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Connecticut Eminent Domain Law in the Post-Kelo World

by Timothy S. Hollister, Esq.

The U.S. Supreme Court's decision started a war in more than 20 states, igniting calls for state legislatures to rebalance the rights of property owners and government in condemnation proceedings.

In *Kelo v. New London*, the City won the local battle over whether the "public use" provision of the Takings Clause of the federal Fifth Amendment limits its proposed use of eminent domain in support of economic development in the Fort Trumbull area. But as we now know, the U.S. Supreme Court's decision started a war in more than 20 states, igniting calls for state legislatures to rebalance the rights of property owners and government in condemnation proceedings.

With the Supreme Court having spotlighted state legislative power to be more protective, and the public clamoring for overruling or at least ameliorating the *Kelo* holding, each state needs to take stock of its existing law. This article summarizes existing Connecticut law about who may exercise eminent domain, and for what purpose; basic condemnation procedure; and limitations on and defenses to condemnation. From this review, we can identify statutory issues that the legislature may want to examine when considering responses to *Kelo*.

Who Can Use Eminent Domain, And For What?

In July 2005, the legislature's Office of Legislative Research issued a report¹

that identifies the types of governmental entities that may take land by eminent domain, and the permitted purposes. At the risk of oversimplification (and omission of some less important matters), the categories may be summarized as follows:



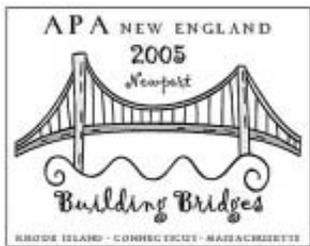
- The State of Connecticut has consented by statute to the federal government condemning land for federal buildings such as courthouses, post offices, and arsenals.

- The State itself may condemn for any state institution, with the statutes specifically calling out educational facilities, airports, armories, and the "urban sites remediation" program.

- The State Department of Transportation has broad authority to condemn land or easements related to highways and transportation facilities (airports, train stations, bus terminals), and may condemn for supporting infrastructure (bridges and drainage), beautification (billboards, maintenance of vegetation) and parking.

- In addition to parks, trails, open space, flood control, dams and pollution preven-

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The 2005 APA New England Fall Conference, "Building Bridges," is Fast Approaching. See page 9 for more info...

Municipalities may condemn for any public use or purpose, including municipal facilities, roads, open space, parking, sewers, waste disposal, neighborhood revitalization, flood control, and water supplies.

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tion or remediation, the Department of Environmental Protection may take land for the abatement of disease, soil conservation, tidal wetlands preservation, and protection of endangered or threatened species.

- The Department of Economic and Community Development may take land to facilitate rehabilitation or development of housing for low- and moderate-income families, and remediate polluted sites in order to promote "business growth or expansion" through reuse or redevelopment.
- Municipalities may condemn for any public use or purpose, including municipal facilities, roads, open space, parking, sewers, waste disposal, neighborhood revitalization, flood control, and water supplies.
- Under the statute at issue in *Kelo* (§ 8-193), a municipality that has adopted an economic development plan may take land needed to carry out that plan.
- Municipal redevelopment agencies may condemn land in order to eradicate blight or deterioration, or to rectify public health or safety problems.
- School districts may condemn land for school facilities.
- Regional and quasi-public agencies such as the Connecticut Resource Recovery Authority may condemn to carry out their statutorily-assigned responsibilities.

- Several other entities may take land, such as municipal electric energy cooperatives, public utilities (gas, electric, etc.), transit districts, railroads, cemetery associations and non-profit hospitals.

It is interesting to note that only a few entities, such as cemetery associations and non-profit hospitals, must apply to the Superior Court for permission to condemn. Some decisions to condemn require review by more than one agency, while others may be determined administratively and with little oversight (such as the Department of Transportation when it deals with highways).

Condemnation Procedure

The procedure for most condemnations is set forth in Title 48, which refers back to §§ 8-128 to 8-132. Again, at the risk of oversimplification: a government's legislative body or an agency's governing body adopts a resolution to use eminent domain. This initial decision is followed by any necessary referrals or collateral agency actions (such as, at the municipal level, a referral to the planning commission for a report as required by § 8-24). Next is the formal appropriation of "just compensation," i.e., the amount to be paid to the property owner. This is followed by preparation of a formal Notice of Condemnation and Statement of Compensation, which are filed with the Superior Court clerk, along with a check representing the government's determination of the money that should be paid for the taking. The Notice and Statement are then served on the property owner and all encumbrancers. Within as little as 12 days

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after service, the condemning authority may apply to the clerk of the court for a Certificate of Taking, which upon issuance may be recorded in the municipal land records. When it is, title to the property vests in the condemnor.

Several other statutes shape the eminent domain process and the rights of property owners. Conn. Gen. Stat. § 37-3 states the statutory rate of interest that must be paid on the just compensation award that is appealed. Section 48-13 allows the condemning authority to obtain permission from a court prior to or during condemnation to conduct physical or environmental testing. Under §§ 8-132 and 48-17d, valuation of property in eminent domain proceedings must consider environmental remediation costs. Under the Freedom of Information Act, § 1-210 (b)(7), appraisals and reports prepared for a condemnor may be shielded from public disclosure until such time as the acquisition is complete.

Defenses To Condemnation

Several common law defenses are

available to a property owner who seeks to contest eminent domain. She may claim that the condemning authority: (1) violated a procedural requirement of the eminent domain statutes; (2) failed to negotiate with the property owner in good faith prior to taking title; (3) does not have authority to condemn; (4) does not need all of the land it seeks to take (sometimes referred to as “lack of necessity” or “excess condemnation”); (5) is using eminent domain in bad faith; or (6) is not condemning for a “public use” or purpose as required by the federal Fifth Amendment and Art. I, § 11 of the Connecticut Constitution.

Cases from across the country in recent years also reveal several eminent domain practices that have been struck down or questioned. These include delegation of eminent domain power to a non-governmental agency; having a private party pay all or most of the just compensation, with the condemnor acting as a “mere conduit”; using condemnation to benefit an entity whose finances are not

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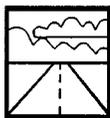
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subject to public inspection; condemning without a thorough, credible study of the expected uses or benefits; condemning in a way that violates some other statute, such as the state or federal Fair Housing Acts or the Americans with Disabilities Act; or stretching the statutory definition of “blight.”

Did *Kelo* Change Connecticut Law?

An interesting prelude to consideration of statutory amendments in response to *Kelo* is whether the Supreme Court’s decision eroded the rights of property owners or added protections. Professor John Echeverria of Georgetown Law School, one of the nation’s foremost scholars in this area,² has argued that *Kelo* actually provides greater protection to property owners than prior law. He explains that several U.S. Supreme Court decisions prior to *Kelo* approved the use of eminent domain in aid of private economic development, and that even though *Kelo* reaffirms judicial deference to legislative determinations, the Supreme Court’s opinion rests factually on the thoroughness of New London’s economic development plan and process. This suggests that, henceforth, anything less than a well-conceived and detailed plan and process may be legally insufficient.

A contrary view — that *Kelo* expands eminent domain and erodes private property rights — is that *Kelo* restated principles announced 50 years ago in *Berman v. Parker*, but applied them to a factual situation without precedent. *Berman* involved condemnation of a thriving de-

partment store in the middle of a blighted area; the store was taken on the theory that its demolition was necessary to eradicate blight in the redevelopment area as a whole. *Kelo*, however, approved the condemnation of single-family homes that are not blighted or unsafe. Thus, *Kelo* appears to have gone beyond prior cases by allowing condemnation that was not necessary to alleviate an adverse physical or economic condition of the property being condemned.

It is conceivable, of course, that both views are correct, *i.e.*, that under *Kelo* the Fifth Amendment Takings Clause will not be interpreted as a prohibition against condemning non-blighted property, but on the other hand, the courts will now scrutinize such uses of eminent domain closely for the existence of a bona fide development plan and process.

Amendment Issues

Against the backdrop of this existing law, we may frame the question: if Connecticut wants to revisit the eminent domain statutory scheme to be more protective of property owners, what statutes should it examine?

Set forth below is a list of suggestions. This list does not state or imply the wisdom of any change; it is simply a list of ideas for consideration that arise from the above summary:

1. In each case of delegated eminent domain power, do the statutes require sufficient review or check by another agency, or a court? Do they ensure that condemnation will not occur by a quick, unilateral agency determination?

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2. Is the 12-day time period stated in § 8-129 that must elapse between service on a property owner of a Notice of Condemnation and Statement of Compensation and the recording of a Certificate of Taking on the land records, sufficient time to allow a landowner to assert available defenses?
3. Section § 8-189 states the required elements of a "Project Plan" for a municipal economic development project, and § 8-193 grants eminent domain power to an agency that has adopted a project plan, but do these two statutes require sufficient analysis of alternatives and proof of the viability of economic development goals prior to the exercise of eminent domain?
4. What is the rationale for the Freedom of Information Act's exemption from public disclosure of all "real estate appraisals, engineering or feasibility estimates and evaluations...relative to the acquisition of property," and is this exemption consistent with procedural due process?
5. Should § 1-225(f) be amended to prohibit executive sessions to discuss the use or initiation of eminent domain?
6. Does § 8-132(c), which requires a judge, when determining the value of property in an eminent domain case, to deduct from value the costs of "required environmental remediation," have the potential to deprive a property owner of his statutory and common law rights to allocate environmental remediation costs to prior owners or third parties?
7. Does § 48-13 adequately explain when and on what basis a court should allow a municipality or agency to enter property and conduct environmental testing, soil borings, etc. in connection with a condemnation or proposed condemnation?
8. Should Connecticut law require just compensation for a taking to be paid from public funds?
9. Does existing just compensation law ensure that someone whose residence is taken by eminent domain has a realistic opportunity to relocate to

suitable housing? For example, if a city were to condemn and pay fair market value for a habitable residence in an area that is economically distressed but surrounded by affluent suburbs with high housing prices, would the property owner be able to find replacement housing?

Our eminent domain laws are undoubtedly complex, but the *Kelo* decision has spotlighted a variety of subjects, both procedural and substantive, that are ripe for re-examination. ■

Footnotes

¹ C. Reinhart, "Eminent Domain Statutes," Office of Legislative Research Report 2005-R-0578, July 11, 2005, available at www.cga.ct.gov/2005/rpt/2005-R-0578.htm.

² J. Echeverria, "The Myth That *Kelo* Has Expanded The Scope of Eminent Domain," Georgetown University Center for Law and Policy, August 2005, available at www.gelphi.org.

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