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Kelo as Trojan Horse: How the Property Rights Movement Is Misusing the Kelo Decision to Advance a Radical Agenda

Regardless of what one thinks of the Supreme Court's ruling in Kelo v. City of New London, everyone can agree that public reaction has been intense. Early polling data reflected immediate and widespread opposition to the Court's ruling. Editorial pages across the country denounced the decision. One U.S. senator called the case the Dred Scott of the 21st century. Local leaders got an earful not only at public meetings but also at their dinner tables.

Most people know about the legislative efforts to respond to *Kelo* at both the federal and state levels. But the public does not know about the pernicious parallel effort to exploit the negative reaction to *Kelo* to advance a different, far more radical agenda.

The property rights movement has been busy drafting regulatory takings measures but disguising them as *Kelo* reform initiatives. These proposals purport to protect home owners and small businesses against condemnation, but they also include well-hidden provisions that would undermine zoning laws, environmental safeguards, and other widely supported measures undertaken to protect communities.

The radical nature of these regulatory takings provisions is best revealed by comparing them to existing takings jurisprudence. Under long-standing Supreme Court case law, a land use measure or other regulation constitutes a compensable taking under the Fifth Amendment only if the action severely reduces market value and unreasonably interferes with the owner's legitimate expectations. The Court has rejected takings challenges to zoning laws and other land use controls that reduced land value by 70 to 90 percent where the prohibited use posed a severe threat to public health or welfare.

The recent regulatory takings initiatives, in their most extreme incarnations, would radically expand takings liability by requiring taxpayers to compensate landowners for virtually any loss in value caused by restrictions on land use, no matter how compelling the justification for the challenged government action—safeguarding public health or welfare—might be. If no compensation is available, the regulation must be waived or invalidated.

The property rights movement has been embarrassingly unsuccessful in selling these proposals straight up in the marketplace of ideas. The U.S. Congress refused to approve these measures, despite several attempts in the 1990s, and state legislatures have largely rejected them.

Therefore, supporters of property rights have turned to Plan B. Their new strategy, sometimes called "*Kelo*-plus," is simple: (1) Choose a bumper-sticker ballot title with broad appeal like "Save Our Homes" or "Property Fairness." (2) Include provisions limiting the use of eminent domain but also add extreme regulatory takings measures. (3) Sell the proposal as a *Kelo*-inspired reform measure while downplaying the regulatory takings provisions. (4) Use Susette Kelo—or, better yet, a local "victim" of eminent domain—as a poster child for the initiative. (5) Most important, never explain the difference between eminent domain and regulatory takings. (6) Finally, exploit public concern over condemnation to advance the far more extreme regulatory takings agenda.

Last year, *Kelo*-plus measures were placed on the ballot in six states: Arizona, California, Idaho, Missouri, Montana, and Nevada. Several out-of-state libertarians and special interest groups poured millions of dollars into these campaigns. Most notable among them was New York real estate mogul Howie Rich, who provided almost $2 million in support. One libertarian think tank, the Reason Foundation, reportedly published a guidebook explaining how to exploit public concern over *Kelo* to promote regulatory takings measures.

For the most part, these campaigns were a bust. Although voters across the country approved several pure *Kelo*-inspired reform measures in the November 2006 elections, they resoundingly rejected most of the *Kelo*-plus initiatives. In Idaho, a state generally sympathetic to property rights, three-fourths of the voters rejected the *Kelo*-plus measure on the ballot. A majority of Californians nixed that state's "Protect Our Homes" *Kelo*-plus initiative because of broad opposition not only from local officials and environmental groups but also from business groups, farmers, realtors, religious organizations, and many others. Court decisions invalidated the regulatory takings provisions in Missouri, Montana, and Nevada because of widespread signature fraud and other irregularities. Voters in the

state of Washington also rejected a pure regulatory takings ballot initiative that did not include measures related to *Kelo*.

Arizona is the only state in which a *Kelo*-plus measure was approved. This measure is relatively limited in scope, because the compensation provisions for regulatory takings are prospective only and thus apply only to new actions by the government. Nevertheless, the citizens of Arizona are already starting to complain about the problems the initiative is creating for historic preservation, smart growth efforts, and other projects designed to promote public welfare.

In like fashion, Oregonians are suffering a severe case of buyers' remorse over the mother of all regulatory takings measures: Oregon's Measure 37, which was adopted at the ballot box in 2004 and requires compensation whenever specified government actions cause *any* loss in property value. Major land developers, mining corporations, forestry companies, and others have filed nearly 7,000 claims covering more than 750,000 acres and seeking more than $19 billion dollars in compensation. Because state and local officials lack funds to pay the claims, the challenged regulations are usually waived, posing a severe threat to public health and welfare, the environment, and Oregon's landmark planning program and urban growth boundaries.

According to recent polls, Oregonians now oppose Measure 37 by almost a 2-1 margin, and several recent examples can demonstrate the repercussions of the measure on residents of the state. One resident who voted for Measure 37 and filed a small claim for two additional homes on his land was flabbergasted to learn that his neighbor had asked the government to allow more than 100 homes to be built on adjacent property. The voter told reporters that he has "not talked to one person who thought they were voting for this type of development." In another case, an elderly couple saw a $1.3 million offer for their farm withdrawn when the county waived zoning restrictions to allow development of a nearby commercial gravel pit. Another claimant seeks to build a pumice mine and power plant inside Newberry National Volcanic Monument. Billboard companies in the state have filed claims that would allow them to place their signs wherever they want, without regard to the natural beauty Oregonians have worked so hard to preserve.

As a result of the widespread dissatisfaction with Measure 37, the Oregon legislature passed a bill to amend it in June, and in November Oregon voters will be asked to ratify this remedy. The amendment would make Measure 37 largely prospective, generally limiting the compensation requirement to new land use controls. The legislation would eliminate claims based on commercial and industrial uses, while preserving claims for residential development, farming, and forestry. The amendment also allows for some small-scale residential development on farmland that previously would have been prohibited.

Notwithstanding the debacles in Oregon and elsewhere, the property rights movement is once again pushing regulatory takings measures for approval at the ballot box. In California, the Howard Jarvis Taxpayers Association announced in July that it is gathering signatures for a new takings initiative to be placed on the ballot in June 2008. Although supporters contend that the measure is limited to eminent domain, the initiative is drafted so broadly that it might well give rise to compensation claims. One portion, in particular, seems intended to prohibit rent control and perhaps other forms of land use controls designed to promote the public interest.

In October 2007, voters in Mat-Su Borough, Alaska, will decide whether to approve a regulatory takings ordinance. This local initiative would require compensation for landowners whenever new county land use controls reduce the value of land. Given the aggressive financial backing from out-of-state libertarians to date, in the coming months we can expect more regulatory takings proposals in the states—both the stand-alone versions and the more deceptive *Kelo*-plus type.

For 200 years, the Supreme Court has developed jurisprudence related to government takings under the Fifth Amendment that considers all relevant factors and strikes a balance between the legitimate rights of landowners and the public interest. It would be a shame to have this carefully crafted case law rendered nugatory because of the deceptive practices of those seeking to exploit public concern over *Kelo*. **TFL**

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