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Domain ruling gives developers options

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Staff writers

Opinions are mixed regarding last week's 5-4 decision by the U.S. Supreme Court that effectively expanded the use of eminent domain for private economic development.

In the case of *Kelo vs. New London, Conn.*, the court held that New London could purchase and remove private homes and businesses to make way for a private riverfront development project because of the potential economic benefit the boost in tax revenues would create.

Kevin Walsh of Harris, Shelton, Hanover, Walsh PLLC, calls the court's decision "an unfortunate expansion of public use."

Walsh has an emphasis on eminent domain in his practice and has represented property owners in cases brought by governmental authorities to take private property.

"I found it disappointing that Judge Rehnquist was not able to muster a majority for purposes of protecting private property rights," Walsh says. "This decision essentially allows governmental entities to take property in the name of public use under the 5th Amendment of the Constitution solely for the purpose of generating additional tax revenue."

Still, there are additional levels of scrutiny to consider regarding the application of Tennessee state law, Walsh says. Tennessee has its own clause with regard to the right to take private property.

"I'm not sure it would be interpreted any differently, but you would have to consider not only the Tennessee Constitution but the enabling legislation or statute under which the power of eminent domain has been delegated," he says.

That would include any legislation that allows a government entity to seize private property, including boards like the Riverfront Development Corp., which gained approval from the City Council last year to transform a four-block area of Downtown known as the Promenade.

The \$50 million redevelopment plan calls for using private developments, including three proposed new buildings, to pay for projects like a two-level promenade and the relocation of parking garages underground. The buildings would be mixed-use, with restaurants and shops lining the bottom floors. Ground leases would keep the property under the control of the city.

Ultimately, the RDC seeks to revamp a 5-mile stretch of the Memphis waterfront over the next half century. The cost of that development has been estimated at about \$300 million.

The property now contains the Cossitt Library, a fire station, the U.S. Post Office and Confederate Park. The land, except for Confederate Park, is virtually inaccessible to most of the public and offers prime views of the river.

The property was donated by the city's founding fathers for use as a public promenade. The heirs of the founders hold title to the land and have been divided on the proposal.

RDC president Benny Lendermon says the High Court's ruling gives the city attorney another tool in dealing with land acquisition for a plan that could produce a significant economic benefit for the city.

"It's incredibly important nationwide," says Lendermon. "Many large metropolitan areas are going through financial crises right now. This gives them more flexibility to pursue economic development when it is for the public good. We developed a plan for the best use of the property."

Barbara Kritchevsky, associate dean of the Cecil C. Humphreys School of Law at the University of Memphis, says the ruling would not directly change any restrictions under the Tennessee Constitution involving eminent domain.

"(The ruling) talks about what is permissible under the federal Constitution," says Kritchevsky. "It means if a state chooses to do what New London did it would not violate the federal Constitution. States could be more restrictive in their own interpretations of eminent domain."

Jim Arthur, an attorney at Armstrong Allen, says Tennessee's eminent domain clause is not more restrictive; it essentially mirrors that of the federal Constitution and has been construed by state courts in lockstep with the U.S. Supreme Court.

The New London case, therefore, may have a particular relevance if a similar situation were to occur here.

"It means if an E-Cycle could convince enough local officials to declare that a particular development project it proposed provides a 'public benefit,' however speculative, private property owners whose property stands in the way are afforded no protection by the Constitution," Arthur says, referring to the fake company the FBI used in its Tennessee Waltz sting operation that netted several local elected officials for allegedly taking bribes.

"According to the Kelo majority, I see nothing to stop the City of Memphis, or some agency to which it might delegate its power of eminent domain, from condemning every square foot of riverfront property in furtherance of some development plan it pronounces to be of 'public benefit,'" Authur says.

Virginia McLean, president of Friends for Our Riverfront, a group that opposes the RDC's proposals, says that won't happen.

The Public Promenade is protected by the Tennessee Supreme Court's prior decisions involving the property and the Tennessee Constitution," McLean wrote on the group's official Web site. "We believe that if the RDC attempts to condemn the Public Promenade, the Tennessee judiciary will reject the U.S. Supreme Court's reasoning in Kelo."

Lendermon says the RDC would use eminent domain as a "last resort."

Another project where eminent domain could come into play is the city's push to redevelop the blighted, 138-acre section of the city south of the \$250 million FedExForum. Current conditions in the area, bounded by Mulberry on the west, G.E. Patterson on the south, Danny Thomas on the east and Linden on the north, are bleak, with lots overgrown with weeds and covered in trash.

The Center City Commission, the agency charged with guiding development Downtown, has developed a plan for revitalizing the area that includes the possibility of using eminent domain for land assemblage that would spur development.

"Land assembly will be key in creating development in what is a long forgotten neighborhood of vacant land," says Jeff Sanford, CCC president. "I would hope that eminent domain wouldn't have to be used to assemble property, but in the end it may be an option."

Downtown developer Henry Turley says the Supreme Court ruling is a victory for cities looking to attract economic development opportunities.

"I think a city has to be able to assemble property for economic development within that city," says Turley, principal of Henry Turley Co. "Otherwise, that economic development occurs outside the city. So the city tends to languish while the surrounding areas tend to prosper, putting the city at a great disadvantage."

At the other end of the spectrum is retired attorney Hal Rounds, chairman of the Libertarian Party of Shelby County, who says the Kelo case is fraught with dangers to everyone who intends to work, invest and build something.

"We have gone from being property owners to conditional custodians at the pleasure of our government," Rounds says.

He believes the matter is not settled, in part because as Justice Clarence Thomas noted in his dissent, the entire body of cases cited by the majority rests not on Constitutional law but on other precedents.

Should the next similar case go back to the 5th Amendment it could overturn more than a century of decisions. In the meantime, Rounds believes the Kelo case, while potentially unlawful, strengthens the hand of the city.

The problem with the decision, as Arthur sees it, is that it lowers the standard for governmental exercise of its power of eminent domain to an all but meaningless level.

"The 5th Amendment originally contemplated government taking private property for its own use, for forts, roads or other necessities for the common good, or for use by others who might incidentally reap a benefit to serve the public," Arthur says.

"Now, government can take your property simply because it determines that someone else can use your property more profitably and generate more tax revenue than you have."

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