

## Supreme Court Eminent Domain Decision Debated at November 30, 2005 Forum

By Josh Moreinis, AICP, PP

Should government take private property for economic development purposes? Is legislation needed to restrain use of eminent domain? Moderator Carol Rosenthal, a partner at Mannatt Phelps Phillips and Metro Chapter Zoning Committee Chair, posed these questions to local and national land use experts at a November 30<sup>th</sup> joint APA/Wagner School forum titled Eminent Domain and Economic Development: Implications of the New London Court Case.

The Supreme Court's July 2005 decision on use of eminent domain in *Kelo vs. New London* essentially affirms a municipality's right to use eminent domain in cases where economic development objectives being pursued overlap with private interests, without the need to demonstrate that acquisition sites are blighted, and without necessarily demonstrating the anticipated efficacy of proposed plans. The APA forum was highlighted by a slide presentation by Dwight Merriam, FAICP, CRE, former President of the American Institute of Certified Planners, Senior Partner at Robinson & Cole, LLP, and author of *Eminent Domain Use and Abuse: Kelo in Context* (Mary Massaron Ross, coeditor). Mr. Merriam posited that the *Kelo* decision was, for those favoring such policies, a case of winning the battle but losing the war, with the New London Development Corporation now having lost its bid to redevelop the waterfront area of Suzette Kelo's house and the Governor asking the City to suspend its takings proceedings. There has also been a wave of backlash legislation sprouting up around the country to more narrowly define when eminent domain can be applied, for what proposed uses, and for what levels of compensation.

Rick Landman, Esq., AICP, NYU Director of Real Estate, opened the event at the Newman Center with photos of now-landmarked townhomes in New York City that were once slated for demolition in the Greenwich Village Urban Renewal Area, highlighting the tabula rasa approach of urban renewal planning in New York City since the 1940s, and the need for plans that better integrate existing development, even if that means planning around holdouts. Although not unanimously agreed to, a number of salient recommendations emerged from the panel, including having the APA promote legislation at the state level that would ensure greater and earlier public input when takings are involved, and address impacts to renters and marginal businesses, with strengthened procedural requirements related to notifications and public hearings.

Dwight Merriam discussed mitigating measures related to relocation, such as the phasing of large scale plans, and provided examples of successful state legislation such as that passed in Utah with requirements for mediation and involvement of a state-wide ombudsman to address acquisition disputes. Mr. Merriam referenced 38 states that now have legislation pending or passed, and the opportunities that now exist in New York State, particularly with the recent convening of a NYS Bar taskforce created to look at the issue of eminent domain laws. Such legislation, it was noted later in the panel discussion,

would build on Governor Pataki's signing of a new law last year regarding notification procedures.

Susan Fainstein, professor and acting director of Columbia University's Graduate School in Urban Planning, challenged the Supreme Court ruling, stating that it's always possible to buy people out or build around them. Doing so, according to Professor Fainstein, "also leads to a more interesting and textured form of urban renewal that promotes long-term economic development," an approach that she recommended be applied rather than those of recent examples of use of eminent domain in Willets Point and in the Atlantic Yards proposal in Brooklyn. Requirements for public participation beyond public hearings alone should be mandated.

Professor Fainstein also noted that the Kelo decision fails to account for poor project planning, something that following panelist Jerilyn Perine, President of Block By Block and former Commissioner of the New York City Department of Housing Preservation and Development (HPD), lamented as a pitfall of politicized planning processes where leaders often look for immediate high profile paybacks rather than pursuing long range planning goals. The former commissioner came out in support of the use of eminent domain, based on her experience with HPD in redeveloping New York City's neighborhoods, while recommending that governments need to better articulate what the public benefits are when taking private property.

Rounding out the morning panel was Frank Fish, FAICP, of Buckhurst Fish & Jacquemart, Inc., who offered the perspective of a metro region planning consultant who has prepared numerous urban renewal plans and in years past has worked with Ed Logue on state redevelopment projects. Mr. Fish recounted the importance of public input in avoiding abuses of eminent domain, referencing resident input at an urban renewal plan hearing in the City of Yonkers that he had attended the previous evening. He also noted that the court may have gone too far this past summer in saying that no blight findings are necessary to justify urban renewal actions (the Supreme Court deferred to Congress and the States for such threshold judgments), and cautioned that unresolved in the Kelo decision is the issue of whether an economic development outcome is a valid public use when it benefits a single user, such as a big box retailer, rather than being geared specifically toward area-wide economic revitalization. Mr. Fish cited the lack of guidance and requirements related to preparation of municipal comprehensive plans in New York State as indication that a stronger planning framework is needed in New York to ensure the effectiveness and fairness of urban renewal plans.

Legislation has recently been proposed in Albany that aims at ensuring that economic development can be pursued by local governments, while guarding property rights, including increasing compensation for takings. Also under discussion is the issue of authorities that do not have to adhere to local review and public hearing procedures. Whether New York State develops legislation to, for example, uphold due process, strengthen notification and public hearing requirements, or require sufficient studies before takings can be effectuated will depend in part on whether we as planners can advance equitable, long range planning while encouraging policy makers to act to

prohibit abuses of eminent domain. As described at <http://www.planning.org/amicusbriefs/kelo.htm>, "The dangers of eminent domain should be addressed by assuring that it remains a second-best alternative to market exchange as a means of acquiring resources, by encouraging careful planning and public participation in decisions to invoke the power of eminent domain, and by building on current legislative requirements that mandate compensation beyond the constitutional minimum for persons displaced from occupied residences or businesses because of government condemnations."

The November 30<sup>th</sup> forum was sponsored by the APA New York Metro Chapter, the APA Planning and Law Division, NYU Wagner Graduate School of Public Service, NYU Wagner Urban Planning Association, and the Steven L. Newman Real Estate Institute.