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MEMORANDUM

TO: OUR CLIENTS AND FRIENDS

FROM: GEORGE R. SCHLOSSBERG
ALAN STRASSER
PAUL KALOMIRIS, PROGRAM MANAGER, LEGISLATIVE RESEARCH
SERVICE

DATE: OCTOBER 5, 2004

RE: SUPREME COURT TO HEAR CHALLENGE TO EMINENT DOMAIN FOR
ECONOMIC DEVELOPMENT PURPOSES

The U.S. Supreme Court on Sept. 28 agreed to hear an appeal of a case that could have far-reaching implications on the ability of communities to wield the power of eminent domain for economic development purposes. This winter, the Supreme Court will hear oral arguments about whether a city violated the prohibition on “takings” in the Fifth Amendment to the U.S. Constitution when it condemned private property for the purpose of transferring it to another private party to enhance local economic development. The case is *Kelo v. City of New London* and involves a development by the New London Development Corp., a federally recognized local redevelopment authority for the former Naval Undersea Sound Laboratory in New London, Connecticut.

The Supreme Court’s decision to hear the case may signal that it intends to scrutinize the Connecticut Supreme Court decision carefully to ensure that it meets the requirements of the Fifth Amendment taking jurisprudence, including the requirement for having a “public use.” Some have argued that the “takings” clause forbids the condemnation of private property for transfer to another private property that only wants to develop the property for private use, even if the private use also brings public benefit through economic development. If the Supreme Court thinks along this line, the justices could create a strict set of conditions for future takings.

What does this case mean for community economic development efforts? Should the Supreme Court rule against the city of New London, the taking of private property for economic development by another private party might be vulnerable to attack on federal constitutional grounds. This could be true even in states — such as California — where state law seems to

SUPREME COURT TO HEAR CHALLENGE TO EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT PURPOSES

October 5, 2004

Page 2

permit municipalities to condemn private property to serve the community's interest in economic development, even if the condemnation results in the transfer of property from one private owner to another one.

Further, such a ruling could limit the conditions under which communities can exercise eminent domain powers for economic development projects. This could require private developers more often to negotiate directly with private property owners to assemble developable parcels of land. This could make larger scale projects more time-consuming and more expensive, thereby delaying or preventing much-needed economic development.

About the case

The original legal challenge came in response to New London's plans to redevelop a 90-acre area through construction of a waterfront hotel and conference center, high-technology research and development space, retail areas and 80 homes. The development is considered a potential boost to the city, which has been struggling economically in no small part to the 1991 realignment and then 1995 closure of the Navy installation. New London is a "distressed municipality," as designated by the Connecticut Office of Policy & Management.

The property in question is adjacent to a new research facility owned by a pharmaceutical company, Pfizer. The development would enhance the area for Pfizer employees and visitors to the facility. The city offered to lease the land (for 99 years at \$1 a year) to a private developer to carry out the plan. Seven property owners within the 90-acre area rejected offers of compensation for the taking of their land and filed a lawsuit to block the development.

In ruling for the city, the Connecticut Supreme Court held:

"... that economic development projects ... that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions."

After surveying multiple decisions from other jurisdictions that upheld economic development as a proper public use, the court upheld economic development as a public use, saying:

"... economic development plans that the appropriate legislative authority rationally has determined will promote municipal economic development by creating new jobs, increasing tax and other revenues, and otherwise revitalizing distressed urban areas, constitute a valid public use for the exercise of the eminent

SUPREME COURT TO HEAR CHALLENGE TO EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT PURPOSES

October 5, 2004

Page 3

domain power under either the state or federal constitution.”

The court acknowledged that decisions in at least seven other states had rejected economic development as a proper public use, but distinguished the holdings and analysis in those cases. The court also held that:

“... an exercise of the eminent domain power is unreasonable, in violation of the public use clause, if the facts and circumstances of the particular case reveal that the taking specifically is intended to benefit a private party. Thus, we emphasize that our decision is not a license for the unchecked use of the eminent domain power as a tax revenue raising measure; rather, our holding is that rationally considered municipal economic development projects such as the development plan in the present case pass constitutional muster.”

The court noted that although a private party (Pfizer) would benefit substantially from the development, the overall purpose of the development is the creation of jobs and the increase in tax revenues in a city that desperately needs them. That satisfied the public use criterion.

The homeowners (Kelo, et al.) now will have their say before the U.S. Supreme Court. They have argued that regardless of the validity of the Connecticut decision, the ultimate holding violates the Fifth Amendment to the federal constitution, which prohibits a taking without just compensation, and has been interpreted to prohibit any taking for a strictly private use, even if that taking is fully compensated.

We will keep you posted as the matter proceeds. If you have any questions concerning the above information, please call George Schlossberg directly at 202/828-2418 or call Alan Strasser directly at 202/828-2417.