



The Community Land Use + Economics Group, LLC

Kelo v. The City of New London: What the Supreme Court's ruling on eminent domain means for America's downtowns

- Kennedy Smith

Can local government take private property away from its citizens and develop it for something that will generate more tax revenue? On June 23, the US Supreme Court [sided with the city of New London, Connecticut](#) in an eminent domain case that has set off tidal waves of anxiety, praise, anger, and confusion across America. Within hours, dozens of weblogs (both conservative and liberal) claimed the decision tramples the rights of private property owners – but dozens of others praised the decision for affirming a crucial community development tool. The [American Planning Association](#) and [National League of Cities](#) hailed the Court's decision, while the [National Trust for Historic Preservation](#) called it “bad news to many preservationists”. Mayor Bart Peterson of Indianapolis and former mayor John Norquist of Milwaukee (both Democrats) faced off against each other on PBS's [NewsHour](#). The Brookings Institution called the ruling “[an important revitalization tool](#)”. CNN called it a “[big box bonanza](#)”.

So, what does the Supreme Court's ruling in *Kelo v. City of New London* mean for America's main streets? Will it make it easier for some communities to strengthen their downtowns? Yes, undoubtedly. Will it make it easier for some communities to build new sprawl-like commercial complexes that drain revenues from their downtowns? Yes, undoubtedly.

Here's what the case is about. In 2000, the City of New London condemned Susette Kelo's house and the houses of a few other property owners in a historic waterfront neighborhood in order to give the land to a private developer who promised to build a new marina, housing, and offices there, generating substantially more tax revenue for the City than the existing houses do. Kelo (who, incidentally, had just rehabbed her Victorian house three years before) and her neighbors sued the City. Their argument: while the Fifth Amendment to the Constitution says that eminent domain can be used for public purposes, it doesn't say anything about condemning property for “private” purposes, and turning the land over to a private developer constitutes a “private” purpose and is therefore

unconstitutional. The City argued that its plan is a key component of the community's economic development strategy and therefore has a public purpose.

The question of what "public purpose" means is therefore at the heart of the New London debate. Cities have long used eminent domain to seize property for public uses, like schools and roads, without stirring much controversy. But the Supreme Court's 1954 decision in [*Berman v. Parker*](#) effectively broadened its use, concluding that a public "purpose" constitutes a public "use" and that eliminating blight serves a public purpose.

Ah. That's where all the brouhaha over the Court's *Kelo* decision really began. Since that 1954 ruling, countless American communities have made shockingly short-sighted decisions about what "blight" is and what to do about it. In the last 50 years or so, our community leaders have leveled hundreds of neighborhoods and demolished tens of thousands of historic buildings in the misguided interests of eliminating blight, hoping that a clean slate will entice somebody to build something better there. But, "somebody" rarely has. I know of no community that has been made stronger by wiping out its architectural heritage. As Justice Anthony Kennedy said, "Blight is in the eye of the beholder."

Maybe it is this sad legacy of destruction that makes us question the Court's decision. But, in many ways the Court's *Kelo* decision simply reaffirms its 1954 decision, recognizing that the power to decide what "public purpose" is, and when eminent domain can be used, lies with local and state governments.

What we're really questioning, then, is whether our local government leaders have the resources and the wisdom to make choices that will stand the tests of time, rather than merely meet the tests of the fiscal year budget. The lasting impact of *Kelo v. City of New London* may ultimately be in focusing attention on how local governments make decisions about new development and underscoring several broader problems with land use planning in the United States.

First, *Kelo* underscores the extent to which a project's revenue-generating potential drives local development decisions. Increasingly pressed for funding for education, social services, and other purposes, countless local governments have welcomed new development believing it would generate new property and retail sales tax revenues, giving little thought to the indirect and longer-term implications of such development. How many

discount superstores have been built because local governments honestly believed they would provide millions in new tax revenue and create several hundred new jobs, only to find that the new stores simply displaced tax revenue and jobs from downtown and other commercial centers? Many, unfortunately, have gotten caught in this trap. By contrast, in the United Kingdom, where retail sales tax revenue accrues to the central (e.g., federal) government, not to local governments, local governments' land use decisions are driven by other factors (like aesthetics, road capacity, etc.), not by the municipal revenue potential of a proposed development project. Not surprisingly, the UK's percentage of vacant commercial space is only a fraction of what we have in the US.

Second, it underscores the myth that big development is better than small development and that, in order to attract a developer, local government must assemble smaller parcels of land into one monolithic chunk of land. But many successful programs – the Main Street program among them – have demonstrated over and over that small-scale, incremental development is not only easier to achieve but also has lasting positive impact.

Third, it underscores the enormous need for objective guidelines to help community leaders understand the true economic impact of a proposed project. I have participated in scores of planning commission hearings in which a big-box developer somehow produces a report “proving” that his project will benefit the community and do little harm to – maybe even help! – the community's downtown. But these reports rarely take into account the jobs and sales that will be displaced from existing businesses; the increased costs of providing fire, ambulance and other municipal services to the new development; the increased traffic and parking demand generated if the downtown shifts from being a community-serving district to a destination district; or any of the other myriad hidden costs associated with such cataclysmic new development. If community leaders had clear guidelines for commissioning and evaluating economic impact studies, fewer of them would be duped by impact studies tilted from the very beginning in favor of the proposed development.

Finally, *Kelo* underscores the need for regional collaboration. Big-box stores are notorious for pitting communities against one another, threatening to open up shop in the next town down the road if they don't get to build *here* or don't get what they want (zoning variances, financial incentives, hassle-free permitting, whatever) in the deal. Retailing used to be a local economic activity – but no more. Retail trade areas don't even remotely correspond to the political boundaries within which our city

governments have the power to regulate commercial development. No matter how diligent a local planning commission or city council has been in putting in place plans and policies to encourage new development downtown, it is ultimately hamstrung without commitments from other communities within the trade area to work together.

Eminent domain isn't bad. It's just been badly used in the past. But it does not have to be badly used in the future. In fact, there are a number of instances in which communities can use (and have used) eminent domain in fair and objective ways to strengthen downtowns. Like assembling property for a rehabilitation project to keep a growing business or industry downtown, for example, rather than losing it to new facilities on otherwise undeveloped land outside the district. Or reopening a downtown's access to a river or canal. Or converting abandoned industrial buildings into much-needed downtown housing.

But there are many more instances in which communities have used eminent domain in ways that irreparably damaged downtowns physically or economically. Like razing historic buildings, for example, rather than rehabilitating them. Or developing a big box superstore, rather than revitalizing a downtown. Or moving city or county offices into sprawling greenfields campuses, rather than expanding existing downtown facilities.

Justice Sandra Day O'Connor's dissenting opinion in *Kelo v. The City of New London* provides a chilly warning of these dangers: "The specter of condemnation hangs over all property," she wrote. "Nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."

Her warning is perhaps slightly exaggerated. All fifty states already have laws regulating eminent domain, and a few have banned it altogether. But the problem is not that eminent domain exists; it's that eminent domain isn't always used wisely. Had the Court had the authority to rule on the soundness of New London's economic development plan, rather than on the constitutionality of using eminent domain for economic development purposes, it might have reached a different decision.

Our civic leaders need powerful tools to help build vibrant downtowns and neighborhoods and to cultivate new businesses. And they need the experience and wisdom to understand how to grow local economies in an era in which economics are global, not neatly confined to the city limits. The answer isn't to eviscerate eminent domain, but to make it a more effective tool.

Every superstore, mall, and lifestyle center built with eminent domain's assistance while buildings stand vacant downtown represents a flaw in the system. For those of us who care about America's downtowns, *Kelo* is a wake-up call to fix the flaws.

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