



Northern News

NORTHERN SECTION, CALIFORNIA CHAPTER, AMERICAN PLANNING ASSOCIATION

SEPTEMBER 2005

“Kelo”GRAM: How will the Supreme Court’s decision affect California’s local governments?

Thanks to Peter Detwiler, staff director, Senate Local Government Committee, for providing the text of this article to the date of the hearing.

On August 17, at the request of Senator Christine Kehoe (D-San Diego), the Senate Local Government Committee held an informational hearing to explore how the United States Supreme Court’s recent decision in *Kelo v. City of New London* is affecting California’s counties, cities, special districts, and redevelopment agencies.

Both the United States and California constitutions limit the use of eminent domain:

The U.S. Constitution’s Fifth Amendment says that “No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.”

The California Constitution contains similar limits: “Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has been first paid to, or into court for, the owner.” (Article I, §19)

THE KELO DECISION

On June 23, 2005, the U.S. Supreme Court ruled on a 5-4 vote that the City of New London’s taking of private, non-blighted property for the purpose of economic development satisfied the constitutional “public use” requirement.

Connecticut state law allows the use of eminent domain for economic development. The City of New London adopted an economic development plan for its waterfront, including a hotel and conference center, retail and office space, and new residences. The city govern-

ment wanted this new development to complement an adjacent Pfizer research center and to reverse the community’s economic slide. When some of the private property owners refused to sell, the City condemned their homes and rental properties.

The private property owners argued that New London’s use of eminent domain for economic development—creating jobs and boosting tax revenues—did not satisfy the constitutional requirement for public use. Relying on several precedents, a divided Supreme Court disagreed and upheld the City’s eminent domain powers.

Since late June, hundreds of articles, editorials, and speeches have reacted to the Kelo ruling, many of them calling for constitutional and statutory changes. Congress has entered the controversy with several measures. Senator Kehoe (the committee chair) felt that, before California state legislators debate possible changes, they should know how the Kelo decision affects their local governments.

The Committee hearing reviewed—

- How the California Constitution limits eminent domain powers.
- What California’s eminent domain statutes prohibit and allow.
- How the courts interpret the requirement for “public use.”
- How California local officials actually use their eminent domain powers.

FIVE WITNESSES

The Committee invited five experienced attorneys to talk at its August 17 informational hearing:

Richard Frank, Chief Deputy Attorney General for Legal Affairs, briefed the legislators on what the Supreme Court said in its Kelo ruling, and precedents that the justices used to reach their conclusions.

(continued on page 4)

“Redevelopment involving the transfer of private property to private companies is the only way our society has for redeveloping economically distressed areas of cities...”

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DIRECTOR'S NOTE *by Hing Wong, AICP*

In last month's issue, we congratulated the Northern Section winners of CCAPA 2005 awards. We are repeating the list in case some of you were on vacation and missed the news:

Receiving Awards of Excellence are:

2005 Comprehensive Planning: Small Jurisdiction Award

East 14th Street South Area Development Strategy

City of San Leandro

2005 Section Service Award

2005 Local Host Committee

Northern Section, California Chapter APA

Receiving Awards of Merit are:

2005 Focused Issue Planning Award

Protect Oakland

City of Oakland

2005 Leadership and Service: Academic Award

Planning in San Jose—A Community Guide

San Jose State University

2005 Distinguished Leadership: Student Award

Gavin Moynahan

We also want all to know that **John Hirten**, FAICP, received National's "APA Lifetime Achievement Award for Exceptional Service to APA and the Planning Profession" in April. Newsletter Editor **Naphtali Knox**, himself a winner of a 2005 National APA Award for distinguished leadership, recalls moving to San Francisco and meeting John in 1960. John, executive director of the Stockton redevelopment agency, had just become the first executive director of the San Francisco Planning and Urban Renewal Association (SPUR). In 1971, he was named Assistant Secretary for Environment and Urban Systems, US DOT. As AIP Executive Director, John was instrumental in the 1978 consolidation of AIP and ASPO into APA. Congratulations all!

Several \$150 Northern Section student scholarships are still available for this year's California Chapter APA Conference in Yosemite, October 30 to November 2, 2005. Write a 500- to 600-word article for the *Northern News* on any planning-related issue and meet a few other criteria. Contact Hing Wong at hingw@abag.ca.gov for more info.

Northern Section is updating its Bylaws. We will email all Northern Section members about the adoption process. Also look for details on our website in September, www.norcalapa.org

NEWSLETTER INFORMATION

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The deadline for submitting materials for inclusion in the *Northern News* is the 16th day of the month prior to publication.

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Smart Growth walking tour of downtown San Jose

Saturday, September 24,
at 10:00 AM

NSCCAPA and Greenbelt Alliance will cosponsor an easily walkable Smart Growth Walking Tour of Downtown San Jose. The tour begins at San Jose's new City Hall, 200 E. Santa Clara St. at Fourth (across from the Martin Luther King, Jr. library). Look for signs and volunteers to direct you to the meeting place.

Vice mayor and city council member **Cindy Chavez** and San Jose planning department deputy director, **Laurel Prevetti**, are scheduled keynote speakers. Community members, business owners, and representatives from the redevelopment agency, the San Jose Downtown Association, and planning department staff will highlight examples of good development.

For more information and to RSVP for the tour, contact Greenbelt Alliance Education and Outreach Coordinator, **Julie Cummings**, at 415-543-6771 or by email at jcumings@greenbelt.org

Homebuilders and nonprofit developers find common ground

A recent joint policy paper has market-rate builders and nonprofit housing developers on the same side of inclusionary housing, according to **Tina Duong**, Director of Communications & Programs for the Non-Profit Housing Association of Northern California (NPH).

This July, NPH and the Homebuilders Association of Northern California (HBANC) released *On Common Ground: Joint Principles on Inclusionary Housing Policies*, a set of rules for working together to increase affordable housing production in jurisdictions where inclusionary policies exist or are being considered.

Both organizations believe that "increasing the housing supply is critical to addressing the affordable housing crisis that affects everyone ..., [that] it will take a much broader commitment from the public and private sectors to make housing affordable ..., [and that] current efforts aren't enough."

"While NPH and HBANC hold differing views on the merits of inclusionary housing,

the following are key principles upon which our organizations agree:

- Providing an adequate supply of housing is a societal responsibility.
- Local communities with inclusionary housing programs have a responsibility to contribute tangible and substantial resources so that the cost of providing affordable housing is spread fairly across the community.
- Affordable housing policies that maximize resources by providing more housing opportunities or deeper levels of affordability at the same or less cost should be encouraged.
- Traditional inclusionary housing policies that require the development of "like-for-like" units distributed uniformly throughout the market-rate development are often not the most effective or efficient way of providing affordable housing.
- To increase effectiveness and efficiency, inclusionary housing programs should provide flexibility and allow a range of alternative methods of providing affordable units."

The entire eight page report can be downloaded in PDF from <http://www.nonprohousing.org>

Onward and Upward...

Pierce Macdonald, formerly with the cities of Berkeley and Dublin, is now an Associate Planner with Pacific Municipal Consultants, Oakland. Northern News readers will remember Pierce from her years as Newsletter Editor. In Dublin, she had a lead role in the Enea Starward Row residential project, winner of a 2005 Northern Section Outstanding Project Award. Pierce, a 1992 graduate of the Jefferson-planned University of Virginia, says her new job and upcoming wedding are keeping her "in high-gear planning mode."

Terri Hansen Payne, who plied her general planning skills in West Valley (Utah) and Walnut Creek, will now do the same as Associate Planner with Deschutes County, Oregon. A Berkeley DCRP graduate, Terri is looking forward to a brand new experience and to coddling her eight grandchildren at her new home in Bend.

Charlie McGowan, Affordable Housing Assistant Manager for the Sonoma County Community Development Commission, retired Monday, August 1. Charlie joined CDC in 1993 as an affordable housing specialist, handling the county's density bonus programs and loans to developers of affordable housing. A very dedicated employee of the County, he created the County [Trust] Fund for Housing, established inclusionary housing and commercial-housing linkage requirements, and secured millions in State funds for affordable housing programs. Enjoy your retirement, Charlie!



Timothy Sandefur, a Pacific Legal Foundation staff attorney, and **Michael Berger**, a Los Angeles-based property rights litigator, gave the property rights perspective. Both Mr. Sandefur and Mr. Berger filed friend of the court briefs in the Kelo case.

The public agency perspective came from **Bill Higgins** of the Institute for Local Government and **Joseph Coomes**, an experienced redevelopment attorney. Both lawyers advise public officials on eminent domain and economic development topics.

POLICY QUESTIONS

During its two-hour hearing, the Committee looked for answers to policy questions, such as:

- Is *Kelo* a departure from earlier decisions of the US Supreme Court?
- Is *Kelo* a departure from earlier decisions of the California Supreme Court?
- Does *Kelo* change California law, either case law or statute?
- Will *Kelo* change California public officials' condemnation practices?
- Can California's public agencies condemn private property for purely private purposes, where there is no public benefit?
- How much public benefit is needed to justify taking private property?
- When a redevelopment agency condemns private property to eradicate blight, is that a constitutionally legitimate public use (even if the agency later sells the cleaned-up site to another private owner)?
- How often do California public officials condemn owner-occupied residential property for private use?
- Is there support for a moratorium on taking owner-occupied residential property for private use while legislators determine if there's a problem?

POSSIBLE CHANGES

Going into the hearing, committee staff suggested possible changes for state legislators to consider:

- Revising the statutory definition of "blight."
- Revising the statutory test for placing

"predominantly urbanized" property into redevelopment project areas.

- Requiring redevelopment officials to quantify physical and economic blight.
- Requiring redevelopment plans to spell out how they will use eminent domain.
- Shortening the time periods for redevelopment officials to use eminent domain.
- Limiting redevelopment agencies' use of eminent domain to blighted parcels.

HEARING OUTCOME

Indeed, witnesses at the hearing suggested ways to strengthen homeowner property rights without hampering local jurisdictions from protecting health and safety and encouraging economic growth. Among the proposals:

- Prohibit taking owner-occupied residential property for private use.
- Tighten standards for determining "blight."
- Allow courts to reverse blight designations.
- Enact a two-year moratorium on seizing owner-occupied homes for any purpose except publicly-owned public facilities.

Both Coomes and Higgins warned against complicating or preventing needed infrastructure improvements and contamination clean up.

WHAT'S NEXT?

Democratic legislators seemed to be intent on constructing a thoughtful response before trying to change the law. They appear to want to avoid a knee-jerk reaction and to take time to study the differences between Connecticut and California and the way eminent domain is used here.

CalChapter executive director and lobbyist **Sande George** attended the full hearing. She observed that legislators said—a number of times—that most jurisdictions are doing the right things and are not abusing the law. Still, after Kelo, committee members are clearly concerned that California eminent domain law be as tight as possible.

Andrew Schwartz, of the San Francisco law firm of Shute, Mihaly & Weinberger LLP, gives this redevelopment/government perspective:

(continued on page 6)

Attention All Young & Adventurous Planners

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Michael D. Bethke, AICP
Interim Planning Director
County of San Benito

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• Experience related to NEPA (EAs and EISs) and CEQA (Initial Studies, Negative Declarations, and EIRs) documentation efforts would be helpful - in particular, preparation of these documents as they relate to programs within the Energy and related industries.

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Excellent writing, editorial, and communication skills are essential; a working knowledge of cultural/historic resources and environmental issues and regulations is preferred.

Knowledge

• BA or BS in Environmental Studies/Engineering, Anthropology, Biological Sciences, History, Geography, Historic Preservation, or related field.

• Experience with historic/cultural resources issues and natural resources agencies preferable, including NHPA, CDFG, USACE, USFWS issues.

• Experience related to NEPA (EAs and EISs) and CEQA (Initial Studies, Negative Declarations, and EIRs) documentation efforts helpful.

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KELO . . . (continued from page 4)

“The condemnation of owner-occupied homes for redevelopment is a rare occurrence. The proponents of changes in redevelopment law have grossly exaggerated the frequency with which such condemnation occurs. They consciously suppress the fact that any owner whose property is taken is entitled to just compensation. Owners are entitled to fair market value, moving and reestablishment expenses, and other benefits that the proponents refuse to acknowledge. The proponents reject the reality that blight exists in California cities, and that the redevelopment of blighted areas is necessary to create jobs, generate taxes, and provide other economic benefits to lift these areas out of distress.”

“Redevelopment involving the transfer of private property to private companies is the only way our society has for redeveloping economically distressed areas of cities, short of the government undertaking the role of private industry and becoming a real estate developer and a manager of retail, office, and other establishments. Once you acknowledge the physical and economic realities of our cities, it follows that redevelopment agencies must have eminent domain powers lest cities be relegated to the dust bin.”

“The State legislature has granted the use of these powers where the private

market has failed. The rationale (for redevelopment) is that government must enter distressed areas and prime the pump because the private market hasn’t worked. The conclusion is that the proponents don’t care about cities. They will cite the number of times eminent domain has been used for private development, but the vast majority of properties have been acquired by market transactions. In the last 25 years, there have been no public acquisitions of private [residential] properties in San Francisco; and those owners whose properties were purchased usually received more than fair market value in the process.”

The Senate Local Government Committee intends to publish a final summary report that legislators can use when reviewing proposed constitutional amendments and statutory changes. Assembly committees on Local Government and Housing and Community Development are planning additional (joint legislative) hearings.

For information, contact Peter M. Detwiler, Staff Director, Senate Local Government Committee, State Capitol, Room 410, Sacramento, California 95814, (916) 651-4115, peter.detwiler@sen.ca.gov

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September

- 15** Registration Deadline for November AICP Exam
- 24** Urban Outing Smart Growth Walking Tour of Downtown San Jose, sponsored by Greenbelt Alliance with the South Bay RAC of NSCCAPA. For information contact Julie Cummings at 415-543-6771.
- 30** California Planning Roundtable 25th Anniversary Celebration & Reunion in San Francisco, with an all day program followed by an evening reception and dinner. Contact Janet Ruggiero at jruggiero@citrusheights.net or Susan Stoddard at sustoddard@aol.com.

October

- 19–Nov. 4** 2005 Fall CEQA Workshop by Association of Environmental Professionals (AEP) at nine locations throughout the state. Check out <http://www.califaep.org/workshops/ceqa-fall.html> for details.
- 30–Nov. 2** CCAPA 2005 Conference at Yosemite. Contact Lynne C. Bynder, CMP at lbynder@dc.rr.com for more information, or visit www.calapa.org.

November

- 7–19** AICP Exam Testing Days

December

- 2** NSCCAPA Holiday Party (Joint party with AEP-SF)!

SEPTEMBER

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