



**U.S. SUPREME COURT:
*Kelo Decision on Takings***

The Supreme Court of the United States lessened the protection afforded to private property owners with its decision in the case of *Kelo v. City of New London*, holding that the takings clause of the Constitution's Fifth Amendment allows property to be taken for private economic redevelopment, even where there is no allegation that the property is blighted or otherwise in poor condition. The Court found that the taking of private homes from individuals of modest means in the Fort Trumbull area of the City of New London, Connecticut to complement an adjoining research center recently constructed by Pfizer Corp, satisfied the Fifth Amendment's requirement that takings be for a "public use" based on the expectation that the expansion would create jobs and

increase tax revenues. The holding affirmed the judgment of the State Supreme Court of Connecticut which upheld a lower state court's determination that the takings were authorized by a state municipal development statute.

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CATEGORIES OF PRIOR CASES

While some view this case as a new development, it is the culmination of a longstanding line of

cases eroding the Fifth Amendment's "public use" requirement. Supreme Court cases have generally recognized three categories of takings that comply with the public use requirement:

- (1) The public ownership category involving transfer of private property to the government.
- (2) The use-by-the-public category whereby property is transferred for uses such as railroads and public utilities.
- (3) The less restrictive "public purpose" category last considered by the Supreme Court over 20 years ago.

The *Kelo* case falls into the "public purpose" category by concluding

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that the economically depressed, though not blighted, Fort Trumbull neighborhood in the City of New London will be redeveloped in a manner likely to increase taxes and create jobs. Similarly, the Court allowed public purpose takings in the 1954 case of *Berman v. Parker* in a "blighted area" pursuant to an urban renewal plan and in the 1984 case of *Hawaii Housing Authority v. Midkiff* involving redistribution of private property to eliminate the "social and economic evils of land oligopoly." In *Kelo*, the court reaffirmed *Berman* and *Midkiff* and went a step further by finding a "public purpose" in the taking of homes in good condition from people of limited means, not for urban renewal of a blighted area, but rather for municipal economic redevelopment.

The *Kelo* decision upheld a delegation of the City of New London's eminent domain power to a private non-profit entity charged with developing an economic redevelopment plan. The Court found the entity's "carefully considered" development plan to be deserving of great deference, declining to "second-guess" its judgments

about what lands are needed to effectuate the plan.

JUDGES DISSENT

As Justice Thomas pointed out in his dissent, however, "it is most implausible that the Framers [of the Constitution] intended to defer to legislatures as to what satisfies the Public



Use Clause, uniquely among all the express provisions of the Bill of Rights." Justice Thomas noted that the Court certainly does not so defer when it comes to searches of homes but seems willing to do so when the government takes the "infinitely more intrusive step of tearing down petitioners' homes."

While Justice Thomas would have overturned the *Berman* and

Midkiff cases in reversing the State court decisions in *Kelo*, Justice O'Connor distinguished *Kelo* from those earlier public purpose cases in her dissent. In arguing that "[i]t was possible to imagine unconstitutional transfers from A to B" after *Berman* and *Midkiff*, she says that after the *Kelo* decision "nearly all real property is susceptible to condemnation." Justice O'Connor warned that any property may now be taken for the benefit of another private party and that the fallout from the *Kelo* decision will not be random. "The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms." As for the victims, Justice O'Connor argued that "the government now has license to transfer property from those with fewer resources to those with more."

EMINENT DOMAIN

According to the Institute for Justice, a Washington public interest law firm representing the New London homeowners, more than 10,000 properties were condemned between 1998

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and 2002. In many of those cases, cities used their powers of eminent domain to accommodate wealthy developers who, undoubtedly, increased the tax base. Justice Thomas cited statistics showing that the vast majority of takings in the years following the *Berman* decision destroyed minority and lower income neighborhoods in the name of urban renewal and economic development. The *Kelo* case will allow takings for "economic redevelopment" to continue as furthering this "public purpose" of taking from the poor and giving to the wealthy in what *The Wall Street Journal* refers to as "reverse Robin Hood fashion."

STATE LEVEL VARIATIONS

The Court concludes in *Kelo* by noting that nothing in its opinion precludes any state from placing further restrictions on its exercise of the takings

power. According to the *Kelo* petitioners' filing, seven states, including New York, allow condemnations for private business development alone, while eight forbid the use of eminent domain when the economic purpose is not to eliminate blight. What the other states will do, if anything, to impose limits on economic development takings remains to be seen. Justice O'Connor believes, however, that the



Supreme Court has abdicated its responsibility by suggesting that States compensate for the Court's refusal to enforce properly the Federal Constitution "and a provision meant to curtail state action, no less." This may prove true, as the majority's public purpose test provides little check on government authority to take private property pursuant to the power of eminent domain. For more information on the *Kelo* decision, contact Brenda J. Joyce by phone at 716.843.3855 or bjoyce@jaeckle.com or Charles D. Grieco by phone at 716.843.3844 or cgrieco@jaeckle.com.





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OUR APPROACH

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- Brownfield Cleanup Program Tax Credits
- Empire Zone Benefits
- Environmental & Local Permitting
- Historic Rehabilitation Tax Credits
- Industrial Development Revenue Bonds
- Limited Partnerships & Limited Liability Companies
- Low Income Housing Tax Credits
- NEPA/SEQRA & Zoning
- Project Labor Agreements
- Public Sector Financing Participation & Incentives
- Real Estate Investment Trust Transactions
- Renewal Community Tax Benefits
- SEQRA Litigation
- Wetlands: Section 404 & 10 permits

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