

# After Kelo Ruling, State Eminent Domain Debate Will Focus on Blight

An interview with Ted Zangari



Ted Zangari

Last week's landmark ruling by the U.S. Supreme Court in the Kelo vs. City of New London case will affect the use of property condemnation powers by municipalities nationwide. Ted Zangari, a partner in the real estate and land use practice at the Sills Cummis law firm in Newark, discusses the wider implications of the ruling with NJBIZ Staff Writer Shankar P.

**NJBIZ: Briefly, what is the U.S. Supreme Court ruling in the Kelo vs. New London case?**

**ZANGARI:** In a 5-4 decision, the Court held that economic development projects which create jobs, increase taxes and contribute to a community's revitalization efforts satisfy the Constitution's "public use" clause. Justice Stevens, who wrote the majority's opinion, noted that the Court long ago rejected the literal meaning of "public use" as a use solely intended to benefit the general public -- such as the construction of highways -- and he reiterated prior decisions of the Court which gave legislative bodies broad discretion to invoke condemnation for a wide range of public purposes.

**NJBIZ: Does the ruling give municipalities wider powers to condemn and acquire properties?**

**ZANGARI:** Yes, but a little background is in order. This is not the first US Supreme Court decision to stretch the meaning of "public use". In a 1964 takings case known as Berman, the Court unanimously rejected efforts by the owner of a department store to derail an urban redevelopment plan in a blighted area of Washington, D.C. In last week's Kelo decision, the Court permitted an expansion of the public use doctrine beyond the purposes of eradicating blight, to include other economic development goals such as lowering the City of New London's high unemployment rate, which was twice the state's rate of unemployment, and removing New London's designation by the state as a "distressed municipality".

**NJBIZ: So is the effect of the Kelo decision that eminent domain may be used for projects that aren't necessarily public works like roads or parks, or the revival of blighted areas?**

**ZANGARI:** Correct. The Court emphasized that there is no practical way to distinguish economic development from other public uses. Justice Stevens portrayed the City of New London's attempt at mixed-use redevelopment -- residential, commercial, recreational -- as a legitimate public use effort to

create a whole new community that is greater than the sum of its existing parts.

**NJBIZ: Speaking of the "greater good" argument, were the particular circumstances of the homeowners in the case given any weight by the Court or did the Court just focus on the bigger picture.**

**ZANGARI:** The Court acknowledged that no allegations had been made by the city that any of the plaintiffs' properties were blighted or in poor condition. However, the Court also noted that the plaintiffs own only 15 out of 115 parcels within the redevelopment area, and that only 10 of those 15 parcels are owner-occupied. The Court then quoted from the earlier Berman decision, which determined that the US Constitution does not require redevelopment efforts to proceed on a piecemeal basis, lot by lot, block by block. Following that principle, the Court concluded that the broader purposes of a development plan outweigh the concerns of individual property owners within the renewal area.

**NJBIZ: But most redevelopment projects are ultimately awarded to private developers. Doesn't that in effect take land from one private land owner and give it to another private party?**

**ZANGARI:** The plaintiffs used that argument, and the Court didn't buy it. Justice Stevens countered by arguing that the public purpose of a redevelopment plan is not diminished -- and in fact could be enhanced -- if the project is built by a private developer instead of a governmental agency.

**NJBIZ: What did the court have to say about compensation structures and how municipalities can ensure that the process leading up to condemnation is fair?**

**ZANGARI:** The Court did not address the subject of compensation. But it did send some signals to governmental bodies about the process leading up to condemnation. The Court emphasized in several instances within its opinion that the City of New London's redevelopment plan was well-crafted, using phrases like "carefully formulated", "comprehensive" and "thoroughly deliberated". In my opinion, the Court is warning state and local governments that -- despite the broad deference of the Court to the condemnation actions of public officials -- it will not tolerate poorly conceived, hastily approved development projects that could negatively affect innocent landowners. And the narrow 5-4 ruling means

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the Court could quite possibly take another one of these cases in the not-too-distant future if the justices can find a distinguishing feature. Lawyers have an expression: bad facts make for bad law.

**NJBIZ: What would a possible scenario of "bad facts" look like?**

**ZANGARI:** Well, perhaps a good example would be a rushed, thinly disguised redevelopment process designed to reward a developer who is the benefactor of a local politician somewhere. The planner's report is light on details, the town council and planning board each conduct their respective hearings in a single night, there are pay-to-play overtones. That sort of thing. It's worth quoting from Justice O'Connor's rather harsh dissenting opinion: "The fallout from this decision will not be random...the beneficiaries are likely to be those citizens with disproportionate influence and power in the political process."

**NJBIZ: So is that the practical impact of this ruling?**

**ZANGARI:** It's certainly a major one. I think municipal attorneys will counsel local planning boards to re-consider the common practice of a one or two-night hearing on the determination of whether an area is in need of redevelopment. Over time, I think we'll see more public input, more community outreach, more "deliberation" to use Justice Stevens' word.

**NJBIZ: Did the ruling take the legal community by surprise? What were the expectations?**

**ZANGARI:** No, I think most land use and development professionals correctly anticipated a reaffirmation of the Berman decision. However, I think many of us were surprised that the justices did not touch the issue of compensation. There had been speculation that the Court would consider whether the enhanced value of a property, after its designation as part of a redevelopment area, ought to be reflected in the valuation analysis for condemnation purposes.

**NJBIZ: What is the future course for property owners who wake up to news that their land is the subject of a renewal project? And is the result different for New Jersey property owners?**

**ZANGARI:** Well, it appears that, as a general rule, property owners in the United States can't stand in the way of community revitalization. However, as Justice Stevens noted, individual states are free to impose more stringent requirements on the meaning of "public use" and, in that regard, New Jersey law already limits the use of condemnation for economic development purposes to only areas that are blighted.

**NJBIZ: So what will be the impact of this ruling on some of the pending cases in New Jersey's courts?**

**ZANGARI:** Very little immediate impact. Government agencies and property owners will continue to squabble over what constitutes "blight". In the longer term, however, I think future courts in public use cases will be taking a harder look at the redevelopment process itself, to make sure that procedural safeguards were in place to avoid the kinds of abuses predicted by Justices Thomas and O'Connor in their dissenting opinions.