



LEGISLATIVE VIEWPOINT

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REDEVELOPMENT - A FUNDAMENTAL RIGHT AND RESPONSIBILITY OF LOCAL GOVERNMENTS

The Need to Preserve Eminent Domain

Presented by the New Jersey League of Municipalities

Following the United States Supreme Court's decision in *Kelo v. the City of New London*, the New Jersey League of Municipalities has been asked to respond to their ruling. The League supports the ruling as a continuation of over 50 years of case law and as consistent with limited powers granted to municipalities under the New Jersey Constitution to remedy blight. Moreover, the League believes that efforts to limit or curtail such powers will remove the ability of local officials to undertake their obligation to preserve and restore a vibrant tax base for their communities as well as frustrate state policies designed to promote smart growth. Therefore, we urge that any efforts advanced in light of the Kelo decision be held and offer our assistance in improving, rather than dismantling, the use of eminent domain in implementing redevelopment projects in New Jersey.

General Overview

The New Jersey League of Municipalities, and its members, joined other local governments throughout this country in watching an otherwise obscure case, *Kelo v. the City of New London*, wind its way through this nation's courts. When the United States Supreme Court delivered its opinion on June 23, 2005, upholding the City of New London's ability to acquire private property through eminent domain for an economic development project, it was not a surprise. It was, in fact, a straightforward recitation and analysis of over fifty years of decisions on this subject by the Supreme Court. There was much discussion in the opinion about "public use" and "public purpose" since the actual language of the United States Constitution states that, "nor shall private property be taken for public use without just compensation". As a result, the question and issue addressed by the Supreme Court was whether "economic development" undertaken by a local government that involved the acquisition of private property through eminent domain would be considered "public use". The Supreme Court in *Kelo* in addressing this point stated the following:

"Petitioners proposal that the Court adopt a new bright - line rule that economic development does not qualify as a public use is supported by neither precedent nor logic. Promoting economic development is a traditional and long accepted governmental function and there is no principled way of distinguishing it from other public purposes this court has recognized."

The question faced by the League of Municipalities in addressing the various reactions and issues that have been raised since the *Kelo* decision is how does this decision and the analysis contained in it apply to New Jersey. At the outset, it must be noted that economic development by itself is neither a public use nor a public purpose that is recognized in the Constitution or laws of New Jersey. It is only economic development within a blighted area that constitutes a public purpose and public use in New Jersey. The New Jersey Constitution enacted

by the voters in 1947 is very specific on this point: "The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired."

The 1949 Redevelopment Law enacted in response to the New Jersey Constitution is likewise specific on this point. It set forth specific threshold requirements for an area to be determined to be blighted. That law was recodified in 1992 with virtually no change in such threshold requirement. While blight (now "redevelopment") is broadly defined in this legislation, the process that is required to ultimately make that determination is a deliberative and public one, involving multiple actions by the planning board of the local unit as well as the governing body and involving public hearings and open public discussion. This law has enabled local governments in New Jersey for decades to fight the forces that cause blight or to otherwise cure the effects of such blight on the community. The determination of what constitutes blight is left to the elected local public officials who face the responsibility to make their community a vibrant place and provide for a better life for the people who live there.

To suggest wholesale changes or even the abolishment of the use of eminent domain as a component part of the redevelopment process in New Jersey because of the circumstances addressed in the Kelo case ignores not only the differences in our Constitution and laws but also this history and the many instances of significant benefit to communities throughout New Jersey derived from the exercise of these powers. At the very least, any discussion should be based on a detailed review of this history and an understanding of the consequences of such action.

The League Position

After the decision, the League has been asked to comment on, criticize or defend the Court's ruling. To be clear, the New Jersey League of Municipalities supports the Kelo decision. As an organization comprised of local government officials, our members are charged with the responsibility of delivering governmental services to our residents. If decided differently, the Kelo decision could have had a broad and ill imagined impact on our members' obligation to undertake redevelopment activities as part of those responsibilities.

When a public safety complex needs to be built; when a road needs to be widened; when a senior center needs to be sited; or when property needs to be redeveloped, it is our members that make those decisions and are held accountable for how those decisions are implemented as well as the consequences if those decisions are made or not made. As an organization, the League recognizes that the implementation of any governmental decision carries risk for our members. Some will do it well and frankly, some may not. The responsibility of local elected officials to plan for and undertake redevelopment, and to consider the exercise of eminent domain as a part of that obligation, is no different from the obligation of local officials to provide police protection, pick up garbage or widen a road. And if a road project goes over-budget or a trash contract is awarded under questionable judgment, the local official's performance is judged by the citizens that elected him or her and that official is held accountable. This is how it should be. There is no legislative proposal to take away a local official's ability to widen a road; no one drops a bill to amend the Local Public Contracts Law to say that contracts can be awarded, except for trash contracts. So why has the Kelo decision generated similar responses concerning redevelopment and the use of eminent domain? Proposals have been introduced seeking to distinguish "public use" from "public purpose" or to classify redevelopment as a second class

public purpose because it may involve an ultimate use by a private property owner or developer at the end of the process to accomplish the development of otherwise stagnant or blighted property within a municipality. These proposals are superficial and reactive to a bad set of facts that are not common to the redevelopment experience in New Jersey. As such, the League opposes them.

No Kelo in New Jersey

As noted earlier, the exact circumstance in the Kelo case could not occur in New Jersey since a designation or blight (redevelopment) is required to provide the basis for any governmental action. A local government could not decide that a hotel/conference center would generate more tax revenue than a row of older homes and therefore the municipality should condemn the homes and put up a new ratable. In New Jersey, the power to condemn land is limited by law to activities related to a governmental purpose or public use. A school board can condemn land for a new school, but not to build a police station. A sewerage authority can condemn land to build a pump station but not a school. Similarly, a municipality can condemn land for specified purposes, including - in limited circumstances - to transfer that land to a private interest to undertake a project in accordance with an approved redevelopment plan. This power comes not from some activist court but from the 1947 New Jersey Constitution, which recognized that the clearing, planning, development or redevelopment of blighted areas is a public purpose and a public use for which private property may be taken or acquired in accordance with procedures adopted by the Legislature. The procedures to use this power are now codified as the Local Redevelopment and Housing Law but the original statutory

authorization to undertake redevelopment and to exercise eminent domain, if necessary, to help clear and alleviate blight was established in 1949.

An Open and Deliberative Process

The present law, like its predecessor, requires several steps to be undertaken in an open and deliberative process before any parcel of land can be taken by eminent domain.

First, the parcel would need to be declared as an area in need of redevelopment. This means that the local elected officials, the municipal planning board, and a licensed planning expert must all conclude that a particular parcel satisfies specific criteria set forth in the redevelopment statute. This conclusion would need to be documented in a study report prepared by a licensed planner and presented to the municipal planning board in a public meeting after adequate public notice to all impacted property owners. The planning board would make a recommendation to accept, reject or modify the expert report and this decision would be reviewed by the local governing body and then accepted, rejected or modified by resolution during a public meeting. Following this process, property owners and interested parties are free to challenge this declaration in court.

Once a parcel is designated as an area in need of redevelopment, it is subject to eminent domain only if it is specifically identified in a duly adopted redevelopment plan. The adoption of a redevelopment plan requires public action by both the planning board and the governing body, including adoption of the final plan by ordinance after a public hearing. Again, the plan and adoption procedures are subject to court challenges.

Finally, if a parcel is identified in a redevelopment plan as being subject to acquisition, the mechanics of such acquisition are usually governed by an agreement with a redeveloper.

While not mandated, such agreements usually require the redeveloper to attempt to acquire the properties through good faith negotiations before a municipality agrees to exercise its powers of eminent domain on a parcel. And the procedures used by the municipality exercising the power of eminent domain procedures are governed by state law and require judicial participation.

This summary demonstrates three things. First, a New Jersey municipality can not just take someone's land and give it to a private developer. Second, the process involved is open, public and subject to judicial review at several key points in the process. Third, the rules and procedures are set forth in statute and controlled by the Legislature. As such, the League of Municipalities acknowledges the Legislature's authority to change or restrict these rules. We caution, however, that any changes be rational, well reasoned and respect the almost 50 years of law and activity in this area. We also offer our expertise and day to day experience to assist in developing any changes that may be warranted.

A Legacy of Success

This expertise and experience has been developed over decades of redevelopment projects. While the Legislature may now be focusing on the Kelo decision and to some extent the controversy in Long Branch, we urge you to also look at New Brunswick's vibrant downtown and Perth Amboy's waterfront as well as the actual history and circumstance in Long Branch that led to the controversy there. Local leaders looked at their communities' strengths and assets, the tools given to them by the Legislature and undertook ambitious projects that literally saved dormant and blighted urban areas while giving inspiration and hope to leaders in other urban areas. Trenton's use of redevelopment powers laid the groundwork for minor league baseball throughout New Jersey. Asbury Park is again attracting private capital and

literally regenerating its tax base. Redevelopment projects are ongoing in Newark, Paterson, East Orange, Morristown, Camden, Ventnor, Millville, and other urban areas across the state.

But redevelopment is not just an urban issue; Princeton, Montclair and Collingswood have used the redevelopment law to assemble land for development to continue investment in their downtowns. Older suburban communities like Hightstown, Bloomfield, Union Township, Haddonfield, are crafting plans to encourage investment and people to return to their central business districts. The City of Bayonne is using all aspects of the redevelopment law to undertake a massive redevelopment project involving an abandoned military base within its borders; while the municipalities that surround Fort Monmouth look for tools to meet the challenges that lie ahead. Meanwhile, Stafford Township in Ocean County, Upper Township in Cape May County and Washington Township in Mercer County contemplate the powers provided by the redevelopment law to clear title, free up unproductive land for development and manage growth rather than allow it to occur in a haphazard fashion, following the lead of municipalities like Tinton Falls.

Eminent Domain is a powerful public policy tool

While these projects may not ultimately need or use the power of eminent domain, the ability to use that power judiciously is required for redevelopment to be undertaken effectively. Why? Because it works. Because sometimes the use of eminent domain becomes necessary to fulfill the vision adopted by the community, or to overcome clouded title or assemble diverse ownership interests, or to remove absentee landlords adverse to making investments in their properties or to force remediation of dirty property when it is not in the current owners' economic interest to do so. But before this power is exercised, recognize that the land has

satisfied the statutory criteria, the plan has received public support, and the governing body remains convinced that it remains the right thing to do. And by the very nature of local government, the land these elected officials are taking is the land of their residents and neighbors. It is a disservice to the public officials faced with the decision to suggest that such a power is, as a matter of course, exercised lightly or in a cavalier fashion.

If the power of eminent domain is taken away, it will likely stop development in areas that need it the most because it will simply make the acquisition of multiple properties too time consuming, too cost prohibitive and too vulnerable to failure. If this happens, it will not just be local vision that is impacted; it will also impact State policies. Over the last several years, growth and development have been restrained in huge parts of the State; the Pinelands, the Highlands, the Meadowlands and CAFRA have controlled and regulated development in a large geographic area. Recently, the desire to promote “smart growth” has brought restrictive policies not just to certain regions but also to parts of many municipalities. As an organization, the League has shared our views on these policies on a case by case basis and our purpose is not to rehash past debates or promote the views of development interests.

Yet we know the projections for increased population which will lead to more houses, more schools and more services. So where will this growth occur? The answer is known. The policy of the State has been to resist green field development and laud brownfield development. So this growth will occur in areas where development already exists.

The real question is how will this growth occur? Local elected officials are at the center of these State policies and an effective strategy has been to marry smart growth state policies with the local obligation to keep municipalities vibrant through redevelopment. From a practical perspective, it is relatively easy to buy a 200 acre farm from one person and build houses. In a

suburban or urban environment, a blighted parcel half that size could involve hundreds of property owners, each with their own interests, abilities and visions. How will these blighted parcels be assembled? How will a developer be attracted to invest in a blighted area if a major tool to attract that developer is taken away? How will the municipal leaders negotiate with the developer for a community based project if the one tool that guarantees the project's success is taken away? If State policy is to encourage development where infrastructure exists, then State policy should be to empower the local officials to implement this policy. Proposals to eliminate eminent domain do just the opposite.

Simple Solutions do not work on Complex Issues

Before the Legislature moves to prohibit or curtail the power of eminent domain, consider some scenarios:

- A municipality is faced with an abandoned gas station in its downtown. Due to nature of its use, the present owners do not wish to sell it because of the potential for a costly environmental cleanup. An investor would like to replace the structure with a new use to service the downtown. Should a town be prohibited from using its powers to help this transaction occur? Should it matter that the service station was abandoned by a corporation or the estate of a local business person whose children have no interest in operating it as a business? The League believes that the municipality is benefited by the beneficial reuse of the property and therefore supports municipal action in moving this transaction forward regardless of the ownership issue. Thus the League opposes proposals to prohibit the use of eminent domain against "small businesses" or "family owned businesses."

- The home of a deceased resident sits in the middle of the block. A private redeveloper has, through good faith negotiations, obtained title to the remainder of the block. Attempts to acquire this parcel have been unsuccessful because the resident died intestate and the estate has been in probate for years. The redeveloper has waited over a year to build a mixed use development as permitted under the redevelopment plan but can not seek planning board approvals or construction approvals until he has control over all the property. Construction will last two years. Meanwhile, residents throw up their hands at the lack of progress and the return of government as usual. The municipality is unable to act because it no longer has the power to condemn residential properties.

These two scenarios are based on actual events. They demonstrate the complexity of the issues involved in actual redevelopment projects and belie the ability to confront perceived abuses with generic fixes. Simply saying no to eminent domain, or denying its use to take “someone’s home” is well meaning but misguided. The answers are not that simple.

Recommendations for Change

If the Legislature decides that changes regarding eminent domain are necessary, we suggest that these proposals focus on areas in the current law that could be improved. While we believe that the power of eminent domain should not be taken away, we also concede that the current process is far from perfect. Therefore we offer the following recommendations that could be enacted to improve the process, rather than eliminate it.

1. Improved Notice. Under current law, property owners receive notice at the time the parcel is considered by the Planning Board for inclusion in an area in need of redevelopment. Many times, the property owner’s main concern is whether their property will be subject to

eminent domain. This, however, is not known until a redevelopment plan is adopted and there is no notice requirement at that stage of the process. Therefore, the League recommends that 40A:12-6 be amended to require notice to property owners at the time a redevelopment plan is considered for adoption. Notice of consideration of a redevelopment plan could be given at the time of the planning board meeting, as is the current practice for the designation of the redevelopment area, or at the time of the public hearing on the ordinance adopting the redevelopment plan, in a manner similar to the current practice for approving assessments for local improvement, or both.

2. New Measure of Compensation. The Eminent Domain Act requires compensation based on an appraised value. In redevelopment actions, the value is determined at the time of condemnation but is based on the underlying zoning before the redevelopment plan was adopted. Thus, it is possible that a row home in a “blighted area” within an urban municipality may appraise for \$10,000, \$20,000 or \$30,000. The problem is the house may be worth a lot more to the family that is living there because the proceeds from the condemnation will not be sufficient to obtain replacement housing. The Legislature could require that when a residential property is taken for a redevelopment project, the condemnation award should be based on the higher of the appraised value, a premium above the appraised value (e.g. a 115% of appraised value), the consideration needed to obtain replacement housing within a prescribed geographic area (e.g. five miles or ten miles or within the county) or the appraised value to the developer under the redevelopment plan.

3. Remove Uncertainty. Current law requires eminent domain to be undertaken in accordance with the procedures set forth in the Eminent Domain Act. The Redevelopment Law requires that parcels to be acquired through eminent domain be identified in a redevelopment

plan. The Redevelopment Law could be amended to require that the redevelopment plan set out a process that the redeveloper will follow before a request for the use of eminent domain is made to the municipality or a schedule of acquisition of parcels so that some of the uncertainty imposed on the property owners is removed.

4. Improved Relocation Assistance. At present, Relocation Assistance Plans (“RAPs”) must be approved by the Department of Community Affairs before the plan can be implemented. These plans set forth the obligations of the municipality and the redeveloper to the persons and businesses that will need to be relocated. Improvements to the process could be a specific set of items that are required to be paid for and a requirement to pay actual expenses rather than average or budgeted expenses so the impact on relocated persons and businesses are mitigated.