

Keys to Kelo: Unlocking the Secrets of Eminent Domain

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Brownfields 2006
Recent Developments in the
Exercise of Eminent Domain Power

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Topics to be covered

Case study: If you build it, they will come:
(The new stadium in Washington D.C.)

Post - *Kelo* cases and trends

Case Study: Steelton, PA

Post- *Kelo* legislation and trends

Summary

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Case Study: The Washington Nationals Stadium

Long-standing Master Plan:

Called for new stadium where old stadium existed

Called for mixed use on southeast waterfront (office, retail and residential; no mention of stadium, convention center or similar use)

Case Study: The Washington Nationals Stadium

Background

Suddenly last summer: Between August of 2004 when MLB awarded the team to Washington, and November, everything changed move to waterfront

Other jewel stadiums on waterfront

Higher cost due to presence of private property while existing location is publicly owned and basically vacant

Case Study: The Washington Nationals Stadium

The Statute

The ownership, of a publicly financed stadium in the District of Columbia for use primarily for professional athletic team events is a municipal use that is in the interest of, and for the benefit of, the citizens of the District of Columbia because such a publicly-owned stadium or arena will contribute to the social and economic well-being of the citizens.

Case Study: The Washington Nationals Stadium

The Statute (*con t*)

To further that interest, it is appropriate for the District of Columbia to pay all or a portion of the cost of constructing, developing, or renovating a stadium.

Case Study: The Washington Nationals Stadium

The Statute (*con t*)

To require the review of cost estimates by the Chief Financial Officer and, if the re-estimated cost exceeds \$165 million, to deem the designated site financially unavailable and to require the Mayor and the Sports and Entertainment Commission to pursue a replacement site



Case Study: The Washington Nationals Stadium

The Statute (*con t*)

prior to the date upon which the District enters into any obligation to acquire the primary ballpark site the Chief Financial Officer shall re-estimate the costs to the District for land acquisition and infrastructure and provide a report on this re-estimate to the Mayor and the Council.

Case Study: The Washington Nationals Stadium

The Statute (*con t*)

Estimate must include:

*One separate appraisal of each parcel
of land to be acquired.*

Case Study: The Washington Nationals Stadium

The Statute (*con t*)

If the total amount of these re-estimated costs to the District exceeds \$165 million, the primary ballpark site *shall be deemed financially unavailable by the District* pursuant to this title. The Mayor and the Sports and Entertainment Commission *shall pursue replacement of the primary ballpark site with a substantially less costly site*

Case Study: The Washington Nationals Stadium

The Statute (*con t*)

if this site shall be unavailable or infeasible for the timely completion of a ballpark relying only on the funding authority provided in this title, any designated alternative site in the District of Columbia . . . , . . . will be available

Case Study: The Washington Nationals Stadium

The Legislature s Intent

From hearings of the Council:

The idea is a two step process: One, if in fact, this number is reached, the trigger is set off, the site is then deemed unavailable. It s unavailable. That s what the legislation says. It is unavailable. It s written in black and white unavailable.

The Legislature's Intent



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The Evidence

Re-estimate of \$161.5 million (law capped cost at \$165 million)

Individual appraisals were not obtained

Case Study: The Washington Nationals Stadium

The Evidence (*con t*)

The Deputy Mayor testified:

it was possible to obtain separate
standard appraisals of each parcel

There s no reason why he can t do
appraisals

Case Study: The Washington Nationals Stadium

The Law

Kelo said: What is the public use and purpose as defined by the legislature?

Kelo said: Defer to the legislature's determination of public use.

Case Study: The Washington Nationals Stadium

The Law

Public purpose here: Building a ballpark on this particular site will benefit the public if a valid re-estimate of the cost shows that it will not exceed \$165 million.



Case Study: The Washington Nationals Stadium

The Federal Court Decision

While the Ballpark statutes clearly authorize the District to proceed with plans to acquire land in the primary ballpark site only if the cost re-estimate does not exceed \$165 million, this limitation operates as an independent condition, and not as an ingredient of the public use finding.

Case Study: The Washington Nationals Stadium

The Federal Court Decision (*con t*)

The \$165 million condition set by the City Council may well have a bearing on the District's authority to proceed to acquire the primary ballpark site but it is not a constitutional requirement and may not be made so by a vote of the District of Columbia legislature.

Case Study: The Washington Nationals Stadium

The Federal Court Decision (*con t*)

The \$165 million figure is neither an express element of the public use finding nor an express limitation on it

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The Federal Court Decision (*con t*)

Did the Court provide its views on what the public purpose was or did it defer to the legislature?

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The Federal Court Decision (*con t*)

Whether the District complied with the Council's mandate to conduct a cost review using certain methods is a dispute of local law that may be properly determined by local courts

Case Study: The Washington Nationals Stadium

The Local Court Decision (*con t*)

Defendants have no right under District law to challenge the question of whether the \$165 million trigger was met.

Case Study: The Washington Nationals Stadium

Post Script

In February of 2006, as appeals were pending, the District of Columbia changed the law:

It removed the cap on land acquisition costs for the stadium

Recent cases

13 cases brought in 10 states (including D.C. over the last year

Georgia, Minnesota, New Jersey (2) ,
New York (2), Ohio, Oklahoma,
Pennsylvania, Rhode Island, D.C. (3)

Recent cases

9 brought in state court

4 brought in federal court

Recent cases

8 cases upheld the condemnation (or the statute authorizing it)

4 cases found the taking to be unconstitutional

1 remains undecided

Recent cases

Bases for decision varied widely

If public purpose is there (remove slum) then condemnation and transfer to private party may not matter.

Likely success of public purpose may not matter. (D.C., Minnesota)

Presence of well considered master plan.

Recent cases

Bases for decision varied widely *(con t)*

Deference to legislative determination (need for open space) regardless of evidence of other motive (limit single family residences) (NJ)

Fact that another private party might benefit irrelevant if public purpose is also present (NJ)

Recent cases

Bases for decision varied widely (*con t*)

Takings claims as untimely because it was not brought until eminent domain power was actually used, rather than when resolution authorizing power was enacted. (NY)

Preliminary injunction to prevent taking denied on the grounds that case was not yet ripe since, although law was passed, eminent domain power was not yet used. (D.C)

Recent cases

Unusual use of Kelo

Developer who was shut out of project by city that used condemnation authority used *Kelo* to argue that city was motivated by desire to favor another developer. (NJ)

Recent cases

Legislature s definition of public purpose can be crucial

Ohio

Trial court permitted evidence from experts that area was not yet deteriorated (standard in law authorizing taking) but deferred to legislature that it area would become so.

Appellate court said that purely financial benefit is insufficient as a matter of law under Ohio Constitution.

Phrase deteriorating area void for vagueness and therefore unconstitutional.

Recent cases

Legislature s definition of public purpose can be crucial (*con t*)

Oklahoma

Economic benefit alone insufficient
public use under State Constitution

Recent cases

Legislature s definition of public purpose can be crucial (*con t*)

Pennsylvania

Taking to eliminate blighted areas not valid public purpose where it is not part of a broader economic development plan and instead was intended to provide religious organization with property.

Recent cases

Legislature s definition of public purpose can be crucial (*con t*)

Rhode Island

Property condemnation not part of broader purpose where it was done at request of landowner
(public entity unable to reach agreement with lessee on lease payments)

Recent cases

**Legislature s definition of public purpose can be crucial
- or not-**

District of Columbia

Council may not expand or contract scope of public use by vote of legislature

Recent Cases:

Lessons Learned

Read the state law authorizing the taking
Carefully consider the legislative record
to support the taking- master plan
Kelo is not a license to cut a back-
room deal

Recent legislative proposals

13 states had measures on the ballot
this year

Arizona, California, Florida, Georgia,
Idaho, Louisiana, Michigan, Montana,
Nevada, New Hampshire, North
Dakota, Oregon, South Carolina

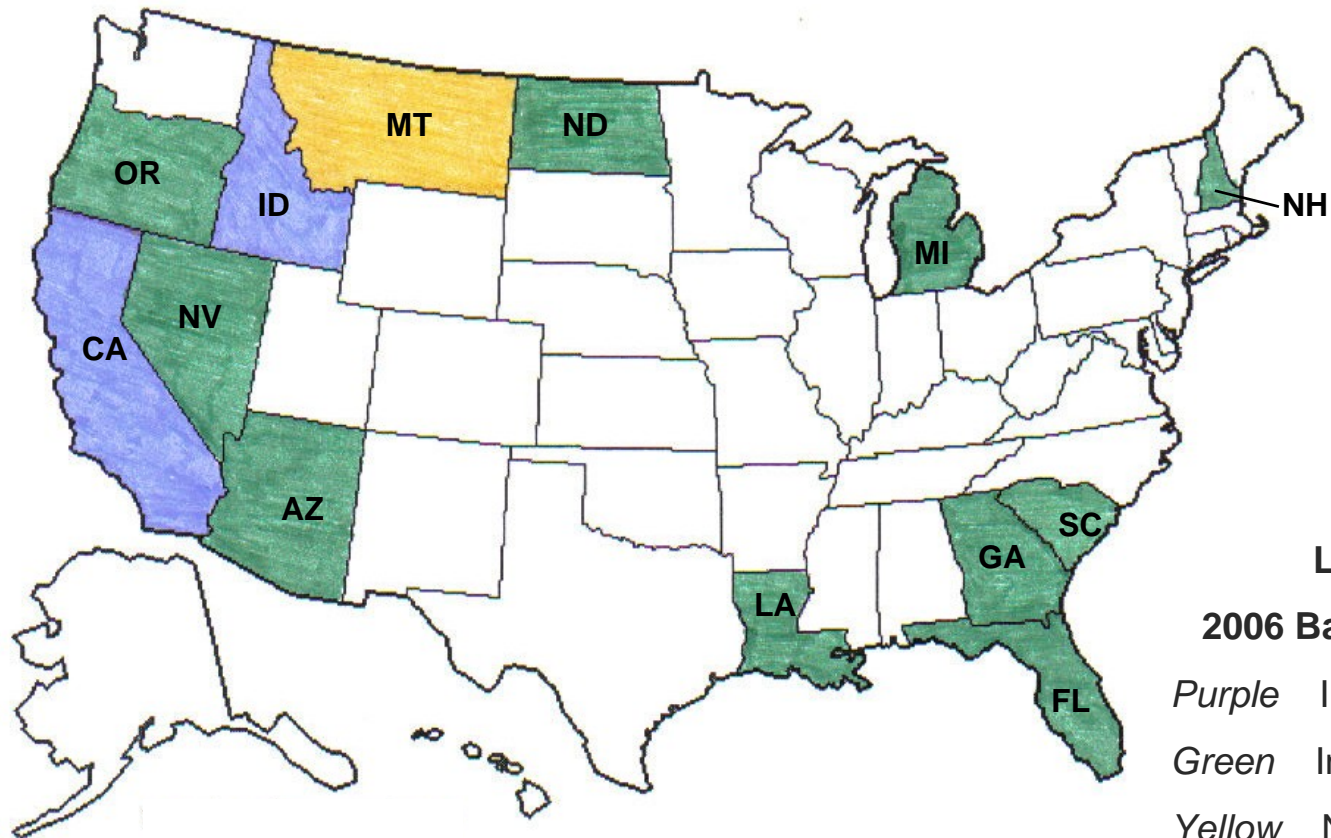
Recent legislative proposals

Results

Initiatives approved: 11

Initiatives defeated: 2

Ballot Initiatives



LEGEND

2006 Ballot Initiatives

- Purple* Initiative Failed
- Green* Initiative Passed
- Yellow* Not Counted

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Recent legislative proposals

Many limit authorization by defining public use:

Some list examples of public uses. (Arizona, Georgia, Idaho, Louisiana, Montana)

Some exclude public benefits of economic development from this use .(Arizona, Georgia, Idaho, Louisiana, North Dakota, South Carolina)

Some place a higher burden on public authority to prove public use. (Arizona, Michigan)

Recent legislative proposals

Examples of public uses:

Utilities

Abandoned property

Direct health and safety threat

Use by public agencies

Roads and channels of trade

Recent legislative proposals

Some further limit authorization by:

Prohibiting transfer to private parties except with legislative approval. (Florida, South Carolina)

Prohibiting transfer to private parties regardless of use. (Idaho, Nevada)

Recent legislative proposals

Some further limit authorization by:

Prohibiting transfer to private parties
except for limited public purposes.
(California, New Hampshire, Montana,
North Dakota, Oregon)

Prohibiting transfer purely for economic
benefits. (Arizona, Idaho)

Recent legislative proposals

Some have gaps and do not define public use or private use

(California, Michigan, Nevada, New Hampshire, North Dakota, South Carolina)

Issues

What is public use ?

(not always defined)

How to prove intent to convey to private party?

How does the taking authority build a record to demonstrate it is acting within the scope of the statute?

How to avoid these disputes?

Recent legislative proposals

Issues

How far can the court go in reviewing the basis for the taking?

What happens in mixed motive cases?

What role can/should an interested developer play?

What happens when the Town Council says one thing and the condemning authority says something else?

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