

The Taking of Property 1-2-3

Does Eminent Domain Ruling Mean People of Color, the Poor and Seniors Are Vulnerable?

By Michael J. Bell

The imminence of losing your property to the government so that a private developer can use it was greatly increased last summer by the U.S. Supreme Court. The high court's 5-4 decision in *Kelo v. New London* (pronounced KEY-low) upheld an action taken by the New London, Connecticut government, and sustained by the state's Supreme Court, to publicly take private property for "economic development" purposes. Clearly, people should be talking about the pros and cons of eminent domain because so much of America's soul and identity is wrapped up in owning property and because property owned by people of color, the poor and the elderly often is the first property government comes after.

Topeka already has had debate on eminent domain with the College Hill redevelopment plan, and other parts of the city soon may be eminent domain battlegrounds (see below). What's of concern here is that many of those potential battlegrounds are inhabited by people of color, the poor and the elderly, the people traditionally least able to fight for themselves and most able to be taken advantage of when government and business operate in unison against them.

Fair is Fair (Or Is It?)

The importance of eminent domain for all neighborhoods is potentially huge, particularly poor neighborhoods (where people of color and seniors also are often found). Eminent domain usually means that the municipality has to offer the private property owner "fair market value" for his or her land. Of course, disputes have raged on for years over exactly what "fair market value" is.

Additionally, those without the wherewithal, financial and otherwise, to obtain legal representation can be taken on the value of their land and their ability to fight public officials intent on acquiring it. And even those with that wherewithal can still find themselves at a disadvantage when taking on an entire municipal structure aided and abetted by the private sector.

Of course, fair-market value in a depressed and deteriorated neighborhood is *never* going to be enough for the folks who live there to relocate to more expensive areas of their cities. Consequently, those folks start anew with a negative balance, financially and socially. In essence, the process becomes a legalized "Trail of Tears" as indigenous people are moved out of their neighborhoods, leaving behind their histories and their identities. In Topeka, that happened in the 1960s to the poor people and people of color who used to live and own businesses in the areas called "The Bottoms," where the Law Enforcement Center is located at the north end of downtown.

And there also are the indigenous low-income renters to consider (although very few do consider them), whose "Trail of Tears" is exacerbated by having *absolutely* no financial or legal claim to make when the homes and neighborhoods in which they live and have family and friends are identified for eminent domain. And, even worse than that, once eminent domain hits an area with affordable rental housing, renters then have fewer affordable rental options available to them. And with typically long Section 8 waiting lists, these folks can get priced out of housing in Topeka.

How does a city *fairly* determine which areas are depressed enough to warrant the use of eminent domain? First, let's put the horse before the cart. Ideally, the decision to use eminent domain in a particular area is preceded by *collective bargaining*, where *all* parties involved come to the same table at the same time to arrive at mutually beneficial outcomes that involve negotiating fair settlements for the property owners. If, and only if, good faith efforts at negotiations fail, then eminent domain can be brought into the conversation. If that process is happening, then the carnivorous monster that eminent domain can be is muzzled and put to sleep.

Might Makes Blight?

Proponents of large-scale redevelopment projects often use the term "blighted" to describe the areas in which they wish to invoke eminent domain. Sometimes those areas are truly blighted, but sometimes blight is in the subjective eye of the beholder, even with it being legally defined by government. In other words, your blight is my rehab-worthy home and neighborhood.

Sometimes neighborhood deterioration; often caused by city neglect, benign or otherwise; can be addressed through large-scale rehabilitation and/or in-fill housing projects. That kind of development often is more cost effective than new construction, maintains the architectural and historical integrity of those neighborhoods, and encourages life-long residents to remain in their homes and new residents to populate areas with decreasing populations. But those projects generally are harder to create and implement and aren't as sexy or as profitable to government as new development.

In Topeka, there are at least two recent cases that have raised questions about the use of eminent domain. First, the College Hill Plan, most notably supported by The Central Topeka TurnAround Team and Washburn University, seeks to renovate the business district along SW Washburn and SW Lane Streets, from SW 13th Street south to SW 17th Street, in addition to building new housing in the area, too. Blight was used by proponents of this plan to justify the use of eminent domain (which ultimately wasn't used). And second, the Central Topeka TurnAround Team and the Elmhurst Neighborhood Association asked the city to use eminent domain to condemn property along the west side of SW Washburn, from SW Munson south to SW 12th Street, to make way for a green space/trail. Blight also was cited here as a reason to use eminent domain.

Also, continued and potential future expansion of St. Francis and Stormont-Vail hospitals in what is called the "Medical District" (roughly bordered by SW Washburn and Lane Streets, from SW 6th Street south to SW 10th Street) could entail the use of eminent domain. Other areas that eventually might have to deal with eminent domain issues are the neighborhoods adjacent to downtown, the neighborhoods near the Oakland Expressway in East Topeka, the area south of White Lakes Shopping Center (in anticipation of the continuing of Kansas Avenue south of 37th Street; there are primarily businesses in the area and three motels that some people use as long-term housing), and the neighborhoods near the Great Overland Station in North Topeka. Many of the neighborhoods included in and adjacent to these areas are characterized by deteriorated housing, businesses and infrastructure; crime, and decreasing populations.

But this just isn't an issue for poor people and neighborhoods. Just as the Rev. Martin Niemoller didn't speak up for the Communists, Jews and Catholics in Europe during World War II (and, consequently, later they couldn't speak up for him), those more affluent neighborhoods near the outer limits of Topeka should beware and be involved in eminent domain discussions because large businesses needing huge amounts of land, like the Target distribution center, soon may come knocking on their doors. Make no mistake: If eminent domain becomes easier to obtain in poor areas, then it will become easier to obtain in *all* areas.

A Connecticut Yankee in King Phizer's Court

In New London, Connecticut, public officials wanted "to take a group of older homes along the city's waterfront for a private developer who plans to build offices, a hotel and convention center. The city wanted to bolster its sagging economy and improve competition with suburban communities that have more land available for similar projects," according to the *New London Day* newspaper.

Susette Kelo, along with other plaintiffs, objected to the plan. Kelo, newly divorced, moved back to Fort Trumbull and the New London area in 1997 and bought a modest cottage to call home. Pharmaceutical giant Pfizer began buying neighboring properties in 1998 to eventually make way for a \$300 million global research and development center for Fort Trumbull and New London.

Kelo was one of a handful of people who decided to fight the city of New London and Pfizer. She told the *Wall Street Journal*, "'For public use--for a bridge or a road or a school or a hospital--that's bad enough. But you add insult to injury if somebody else can *live* here. That's exactly what they plan on doing here. Making it so somebody else can *live* here. But *I* live on East Street. *I* live on East Street. Why can't *I* live here?'"

"I Have an American Dream"

The NAACP, along with the American Association of Retired Persons (AARP), Hispanic Alliance of Atlantic County, Inc., Citizens in Action; Cramer Hill Resident Association, Inc.; and the Southern Christian Leadership Conference (SCLC), submitted an *amici curiae* ("friend of the court") brief in support of plaintiffs Susette Kelo, et al, in *Kelo v. New London*. For the complete text of the brief, go to http://www.ij.org/pdf_folder/private-property/kelo/naacp02.pdf.

The NAACP brief made the following points:

1. The Fifth Amendment to the U.S. Constitution specifically requires that any public taking of property be for a public use (roads, bridges, schools, hospitals, and the like).
2. The burden of eminent domain has and will continue to fall disproportionately upon racial and ethnic minorities, the elderly, and the economically disadvantaged.
3. Eminent domain power has historically been used to target racial and ethnic minorities.
(Again, what happened to "The Bottoms" here in Topeka after urban renewal paid us a visit in the 1950s and '60s is good evidence of this locally?)
4. Even absent abuse, takings for "economic development" will disproportionately affect neighborhoods with relatively high concentrations of racial and ethnic minorities and the elderly.
5. The impact of takings on the elderly, minorities and the economically disadvantaged is different in kind from their impact on other populations.
(This is what happened in Topeka with the College Hill Plan. Upscale apartments and town homes will replace the affordable housing that currently is in the area. And, ironically, the increased property values that will result from revitalizing the area may drive up the overall costs of housing in the area, thereby pricing out poor people. Of course, one way to counter that would be to designate some of the new housing for low-income people. We hear much about mixed-income housing and neighborhoods in Topeka. Here was an opportunity to address that. I didn't hear anything about that during discussions on the Plan.
(Another way the affects of takings involving the elderly, minorities and the economically disadvantaged are different from other groups is the political dispersal of those people, which is, in essence, legalized gerrymandering. Those communities that have been historically comprised of people of color, the poor and/or the elderly are destroyed, with their residents flung throughout the city to comprise weakened geographic voting blocks.)
6. While the Supreme Court has permitted the use of eminent domain power to remedy blight, it has never endorsed takings purely for economic development.
7. Some states have recognized that economic development alone cannot constitute a public use.

8. "Economic Development" is not amenable to standards enabling judicial review.

According to the Washington Bureau, NAACP National hasn't taken any formal position on pending national eminent domain legislation, including Representative Maxine Waters' (D-CA) proposal to prohibit the use of federal funds on projects that use eminent domain for economic development purposes.

"Love is Here and Now you're Gone," by The Supremes

Ultimately the Supreme Court, in the narrowest of majorities, said that the government-backed Phizer project, although having economic development motives and directly benefiting private interests, was still created to advance the public good; namely a healthier and more competitive community.

According to the *Washington Post*, Justice John Paul Stevens, writing for the 5-4 majority, "cited cases in which the court has interpreted 'public use' to include not only such traditional projects as bridges or highways but also slum clearance and land redistribution. He concluded that a 'public purpose' such as creating jobs in a depressed city can also satisfy the Fifth Amendment.

"The court should not 'second-guess' local governments," Stevens added, "noting that '[p]romoting economic development is a traditional and long accepted function of government.'"

However, the *Post* said, "Stevens's opinion provoked a strongly worded dissent from Justice Sandra Day O'Connor, who wrote that the ruling favors the most powerful and influential in society and leaves small property owners little recourse. Now, she wrote, the 'specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.'"

The Supreme Court did leave it to the states, if they so chose, to craft laws that could limit the scope of its *Kelo* ruling.

Your Home on the Range

And law crafting has been happening all over the nation this year in state legislatures from sea to shining sea. In Kansas, the House passed a bill on March 24th to make any property seizure via eminent domain for economic development subject to legislative approval. The House bill, passed on a 117-4 vote, now replaces a bill passed earlier in the same week by the Senate, on a 27-13 vote. The House killed the Senate bill on March 23rd. A conference committee will convene shortly to work out any differences between the two bodies. It is unknown if Governor Kathleen Sebelius will sign the measure. However, given the huge majorities in both houses, even if Sebelius vetoes the bill, the legislature would override her.

It's clear that the legislature wanted to do something to curb what it saw as the potential for unchecked opportunism from the U.S. Supreme Court's decision in *Kelo*. But did the legislature really do its job in terms of communities of color, the poor and seniors?

Here one important thing to consider:

Both the House and Senate proposals have prominently featured the term "fair market value," which is synonymous with appraised value. Appraised value is greatly colored by where property is located. So is compensation based on where property is located really fair? One way to address this is to replace the term "fair market value" with "replacement value." "Replacement value" is an insurance industry term that sets the value of a structure based on how much it would cost to replace it, *regardless* of where it's located.

For example, identical three-bedroom, two-bath houses with full basements would be appraised differently in East and West Topeka. The house in East Topeka might be valued at \$60,000, while the same house in West Topeka might be valued at \$100,000. If eminent domain hits both homeowners, the West Topeka homeowner will get more for his house, although both houses are the same. Both homeowners will have to relocate, but the East Topeka homeowner is more likely to start anew with a negative financial balance (read mortgage) because his compensation won't go as far as the West Topeka homeowner's compensation.

However, if "replacement value" is used, then we're looking at what it would cost to replace the house, *regardless* of where it's located. The replacement value on the above homes might be \$120,000, which would mean *both* homeowners would receive the same amount of money for the same amount of pain.

Can't We All Just Get Along?

Can common ground be found between the good that redevelopment can do in depressed neighborhoods and the harms that can result if that redevelopment isn't implemented fairly, equally and openly? Paul Farmer, Executive Director and CEO of the American Planning Association (APA), which submitted a brief in support of the government in *Kelo*, had this to say on the subject (**bolding mine**):

"The Supreme Court faced a difficult decision in the *Kelo v. City of New London* case. In the 5-4 opinion issued today, the Court emphasized the importance of linking eminent domain to a community's comprehensive plan.

"This decision validates the essential role of planning in ensuring fairness in the eminent domain process.

"The Court's decision need not strike fear into every property owner's mind; it will not open the floodgates for eminent domain use. The Court specifically mentions that a determining factor in their decision was the city's "comprehensive character of the plan" and the "thorough deliberation that preceded [the plan's] adoption." The Justices determined that the plan and the thorough planning process ensured that the project truly met the Constitution's "public use" standard.

"Using eminent domain for the benefit of the community as a whole is never easy. It is one of many valuable tools planners and elected officials use to create communities that enrich people's lives. Without eminent domain, adapting to the challenges presented by growth and change would be even more difficult, if not impossible.

"Eminent domain is a tool that should be used with caution, and only as a last resort. The Court stressed that cities and planners have the power to exercise eminent domain if it is done thoughtfully and is consistent with the implementation of a community's comprehensive development plan.

"The American Planning Association (APA) strongly believes that citizens should be justly compensated with fair market value when eminent domain is used. Furthermore, APA holds that it is important to preserve the ability of local governments to use redevelopment tools and techniques, including eminent domain when appropriate, to achieve well-defined public purposes to create communities of lasting value.

"This decision, coupled with the 9-0 decisions handed down in the *Lingle* and *San Remo* cases issued earlier this term, shows that the Supreme Court is "staying the course" with long-standing principles of U.S. land-use law. The court has refused to introduce radical and potentially troubling new concepts into a system that fairly balances rights and responsibilities.

"The opinion, albeit difficult, underscores the importance of the planning process. The planning process involves everyone: residents, businesses, civic leaders, elected officials and planners alike. **It's not easy, but a democratic planning process with meaningful public participation is the appropriate way to proceed.** This community engagement is necessary to keep our cities growing and prosperous."

I watched a C-SPAN program on Mar. 18th on eminent domain. It featured author Steven Greenhut, whose book "Abuse of Power: How the Government Misuses Eminent Domain" was the chief topic of discussion. There were about 100 people in the audience. There was one black face there. He didn't say anything. No one spoke about the unique issues that not only people of color, but the poor and seniors, traditionally have had with eminent domain. No one spoke for renters, either, who are the most vulnerable when it comes to property seizures. Someone should be speaking for these people.

Discussions on this issue are already occurring in Topeka, but those discussions rarely have included the concerns and hopes of the people this organization represents. Getting involved in those discussions is important because the government-industrial complex that characterizes so many cities today will go unchecked. Getting involved also is important because our lives as we know them, based largely on the sanctity and security of having a place to call home, could hang in the balance.

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