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PROPERTY RIGHTS
AND LAND POLICIES

Edited by Gregory K. Ingram and Yu-Hung Hong

Property Rights and Land Policies

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The Myth and Reality of Eminent Domain for Economic Development

Jerold S. Kayden

In the continuing wake of the U.S. Supreme Court's controversial opinion in *Kelo v. City of New London*, 545 U.S. 469 (2005), this chapter partly addresses a question begging for a nonideologically determined empirical answer: how widely does government actually use the power of eminent domain to advance economic development goals? Although *Kelo* upheld the constitutionality of using eminent domain to take single-family homes for higher and better urban redevelopment uses that, among other things, produce more jobs and tax revenue, the subsequent public outcry revealed that *Kelo* was less a constitutional law, and more a political science, story. Was the reaction fueled in part by extensive, yet relatively underpublicized, government exercise of this power?

This chapter provides part of the answer, reporting the results of a survey of cities with populations of 100,000 or more that asked how many properties were taken in the city for economic development purposes in the five years preceding the *Kelo* case. The answer is a surprisingly low number. To be sure, other data could illuminate the answer further, including how partially exercised takings, announced threats of exercise, or even the mere existence of the power affects property-owning individuals. Nonetheless, the actual data to some degree undercut the claim put forth in some reports of an "abusive" use of the power. Whatever else may influence people's attitudes about eminent domain, the risk of being the object of a completed land taking for economic development purposes is not a factor.

Background

The eminent domain power is the power of government to take property without the consent of the owner as long as the taking satisfies three conditions: it is for a public use; compensation is paid; and a fair process is followed. Federal and state constitutions and statutes draw contours for exercising the power. The just compensation (or takings) clause of the U.S. Constitution implicitly authorizes and explicitly limits the power when it states “nor shall private property be taken for public use, without just compensation.” Further elaborated by federal, state, and local statutes, land takings functionally identify themselves as condition precedent and/or condition subsequent takings. Condition precedent takings address problematic existing conditions of land use; the focus is on the before-taking land use. Most famous (some would say notorious) is the legislatively mandated blight condition precedent, the gold standard for land takings pursued under the federal urban renewal program of the 1950s and 1960s. Condition subsequent takings address future conditions of land use without regard to existing conditions; the focus is on the after-taking land use. Statutes nationwide offer laundry lists of such future uses, including roadways, runways, rail rights-of-way, reservoirs, and public facilities.

Urban redevelopment takings that clear blighted conditions and replace them with new development, whether conducted under formal urban renewal laws or not, reside in the Venn diagram intersection of the condition precedent and condition subsequent categories. The land taken is blighted, and subsequent redevelopment is planned from the beginning. The *Kelo* case addressed land takings for urban redevelopment, but without the above-described intersection; there was no condition precedent of blight or other harmful situation preceding the taking.

Let’s briefly rehearse the case. The New London Development Corporation, a private not-for-profit entity created in 1978 to help revitalize the city of New London, Connecticut, prepared a development plan for a 90-acre area adjacent to the site of a proposed global research facility developed by pharmaceutical giant Pfizer. The purpose of the development plan was to “create jobs, increase tax and other revenue, encourage public access and use of the city’s waterfront,” and generally kick-start revitalization. The development corporation sought 115 privately owned individual land parcels that would together be leased to a private developer for 99 years at \$1 per year. The developer would build a high-tech research and office project along with parking and a marina. According to an economic development consultant working hard for its money, the project benefits included 518 to 867 construction jobs, 718 to 1,362 direct jobs, 500 to 940 indirect jobs, and \$680,544 to \$1,249,843 in taxes.

Several of the land parcels contained nonblighted single-family homes, including those of Susette Kelo, who had lived in the area since 1997, and Wilhelmina Dery, who was born in her house in 1918. Dery’s husband, Charles, had lived with Wilhelmina since they married some 60 years earlier. Of the

fifteen properties contested, ten were occupied by owners or family members, five were investments, and none was blighted or otherwise in bad condition. Nine parties declined to sell their land voluntarily and challenged the development corporation's subsequent exercise of the power of eminent domain. In a five-to-four decision authored by Justice John Paul Stevens, the Court held the exercise constitutional. The just compensation clause's "public use" proviso was interchangeable with the phrase "public purpose," and the comprehensive, carefully considered development plan served such a purpose, said the majority. Justice Sandra Day O'Connor's dissenting opinion memorably warned, "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."

Described as "perhaps the term's most disputed decision" by Linda Greenhouse, the *New York Times* Supreme Court reporter, the case ignited a firestorm of negative media, political, and public responses. Newspapers across the country, after mischaracterizing the decision in their reporting by headlining that the Court had expanded government's authority to take private property, editorialized against it. *Parade* magazine's cover showed a house; father, mother, and three children standing in front; the headline "Will the Government Take Your Home?" and the subhead "A family fights back." Conservative and liberal politicians alike were outraged. Democratic Representative Maxine Waters of California and Republican Senator John Cornyn of Texas decried the decision on the same day, the political equivalent of a "once in a millennium" celestial alignment of planets. The NAACP, conservative think tanks, and other special interest groups that rarely agree on anything found concord.

The response even affected members of the Court's majority. In an address to a bar association meeting in Las Vegas two months after the opinion's release, Justice Stevens, apparently uncomfortable with the public reaction, referred to the outcome in *Kelo* as "unwise," adding "I was convinced that the law compelled a result that I would have opposed if I were a legislator." "[T]he free play of market forces," he said, "is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials." A local gadfly in Weare, New Hampshire, organized a campaign to have the town take a farmhouse owned by Justice David Souter for a hotel to be named the Lost Liberty Hotel. The proposal failed on a ballot initiative.

State legislatures busily considered and enacted laws banning or otherwise limiting the exercise of eminent domain for economic development. Referenda initiatives restricting use were placed on state ballots. The U.S. House of Representatives passed its own limiting bill. The Anchorage, Alaska, city council banned eminent domain for economic development.

The Survey _____

Why did substantial segments of the media, the public, and the political class react with such hostility to the *Kelo* decision? Were they disturbed solely with

what happened to Susette Kelo and fellow homeowners without regard to a broader context? Were they aware of similar cases in their neighborhoods? Were they assuming that this was the tip of the iceberg? Were they concerned that their own properties were at risk of being taken for economic development purposes, a concern fanned by either the reality or the perception that government widely exercises the eminent domain power for economic development?

To partially address these questions, I conducted a nationwide survey of cities with populations greater than 100,000, asking officials whether, how often, and how widely their cities had taken property for economic development purposes during the five-year period of January 2000 through December 2004. Economic development here was defined as condition subsequent, privately owned or leased, privately developed land uses that would generate new jobs and additional tax revenue on site. Takings that included condition precedent land uses of blight or other harmful conditions were not disqualified from the survey count as long as conditions subsequent of economic development were present. Owing to data limitations, filed but uncompleted eminent domain actions were not counted. Oral or written threats of eminent domain actions were similarly not counted.

The survey specified a random sample of 153 cities (see Appendix, Table 8.1) out of the population of 251 cities with 100,000 or more residents, yielding a 95 percent confidence level for reaching conclusions about all 251 cities. Survey researchers contacted local officials by phone, supplemented by e-mail and occasionally surface mail, to determine who would know this information and to secure the data. Respondents mostly worked at city departments charged with economic development, community development, legal issues, and housing and local urban renewal agencies. Contacted on multiple occasions, respondents took several days or weeks to conduct the research necessary to answer the survey question. For reasons of data availability, the survey used the number of properties taken by eminent domain rather than the number of owners affected. Thus, if one owner had 10 properties taken, the survey cited the number ten rather than the number one. The survey also declined to use the number of economic development projects, rather than the number of properties taken, as the data point. Thus, the exercise of eminent domain in *Kelo's* New London would register as 15 observations rather than one.

The survey found 207 properties taken for economic development purposes in the surveyed cities over the five-year period, suggesting a per city average of 1.3 properties over five years, or 0.26 annual takings. Of the 153 cities, 112 reported no takings for economic development at all.

Importance and Limitations of the Results _____

The results of the survey show that completed eminent domain exercises for economic development are rare. Reactions to the *Kelo* outcome are unlikely to have evolved from historic experience with or knowledge about such examples.

However, the survey results have limitations. The survey methodology of phone calls, e-mails, and letters, although comprehensive and systematic, left this researcher wondering if the numbers reported to the surveyors by local officials captured every qualified land taking. The survey did not determine the number of eminent domain cases filed against property owners if the properties were never obtained through completed exercise of the power. The survey also did not determine how often local governments threatened use of the power without filing actions. Finally, the survey did not address the role played by the mere existence of the power, a proverbial sword of Damocles hanging over everyone's head.

The Institute for Justice, a Washington-based private property rights organization, published a report in April 2003 entitled *Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain* (Berliner 2003). The report sprang from the ideological fount that every exercise of the power of eminent domain for economic development axiomatically constitutes abuse. It compiled its information from "published accounts and court papers." The survey found 3,722 properties subject to filed takings and 6,560 subject to threatened but unfiled takings, for a total of 10,282 properties. The survey classified these results as the "tip of the iceberg" and called them "chilling." A comprehensive evaluation of the results is beyond the purview of this chapter, and a comparison between this chapter's study and the Berliner report is made difficult by different methodologies, populations, and definitions. However, a cursory reading of the report reveals questionable classifications that undermine confidence in the overall results. For example, the eight properties counted in the five years of Alabama results were subject to a filed takings action for a "municipal parking facility." One of the filed takings counted in the Arkansas results was for the Clinton presidential library. This analysis is limited to states starting with the letter A. It is probable that the land takings upheld in the Supreme Court's seminal *Berman v. Parker*, 348 U.S. 26 (1954), decision would be deemed abusive by the Institute. The Institute subsequently released a June 2006 report entitled *Opening the Floodgates: Eminent Domain Abuse in the Post-Kelo World* (also authored by Dana Berliner) arguing that the "Kelo decision opened the floodgates of abuse, spurring local government to press forward" with more projects involving the use of eminent domain for private parties.

Conclusions

Empirical studies often influence public policy debates. Statutory law is informed by the perception, if not reality, of misuse of a publicly wielded technique. Even constitutional law can turn on the sense that judges have of the extent of the problem. The first Institute report was cited in Justice O'Connor's dissenting opinion in *Kelo*. This study offers a modest contribution in ascertaining the breadth and frequency of use of eminent domain. It is not an argument for or against its use, but it does suggest that Americans can sleep tonight without the anxiety that, by the next morning, they will be out of house and home to accommodate a Motel 6.

APPENDIX

Table 8.1
 Surveyed Cities with Populations Over 100,000, by State

Alabama Birmingham Huntsville Mobile	Roseville Sacramento San Buenaventura Santa Clara Stockton Sunnyvale Thousand Oaks	Idaho Boise City
Alaska Anchorage		Illinois Aurora Chicago Joliet Naperville Peoria Rockford
Arizona Chandler Gilbert Mesa Phoenix Scottsdale	Colorado Arvada Denver Lakewood Pueblo Thornton	Indiana Fort Wayne South Bend
California Bakersfield Berkeley Burbank Chula Vista Concord Corona Downey El Monte Escondido Fremont Fresno Garden Grove Irvine Long Beach Los Angeles Modesto Moreno Valley Oceanside Ontario Palmdale Pomona Rancho Cucamonga Richmond Riverside	Connecticut Hartford New Haven Stamford	Iowa Des Moines
	Florida Cape Coral Clearwater Coral Springs Fort Lauderdale Gainesville Hollywood Miami Gardens Orlando Pembroke Pines St. Petersburg Tallahassee	Kansas Kansas City Olathe Overland Park Wichita
	Georgia Augusta-Richmond (County) Columbus Savannah	Kentucky Lexington-Fayette
	Hawaii Honolulu	Louisiana Lafayette New Orleans Shreveport
		Maryland Baltimore
		Massachusetts Cambridge Lowell Springfield Worcester

(continued)

Table 8.1
(continued)

Michigan Detroit Grand Rapids Sterling Heights Warren	North Carolina Cary Charlotte Durham Fayetteville Greensboro Raleigh Winston-Salem	Texas Amarillo Arlington Carrollton Garland Houston Irving Lubbock McAllen Pasadena San Antonio Waco Wichita Falls
Minnesota Minneapolis	Ohio Akron Dayton Toledo	Utah Salt Lake City West Valley City
Mississippi Jackson	Oklahoma Oklahoma City Tulsa	Virginia Alexandria Hampton Norfolk Richmond Virginia Beach
Missouri Independence Kansas City St. Louis Springfield	Oregon Eugene Salem	Washington Bellevue Vancouver
Nebraska Lincoln Omaha	Pennsylvania Allentown Philadelphia	Wisconsin Green Bay Madison Milwaukee
Nevada Henderson North Las Vegas Reno	Rhode Island Providence	
New Jersey Elizabeth Newark	South Dakota Sioux Falls	
New Mexico Albuquerque	Tennessee Chattanooga Clarksville Nashville-Davidson	
New York Buffalo Rochester Syracuse Yonkers		

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- . 2006. *Opening the floodgates: Eminent domain abuse in a post-Kelo world*. Washington, DC: Institute for Justice.