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UPDATE ON THE LAW



TAKING OF PROPERTY BY LOCAL GOVERNMENT FOR ECONOMIC DEVELOPMENT UPHELD.

On June 23, 2005, the United States Supreme Court rendered a decision in a case originating in Connecticut, Kelo v. City of New London, holding that it is generally up to the local government to define what constitutes a “public use” which allows them to take property under the Fifth Amendment. The Court held that they should give deference to a local government’s carefully formulated economic development plan even if the main beneficiaries of the plan are private entities. Justice Stevens, who wrote the decision for a narrow majority, stated that “[T]he government’s pursuit of a public purpose will often benefit individual parties.”

In Kelo, the Connecticut city of New London had financial difficulties and was considered a distressed municipality by the state. New London had an underutilized waterfront area which it planned to use to revitalize its economic activity. In attempting to capitalize on this attribute, the City identified ninety acres adjacent to the Thames River as an area for development. The proposal included residential, commercial, office, research and public elements. The area, however, was neither vacant, abandoned nor blighted. The current uses of the area were considered to be comparatively affordable and adequate.

The matter proceeded through the Connecticut courts. The Connecticut Supreme Court concluded that the public benefits of the project, including economic growth and revitalization of the financial climate of the City,

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outweighed the private benefits that would be realized by the developers. The Connecticut court also found that the re-development plan constituted a valid public use sufficient to allow the City to exercise its power of eminent domain.

The United States Supreme Court addressed the issues, and in particular, whether the proposed mixed use constituted a public use within the meaning of the Fifth Amendment. By a narrow margin of 5 to 4, the Supreme Court, with the primary opinion written by Justice Stevens, concluded that the public use test had been satisfied and was not an impermissible private taking. The Court required that the objections to the plan should be considered in light of the plan in its entirety. Justice Stevens concluded that the “plan unquestionably serves a public purpose,” and therefore, the taking satisfied the public requirements of the Fifth Amendment.

The ruling indicates that there might be some circumstances in which a government taking may be considered so egregious that it would fail this test. Justice Stevens indicated that a municipality could not directly transfer property to a private company “under the mere pretext of a public purpose” where a review of the facts would reveal the actual purpose was to create a private benefit. Justice Stevens, however, concluded that the overall purpose of the taking benefitted the City of New London in accordance with its comprehensive economic development plan.

This ruling is considered to provide guidance on the limits of eminent domain power. It is considered to have set definite rules which are worthy of due consideration by any governmental entity or objector in addressing economic development and re-development plans to be created or undertaken by a public entity.

DiFrancesco, Bateman, Coley, Yospin, Kunzman, Davis & Lehrer, P.C., *has extensive experience in the representation of public entities in land use, COAH, development and re-development matters. For more information on the decision discussed above or with regard to any other local government matters, please feel free to contact Donald D. Francesco, Esq. at our firm.*

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