

# **Illinois Institute for Continuing Legal Education**

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## **Eminent Domain Update**

**Chicago, June 12, 2009  
Springfield, June 18, 2009**

### **Eminent Domain to Promote Economic Development**

- A. Eminent Domain as a Tool for Property Assemblage for Redevelopment.**
  - 1. What is economic development acquisition?
  - 2. Historic urban renewal.
  - 3. City of Chicago North Loop and Central Loop Projects.
  - 4. Oak Park projects.
  - 5. Privatizing public functions.
    - a) Stadiums.
    - b) Parking.
- B. The impact of the current economic recession on condemnation for economic development.**
- C. U.S. Const. Amend. V:**

“...nor shall private property be taken for public use, without just compensation.”
- D. The constitutional and legislative sources for economic development condemnation**
  - 1. State of Illinois – plenary condemnation authority.

- a) Illinois Department of Commerce and Community Affairs, 20 ILCS 605/605.
- 2. Home Rule: Art. VII, Sec. 6 “Exercise any power and perform any function pertaining to its government and affairs.”
- 3. Legislative Authority.
  - a) Business District redevelopment – 65 ILCS 5/11-74.3-3.
  - b) Historic Preservation redevelopment – 65 ILCS 5/11-48.2-2.
  - c) Tax Increment Financing (TIF) – 65 ILCS 5/11-74.4-1 et seq.
  - d) Substandard structures 65 ILCS 5/11-13-17.
  - e) Commercial blight 65 ILCS 5/11-74.2-8.
  - f) General condemnation power 65 ILCS 5/11-61-1.
  - g) Industrial Jobs Recovery Law 65 ILCS 5/11-74.6-15.
  - h) Urban Renewal Consolidation Act of 1961 315 ILCS 30/12, 24.

**E. *Kelo v. City of New London*, 545 U.S. 469 (2005).**

**F. The precedent for the *Kelo* opinion: public use has meant public purpose.**

- 1. 19th Century precedent: The Mill Acts, mine cases and railroad condemnation authority.
- 2. *Berman v. Parker*, 348 U.S. 26 (1954).
- 3. Hawaii Bishop Estate case: *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

**G. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) may have more impact on economic development than *Kelo*.**

- 1. The Court invalidated the “substantially advances a legitimate state interest” test for regulatory takings.
- 2. Justice O’Connor for a unanimous court: “[T]his formula prescribes an inquiry in the nature of a due process, not a takings, test and . . . it has no proper place in our takings jurisprudence.” 125 S.Ct. at 2083.

3. The standard of review is deferential: “The notion that such a regulation nevertheless ‘takes’ private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.” 125 S.Ct. at 2084.
4. In *Kelo*, Justice Stevens cited *Lingle* with approval to support deferential treatment of legislative decisions. 125 S.Ct. at 2667.
5. “Our public use jurisprudence wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.” 125 S.Ct. at 2664.

#### **H. Post *Kelo* economic development: “It’s the plan, stupid.”**

1. The plan is emphasized in Justice Stevens’ opinion:
  - a) A “carefully considered” development plan. 125 S.Ct. at 2661.
  - b) “The City has carefully formulated an economic development plan.” 125 S.Ct. at 2665.
  - c) “the comprehensive character of the plan.” *Id.*
  - d) “thorough deliberation” preceding the plan’s adoption. *Id.*
  - e) a state statute “specifically authorize the use of eminent domain to promote economic development.” *Id.*
  - f) “in the context of a comprehensive development plan meant to address a serious city-wide depression.” 125 S.Ct. at 2670 (Justice Kennedy, concurring).
2. Lack of a Plan: *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 199 Ill.2d 225 (2002).
  - a) There was no pre-condemnation legislative purpose.
  - b) The agency’s true intentions were not clothed in an independent legitimate governmental decision to further a planned public purpose.
  - c) No economic plan was formulated for the use of the property to be acquired.
  - d) No study of the need for parking existed.
  - e) The acquisition was undertaken “solely in response” to a private expansion plan.

**I. The surprising reaction to *Kelo*.**

1. Lesson: the law is not all precedent.
2. The impact of a well-financed and well-articulated libertarian opposition to governmental assistance for urban economic development.

**J. The legislative response to *Kelo*.**

1. Justice Stevens invited the states to broaden the reach of the public use clause: nothing in the Court's opinion "precludes any State from placing further restrictions on its exercise of the takings power."
2. The court reinforced constitutional public use jurisprudence; legislation limiting the use of eminent domain is an appropriate if mistaken response to *Kelo*.

**K. Ameliorating the effects of Hurricane *Kelo*.**

1. Publicize successful economic development projects.
2. Consider making compensation more just.
  - a) Provide moving and move-in cost reimbursement in non-federal projects.
  - b) Reimburse out of pocket costs, such as appraisal.
  - c) Reimburse attorneys fees.
  - d) Make allowance for intangible or non-economic costs.

# Chicago Tribune

MONDAY AUGUST 22, 2005

