June 2005
Vol. V, No. 6

Community Rights Report

CRC's Monthly Newsletter

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FEATURE CASE

High Court Upholds Economic Development As a "Public Use" under the Fifth Amendment

Kelo v. City of New London, No. 04-108 (June 23, 2005)

In a 5-4 ruling, which was closer than expected by most court-watchers, the U.S. Supreme Court upheld the use of eminent domain for economic development, ruling that such development satisfies the "public use" requirement of the Takings Clause.

At issue was the 90-acre Fort Trumbull redevelopment plan in New London, Connecticut, which the city hopes will bring more than 1,000 new jobs and increased revenues for social services to revitalize that economically depressed area. Nine landowners who own 15 properties within the development site refused to sell, and the city commenced condemnation proceedings. None of the properties is alleged to be blighted. Although portions of the development are earmarked for a public riverwalk and other public amenities, other portions will be used for office space, condominiums, and other facilities not open to the public.

Writing for the majority, Justice John Paul Stevens observed that the court had long ago abandoned the notion that condemnations must be limited to situations where the condemned property is directly owned and used by the public. Rather, for more than 100 years the court has adhered to "the broader and more natural interpretation of public use as 'public purpose.'" Citing early examples of condemnations to promote mining, farming, railroads, private power-producing dams, and other economic enterprises, the court concluded that there is no principled way of distinguishing takings for economic development. The court also invoked longstanding precedent requiring deference to legislative judgments regarding the need to acquire property, as well as federalism principles that compel respect for state and local decisionmaking.

It is important to note that the ruling is not a "blank check" to government officials. The court observed that condemnations may not proceed "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." It stressed that New London was indisputably in economic distress and that its use of eminent domain was part of a "carefully considered" comprehensive development plan that had been subject to thorough deliberation. It further noted that at the time of the condemnation decision, New London had not chosen a private developer or the private tenants, thereby reducing the risk that the condemnations were for the benefit of particular private interests. The court also emphasized that a different result might be obtained where, "outside the confines of an integrated development plan," a city transfers "citizen *A*'s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes," a scenario that "would certainly raise a suspicion" that the takings was for a private purpose.

Careful attention also should be paid to the concurring opinion authored by Justice Kennedy, who provided the critical fifth vote in favor of New London. His opinion reads like a list of "best practices," and he expresses willingness to scrutinize future condemnations in appropriate cases where takings lack adequate consideration. In particular, he insisted that a court "should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits." He quoted with approval the trial court's conclusion that for economic development takings that involve a transfer of the land to a private party, "the court must review the record to decide if the stated public purpose – economic advantage to a city sorely in need of it – is only incidental to the benefits that will be confined on private parties of a development plan." He observed, among other things, that New London suffers from serious economic depression, adopted a comprehensive development plan, reviewed several development plans, and chose a developer from a group of applicants rather than identifying one beforehand. The project was supported by substantial state funds, and nothing in the record indicated a desire to benefit a particular private party.

CRC coauthored an amicus brief in support of New London on behalf of a broad coalition of state and local government groups.

QUOTE OF THE MONTH

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" that we owe to state legislatures and state courts in discerning local public needs.

Kelo v. City of New London (U.S. 2005)

ON THE HORIZON

High Court Rejects Duplicative Takings Relitigation, But Four Justices Invite Future Review of *Williamson County*

In its June 20 ruling in *San Remo Hotel, L.P. v. City and County of San Francisco*, No. 04-340, the U.S. Supreme Court rejected arguments by developers and the so-called property rights movement, urging that takings claimants be given two bites at the litigation apple, first in state court and then in federal court. Instead, the court ruled that the federal Full Faith and Credit Act, 28 U.S.C. § 1738, requires federal courts to apply normal principles of issue preclusion to state court findings and conclusions once a takings claimant returns to federal court after first seeking compensation in state court as required by *Williamson County*.

The procedural history of *San Remo* is complicated, but the ruling is broadly applicable. After noting that the Full Faith and Credit Act was enacted in 1790 and has remained essentially unchanged since then, the court observed the doctrines of claim and issue preclusion (also called res judicata and collateral estoppel) embodied in that law long predate the Republic and are found in every system of jurisprudence because they are essential to repose and finality. The court then drew upon a long line of precedent to reject the notion that plaintiffs have a right to vindicate their federal claims in a federal forum, even where the plaintiff would have preferred not to litigate in state court. The court also emphasized that "state courts are fully competent to adjudicate constitutional challenges to local land-use decisions."

The court did note that when takings claimants first seek compensation in state court as required by *Williamson County*, they may file their federal takings claims in state court "in the alternative." Many, if not most, state courts appear to allow this procedure already. The phrase "in the alternative" suggests that state courts should first address the state takings claim and turn to the federal takings claim only if the former is unsuccessful. *E.g. Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620, 645-46 (2003) (refusing to award attorneys fees under §1988 regarding the claimant's federal takings claim where the claimant prevailed on its state takings claim). [Hat tip to Robert Brown at Brown & Hofmeister, LLP, for this helpful example.]

What remains "on the horizon"? Four Justices (Chief Justice Rehnquist, joined by Justices O'Connor, Kennedy, and Thomas) issued a separate concurrence to note that they would be willing to reconsider the *Williamson County* requirement that takings claimants seek compensation in state court first. The concurrence agrees with the majority that takings claimants should not be allowed two bites at the apple, but it questions whether constitutional or prudential considerations require claimants to seek compensation in state court first. It remains to be seen whether there are five votes on the court to abandon this requirement.

CRC filed an amicus brief supporting San Francisco on behalf of the California State Association of Counties, the League of California Cities, and the American Planning Association.

EYE ON WASHINGTON

Victory in *Gonzales v. Raich*, ESA Lives Another Day

In *Gonzales v. Raich*, No. 03-1454 (June 6, 2005), the U.S. Supreme Court rejected a Commerce Clause challenge to the application of federal drug laws to the medical use of marijuana, even where the marijuana is grown and distributed intrastate. The 6-3 decision is a straightforward application of *Wickard v. Filburn* (1942), which held that Congress may regulate wholly intrastate activity (there, homegrown wheat) when Congress reasonably could conclude that the activity, when viewed in the aggregate with similar activity, could affect interstate commerce. In *Raich*, the court deferred to congressional findings that locally produced and distributed marijuana could "leak" into the interstate market.

Although CRC takes no position on medical marijuana use, we filed an amicus brief in support of the government because a narrowing of Commerce Clause authority could jeopardize environmental safeguards, civil rights laws, and other federal protections. Just one week after *Raich*, the court declined to review a Commerce Clause challenge to federal protections for endangered species, and it used *Raich* to vacate and remand lower court rulings invalidating federal controls on machine guns, child pornography, and discrimination against the disabled. On June 21, the Seventh Circuit relied on *Raich* to reject a Commerce Clause challenge to federal wetland protections. *United States v. Gerke Excavating, Inc.*, No. 04-3941.

By reaffirming longstanding Commerce Clause precedent, *Raich* solidifies the constitutional foundation of a vast array of federal protections.