Post-Kelo Reforms: Far From 'Phony'

Following the U.S. Supreme Court's 2005 decision in *Kelo v. City of New London*, some have argued that legislators have not taken sufficient action to prevent future eminent domain abuses, particularly in California. In *Kelo*, a 5-4 majority of the Supreme Court upheld New London's use of eminent domain to acquire Susette Kelo's home for an economic revitalization project by a private developer. That project has since fallen through, and Pfizer Inc., the pharmaceutical company whose operations were supposed to anchor the redevelopment, recently announced plans to close its New London facility.

Since *Kelo,* California voters and legislators have indeed enacted significant reforms that provide property owners with real protection.

In fact, the Supreme Court in *Kelo* noted that California's Community Redevelopment Law already imposed stricter public use requirements than "the federal baseline" under which the Connecticut law was analyzed. But, to some anti-*Kelo* advocates, this is a distinction without a difference. The California law allows a public entity to take private property located in a blighted area by eminent domain, and then transfer the property to a private developer for a private development project. Eminent domain for redevelopment purposes is, they contend, the crux of the problem. The question then becomes: Have the post-*Kelo* reforms in California effectively addressed perceived abuses of eminent domain for redevelopment purposes?

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In November 2006, Californians were asked to vote on Proposition 90, a ballot initiative that would have amended the California Constitution's "takings" clause to expressly prohibit "takings expected to result in transfers to non-governmental owners on economic development or tax revenue enhancement grounds...." If approved, this language would have effectively precluded the use of eminent domain for redevelopment purposes. Ultimately, Californians voted against Proposition 90 by a 52.4 percent to 47 percent margin.

Californians were asked to vote again in June 2008 to amend the "takings" clause of the state Constitution. This time, there were two competing ballot initiatives. Proposition 98 proposed to include language clarifying that "[p]rivate property may not be taken or damaged for private use", and defining "private use" as the "transfer of ownership, occupancy, or use of private or associated property rights to any person or entity other than a public agency or a regulated public utility." Like Proposition 90 before it, Proposition 98 would have effectively precluded the use of eminent domain for redevelopment purposes.

Proposition 99, on the other hand, did not propose to eliminate eminent domain for redevelopment purposes altogether. Rather, it sought to restrict its use on certain types of properties. Much of the anti-*Kelo* furor related to the sentiment that a person's home should not be subject to eminent domain for use by a private developer. Proposition 99 specifically proposed to preclude public entities, including redevelopment agencies, from "acquiring by eminent domain an owner-occupied residence for the purpose of conveying it to a private person." The term "conveyance" included not just the transfer of title, but also a lease of property to a private developer as in the *Kelo* case.

In June 2008, California voters soundly rejected Proposition 98 while approving Proposition 99 with 62.5 percent of the vote. With this voter-approved amendment to the state Constitution's "takings" clause alone, the type of eminent domain action in the *Kelo* case could not occur in California. That was not phony.

Other post-*Kelo* legislative reforms to the California Eminent Domain Law also were very real.

In 2006, the California Legislature acted to address other perceived abuses of eminent domain for redevelopment purposes. One such alleged abuse related to the length of time from when a redevelopment agency took possession of property until construction of a redevelopment project actually started. Proponents of eminent domain reform pointed to examples where redevelopment agencies would file complaints in eminent domain, obtain orders for prejudgment possession, and displace the landowners - only to have the property sit vacant for months or even years before construction of a new redevelopment project would commence.

Prior law did allow a redevelopment agency to obtain an order for prejudgment possession on just 24 hours' notice to the landowner. In order for the court to grant such an order, a redevelopment agency was only required to demonstrate that it was entitled under the law to acquire the property by eminent domain, and that it had made a deposit of its appraised value of the property with either the State Treasury Condemnation Fund or with the Superior Court. Generally, redevelopment agencies were able to make these showings without much difficulty. Assuming the court granted an order for prejudgment possession, a redevelopment agency was then entitled to take physical possession of improved, occupied property after 90 days without being required to show when construction of the redevelopment project would start.

But, with three significant changes by the Legislature in 2006, those days are gone. First, unless a redevelopment agency states in writing that the development, redevelopment or public use of the property is scheduled to begin within two years, the agency now has an affirmative obligation to offer a one-year leaseback of the property to the landowner. This leaseback option must be offered annually unless, again, the agency can state in writing that the redevelopment project is scheduled to begin within two years.

Second, the Legislature significantly lengthened the process governing a redevelopment agency's ability to obtain an order for prejudgment possession. A redevelopment agency can no longer seek an order for possession on just 24 hours' notice. Instead, in cases where the property is occupied, a redevelopment agency must now set a hearing date with the court no less than 90 days from the date of filing a motion for prejudgment possession.

Third, the Legislature gutted and replaced the standards to be applied by a court in ruling on a redevelopment agency's order for possession. When a landowner opposes a motion for order for possession in a timely manner, a redevelopment agency now needs to answer the question of when construction of an actual redevelopment project will start. The court can only grant the motion if it finds, among other things, that the redevelopment agency has an overriding need to possess the property before the final judgment; would suffer a substantial hardship if the motion were denied; and that the resulting hardship would outweigh the hardship to the landowner.

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As a practical matter, these are all dramatic changes when compared to prior practice.

In addition to these reforms, the California Legislature also took action in 2006 to address a perception that some redevelopment agencies sought to exercise their eminent domain authority in areas that were not truly blighted. For example, in S.B. 1206, the Legislature expressed its intent in amending certain provisions of the Community Redevelopment Law "to focus public officials' attention and their extraordinary redevelopment powers on properties with physical and economic conditions that are so significantly degraded that they seriously harm the properties for physical and economic development without the use of redevelopment."

These additional protections now afforded to landowners did not exist before *Kelo*. It is true that they do not ban eminent domain for redevelopment purposes in all instances. (In two separate ballot initiatives since *Kelo,* Californians rejected such a proposed ban.) But, there is no question that they are significant and meaningful in addressing prior alleged eminent domain abuses by redevelopment agencies. These substantial reforms are far from being "phony."