

Amortization

Background

Amortize means to extinguish, as in paying down the principal of a mortgage. Regarding billboards, amortization is a scheme for government to take private property without payment of just compensation to the owner. Typically, an amortization scheme sets an arbitrary deadline for removal of a billboard, such as five years, and then the billboard must be removed at the owner's expense without compensation for the loss.

The concept of just compensation is one of the founding principles of the American republic. The framers of the Constitution incorporated traditional notions of fair play into the *Bill of Rights*. The “takings clause” of the Fifth Amendment says,

“ . . . nor shall private property be taken for public use without just compensation.”

Message Points

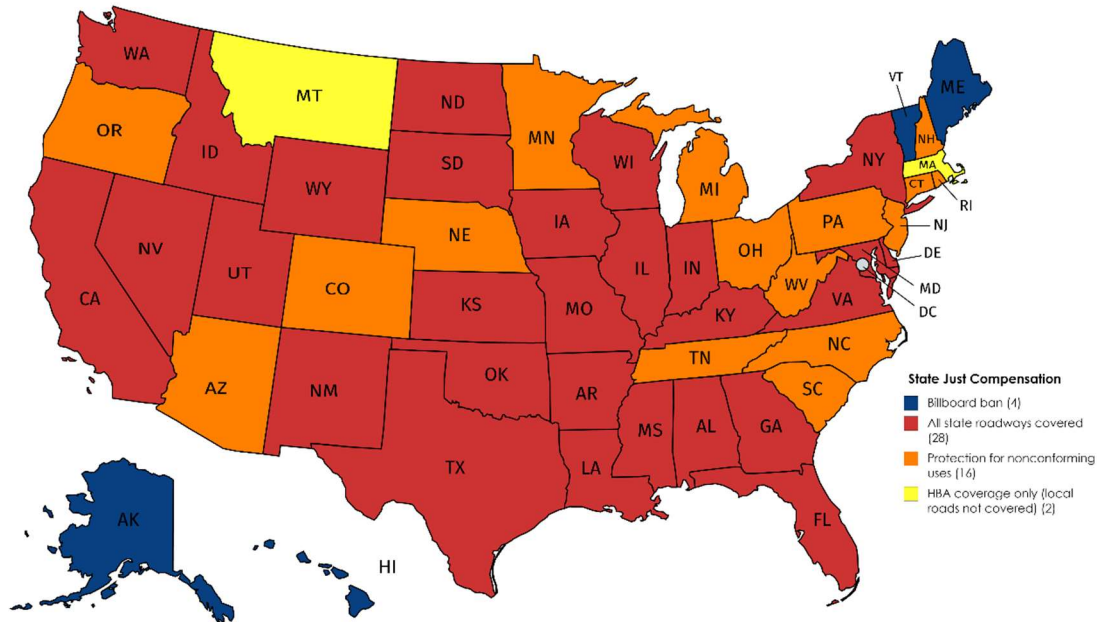
- Amortization is unfair
- Government has rejected amortization
 - Clear policy direction from FHWA regarding controlled highways
 - Congress repeatedly has rejected amortization along controlled routes
 - Nearly all states say ‘no’ for all roads
- Amortization is not just compensation

A Settled Issue

Generally, the amortization issue has been settled. Clearly worded policy guidance from the Federal Highway Administration (FHWA) says that removal of legal billboards along federal roadways (controlled highways) requires the payment of just compensation to the owner; FHWA defines just compensation as cash compensation. Congress repeatedly has rejected amortization, including amending the Highway Beautification Act in 1978 to clarify that “just compensation shall be paid upon the removal” of billboards.

In 2006, FHWA sponsored a national “assessment” of the billboard control program. The assessors said that amortization is a non-issue.

Of the 46 states with billboards, 44 states have some form of protection against amortization for all roads (i.e. just compensation requirement). South Carolina is the latest state to enact such a provision (2006).



Meanwhile, many courts also have rejected amortization. In 2006, the Illinois Supreme Court affirmed an appellate court ruling that struck down amortization of billboards. The appellate court held that “[a]mortization has nothing to do with fair market value of the property at its highest and best use on the date the property is deemed condemned. The City’s claim, that amortization is just compensation, fails.” (See City of Oakbrook v. Suburban Bank and Trust).

Despite being a settled issue, this issue routinely arises. The issue general comes up when a municipality opts to use amortization to remove billboards in its jurisdiction in violation of the HBA. Accordingly, the state DOT’s are obligated to protect billboards located on state controlled routes from amortization by the local municipalities (See attached letter from the Florida DOT to Flagler County). If the local municipality does not comply, FHWA can withhold funds from that locality. (See FHWA letter to Elizabethtown, North Carolina) Another item of note is that the federal highway reauthorization bill “Moving Ahead for Progress in the 21st Century Act” (MAP 21) has increased the number of routes controlled by the state DOTs. Thus, more billboards are covered by the HBA’s anti-amortization provision.

Political Climate

The U.S. Supreme Court hit a nerve with the public when it ruled in 2005 that local governments can condemn private property to make way for private development (Kelo v. City of New London). This case caused a visceral reaction because Mrs. Kelo's home was condemned. However, the case affirmed the principle that government must pay just compensation when taking private property for a public purpose.

Resources

Will, George F, "Coercion Pollution and the Open Road," column, *The Washington Post*, May 9, 1991

Bush, Jeb, Governor of Florida, April 4, 2002

Owens, Bill, Governor of Colorado, June 11, 2003

Saunders, G.B, chief, Real Property Acquisition Division, policy guidance, Federal Highway Administration, May 30, 1979

Matatzke, Bruce E., Division Administrator, Re: amortization ordinance, Federal Highway Administration, July 8, 2004

The Osprey Group, "Conflict Assessment: Federal Outdoor Advertising Control Program," Report to The U.S. Institute for Environmental Conflict Resolution, January, 2007

Freeman, Don, South Carolina State Highway Engineer, letter to Myrtle Beach, SC, August 1, 2003

City of Oakbrook Terrace v. Suburban Bank and Trust, Appellate Court of Illinois, 2nd District (No. 2-04-0719), 2006

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

The Washington Post, May 9, 1991
'Coercion Pollution' and the Open Road

by George F. Will

Remember? Around the curve Lickety-split Lovely car Wasn't it

Roadside doggerel, sponsored by Burma Shave, was part of the fun of automobile travel long ago, when the world was young and the reforming spirit occasionally took a day off.

Nowadays, as America approaches perfection, the fine-tuners of life have returned their attention to the republic's remaining billboards. Here comes another of Washington's morality plays – playettes, really – pitting "activists" against an industry, the former fighting for beauty, the latter for profit.

But the billboard industry has two things to be said for it. It is defending an important right, and it is not as insufferably noble as its adversaries.

Bills now pending in Congress would amend the 1965 Highway Beautification Act, which provides compensation for owners required to dismantle billboards. In 1965 there were 1.1 million signs along the Federal Interstate and Primary Highway systems. Since then more than 700,000 have come down.

But dismantlings slowed drastically in the 1980s, when federal appropriations for compensation became scarce. And in 1978 the outdoor advertising industry got the 1965 act amended to require state and local compensation for signs banned by changes in local zoning ordinances.

The new attack on billboards, tailored to this era of fiscal austerity, has one objectionable feature. It would allow state and local governments to ban billboards without paying compensation. Instead they could merely allow a grace period of amortization for owners to recoup in rentals a sum equal to construction costs.

Billboards are often referred to as "visual pollution" and "sensory litter." A Boston Globe editorial calls the billboard an "unsightly nuisance." Why a sign telling travelers that there is a cheap motel a mile ahead is a "nuisance" to anyone is unclear. Perhaps people who feel that way do not operate or stay at the kind of low-cost motels that get most of their business from millions of nonaffluent travelers who get their information about inexpensive accommodations from roadside signs. But, still, are these signs a "nuisance"?

Let us stipulate that all of us sensitive people would rather see trees than signs. Now if we are quite done preening about our exquisite taste and delicate sensibilities, can we spare a moment for thoughts about justice and the Constitution? At issue are the Fifth Amendment provisions of the Bill of Rights that say people shall not be deprived of property without due process and just compensation.

The billboard industry says the substitution of amortization for compensation is slow-motion confiscation, and the industry has a point. Imagine "amortizing" private homes for highway purposes without compensation.

No one disputes the legitimacy of using government power to regulate signs. But the Constitution is not trivial, even when it inconveniences something as nobly named as Scenic America, the lead organization in the anti-billboard coalition of environmental groups.

It is disingenuous to dress up the proposed legislation in Jeffersonian language about "restoring local control." States already have the power to regulate, even ban, billboards with just compensation. The question is, shall constitutional values be disregarded because Americans would prefer not to pay the price – compensation – of an improvement they desire?

In this era of \$400 billion deficits, Americans are adept at making others (the voiceless and voteless generations to come) pay a significant portion of the price of today's choices. Taking the property of billboard owners, and diminishing the value of the property of people who rent land for billboards, and doing this without proper compensation, fits today's political morality: Enjoy the benefit, make others pay.

Critics say billboards are "parasites" and "free riders," benefiting from highways but not contributing to their construction and maintenance. If so, that problem could be addressed by taxing them more heavily. On the other hand, people who live near high-density highways suffer inconveniences for which rental income from signs on their land can be partial compensation.

Americans seem increasingly irritable, throwing elbows as they jostle for social space. Privacy – the right to be let alone – is under increasing pressure. On campuses speech is increasingly regulated in the name of a new entitlement – the right of hypersensitive people to pass through life without being annoyed by the thoughts of others. And now comes an intensified attempt to abridge some people's property rights in order to spare other people, often passersby, something they consider a "nuisance" because it is "unsightly."

Some of those who are eager to get visual "litter" and "pollution" out of sight are unwilling to pay a fair price for property taken or devalued. They can fairly be suspected of relishing the prospect of wielding power over others. Call this "**coercion pollution**." It is a growing problem in the social environment.

Governor Jeb Bush (R) letter upon signing Anti-amortization Law

April 4, 2002

The Honorable Katherine Harris
Secretary of State
PL 02 The Capitol
Tallahassee, Florida 32399

Dear Secretary Harris:

I hereby transmit to you with my signature Committee Substitute for House Bill 715, an act relating to transportation. Committee Substitute for House Bill 715, among other issues, provides a mechanism for the removal of billboards in Florida's counties and cities.

Over the last 20 years, local communities have launched road beautification programs intended to remove what many consider to be the blight of billboards in our communities. Under this bill, localities may still continue with that process. The issue the bill seeks to address, however, is how localities are to compensate billboard owners for damages that result in the takings of these billboards. The bill also seeks to balance two fundamental governing principles – that we should whenever possible allow local governments to govern their own affairs, and that Floridians should be protected in their private property from government takings.

In this particular bill, these principles appear to compete. Local communities seeking to remove billboards have employed a compensation policy called amortization. Under this policy, billboard owners would be allowed to keep their billboards intact for a predetermined period of time, established by the locality, in order to recoup as much of their investment as possible.

Upon expiration of this time period, localities could then force the removal of the billboards without paying compensation to the billboard owners. Localities believe this is an appropriate means for compensation. On the other hand, billboard owners see forced removal of their property much like the forced removal of a business or a home. The takings of a business or a home would trigger a different compensation mechanism known as “just compensation” – localities would have to pay the fair market value of the property taken, rather than waiting for a period of time and then taking the property without compensation.

Hence, the issue: Localities seek to utilize amortization in order to remove billboards without having to expend taxpayer dollars, while billboard owners desire to be paid fair market value for the takings of their property.

This issue is especially difficult since I am a firm believer in both local control and property rights. I also believe that CS/House Bill 715, while not perfect, strikes an adequate balance between important principles.

First, this bill seeks to avoid the thorny issue of compensation altogether by first promoting the relocation of billboards. Unlike earlier legislative amendments on this

issue, this legislation provides for a negotiation and arbitration process designed to encourage relocation of a billboard as a first remedy. In fact, many billboard owners would prefer to have their billboards relocated.

This is evidenced by the fact that already many agreements between billboard owners and localities are settled by relocation. In CS/House Bill 715, billboard owners and localities are encouraged to negotiate for relocation. If those negotiations fail, a process for non-binding arbitration is established. Only if arbitration fails to yield a satisfactory resolution does the requirement for just compensation take effect.

Second, this bill does not prohibit localities from passing ordinances banning all future billboards going forward. Rather it deals only with existing billboards and how they should be removed. It also still permits amortization as a negotiation tool for communities. There is nothing in this bill that prevents communities from offering a longer amortization in lieu of just compensation – in fact, some commentaries on this subject suggest amortization is a more lucrative form of compensation for billboard owners. If that is the case, an individual billboard owner may still agree to an amortization period in place of fair market value, if he or she finds that will be a more appropriate form of compensation.

Third, the legislation specifically recognizes by exemption existing billboard agreements between billboard owners and localities, as well as communities with amortization periods completed that are in litigation with billboard owners as of January 1, 2001. These two exceptions alone would exempt a good many communities, including some of Florida's largest counties and cities, from the impact of this bill.

Fourth, the requirement for just compensation for billboard removal in this country is the rule, not the exception. Already, the State of Florida pays just compensation when it seeks to remove billboards. In 39 other states, the law provides for just compensation. In addition, the bill is consistent with the federal government policy that provides just compensation for the removal of billboards on all federal-aid highways.

Fifth, the bill would treat billboard owners and billboard tenants as we treat other property owners and other business tenants. Instead of suggesting that a billboard is property that is less deserving of protection against government takings, this bill would level the playing field, treating billboards as we would treat a leased or owned restaurant or a gas station that is removed by government to advance a public purpose. There is no priority interest given to billboard owners; there is no change in eminent domain law.

Sixth, the payment of just compensation by counties and cities is not necessarily prohibitive. In editorials around the state opposing this legislation, it is often remarked that paying just compensation will bankrupt cities or force them to abandon their beautification programs. While the cost of removing billboards may be

hard to quantify, the Florida Department of Transportation's (DOT) own experience in billboard removal has been fairly reasonable. For example, in a random survey by DOT of its eminent domain proceedings with billboards, it found that in only seven cases of the 33 proceedings surveyed, billboard owners were compensated at an amount greater than \$100,000 for signs located in heavy urban areas and along major interstates. About half of the eminent domain settlements resulted in compensation of less than \$50,000.

Finally, the bill is the product of a two-year negotiation process. When this issue arose a number of years ago, I asked my office to initiate discussions between both the billboard owners and local governments. While these meetings failed to yield consensus, it did have the effect of moderating the initial legislative proposals – proposals that did not include exemptions, clarification that the bill applies only to “lawfully erected” signs, and an arbitration process designed to encourage relocation. Nevertheless, the version of the proposal now under consideration did go through ten committee hearings over the last two years, was debated five times before the full House and five times before the full Senate, and has passed the Legislature not once, but twice.

Some opponents of this legislation suggest that the bill is unfair because billboards for tax purposes are valued as tangible personal property, and that may be less than the valuation of the billboard for eminent domain purposes. Although this issue is irrelevant to the bill since property tax appraisals cannot by law be considered in eminent domain proceedings, it is important to point out that property appraisers in valuing a billboard may consider cost, market and income approaches. In reality, however, our research has found that many counties rely solely on cost at their discretion. The Legislature in its wisdom recognized the need to review valuation of signs by calling on the Office of Program Policy Analysis and Government Accountability (OPPAGA) to study the value of offsite signs in relation to the valuation of other commercial properties for ad valorem tax purposes, including a comparison of tax valuations from other states.

In sum, CS/House Bill 715 protects the rights of property owners while still allowing local governments the latitude to remove or relocate billboards. Under the bill, localities can still use their home rule power to remove a billboard. If they choose, localities may now remove billboards immediately, without having to wait for years. Or, they may offer relocation or amortization as a settlement. Their existing agreements with billboard owners are still honored. It allows for the continuation of court cases in progress before January 1, 2001, and it preserves all existing and future ordinances not in conflict with the just compensation provisions of the law.

CS/House Bill 715 also stands for something in which I strongly believe. As a conservative, it is my opinion that we must always be wary of the government taking or regulating away the use of property, tangible or real, whether direct or indirect. It should not be something taken lightly, and it should not be something made too easy. The taking, whether direct or indirect, of private property is serious business. It should require extraordinary effort on the part of government to effectuate. Imagine a

government that could amortize your home or your business as a means of taking your property? Such a failure of the checks and balances of government power would be pernicious. Similarly, we, as a people, do not deserve the further diminishment of our rights by marginalizing how government compensates us when it does actually utilize its extraordinary power to take property.

For these reasons, and due to the bill's attempt to balance the rights of cities and counties with the rights of property owners, I hereby approve CS/House Bill 715.

Sincerely,
Jeb Bush
JB/pan
Attachment

Governor Bill Owens (R) letter upon signing Anti-amortization Law

STATE OF COLORADO
EXECUTIVE CHAMBERS
136 State Capitol
Denver, Colorado 80203-1792
Phone (303) 866-2471
June 11, 2003

Ms. Carolynne White
Staff Attorney
Colorado Municipal League
1144 Sherman Street
Denver, CO 80203

Dear Ms. White:

Thank you for writing to me to express your concerns about recent property rights legislation passed by the General Assembly. It is good to know of your views on this important subject.

I am aware that a number of local government officials are concerned about the impacts of two bills in particular on their ability to condemn or amortize properties. House Bill 1089 allows property owners to be reimbursed for legal costs incurred during a successful challenge of a condemnation authority's offer of property acquisition, but only if the court awarded the owner a settlement amounting to more than 130 percent of the last written offer by the authority. Senate Bill 251 prohibits a local government from enacting or enforcing an ordinance that requires a nonconforming property use that was lawful at the time of its inception to be terminated or eliminated by amortization.

As you may know, I signed both H.B. 1089 and S.B. 251 into law on June 7, 2003. As a strong supporter of the rights of private property owners, I believe that condemning authorities must adhere literally to the "just compensation" clause of the Fifth Amendment to the U. S. Constitution. Furthermore, "just compensation" should include any reimbursement of costs incurred by the property owner in pursuing his or her constitutional rights. H.B. 1089 was drafted with the intention of ensuring this right to property owners who would otherwise be victims of "low ball" offers by condemning authorities. S.B. 251, in a similar manner, is

meant to ensure that property owners are properly compensated for any change in property use codes by a local government.

Although we may disagree about the merits of these new laws, I appreciate hearing your views on this legislation. I look forward to working with you in the future on issues affecting local governments.

Sincerely,

Bill Owens
Bill Owens Governor

The Federal Highway Administration (FHWA) has stated that Just Compensation is cash compensation

After the Highway Beautification Act was amended in 1978, to require just compensation for takings, FHWA headquarters sent the following clearly worded memo to its regional offices:

“Question: Are we to measure the value of ‘just compensation’ without regard to the remaining economic life of the sign under establishment of amortization periods?

“Answer: The March 6, 1979, opinion coupled with clear legislative history of the 1978 amendments, indicate that the Congress intended to completely reject amortization for signs affected.”

(FHWA memo signed by G. B. Saunders, Chief, Real Property Acquisition Division, dated May 30, 1979)

COPY



U.S. Department
of Transportation
Federal Highway
Administration

Wisconsin Division

Highpoint Office Park
567 D'Onofrio Drive, Suite 100
Madison, Wisconsin 53719-2844
608-829-7500

July 8, 2004

IDA-WI

Mr. Frank J. Busalacchi, Secretary
Wisconsin Department of Transportation
4802 Sheboygan Avenue, Room 120B
Madison, WI 53707-7916

Attention: Mr. David Vieth, Director
Bureau of Highway Operations

Subject: City of Greenfield 1998 Signboard Ordinance
and Inquiry from Clear Channel Outdoor, Inc.

Dear Secretary Busalacchi:

It has come to our attention that the City of Greenfield passed a City ordinance on July 21, 1998 that provides for the removal of all off-premise signs (19 structures) using an "amortization period" that would allow the off-site/premise billboards to continue for a period of twelve years after the effective date of the City ordinance before removal is required. As we understand the City's ordinance, all outdoor advertising signs that are not in compliance with the new billboard ordinance would have to be brought into compliance or removed. We also understand that there are no provisions in the ordinance for cash compensation for billboards that may be removed in the future as a result of the ordinance.

We understand the City's vision and strategies to beautify Greenfield, and we support the City's efforts to provide for effective control of outdoor advertising; however, we would be remiss if we did not notify you and the City of the possible violations of federal statutes, including possible consequences thereof, should the City effect their amortization ordinance of the billboards adjacent to the federal-aid primary system (FAP). For purposes of outdoor advertising control, the FAP is defined under Section 131(t) of 23 U.S.C.

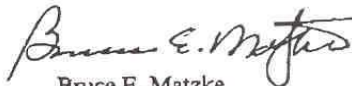
Section 131(g) of Title 23 U.S.C. requires that "just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (C) of this section, whether or not removed pursuant to or because of

this section." In other words, the 1965 Beautification Act requires the payment of cash compensation for the taking or removal of any sign. Cash compensation for the taking or removal of a lawfully erected outdoor advertising sign is required under Section 131(g) regardless of the classification of the sign as real estate or personal property.

In summary and in consideration of the aforementioned 1965 Act cash compensation requirements, FHWA would look to the City and/or the State to provide for the required cash compensation upon the removal of any legal billboards along the FAP routes through Greenfield. We hope that all parties can work together to assure that state and federal billboard control laws are not compromised or violated.

In the event Greenfield causes the removal of signs subject to control under 23 U.S.C 131(g) without payment of just compensation, FHWA would look to the WisDOT to provide the required cash compensation. Failure of the City and/or the State to pay cash compensation would subject WisDOT to the 10% penalty of future apportioned Section 104 highway funds. Accordingly, we suggest that you address this potential problem with the City of Greenfield.

Sincerely,



Bruce E. Matzke
Division Administrator

South Carolina DOT Letter to City of Myrtle Beach

SCDOT LEGAL DIV
South Carolina
Department of Transportation

August 1, 2003

VIA FACSIMILE -(843) 918-1028

The Honorable Mark S. McBride
Mayor, City of Myrtle Beach
Post Office Box 2468
Myrtle Beach, SC 29578-2468

Re: Ten Percent (10%) Reduction in Federal-aid Highway Funding Due to Unlawful Removal of Signs Subject to Highway Advertising Control Act

Dear Mayor McBride:

Based upon statements made by Lyle H. Kershner, on behalf of the City of Myrtle Beach, in a recent deposition in the Clear Channel Outdoor vs. City of Myrtle Beach, et al (City) lawsuit, it appears that the City may not be aware of the ramifications that its sign removal ordinance could have on Federal-aid highway funding in this State. The City's sign removal ordinance provides that billboards, permitted by the SCDOT pursuant to the Highway Advertising Control Act (S.C. Code Ann. §57-25-110- et seq. (1991, as amended), can be removed through an amortization scheme. By letters dated November 29, 1999 and July 25, 2001, the SCDOT has previously notified the City that it is SCDOT's and Federal Highway Administration's (FHWA's) position that the City's sign removal ordinance, because it allows amortization rather than compensation, violates federal law. These letters also informed the City that federal highway funds to this State were in jeopardy of being reduced if the City continued in its efforts to remove the signs by amortization.

I am advised by SCDOT's attorney that Federal and State law specifically requires compensation upon the removal of a state permitted sign. I am further advised that FHWA takes the position that amortization is not compensation and therefore, to allow the City's ordinance would not be considered "effective control" of these signs under federal law. As I understand it, Federal law allows the FHWA to penalize the State for failing to effectively control signs. Specifically, federal law provides that "[F]ederal-aid highway funds shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until Such time as such State shall provide for such effective control." 23 USC §131 (b)

The reduction of federal-aid highway funding is a serious matter that impacts the State at all levels of government. If this stiff penalty is imposed, highway

improvements, which benefit the City and Horry County, will be impacted. While the City may be under the impression that the federal penalty will not affect it, I assure you the long-range transportation needs of your community, as well as those of Horry County, will be affected. These federal funds are used not only to supplement City projects, but also are used toward County projects, bridge repair and replacement projects, resurfacing projects, enhancement projects and safety projects in your community. Therefore, I am forwarding a copy of this letter to the Waccamaw Regional Council of Governments Waccamaw COG) and the Grand Strand Area Transportation Study (GSATS) to advise them of potential impacts to their future federal funding and transportation needs if the City maintains its course of action.

We would like to discuss this matter with you in an effort to prevent the loss of federal funding to the City and Horry County. The SCDOT is available at your convenience. We ask that you advise us of the earliest date that you are available so that the meeting can be confirmed.

I appreciate your prompt attention to this matter.

Sincerely,

Don Freeman
State Highway Engineer

/bmw

cc: Honorable Thomas Keegan, GSATS
Mayor James Kirby, Waccamaw
COG
C. Kenneth Thompson, Waccamaw Regional Planning & Dev. Council
All Commissioners
Robert L. Lee, FHWA Division Administrator
Linda McDonald, Chief Counsel

Illinois Case Law on Amortization


The City of Oak Brook Terrace v Suburban Bank and Trust Company, e t, al

Plaintiff, the City of Oakbrook Terrace (City), sought to enforce a zoning ordinance regulating off-premises, freestanding, outdoor advertising signs against various defendants that owned or leased either, existing legal, nonconforming signs, or the property on which such signs were located. The parties filed cross-motions for summary judgment. Relying primarily on section 7–101 of the Eminent Domain Act (Act) (735 ILCS 5/7–101 (West 1998)), the trial court found that the City could not require alteration of defendants' signs without paying them just compensation. Accordingly, it granted defendants' motions for summary judgment and denied the City's motion.

Upon the city's appeal, the Appellate Court of the Second District of Illinois affirmed the trial court's findings.

Kelo v. City of New London

From Wikipedia, the free encyclopedia

<i>Kelo v. New London</i>	
	
Supreme Court of the United States	
Argued February 22, 2005	
Decided June 23, 2005	
Full case name:	<i>Susette Kelo, et al. v. City of New London, Connecticut, et al.</i>
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, <i>Kelo v. City of New London</i> , 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
<p>Majority by: Stevens Joined by: Kennedy, Souter, Ginsburg, Breyer</p> <p>Concurrence by: Kennedy</p> <p>Dissent by: O'Connor Joined by: Rehnquist, Scalia, Thomas</p> <p>Dissent by: Thomas</p>
Laws applied
U.S. Const. amend. V

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

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 Case

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.

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 m²) 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.

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. 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."