



Kelo v. City of New London: Eminent Domain and Affordable Housing

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The recent United States Supreme Court opinion in the case of *Kelo v. City of New London*, 125 S.Ct. 2655 (2005) has ignited a debate both at the federal and state level over the exercise of eminent domain authority by local governments to further urban redevelopment projects. In *Kelo*, the court addressed the issue of whether the condemnation of several individual homes to accommodate a redevelopment plan approved by the City of New London qualifies as a “public use” within the meaning of the Taking Clause of the United States Constitution. The City of New London approved a development plan for approximately 90 acres, that was “projected to create over 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas,” and authorized the New London Development Corporation (NLDC) to exercise the power of eminent domain to obtain the land for the project.



promote economic development. The court held, in a 5-4 opinion, that the City’s proposed condemnations for the purpose of economic development were for a “public use” within the 5th Amendment. Moreover, the court deferred to legislative judgments regarding the determination of what public needs justify the use of the takings power.

THE FLORIDA RESPONSE

In response to the ruling, Florida House Speaker Allen Bense appointed a Select Committee to Protect Private Property Rights, chaired by Rep. Marco Rubio, to evaluate the effect of the *Kelo* case on Florida eminent domain law. The charge of the committee is to take appropriate steps “to ensure that, in Florida, eminent domain is only asserted in situations where the public necessity and public benefit are very clear.”

The NLDC initiated condemnation proceedings over some property owners who were longtime homeowners in the area and whose homes were not considered to be blighted. These homeowners challenged the condemnation arguing that the taking of their property would violate the “public use” restriction in the Fifth Amendment of the United States Constitution because the property was not going to be put to a use for the general public, but to facilitate economic development by providing land for various commercial uses, and for the location of a research and development facility to be operated by the Pfizer company. Under Connecticut law, cities are authorized to use eminent domain power to

Under Florida Law, the applicability of *Kelo*, will focus on the eminent domain authority granted to community redevelopment agencies under Florida’s Community Redevelopment Act. Pursuant to s. 163.375, F.S.,

Any county or municipality, or any community redevelopment agency pursuant to specific approval of the governing body of the county or municipality which established the agency, as provided by any county or municipal ordinance has the right to acquire by condemnation any interest in real property, including a fee simple title thereto, which it deems necessary for, or in



connection with, community redevelopment and related activities under this part.

In order to exercise community redevelopment authority, the county or municipality must make a legislative finding that “slum” and “blight” conditions, exist. The resolution must state that: 1) one or more slum or blighted areas, or one or more areas where there is a shortage of housing affordable to residents of low or moderate income, exist in the county or municipality and 2) the rehabilitation of such areas is necessary to public health and safety. The definitions of both slum and blight are very broad under the Act. The definition of “blighted area,” for example, is based on whether two or more of a list of fourteen factors is present or can include an area where only one of the factors is present and all taxing authorities agree to the designation.

These factors include:

- (a) Predominance of defective or inadequate street layout, parking facilities, roadways, bridges, or public transportation facilities;
- (b) Aggregate assessed values of real property in the area for ad valorem tax purposes have failed to show any appreciable increase over the 5 years prior to the finding of such conditions;
- (c) Faulty lot layout in relation to size, adequacy, accessibility, or usefulness;
- (d) Unsanitary or unsafe conditions;
- (e) Deterioration of site or other improvements;
- (f) Inadequate and outdated building density patterns;
- (g) Falling lease rates compared to the remainder of the county or municipality;
- (h) Tax or special assessment delinquency exceeding the fair value of the land;
- (i) Residential and commercial vacancy rates higher in the area than in the remainder of the county or municipality;
- (j) Incidence of crime in the area higher than in the remainder of the county or municipality;
- (k) Fire and emergency medical service calls to the area proportionately higher than in the remainder of the county or municipality;
- (l) A greater number of violations of the Florida Building Code in the area than the number of violations recorded in the remainder of the county or municipality;

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- (m) Diversity of ownership or defective or unusual conditions of title which prevent the free alienability of land within the deteriorated or hazardous area; or
- (n) Governmentally owned property with adverse environmental conditions caused by a public or private entity.

In contrast to the Connecticut law cited in the Kelo case, Florida’s CRA statute does not allow the purpose of economic development, by itself, to justify the exercise of eminent domain; however, the “blight” criteria are flexible enough that some will argue that the results of the application of the criteria may allow the takings of private property for the sole purpose of economic development. Accordingly, the focus of the House Select Committee has been on: 1) whether changes to

Florida law are necessary to prohibit takings of private property for the sole purpose of economic development; 2) whether the threshold definitions of slum and blight in Florida’s Redevelopment Act need to be narrowed or changed; and 3) what is the appropriate judicial standard of review of both the creation of a community redevelopment agency and the burden necessary to establish a public purpose and reasonable necessity of the taking.

What impact will the debate over Kelo have over the provision of affordable housing? First, changes to the definition of slum and blight could make it more difficult for CRAs to condemn existing affordable housing units that are in the path of a proposed hotel, convention center etc. if the definition of slum and blight is narrowed. Second, if new affordable housing units were a significant component of a redevelopment plan, limitations on the exercise of eminent domain authority by a CRA could make the provision of such affordable housing more difficult. Unfortunately, the creation of CRAs does not usually result in the provision of more affordable housing. Perhaps affordable housing advocates should use the debate over the scope of Florida’s Community Redevelopment Act to suggest ways that the act could be changed to facilitate the provision of affordable housing. 

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