

REQUEST FOR CHARTER REVIEW COMMISSION ACTION

MEETING DATE(S): 01/05/2010

SUBMITTED TO: HB Charter Review Commission

SUBMITTED BY: Mark D. Bixby, Charter Review Commissioner *MDB*

SUBJECT: Prohibit the use of eminent domain to transfer propriety from one private owner to another private owner for commercial profit-making purposes.

Statement of Issue: In the past the city has used eminent domain in redevelopment projects to transfer property from one private owner to another for the purposes of furthering community-wide economic growth. In *Kelo v. City of New London*, 125 S. Ct 2655 (2005), the US Supreme Court by a split vote of 5-4 upheld such use of eminent domain. Public backlash was swift, and many states and municipalities reacted by passing laws prohibiting Kelo-style eminent domain. I propose a similar prohibition for Huntington Beach.

Recommended Action: Motion to:

Amend Huntington Beach charter to add new section prohibiting the use of eminent domain for the purpose of acquiring property from a private owner for transfer to another private owner for for-profit purposes.

Analysis:

A brief chronology of Kelo and its aftermath follows below.

Kelo v. City of New London, June 23, 2005

Quoting from Wikipedia

(http://en.wikipedia.org/wiki/Kelo_v._City_of_New_London):

“Kelo v. City of New London, 545 U.S. 469 (2005) was a case decided by the Supreme Court of the United States involving the use of eminent domain to transfer land from one private owner to another to further economic development. The case arose from the condemnation by New London, Connecticut, of privately owned real property so that it could be used as part of a comprehensive

REQUEST FOR CHARTER REVIEW COMMISSION ACTION

MEETING DATE(S): 01/05/2010

redevelopment plan. The Court held in a 5–4 decision that the general benefits a community enjoyed from economic growth qualified such redevelopment plans as a permissible "public use" under the Takings Clause of the Fifth Amendment.

The case was appealed from a decision by the Supreme Court of Connecticut in favor of the City of New London. The state supreme court held that the use of eminent domain for economic development did not violate the public use clauses of the state and federal constitutions. The court held that if an economic project creates new jobs, increases tax and other city revenues, and revitalizes a depressed urban area (even if not blighted), then the project qualifies as a public use. The court also ruled constitutional the government delegation of its eminent domain power to a private entity.

...

The decision was widely criticized. Many of the public viewed the outcome as a gross violation of property rights and as a misinterpretation of the Fifth Amendment, the consequence of which would be to benefit large corporations at the expense of individual homeowners and local communities.

...

In November 2009, Pfizer, the beneficiary of the eminent domain action, announced that it would leave New London.”

City Council Meeting, October 3, 2005

In California, efforts to prohibit Kelo-style eminent domain began immediately in the Sacramento legislature in the wake of Kelo. This issue came before the city council on October 3, 2005, in the form of an Intergovernmental Relations Committee item asking the council to oppose SCA 15 (McClintock/Florez) and ACA 22 (La Malfa), which were nearly identical senate and assembly constitutional amendments to restrict local governments' use of eminent domain.

REQUEST FOR CHARTER REVIEW COMMISSION ACTION

MEETING DATE(S): 01/05/2010

Instead of opposing SCA 15 and ACA 22 as recommended, the council ended up supporting both measures to prevent further Kelo abuses.

Quoting from the minutes of the October 3, 2005 city council meeting:

“Councilmember Hansen stated his reasons for supporting SCA 15 (McClintock & Florez) and ACA 22 (La Malfa) including abuses by government of private citizens and their property.

Councilmember Bohr stated his reasons for opposing SCA 15 and ACA 22, including what he stated is a lack of eminent domain abuse in Huntington Beach.

Councilmember Cook stated her support for SCA 15 and ACA 22, citing what she perceives as instances of eminent domain abuse in the City.

Councilmember Coerper and Mayor Pro Tem Sullivan stated their support for SCA 15 and ACA 22, citing other examples of perceived eminent domain abuses.

Councilmember Bohr spoke regarding fair market value paid to property owners.

Mayor Hardy stated her reasons for opposing SCA 15 and ACA 22, including her opinion that the legislation is too restrictive.

A motion was made by Hansen, second Green to SUPPORT SCA 15 (McClintock & Florez) as amended on 8/23/05 and ACA 22 (La Malfa) as introduced – Restricting local governments’ use of eminent domain. The motion carried by the following roll call vote:

AYES: Hansen, Coerper, Sullivan, Green, Cook

NOES: Hardy, Bohr

ABSENT: None”

REQUEST FOR CHARTER REVIEW COMMISSION ACTION

MEETING DATE(S): 01/05/2010

Redevelopment of Under-performing Shopping Centers, June 2007

In January 2007, council member Hansen brought forth an H item directing staff to prepare an inventory of under-performing shopping centers for possible inclusion into an expanded Merged Redevelopment Area. This was approved by a vote of 7-0.

At a June 2007 study session on the subject, staff was directed by council to proceed without considering the use of eminent domain.

Proposition 99, June 3, 2008

On June 3, 2008, California voters passed Proposition 99 ([http://ballotpedia.org/wiki/index.php/California_Proposition_99_\(2008\)](http://ballotpedia.org/wiki/index.php/California_Proposition_99_(2008))) with 62% of the vote to prohibit the use of eminent domain for acquiring an owner-occupied residence for the purpose of conveying it to a private person. This effectively prohibited Kelo-style eminent domain, but only for owner-occupied residences.

Critics of this proposition rightfully complained that renters and business owners would still be unprotected from Kelo-style eminent domain.

Redevelopment of Under-performing Shopping Centers, March 2009

A preliminary survey of “blighted” shopping centers was presented at the March 2, 2009 city council study session. There was again discussion of eminent domain, but according to the minutes, “Councilmembers provided support to proceed, with the option to discuss inclusion of eminent domain authority later in the process”.

So it appears the council has backed off slightly on their commitment to avoid using eminent domain for this plan.

REQUEST FOR CHARTER REVIEW COMMISSION ACTION

MEETING DATE(S): 01/05/2010

Eminent Domain and Other Charter Cities

Several charter cities contain charter provisions to prohibit Kelo-style eminent domain; see References below for a partial list. Note that most of these restrictions were implemented in the year after the Kelo decision. The Anaheim measure passed with 80.3% of the vote, and the Newport Beach measure passed with 76.4% of the vote. It is clear that restricting this type of eminent domain is wildly popular with the voters.

The Anaheim and Newport measures share much common language. However, an OC Register news article (<http://www.ocregister.com/news/law-43862-measure-newport.html>) points out several flaws in the Newport measure, and concludes that the Anaheim measure is the stronger of the two.

Huntington Beach Charter Proposal

I propose that the Huntington Beach charter be amended with an Anaheim-style restriction on eminent domain, but ***without*** the mitigation exception clause. I feel there is sufficient wiggle-room in that clause to allow for gaming the system, and so an amendment without such a clause will offer stronger protections against abuse.

References:

Anaheim - November 7, 2006 city council measure

From http://www.anaheim.net/docs_agend/charter.pdf:

Section 402. LIMITATIONS ON USE OF EMINENT DOMAIN.

Neither the City of Anaheim nor any City-affiliated agency may exercise the power of eminent domain to acquire any property from any private owner thereof, without such owner's consent, when the purpose of the acquisition is the intended conveyance of the property so acquired to any other private party, for the conduct of any for-profit commercial activity or for-profit residential development, sales or

REQUEST FOR CHARTER REVIEW COMMISSION ACTION

MEETING DATE(S): 01/05/2010

leasing. Nothing contained in this section shall be deemed to prohibit acquisitions of property interests by eminent domain for the purpose of either (i) conveying such acquired interests to the owner of other property affected by a public acquisition of property in order to mitigate impacts of the acquisition or the project to be constructed on such other property, or (ii) the development of any facilities to be operated by the City or any facilities of which the City is or shall be an owner.

As used in this section, the following terms shall have the following ascribed meanings:

“Owner” means the owner of the fee title interest in the property to be acquired, as shown on the last equalized assessment roll, or other more current proof of vesting the City may have.

“Property” shall mean any interest in real or personal property otherwise subject to acquisition through the use of eminent domain.

“City-affiliated agency” shall mean the Anaheim Redevelopment Agency, Anaheim Housing Authority, and any other entity possessing the power of eminent domain the governing board of which is solely composed of, or is solely appointed by, the members of the City Council of the City of Anaheim. (Added November 7, 2006, filed by the Secretary of State February 13, 2007.)

Chula Vista – June 6, 2006 citizen initiative

From

http://www.chulavistaca.gov/City_Services/Administrative_Services/City_Clerk/PDFs/CVCharter.pdf:

Sec. 305.5 Limitations on Powers of Eminent Domain

Eminent domain is not to be used to further private economic development. The City of Chula Vista shall not initiate or participate in any proceedings, or take any action to condemn private property for the purpose of making such property available for private development, nor shall the City participate, directly or indirectly, in such takings. “Participation” means contributing, lending, providing, pledging, or foregoing, any funds, property, credit, in-kind services, or incurring

REQUEST FOR CHARTER REVIEW COMMISSION ACTION

MEETING DATE(S): 01/05/2010

any debt or lease obligation, or providing any other thing of value to any agency, organization, or project. Notwithstanding these prohibitions, the City of Chula Vista may participate in proceedings to condemn private property for the purpose of making such property available for private development if such participation is approved by a majority of the voters in the City.

Sec. 305.6 Minimum Public Use Period

Property acquired by the City of Chula Vista through the use of eminent domain after the effective date of this charter amendment must be held or used for a public use by the City for a minimum ten year period prior to sale, lease, transfer or other disposition by the City.

Monterey – predates Kelo?

From <http://www.codepublishing.com/ca/Monterey/html/MontereyCH.html#2.7>:

Sec. 2.7 Voter Approval Required for Eminent Domain Actions to Acquire Property for Re-Sale in Redevelopment Projects.

In any Redevelopment Project adopted or substantially amended after May 1, 1983, neither the City nor Redevelopment Agency shall by eminent domain proceedings acquire property within a Redevelopment Project for the purpose of re-sale for private redevelopment without first submitting to and receiving the approval of the electorate.

This section shall not prohibit either the City or Redevelopment Agency from acquiring property by eminent domain proceedings for any other public purpose nor shall it prohibit either the City or Agency from acquiring property within a Redevelopment Project from a willing seller for any purpose.

The proposal to acquire property within a Redevelopment Project for re-sale to private redevelopers shall be placed before the electorate at either a general election or special election called for that purpose.

REQUEST FOR CHARTER REVIEW COMMISSION ACTION

MEETING DATE(S): 01/05/2010

Newport Beach – November 7, 2006 city council measure

From

<http://www.codepublishing.com/CA/NewportBeach/html/NewportBeachCH.html#04.424>:

Section 424. Limitations on Use of Eminent Domain.

The City of Newport Beach and/or any City-Affiliated Agency shall not exercise the power of eminent domain to acquire any property from the owner of the property, without the owner's consent, for the sole purpose of transferring the property to another person to further private economic development.

As used in this section of the Charter, the following terms shall have the following ascribed meanings:

“Owner” means the owner of the fee title interest in the property to be acquired, as shown on the last equalized assessment roll, or other more current proof of vesting the City may have.

“Property” shall mean any interest in real or personal property otherwise subject to acquisition through the use of eminent domain.

“City-Affiliated Agency” shall mean the City of Newport Beach and/or any other entity possessing the power of eminent domain, the governing board of which is solely composed of, or is solely appointed by, the members of the City Council of the City of Newport Beach. (Added by amendment effective January 12, 2007)