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The Implications of Eminent Domain in a Post-Kelo World

Brock L. Toll

ABSTRACT. Eminent domain has been a government power for centuries. In most cases, eminent domain is used to provide essential public goods. Using it for the advantage of private entities is hotly debated. The 2005 U.S. Supreme Court decision in *Kelo vs. New London* allowed the use of eminent domain for privately driven endeavors. By examining the holdout problem, compensation and the effects of the *Kelo* case, national reform is determined as the best solution to private/public ventures using eminent domain.

I. Introduction

Of all tyrannies, a tyranny exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end, for they do so with the approval of their own conscience.

C.S. Lewis

The power of eminent domain and the classic freedom stemming from property rights are fundamentally opposed. For decades, property rights have been molded by increased government power made possible through judicial interpretation. To combat this trend, disgruntled citizens have taken the fight to activist governmental bodies. This movement is characterized by a dramatic mental shift in Americans, a phenomenon depicted by this anecdote from the 1950's. An Ohio businessman named Albert was on his way out of the office. He put on his coat and headed for the door when his father stopped him.

"Al, where are you going?"

"I'm going to meet the Ohio Department of Transportation," replied Al.

"How come?"

"Dad, you know the land we have on Mayfield Road? They're going to take that and put a highway right through it."

And Albert's father...looked at him and said, "That's going to be terrific for our land. How much do we have to pay them for that?"

Albert replied, "No, Dad, you have it mixed up. We don't pay them, they pay us."

At this point, Albert's father declared, "What a country." [Oder, 2006]

The tale chronicles a rose-colored frame of mind that some irritated property owners today know nothing about. Anger over condemnation of private property does hearken back to another pivotal time in American history. The Founding Fathers attempted to protect private property in the midst of building a nation. The Fifth Amendment's famous Takings Clause states, "nor shall private property be taken for public use, without just compensation" [Wikipedia, 2007]. While the intent may have been honorable, the clause implies that private property *can* be condemned under two pretenses: The property will be taken for a public use and the owner will be justly compensated.

Arthur Lee, an American Revolutionary from Virginia, defended the right to property in the early stages of the American democracy when he asserted, "The right of property is the guardian of every other right, and to deprive the people of this is, in fact, to deprive them of their liberty." The right to pursue and possess property has been a quintessential element of American freedom since the country's inception. Given these preconceptions, every American has a stake in the condition of property rights today. To impede property rights with eminent domain is to infringe on the foundation of America.

Ethically speaking, the taking of that which is not yours is a serious moral problem. By taking private property, the moral fortitude of America is called into question. From an economics perspective, the institution of private property is an essential element in strong economies. Solid private property rights give owners incentive to take care of what they own. This contributes to economic growth, trade, and efficient production. However, in the complex, shrinking world of today, eminent domain will surely not go away. In certain instances, eminent domain may even prove to be a legitimate tool for economic growth and development. To better understand the evolution, process, and future of eminent domain, this paper explores both sides of the issue to conclude that national reform is the best compromise.

II. Background

Eminent domain has recently become a hot-button issue. This is largely due to the June 2005 U.S. Supreme Court decision in *Kelo v. New London*. In a tight 5-4 decision, the Court instigated a public policy controversy in the timeless debate over private property rights [Dearth and Hardin, 2006, 21]. The ruling upheld the decision of the Connecticut Supreme Court in a case that allowed the taking of 15 private properties for an economic development project [Garrett and Rothstein, 2007, 5].

The plaintiffs in *Kelo* attempted to stop a development project that promised to bring a plethora of new retail and commercial entities to New London, including a new Pfizer pharmaceutical plant [Sandefur, 2006, 97]. Residents such as Susette Kelo were outraged that their homes could be taken to fulfill the planning objectives of local officials. The city objective was to revitalize Fort Trumbull, a 90 acre economically distressed area [Dearth and Hardin, 2006, 21]. In fact, the city was so depressed that it had endured three decades of economic and population decline that left only 44 percent of real property in the tax base. The development project would also create at least 1,000 new jobs, which would reduce an unemployment rate that was nearly double the state average [Zax and Malcolm, 2005, 85].

By not overturning the lower court's decision, property right activists argue that the Supreme Court expanded the power of eminent domain into the realm of development. In doing so, opponents see an incongruent ruling outside the customary use of eminent domain. The ruling seems to interpret the words "public use" as anything for a public purpose. The difference between these two concepts cuts to the crux of this matter. Traditionally, public use has meant structures open to the public such as highways, government buildings, and parks. Public purpose has been more comprehensive and less public in the strict sense of the word. A public purpose is any measure that conceivably benefits the public even if that means transferring private property from one individual to another. The evolution of eminent domain from a public use to a public purpose seems trivial, but the consequences are surely not. However, as prior judicial decisions show, the precedent may have already been set in motion. Even before Supreme Court Justice Stevens wrote the majority opinion in *Kelo*, there have been a number of key judicial decisions that broadened the Takings Clause.

In 1896, *Fallbrook Irrigation Dist. v. Bradley* dealt with a group of

land owners who were forced to pay for an irrigation ditch. The Supreme Court decided the “irrigation of arid land served a public purpose and the water was ‘put to’ a public use” [Garrett and Rothstein, 2007, 7]. According to the Bradley case, the shift of eminent domain from a public use to a public purpose was established before Kelo.

The boundaries of eminent domain would not be seriously tested for over half a century in the wake of the Bradley case. In 1954, *Berman v. Parker* addressed a Washington D.C. decision to condemn private properties under a blight designation, a historically broad tag in which local officials can declare a property obsolete. In the Berman case, a non-blighted property owner objected to the taking of his property just because adjacent properties were deemed blighted. The Supreme Court ruled in favor of the development, which furthered the doctrine of public purpose and affirmed the legal use of blight.

Thirty years later in *Hawaii Housing Authority v. Midkiff*, the Court broke up a land oligopoly in Hawaii. While the case was somewhat of an anomaly, the end result confirmed the forced legal transfer of private property from one individual to another [Garrett and Rothstein, 2007, 7].

Lastly, in the 1992 case of *National R.R. Passenger Corp. v. Boston & Maine Corp.*, the Court upheld the forced transfer of a rail line from one company to the next. A government entity determined that the original company could not sufficiently maintain the rail line. The Court agreed, stating they could not “strike down a condemnation...so long as the taking is rationally related to a conceivable public purpose” [Echeverria, 2005b, 1].

It is clear Kelo was not the first case to consider the power of eminent domain. Some argue that Kelo has only served to reaffirm these earlier decisions. Others will go as far as to say that Kelo actually tightened the use of eminent domain altogether. In the other corner, property rights activists want to strike down Kelo. These activists believe Kelo expanded government powers and diminished individual rights. In the end, there will always be two viewpoints to eminent domain. To determine the most efficient solution, I will explore both sides of this polarizing issue in more depth.

III. Diametrically Opposed – Both Sides of the Issue

As the case law suggests, the evolution of public use into a reasonable public purpose has marked a parallel progression in the use of eminent

domain. If eminent domain ever meant the transfer of private property to the government for public goods, it is no longer just that. The courts have sided with the overall economic progress of the whole rather than the individual. In practice, private development for the greater good and the government power of eminent domain go hand in hand. Lawrence O. Gostin, Director of the Georgetown Center for the Law and Public's Health, confirms this notion:

Government must make hard choices when faced with desperately poor and dilapidated inner cities. It is not possible to act boldly for the common good while privileging a small handful of property owners. Nor is it possible to revitalize communities without conferring some economic advantage on private developers [2006, 11].

With ardent support on both sides, the issue can be lost in a dizzying mess of rhetoric and politics. However, the sheer volume of discussion makes for clear points of contention to help form possible solutions.

A. KELO V. NEW LONDON—EXPANSION OR RETRACTION?

One popular disagreement stems from whether Kelo actually expanded the power of eminent domain. John D. Echeverria, Director of the Georgetown Environmental Law & Policy Institute, argues that the Court has already upheld the use of eminent domain for justifiable public purposes. Echeverria believes “it is incorrect to suggest that Kelo broke new ground and expanded government’s power of eminent domain” [2005b, 3]. He contends that the Kelo decision restricted the use of eminent domain for economic development. Echeverria defends his assertion on the principle components of the majority decision in Kelo. First, the Court held that any development project must be publicly heard and approved by city officials in order to emphasize comprehensive consideration. The majority opinion also made clear it would not blindly uphold “a one-to-one transfer of property, executed outside the confines of an integrated development plan” [Echeverria, 2005b, 4]. The Court’s decision strongly suggested “the developer chosen to implement the development be bound to carry out the redevelopment and serve as the public’s agent” [Echeverria, 2005b, 4]. Comprehensive consideration will force municipalities to explore all possibilities in their development plan.

By contractually binding the developer, citizens will have legal backing to increase the probability of project success.

Furthermore, Echeverria cites Supreme Court Justice Kennedy's decisive, concurring opinion. Justice Kennedy argued in favor of the New London redevelopment because essential factors applied. These aspects included the city wide depression in New London, which fueled the formulation of a "comprehensive development plan" without private influence present or procedural requirements neglected [Echeverria, 2005b, 4].

On the dissenting side, Supreme Court Justice O'Connor described prior precedents as "condemning land to eliminate an identifiable public harm caused by the property" [Castle Coalition, 2006, 1]. While this may be true, a municipality could identify any harm it sees fit to go forward with a self-proclaimed redevelopment project. In this sense, the speculative powers of eminent domain were not expanded beyond prior decisions even though the stated intentions were more explicit. Justice O'Connor has mischaracterized the situation. Clearly the crucial aforementioned cases did not go forward due solely to "an identifiable public harm." Other issues were at hand in many of the projects even if a public harm was a contributing factor. To say that a public harm was the overriding aspect of prior cases is a slanted opinion, which Justice O'Connor has put forth in an attempt to reverse previous decisions. The activist courts of the past have constrained the conservative, dissenting Justices in the Kelo decision. Subsequently, they are forced to restructure the precedent in order to reaffirm private property rights.

B. INCREASES IN EMINENT DOMAIN USAGE

In terms of actual numbers, anti-eminent domain lobbyist groups such as the Castle Coalition confirm an increase in condemnations since Kelo. According to their research, more than 10,000 condemnations were "filed or threatened" from 1998 to 2002 [2006, 4]. Since the Kelo decision, the Coalition reports over 5,000 condemnations during the period of June 2005 to June 2006 [2006, 4]. While these numbers may seem startling at first, the data represent individual condemnations, which sometimes were only threatened. All else equal, the sudden doubling in condemnations does seem troubling. However, the Coalition's findings hardly constitute any kind of irrational, wide-spread public harm.

The Castle Coalition attempts to make the public feel helpless with

these numbers, and show that political processes are not a strong enough check. Repeated abuse of eminent domain and a rational, comprehensive development plan should not occur simultaneously. This is a clear benefit of the Kelo case. A comprehensive development plan will not end corruption, but it will help rationally guided projects to succeed. If bad development projects occur, the political process can represent a solid check against unwarranted use of public power. In a case covered by *60 Minutes*, city officials in Lakewood, Ohio targeted a residential neighborhood. In the next general election, the mayor was not re-elected, and the unpopular and imprudent use of eminent domain was thwarted [Echeverria, 2005a, 2]. One Supreme Court case cannot cut through the corruption of man in one fell swoop, but it can point us in a better direction.

C. EMINENT DOMAIN FOR ECONOMIC GROWTH

The effectiveness of eminent domain for economic growth is greatly debated. In *The Taking of Prosperity* by Garrett and Rothstein, the authors assert that eminent domain for development has a negative economic effect [2007, 9]. In a simple example, the authors illustrate their viewpoint:

Suppose a local government takes \$10,000 from Peter and gives it to Paul, who plans to open a business. Paul then uses the \$10,000 to open his business, which creates tax revenue and jobs. From a social welfare point of view, Peter loses \$10,000 and the savings or consumption benefits of his \$10,000. Paul gains \$10,000 to open a business, and jobs are created. By taking the \$10,000 from Peter and giving it to Paul, the local government is essentially saying that Paul can create greater societal wealth with Peter's \$10,000 than Peter can. The same would be true if local governments paid Peter for his house and then gave the property to Paul for development purposes [2007, 9].

Garrett and Rothstein argue that replicating this scenario thousands or millions of times will result in a zero-sum gain [2007, 9]. Furthermore, they claim that given additional expenditures inherent in eminent domain proceedings, the net result will be negative [2007, 9].

Unfortunately, their argument is inherently flawed due to its

simplicity. They simply assume that Paul's venture will not create greater societal wealth. There is no basis for this assumption, yet they replicate it a million times to conclude that eminent domain is a zero-sum endeavor. If eminent domain is available to private/public enterprises, they have gained \$10,000 in property while Peter has been reimbursed at least \$10,000. Since many areas targeted by development projects are dilapidated, it is difficult to understand how new capital will not be a positive net gain. The resulting loss or gain on the project is shouldered by the development enterprise. The financial scrutiny by the private development company will not allow negative growth projects to go forward. When the private developer is obligated contractually, this will most certainly be true.

Eminent domain may not be the cause of economic growth, but it can help ensure positive growth projects are not derailed. "Eminent domain is essential...to proceed with redevelopment in an open and transparent fashion, and to achieve efficient and effective redevelopment" [Echeverria, 2005a, 3]. However, the Castle Coalition cites evidence to the contrary. In a Scottsdale, Arizona case, the Castle Coalition claims the threat of eminent domain "stonewalled \$2 billion of successful redevelopment for years" with money flowing in "only after Scottsdale removed the threat of eminent domain" [2007, 5]. This point is very plausible. However, it paints a dire picture of American property rights that simply is not true. Practically speaking, new developments need not worry about the use of eminent domain. These developments are the reason for eminent domain if land assembly problems occur. Subsequently, they will not be targeted in the future by eminent domain unless the property or area become obsolete or if a necessary public use is identified. This could happen anywhere, and the occurrence does not signal weak or irrational property rights.

D. IS EMINENT DOMAIN REQUIRED FOR DEVELOPMENT?

Property rights activists cite successful ventures such as Disney World and an entirely new city created in Howard County, Maryland as examples of development without eminent domain [Castle Coalition, 2006, 9]. In fact, the majority of development is completed without eminent domain. In Utah, redevelopment agencies have not been able to use eminent domain since March 2005, but construction has exceeded the previous year's expenditures by 28.7 percent [Castle Coalition, 2006, 9].

However, this measure does not account for inflation nor does it satisfactorily link the value of construction with the absence of eminent domain.

The real issue for development in relation to eminent domain is the refusal power of property owners to sell their property. This can cause serious problems in land assembly for development, especially when ideal tracts are identified. Real estate is a distinctive commodity in that every parcel is absolutely finite and geographically unique. The use of eminent domain spawns from the bundle of rights inherent in every property. In turn, the rights secured through private property leads to the holdout problem, an issue requiring further exploration.

IV. The Holdout Problem

The holdout problem is a term used to describe a property owner who refuses to sell his property. The economics of the holdout or assembly problem can be best explained using a model derived by Thomas J. Miceli in his book, *The Economic Approach to Law*. In figure 1, Miceli explores the economic advantage gained by property owners who choose to hold out.

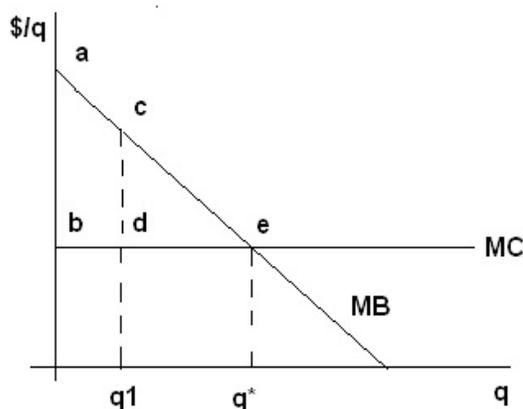
By examining the graph closely, the optimum number of parcels to be acquired can be found at q^* where the marginal cost and marginal benefit curves intersect. If the project is successfully completed, the surplus realized by the project can be found in the triangle *abe*. If any individual property owner chooses to holdout, the model is thrown out of equilibrium to q_1 . The holdout owner can then demand the true reservation price, represented by height *d*, plus any amount of the additional surplus represented by triangle *cde*. If other properties are required for the development to succeed, the project is essentially vetoed by one holdout owner. The triangle *cde* would then represent a deadweight loss to the development company. In practice, while holdout owners are usually in the minority, there tends to be more than one. Consequently, development projects face the holdout problem repeatedly. Obviously, “this problem poses a serious impediment to the completion of the project” [Miceli, 2004, 216].

In holdout scenarios, the property owner can disrupt a development project not only by holding out, but also by requiring an irrational amount of compensation. Miceli characterizes this advantage as granting a “significant monopoly power on individual owners, who can hold out for

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prices well in excess of their true valuations” [2004, 216]. In doing so, there is an economic market failure on the supply side caused by irrational expectations [Miceli, 2004, 216].

Figure 1



The Economic Approach to Law (Miceli, 2004, 217)

q^* = Equilibrium quantity of parcels

q_1 = Holdout point

MC = Reservation price of an individual parcel

MB = Marginal Benefit of project as a function of q

Miceli further explains the economics of the holdout problem in relation to public and private use in four distinct categories [2004, 218]:

1. Private ventures without an assembly problem.
2. Private ventures with an assembly problem.
3. Public ventures without an assembly problem.
4. Public ventures with an assembly problem.

In situation 1, a private entity with no assembly problem has no need for eminent domain. In situation 4, a public entity can lawfully use the power of eminent domain for a public good such as a park. However, situations 2 and 3 have conflicting values.

In situation 3, the public good being provided could justify eminent domain, but there is no assembly problem. If there is no holdout problem, “the transaction costs of using the market are typically less than that of using eminent domain” which minimizes the risk of government abuse [Miceli, 2004, 218].

Situation 2 represents the issue at hand in the Kelo case. A private entity cannot exercise the power of eminent domain, but the holdout problem calls for its use. In practice, the Courts have upheld numerous private/public development enterprises given a holdout problem. In economic evaluations, the “takings power should be extended to any party, public or private” that is facing a holdout problem [Miceli, 2004, 219]. By allowing eminent domain in privately driven ventures, value is not destroyed by the irrational reservation prices of holdout owners. Additionally, the mere threat of eminent domain will distinguish the holdout problem in most situations. This will ultimately save the extra expenses associated with litigation [Miceli and Segerson, 2006a, 14]. In the end, the best economic solution for the whole is realized when eminent domain can be utilized in holdout situations.

In cause-effect terms, the holdout problem represents the economic basis for the use of eminent domain. However, many eminent domain cases regarding private development are adjudicated in terms of public benefits. To address this misguided practice, Miceli and Segerson propose a two-pronged test [2006b, 6]. The use of eminent domain is justifiable if the project will concurrently create a social benefit and is hindered by a holdout problem. In an ideal world, the first restraint will ensure that all parties involved will be considered. Unfortunately, the test does not address whether or not the compensation will be just. The authors suggest that if the two-pronged test is met, “the fairness issue stemming from under-compensation is more appropriately addressed by an adjustment in the amount of compensation” [Miceli and Segerson, 2006b, 6]. By considering the level of compensation, the gap between the equilibrium quantity of a development project and the inefficiency created by a holdout can be lessened.

V. Compensation

The just compensation parameter of the Takings Clause requires a fair market value reimbursed to the owner of the condemned property. The total compensation in forced takings can be split into two parts, the fair

market value portion and a personal portion. The fair market value does not include the personal portion which includes a variety of less tangible factors such as economic loss, subjective loss, and dignitary harms [Garnett, 2006, 3]. To determine fair market value in forced sales is difficult. There is no true market to dictate the price. This is an essential concept of real estate appraisal. It is assumed under fair market evaluations that the “buyer and seller are typically motivated” [The Appraisal Institute, 2001, 23]. In projects threatening eminent domain, the buyer and sometimes even the seller are not typically motivated. For this reason, the personal portion is compensated individually to account for uncertainty in transactions affected by eminent domain.

Economic losses include relocation and replacement expenses above and beyond the market value of the condemned property. Compared to other costs, economic losses are much easier to quantify. The cost of boxes, a moving van, or a replacement home can be determined without much hassle. In reality, economic losses can be easily compensated in eminent domain cases.

An exceedingly difficult parameter to measure is subjective loss. Subjective value on a home, land or business can vary greatly between owners even if the parcels are similar. Sentimental connection can force an owner’s reservation price well above fair market value. These feelings can even lead to emotional trauma in the wake of condemnation, and must be considered if eminent domain is utilized [Garnett, 2006, 4].

Lastly, dignitary harms encompass a wide variety of problems. Owners may feel offended by the insinuation that their property could be put to better use. They can also feel targeted if other properties close to them were not condemned. Condemned owners who stay in the area may feel disenfranchised if the proposed benefits do not directly affect them [Garnett, 2006, 4]. Dignitary harms usually represent the most intangible factors. Therefore, they are the most difficult to compensate.

In many situations, the personal portion can be accounted for with more than fair market compensation. When dealing with properties not on the market, prices usually exceed market values by 20-25 percent [Garnett, 2006, 11]. The developers of a new GM plant in South Bend, Indiana utilized this concept. Under time constraints, General Motors paid well over market values to be fair to the condemned landowners. On average, the property owners received 157 percent of the average appraised value of their property [Garnett, 2006, 12]. Some owners received more in replacement expenses than they did for the value of their

house. While this project may be an outlier under the pressure of time, it shows that respecting the existing property owners can benefit all parties. Given the unique nature of this venture, the majority of development projects still need to be checked, and states have begun to balance eminent domain with full force.

VI. The Net Effect

The backlash to Kelo was fast and furious. The U.S. House of Representatives approved a resolution to criticize the condemnation power passed by the Court [Garrett and Rothstein, 2007, 5]. The House also considered a bill to disallow any federal funding for development in which eminent domain is present. A year after the decision, President Bush issued an executive order to address the issue. With such general language, the order did little to restrict the use of eminent domain. In fact, the order seems to uphold the Court's decision by stating property should only be taken "for the purpose of benefiting the general public" [Bush, 2006, 1].

The actions taken by the federal, legislative, and executive branches pale in comparison to the real changes at the state level. As of the November 2006 general election, 34 states have taken measures to address Kelo [Echeverria, 2006, 2]. The legislation ranges from statutes to constitutional amendments or even both. States have not let the Kelo decision rest. According to the National Conference of State Legislatures, the state legislation falls into seven general categories [NCSL, 2006, 1]:

- Prohibiting eminent domain for economic development purposes, to generate tax revenue, or to transfer private property to another private entity.
- Defining what constitutes "public use," generally the possession, occupation or enjoyment of the property by the public at large, public agencies or public utilities.
- Restricting eminent domain to blighted properties and redefining what constitutes blight to emphasize detriment to public health or safety.
- Requiring greater public notice, more public hearings, negotiation in good faith with landowners and approval by elected governing bodies.

- Requiring compensation greater than fair market value where property condemned is the principal residence.
- Placing a moratorium on eminent domain for economic development.
- Establishing legislative study committees or stakeholder task forces to study and report back to legislature with findings.

As evidenced by the categories, the states differ greatly in their response to Kelo. State variations represent alternative approaches as they are “productively experimenting with different approaches to policy reform in this important and controversial area” [Echeverria, 2006, 1].

One issue that remains unclear is the definition of blight and public use. Due to vague definitions, many states’ policies are empty. To clamp down on eminent domain but leave ambiguous definitions will garner mixed results. Many state actions are misplaced with backdoors left open. For instance, California can condemn properties under blight designations for “substandard design, inadequate size given present standards and market conditions, or lack of parking” [Sandefur, 2006, 105]. While these issues may require attention, they are too vague to automatically make a property blighted. Worse yet, Delaware law only requires local officials to tell property owners *why* they have chosen to condemn their property [Sandefur, 2006, 106]. While the actions of many states remain woefully insufficient to adequately protect property rights, the quick action of states has laid the foundation for more efficient and effective long-run solutions. Ultimately, the infrastructure must be built on a higher level to ensure equitable property rights nationwide.

VII. Policy Recommendations: The Future of Eminent Domain

To protect property rights, national law must be invoked to reconcile the power of eminent domain with private property rights. States should be allowed to tighten eminent domain restrictions as they see fit. However, the federal legislature must intervene with clear, minimum standards in order to shelter property rights and the freedom derived therefrom. In doing so, property rights will be solidified yet tempered with the government necessity to use eminent domain.

Before the states’ backlash, the issue of eminent domain was largely

left up to precedent of court judgments. However, when defining property rights in relation to the needs of all citizens, the responsibility must fall on the “democratically elected representatives of the people rather than the judiciary” [Gostin, 2006, 11]. Judges simply cannot be allowed to pass decisions which empower states to exploit property rights by the conscionable standards of local officials. Changes must be implemented on a wide scale in three key realms: Public, Private, and Procedural.

A. THE PUBLIC ROLE

As stated earlier, to consider eminent domain under perceived public benefits may be a misplaced notion. However, no development project should go forward unless concrete gains are present in the comprehensive plan. If private entities demonstrate public profit, public support will be garnered. In turn, broad public appeal will lead to decreased need for eminent domain. If the demand for a project increases, the supply of properties in question will also increase. This creates a fair market value situation in which all parties can benefit.

On a smaller scale, it is essential to allow individual community members initiate development project hearings democratically. Projects must be made public from the beginning so that accountability can be administered by the community [Zax and Malcolm, 2005, 86]. The developer must be present during town meetings, and referendums with a majority vote should veto bad projects. These measures will put the onus on development companies and local governments to work with the community as a whole. If the public is given more of a say in the project, the ultimate power will move closer to equilibrium to create a more symbiotic relationship.

Lastly, an internal check and balance must be implemented. State wide review boards could rule on the use of eminent domain. These bodies would modify the use of eminent domain to fit the economic concerns of individual states. It would be prudent to utilize the expertise of unbiased real estate professionals. These positions could be appointed by the governor and then blended with at least two elected board members. Establishing eminent domain review boards would take the power out of the hands of activist judges and entrust it with professionals and elected officials who understand the situation more completely.

B. PRIVATE RESPONSIBILITY

If private entities are included in development projects, the private developer must be selected fairly and held to task throughout the project [Zax and Malcolm, 2005, 86]. To avoid government collusion with private entities, development plans must be formed before a private developer is brought into the process. After a comprehensive plan is in place, city planners can search for the best development agency to carry out their plan. If the developer is chosen from a pool of candidates, the public can rest assured that market forces chose the developer, not secret, back-handed agreements.

After a development agency is selected, assurances must be made by the developer to the municipality. The phony promises of profit driven businessmen will not suffice. The developer must be obligated to fulfill the promises set forth in the comprehensive plan. This can be done in a variety of ways. Perhaps the most stringent is contractual obligation. To a lesser extent, the developer could forge dual ownership with the city to ensure a check and balance partnership. In cases of complete failure, the developer will be forced to hand over ownership back to the city. With the city in control of the property, local officials can then attempt the development again with a new agency.

C. PROCEDURAL POSSIBILITIES

Since local governments are intertwined with any publicly planned development project, they must remain involved throughout the life of the venture. Zax and Malcolm suggest a governmental role in a project “would provide additional evidence of the continuing public purposes served by condemnation for economic development” [2005, 87].

In addition to expanded public/private partnerships, prescriptive guidelines must be implemented to guide projects. Local officials should be the initiators of development, not the authority on how the development should be carried out. Minimum procedural guidelines will ensure a standard level of expectations, thus decreasing the incidence of bad projects and poor management due to lack of guidance.

On top of statutory guidelines, improvements must be made to the land assembly process. Developers must attempt to negotiate with property owners before eminent domain is threatened. This procedure will ensure fair conditions are present before eminent domain is used. During

negotiations, developers must be required to attain at least two separate appraisals to establish a minimum value. This value will be used to determine a fair above market value price given intangible factors. While it may be difficult to set a national standard, an arranged premium for any condemned property can be established. Indiana is a primary example. Any condemned property used as a primary residence must be compensated at 150 percent of fair market value [NCSL, 2006, 3].

The last procedure that must be remedied is definitional. A clear, working description of blight must be established. Current blight definitions create a back door for many local officials to initiate questionable uses of eminent domain. Supreme Court Justice Kennedy addressed this issue during Kelo oral arguments. Justice Kennedy asserted that blight will always “be in the eye of the beholder” [Zax and Malcolm, 2005, 88]. The abuse of blight will be stifled if this broad concept is narrowed. Many states have already begun to constrict the definition. In Alabama, redevelopment projects can only declare properties blighted if they are detrimental to the public health and safety [NCSL, 2006, 2]. While this definition still remains vague enough for the imaginative to abuse, the intent is more restrictive than many current loophole, senseless, or dated definitions of blight.

VIII. Conclusion

Kelo vs. New London revived a heated debate over property rights. The decision handed down better intentions for the use of eminent domain than judgments of the past. It also forced many states to take a closer look at the issue, which has effectively begun the discussion for wide-scale reform. In terms of the lawful use of eminent domain, the holdout problem provides the economic justification for condemnation. Going forward, national reform can eliminate the inefficiencies of developments using eminent domain. In doing so, the benefits will be realized with much greater scope and significance in every project.

In many developments there are only a handful of individuals delaying project success. The positive benefits incurred by the majority of affected property owners are rarely reported. If both sides are weighed fairly, should economic progress be thwarted because of a small minority’s objections? At any rate, eminent domain will continue to be a tool used by governments to provide public essentials, and it will forever remain a debatable issue in private development. To bring both sides

closer together, federal legislation drafted to install minimum standards will more efficiently allocate the economic and societal rewards. Most importantly, reform can effectively strike a balance between the power of eminent domain and the supreme freedom associated with property rights.

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