

**OREGON ASSOCIATION OF REALTORS®
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EMINENT DOMAIN: WHAT DOES THE KELO DECISION MEAN?

What is Eminent Domain and Where Did it Come From

Eminent Domain in common law legal systems is the power of the state to appropriate private property for “public use” without the owner’s consent. The term Eminent Domain was derived in the mid-19th century from a legal treatise written by the Dutch jurist, Hugo Grotivo, in 1625. Governments most commonly use the power of eminent domain when the acquisition of real property is necessary for the completion of a public project such as a road; and the owner of the required property is unwilling to negotiate a price for its sale. Generally, the power of eminent domain is tempered with a right that just compensation be made for the appropriation.

The term “condemnation” is used to describe the act of a government exercising its authority of eminent domain. It is not to be confused with the term of the same name that describes the legal process whereby real property, generally a building, is deemed legally unfit for habitation due to its physical defects. Condemnation via eminent domain indicates the government is taking the property; usually the only thing that remains to be decided is the amount of just compensation. Condemnation of buildings on grounds of health and safety hazards or gross zoning violation usually does not deprive the owner of the property condemned but requires the owner to rectify the offending situation.

The Fifth Amendment to the Constitution requires that just compensation be paid when the power of eminent domain is used and requires that the property be taken for “public use”. These requirements are sometimes called the “takings clause”. Most courts have interpreted “just compensation” to be the fair market value of the condemned property. Over the years, the definition of “public use” has expanded to include economic development plans which use eminent domain seizures to enable commercial development for the purpose of improving the community. The definition of “public use” was mostly viewed as “use by the public” until the 20th century. The Supreme Court started expanding the definition in the 1920s to condemn slums.

What Constitutes “Public Use”? The Kelo Decision

1. Facts of Kelo

The unemployment rate of New London, Connecticut was nearly double the unemployment rate in the rest of the state. The U.S. Government had recently closed a naval base, taking 1,500 jobs. The population of the City was at its lowest level since 1920. The City felt that something needed to be done.

In 2000, the City approved an economic redevelopment plan. The plan covered 90 acres and involved the conversion of the naval base and 115 privately owned properties into such things as a park, a research facility for Pfizer, Inc., a marina, a museum, a hotel, and other structures designed to create a “small urban village”. The goal of the project was to create jobs, increase the City’s tax base, and cause a revitalization of the downtown.

The City successfully negotiated the purchase for all but 15 of the privately held properties. The remaining properties were owned by nine individuals. Ten of the properties were residential properties occupied by the owner, some of which had been owned for years by the same family. The remaining five properties were held as investment properties. Because the holdouts would not sell their properties, the City authorized the private firm to condemn the properties.

2. The Lawsuit and Lower Court History

The holdouts filed a lawsuit challenging the condemnation, arguing that the taking of their property would violate the “public use” provision of the takings clause found in the Fifth Amendment of the U.S. Constitution. The trial court entered a permanent restraining order prohibiting the government from taking the holdouts’ property but the Supreme Court of the Connecticut reversed the trial court and ruled that the takings were valid. The state’s highest court found that a state statute allowed the taking of private land as part of an economic development plan and such a taking is a “public use” and in the “public interest”. The court further determined that the takings were “reasonably necessary” to achieve the City’s economic development plan. The holdouts appealed to the Supreme Court of the United States.

3. Issue of Kelo

Whether a City’s condemnation of private property for the purpose of economic development is a “public use”.

4. The Supreme Court’s Ruling

On a 5-4 vote, the Supreme Court ruled that general economic development of a City constitutes a public use, even though the property being taken is not being used by the public. Although the majority agreed there were limits on the ability to take private property for economic development (such as taking private property and giving it to another private entity, with no appreciable public benefit), the Court was convinced that the New London development plan would greatly benefit the City at large, which overrode the loss of private property.

The Court concluded that past precedent supported judicial deference to legislative judgments on what constituted a sufficient public good justifying the use of the takings power. Applying this principle, the Court found that the City’s

determination that its economic distress necessitated the plan was entitled to deference by the Court. The Court stated that the case turned on the question of whether the City's proposed taking constituted a valid "public purpose." Looking at prior cases, the Court found it had construed the "public use" principle broadly in earlier cases. In one case, the Court had allowed a condemnation of a nonblighted department store in a part of Washington DC that Congress had ordered condemned for its overall blighted condition. In that case, the Court had stated that it was not necessary for the legislature to make a property-by-property determination of the area's blighted condition but instead could pursue an overall development plan which could involve nonblighted properties.

In another case, the Court allowed the state of Hawaii to transfer property title from a small group of owners to a larger group. In that case, the state had determined that the concentration of property ownership in the hands of a few had caused property values to be artificially high. The Court deferred to the state's determination, finding that the elimination of the "economic evils" caused by oligopoly constituted a public use which justified the taking. Based on these earlier cases, the Court concluded that past precedent supported judicial deference to legislative judgments on what constituted a sufficient public good justifying the use of the takings power. Applying this principle to this case, the Court found that the City's determination that its economic distress necessitated the Plan was entitled to deference by the Court.

In conclusion, the Court stated that its decision did not foreclose state legislatures from enacting laws defining what constituted an appropriate public use and these standards could be stricter than the federal standard. The Court cited California as having a law which restricted takings for economic development to only blighted areas. Thus, the Court affirmed the ruling by the Connecticut Supreme Court.

5. The Dissenting Opinions

The dissent argued that the government shouldn't have power to take ordinary private property in order to convert the property from one use to another chosen by the government, even if the owners are compensated. The dissent expressed concern that wealthy developers would benefit the most from the Court's decision, as they had the power to influence the legislature.

Oregon Law

Article I, subsection 18 of the Oregon Constitution states, "Private property shall not be taken for public use nor the particular services of any man be demanded, without just compensation, nor exception the case of the state, without such compensation first assessed and tendered; provided that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use."

The Oregon Supreme Court had an opportunity to address “public use” in Foeller v. Housing Authority of Portland, 198 Or. 205 (1953). In Foeller, the court said the term public use means a more intimate relationship between the public and an item of property which has been acquired under the power of eminent domain than is denoted by terms such as “public benefit” and “public utility”. Public use demands that the public’s use and occupation of the property must be direct. If someone other than the public uses the property, the fact that the public will share in the benefits does not suffice. It must be the public which will use and occupy the property upon its acquisition. However, the fact that a plan possibly provides that the property should be sold to private persons does not in itself demand a holding that the power of eminent domain may not be employed for the acquisition of the property.

Eminent domain is an inherent power of sovereignty. That means the state has the power whether it is in the Constitution or statute or both. In Oregon, it’s in both. Currently, the only restriction on government takings of property is that it be for a public purpose. A blighted area only restriction is one of the options being considered for reform legislation. A ballot measure is currently in the signature gathering phase which would prohibit a public body from condemning private real property if the intent is to convey the property to a private party. One of the significant provisions of the ballot measure would remove the deference that courts have extended to local governments over the years. The provision provides that courts shall independently determine whether a taking of property complies with the statutory requirements without deference to any determination made by the public body.

NAR Policy and Position

NAR urges that government entities be required to justify condemnation actions in order to ensure, as much as possible, that under the circumstances they are both necessary and likely to achieve real and substantial community benefits. The government should provide persuasive, objective evidence that the project, and the resulting public purpose or benefit will in fact be realized. Furthermore, considerations of fairness and reasonableness require that payment of just compensation, as directed by the 5th Amendment, must cover the additional costs incurred by property owners affected by condemnation actions above and beyond the loss of the subject property.

Since eminent domain impacts the Constitutional rights of property owners, it should be exercised carefully and only in special circumstances. This is especially true in situations where a condemnation action transfers a property interest from one private party to another.

In an Amicus (friend of the Court) brief filed jointly with the National Association of Home Builders in the Kelo Case, NAR argued that the Supreme Court should provide a framework for an intermediate level of judicial scrutiny that would allow courts in future cases to determine whether eminent domain is appropriate in situations where a private party will maintain primary ownership control or jurisdiction over the

condemned property. Legislative deference generally is not a proper standard of review for condemnations involving significant private interests, especially those with economic development as the sole justification. A higher level of scrutiny would allow for a more careful review of the use to which the property will be put to determine whether the public use or purpose is primary or incidental. The Court rejected this argument determining that it was inappropriate to second guess the City's comprehensive economic development plan.

Policy Questions to Consider

1. Should use of eminent domain be limited to takings for public ownership (i.e., a road)?
2. Should use of eminent domain for private to private transfers be limited to when the private party receiving the property is required to make the property available for the public's use (i.e., railroad, public utility, stadium)?
3. Should the use of eminent domain for private to private transfers never be allowed when it is for economic development purposes?
4. Should use of eminent domain for private to private transfers be allowed only where there is a finding of "blight"?
5. Should use of eminent domain for private to private transfers only be allowed where the property taken is, in its pre-condemnation use, causing a "harm" to the public?
6. Should the measure of value of private property taken by eminent domain include not only the fair market value of the property but also all other reasonable and necessary costs generated by the condemnation (i.e., costs of legal counsel, temporary housing, and lost business revenue)?
7. In the case of eminent domain for economic development, should the private property owner whose property is condemned receive the fair market value based on the ultimate use of his or her property as redeveloped?

When considering which path, if any, to pursue, REALTORS® must address the need to balance property rights with urban renewal. This suggests a constitutional approach may be misguided because it lacks flexibility, leaves interpretation to the judiciary, and is hard to change if you find you got it wrong. Any legislative or statutory initiative needs to be carefully looked at so that urban renewal is not held hostage. However, legislation can have exceptions; and it is easier to amend when today's great idea turns into tomorrow's what were we thinking. It is worth considering whether protecting the right to sell a few homes is worth crippling urban renewal. In closing, REALTORS® need to balance protecting individual property rights versus facilitating new development.

