

***Kelo* and California:  
How The Supreme Court's Decision  
Affects California's Local Governments**

A Background Paper  
for the  
Committee's Informational Hearing

10:00 a.m. to 12:00 noon  
Wednesday, August 17, 2005  
State Capitol, Room 112

***Kelo* and California:**  
**How The Supreme Court's Decision Affects California's Local Governments**

On Wednesday morning, August 17, the Senate Local Government Committee will hold an informational hearing to explore how the United States Supreme Court's recent decision in *Kelo v. City of New London* affects California's counties, cities, special districts, and redevelopment agencies. To help legislators prepare for that hearing, this paper sketches the decision and frames some of the policy questions.

Eminent domain is the government's power to take private property for public use.

However, both the United States Constitution and the California Constitution limit the use of eminent domain:

The U.S. Constitution's Fifth Amendment says that "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The California Constitution contains similar limits: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has been first paid to, or into court for, the owner."  
(Article I, §19)

**The *Kelo* Decision**

On June 23, 2005, the U.S. Supreme Court ruled on a 5-4 vote that the City of New London's taking of private, non-blighted property for the purpose of economic development satisfied the constitutional "public use" requirement.

Connecticut state law allows the use of eminent domain for economic development. The City of New London adopted an economic development plan for its waterfront, including a hotel and conference center, retail and office space, and new residences. The city government wanted this new development to complement an adjacent Pfizer research center and to reverse the community's economic slide. When some of the private property owners refused to sell, the City condemned their homes and rental properties.

The private property owners argued that New London's use of eminent domain for economic development --- creating jobs and boosting tax revenues --- did not satisfy the constitutional requirement for public use. Relying on several precedents, a divided Supreme Court disagreed and upheld the City's eminent domain powers.

Since late June, hundreds of articles, editorials, and speeches have reacted to the *Kelo* ruling, many of them calling for constitutional and statutory changes. Congress has entered the controversy with several measures. Before California state legislators debate possible changes, they should know how the *Kelo* decision affects their local governments.

The purpose of the Committee's hearing is to review:

- How the California Constitution limits eminent domain powers.
- What California's eminent domain statutes prohibit and allow.
- How the courts interpret the requirement for "public use."
- How California local officials actually use their eminent domain powers.
- How *Kelo* affects California's local governments.

### **Five Witnesses**

To help answer these questions, the Committee has invited five experienced attorneys to talk at its August 17 informational hearing.

**Richard Frank**, Chief Deputy Attorney General for Legal Affairs, will be the Committee's first witness. Mr. Frank will brief the legislators on what the Supreme Court said in its *Kelo* ruling, and precedents that the justices used to reach their conclusions.

**Timothy Sandefur**, a Pacific Legal Foundation staff attorney, and **Michael Berger**, a Los Angeles-based property rights litigator, will give the Committee the property rights perspective. Both Mr. Sandefur and Mr. Berger filed friend of the court briefs in the *Kelo* case.

The public agency perspective will come from **Bill Higgins** of the Institute for Local Government and **Joseph Coomes**, an experienced redevelopment attorney. Both of these lawyers advise public officials on eminent domain and economic development topics.

### **Policy Questions**

During its two-hour hearing, the Committee members may wish to listen for answers to these policy questions:

- Is *Kelo* a departure from earlier decisions of the US Supreme Court?
- Is *Kelo* a departure from earlier decisions of the California Supreme Court?
- Does *Kelo* change California law, either case law or statute?
- Will *Kelo* change California public officials' condemnation practices?
- Can California's public agencies condemn private property for purely private purposes, where there is no public benefit?
- How much public benefit is needed to justify taking private property?
- When a redevelopment agency condemns private property to eradicate blight, is that a constitutionally legitimate public use?
- Even if the agency later sells the cleaned-up site to another private owner?
- How often do California public officials condemn owner-occupied residential property for private use?
- Would you support a moratorium on taking owner-occupied residential property for private use while legislators determine if there's a problem?

### **Other Changes**

Based on the witnesses' testimony and other information, state legislators may conclude that the *Kelo* decision did not change California case law or state statutes, and may not affect how public officials use their eminent domain powers.

Even so, the Committee may wish to consider other statutory changes, particularly for redevelopment agencies. Legislators may wish to consider bills that:

- Revise the statutory definition of “blight.”
- Revise the statutory test for placing “predominantly urbanized” property into redevelopment project areas.
- Require redevelopment officials to quantify physical and economic blight.
- Require redevelopment plans to spell out how they will use eminent domain.
- Shorten the time periods for redevelopment officials to use eminent domain.
- Clarify that redevelopment plan amendments that change how redevelopment officials can use their eminent domain powers are referendable.
- Limit redevelopment agencies’ use of eminent domain to blighted parcels.

Any of these changes will be controversial and each requires extensive legislative discussions and public hearings before legislators can draft statutory amendments. In particular, legislators should be very careful in defining their terms.



After the August 17 hearing, the Committee will collect the witnesses’ written statements along with materials from other interested persons and publish a final summary report. Other legislators will be able to use the Committee’s work to review proposed constitutional amendments and statutory changes.