

M E M O R A N D U M

TO: THE HONORABLE MAYOR AND MEMBERS OF CITY COUNCIL

FROM: IGNACIO B. PESSOA
CITY ATTORNEY

DATE: SEPTEMBER 23, 2005

SUBJECT: CONSIDERATION OF THE CITY'S POLICY ON THE USE OF EMINENT DOMAIN

ISSUE: Consideration of a resolution to articulate the City's policy on its use of the power of eminent domain, in light of the recent U.S. Supreme Court decision in *Kelo v. City of New London*.

RECOMMENDATION: That City Council adopt the attached resolution, if Council wishes to articulate a policy with respect to the use of the City's power of eminent domain.

DISCUSSION: Mayor Euille and Councilman Krupicka requested that I prepare for Council's consideration a resolution which articulates the City's policy on the use of eminent domain, in light of the Supreme Court's June 23, 2005 decision in *Kelo v. City of New London*, 545 U.S. ___, 125 S. Ct. 2655 (2005). As you are aware, the *Kelo* decision has produced intense public discussion over the appropriate limits of the eminent domain or condemnation power, under which government is authorized to take private property, but only for a "public use."

The majority opinion in *Kelo* found no federal constitutional impediment to New London's condemnation of a private, non-blighted residence, to assemble land for the comprehensively planned economic redevelopment of the city's waterfront. The economically strapped city assembled over 100 parcels within a 90 acre area characterized by that city's council as an area of high vacancy rates, significant disinvestment, and neglect. Prior Supreme Court decisions have upheld the use of eminent domain to take non-blighted property for an urban renewal project in a blighted area of Washington, D.C., *Berman v. Parker*, 348 U.S. 26 (1954), and to break up an oligopoly under which a very few owners held the vast majority of the privately owned land in Hawaii, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). In all three cases, the Court found that the property at issue was taken for a public use, as determined by the legislative body which initiated the condemnation.

The dissenting justices in *Kelo*, as well as many commentators, see the decision as taking the public use restriction on eminent domain one step beyond the prior cases, largely because of the limited governmental role in the subsequent ownership, use and redevelopment of the property. In the view stated by Justice O'Connor, the majority decision allows a locality "to take private property currently put to ordinary private use, and give it over for a new, ordinary private use, so long as the new use is predicted to generate some secondary benefit [employment opportunities

and tax revenue] for the public.” Congress, and many state legislatures, have responded by considering legislation to restrict the use of eminent domain for so-called “economic development” purposes.

In considering the limits of a proper public use taking under Virginia law, the Virginia Supreme Court has established a balancing test, which requires that the resulting public use of the property – which implies the possession, occupation and enjoyment of the property by the public at large or by a public agency – predominate over any incidental benefit or gain which may be conferred on private interests. *Phillips v. Foster*, 215 Va. 543 (1975), *City of Richmond v. Dervishian*, 190 Va. 398 (1950). While the Virginia Court has upheld the use of eminent domain for urban renewal purposes, as did the U.S. Supreme Court in *Berman, Mumpower v. Housing Authority of City of Bristol*, 176 Va. 426 (1940), the state court has also opined that the government’s receipt of “the incidental benefits, such as usually spring from the improvement of lands or the establishment of prosperous private enterprises” are alone insufficient to establish a public use for the taking. *Phillips*, 215 Va. at 547. Like its federal counterpart, the Virginia Supreme Court has given great deference to the legislative body’s determination of whether a public use for the taking has been established in a given case.

Accordingly, in the absence of definitive action by the Virginia state legislature or courts, it is appropriate for the Council to express its sense as to where an appropriate balance of public vs. private interest lies in order to support a finding of public use, and justify, should the statutorily required attempt at a voluntary purchase prove unsuccessful, using the power of eminent domain to acquire private property.

The attached resolution includes the following points:

1. That the exercise of the power of eminent domain is at times necessary to the government’s effective performance of its role in preserving or enhancing the public health, safety and general welfare.
2. That, nevertheless, the exercise of the power may be opprobrious in its effect on the owner of the property taken, even though fair and just compensation is paid.
3. That the City of Alexandria is committed to exercising the power of eminent domain only in those circumstances where Council determines that no other reasonable alternative exists to effectively preserve or enhance the public health, safety and general welfare.
4. That the City of Alexandria is committed to exercising the power of eminent domain only in those circumstances where Council determines that public use of the property – which implies the possession, occupation and enjoyment of the property by the public at large or by a public agency – predominates over any incidental benefit or gain which may be conferred on private interests.
5. That prior to initiating the use of eminent domain to acquire any specific property, the City Council will hold a public hearing on the proposed acquisition, in order to permit all affected parties and the public a full and fair opportunity to address the Council.

I believe that this resolution, which includes a procedural step – a public hearing on the proposed acquisition – which is not required by current Virginia law, strikes a fair balance between the public’s expectation that the City will exercise all its powers, including when necessary the eminent domain power, to effectively preserve or enhance the public health, safety and general welfare of its residents, and the expectation of property owners that their property will not be taken without both an opportunity to be heard by the Council and a demonstrated public use.

I will be pleased to answer any questions on Tuesday night.

Attachment: Proposed resolution

cc: Jim Hartmann
City Manager

Jacqueline M. Henderson
City Clerk

Michele Evans
Assistant City Manager

Council Eminent Domain Memo.wpd

RESOLUTION NO. _____

WHEREAS, the decision of the United States Supreme Court in *Kelo v. City of New London*, 545 U.S. ____, 125 S. Ct. 2655 (2005), has produced intense public discussion over the appropriate limits for the use of the eminent domain or condemnation power, under which government is authorized to take private property, but only for a “public use;” and

WHEREAS, it is appropriate for the City Council of Alexandria to express the sense of Council as to where an appropriate balance between public vs. private interest lies, in order to support a finding of public use, and justify, should a voluntary purchase prove unsuccessful, using the power of eminent domain to acquire private property; and

WHEREAS, the City Council of Alexandria wishes to establish the policy of conducting a public hearing on the proposed acquisition, prior to initiating the use of eminent domain to acquire any specific property, in order to afford all affected parties and the public a full and fair opportunity to address the Council.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Alexandria:

Section 1. That the exercise of the power of eminent domain may at times be necessary for the City effectively to perform its role in preserving or enhancing the public health, safety and general welfare of the City’s residents.

Section 2. That, nevertheless, the effect of any exercise of the power of eminent domain may be opprobrious to the owner of the property taken, especially where the owner resides in the property, even though fair and just compensation is paid.

Section 3. That the Council of the City of Alexandria is committed to exercising the power of eminent domain only in those circumstances where Council determines that no other reasonable alternative exists to effectively preserve or enhance the public health, safety and general welfare.

Section 4. That the Council of City of Alexandria is committed to exercising the power of eminent domain only in those circumstances where Council determines that public use of the property – which implies the possession, occupation and enjoyment of the property by the public at large or by a public agency – predominates over any incidental benefit or gain which may be conferred on private interests.

Section 5. That, in addition to all other procedural requirements of Virginia law antecedent to the City’s exercise of the power of eminent domain, the City Council of Alexandria will hold a public hearing on the proposed acquisition, prior to initiating the use of eminent domain to acquire any specific property, after giving reasonable notice, in order to afford all affected parties and the public a full and fair opportunity to address the Council.

ADOPTED:

WILLIAM D. EUILLE MAYOR

ATTEST:

JACQUELINE M. HENDERSON, CMC, CITY CLERK

22

9-27-05

MEMORANDUM

TO: THE HONORABLE MAYOR AND MEMBERS OF CITY COUNCIL

FROM: IGNACIO B. PESSOA
CITY ATTORNEY

DATE: SEPTEMBER 23, 2005

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The majority opinion in *Kelo* found no federal constitutional impediment to New London's condemnation of a private, non-blighted residence, to assemble land for the comprehensively planned economic redevelopment of the city's waterfront. The economically strapped city assembled over 100 parcels within a 90 acre area characterized by that city's council as an area of high vacancy rates, significant disinvestment, and neglect. Prior Supreme Court decisions have upheld the use of eminent domain to take non-blighted property for an urban renewal project in a blighted area of Washington, D.C., *Berman v. Parker*, 348 U.S. 26 (1954), and to break up an oligopoly under which a very few owners held the vast majority of the privately owned land in Hawaii, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). In all three cases, the Court found that the property at issue was taken for a public use, as determined by the legislative body which initiated the condemnation.

The dissenting justices in *Kelo*, as well as many commentators, see the decision as taking the public use restriction on eminent domain one step beyond the prior cases, largely because of the limited governmental role in the subsequent ownership, use and redevelopment of the property. In the view stated by Justice O'Connor, the majority decision allows a locality "to take private property currently put to ordinary private use, and give it over for a new, ordinary private use, so long as the new use is predicted to generate some secondary benefit [employment opportunities

I believe that this resolution, which includes a procedural step – a public hearing on the proposed acquisition – which is not required by current Virginia law, strikes a fair balance between the public’s expectation that the City will exercise all its powers, including when necessary the eminent domain power, to effectively preserve or enhance the public health, safety and general welfare of its residents, and the expectation of property owners that their property will not be taken without both an opportunity to be heard by the Council and a demonstrated public use.

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cc: Jim Hartmann
City Manager

Jacqueline M. Henderson
City Clerk

Michele Evans
Assistant City Manager

Council Eminent Domain Memo.wpd

ADOPTED:

WILLIAM D. EUILLE MAYOR

ATTEST:

JACQUELINE M. HENDERSON, CMC, CITY CLERK

RESOLUTION NO. 2161

WHEREAS, the decision of the United States Supreme Court in *Kelo v. City of New London*, 545 U.S. _____, 125 S. Ct. 2655 (2005), has produced intense public discussion over the appropriate limits for the use of the eminent domain or condemnation power, under which government is authorized to take private property, but only for a "public use;" and

WHEREAS, it is appropriate for the City Council of Alexandria to express the sense of Council as to where an appropriate balance between public vs. private interest lies, in order to support a finding of public use, and justify, should a voluntary purchase prove unsuccessful, using the power of eminent domain to acquire private property; and

WHEREAS, the City Council of Alexandria wishes to establish the policy of conducting a public hearing on the proposed acquisition, prior to initiating the use of eminent domain to acquire any specific property, in order to afford all affected parties and the public a full and fair opportunity to address the Council.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Alexandria:

Section 1. That the exercise of the power of eminent domain may at times be necessary for the City effectively to perform its role in preserving or enhancing the public health, safety and general welfare of the City's residents.

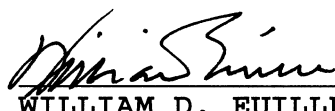
Section 2. That, nevertheless, the effect of any exercise of the power of eminent domain may be opprobrious to the owner of the property taken, especially where the owner resides in the property, even though fair and just compensation is paid.

Section 3. That the Council of the City of Alexandria is committed to exercising the power of eminent domain only in those circumstances where Council determines that no other reasonable alternative exists to effectively preserve or enhance the public health, safety and general welfare.

Section 4. That the Council of City of Alexandria is committed to exercising the power of eminent domain only in those circumstances where Council determines that public use of the property - which implies the possession, occupation and enjoyment of the property by the public at large or by a public agency - predominates over any incidental benefit or gain which may be conferred on private interests.

Section 5. That, in addition to all other procedural requirements of Virginia law antecedent to the City's exercise of the power of eminent domain, the City Council of Alexandria will hold a public hearing on the proposed acquisition, prior to initiating the use of eminent domain to acquire any specific property, after giving reasonable notice, in order to afford all affected parties and the public a full and fair opportunity to address the Council.

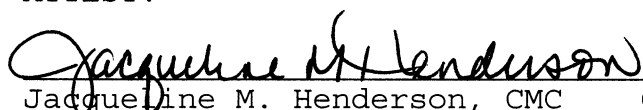
ADOPTED: September 27, 2005



WILLIAM D. EUILLE

MAYOR

ATTEST:



Jacqueline M. Henderson, CMC City Clerk