

**Private Use of Eminent Domain,
A look at current eminent domain issues
and a revisit of *Kelo v. City of New London***

by Eric Kemper

Introduction

With heated debate taking place on Capitol Hill regarding the building of a border wall between the United States and Mexico, the debate centered on the funding of the wall with most of the logistics being left out. Much of the land needed for the wall is privately owned, so the government plans to use eminent domain to acquire the land for erecting the wall. This requires the current landowner to be given just compensation for the land.¹ The landowner has no choice but to cede this land to the government or seek higher compensation through the court system. While this may seem straight-forward and relatively fair if the wall is for the national security interests of the country, it is often not this clear-cut. The power of government to exercise eminent domain is restricted by the Takings Clause in the Fifth Amendment of the U.S. Constitution. The Takings Clause states, "... nor shall private property be taken for public use, without just compensation." Although the border wall would fit under the definition of public use, there are cases where the government seeks to take land by eminent domain and sell it to a private developer. Does such a taking violate the "public use" restriction of the Takings Clause?

The issue was directly challenged in the case of *Kelo v City of New London*,² when in 2000, the city of New London approved a development plan by a private not-for-profit entity, the New London

¹ *U.S. Const., Amend. V*

² *Kelo v. City of New London*, 545 U.S. 469 (2005).

Development Corporation (“NLDC”), that required using the city’s eminent domain powers to take private land. The city designated NLDC in charge of the development plan implementation and authorized it to “purchase property or to acquire property by exercising eminent domain in the city’s name.”³ When NLDC could not successfully negotiate purchases with all of the private property owners, it instituted condemnation proceedings leading to a lawsuit by the landowners against the city. The owners, including Susette Kelo, argued that the taking of their properties violated the “public use” restriction in the Fifth Amendment.

Although the owners were successful at the trial court level, they were not so on appeal. The U.S. Supreme Court granted certiorari to “determine whether a city’s decision to take property for the purpose of economic development satisfies the “public use” requirement of the Fifth Amendment.”⁴ The Court ruled in favor of the city holding that the private project was a revitalization of an economically depressed area, therefore fitting the definition of “public use” because the citizens of the city would benefit from it.⁵

This case, and several prior decisions discussed in the Court’s opinion⁶ represent a massive expansion of the Fifth Amendment and has paved the way for other private companies to use the government’s powers of eminent domain to acquire land from private owners who refuse to sell. Other examples include the Keystone XL pipeline and a Foxconn factory. In the Keystone XL matter, TransCanada sought to use eminent

³ *Id.* at 474.

⁴ *Id.* at 477.

⁵ *Id.* at 490.

⁶ *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954).

domain to acquire the land needed to complete the pipeline. The pipeline project is currently in limbo as it was blocked by a federal judge for not fully researching the effect the pipeline would have on climate change, leaving landowners unsure about what will happen with their land. The Trump administration is expected to appeal this decision. The microchip company Foxconn sought government assistance through eminent domain to acquire land for the construction of a new factory. Foxconn does plan to open a new manufacturing facility in Wisconsin, but the value of project is now lower than the initial \$10 billion projection. However, all of the land needed for the \$10 billion valuation is currently in Foxconn's possession, obtained through eminent domain.

Analysis

The plaintiffs were not alone during the *Kelo v City of New London* case, when the Supreme Court ruled that cities could take non-blighted properties for the pursuit of economic development by private developers. Kelo and the other plaintiffs were backed by several institutions such as the Institute for Justice, a non-profit whose goal is limiting the size and scope of the government through litigation. The Institute for Justice claimed that this policy of eminent domain use, "... undermines the rights of every American."⁷ Unfortunately, their support through *amicus curie* briefs did not help win the day. The dissenting opinions of Justices Sandra Day O'Connor and Clarence Thomas also supported the claims made by Kelo and the other plaintiffs. In her dissent of the Court's 5-4 decision, Justice O'Connor wrote:

To reason, as the Court does, that the incidental public benefits resulting from the subsequent

⁷ John Kramer, *Homeowners Lose Eminent Domain Case*, Institute for Justice, <https://ij.org/press-release/new-london-connecticut-release-6-23-2005/>, (last visited Mar 19, 2019).

ordinary use of private property render economic development takings “for public use” is to wash out any distinction between private and public use of property—and thereby effectively to delete the words “for public use” from the Takings Clause of the Fifth Amendment. Accordingly I respectfully dissent.

Indicating her belief that the Court was wrongfully interpreting the Takings Clause and expanding the powers of government. This follows that the Fifth Amendment prohibits a government’s taking of private property for private development, and is in fact, what the Takings Clause is meant to prevent.

With municipalities being able to take private land for large scale developments, property owners in traditionally underrepresented areas could have their lives upended to make way for large revenue generating projects. In some cases, property taken by a government’s use of eminent domain sits vacant and not developed. While in the opinion of the Court, Justice Stevens said, “The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community,”⁸ nearly twenty years after the Supreme Court’s decision, the property lost by *Kelo* sits vacant with no improvements or development. All of the plaintiffs from that case whose homes were taken have had no development on their condemned properties,⁹ showing that the government forced these people out of their homes, disrupting their lives only to do nothing with the land.

⁸ *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

⁹ Susette Kelo, *I still feel the pain of losing my ‘Little Pink House’*, USA Today, <https://www.usatoday.com/story/opinion/2018/04/16/private-land-seizure-pfizer-new-london-little-pink-house-column/507608002/>, (last visited Mar 19, 2019)

However, the *Kelo* majority recognized that state legislatures have the ability to impose their own restrictions on the use of eminent domain. In his opinion for the Court, Justice Stevens concluded by noting:

In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding payment of just compensation. We emphasize 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 as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. Internal citations omitted.

Florida, for example, has one of the toughest eminent domain policies in the country requiring that land taken through eminent domain must remain in public hands for 10 years before it can be sold to private developers.¹⁰ This law coincides with the dissenting opinion of Justice Clarence Thomas in *Kelo* and the Taking's Clause mandate that private property must be taken for public use. In *Kelo*, Justice Thomas wrote, "If the Public Use Clause served no function other than to state that the government may take property through its eminent domain power—for public or private uses—then it would be surplusage."¹¹

¹⁰ Fla. Stat. s. 73.013 (2019).

¹¹ *Kelo v. City of New London, Conn.*, 545 U.S. 469, 508 (2005).

While Florida has followed Justice Thomas' recommendation to prevent eminent domain abuses, many states do not have such strong protections. However, even in states with strong protections from eminent domain abuses the government can still force people to sell the land to private investors, and often for much less than the original market value of the land. This is done through the issuance of a property or "condemnation blight" which is a declaration the property is too far dilapidated to be recovered and the value of the land is drastically reduced.¹² Declaring the land a condemnation or property blight clears the way for developers to obtain the land at far less than market value because the land is deemed unsafe and abandoned. In some instances, merely the discussion of a property blight declaration can reduce property values. Worse, if the municipality ultimately decides against issuing the blight, the property's value may never recover and the owner has no rights to seek damages from the municipality for devaluing their property.¹³

A common argument against restricting the government's exercise of eminent domain is that it would hamper economic development because stubborn land owners could block large projects from succeeding. These claims are too broad, however, because this would simply give land owners the right to participate in the market. Their land will be worth much more to developers who want to use it to build. Instead of adversely affecting property values, announcements of these projects

¹² Robert Alfert, *Condemnation Blight Under Florida Law: A Rule of Appropriation or the Scope of the Project Rule in D*, The Florida Bar Journal (July/August 1998), <https://www.floridabar.org/news/tfb-journal/?durl=%2Fdivcom%2Fjn%2Fjnjournal01.nsf%2FAuthor%2F287B3B9F4487411A85256ADB005D61F6>, (last visited Jun 19, 2018).

¹³ Id. at 14.

will increase the value of the land, incentivizing owners to sell at market or a higher price to the developer. A bill similar to this idea has been introduced recently in Texas to address their booming economy and swift building of new energy pipelines. Texas Senate Bill “421 features several statutory changes, including: mandating a public meeting to ensure property owners understand the process and can have their question answered, stipulating minimum protections that must be present in the contract, as well as holding condemners accountable if they offer property owners less compensation than they are owed.”¹⁴ Texas allows private developers to use eminent domain for pipelines as they are deemed a public use, sometimes these companies do not have public meetings and unilaterally take the land from private owners.

This type of legislation should be universal, since it protects private property owners from having their land taken by other private entities. It also lessens the burden on the courts since land deals are more likely to be done privately so the deal can be completed quickly and quietly. The bill allows land owners to do more than simply accept the offer given to them or go to court to dispute the offer. Instead it allows property owners to have public meetings and ensures they are well compensated for ceding their land. Many groups in Texas and across the country support the bill and tighter controls on a government’s exercise of eminent domain. By holding municipalities and their developer counterparts accountable for the use of property blights, property owners can feel comfortable knowing that a private developer will not take their house from them using eminent domain.

Conclusion

¹⁴ Scott Willey, *Lois Kolkhorst files eminent domain reform bill* Fort Bend Herald, (2019), http://www.fbherald.com/free/kolkhorst-files-eminent-domain-reform-ill/article_d709df39-bf34-5b0c-a7ec-c66f34397036.html , (last visited Jan 28, 2019).

The general involvement of government aiding private developers in real estate transactions calls into question the protections granted by the Fifth Amendment to the U.S. Constitution. *Kelo v City of New London*, should be overturned to prevent more eminent domain abuses and allow property owners to have complete ownership of their land without fear that the government will seize it for a large private development project. The use of condemnation or property blights to lower property values so that the market value of the property is cheaper for developers must also be revised. Laws should be passed to provide monetary remedies for property owners when their property is publicly scheduled to be blighted, causing values to plummet, despite the blight not being declared. This would hold the government financially accountable for their misuse of blights. In many cases, the property subjected to taking is not developed and sits vacant as in the case of *Kelo v City of New London*. In other words, the City of New London forced these people out of their homes and disrupted their lives only to do nothing with the land.

Restricting eminent domain by holding state and local governments accountable and creating financial remedies for property owners will have a positive impact in this country. It can save taxpayers money by forcing governments (and their officials) to be more calculating in their exercise of eminent domain and condemnation blighting, which may also have the effect of allowing more people to stay in their homes, keeping their lives and property intact. Private developers should be required to negotiate fairly with private landowners and not resort to government intervention or the courts to take action in getting the deal finished. Sadly, as Justice O'Connor noted, "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a

shopping mall, or any farm with a factory.” Before government can exercise the power of eminent domain solely for economic development, the government and private developers should be required to negotiate at arms-length just as buyers and sellers do in ordinary real estate transactions. It is within the purview of state legislators to restrict the exercise of eminent domain, and it is their obligation to protect private landowners from unlawful takings by revenue seeking bureaucrats and greedy developers.