



Wisconsin Legislature Limits Impact of Supreme Court Decision on the Use of Eminent Domain For Economic Development

In *Kelo v. City of New London*, 2005 U.S. Lexis 5011, 545 U.S. ____ (June 23, 2005), the United States Supreme Court affirmed a decision of the Connecticut Supreme Court that economic development is a constitutionally permissible public use under the Fifth Amendment of the United States Constitution.

Background

The City of New London experienced severe economic depression in the 1990s. In 1996, the federal government closed the Naval Undersea Warfare Center, located in the Ft. Trumbull area of the city, which had employed more than 1,500 people. The City's unemployment rate was nearly double that of the State of Connecticut, and the population of the city was at its lowest point since 1920. In an effort to rejuvenate the waterfront area, the city adopted an integrated development plan in 2000. The plan, in addition to taking advantage of a proposal by a large pharmaceutical company to locate a 300 million dollar research facility in the city, was also designed to attract visitors to the area. A large waterfront conference hotel was to be the center of a small "urban village" that would include restaurants and shopping. The plan also provided for marinas for both recreational and commercial uses. The areas would be linked by a pedestrian riverwalk. Space was reserved for a new U.S. Coast Guard museum. The plan covered a 90 acre area and was projected to create in excess of 1,000 jobs.

Most of the land required for the development plan was acquired by the city from willing sellers. The city sought to acquire the remaining 15 properties owned by Kelo and eight others through eminent domain. There were no allegations that any of the properties being acquired were blighted or otherwise in poor condition. Rather, they were condemned only because they happened to be located in the development area.

Issue on Appeal

The “takings clause” of the Fifth Amendment to the Constitution states: “nor shall private property be taken for public use, without just compensation.”

The 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. *Id.* at 14.

Court’s Decision

By vote of 5 to 4, the Court affirmed the Connecticut Supreme Court’s decision that the takings were constitutionally permissible.

The Court noted that its longstanding interpretation of the “public use” restriction in the Fifth Amendment equated that phrase with the broader concept of “public purpose.” *Id.* at 17. The Court pointed out that the takings in this case were executed pursuant to a “carefully considered” development plan, and was not a situation in which the government was taking the property of “A” for the sole purpose of transferring it to another private party “B.” Given the “comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of [the Court’s] review,” the Court held that the plan unquestionably served a public purpose, therefore satisfying the public use requirement of the Fifth Amendment.

In addition, the Court refused to adopt a “bright line” rule that economic development does not qualify as a public use. The Court rejected the argument of the dissent (and media) that without a bright-line rule nothing would stop a city from transferring Citizen A’s property to Citizen B for the sole reason that Citizen B will put the property to a more productive use and thus pay more taxes. The Court pointed out that such a “one-to-one transfer of property, executed outside of the confines of an integrated development plan, is not presented in this case.” Moreover, the Court noted that such an “unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot.” *Id.* at p. 32.

Finally, the Court noted that nothing in its opinion precludes any state from placing further restrictions on its exercise of the takings power. *Id.* at 36.

Justice Kennedy, who provided the swing vote, wrote a concurring opinion. He opined that the Court should strike down a taking that is intended to favor a particular party, with only “incidental or pretextual” benefits. *Id.* at 39. In this case, benefiting the pharmaceutical company was not the primary motivation of the development plan.

Wisconsin Legislature's Response to *Kelo* Decision

In response to the *Kelo* decision, the Wisconsin Legislature enacted 2005 Wisconsin Act 233 that prohibits a municipality from acquiring by condemnation property within a blighted area that consists of only one dwelling unit, unless at least one of the following applies:

1. The property is not occupied by the owner of the property, his or her spouse, or an individual related to the owner.
2. The crime rate in, on, or adjacent to the property is at least three (3) times the crime rate in the remainder of the municipality in which the property is located.

The Act also prohibits a municipality from acquiring by condemnation property that is not blighted if the municipality intends to convey or lease the acquired property to a private entity.

This Act, which took effect on April 13, 2006, effectively overturns a 1996 Wisconsin Court of Appeals decision holding that municipalities may condemn all property within a designated blighted area as part of a redevelopment project even if particular properties within the area are not blighted. *Grunwald v. CDA of the City of West Allis*, 202 Wis. 2d 471, 551 N.W.2d 36 (Ct App. 1996).

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