



MEMORANDUM

FROM: Paul Edmondson, Vice President & General Counsel
DATE: August 2, 2005
SUBJECT: Some thoughts about the *Kelo* decision for members of the historic preservation community...

It has been just over a month since the U.S. Supreme Court issued its controversial decision in the case of *Kelo v. City of New London*, 539 U.S. ___, 125 S.Ct. 2655 (2005), finding that the City of New London was authorized under the U.S. Constitution to use its condemnation authority to seize properties from local residents for a major private development project expected to bring jobs and tax revenues to a city considered by its own municipal authorities to be “economically distressed.” While many Supreme Court decisions are instantly controversial, virtually no other ruling in the land use area, at least in recent memory, has brought such an intense and emotional public response as has *Kelo*. Despite cheers from planners and representatives of state and municipal governments—many of whom consider eminent domain to be an essential tool for community revitalization and economic development—the overwhelming public response, or at least as reported in the news media, has been a hue and cry *against* the Court’s broad reading of the constitutional powers granted to government in this area. Across the country, editorial writers, columnists, and readers penning letters to the editor have decried the Court’s decision as a radical expansion of the power of government, and have called for legislative changes to limit the authority of state and local government agencies. Even a number of dedicated preservationists, writing on the National Trust’s email list-serve, have condemned the case, one writer describing the decision as granting “carte blanche for development.” Ironically, a Supreme Court decision that stands in the loss column for so-called property rights advocates has proved to be a huge victory for such advocates in the court of public opinion.

But what is the real impact of the *Kelo* decision, from a legal standpoint—and from the standpoint of the preservation community? Does it significantly change the balance of power at the state and municipal levels, and does its validation of broad eminent domain powers really threaten historic neighborhoods and landmarks? Is it true, as Justice O’Connor stated in her strongly-worded dissent, that after *Kelo* “the specter of condemnation hangs over all property”—that no property is safe from being seized for private development simply to increase tax revenues and create jobs? Or, as a number of legal commentators have suggested, does the case do little more than affirm the broad grant of condemnation powers recognized in earlier decisions?

Before addressing the legal effect of the *Kelo* decision—and the appropriate response—it may be helpful to put eminent domain and historic preservation in context. There are, in fact, good reasons why many preservationists have a healthy skepticism of the use of eminent domain powers by government since, over the years, it has often proved to be a double-edged sword.

Protecting the Irreplaceable



Indeed, in some ways the modern preservation movement grew in reaction to the urban renewal era of the 1950s and 1960s, when local governments used eminent domain as a blunt instrument to remove older and historic buildings in communities that were considered “blighted” (a term that, even today, is sometimes misused). Over the past fifty years, the power of the government to condemn property has been used in a number of cases by state, local and federal authorities to clear historic neighborhoods—many comprised of poor and minority communities. And, although the urban renewal days of the fifties and sixties are long gone, the threat of widespread demolition still remains in some cities, particularly those experiencing large levels of urban decay and—in extreme cases—neighborhood abandonment.

On the other hand, most preservationists also recognize that eminent domain can be, and has been, used to *protect* historic resources. In some cases, the power of condemnation has been exercised to save specific historic structures or land areas threatened with inappropriate development—such as the Manassas Battlefield, portions of which were protected through an unusual Congressional exercise of the power of eminent domain in 1988. In other cases, the power has been used by municipal governments—from Tacoma, Washington, to Chicago, to New York City—to acquire historic buildings to save them from neglect or demolition. More importantly, municipal and state economic development authorities whose predecessors once condemned older neighborhoods to make way for “modern” development projects are far more likely today to use their condemnation powers (or, more typically, the power to negotiate purchases backed by condemnation as a last resort) to assist local developers to rehabilitate abandoned buildings or vacant warehouses as loft apartments, artists’ studios, or mixed-use commercial centers.

Of course the fact that the power of condemnation can be used to promote historic preservation and community revitalization does not mean that the power is not susceptible to abuse in some instances, and few preservationists would oppose measures to increase transparency, public accountability, and individual fairness to the process. But the legislative solution most commonly being discussed in response to the *Kelo* case—perhaps encouraged by Justice O’Connor’s warning in dissent that the power now hangs as a Damoclesian sword over *all* owners of private property—is to *eliminate* the authority, at least to the extent that it is used to promote private commercial development.

Elimination of the power of eminent domain for private commercial development that clearly furthers public interests would be a significant diminishment of the powers of government, particularly at the state and local levels. But is such a change justified? Have the legal rules in this area been changed so significantly that the use of eminent domain for economic development should be eliminated to protect the public from its widespread abuse?

The answer may surprise many who have heard or read reports that *Kelo* dramatically shifted constitutional standards in this area: Many constitutional analysts believe that the Supreme Court’s decision in *Kelo v. Town of New London* does *not* substantially change the playing field for state, federal or local governments. A few commentators have even suggested that the case narrows the authority in certain respects.

The *Kelo* case involved the condemnation of private property for redevelopment by the New London Development Corporation (NLDC), a private nonprofit entity established to assist the City of New London in planning economic development. Although the majority of the property

owners in the area agreed to sell their property, a few did not. Included among them were the petitioners, Wilhelmina Dery, who lives in the house her family has owned for over 100 years, and Susette Kelo, who had rehabilitated her house and valued her water view. In response to condemnation proceedings brought by NLDC, these and other property owners sued, challenging whether the purpose of the redevelopment project justified the use of the power of eminent domain by the government.

The primary issue discussed in the case centered around the meaning of the term “public use” in the just compensation clause of the Fifth Amendment. The just compensation—or “takings”—clause provides, “...nor shall private property be taken for public use, without just compensation...” In *Kelo*, the Court explored the degree to which the phrase “for public use” acts as a limit on the power of government to condemn property.

The majority opinion, written by Justice Stevens and joined by four other justices, noted that the term “public use” had been broadly interpreted in prior decisions to permit the government to exercise the power of eminent domain for “public purposes,” and the Court reaffirmed that analysis. Although the petitioners argued that economic development alone should not be considered a “public purpose,” the majority disagreed. Citing several earlier cases, including *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the Court held that it had long recognized that the public benefits attributable to economic development may qualify as a valid public purpose. Although the Court reiterated that the government cannot take the property of one person for the sole purpose of transferring it to another private party, even if just compensation is paid, the Court confirmed that the government can take property and transfer it to another private party if it does so for a public purpose.

The Court’s decision in *Kelo* did not address the wisdom of the City’s efforts, declining to “second guess” the City’s “considered judgments about the efficacy of its development plan,” and its “determinations as to what lands it needs to acquire in order to effectuate the project.” Adhering to longstanding judicial precedent on eminent domain—and *Berman v. Parker* in particular—the Court reiterated that “it is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project.” (It is worth noting that *Berman v. Parker*, a 1954 decision upholding the exercise of eminent domain authority for an urban renewal project in Washington, D.C., is often relied upon by preservationists to support the view that aesthetic regulation is a valid public use. In *Berman*, the Court stated that “[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled,” an observation repeated by the Supreme Court in its 1978 decision in *Penn Central v. City of New York*, 438 U.S. 104.)

In a concurring opinion, Justice Kennedy wrote that, in his view, transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, continue to be forbidden, and that courts should ensure that such takings are “rationally related to a conceivable public purpose.”

In dissenting, Justice O’Connor, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, wrote that she would find the exercise of eminent domain for economic development purposes insufficient to meet the “public use” requirement. However, the dissent did not indicate that it would overturn either *Berman* or *Midkiff*, in which the justifications for those takings were to remedy an affirmative harm—with *Berman*, the blight resulting from extreme poverty and in

Midkiff, an oligarchy on land ownership. Although both cases resulted in the transfer of property from private owners to other private owners, the dissent considered such takings to meet the public use requirement because they eliminated harmful conditions. In a separate dissent, Justice Thomas reminded the Court that governmental takings, just as in the era of urban renewal, were likely to affect poor and minority communities more than wealthier communities.

The *Kelo* decision certainly confirms the power of government to exercise the power of eminent domain for economic development purposes. But—despite the vigorous dissent by Justice O'Connor—a careful reading of *Kelo* suggests that it did not substantially change existing law. The Court relied heavily on its 1954 decision in *Berman v. Parker* in recognizing the broad powers of government in this area. And, equally importantly, the Court made it clear that it was not authorizing the taking of private property simply to benefit one private entity at the expense of another under the pretext of a public purpose. Rather, the *Kelo* decision clarifies that (1) condemnation actions taken pursuant to a comprehensive development plan will be upheld under the Constitution as a valid “public use,” provided that such actions do not benefit a class of identifiable individuals and (2) constitutional challenges to condemnations actions are subject to a rational basis standard of review. This standard accords substantial deference to local governments.

Several constitutional analysts have suggested that the *Kelo* decision may actually be read to narrow the principles of *Berman v. Parker* in some respects, in light of the factors that the court articulated as being of relevance in finding that the City of New London’s actions met the rational basis test. *See, e.g.*, John D. Echeverria, “Some Thoughts on Kelo and the Public Debate Over Eminent Domain,” Georgetown University Environmental Law & Policy Institute, July 22, 2005), arguing that *Kelo* suggests that eminent domain can only be exercised in this context (1) to implement a comprehensive plan for community redevelopment based on wide public consultation and with high-level approval within the community, and (2) when the community has obtained contractual commitments to ensure that the public’s redevelopment objectives will be met.

So what is the appropriate response of the preservation community to the *Kelo* case?

First, it is important to acknowledge that eminent domain is a tool that can be used to promote historic preservation, but on the other hand to acknowledge that it can harm—and has harmed—preservation interests in some cases (often in the guise of eliminating “blight”). It is incumbent on preservationists to be active in promoting the former and opposing the latter. *From either perspective, legislative reforms that would eliminate the tool in its entirety—to end any use of eminent domain to promote economic development—should not be necessary to correct abuse, but reforms designed to increase transparency, encourage community involvement in planning, and increase attention to protecting neighborhood character would go a long way in helping to ensure that the tool is not misused.* In addition, preservationists should demand that objective economic guidelines are used to assess the true economic impacts of proposed projects, and that the project will in fact be carried out successfully. (For an excellent analysis of how local governments can make better decisions in using eminent domain to promote new development, see Kennedy Smith, “*Kelo v. The City of New London*: What the Supreme Court’s Ruling on Eminent Domain Means for America’s Downtowns,” Clue Group News, July 11, 2005.)

Second, it is essential for preservationists to recognize that, from the perspective of individual property owners, eminent domain can be a one-sided—and sometimes harsh—instrument. Where the power is exercised, preservationists should support community efforts that respect individual rights, protect the interests of minorities and the poor, and provide relocation assistance to renters in addition to compensation to owners for their lost property rights.

Third, preservationists should continue to encourage communities to use a variety of planning tools and economic incentives to promote historic preservation so that condemnation is not necessary. Historic preservation tools such as historic districting, property assessment roll-backs, and rehabilitation tax incentives support the use, reuse, occupancy, conservation and stability of our older and historic neighborhoods and commercial corridors. A community's use of these tools can promote economic revitalization, precluding the need for more invasive forms of redevelopment and the use of eminent domain.

Ultimately, the holding of the *Kelo* decision does not change the basic fact that the majority of historic buildings in the United States are protected through ownership by private individuals or corporations, who consider themselves stewards of these resources for this generation. Communities continue to have the right to choose to protect these older and historic buildings, neighborhoods and downtowns, or to choose *not* to protect these irreplaceable resources. Fortunately, an increasing number of communities recognize that historic places provide a sense of community and stability critical to the well-being of our citizens. Historic preservation—whether achieved through or in spite of eminent domain—continues to be one of the most effective ways that communities can achieve revitalization and economic stability.