

THE INFLUENCE OF *KELO V. CITY OF NEW LONDON*, *CONNECTICUT* ON THE USE OF EMINENT DOMAIN IN PLACE MARKETING AND ECONOMIC DEVELOPMENT

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*Seeking to enhance the economic growth of a respective business ecosystem, one tool in the governmental place marketer's (place marketer) arsenal that has recently come under scrutiny is its ability to expropriate private property through eminent domain when assimilating parcels of land. While the practice of eminent domain by a sovereign government is rooted deep in United States law, its use in economic development initiatives was challenged in Connecticut when a recent ruling by the United States Supreme Court in *Kelo v. The City of New London* upheld a taking of property by the City of New London for a different kind of public use. The negative public reaction to this ruling spurred state and federal actions that sought to constrict the power of eminent domain in place marketing. This manuscript provides a review of the *Kelo* case and discusses the governmental place marketing implications associated with its ruling.*

INTRODUCTION

The development of business ecosystems and an emphasis on the branding of places has highlighted the importance of marketing in the growth and decline of communities throughout the United States (Hunt 1981; Kerr 2006; Kotler and Gertner 2002; Layton and Grossbart 2006; Ulaga, Sharma and Krishnan 2002). When governments seek to enhance the economic growth of their respective business ecosystems, place marketers under the authority of municipalities, regions, states, etc. often combine parcels of land with items like tax and financing incentives to create market offerings that will hopefully attract and/or grow businesses, jobs, and tax revenue within their communities (Kotler, Haider and Rein 1993; Mastroieni 2007). One tool in the governmental place marketer's arsenal that has recently come under scrutiny is their ability to expropriate private property through eminent domain when assimilating parcels of land.

While the practice of eminent domain by a sovereign government is deeply embedded in United States law, and it is accepted that a government has the right to take private property for a public use such as a public park or road, a recent ruling by the United States Supreme Court in *Kelo v. The City of New London* upheld a taking by the City of New London for a different kind of public use (Greenhut 2006; Main 2007). The City took private property for the public use of "economic development," that, in reality, resulted in the property being sold by the City to another private party who would develop the property in the City's hopes of creating more jobs and tax revenue.

Since *Kelo*, the power of eminent domain exercised for the public purpose of economic development has come under intense scrutiny. Because this ruling was not well received by many private land owners who feared the taking of their own property for economic development purposes, it initiated a society-to-marketing movement that raised the issue of eminent domain within State legislatures throughout the United States. The actions taken

by States will be detailed further in this manuscript, but it is important to note that public policy is currently being used to influence marketing practices and the related social consequences which stem from the actions taken by place marketers (Fisk 1982; Redmond 2005). Following is an examination of the *Kelo* case and its effect on the practice of place marketing.

BACKGROUND OF THE LAW

Ownership, with its attendant right to exercise control over the use and alienation of real property, initially flowed from the owners' physical ability to occupy and hold that property against all challengers. The establishment of the concept of the government and its powers of sovereignty, the absolute right of the government to control everything within its own territory, removed the contest for the rights of ownership from the physical arena to that of laws. The federal form of government adopted by the United States divides sovereign power over the territory of the United States between the national (federal) government and the fifty member states. The concept of eminent domain is embraced at both levels of government.

The Fifth Amendment of the U.S. Constitution requires that private property be taken only when three requirements are met. It must be taken (1) by a procedure that grants due process of law to those whose property is to be taken, (2) payment of just compensation must be made for that which is taken, and (3) it must be taken for a public purpose. On the question of whether the property owner was given "due process," the courts have largely agreed that due process can be satisfied by minimally requiring that notice of the taking of the property and the opportunity to be heard be given to the party whose property is to be taken. On the question of "just compensation," the courts have agreed that the property owner is treated fairly if he receives "...the full and perfect equivalent in money of the property taken, whereby the owner is put in as good a position pecuniarily as he would have occupied

if his property had not been taken." *Kelo v. New London* dealt with the question "What is public use?"

Previous court rulings held that while the judgment of the legislature is to be accorded great weight, whether a specific purpose or use is a "public use" is a question for the courts. Subsequently, a review of the cases shows that not all courts have agreed on the answer to that question. In answering the question, some courts have defined "public use" broadly as a use which concerns the whole community: "It is not necessary that the public have a direct interest, and the fact that the main end is private gain and that the benefit to the people at large results only indirectly from the increase of wealth and development of material resources is immaterial." These holdings conflicted directly with other state court decisions that held that "the power of eminent domain may not be exercised to transform an area from a predominantly low-class residential area to a commercial and industrial area" and "...the condemnation of property to create industrial development districts or for development and sale thereof to private entities for use as industrial sites..." is an invalid use of the power of eminent domain. Conflicts between the rulings of state courts can only be resolved by appeal to the U.S. Supreme Court. The stage was set for *Kelo*.

WHAT HAPPENED IN KELO?

In 1990 a Connecticut state agency declared the City of New London a distressed municipality. In 1996, the Naval Undersea Warfare Center, which was in the Fort Trumbell area of the City of New London and had employed over 1,500 people, was closed. In 1998, the unemployment rate was greater than most of the state and the population was decreasing. Because of these conditions, the state of Connecticut approved the issuance of two bonds by the City: first for \$5.35 million to revive a private nonprofit entity, New London Development Corporation (NLDC), whose purpose was to assist the City in developing plans to promote economic development of the

City; and second for \$10 million to create Fort Trumbull State Park on 18 of the 32 acres formally occupied by the Naval Facility.

Shortly after the bond issue, a pharmaceutical company, Pfizer, announced its intent to build a \$300 million dollar research facility immediately adjacent to Fort Trumbull. In January 2000, the NLDC, after planning and neighborhood meetings, submitted a plan and received approval for the redevelopment of 90 acres in the Fort Trumbull area. The 90 acres included 115 privately owned properties and the 32 acres (including Fort Trumbull State Park) of the former naval facility. The plan consisted of seven parcels and addressed each as follows:

Parcel 1 is designated for a waterfront conference hotel at the center of a 'small urban village' that will include restaurants and shopping. This parcel will also have marinas for both recreational and commercial uses. A pedestrian 'riverwalk' will originate here and continue down the coast, connecting the waterfront areas of the development. *Parcel 2* will be the site of approximately 80 new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park. This parcel also includes space reserved for a new U.S. Coast Guard Museum. *Parcel 3*, which is located immediately north of the Pfizer facility, will contain at least 90,000 square feet of research and development office space. *Parcel 4A* is a 2.4 acre site that will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina. *Parcel 4B* will include a renovated marina, as well as the final stretch of the riverwalk. *Parcels 5, 6 and 7* will provide land for office and retail space, parking, and water-dependent commercial uses (Emphasis ours).

Hoping to capitalize on the new business the Pfizer facility would bring, the NLDC's development plan was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." In addition, the plan was to "make the city more attractive and to create leisure and recreational opportunities on the waterfront and in the park." From a marketing perspective, the NLDC was authorized to assimilate the needed property by purchasing land from willing sellers and leveraging the power of eminent domain to acquire land from unwilling sellers. Nine unwilling sellers, including Suzette Kelo, owned 15 properties within the redevelopment plan area of Fort Trumbull. The properties in question were described as follows:

4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member of the owner; the other five are held as investment properties. There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.

THE LEGAL QUESTION

Suzette Kelo and the other eight property owners brought suit in the Connecticut state courts claiming that the taking of their property for this development plan violated the 5th amendment of the U.S. Constitution in that the land was not being taken for 'public use.' The Fifth Amendment to the U.S. Constitution, which also applies to the state by the 14th amendment, forbids the taking of private property for public use, without just

compensation. State constitutions have very similar provisions, although some states may use the term “public purpose” instead of the term “public use.” This term “public use” and “public purpose” are not defined in the U.S. or state constitutions; therefore, the courts, over time, have had to decide on a case-by-case basis whether a particular “taking” fit within the meaning of these terms. In addition and similar to other states, Connecticut had a state statute that allowed the taking of land, as part of an economic development project.

The Lower Court Decisions

The Connecticut Supreme Court, using previous U.S. Supreme Court cases as precedent, held that **economic development qualified as a valid public use** under both the Federal and Connecticut Constitutions. The court also affirmed the lower Connecticut court’s ruling that the Connecticut state statute, “expressed a determination that the taking of land, as part of an economic development project is a ‘public use’ and in the ‘public interest.’” The nine property owners appealed to the Supreme Court of the United States.

The U.S. Supreme Court's Reasoning

The U.S. Supreme Court decided to hear the case to determine if the taking of property for economic development satisfied the “public use” requirement of the Fifth Amendment.

The U.S. Supreme Court set out the two opposing propositions as follows:
 “A sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.”

“[A] state may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking.”

Arguments Made by Kelo

It is impossible to put any limits on the term “public purpose.”

Kelo argued that “public use” refers to the situation where the land is actually used by the general public, such as happens, for example when land is expropriated for the operation of common carriers, or a public park. In *Kelo*, the private lessees of this land were not going to open all of the expropriated land to the public to use as the public would use a park. The petitioners argued that, if Connecticut were allowed to take this property, there would be no limit as to how far a state could go in transferring property from one private owner to another private owner with such a vague requirement as “for a public purpose.” A state could seemingly transfer land from any one private owner to any other because, with a different use, the second owner might pay more taxes, which taxes could be used for the public benefit, and, therefore, the transfer could be seen as “for a public purpose.”

In rejecting this argument, the court relied on previous cases, finding that, while the early narrow test used by the courts required that the land was to be put to use by the general public, over time the courts found that in many situations the courts could not answer *how much* of the land necessarily had to be actually used by the general public. Even if the land was used for a park, for instance, there might be buildings or portions of the park into which the public would not be allowed. This difficulty, of judging “how much” land had to actually be used by the public, led courts to begin to turn to a broader test to determine if the taking was constitutional: that the land had to be used for a “public purpose,” rather than by the general public. The Court cited a long line of previous cases in which the narrow test of “public use” had been abandoned because it was impractical and too difficult to administer. The Court in *Kelo* rejected the petitioners’ argument that the land had to be put to *public use*, finding that if the land was taken for a *public purpose*, it could be a constitutional taking. The Court also

found that the federal government did not have the authority to judge the amount of land or the choice of land that a state chose to take to carry out its development plan.

This particular taking was not for a “public purpose.”

The next question raised was whether this particular taking was for a “public purpose.” Answering this question, the Court noted that “public purpose” had always been interpreted broadly, giving the states “‘great respect’ in determining local needs.” Here, Connecticut had a statute that authorized the expropriation of land to promote economic development. The City of New London used this authority to implement their plan for economic development. The Court found that precedent called for the Court to respect the City of New London’s determination that benefit to the City would result in implementation of this particular plan, regardless of the fact that this area was not distressed. “[W]e decline to second-guess the City’s considered judgments about the efficacy of its development plan.”

Economic development should not qualify as a “public purpose.”

The petitioners asked that the Court establish a rule that economic development does not qualify as a “public use.” The Court responded that neither precedent nor logic supported this determination and that economic development could be a “public purpose.” When the petitioners contended that the line between public and private takings could be lost if economic development was considered a public use, the Court responded that it could not say that a public purpose could not be served by private ownership. Going even farther, the Court said that an expropriation for private use *outside of a redevelopment plan*, like the redevelopment plan in the *Kelo* case, may or may not be an unconstitutional taking, and such a case would have to be judged if it arose.

“Public purpose” could be used as a pretext by the government.

Concerned about the government’s use of eminent domain as a tool in the marketing and development of a municipality, *Kelo* argued that the government would use “public purpose” as a pretext to disguise the taking of property of one private owner and giving it to another. The Supreme Court found that, while the property could not be taken under the mere *pretext* of a public purpose, in this case there was a “carefully considered development plan” and “no evidence of an illegitimate purpose.”

There should be some reasonable certainty that the public would eventually benefit.

When *Kelo* and the other petitioners argued that there should at least be some “reasonable certainty” that there would eventually be a benefit to the public, the court rejected the argument. The court concluded that if every taking by the state had to be shown to be successful before it could be effectuated, the development plans of a state could be delayed, perhaps indefinitely.

Holding of the U.S. Supreme Court

The United States Supreme Court affirmed the judgment of the Supreme Court of Connecticut that this use of eminent domain was constitutional. There have been numerous responses by commentators to the decision in *Kelo*. Newspaper articles, law review articles and numerous trade journals articles were immediately forthcoming, few in support of the Court’s finding. However, almost all commentators agreed that the decision of the U.S. Supreme Court was, in fact, correct as a matter of law. The judgment in *Kelo* should have been expected if one looked at the long line of cases that came before it. The Court’s finding was based solidly on precedent that “public use” could be defined as an indirect benefit that the public would receive from economic development. *Kelo* was the natural result of previous cases which found the 5th amendment clause stating that “no property shall be taken without just compensation” means that federal and state governments have

the right to decide what property it can take for what it deems the public good. The U.S. Supreme Court did, however, leave the door open for the federal and state legislatures to overrule with holding with statutes or constitutional amendments. Since eminent domain is the federal and state governments' right, it could be controlled only by the federal or state governments drafting new statutes, amending old statutes, or amending their constitutions to limit their own powers.

SOCIETY AND MARKETING INTERFACE

As a result of the Court's holding in *Kelo v. New London* proceedings, the role of eminent domain as part of one's marketing strategy within economic development practices has come under fire. In particular, the lawful taking of property from unwilling landowners by governmental place marketers when assimilating land for a project has been supported by the United States Supreme Court. This holding legitimized the proposition that eminent domain can be leveraged by place marketers when creating incentive packages (value propositions) for prospective clients. Naturally, the ruling resonated with private landowners throughout the United States.

Given the open nature of marketing systems, society influences marketing practice when (1) its wishes change and thus cause marketers to adjust their practices to accommodate changing needs and wants and (2) it reacts to previous impacts of marketing on society and creates an endogenous change on marketing practice (Fisk 1967; Redmond 2005). *Kelo v. New London* spurred a negative reaction amongst private landowners toward the use of eminent domain in the marketing of sites to potential developers. The negative public reaction to the court ruling was similar to the telemarketing exemplified detailed by Redmond (2005) in that the public called for government intervention.

STATES TAKE ACTIONS

In response to the U.S. Supreme Court decision in *Kelo v. New London* on June 23, 2005 and the accompanying negative public reaction, many state legislatures began the process of enacting state laws and amending their constitutions to forbid the use of eminent domain in the context of an economic development plan. According to the National Conference of State Legislatures (NCSL), thirty-four states enacted legislation or passed ballot measures during 2005 and 2006. The remaining states are considering legislation in 2007. Twenty-four states passed statutes (two of the original twenty-six state statutes were vetoed by the governor), six passed constitutional amendments, and three passed both statutes and constitutional amendments. An analysis of the categories into which the bills and laws fall is reported by the NCSL as follows:

- Restricting the use of eminent domain for economic development [21 states], enhancing tax revenue or transferring private property to another private entity (or primarily for those purposes).
- Defining what constitutes public use [7 states].
- Establishing additional criteria for designating blighted areas subject to eminent domain. [3 states]
- Strengthening public notice, public hearing and landowner negotiation criteria, and requiring local government approval before condemning property [6 states].
- Placing a moratorium on the use of eminent domain for a specified time period [1 state] and establishing a task force to study the issue and report findings to the legislature [3 states].

Jarosz (2007, 38) states that in the first major eminent domain case after *Kelo*, *Norwood v. Horney*, the Ohio Supreme Court held that "the municipality could not take property for an economic development project. The Court also found that classifying an area as 'deteriorating' does not justify condemnation". Some states,

such as New York are waiting until research is done in order to ascertain the effects of statutes and constitutional amendments prohibiting the use of eminent domain solely for economic development purposes before taking any action.

FEDERAL GOVERNMENT TAKES ACTION

On June 26, 2006, in response to *Kelo*, President Bush signed an executive order in which he limited the federal government's ability to seize private property for other than public use such as a road or a hospital. In December 2006, the Senate failed to bring a vote to the floor on the eminent domain issue that would have limited federal funding for state projects that involve exercising eminent domain powers acknowledge by the U.S. Supreme Court in *Kelo*. In 2007, the "Private Property Protection Act" was introduced, which would limit the power of the federal government or programs or activities receiving federal financial assistance or that would affect commerce with foreign nations, among the states, or with Indian tribes, from exercising eminent domain without the consent of the private property owner. In this act, the property owner may file a property protection statement indicating that the condemning entity is exceeding its authority, at which time federal funds are withheld until the condemning entity receives a judicial determination of the validity of the taking. This bill, introduced by Senator John Ensign of Nevada, has been referred to a Senate Committee on Finance.

MARKETING IMPLICATIONS STEMMING FROM *KELO*

The findings of *Kelo* and subsequent State actions have heightened interest in property expropriation. This public interest has caused the toolsets of post-*Kelo* place marketers to adjust and meet the needs and wants of its respective publics by turning to socially responsible/volunteerism strategies and relationship marketing. Additionally, the interpretation of the court rulings and subsequent marketing actions are beginning to

raise questions regarding the ethical nature of some other marketing practices.

Socially Responsible/Volunteerism Strategies

Given the Court's ruling, should governmental place marketers in the United States voluntarily stop leveraging eminent domain in their marketing strategies? While *Kelo* has not prohibited governmental place marketers from using the power of eminent domain, it has made them cautious when taking on projects that might call for the assimilation of large parcels of land by taking from some private owners and selling it to other private owners in the name of economic development. Traditionally, place marketers sought to provide offerings that best addressed the needs of prospects and that contributed positive economic impact to their communities. While this has not changed, the increased public interest in eminent domain issues is challenging place marketers to develop market offerings that may avoid expropriation all together and to find alternative methods of attracting developers. The inclusion of social responsibility calls on marketers to avoid the taking of property when, in the balance, it will likely create a great a cost to society and/or its members.

Today's place marketers are called upon to possess skills in both the art and science of marketing. When attracting business to an area, marketers are challenged with creating value propositions that leverage not only economic factors (tax incentives) but also noncost factors like quality of education, recreational activities, and quality of life. The "transition from cost to noncost factors" call upon the marketer to sell all aspects of their community when recruiting prospects (Kotler, Haider and Rein 1993). This came about partly because prospective buyers or developers were beginning to realize that tax and financing incentives, while economically pleasing, do not influence the availability of skilled labor or the ability of one's organization to recruit employees into a specific location.

Businesses searching for a location typically ask place marketers to provide information on:

- local labor market
- access to customer and supplier markets
- availability of development site facilities and infrastructure
- transportation
- education and training opportunities
- quality of life
- business climate
- access to R&D facilities
- capital availability
- taxes and regulations (Kotler, Haider and Rein 1993)

Thus, place marketers today must be able to brand their respective jurisdictions and create market positions that leverage both cost and noncost factors.

Other seemingly sound alternative marketing strategies have emerged that a government might use to achieve economic development without taking the land from one private person and leasing or selling it to another. For instance, one commentator, Greenhut (2006, 14A) points out that some times micromanaged economic development plans fail completely, leaving a city with a huge bond debt, whereas the actions such as those used by the City Council of Anaheim, California were successful, without the use of eminent domain. To stimulate growth in the depressed area, the City: waived fees for homeowners undertaking renovations, “on the ground that the city would gain in the long run by the increase in property taxes”; waived fees for business start-ups for three months, increasing the number of new businesses by one-third over the previous year; “passed a tax amnesty and eliminated business taxes altogether for home-based businesses”; removed most hurdles for approval for churches, even though churches are not tax-paying entities because churches often have to build in industrial areas, taking up space that could create more taxes; did not call for builders to allocate a certain percentage of new houses to “affordable” range. The City “protected property rights, deregulated land use, promoted competition, loosened business

restrictions, lowered taxes and the City flourished. In order to build a new downtown, Anaheim allowed almost any imaginable use of property, and because owners could then sell to a wider range of buyers, the area has made great strides in economic development without the use of eminent domain.

Relationship Marketing

The practice of relationship marketing is beginning to enter the repertoire of government related practitioners like economic developers and universities (Thakur, Summey and Balasubramanian 2006; Judson, Aurand and Karlovsky 2007). While it has traditionally been practiced in recruiting/selling initiatives, governmental place marketers are beginning to recognize the value of building relationships with landowners (small and large) throughout their communities. Also spurring the emergence of relationship marketing is the reality that the role of economic incentives like tax-breaks and low-interest financing are becoming less important to potential developers. Potential prospects approach a particular locale with the understanding that they will be future members of and participants in the community. The relationship they develop with the governmental place marketers is very important because it serves as an introductory vehicle into the community and hinges upon the ability of the place marketer to effectively manage relationships with landowners that may be involved in the creation of a development site. Just recently, a steel mill from Germany chose to locate a new manufacturing facility in Alabama rather than in Louisiana. After months of intensive international recruitment, Louisiana was the runner-up in a 20 state competition and its marketers were in a state of shock. While Louisiana provided a superior financial offering, Alabama utilized an ongoing relationship with the German Government as a vehicle to leverage existing relationships it has with other German manufacturers like Mercedes Benz (Scott 2007). This case demonstrates that today’s place marketer is challenged to move beyond the financial

aspects of a business and to begin demonstrating how a location will influence the success of a company, its corresponding supply chain, and the local community.

Strategies Combining Social Responsibility and Relationship Marketing

Thus far, eminent domain has been described in situations where landowners face the possible expropriation of their property. In some situations however, the strategies of place marketers must also account for third parties like lessees of properties under consideration for expropriation. In these situations, place marketers must balance relationships with involved parties (potential developers, land owners, lessees) and their inherent responsibility to manage the future growth of their respective economy and community (social responsibility). For instance, low-income tenants and small businesses are often neglected in the economic development discussion. The owners of the tenement buildings are compensated, but the lessees lose their homes. Place marketers, like those in Philadelphia working on the redevelopment of Jefferson Square, are developing plans that will revitalize communities, support current homeowners, and introduce new economic growth opportunities into the locale (Mastroieni 2007). This type of initiative is cumbersome for marketers because it requires (1) a long-term vision of economic development, (2) understanding of the potential consequences stemming from a development within a particular community, and (3) willingness to introduce non-cost factors like quality of life, etc. into the expectation of what potential development companies/investors will contribute to the community.

Post-*Kelo* Ethical Concerns Involving Third Parties

As mentioned in the previous section, the avoidance of land expropriation calls for the development of strategies that are much more complex, labor intensive, and time consuming. Given the public outcry and the realization of

tension surrounding situations involving eminent domain, practitioners are using still other marketing practices to both circumvent and at times even create potentially harmful consequences. On the one hand, place marketers can use marketing to build relationships with landowners and to create mutually beneficial solutions which avoid the use of eminent domain. On the other hand, however, the use of eminent domain is also avoided by engaging in questionable marketing strategies that create pressure for buyers to sell their property.

Governmental place marketers are continuously faced with the task of identifying large tracts of land for commercial development. When dealing with multiple land owners and the challenge of stimulating economic growth in the region, place marketers often confront the tragedy of the commons (Hardin 1968) where a single land owner can jeopardize the economic future of a respective region through self-centered, greedy actions (Redmond 2005). Rather than negotiating directly with a reluctant landowner, which may take an extended period of time, place marketers are often tempted by the opportunity to engage local media outlets in the promotion of economic development initiatives. While these actions are rarely made public, place marketers can effectively use the media to create anticipation and enthusiasm within their respective communities. This is done by providing information on potential commercial developments that will create jobs, increase taxes, improve schools, etc. In doing so, marketers may intentionally or unintentionally isolate problematic land owners in the eyes of the community and create a social burden that does not naturally exist in the exchange of property between owner and government. In this instance, the citizens of the community become an involved third party without full knowledge of the situation. The land owner becomes someone who is “holding up progress and/or the future of a community.”

Similar to Redmond’s (2005) detail of telemarketing’s impact on individuals who are not consumers or who have self-selected out of

telemarketing, situations involving eminent domain can potentially create negative consequences for third parties (landowners, lessees, community at large) who are not directly involved in the transaction between the governmental place marketer and the potential developer/investor. It is because of these potential negative consequences that state governments have started to use the legislative process as a means for addressing the public's concern. Future research is needed to address the creation of pressure within a marketplace and to determine its impact on landowners. First, do landowners associate public pressure with the creation of news items by place marketers? Second, how do landowners manage the related public pressure? What is its impact on landowners' business strategy?

CONCLUSION - *KELO* CONTINUES TO CAUSE CONCERN

It is argued that the result of *Kelo* will be that, as Justice O'Connor predicted in her dissent:

all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded--i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public--in the process.

Continuing, she wrote that...

...for the majority decision to hold that incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property.

Many commentators agree, as Cohen (2006, 497) stated, that this kind of economic development "has failed to produce the two most important goals of a proper eminent domain regime: efficiency and justice".

It has also been argued that the problem may be solved by refocusing on the compensation paid to the private landowner (Tally 2006). Some

say the mistake of the Supreme Court was to neglect to address the issue of "just compensation" because it is this second element that was designed to keep government in check and deter its improper use of eminent domain for economic development. One of the problems cited is that the Courts have opted to use the more easily applied "fair market value" to land to be taken by eminent domain. One commentator, Tally (2006, 766), noted that the Court "has admitted the inability of 'fair market value' to fully compensate a dispossessed owner. This under compensation leads to the overuse of eminent domain". It is suggested that compensation at a premium, adding a fixed amount, such as twenty percent, which method is used by other countries, would stop some of the present abuse. Some argue that small businesses suffer from the federal government cap of \$10,000 for moving expenses, which is often far from the real cost of relocating a business and should be increased to justify the taking.

Quick action on the part of state legislatures can be detrimental in the long run and many believe that scientific research is needed to assess the effects of state legislative restrictions on eminent domain. The government often lacks the expertise to proceed with economic development alone, and an association with private industry may be necessary to gain the expertise, financial resources, and efficiency that the government alone may lack (Greenhut 2006). The fact that the new legislation may not have much effect in many states where eminent domain is infrequently used has not quieted the fears of private homeowner who worry about the government's power to take private property and sell it to another private party.

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ENDNOTES

- 1 29 A C.J.S. Eminent Domain § 2 (undated June 2007).
- 2 The U. S. Supreme court eloquently stated in *State of Georgia v City of Chattanooga, Tenn.* "The sovereign power to take private property for public use cannot be surrendered, alienated, or contracted away; the legislature cannot bind itself or its successors not to exercise it."; 91 C.J.S. United States § 7 (June 2007).
- 3 *Collins v City of Wichita, Kansas, C.A.Kan.*, 225 F.2d 132, 135, cert. denied 76 S.Ct. 140, 350 U.S.886, 100 L.Ed. 781 (1955).
- 4 *Almota Farmers Elevator & Warehouse Co. v. U.S.*, Wash., 93 S. Ct. 791, 409 U.S. 470, 35 L.Ed.2d 1 (1973); *U.S. V. Reynolds, Ky.*, 90 S.Ct. 803, 397 U.S. 14, 25 L.Ed.2d 12 (1970).
- 5 *Humphrey v City of Phoenix*, 102 P.2d 82, 55 Ariz. 374 (1940).

- 6 *Rindge Co. v. Los Angeles County, Cal.*, 43 S.Ct. 689, 262 U.S. 700, 67 L.Ed. 1186 (1923).
- 7 *Blackwell Lumber Co. v. Empire Mill Co.*, 155 P. 680, 28 Idaho 556 (1916).
- 8 *Edens v City of Columbia*, 91 S.E.2d 280, 228 S.C. 563 (1956).
- 9 *Hogue v. Port of Seattle*, 341 P.2d 171, 54 Wash.2d 799 (1973).
- 10 125 S. Ct. 2655, 2659 (citing 1 App. 109-113).
- 11 *Id.* at 2658 (citing the Connecticut Supreme Court 268 Conn. 1, 5, 843 A.2d 500, 507) (2004).
- 12 *Id.* at 2659.
- 13 *Id.* at 2660.
- 14 Article 1 § 4 of the Louisiana Constitution of 1974.
- 15 Conn. Gen.Stat. § 8-186 et seq. (2005).
- 16 268 Conn. at 40.
- 17 *Id.* at 18-28.
- 18 125 S.C. at 2661.
- 19 *Id.*.
- 20 *Id.* at 2664.
- 21 *Id.* at 2668.
- 22 *Id.* at 2666.
- 23 *Id.* at 2661.
- 24 *Id.* at 2667.
- 25 *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32, 36 S.Ct. 234, 60 L.Ed. 507 (1916) (“The inadequacy of use by the general public as a universal test is established.”); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014-1015, 104 S. Ct. 2862, 81 L.Ed.2d 815 (1984) (“This Court, however, has rejected the notion that a use is a public use only if the property taken is put to use for the general public.”).
- 26 <http://www.ncsl.org/programs/natres/EMINDOMAIN.htm> (last visited on July 5, 2007).
- 27 <http://www.ncsl.org/print/natres/mapslide.pdf> (last visited July 5, 2007).
- 28 <http://www.ncsl.org/programs/natres/EMINDOMAIN.htm> (brackets ours) (last visited on July 5, 2007).
- 29 853 N.E.2d. 1115, 110 Ohio St. 3d. 353 (Ohio 2006).
- 30 Associated Press, *Bush Signs an Executive Order Limiting Eminent Domain Powers of Federal Government*, ” <http://www.foxnews.com/story/02933.200833.00.html> (last visited July 6, 2007).
- 31 <http://www.therealestatebloggers.com/2006/12/11/senate-failed-to-vote-on-eminant-domain-legislation> (last visited on July 5, 2007).
- 32 125 S.Ct. at 2669.