The Real Estate Roundtable

The Fifth Amendment and Kelo

- The Fifth Amendment allows government to "take" private property for "public use." However, if government commits a "taking" then it must pay "just compensation."
    - That is, a "taking" of private property for "public use" is not ***per se*** unconstitutional. Rather, an ***uncompensated*** taking is unconstitutional.
- A compensated taking – to be constitutional – must be for a ***"public"*** use, and not for a ***"private"*** use.
    - Government policy that forces one ***private*** owner to sell property to another ***private*** owner is generally deemed as being for "private use" -- and would be unconstitutional under the Takings Clause.
- In the controversial *Kelo v. City of New London* (2005) case, a bare 5-4 majority ruled that the government did ***not*** commit a taking by forcing one private property owner to sell to another private property owner
    - There was no taking in *Kelo* because the forced sale of private property was in the context of an "integrated land development plan" passed by the local city council to achieve the broader, beneficial public purpose of "economic development" and increasing the local tax base.
- Even though *Kelo* ruled there was no taking in the case, the Court's majority recognized the long-established principle: "It has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation" – unless the taking is for a "public use."
    - See also *Hawaii Housing Auth. v. Midkiff*, 467 U. S., at 245 (1984): "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void. (State statute created a land condemnation process with hearings for government to acquire private property; no analogous condemnation or public hearing process is contemplated in the Senate's BTR language at issue).

Impact on the BTR Provision in the Senate's Housing Bill

- The Senate's housing bill provides that a BTR landlord may rent a single-family home for 7 years. After 7 years (and a one-time potential lease extension period), the BTR landlord ***must*** stop using the property to generate rental income, or incur significant fines.

3/10/26

- Subsection 901(c)(1) of the Senate's bill language is entitled, "***Requirement to Dispose.***" It establishes the general rule that any large institutional investor ("LII")[1] "***shall dispose*** of the single-family home to an individual buyer not later than 7 years after the date of purchase."[2]

- Effectively, this language would operate in the market to coerce the BTR landlord to sell the single-family rental property to another "individual home buyer" -- as the BTR language private party expressly envisions.

- Assuming for the sake of argument that "affordable housing" in theory is similar to ***Kelo*** "economic development" and qualifies as an abstract valid "public use" for a taking, the ***Kelo*** court plainly cautioned:

  - "A one-to-one transfer of property, ***executed outside the confines of an integrated development plan***, is not presented in this case … ***[S]uch an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot.***"

- Unless several exemptions apply, the Senate's housing bill on its face will effectively force a private-to-private transfer of property after 7 years.

  - The BTR Landlord must sell the property after Year 7.

  - Not even ***Kelo*** would support this type of forced sale "to an individual home buyer."

  - Clearly, there is no "integrated development plan" presented by Congress to support a forced sale of BTR housing units after the 7-year period.

- Moreover, even assuming that "affordable housing" in the abstract is a public "purpose" to support the BTR "forced disposition" provision:

  - The Senate's language will essentially result in expulsion or eviction of single-family renters in the coming years. It is hard to envision how this result can be deemed a valid "public use" even given ***Kelo***'s expansive reading of that phrase as a "public purpose."

  - The Senate did not even **hold a single hearing**, or assemble any evidence, to show that the "forced disposal" will indeed improve affordable housing.

  - Congress should not move forward with this language without providing a full and fair hearing considering all perspectives on this issue.

- Accordingly, there is a fair argument for the Judiciary Committee's consideration as to whether the "forced disposal" aspects of the Senate's bill raise significant constitutional

[1] "LII" is defined as a private sector business with direct or indirect "investment control" of at least 350 single-family homes rented to tenants. § 901(a)(4).
[2] § 901(c)(1), pp. 293-294.

problems under the Takings Clause – and even goes beyond the outer limits of the ***Kelo*** decision.

Kelo Would Likely Not Stand If The Supreme Court Decided It Today

- Moreover, the controversial 5-4 *Kelo* decision, if it were heard today, would likely ***not*** stand.

- Rather, dissents from Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas would likely govern today, given the Supreme Court's current makeup.

- Justice Thomas wrote in dissent in *Kelo*:

    - "When the government takes property and gives it to a private individual, and the public has no right to use the property, it strains language to say that the public is 'employing' the property, regardless of the incidental benefits that might accrue to the public from the private use."

    - "The Clause is thus most naturally read to concern whether the property is ***used*** by the public or the government, not whether the ***purpose*** of the taking is legitimately public."

    - "[A] court owes no deference to a legislature's judgment concerning the quintessentially legal question of whether the government owns, or the public has a legal right to use, the taken property."

- In other words, in the view of Justice Thomas (and likely of a majority of the Supreme Court in 2026), forcing a ***private*** property owner to sell a home to another ***private*** property owner is neither "public" nor "use" to pass muster under the Takings Clause.

    - The Senate's ***purpose*** with the BTR text might be to encourage "affordable housing."

    - But coercing a sale to another private property owner is not a "public ***use***" for purposes of the Takings Clause, as per Justice Thomas's *Kelo* dissent.

Congressional and State Reaction to Kelo Was Harsh.

- In any event, even if the Senate's "forced disposition" BTR language somehow fits within the ***Kelo*** decision – Congress should consider whether it is on the precipice of an "about face" by passing legislation which pushes ***Kelo*** to its outer limits, and thereby endorses what has been called "one of the worst Supreme Court decisions" given its disregard for property rights in private home ownership.

- Shortly after *Kelo* was decided, an overwhelming vote in the House – ***supported strongly by both Republicans and Democrats*** – forcefully disapproved of the Supreme Court's 5-4 decision.

- See H. Res. 340 (June 24, 2005) (109th Congress, 1st sess.)
    - Passed the House 365-33
    - "Resolution expressing the grave disapproval of the House of Representatives regarding the majority opinion of the Supreme Court in the case of *Kelo v. City of New London*, that nullifies the protections afforded private property owners in the Takings Clause of the Fifth Amendment."
    - The House "disagrees with the majority opinion … and its holdings that effectively negate the public use requirement of the Takings Clause."
- Moreover, anti-Kelo reactions in the states have been overwhelming.
    - *"Kelo* generated a massive political and judicial backlash, with **45 states enacting eminent domain reform laws in response and several state supreme courts repudiating *Kelo*** as a guide to interpreting their state constitutions." State Court Report, ***Assessing the State Reaction to the Supreme Court's Undermining of Property Rights*** (June 23, 2025)