

Eminent Domain is in the news – what does it mean to you?

A recent Supreme Court case has put the use of Eminent Domain into the news. As a water or wastewater system, you have the power of Eminent Domain, with some limitations. But what does that mean? And how does it work?

What is Eminent Domain?

Eminent Domain is the taking of property for a public purpose. While never considered as a first option in acquiring property, Eminent Domain (often also referred to as “condemnation”) is a valuable tool in acquiring property when necessary. Water and wastewater systems normally only use their condemnation powers to acquire easements or property upon which to construct facilities, or to place water mains. Acquisition of

property for municipal uses, or for use by a public utility, are long recognized as legitimate “public uses” contemplated by the Constitution. By law, property owners must be compensated for any property taken through Eminent

Domain. While it is preferable in most instances to obtain the property through donation by the landowners to avoid the need to pay compensation, or purchase by negotiation with the landowner, occasionally systems are forced to use the condemnation power.

How does Eminent Domain work?

In Kansas, the use of Eminent Domain is a fairly well settled process, detailed in State statutes,

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K.S.A. 26-501 through 26-517. It requires the system invoking the power to bring an action before the County District Court to perform the acquisition of the property. This action is essentially an administrative process whereby the court manages an appraisal process to determine just compensation for the property. Prior to bringing the action, the water system is required to establish in some formal setting, usually by resolution, the property that it

permissible “public purpose” so it is extremely rare for the proposed use to be challenged in court. Usually, the use is established in an initial hearing, and the court focuses on the appointment of three disinterested parties to serve as appraisers of the property. The court is then required to give the appraisers instructions on how to perform their duties and value the property. This culminates in a meeting between the parties and the appraisers where they view the



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The U.S. Supreme Court building in Washington, D.C.

wishes to acquire, and the necessity of the taking for a public purpose. It is well established that taking of property for use by a municipality or by a utility is a

property, hear what each party considers to be reasons why the property should be considered to be either more or less valuable than would normally be the case,

and where the appraisers determine amongst themselves the fair value of the property. The water system then pays this amount to the court, which grants the system title to the property, and the landowner is then entitled to withdraw the money held by the court. If the property owner disputes the valuation, the matter is brought to the court for trial by jury, which will again only determine just compensation for the property. In the end, water systems usually have very little trouble obtaining property under this system, it is only a question of the proper value of the property taken.

The Supreme Court decided Kelo v. City of New London, Connecticut

In recent years, the use of Eminent Domain to acquire property that the local government would then turn over to a private business has been used more frequently, and has become more controversial. While the acquisition of property for city streets or municipal utilities remains uncontroversial, more aggressive use of local power to attract large businesses and commercial development has become a more significant issue. Recent examples in Kansas included the Kansas Speedway in Wyandotte County, the Target Distribution Center in Shawnee County, and a car dealership in the city of Merriam.

The U.S. Supreme Court decided the case of Kelo v. City of New London, Connecticut in June, 2005. This case involved the city of New London, which had been subjected to decades of economic decline, and was designated a “distressed municipality” by a state agency. In 1996 the closure of a local military base resulted in excessive levels of unemployment, and a loss in population. This decline

led to the formation of a nonprofit economic development corporation that partnered with the pharmaceutical company Pfizer to create an ambitious plan for the redevelopment of New London.

In the past, the Supreme Court has approved the use of economic development laws to rehabilitate blighted areas as sufficient as a public purpose under the Fifth Amendment, but had not extended

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The plan involved change of existing residential property to new residential property, commercial property, parks and a museum. A small handful of property owners challenged the plan before the Connecticut courts, arguing that the proposed use by Pfizer, developers and other individuals was not a “public purpose” as required by the Fifth Amendment of the United States Constitution.

that finding for areas that were not blighted, but merely a part of some larger economic development area. In the Kelo case, the Supreme Court held that since the condemnation was part of a carefully considered development plan, and that it did not seek to benefit a specific class of identifiable individuals, it was permissible. The incidental benefits to the community of more jobs and an increased tax base due to the higher use of the properties

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involved was deemed sufficient to establish the “public purpose” as required by the Fifth Amendment. A dissent joined by four Justices denounced this change in the law, contending that the past cases and the Fifth Amendment required a direct benefit to the public body involved, for example, the removal

of blighted areas. The dissenters complained that a “public purpose” cannot be found in indirect tax and employment benefits based upon the transfer of property to private parties.

The Supreme Court’s decision drew a lot of attention, most of which was critical. Many consider

the decision to reflect a lack of respect for private property with a corresponding potential for abuse by local governments in the taking of that property for what many considered to be private, not public purposes. While the Supreme Court’s ruling may hearten those municipalities with complex redevelopment plans brewing, the possibility of the transfer of property from one individual to another under a pretext of public use is still a remote one.

How will water and wastewater systems be affected?

The Supreme Court noted that its decision is only based upon the Fifth Amendment, and would not prevent state legislatures from passing laws which would restrict the use of Eminent Domain in economic redevelopment situations. Since municipalities derive their power of Eminent Domain from the state of Kansas, and the procedure of Eminent Domain is a state statutory procedure, this right is completely under the control of the Kansas Legislature. The Kelo decision itself has no direct impact, one way or the other, on water or wastewater systems, as economic redevelopment is not an activity these systems perform. However, a rush in the Legislature to change state law to restrict the effect of Kelo may have some impact in the long run, as legislators consider the decision and public backlash that followed.

Almost everyone expects there to be one or more bills introduced in the 2006 Legislature that will be aimed at preventing perceived abuses of the Eminent Domain process. Water systems have little to fear from narrowly tailored legislation that will restrict use of economic redevelopment as a “public purpose.” The fear however, is that the Legislature will take this opportunity to make larger changes to the Eminent



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Domain laws, either requiring more to establish a “public purpose” or restricting the power in such a way as to harm water systems.

It is not likely that any Bill will intentionally seek to eliminate the use of Eminent Domain by water and wastewater systems entirely. The perceived abuses lie in the areas of acquisition of property for ultimate use by private business or industry, with the public purpose that is being achieved being that of general economic well being of the community and the state. Legislation will likely be aimed at reining in these uses of the process. Systems should be watchful, however. For example, the answer to a need for a new public water supply frequently is to construct a new reservoir. While this reservoir will have water storage capacity needed to serve the public water supply, it will invariably include some other benefits, such as recreational or land development purposes. Broad laws that limit benefit to private parties could cause, at best, additional legal hoops to jump through, at great cost to water systems, and could, at worst, choke off otherwise legitimate use of the Eminent Domain power. Legislation should be watched carefully to ensure that it does not unnecessarily limit the options of water systems to develop imaginative projects that serve the needs of their customers in the most efficient way possible, despite their incidental benefits to others.

Conclusion

The hue and cry over the Kelo ruling has generated more heat than

established economic redevelopment plans. The more dangerous issue is the possibility

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light, at least as far as water and wastewater systems are concerned. While the ruling represents an expansion of municipal takings power, it is limited to well-

that overzealous legislators will use this opportunity to limit legitimate and well-established uses of Eminent Domain.

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