

# K&LNGAlert

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## Real Estate

### United States: Private Development Through Eminent Domain *May* Be Permissible

#### NEW SUPREME COURT DECISION PERMITS GOVERNMENTS TO CONDEMN LAND FOR BUSINESS DEVELOPMENT UNDER CERTAIN CIRCUMSTANCES

On June 23, 2005, the United States Supreme Court declared in a 5 to 4 decision that governments may use their eminent domain powers to condemn property for the purpose of spurring private development in certain economically distressed areas. Specifically, a slim majority of the Supreme Court held that economic redevelopment meets the “public use” requirement of the Takings Clause of the Fifth Amendment to the United States Constitution under certain circumstances. This ruling may broadly impact development and redevelopment projects across the nation. However, the narrow majority (composed of a four justice plurality plus a concurring opinion from Justice Kennedy), coupled with the forthcoming change in the Court’s composition, cautions against an overly expansive reading of what the Court did in this case or is likely to do in the future. Accordingly, those interested in economic development projects should exercise particular care when considering use of eminent domain in aid of such development efforts.

The *Kelo v. City of New London* decision ends a five-year battle between the City of New London, Connecticut, and a group of home and business owners in the Fort Trumbull area of the City. When a major military installation closed in 1996, the City lost over 1,500 jobs, and its unemployment rate was soon nearly double that of the rest of the state. Seeking to revitalize its ailing economy, the City hoped to capitalize on the arrival of a major pharmaceutical research facility in the area. In January 2000 the City approved a comprehensive plan to redevelop 90 acres on a peninsula next to the research facility for use as office space, retail space, a hotel, and new residences.

Most of the peninsula’s existing residents voluntarily sold their properties to the City. However, when a group of property owners led by Suzette Kelo refused to sell, the City, acting through its development agency, exercised its power of eminent domain to condemn their properties. Kelo and the others filed suit, claiming that the City had no right to take their properties because economic development was not a “public use” under the constitutions of either Connecticut or the United States.

The Court rejected the owners’ contention that economic development can never satisfy the public use requirement of the Takings Clause. Instead, the Court examined the facts of the City’s redevelopment efforts to determine if the takings satisfied the public use requirement. The Court noted that the City had previously declared the peninsula to be a “distressed area,” and that the City was following the comprehensive and thoroughly deliberated development plan it had previously created with the goal of providing appreciable benefits to the community. Under these carefully defined circumstances, the Court approved the City’s actions. The Court also rejected the owners’ contention that courts should require a “reasonable certainty” that the expected public benefits will actually accrue from a condemnation, and declined to second guess the City’s “considered judgments” about the efficacy of its development plan.

In addition, the Court pointed out that nothing prevents a state from adopting measures that restrict its own takings powers. Since the Court’s decision applies exclusively to federal law, each state has the right to decide if economic development is a valid “public use”

under its own state constitution. Therefore, each state may have requirements that differ from the federal condemnation provisions. In fact, some states have already begun making changes to their own laws that may limit the effect of the new ruling.

While the majority of the Court approved of New London's use of eminent domain in this particular situation—where the economic distress of the community and the rationale behind the development project were well documented—the majority, concurring, and dissenting opinions of the divided Court underscore the need for a careful reading and a cautious approach. The fifth concurring vote from Justice Kennedy came with a cautionary separate opinion, warning that closer scrutiny might be given to situations where there is a plausible accusation of impermissible favoritism to private parties. Moreover, with the retirement of Justice O'Connor and other possible changes to the Court's composition, the membership of the Court may become more conservative. As signaled by the four dissenting Justices in *Kelo*, the Court's current conservative wing is significantly more hostile to finding "public use" where a development involves taking of private property for redevelopment by private entities.

Local government use of condemnation to assist redevelopment efforts has been subject to increased

criticism and challenge in recent years. The Court's holding regarding public use and its deference to the judgment of elected officials may provide new life to these efforts and opportunities for private developers, but changes to the Court on the near horizon merit a close watch and judicious use of the eminent domain power. Because of the changes the *Kelo* decision has made in federal law and the changes it may create in state law, the new constitutional ruling could have a significant impact on government's willingness and ability to promote economic development by exercise of its power of condemnation. Given the intricate legal questions involved in condemnation actions and questions of "public use," developers, governmental agencies, and others interested in redevelopment projects should contact us to discuss how the new ruling might impact any individual situations.

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