a limited supply of land, eminent domain is a vitally important and any curtailment of its use here is a worrying prospect. Philadelphia, which by some accounts has the most abandoned real estate per capita of any U.S. city[1], uses eminent domain on about 2,000 properties a year, yielding between five and six hundred affordable housing units annually. While New York City is fortunate to not require takings to that extent, there is and will be a continuous need to assemble sites for affordable housing. Community resistance to greater density makes the need even more pressing.

In New London, after the protracted legal battle, the city was ultimately able to achieve compromise with the final eight of 104 property owners. Susette Kelo's home will be preserved, moved to a site near its original location, from where it was moved a hundred years earlier. It is important that compromise also be achieved on the larger issue of eminent domain. The best reforms should seek to assuage the concerns of property rights activists and at the same time ensure that localities will continue to be able to use the process to foster community development, redevelopment, and economic growth. *Kelo* represents a chance for the eminent domain process to be improved and made more democratic, but at the same time, it is important to be mindful of attempts that seek to negate the ability of cities to become more attractive places for residents and businesses alike. – Jeffrey L. Otto

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