

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

The Summary Report
from the
Committee's Informational Hearing

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

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On Wednesday morning, August 17, 2005, the Senate Local Government Committee held an informational hearing that examined how the United States Supreme Court's decision in *Kelo v. City of New London* affected California's counties, cities, special districts, and redevelopment agencies. The hearing began at 10:00 a.m. Held in the State Capitol, the Committee's hearing attracted more than 75 people.

Seven Committee members attended the hearing:

- Senator Christine Kehoe, Committee Chair
- Senator Dave Cox, Committee Vice Chair
- Senator Sheila Kuehl
- Senator Michael J. Machado
- Senator Tom McClintock
- Senator Nell Soto
- Senator Tom Torlakson

Four Assembly Members also participated in the Committee hearing:

- Assembly Member Doug La Malfa
- Assembly Member Dennis Mountjoy
- Assembly Member Gene Mullin
- Assembly Member Simón Salinas

The Senate TV and Video Programs' staff recorded the hearing and copies of the videotapes are available. The total cost for the two-tape set is \$15 (\$5 for each tape, plus \$5 for shipping). To order a set of these videotapes, call (916) 651-1531.

This summary report contains the Committee's staff explanation of what happened at the hearing [see the *white* pages], reprints the briefing paper [see the *blue* pages], and reproduces the written materials provided by the witnesses and others [see the *yellow* pages].

STAFF FINDINGS

Any attempt to distill two hours of prepared presentations, legislators' questions, and lively discussions into a few findings must necessarily gloss over important details and subtle nuances. But after carefully considering the witnesses' state

ments and reviewing their written materials, the Committee's staff reached these findings:

Who's affected? None of the five witnesses said that *Kelo* affected California's counties, cities, special districts, or school districts. All of them focused on how *Kelo* affected redevelopment agencies.

California effects. The five witnesses disagreed on how *Kelo* affected redevelopment agencies' eminent domain powers. **Rick Frank** said that a *Kelo*-like taking was impossible in California. **Tim Sandefur** said that California's situation is worse than Connecticut's. **Mike Berger** warned of redevelopment agencies "that are feeling their oats" after the *Kelo* ruling. **Joe Coomes** explained that California law provides two important protections that differ from Connecticut; the "blight" requirement and evidentiary hearings. **Bill Higgins** said that "California has substantial safeguards in place" against abusive eminent domain.

Eminent domain procedures. The witnesses disagreed over property owners' protections under the existing statutory procedures. **Tim Sandefur** and **Mike Berger** called for legislative changes that would benefit property owners who oppose eminent domain. **Joe Coomes** defended the existing statutory protections. **Senator Kehoe** noted that the Senate Judiciary Committee has jurisdiction over the state's eminent domain procedural statutes.

The "blight" definition. State law limits redevelopment agencies' eminent domain powers to redevelopment project areas where the property must be blighted. As **Joe Coomes** said, "Without blight you don't have eminent domain." **Tim Sandefur** called on legislators to tighten the statutory definition. **Joe Coomes** said that legislative discussions are appropriate. **Senator McClintock** remained skeptical of the statutory definition. **Senator Kehoe** announced that the "blight" definition would be a subject of her Committee's fall interim hearings.

THE WITNESSES

The Committee invited five witnesses to discuss how the *Kelo* decision affected California's local governments. Each of these witnesses provided written materials to supplement their remarks. The appendix to this report reprints those materials [see the *yellow* pages].

Richard Frank
Chief Deputy Attorney General for Legal Affairs

Timothy Sandefur, Staff Attorney
Pacific Legal Foundation

Michael Berger
Manatt, Phelps & Phillips, LLP

Bill Higgins, Land Use and Housing Program Director
Institute for Local Government

Joseph E. Coomes, Jr.
McDonough Holland & Allen, PC

To complement these remarks, two other people provided written materials which also appear in the appendix [see the *yellow* pages].

Steven P. Zehner
County of Los Angeles

Supervisor Chris Norby
County of Orange

The appendix also reprints additional materials about the *Kelo* case from both Senator Kehoe and Senator McClintock. The Assembly Housing and Community Development Committee and the Assembly Local Government Committee authored the materials that Senator Kehoe circulated. Senator McClintock circulated rejoinder materials from Tim Sandefur at the Pacific Legal Foundation.

OPENING REMARKS

As the Committee's Chair, **Senator Kehoe** opened the hearing by saying that legislators wanted to learn how the U.S. Supreme Court's recent *Kelo* ruling affects California's cities, counties, special districts, and redevelopment agencies. The Senate Local Government Committee cannot rewrite the state's eminent domain laws because that topic falls within the policy jurisdiction of the Senate Committee on the Judiciary. Instead, she said, the Committee wants to know what *Kelo* means

to California property owners and the local officials who serve them. “We need to dig deeper and find out what *Kelo* really means here in California,” she said.

Redevelopment agencies and their 771 redevelopment project areas are the most likely to be affected by the Supreme Court’s ruling, Senator Kehoe explained, because they can use eminent domain to eradicate blight. Her own experiences on the San Diego City Council showed that condemnations of private property “were tough decisions ... however, those hard choices created better neighborhoods.” Senator Kehoe acknowledged “that not all redevelopment agencies act as responsibly,” and expressed her dismay at the City of California City’s condemnation of desert land for an auto test track. Senator Kehoe noted the Attorney General’s support of the lawsuit challenging that eminent domain attempt.

Senator McClintock told his legislative colleagues about his recent meeting with John Revelli, a brake shop owner in a redevelopment project area near downtown Oakland. He described the tears in Mr. Revelli’s eyes as they talked about eminent domain which Senator McClintock called “an alien doctrine.”

BRIEFING AND OVERVIEW

Rick Frank, the Chief Deputy Attorney General for Legal Affairs, explained how the Supreme Court relied on its 1954 *Berman v. Parker* decision and the 1984 decision in *Hawaii Housing Authority v. Midkiff* as precedents for its *Kelo* ruling. Mr. Frank sketched the setting in New London, Connecticut that resulted in the “most sympathetic” plaintiffs filing the lawsuit against the use of eminent domain. As a close observer of these cases, Mr. Frank told the legislators that he had expected an easy decision that relied on the earlier precedents, but the 5-4 decision was a “surprise” from the Supreme Court.

Justice Stevens’ majority opinion cautioned government officials from taking private property “simply to confer a private benefit on another private property owner. But so long as the proposed condemnation services a general ‘public purpose’ [it] suffices to meet the Takings Clause’s ‘public use’ requirement.” Mr. Frank’s prepared statement quotes the majority opinion, “Promoting economic development is a traditional and long accepted function of government.” An important caveat in the majority opinion is that states can adopt tighter standards on how state and local officials use their eminent domain powers.

Justice O'Connor's dissent involved a "remarkable bit of soul searching," given her authorship of the 1984 *Midkiff* decision. Mr. Frank explained that Justice O'Connor would limit "public use" takings to three circumstances:

- Transfers of property to public ownership, like a city hall or a highway.
- Transfers of private property to a private concern where the public still has full access and use, like a railroad right-of-way or a sports stadium.
- Where the private use inflicted affirmative harm on society.

Assembly Member Mullin asked if a *Kelo*-like economic development taking was possible in California. No, Mr. Frank replied, because California law requires property to be predominantly urbanized and blighted before it can be placed in a redevelopment project area and redevelopment agencies can only use their eminent domain powers in project areas. **Senator McClintock** pressed Mr. Frank on the statutory definition of "blight." Holding up an aerial photo of New London, Connecticut, he asked if this area would be considered blighted under California law. Mr. Frank replied that the California courts have applied the blight definition in "widely and wildly varied" ways. That is why the Attorney General has filed a brief supporting the plaintiffs in their suit against the City of California City's redevelopment plan.

Senator Cox asked if the Attorney General will be filing more briefs on eminent domain. Mr. Frank said that he could not "promise what we can't deliver," given his department's "limited resources," but the Attorney General will be involved "where appropriate." **Senator Cox** asked Mr. Frank to explain the criteria that the Attorney General would use to decide which cases to support. Cases that involve "egregious facts" and that would help the courts write clear standards would attract the Attorney General's attention, Mr. Frank said. **Senator Kuehl** asked if a property's proximity to incompatible uses was an adequate reason by itself for local officials to find "blight." Mr. Frank discussed the statutory definition and expressed his hope that local officials will pay closer attention to those standards.

PROPERTY RIGHTS PERSPECTIVE

Predicting harm to the least powerful, the Pacific Legal Foundation's **Tim Sandefur** criticized the *Kelo* ruling because it "hurts most those who have the least." He presented legislators with four myths about eminent domain:

- The *Kelo* decision does not affect California because state law only allows condemnation of blighted property.

- Eminent domain is only used as a last resort.
- Eminent domain is needed to revitalize economically failing areas.
- Property owners are included in the eminent domain process.

“Redevelopment barons” make these statements, Mr. Sandefur said, but none of these myths is true. Citing a study by the Castle Coalition, he said that between 1998 and 2003, there were 5,583 condemnations in California, including 223 transfers to other private owners. Mr. Sandefur offered examples of redevelopment condemnations in Chula Vista, San Diego, Lancaster, Cypress, San José, Alhambra, and Sacramento. He declared that citizens are threatened by the “‘Costco-Ikea-Home Depot-Redevelopment Agency’ complex ... that abuses government power and enriches developers at the expense of other people’s rights.”

Mr. Sandefur gave the Committee four possible reforms:

- Clarify the “public use” definition with a constitutional amendment.
- Tighten the “blight” definition to focus on “truly unsafe property.”
- Reform the eminent procedures to benefit property owners.
- Make blight designations time-limited.

“So, was *Kelo* a big deal?” attorney **Mike Berger** asked, reflecting his long experience representing property owners in condemnation cases. He answered his own rhetorical question, “Yeah, I think it was.”

Mr. Berger distinguished the *Kelo* ruling from the precedents used by the Supreme Court. “*Kelo* is nowhere near *Berman* or *Midkiff*,” he asserted, because in the Connecticut case, the Court’s decision moved the focus from an economically depressed area to an entire economically depressed city. “That’s a major jump” in federal case law, Mr. Berger said.

“Most redevelopment agencies in California, I believe, have not abused their powers,” Mr. Berger told the legislators. However, there is a potential for abuse because the declaration of blight “is well nigh conclusive.” The California courts defer too much to local officials which is why attorneys can’t use *Kelo* to protect property owners. Later, he warned legislators about redevelopment agencies “that are feeling their oats” after the *Kelo* ruling.

Calling the California City example “out of bounds,” he agreed with the Attorney General’s decision to intervene. Answering a question from **Senator Torlakson** about public works projects, Mr. Berger said that “The condemnations I’ve seen

are for the things most people would agree are blighted,” but that shows the need for the Legislature to revise the “blight” definition. He also recommended that legislators change the eminent domain procedures by removing the short time limit for filing lawsuits and by allowing property owners to challenge the “blight” designation when redevelopment officials file eminent domain actions.

Senator McClintock asked Mr. Sandefur if he agreed with the California Redevelopment Association’s view that California is not Connecticut. Mr. Sandefur agreed because “California is worse than Connecticut” when it comes to the number of eminent domain actions. “California has a rash of eminent domain,” he said, pointing to an example from San José. “San José has the most abusive redevelopment agency in California,” Mr. Sandefur claimed. **Senator McClintock** asked Mr. Berger to review the procedures that property owners face when redevelopment agencies use their eminent domain. Mr. Berger criticized the eminent domain statute’s short notice periods, the appraisal standards, and the amount of compensation available to property owners. **Senator McClintock** reacted by quoting William Pitt:

The poorest man may in his cottage bid defiance to all the forces of the Crown - it may be frail, its roof may shake, the wind may blow through it - the storm may enter, the rain may enter, but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement.

- William Pitt the Elder (Lord Chatham), 1763

PUBLIC AGENCY PERSPECTIVE

Joe Coomes drew on his long experience as a lawyer for redevelopment agencies as he explained that California law differs from Connecticut in two ways:

- California does not allow taking private property for economic development; only to eliminate blight in redevelopment projects.
- Eminent domain requires evidentiary findings; it is not conclusionary.

The courts have not been reluctant to challenge redevelopment agencies’ determinations of blight. “Without blight, you don’t have eminent domain,” Mr. Coomes explained. He described for the legislators the detailed steps that local officials must follow to adopt redevelopment plans, including sending notices to property owners, creating Project Area Committees, and paying relocation benefits.

Mr. Coomes stated that “approximately 50 percent of redevelopment plans exclude or limit the power of eminent domain.” He continued that, for both legal and political reasons, it was “very rare” for redevelopment agencies to condemn residential property. However, when other techniques fail, redevelopment officials must use their eminent domain powers. Mr. Coomes gave three examples from the Sacramento area involving the notoriously run-down Franklin Villa neighborhood, an Oak Park liquor store, and a West Sacramento adult bookstore. New investment is occurring as a result of eminent domain, he said. Before the *Kelo* case, Mr. Coomes argued, eminent domain was not controversial in California and complaints were uncommon. In his view, *Kelo* did not change California law, but redevelopment officials believe that legislative discussions are appropriate and they are willing to work with the Committee.

Bill Higgins represented the view of the Institute for Local Government when he acknowledged the post-*Kelo* concern for protecting private homes. But public officials also need to accommodate population growth of more than 600,000 new Californians a year. The press has mischaracterized the *Kelo* ruling and ignored how redevelopment officials have used eminent domain to clean-up contaminated property that private owners won’t or can’t clean-up. Citing Emeryville’s Bay Street redevelopment project as an example of effective eminent domain that restored property values, Mr. Higgins said that “California has substantial safeguards in place” against abusive eminent domain. Like all powerful tools, he added, eminent domain must be used prudently.

Mr. Mullin asked if there was “any room for improvement in redevelopment law. Can we do better?” Mr. Coomes responded that there is “always room for improvement,” and cited earlier cycles of legislative concern and redevelopment reform in the early 1950s, the mid-1970s, and the 1993 Isenberg changes.

Senator McClintock distributed photographs taken in Port Hueneme and downtown San Diego, asking Mr. Coomes, “Do you believe those properties are blighted?” Mr. Coomes said that he could not say if properties were blighted by looking at photos. When Senator McClintock pushed on the question of blight, Mr. Coomes explained that redevelopment law requires officials to give property owners repeated notices about redevelopment plans, potential appraisals, and public hearings on eminent domain decisions. When Senator McClintock again raised Mr. Revelli’s situation in Oakland, Mr. Higgins reminded legislators that for every sympathetic story, there are other stories of how cities step in and use eminent domain to improve neighborhoods, citing examples in Sacramento, Emeryville’s Bay Street, and a senior apartment complex in Pacifica.

Responding to a question from **Senator Kehoe**, Mr. Coomes argued that following Mr. Sandefur's recommendations would put legislators on a "dangerous route" that would overturn 50 years of basic jurisprudence. Time limits to challenge public decisions are typically short because they create the economic certainty that's needed to promote private and public investment in blighted areas.

IN CONCLUSION

As she closed the Committee's hearing, **Senator Kehoe** told her colleagues and the audience what she expected to happen as a result of the testimony. Senator Kehoe said that she would:

- Forward the recommendations about changing the procedures for eminent domain to Senator Dunn who chairs the Senate Judiciary Committee. That topic falls within the other Committee's policy jurisdiction.
- Hold hearings during the Legislature's fall interim recess to look at the definition of blight and at how redevelopment agencies plan for eminent domain. The Committee would cooperate with the Senate Transportation and Housing Committee, the Assembly Local Government Committee, and the Assembly Housing and Community Development Committee on those hearings.

The hearing concluded at 12:15 p.m.

