Outdoor Advertising Association of America

Issue Briefs

Exaction

Message Points

- Exaction is a ruse created by government entities in order to take and remove private property without paying just (i.e. cash) compensation. This action is similar to a "forced" taking by the government, without compensation to the owners.

- Basic fairness calls for government to compensate property owners if government uses its extraordinary powers to take private property. Motivated to protect property rights, states are enacting anti-exaction protections. Missouri did so in 2007; Indiana, Minnesota, and Wisconsin in 2006.

Background

Exaction is the practice of conditioning land-use approval on removal of billboards without payment of just compensation to the owners:

- A landowner seeks a variance or permit from local authorities
- Local authorities say they'll respond favorably if the landowner removes a billboard or billboards from the property
- The owner of the billboard is not compensated

Exaction is unfair, and flies in the face of the longstanding American principle that government must compensate owners for taking private property.

Trend-line

Courts and lawmakers have responded against exaction. In 2006, three more states enacted anti-exaction laws (Indiana, Minnesota, and Wisconsin). Twelve states have anti-exaction provisions. In Michigan, a federal court stopped a township from implementing the practice of exaction (Lamar Advertising Company v Charter Township of Clinton, issued January 22, 2003).

Opportunity

In 2005, the US Supreme Court shook up the property-rights debate by upholding local authority to condemn private property – even homes – to make way for economic-development projects.

This controversial ruling is known as the Kelo case (Kelo v City of New London). In a 5-4 decision, the highest court in the land said that the City of New London, CT, could condemn Mrs. Kelo's home for private development. This case struck a public nerve, because it involved taking Mrs. Kelo's home. Prompted by strong backlash against the ruling, multiple states have considered legislation to reign in local eminent domain power. *(Kelo case note: in the Kelo case, the U.S. Supreme Court affirmed the principle of just compensation, that government must pay for taking private property for public purpose.)*

One such state was Indiana, which adopted eminent domain reform in 2006. Included in that broader bill was clearly worded language to protect billboards from exaction:

> *"A state agency or political subdivision may not require that a lawfully erected sign be removed or altered as a condition of issuing*
> *(1) a permit;*
> (2) *a license;*
> (3) *a variance; or*
> (4) *any other order concerning land use or development; unless the owner of the sign is compensated . . ."*

Best practice tip

Know your landowner. If a locality attempts an exaction, the landowner is crucial to the outcome.

References

- Kelo v City of New London, 545U.S. 469 (2005); Wikipedia, http://en.wikipedia.org/wiki/Kelo_v._City_of_New_London

- "Property Rights Victory in Indiana: Thank You Mrs. Kelo," Charles Miller, president, Media Division, Burkhart Advertising, OAAA *Outdoor Outdoor,* April 17, 2006

- State anti-exaction laws, "OAAA Compendium of Statutes"
  - Arizona
  - California
  - Florida
  - Idaho
  - Indiana
  - Michigan
  - Minnesota
  - Missouri
  - Nevada
  - Tennessee
  - Virginia
  - Utah
  - Wisconsin

- "When Billboards Are Not Free," OAAA Legal Counsel Eric Rubin, Rubin Winston Direcks Harris & Cooke, February 19, 2003

Kelo v. New London

Supreme Court of the United States

Argued February 22, 2005
Decided June 23, 2005

Full case name:	*Susette Kelo, et al. v. City of New London, Connecticut, et al.*
Docket #:	04-108
Citations:	545 U.S. 469; 125 S. Ct. 2655; 162 L. Ed. 2d 439; 2005 U.S. LEXIS 5011; 60 ERC (BNA) 1769; 18 Fla. L. Weekly Fed. S 437
Prior history:	Judgment for defendants as regarding certain plaintiffs, judgment for remaining plaintiffs, Kelo v. City of New London, 2002 Conn. Super. LEXIS 789 (Conn. Super. Ct. Mar. 13, 2002); affirmed and reversed in part, remanded, 843 A.2d 500 (Conn. 2004); cert. granted, 542 U.S. 965 (2004)
Subsequent history:	Rehearing denied, 126 S. Ct. 24 (2005)

Holding

The governmental taking of property from one private owner to give to another in furtherance of economic development constitutes a permissible "public use" under the Fifth Amendment. Supreme Court of Connecticut affirmed.

Court membership

Chief Justice: William Rehnquist
Associate Justices: John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer

Case opinions

Majority by: Stevens
Joined by: Kennedy, Souter, Ginsburg, Breyer
Concurrence by: Kennedy
Dissent by: O'Connor
Joined by: Rehnquist, Scalia, Thomas

Dissent by: Thomas	
Laws applied	
U.S. Const. amend. V	

Kelo v. City of New London, 545 U.S. 469 (2005)[1], was a case decided by the Supreme Court of the United States involving the use of eminent domain to transfer land from one private owner to another to further economic development. The case arose from the condemnation by New London, Connecticut of privately owned real property so that it could be used as part of a comprehensive redevelopment plan. The Court held in a 5-4 decision that the general benefits a community enjoyed from economic growth qualified such redevelopment plans as a permissible "public use" under the Takings Clause of the Fifth Amendment.

The decision was widely criticized by American politicians and the general public. Many members of the general public saw the outcome as a gross violation of property rights and as a misinterpretation of the Fifth Amendment whose consequence would be to benefit large corporations at the expense of individual homeowners and local communities. Most in the legal profession, however, construe the public's outrage as being directed not at the legal principles involved in the case, but at the factual outcome.[1]

History

The case was appealed from a decision in favor of the city of New London by the Supreme Court of Connecticut, which found that the use of eminent domain for economic development (the central focus of the case) did not violate the public use clauses of the state and federal constitutions. The court found that if an economic project creates new jobs, increases tax and other city revenues, and revitalizes a depressed (even if not blighted) urban area, it qualifies as a public use. The court also found that government delegation of eminent domain power to a private entity was also constitutional as long as the private entity served as the legally authorized agent of the government.

The United States Supreme Court granted certiorari to consider questions first raised in *Berman v. Parker,* 348 U.S. 26 (1954) and later reaffirmed in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). Namely, does a "public purpose" constitute a "public use" for purposes of the Fifth Amendment's Taking Clause, "nor shall private property be taken for public use, without just compensation"? Specifically, does the Fifth Amendment, applicable to the states through the Due Process Clause of the Fourteenth Amendment (see main article: Incorporation of the Bill of Rights), protect landowners from the use of eminent domain for economic development, rather than, as in *Berman,* for the elimination of slums and blight?

The Development Plan

The city of New London, Connecticut had by the early 2000s fallen on hard economic times. The city's tax base and population were continually decreasing, and city leaders were growing desperate for some hope of economic development. In 1998, the pharmaceutical company Pfizer began construction of a major new research facility on the outskirts of the Fort Trumbull neighborhood of New London. Seeing an opportunity, the city of New London reactivated the New London Development Corporation, a private entity under the control of the city government, to consider plans to redevelop the Fort Trumbull neighborhood and encourage new economic activities that might be brought in by the Pfizer plant.[2]

The development corporation created a development plan that included a resort hotel and conference center, a new state park, 80–100 new residences (which is now down to a mix of 14 rental townhouses and 66 apartments in a three-story building), and various research, office, and retail space. The plan divided the area into seven parcels, but did not specify the exact plans for development in any but the first parcel (the resort hotel and conference center). The city in 2000 approved the development plan and authorized the corporation to acquire land in the Fort Trumbull neighborhood.

Today, the former Fort Trumbull neighborhood is a bulldozed lot overgrown with weeds. The Pfizer facility can be seen in the background.

Fort Trumbull was an older neighborhood, some 90 acres (364,000 m^2) in size and including 115 residential and commercial lots. The development corporation offered to purchase all 115 lots; however, the owners of 15 of these properties did not wish to sell to the corporation. Of the 15 properties, ten were owned by occupants, and five by investors. These owners were the petitioners in this case; the lead plaintiff, Susette Kelo, owned a small home on the Thames River in the development area.

The city of New London chose to exercise its right of eminent domain. The city ordered the development corporation, a private entity acting as the city's legally appointed agent, to condemn the 15 holdout owners' lots.

The Case in the Connecticut Courts

The owners sued the city in Connecticut courts, arguing that the city had misused its eminent domain power. The power of eminent domain is limited by the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment, which restricts the actions of the federal government, says in part that "private property [shall not] be taken for public use, without just compensation"; under Section 1 of the Fourteenth Amendment, this limitation is also imposed on the actions of U.S. state and local governments. Kelo and the other appellants argued that economic development, the stated purpose of the Development Corporation, did not qualify as public use.

Public Reaction

Opinion polls found that the public overwhelmingly disapproved of the ruling. A Christian Science Monitor online poll found that 93% disagreed with the ruling. Most other polls, depending on the question posed, reacted negatively in the 65% to 97% range. Opposition to the ruling was stated by popular groups such as AARP, the NAACP, the Libertarian Party, and the Institute for Justice. Many owners of family farms also disapproved of the ruling, as they saw it as an avenue by which cities could seize their land for private developments. The grassroots lobbying group American Conservative Union and The New Media Journal described the decision as judicial activism, as did numerous blogs. [2] [3]

Presidential Reaction

On June 23, 2006, the one year anniversary of the original decision, President George W. Bush issued an executive order instructing the federal government to use eminent domain "...for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken." However, eminent domain is often exercised by local and state governments; the order may thus have little overall effect.

Congressional Reaction

On June 27, 2005, Senator John Cornyn (R-TX) introduced legislation, the "Protection of Homes, Small Businesses, and Private Property Act of 2005" (S.B. 1313), to limit the use of eminent domain for economic development. The operative language (1) prohibits the federal government from exercising eminent domain power if the only justifying "public use" is economic development; and (2) imposes the same limit on state and local government exercise of eminent domain power "through the use of Federal funds." Similar bills have subsequently been put forth in the House of Representatives by Congressman Dennis Rehberg (R-MT), Tom DeLay (R-TX), and John Conyers (D-MI) with James Sensenbrenner (R-WI). As most small-scale eminent domain condemnations (including notably those in the *Kelo* case) are entirely local in both decision and funding, it is unclear how much of an effect the bill would have if it passed into law.[12] House Minority Leader Nancy Pelosi (D-CA) believes that the proposed laws would violate separation of powers and that it would require a constitutional amendment to alter the meaning of the Fifth Amendment as interpreted by *Kelo:* "when you withhold funds from enforcing a decision of the Supreme Court you are, in fact, nullifying a decision of the Supreme Court... I would oppose any legislation that says we would withhold funds for the enforcement of any decision of the Supreme Court." [13]

Guest Column
Property Rights Victory in Indiana: Thank You Mrs. Kelo
By Charles Miller

Less than a year ago, the US Supreme Court issued a ruling that shook up the debate about property rights.

In a 5-4 ruling, the Court said that local government could use its power of eminent domain for the sake of economic development (Kelo v. City of New London). In other words, the city could take Mrs. Kelo's home to make way for private development.

From the standpoint of outdoor advertising, the Kelo case highlights at least two important points:

1.) The highest court in the land affirmed the principle of just compensation in government takings. The justices – while debating other parts of the decision – agreed that Mrs. Kelo must be paid for her home.
2.) The aftershocks from the Kelo decision created political opportunity.

In this *Guest Column*, I will focus on the second point. This Court ruling struck a raw nerve with the public, prompting politicians to pay more attention to property rights. I saw this phenomenon first-hand in Indiana.

On March 24, Governor Mitch Daniels signed legislation that prohibits exaction by municipalities. Exaction is the obnoxious practice of conditioning regulatory approval on removal of billboards without paying just compensation to owners.

This year, the Indiana Legislature considered broad legislation to reform eminent domain. In part, lawmakers' focus on eminent domain was driven by the Kelo decision.

In this post-Kelo environment, we were able to include our long-sought anti-exaction language into the larger bill, which passed overwhelmingly.

Kelo doesn't deserve all the credit for our legislative success. The outdoor industry was united, the state association was engaged, we had a good lobbyist, and we benefited from the coaching of our colleagues from North Carolina, Virginia, and OAAA.

But Kelo created an opening here, and I suspect elsewhere. Watch what happens in Minnesota, where anti-exaction legislation just passed the House by a vote of 115-17. Thank you, Mrs. Kelo.

(Charles Miller is president of the Outdoor Advertising Association of Indiana, and president of the Media Division of Burkhart Advertising, based in South Bend, IN)

Sample exaction statutes for legal nonconforming use (Conditional use)

The following eleven state statutes reflect some of the better language that supports the industry when localities attempt to use exactions through a conditional use requirement to remove billboards without compensation

Arizona
Ariz. Rev. Stat. 9-462.02

"The municipality may acquire only by purchase, or condemnation or gift private property for the removal of nonconforming uses and structures. The elimination of such nonconforming uses and structures in a zoned district is for a public purpose. Nothing in an ordinance or regulation authorized by this article shall affect existing property or the right to its continued use for the purpose used at the time the ordinance or regulation takes effect, including the continuation of nonconforming uses and structures on any parcels on which other development or other construction subsequently occurs, nor to any reasonable repairs or alterations in buildings or property used for such existing purpose."

California
Cal. Bus and Prof Code 5412, 5412.6

5412.6. The requirement by a governmental entity that a lawfully erected display be removed as a condition or prerequisite for the issuance or continued effectiveness of a permit, license, or other approval for any use, structure, development, or activity other than a display constitutes a compelled removal requiring compensation under Section 5412, unless the permit, license, or approval is requested for the construction of a building or structure which cannot be built without physically removing the display." (3) Those lawfully erected on or after July 14, 1969.

Florida
F.S. Section 70.20 (6) (enacted 2002)

(6) The requirement by a municipality, county, or other governmental entity that a lawfully erected sign be removed or altered as a condition precedent to the issuance or continued effectiveness of a development order constitutes a compelled removal that is prohibited without prior payment of just compensation under subsection (2). This subsection shall not apply when the owner of the land on which the sign is located is seeking to have the property re-designated on the future land use map of the applicable comprehensive plan for exclusively single family residential use.

(12) Subsection (6) shall not apply when the development order permits construction of a replacement sign that cannot be erected without the removal of the lawfully erected sign being replaced."

Idaho
40-1910A

(4) The requirement by a local governmental entity that legally placed off-premises advertising be removed as a condition or prerequisite for the issuance or continued effectiveness of a permit, license or other approval for any use, structure, development or activity other than off-premises outdoor advertising constitutes a compelled removal requiring compensation under this section unless the permit, license or approval is requested for the construction of a building or structure which cannot be built without physically removing the off-premises outdoor advertising.

<u>Indiana</u>

SECTION 1. IC 22-13-2-1.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS:

Sec. 1.5 A state agency or political subdivision may not require that a lawfully erected sign be removed or altered as a condition of issuing:
(1) a permit;
(2) a license;
(3) a variance; or
(4) any other order concerning land use or development; unless the owner of the sign is compensated in accordance with 13 IC 32-24.".

<u>Michigan</u>
Sec. 7A

(e) If a permit holder has a valid annual permit or permits for a site or sites where no sign structure exists or no construction has begun to build a sign structure on January 1, 2007, the permit holder may exchange the permit or permits for an interim permit under this section or begin construction under the valid permit or permits no later than 1 year after January 1, 2007. The number of permits that can be received in an exchange shall be determined under subsection (4).

<u>Minnesota</u>
Sec. 10 [117.184]

COMPENSATION FOR REMOVAL OF LEGAL NONCONFORMING USE

(a) Notwithstanding any law to the contrary, an ordinance or regulation of a political subdivision of the state or local zoning authority that requires the removal of a legal nonconforming use as a condition or prerequisite for the issuance of a permit, license, or other approval for any use, structure, development, or activity constitutes a taking and is prohibited without the payment of just compensation. This section does not apply if the permit, license, or other approval is requested for the construction of a building or structure that cannot be built without physically moving the nonconforming use.

(b) This section applies to an action of a political subdivision of the state or a local zoning authority occurring on or after the effective date of this act that requires removal of a legal nonconforming use as a condition or prerequisite for the issuance of a permit, license, or other approval.

Missouri
Section 226.527 (5) (Enacted 2007)

(5) When a legally erected billboard exists on a parcel of property, a local zoning authority shall not adopt or enforce any ordinance, order, rule, regulation or practice that eliminates the ability of a property owner to build or develop property or erect an on-premise sign solely because a legally erected billboard exists on the property.

Nevada
Nev. Rev. Stat. 278.0215

5. A city or county shall not require the removal of a nonconforming outdoor advertising structure as a condition to the development or redevelopment of the property upon which the nonconforming outdoor advertising structure is located without first holding a public hearing at which the owner of the nonconforming outdoor advertising structure has an opportunity to be heard. The requirements of subsection 1 do not apply if, after the public hearing required by this subsection, a city or county requires the removal of the nonconforming outdoor advertising structure.

Tennessee
Sec. 13-7-208 (b) (2)

(2) When the use permitted to continue to expand, or to be rebuilt pursuant to any subsection of § 13-7-208 is an off-premises sign, such use shall not preclude any new or additional conforming use or structure on the property on which the sign structure is located or on any adjacent property under the same ownership, provided that any such new or additional use or structure does not result in any violations of the applicable zoning restrictions other than those nonconformities associated with the off-premises sign as allowed hereunder.

Virginia
33.1-370.1
Notwithstanding any other provision of law, no billboard sign subject to this chapter may be removed by action of a county, city, or town under Chapter 22 (§ 15.2-2200 et seq.) of Title 15.2 without the payment of just compensation by the county, city, or town unless the billboard sign cannot remain on the property due to the site constraints of the property and removal of the billboard sign is therefore necessary for development on the property. The property owner may terminate the leasehold or other right of the billboard sign to remain on the property in accordance with the terms and conditions of the contract between the property owner and the billboard

sign owner, but may not be required to do so by the county, city, or town as a condition of obtaining development approval for the property, unless removal of the billboard sign is necessary for development of the property or the billboard sign is nonconforming and is the principal use on the property and the zoning ordinance permits only one principal use.

<u>Utah</u>
Utah code Ann. 72:7-510

Existing outdoor advertising not in conformity with part -- Procedure -- Eminent domain -- Compensation -- Relocation.

(4) Except as specifically provided in this section or Section 72-7-513, this part may not be construed to permit a person to place or maintain any outdoor advertising adjacent to any interstate or primary highway system which is prohibited by law or by any town, city, or county ordinance. Any town, city, county, governmental entity, or public utility which requires the removal, relocation, alteration, change, or termination of outdoor advertising shall pay just compensation as defined in this part and in Title 78, Chapter 34, Eminent Domain.

(5) Except as provided in Section 72-7-508, no sign shall be required to be removed by the department nor sign maintenance as described in this section be discontinued unless at the time of removal or discontinuance there are sufficient funds, from whatever source, appropriated and immediately available to pay the just compensation required under this section and unless at that time the federal funds required to be contributed under 23 U.S.C., Sec. 131, if any, with respect to the outdoor advertising being removed, have been appropriated and are immediately available to this state.

(7) (a) The governmental entity, quasigovernmental entity, or public utility that causes the need for the outdoor advertising relocation or remodeling as provided in Subsection (6)(a) Shall pay the costs related to the relocation, remodeling, or acquisition. (b) If a governmental entity prohibits the relocation and remodeling as provided in Subsection (6)(a), it shall pay just compensation as provided in Subsection (3)."

<u>Wisconsin</u>
SECTION 1e 59.69 (2) (g)

59.69 (2) (g) Neither the board nor the county zoning agency may condition or withhold approval of a permit under this section based upon the property owner entering into a contract, or discontinuing, modifying, extending, or renewing any contract, with a 3rd party under which the 3rd party is engaging in a lawful use of the property.

November 2002

When Billboards are Not Free

This month's *OAAA Legal Report* covers two important topics: exactions and the industry lawsuit against new inspection fees in Los Angeles.

1. Exactions and State Compensation Laws.
St. Mary's County, (MD) has a problem. As we reported earlier, in January, the Maryland Court of Special Appeals issued a comprehensive decision holding that the Maryland outdoor advertising compensation law prohibited localities from compelling the removal of billboards without payment of monetary compensation. The Maryland statute clearly states: "A county or municipality shall pay the fair market value of an outdoor advertising sign, removed or required to be removed by the county or municipality…"

Undeterred, St. Mary's County proceeded to enact a seven-year amortization law. Furthermore, the county included a provision designed to pressure lessors into terminating existing billboard leases even before the amortization period expires.

"No site plan or subdivision plat may be finally approved unless all nonconforming signs on the property are brought into full compliance with this Ordinance or, in the case of an off-premise sign that is on property pursuant to a lease with a third party, the applicant executes an enforceable agreement with the County to remove the sign within 30 days of the end of the current lease term."
How can we attack these types of exactions where government acts indirectly to force the uncompensated removal of property? The immediate tendency is to look first to First and-or Fifth Amendment arguments for relief.   But in many states like Maryland, state compensation laws and statutes that create vested rights for nonconforming uses may provide a more concrete platform for challenging certain types of exactions.

Focus on the language of the Maryland compensation law quoted above. A locality must pay monetary compensation for an outdoor advertising sign "…removed, *or required* to be removed…" by that locality. And measure St. Mary's amortization/exaction clause against the decision of the Maryland Court of Special Appeals that localities have "…no authority to ban pre-existing lawfully erected billboards without paying the fair market value of the billboards…"   If amortization is invalid under Maryland Law, then the St. Mary's County development clause certainly also is a "removal requirement" under the Maryland statute since, as a practical matter, this provision could be applied to force the removal of off-premise signs even before the amortization period expires.

The Maryland statute is not an isolated example. The California compensation law is written even more expansively: "…no advertising display…shall be compelled to be removed, nor shall its customary maintenance or use be limited." The Alabama compensation law provides: "...no removing authority shall remove or cause to be removed, or, cause alteration in any manner ..." Illinois states: "The right to just compensation applies to... [any sign] that is compelled to be altered or removed...under any ordinance or regulation of...any unit of local government..." Louisiana: "...should the state or any of its political subdivisions expropriate any off-premise advertising signs..."

Confronted with an exaction, it is important that we're not so smitten with the Fifth Amendment that we ignore the basics of state law.

2. L.A. Inspection Fees

Last month, we reported on litigation initiated by the industry challenging a Los Angeles ordinance that imposed a $314 inspection fee on off-site signs within that city. On October 30, the U.S District Court for the Middle District of California issued a preliminary injunction restraining Los Angeles from enforcing its ordinance pending full adjudication of the case.

The District Court decision closely parallels the industry's First Amendment arguments outlined in the *OAAA October Report*. The Court based its decision on the well-established principle that the potential loss of First Amendment rights, even for a minimal period of time while the validity of a restraint is being adjudicated, is sufficient to support a finding of potential irreparable injury, thus satisfying the first test for issuance of a preliminary injunction.

Applying Metromedia v. San Diego, the Court then surveyed the ways in which the Los Angeles ordinance potentially violates the First Amendment by favoring commercial over non-commercial speech, and by favoring certain categories of noncommercial speech over other noncommercial categories. The Court also cited the likelihood that the city's inspection fee program burdens commercial speech and that the city will not be able to demonstrate that its regulation directly advances its goals since the inspection program does not touch the vastly larger number of on-premise signs that do not comply with local regulations. Finally, the Court found that the ordinance may have been drafted so vaguely that it is not possible to determine which signs are actually subject to the city's restrictions. For now, Los Angeles' new inspection program is dead in the water; the City has filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit.