

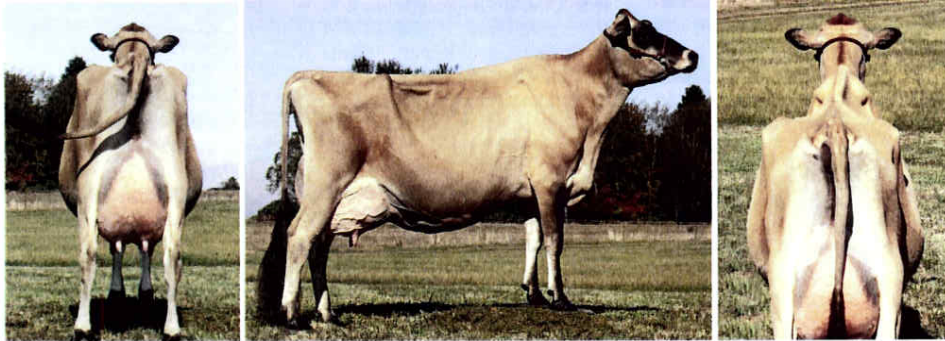
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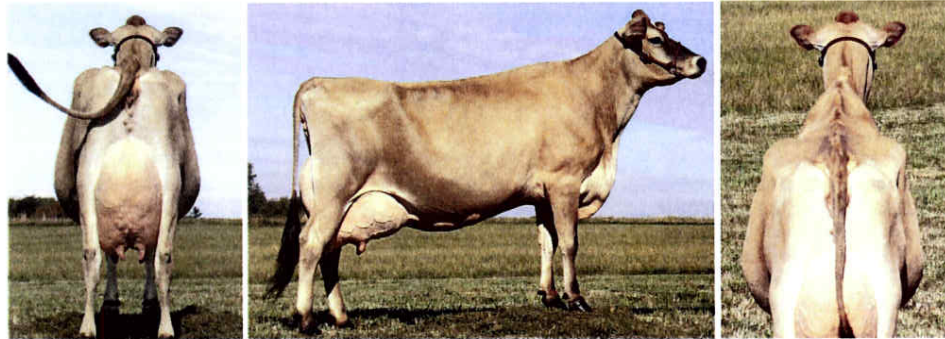
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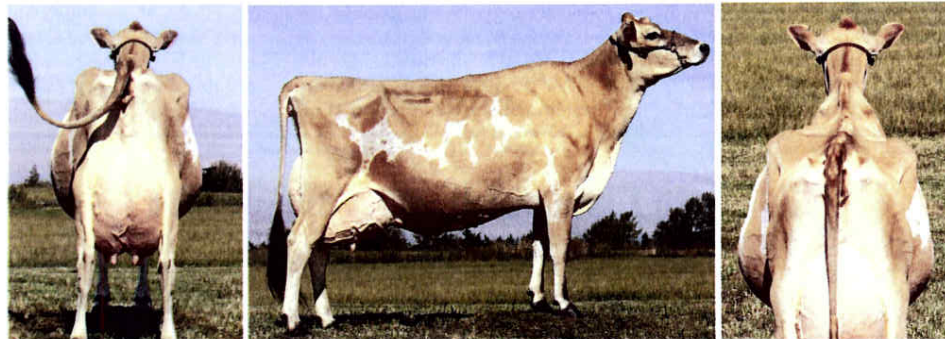
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Jersey

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Could eminent domain trump your farm?

What landowners, developers, and local governments should know about the Kelo decision.

by Dan Gentges

THE use of eminent domain authority — the power to purchase private property and put it to a public use — has been accepted within the general powers of local government for decades. Local governments have, however, increasingly exercised their eminent domain authority to acquire private property to promote private economic development. And a string of United States Supreme Court, state supreme court, and appellate cases paved the way for minimal judicial scrutiny of this exercise of eminent domain authority. Despite this trend, property rights activists have challenged the validity of using eminent domain to promote private economic development.

Came to a head . . .

The United States Supreme Court's decision last summer, in *Kelo versus City of New London* (Conn.), was anticipated by many hoping for the final word in resolving the limits of eminent domain

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authority for private economic development. *Kelo* pitted private landowners and property rights advocates against municipalities and commercial developers.

In a sharply divided 5-4 decision, the Court ruled that the United States Constitution does not prevent local governments from condemning private property to promote economic development plans. The Court continued to allow state

Justice O'Connor concluded that "nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."

legislatures broad latitude to determine what constitutes an appropriate taking for a "public use" and how best to address the needs of local communities.

The Court, in a majority opinion authored by Justice John Paul Stevens, emphasized that since the "close of the 19th century, [the Court has always] embraced the broader and more natural interpretation of public use as 'public purpose.'" The Court further observed that the

"government's pursuit of a public purpose will often benefit individual private parties" and that "the public end may be as well or better served through an agency of private enterprise than through a department of government — or so the Congress might conclude."

There was major dissent . . .

In a stinging dissent, Justice Sandra Day O'Connor rejected the majority's expansion of the meaning of "public use." She argued that such a broad meaning of "public use" would necessarily imply "that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicated to generate some incidental benefit to the public. Thus, if predicated (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words "for public use" do not realistically exclude any takings and, thus, do not exert any constraint on the eminent domain power."

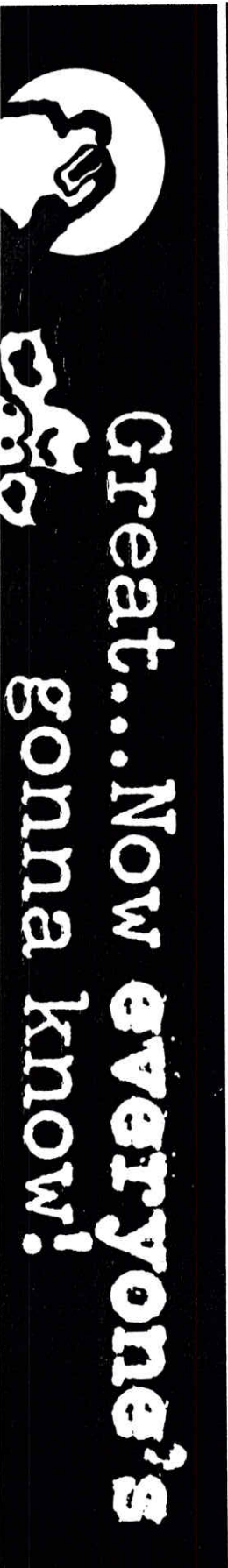
Justice O'Connor concluded that "nothing is to prevent the State from replacing any Motel 6 with a Ritz-

Carlton, any home with a shopping mall, or any farm with a factory."

The United States Congress moved swiftly in response to the *Kelo* decision. The "Protection of Homes, Small Businesses, and Private Property Act of 2005" was introduced shortly after the *Kelo* decision in both the Senate and the House of Representatives.

The proposed legislation applies to all exercises of eminent domain authority by the federal government. It also reaches projects by state and local governments that use federal funding. The act states "the power of eminent domain shall be available only for 'public use.'" The act deviates from *Kelo* by stating that "public use" may not be construed to include economic development. The proposed legislation has been referred to the Judiciary Committees of both houses of Congress.

While the Supreme Court declined to restrict the use of eminent domain for economic development, the *Kelo* majority (Supreme Court) made clear that the states are now free to legislate those restrictions. As states reconsider the scope of the "public use" doctrine and the proper limits on eminent domain, property rights



Great... Now everyone's gonna know!

advocates can shape the definitions and limitations on public use for economic development. And developers can expect to operate within those changing definitions and limitations.

Developers, in particular, should be prepared to be flexible in responding to changes in the scope and application of the "public use" doctrine. These changes are likely to intensify as more states reconsider the scope and use of eminent domain actions for economic development.

Developers and their local government partners will be well served to create and promote redevelopment plans that steer clear of takings benefiting just a few parties, as opposed to the public generally. Those wishing to move projects forward need to craft plans that clearly highlight a more traditional public use, notwithstanding a private benefit.

Similarly, affected landowners and property rights advocates should monitor closely proposed uses of eminent domain for economic development. They should not expect to rely on more traditional understanding of what constitutes the "public use" when faced with the prospect of a governmental faking to promote private development.

Strategies for developers . . .

Observers of the real estate development community are already outlining commonsense measures that developers and local governments should follow when pro-

moting takings for economic development. As examples:

(1) Developers should carefully review state statutes regarding blight or economic distress because they vary and may sometimes be broader than the developer anticipates.

(2) Developers should craft clear redevelopment plans and document how the proposed project directly benefits the public.

(3) Developers should always rely on condemnation as a last resort. Courts will often look more favorably upon developers who can show that they exhausted negotiation efforts with objecting landowners to purchase the property for fair market value, and, thus, condemnation remains the only viable option for the project to proceed.

(4) Local governments should select developers for economic development projects in a manner that promotes public confidence and, where possible (and certainly if required), through a competitive process.

(5) Developers and local governments should stringently follow all statutory procedures and refrain from determining in advance whether to condemn before offering to purchase an affected landowner's property. When possible, and whenever dictated by statute, affected landowners should be encouraged and given opportunities to participate in the redevelopment project.

(6) Meaningful and broad public

involvement in the redevelopment project is often critical to its success. Developers and local governments should strive to create as many opportunities for public involvement as possible.

(7) Local governments must also be prepared to articulate clearly the purpose of and motivation for a proposed condemnation.

(8) Documented commitments that the project will be developed after condemnation are helpful. These reassurances can come in the form of developer commitment letters, financing commitment letters, and so forth.

(9) A continued governmental role in the completed project often eases the concerns of reviewing courts that a redevelopment project serves a public purpose. This involvement may range from an ownership interest in the redeveloped property to sharing in the profits of the project.

(10) Finally, developers and local governments should be prepared to exhaust all administrative remedies before resorting to court action, to increase the likelihood of a successful court action.

Strategies for landowners . . .

Regardless of potential public benefits, property rights advocates may still fight to limit the use of eminent domain authority. In addition to Congress, legislatures in several states are taking action to limit the use of eminent domain for economic development. Those

actions include efforts to narrowly define "public use" and to classify specifically those properties that are deemed "blighted" for purposes of redevelopment. Given the charged atmosphere following the Supreme Court's Kelo decision, property rights advocates and concerned landowners will do well to engage their legislative and municipal representatives in a discussion of the proper role for eminent domain.

Who picks Supreme Champion?

Each year, our 4-H members are asked to select a Supreme Winner in your cow judging contest on their entry blanks. Who selects the Supreme Winner? Is there some kind of vote? VERMONT G.A.

Actually, there is a vote. We ask each of our official judges to send their placings and reasons to us by early February. Then we send a letter back to the five officials, asking them to rank the winning cows from each class. To keep the selection fair, we ask each judge to rank only the winning cows from the four breeds they did not judge. After judges complete their ranking, we assign points for each placing and tally the score. The cow with the most points is named Supreme Champion.

—THE EDITORS

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