



Six Years of Separation: Life After Kelo

by [Ethan Friedman](#)

It has been just over six years since the United States Supreme Court issued its landmark takings ruling in *Kelo v. City of New London*. The court's widely publicized and mostly criticized ruling found that the City of New London could use the power of eminent domain to condemn a private residence for the public purpose of economic development. In *Kelo*, the court approved of the taking of a private home and giving the property to Pfizer Corporation for construction of its national headquarters and an urban village for revitalizing the City of New London. Shortly after the decision was issued, the United States Senate and House of Representatives both passed resolutions condemning (pun intended, sorry) the decision. The debate over *Kelo* and the ramifications of the decision continue unabated.

Forty-three states have adopted post-*Kelo* legislation imposing tighter restrictions on the use of eminent domain. The anger over the decision was refueled in 2009 when Pfizer decided to abandon New London and move its headquarters, and its 1,400 jobs, out of the City. Hundreds of acres of barren land, slated for hotels, offices and retail development which were never built, represent the new blight of New London. In response to *Kelo* and Pfizer's abandonment of New London, the House Judiciary Committee is currently considering the Private Property Rights Protection Act of 2011 (the "Act"). The Act is intended to "prohibit eminent domain abuse" by states and the federal government by prohibiting the federal funding of state "economic development" (which is defined by the Act) where the power of eminent domain is invoked to acquire private property for the redevelopment. The Act would also prohibit the federal government from using its eminent domain powers for economic development. The Act would also give citizens a private right of action, a right to refer a violation to the attorney general, and the right to recover attorney and expert fees against any governmental body found to have violated the Act.

In 2007, the California legislature adopted more strict rules concerning redevelopment and the standards for determinations of blight, which require governments to show "substantial evidence" that an area is blighted, either physically or economically. Previously, redevelopment agencies used less specific reports, reaching general conclusions that an area was blighted. California voters also passed Proposition 99 in 2008 which amended the State Constitution and prohibits the taking of an owner-occupied residence for the purpose of economic redevelopment.

Now, in 2011, the anti-eminent domain fervor is as strong as ever throughout the Country and here in California. In these extremely challenging economic times, the governor proposed eliminating redevelopment agencies and the state legislature passed two bills which would do exactly that. ABX1 26 and ABX1 27 are "trailer bills" passed by the California Senate and Assembly intended to help implement the State budget bill, by reallocating tax revenue which would otherwise go to redevelopment. In short, these two bills dissolve current redevelopment agencies as of October 1, 2011, but provide a mechanism for continuation of redevelopment agency operations if the agency commits to making specified payments for education and other local government functions. These are budget balancing bills, but are very popular among politicians and voters who think redevelopment agencies abuse the power of eminent domain. A legal battle challenging these bills is currently underway.

California trial courts are also taking notice of the continued anti-eminent domain fervor. The most notable ruling is the story of a boxing club for at-risk youth in National City. The club was slated for condemnation as part of National City's redevelopment plan. In April, a San Diego County Superior Court Judge blocked National City's efforts to identify the club and its surrounding neighborhood as



blighted, and ultimately National City's effort to condemn the club for redevelopment. It is the first time a court has upheld the 2007 legislative revisions that raised the thresholds agencies have to meet to declare an area "blighted" for redevelopment purposes. The Judge wrote that National City failed to identify and cite "specific, quantifiable evidence about the location and prevalence of the alleged blighting conditions." The National City case, while decided under state law, mirrors a national legal debate over the proper standard for takings for economic development purposes.

A primary issue in the *Kelo* case was whether takings for economic development purposes require a higher level of judicial scrutiny than takings for true public use projects, such as roads and schools. At that time, the court sidestepped this specific issue but effectively ruled that the *Kelo* take did not require a higher standard. However, the Supreme Court had a vastly different makeup in 2005 than it does today. The new Supreme Court, with Justices Alito, Roberts and Sotomayor, and without Justices Stevens, Breyer and O'Connor, was recently asked to consider a Hawaii case, again raising the issue of whether takings for economic development purposes require a higher standard of review.

In [*County of Hawaii v. C&J Coupe Family Ltd. P'ship*](#), the Hawaii Supreme Court upheld the taking of land on the Big Island, holding that the asserted public use was not a pretext to hide the overwhelming private benefit to the developer of a luxury hotel and resort project. The Hawaii Supreme Court held that a transfer of property to a private developer by eminent domain, completed outside of an integrated development plan, and while the County of Hawaii was bound by a contract to condemn the land for a developer, was not subject to a presumption of invalidity or even heightened scrutiny under the 5th Amendment's Takings Clause. The Hawaii Supreme Court held that even when "a contract that delegates a county's eminent domain powers raises well founded concerns that a private purpose is afoot" under *Kelo*, the property owner has the burden of proof, by "clear and palpable" evidence, that the asserted reason for condemning the property is "manifestly wrong." The property owner's petition to the Supreme Court asks the following question:

"What category of takings are subject to heightened judicial scrutiny, and when is the risk of undetected favoritism so acute that an exercise of eminent domain can be presumed invalid?"

It is unclear whether the United States Supreme Court will agree to hear this case, and, if so, whether it will overturn the Hawaii Supreme Court's decision relying on *Kelo*. What is clear, however, is that the debate which *Kelo* created rages on throughout the country, from urban centers to the tropics of Hawaii. The limit of the government's power to condemn property for economic development purposes is still in flux. The debate is even more contentious because of the assertions of gentrification and the potential for real or imagined civil rights abuses. In fact, the United States Commission on Civil Rights held a briefing on August 12, 2011, entitled *The Civil Rights Implications of Eminent Domain Abuse*. These are important issues which will undoubtedly complicate the discussion.

Six years after *Kelo*, this much we know: Legislators, both state and federal, continue to clamp down on the rights of the government to condemn private property for economic development, and some state courts have begun to add to the discussion. We will now hold our collective breath and wait to see if the nation's highest court will get into the mix again too. The end of this story is yet to be written, but we can say one thing with certainty, that life after *Kelo* is a compelling and fascinating narrative which continues to captivate society.