

WAPA LEGAL ALERT

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Condemnation for Private Redevelopment

In my January 2005 “WAPA Legal Update” and the presentation I gave at WAPA’s Planning Conference in May, I reported on a forthcoming decision to be made by the U.S. Supreme Court which was likely to be the most significant land use decision to be made by the Supreme Court in decades. Based on the amount of press coverage the decision in *Kelo v. City of New London* has received since the Court decided this issue in a 5-4 decision on June 23, 2005, it looks as if my “hype” was justified. I also believe that the consequences of this decision nationally and in Wisconsin are deserving of a special alert to WAPA members.

Due to the enormous media coverage which summarized the facts and holding in *Kelo*, the purpose of this “Alert” is to focus on the possible impact of the *Kelo* decision in Wisconsin. There are a few often overlooked facts in *Kelo* which are particularly relevant.

The *Kelo* case did not involve a blight determination. Instead, the case interpreted a Connecticut statute that allowed condemnation for economic development purposes. No such statute currently exists in Wisconsin. Second, despite arguments made in blistering dissents written by Justices O’Connor and Thomas, I do not believe that the facts of *Kelo* supported their contention that what the City of New London was doing was condemning property and transferring it to another property owner for the sole purpose of bestowing a private benefit on a particular property owner.

Another fact sometimes overlooked in *Kelo* was that the City had established a New London Development Corporation (“NLDC”), a private non-profit entity years before Pfizer Inc. had announced that it would build a \$300 million research facility on a site immediately adjacent to the area designated for economic development revitalization. Therefore, the NLDC intended that its development plan would capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract. Finally, the NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area involved but the negotiations with

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some of the private homeowners failed which gave rise to the condemnation proceedings.

To better understand the significance of the *Kelo* decision in Wisconsin, it is helpful to summarize the two sets of statutes that authorize the use of condemnation in Wisconsin for certain purposes.

The traditional basis for the use of condemnation is outlined in Wis. Stat. Ch. 32. In this statutory scheme, condemnation may be invoked by municipal government to acquire property for “public use.” Although some state courts in the United States are not in agreement as to the test to be applied to determine whether a use is a “public use” or not, Wisconsin clearly supports a more literal interpretation of this phrase. In other words, our courts have held that the exercise of the power of eminent domain implies a direct possession, occupation, and enjoyment of the land by the public or public agencies. Because Ch. 32 can only be used to acquire public property for such uses as to widen a road, to acquire parkland, or to expand the public water and sewer system, the holding in *Kelo* does not change the ability of Wisconsin municipalities to condemn property by using Ch. 32 of the Wisconsin Statutes as a legal basis.

The second method that can be used by a local government to condemn property is pursuant to the establishment of a redevelopment district as provided for in Wis. Stat. § 66.1333. Once a city has determined that at least 50% of the property in a particular proposed redevelopment district is blighted, the Wisconsin courts have said that the blight finding is a legislative determination that the acquisition, clearance, and redevelopment of any property in the district is a public use.

The most relevant case in Wisconsin interpreting the powers of a city in the redevelopment district context, is *Grunwald v. Community Development Authority of the City of West Allis*, which was decided in 1996. In *Grunwald*, despite the fact that the Grunwald’s property was only several years old and not blighted, the court said that because the City of West Allis had determined that the area was blighted, the municipality could then condemn sound, conforming buildings if they were located in a blighted area. Moreover, the court held that the condemned property may be in public use for ownership for only a short period of time but that that fact did not defeat the right to condemn.

Therefore, even before *Kelo* was decided, a Wisconsin municipality could condemn property and then transfer it to another redevelopment agency or even another property owner since our courts concluded that the public would benefit and that the benefit to the private property owner was incidental.

Therefore, the only fact situation which I could conceive of where a Wisconsin municipality would not be legally permitted to condemn property in the context of a redevelopment district is overwhelming evidence that the condemnation and ultimate transfer of the property was merely a smoke screen to bestow benefit to another private property owner. It is hard to imagine how a municipality would not be successful in its effort to implement a comprehensive redevelopment plan by using the power of eminent domain.

By far the most significant aspect of the *Kelo* case for Wisconsin officials, developers and planners is not so much the end result of the holding, but how it got there. The court reached its conclusion that significant deference should be given to a local legislative decision when that decision is based on a carefully considered comprehensive plan. Thus, the decision in *Kelo* is based on a number of assumptions that are near and dear to planners.

First, the court embraced the argument that the private sector often cannot accomplish the job of economic development without governmental assistance, including the use of condemnation. Second, the court recognizes that eminent domain can be abused but it stated that careful planning and public participation can limit that abuse.

The 25 briefs filed on behalf of *Kelo*, the 12 briefs filed in support of the City of New London, the vigorous oral arguments and the cogent majority, concurring and dissenting opinions are reflective of the significance of this decision. The *Kelo* case was one of five decisions made by the U.S. Supreme Court in this term wherein an *amicus curiae* brief filed by the American Planning Association was persuasive in upholding the importance of planning in land use decisions.

However, it was the briefs filed on behalf of *Kelo* that raised some eyebrows since an interesting coalition was formed. Besides the predictable property rights advocates, *Kelo's* position was also supported by John Norquist and the NAACP, among other liberal organizations. Their position was that to allow government to take property solely for public purposes was bad enough but to extend the concept of public purpose to encompass any economically beneficial goal guaranteed that those losses will fall disproportionately on poor communities.

It is somewhat ironic that in Justice O'Connor's last written opinion, she was on the losing side. She concluded that nothing now prevented a state from replacing any Motel 6 with a Ritz Carlton or any home with a shopping mall or any farm with a factory. She concluded by saying that the fallout from this decision would not be random. Instead, she argued that the beneficiaries were likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms.

My conclusion is that at least in Wisconsin there are not many examples of governmental abuse of the eminent domain power which would justify Justice O'Connor's concern. In her dissent, she cites a five-year state-by-state report examining the abuse of eminent domain that was published in 2003.² However, I looked at the one example of abuse in Wisconsin and that example cited was fairly minor as compared to what had happened in other states.

The only instance of what is termed "private use condemnation" was a situation where the City of Milwaukee in 2001 created a tax incremental financing district and authorized the Milwaukee Redevelopment Authority to begin eminent domain proceedings to acquire the 15-acres of land needed to build a 156,000 square foot Super K-Mart store. Twelve buildings would have been demolished and dozens of small local businesses would have been removed to make way for the discount retail giant. However, the City put an abrupt hold on all plans to condemn properties for the project when K-Mart filed bankruptcy protection in February 2002. However, the City refused to take the property until K-Mart's financial picture became clear. The project was ultimately abandoned by the City but it did appear as if the purpose of creating the TIF District and condemning the businesses was just to give the property to K-Mart.

Although I do not believe that the *Kelo* decision, in and of itself, will have significant impact on how Wisconsin courts view these matters, I do think that *Kelo* could result in significant legislative changes in Wisconsin. Senator Dave Zien and Representative Jeff Wood are in the process of drafting a "Property Rights Protection Act" which they say would restore private property rights and prohibit government from hiding behind the eminent domain law to confiscate private property for the benefit of corporations and private companies. In addition, the CRG Network which is a conservative think-tank is also launching efforts to strengthen state statutes to protect Wisconsinites against what they consider to be a disgraceful attack on personal property rights. One possible legislative change, is that Wis. Stat. § 66.1333 could be amended so that it is much more in keeping with the stringent eminent domain statute as interpreted by the courts in Ch. 32 of the Wisconsin Statutes. Jordan Lamb and I will monitor future legal and legislative developments that occur as a result of the decision in *Kelo*.

² Institute for Justice, D. Berlinger, Public Power, Private Gain: five-year, state-by-state report examining the abuse of eminent domain (2003).