

THE SACRAMENTO REPORT

Interest in Property Rights Grows

by Greg McConnell

Last month, I predicted (rather cynically) that by August the public outcry against the Supreme Court's Kelo v. New London Connecticut decision would subside. That does not appear to be the case. Public interest in private property rights seems to be at an all time high after homeowners and business owners became aware that their properties could be taken by local governments and sold to private developers who promise more income by turning properties into higher tax producers. In fact, the Wall Street Journal has reported that property rights is considered the most important issue facing the country, ahead of terrorism, the economy, education, and crime.

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The Homeowner and Property Protection Act

California State Senator, Tom McClintock, joined by Republicans and Democrats, has introduced SCA 15. The measure would place a constitutional amendment on the California ballot that would allow voters to amend the California Constitution to prevent local government entities from taking privately owned property from individuals and selling it to others as allowed in the US Supreme Court's Kelo v New London Connecticut decision.

Under the provisions of SCA 15, government could continue to use eminent domain to take private property. The differences, however, are as follows:

- eminent domain could only be used for a specific public purpose, as opposed to generalized public benefit, as allowed under the Kelo decision
- government must have no reasonable alternative to taking the property
- government must not transfer the property to another private individual, and
- if the property ceases to be used by the government, it must be sold back to the person or entity that originally owned it at the compensated price or fair market value, whichever is less

Shortly before he introduced SCA 15, I asked Senator McClintock why he thought his measure was necessary. His response was precise: "There are 6,000 public agencies in California that now have the power to seize your home, pay you pennies on the dollar for it, and then give it to somebody else for their own personal gain and profit." Unless checked, he said, "This will result in local governments taking property from someone they do not like and giving it to someone that is better connected."

To be sure, SCA 15 is not without its detractors. Opposition includes the League of Cities and dozens of Redevelopment Agencies.

Dan Walters, one of the premier political reporters in California, reported that the California Redevelopment Association quickly announced opposition to SCA 15. They asserted "this proposal is a solution in search of a problem. California is not Connecticut."

The implication is that government rarely takes property in California and would not use the authority in the Kelo decision. But, tell that to John Revelli and Tony Fung who own an auto shop that is being condemned in Oakland, or 70 year old Ron Lau, who owns a bookstore and cafe in Santa Cruz. According to them, the Kelo decision has emboldened local governments to take their property and transfer it to others leaving them with little legal recourse.

As with all major policy issues, there is support for the arguments on both sides of the issue. In California, there are many examples of inappropriate land use that prevents the construction of new homes and prolongs the supply demand imbalance and locks in excessive housing prices. On the other hand, it is indeed scary that there are so many local government agencies that now have the right to take property almost whimsically and pay only a fraction of its value.

The chances of SCA 15 making it out of the California Legislature seem slim. The League of Cities is a very strong lobbying group that enjoys considerable support from the Legislature. That, however, will not deter Senator McClintock. When I spoke with him, he made it clear that if the Legislature does not place the measure on the ballot, he will get it on the ballot through the initiative process.

Given the strong reaction to the Kelo case and the emergence of a property rights battle cry, I think he has a strong chance of getting this measure to the voters. Then, there will be a very serious debate about how far government should be allowed to go in taking private property for so-called public use.

Excerpts From SCA 15

WHEREAS, eminent domain has been subject to widespread abuse in California, whereby local governmental entities have condemned property and transferred it, by sale, lease, or otherwise, to the control, management, or exploitation of private entities for private use and profit on the theory that generalized public benefits will flow there from; and

WHEREAS, the United States Supreme Court, in *Kelo v. City of New London*, ___ U.S. ___ (2005), has held that the United States Constitution does not prevent the transfer of property, seized through eminent domain, to private entities for private profit; and

WHEREAS, the rights guaranteed in the California Constitution are not dependent on rights guaranteed under the United States Constitution (Section 24 of Article I of the California Constitution), and the California Constitution should protect the property rights of Californians to a greater degree than does the United States Constitution; nor should the term "public use" in the California Constitution be construed as identical to that phrase as employed in the Fifth Amendment to the United States Constitution; and

WHEREAS, it is the intent of the Legislature that private property shall not be taken or damaged for the use, exploitation, or management of any private party, including, but not limited to, the use, exploitation, or management of property taken or damaged by a corporation or other business entity for private profit, as is currently permitted under the United States Constitution under *Kelo v. City of New London*, __ U.S. __ (2005); and

WHEREAS, this amendment shall apply only to condemnation actions that are completed after this amendment goes into effect; now, therefore, be it . . .

Resolved by the Senate, the Assembly concurring, That the Legislature of the State of California at its 2005-06 Regular Session commencing on the sixth day of December 2004, two-thirds of the membership of each house concurring, hereby proposes to the people of the State of California, that the Constitution of the State be amended as follows:

Section 19 of Article I (of the California Constitution) is amended to read:

(a) Private property may be taken or damaged for a *stated* public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. *Private property may not be taken or damaged for private use.*

(b) Private property may be taken by eminent domain only for a stated public use and only upon an independent judicial determination on the evidence that the condemner has proven that no reasonable alternative exists. Property taken by eminent domain shall be owned and occupied by the condemner or may be leased only to entities that are regulated by the Public Utilities Commission. All property that is taken by eminent domain shall be used only for the stated public use.

(c) If any property taken through eminent domain after the effective date of this subdivision ceases to be used for the stated public use, the former owner of the property or a beneficiary or an heir, if a beneficiary or heir has been designated for this purpose, shall have the right to reacquire the property for the compensated amount or the fair market value of the property, whichever is less, before the property may be sold or transferred.

(d) The Legislature may provide for possession by the condemner following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

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