Shorewood

Village Attorney's Office

Raymond J. Pollen
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MEMORANDUM

August 22, 2005

TO: M. Chris Swartz, Village Manager

FROM: Raymond Pollen, Village Attorney

RE: ***Kelo*** Decision and Eminent Domain

At the last Village Board meeting, the ***Kelo*** decision was set as an item for future discussion. This memo follows as background on the case and with options for consideration.

In ***Kelo v. City of New London***, the U.S. Supreme Court considered the action by a Connecticut community to exercise its power of eminent domain in accordance with the City's plan of economic development. Contrary to the reading by some, the Court did not advocate for the use of condemnation to benefit one private landowner over another. Rather, the U.S. Supreme Court deferred to the comprehensive state process that would favor public meetings and thorough deliberation in such decisions. Since the ***Kelo*** decision itself is quite long, I have attached a syllabus from the U.S. Supreme Court which summarizes its holding. I have also provided a number of articles from commentators who have discussed the case and its impact.

In Wisconsin, economic redevelopment projects which include land acquisition are usually part of a TIF process which includes hearings, evaluations and findings that property within the boundary has been determined to be "blighted". Within those restrictions, land may be acquired through eminent domain when funds are expended for a "public purpose". Fair value is paid for the property and Wisconsin law also provides for costs and benefits associated with the relocation. While some states may view the ***Kelo*** case as a "change in direction" from prior interpretations, many find it to be consistent with previous law. This is especially true given the processes available in Wisconsin.

After having considered the ***Kelo*** case and the recent commentary addressing eminent domain law in Wisconsin, the Village Board may have at least four options.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KELO ET AL. *v.* CITY OF NEW LONDON ET AL.

CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

No. 04–108. Argued February 22, 2005—Decided June 23, 2005

After approving an integrated development plan designed to revitalize its ailing economy, respondent city, through its development agent, purchased most of the property earmarked for the project from willing sellers, but initiated condemnation proceedings when petitioners, the owners of the rest of the property, refused to sell. Petitioners brought this state-court action claiming, *inter alia*, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment's Takings Clause. The trial court granted a permanent restraining order prohibiting the taking of the some of the properties, but denying relief as to others. Relying on cases such as *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, and *Berman* v. *Parker*, 348 U. S. 26, the Connecticut Supreme Court affirmed in part and reversed in part, upholding all of the proposed takings.

Held: The city's proposed disposition of petitioners' property qualifies as a "public use" within the meaning of the Takings Clause. Pp. 6–20.

(a) Though the city could not take petitioners' land simply to confer a private benefit on a particular private party, see, *e.g.*, *Midkiff*, 467 U. S., at 245, the takings at issue here would be executed pursuant to a carefully considered development plan, which was not adopted "to benefit a particular class of identifiable individuals," *ibid.* Moreover, while the city is not planning to open the condemned land—at least not in its entirety—to use by the general public, this "Court long ago rejected any literal requirement that condemned property be put into use for the . . . public." *Id.*, at 244. Rather, it has embraced the broader and more natural interpretation of public use as "public purpose." See, *e.g.*, *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S. 112, 158–164. Without exception, the Court has defined that concept broadly, reflecting its longstanding policy of deference to legislative judgments as to what public needs justify the use of the takings

Syllabus

power. *Berman*, 348 U. S. 26; *Midkiff*, 467 U. S. 229; *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986. Pp. 6–13.

(b) The city's determination that the area at issue was sufficiently distressed to justify a program of economic rejuvenation is entitled to deference. The city has carefully formulated a development plan that it believes will provide appreciable benefits to the community, including, but not limited to, new jobs and increased tax revenue. As with other exercises in urban planning and development, the city is trying to coordinate a variety of commercial, residential, and recreational land uses, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the city has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the plan's comprehensive character, the thorough deliberation that preceded its adoption, and the limited scope of this Court's review in such cases, it is appropriate here, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the Fifth Amendment. P. 13.

(c) Petitioners' proposal that the Court adopt a new bright-line rule that economic development does not qualify as a public use is supported by neither precedent nor logic. Promoting economic development is a traditional and long accepted governmental function, and there is no principled way of distinguishing it from the other public purposes the Court has recognized. See, *e.g.*, *Berman*, 348 U. S., at 24. Also rejected is petitioners' argument that for takings of this kind the Court should require a "reasonable certainty" that the expected public benefits will actually accrue. Such a rule would represent an even greater departure from the Court's precedent. *E.g.*, *Midkiff*, 467 U. S., at 242. The disadvantages of a heightened form of review are especially pronounced in this type of case, where orderly implementation of a comprehensive plan requires all interested parties' legal rights to be established before new construction can commence. The Court declines to second-guess the wisdom of the means the city has selected to effectuate its plan. *Berman*, 348 U. S., at 26. Pp. 13–20.

268 Conn. 1, 843 A. 2d 500, affirmed.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed a concurring opinion. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined. THOMAS, J., filed a dissenting opinion.

THE U.S. SUPREME COURT DECISION IN Kelo v. City of New London

Analysis by David L. Callies
The Benjamin A. Kudo Professor of Law at the William S. Richardson School of Law

§ I Introduction

In *Kelo v. City of New London,*[1] a bare majority of the Court upheld the exercise of eminent domain for the purpose of economic revitalization. Heavily relying on its previous decisions in *Berman v. Parker*[2] and *Hawaii Housing Authority v. Midkiff,*[3] the Court in essence said that it was too late in the game to revisit its present expansive view of public use. Formally, the Court stated that there is no difference in modern eminent domain practice between public use and public purpose[4] – at least in federal court. Indeed, the Court – by a narrow 5/4 vote – specifically equated public use and public purpose before holding that condemning land for economic revitalization was at worst simply another small step along the continuum of permitting public benefits to be sufficient indicia of meeting the public use/public purpose requirements for purposes of the Fifth Amendment's Takings Clause.[5] As the Court also noted, it is now up to the states to decide whether or not to increase the burden on government exercise of compulsory purchase powers.[6] The federal bar is presently set so low as to be little more than a speed bump.

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[1] 2005 U.S. LEXIS 5011 (June 23, 2005), Case No. 04-108. Citations to the Kelo v. City of New London opinion in this current issues notice are to the LEXIS opinion.

[2] 348 U.S. 26 (1954).

[3] 467 U.S. 229 (1984).

[4] 2005 U.S. LEXIS 5011, at *26–27.

[5] Id. at *26-28.

[6] Of the slightly more than a dozen state courts that have considered whether economic revitalization is sufficient public use for governmental exercise of eminent domain, about half have decided – like Connecticut's Supreme Court and now the U.S. Supreme Court -that it is, and about half – like Michigan's Supreme Court in its recent and thoroughly reviewed and discussed decision in County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) – that it is not, utilizing various tests such as whether the condemnation serves primarily a public purpose or primarily benefits the private sector. See, for extensive analysis and commentary, Amanda Eckhoff and Dwight Merriam, *Public Use Goes Peripatetic*, 56 Planning and Environmental Law No. 1 (January 2005) at pp. 3 *et seq.*; Steven J. Eagle, *The Public Use Requirement and Doctrinal Renewal,* 34 Envtl. L. Rep. 10999 (2004).

for the purposes of providing employment and bettering the local tax base as the parties brought to its attention: "A parade of horribles is especially unpersuasive in this context since the Takings Clause largely 'operates as a conditional limitation permitting the government to do what it wants so long as it pays the charge.'"[19]

The facts in *Kelo* are straightforward. In order to take advantage of a substantial private investment in new facilities by Pfizer, Inc., in an economically depressed area of New London along the Thames River, the City reactivated the private non-profit New London Development Corporation (NLDC) to assist in planning the area's economic development.[20] Authorized and aided by grants totaling millions of dollars, NLDC held meetings and eventually "finalized an integrated development plan focused on 90 acres in the Fort Trumbull area."[21] Among the several parcels made a part of the plan which the City approved were two in which the plaintiffs owned property, none of which was blighted. The Kelos owned a single-family waterfront house, in which Mrs. Kelo had lived for her entire life. It was nevertheless condemned with the others "because they happen to be located in the development area."[22] On these facts, petitioners claimed that the taking of their property violated the public use restriction in the Fifth Amendment.[23] A trial court agreed as to the parcel containing the Kelo house, but a divided Supreme Court of Connecticut reversed, holding that all of the City's proposed takings were constitutional.[24] Noting that the proposed takings were authorized by the state's municipal development statute and in particular the taking of even developed land as part of an economic development project was for a public use and in the public interest, the court relied on *Berman* and *Midkiff* in holding that such economic development qualified as a public use under both federal and state constitutions.[25] The U.S. Supreme Court granted certiorari "to determine whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."[26]

The Court's answer: an unequivocal yes. While the Court noted that "the sovereign may not take the property of *A* for the sole purpose of transferring to another private party *B*. . . it is equally clear that a State may transfer property

19 2005 U.S. LEXIS 5011, at *33, n.19 (citing Eastern Enterprises v. Apfel, 524 U.S. 498, 545 (1998)). For a compendious list of such "horribles" *see* Dana Berliner, *Public Power, Private Gain* (2003).

20 *Id.* at *7.

21 *Id.* at *8.

22 *Id.* at *11.

23 *Id.*

24 *Id.* at *11-14.

25 *Id.* at *13.

26 *Id.* at *14.

from one private party to another if future 'use by the public' is the purpose of the taking."[27] The question, then, is what constitutes sufficient use by the public. Three factors appear to be important in reaching the conclusion that economic revitalization in New London constitutes such use: a rigorous planning process, the Court's precedents embodied in *Berman* and *Midkiff*, and deference to federalism and state decisionmaking.

The Court commences its analysis by reiterating that bare private-private transfers are unconstitutional and any pretextual public purposes meant solely to accomplish such transfers would fail the public use test.[28] However, the Court observed that the governmental taking before it was meant to "revitalize the local economy by creating temporary and permanent jobs, generating a significant increase in tax revenue, encouraging spin-off activities and maximizing public access to the waterfront" all done under a "carefully considered" and "carefully formulated" development plan in accordance with a state statute "that specifically authorizes the use of eminent domain to promote economic development."[29] Therefore, the "record clearly demonstrates that the development plan was not intended to serve the interests of Pfizer, Inc., or any other private entity."[30] Indeed, the Court was particularly impressed by "the comprehensive character of the plan [and] the thorough deliberation that preceded its adoption."[31] Although little in the plan demonstrated any actual use by the public, the Court observed that it had embraced a broader and more "natural" interpretation of public use as public purpose at least since the end of the 19th Century[32] and "we have repeatedly and consistently rejected that narrow [use by the public] test ever since."[33] Next, the Court observed that this broad definition of "public use" accorded with its "longstanding policy of deference to legislative judgments in this field."[34] The Court pointed to its decisions in *Berman and Midkiff* as demonstrations of such legislative deference, quoting heavily from the language in *Berman* about " 'the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.'"[35] The Court concluded that its "jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of

[27] *Id.* at *14-15.

[28] *Id.* at *15, 16 n.6.

[29] *Id.* at *15, 16 n.6, 26.

[30] *Id.* at *16 n.6.

[31] *Id.* at *26.

[32] *Id.* at *17 (citing, *inter alia*, Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896)).

[33] *Id.* at *18.

[34] *Id.* at *20.

[35] *Id.* at *22 (citing *Berman*, 348 U.S. at 33).

the takings power."[36] It thus appears that the Court has clearly and unequivocally substituted a welfare-based public needs test for use by the public when such needs are legislatively determined.

The Court steadfastly and bluntly rejected any suggestion that it formulate a more rigorous test.[37] Thus, for example, to require government to show that public benefits would actually accrue with reasonable certainty or that the implementation of a development plan would actually occur would take the Court into factual inquiries already rejected earlier in the term when the Court rejected the "substantially advances a legitimate state interest" test for regulatory takings in *Lingle v. Chevron U.S.A. Inc.*[38] Similarly, the Court declined to second-guess the City's determinations as to what lands it needed to acquire in order to effectuate the project.[39]

Lastly, the Court rejected the invitation by some *amici* to deal with the appropriateness of compensation under the circumstances. While the Court acknowledged the hardships which the condemnations might entail in this case, ". . . these questions are not before us in this litigation" even though members of the Court itself raised the adequacy of compensation during oral argument.[40] In a nod to federalism and states rights, the Court concluded by leaving to the states any remedy for such hardships posed by the condemnations in New London: "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many states already impose 'public use' requirements that are stricter than the federal baseline."[41]

Only Justice Kennedy's concurrence suggests some small role yet for federal courts in determining that a particular exercise of eminent domain might fall short of the required public use requirement: "There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public

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[36] *Id.* at *25.

[37] *Id.* at *34.

[38] 125 S. Ct. 2074, 161 L. Ed. 2d 876, 2005 U.S. LEXIS 4342 (2005).

[39] 2005 U.S. LEXIS 5011, at *36.

[40] *Id.* at *37, n.21. Other countries provide a measure of extra compensation where, as here, it is a private residence which is condemned and the landowner has a demonstrable emotional attachment to the improved land. *See, e.g.,* the Australian concept of solatium, amounting to up to 10% additional compensation beyond fair market value in such circumstances, briefly noted (among other compensation issues) in Lee Anne Fennell, *The Death of Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock: Taking Eminent Domain Apart,* 2004 Mich. St. L. Rev. 957, 1004 (Winter 2004), and referencing Murray J. Raff's more lengthy description in Chapter 1 of Kotaka and Callies (eds.) Taking Land: Compulsory Purchase and Regulation in Asian-Pacific Countries (2002).

[41] *Id.* at *36 (citing, inter *alia,* the recent Michigan decision in *Hathcock, supra* n.6).

Use Clause."[42] This is, however, largely a due process argument rather than an argument as to the validity of an eminent domain action, and in any event, continued Kennedy: "This demanding level of scrutiny is not required simply because the purpose of the taking is economic development."[43]

§ IV The Dissents

The argument for a judicial hands-off is not so strong as the Court majority suggests, however, as the vigorous dissents from Justices O'Connor and Thomas demonstrate. Particularly strong is the dissent by Justice O'Connor who wrote the broadly worded *Midkiff* opinion for a unanimous Court in 1984. Observing that the question of what is a public use is a judicial, not a legislative one,[44] Justice O'Connor commences by declaring that if economic development takings meet the public use requirement, there is no longer any distinction between private and public use of property, the effect of which is "to delete the words 'for public use' from the Takings Clause of the Fifth Amendment."[45]

But what then of *Berman* and her own language in *Midkiff*? These decisions, according to O'Connor, were exceptions to the Court's jurisprudence which required public use to be actual use by the public. The Court, says O'Connor, has "identified" three categories of public use takings of private property: (1) transfers to public ownership for such as roads, hospitals and military bases; (2) transfers to private common carriers or utilities for railroads or stadiums (both of which she characterizes as "straightforward and uncontroversial")[46] and (3) the rare "public purpose" case "in certain circumstances and to meet certain exigencies" like the eradication of blight and slums in *Berman* and the elimination of oligopoly in *Midkiff*, where deference to legislative determinations were warranted because the " extraordinary precondemnation use of the targeted property inflicted affirmative harm on society."[47] In other words, these were exceptional circumstances clearly not replicated in New London, and the application of this third exceptional category in these circumstances "significantly expands the meaning of public use."[48] If, as the majority suggests, government can take private property and give it to new private users as long as the new use is predicted to generate some secondary public benefit like increased tax revenues or more jobs, then the "for public use" requirement does not exclude any takings.[49] Dismissing Justice Kennedy's test as one in which no one but

[42] *Id.* at *43 (Kennedy, J., concurring).

[43] *Id.* at *44.

[44] *Id.* at *50-51 (O'Connor, J., dissenting) (citing Cincinnati v. Vester, 281 U.S. 439 (1930)).

[45] *Id.* at *46.

[46] *Id.* at *51.

[47] *Id.* at *52.

[48] *Id.* at *57.

[49] *Id.* Justice O'Connor also confesses error (her own as well as the Court's) in ever equating

a "stupid staffer" could fail, Justice O'Connor finds the logic of the Court's decision such 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."[50] Leaving any tougher standards designed to limit such possibilities to the states is "an abdication of our responsibility. States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution . . . is not among them."[51] She ends with concerns for those with fewer resources who will suffer in contests over exercises of eminent domain with those with "disproportionate influence and power in the political process, including large corporations and development firms . . .."[52]

Justice Thomas raises similar concerns in his dissent, but in considerably more detail. Picking up on Justice O'Connor's concern for the politically least powerful and characterizing the Court's deferential standard as "deeply perverse,"[53] Justice Thomas provides several examples indicating that those uprooted in even the urban renewal cases were overwhelmingly poor, elderly, black, or all of the above.[54] His disagreement with the Court goes much deeper than that of Justice O'Connor, however. Reviewing a series of court opinions and writings from the late 18th Century, Justice Thomas concludes that the cases cited by the majority for the proposition that public use meant public purpose rather than use by the public in the early years of the republic were exceptions – aberrations that varied from the usual rule. Thomas concludes that the Court's current public use jurisprudence therefore rejects the original meaning of the public use clause, to which he urges the Court to return, and from which it has clearly deviated.[55]

§ V A Requiem for Public Use

There was very little left of the public use clause – at least in federal court – even before the *Kelo* decision. While a growing handful of state court decisions (and federal decisions applying state law) found economic revitalization public purposes invalid on constitutional grounds,[56] an equal number of decisions agreed with the Connecticut Supreme Court that this was a valid public use.

public use and the police power, from which, she accurately observes, much of the expanded doctrine of public use into broad public purpose, and particularly deference to legislative determinations of public purpose, derive.

[50] *Id.* at *61.

[51] *Id.* at *63.

[52] *Id.* at *64.

[53] *Id.* at *92 (Thomas, J., dissenting).

[54] *Id.* at *93.

[55] *Id.* at *94.

[56] *See, e.g.*, the decisions in *Hathcock, supra* n.6; Southwestern Illinois Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1 (Ill. 2001).

Clearly this is the view of hundreds of state and local revitalization and redevelopment agencies.[57] Whether one reads the Court's previous jurisprudence on public use broadly, as Justice Stevens does for the Court's majority, or more narrowly, as does the dissent, it is difficult to argue with the conclusions reached separately by Justices O'Connor and Thomas: the public use clause is virtually eliminated in federal court. What yellow light of caution the handful of recent cases signaled has now turned back to green, and government may once more acquire private property by eminent domain on the slightest of public purpose pretexts unless such a use is inconceivable or involves an impossibility, the tests following *Midkiff* in 1984. In other words, it's now all about process, and process only. There is no doubt that state and local governments will do much good in terms of public welfare and public benefits flowing from economic revitalization under such a relaxed standard, as they have often done in the past. And yet, the public use clause is more than simple policy; it is a bedrock principle contained in the Bill of Rights amendments to our Federal Constitution, designed not to further the goals and desires of the majority, but as a shield against majoritarian excesses at the expense of an otherwise defenseless minority – like the Kelos. Surely we could have found grounds to preserve that shield in federal court.

For comprehensive coverage of eminent domain issues, the authoritative source is *Nichols on Eminent Domain*® (Matthew Bender).

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[57] *See* Berliner, *supra* n.19.

Georgetown Environmental Law & Policy Institute

The Myth That *Kelo* Has Expanded the Scope of Eminent Domain

John D. Echeverria
July 18, 2005

In the wake of the Supreme Court's June 23, 2005, decision in Kelo v. City of New London, some have contended that the Court's decision expanded government authority to condemn private property for economic development. For example, a story in The Washington Post states, "The ruling greatly broadened the types of projects for which government may seize property to include not only bridges and highways but also slum clearance and land redis-tribution." The idea that Kelo expanded the law of eminent domain is simply *incorrect.*

I. The Law Before *Kelo*

In the modern era prior to Kelo, there were basically four Supreme Court cases dealing with the use of eminent domain for economic development. In each of these cases the Court, applying a deferential standard, upheld the use of eminent domain because the taking was found to serve a legitimate public purpose and the owner received just financial compensation.

National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992), involved an Interstate Commerce Commission order requiring one railroad to transfer a rail line to a second railroad. The ICC issued the order because the first railroad had neglected to maintain a portion of the line which carries the Amtrak "Montrealer" through New England, and it believed the second railroad would do a better job of maintaining the line. The Court unanimously rejected the first railroad's objection that the taking was not for a public use because the use of the rail line would not physically change. The Court said it could not "strike down a condemnation... so long as the taking is rationally related to a conceivable public purpose." In this case, Justice Kennedy said, "there can be no serious argument that the ICC was irrational in determining that the condemnation will serve a public purpose by facilitating Amtrak's rail service. That suffices to satisfy the Constitution...."

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Hawaii Housing Authority v. Midkff, 467 U.S. 229 (1984), involved a challenge to a Hawaii statute designed to deal with the problem that a very few owners held most of the private land in the state. The statute required owners of large holdings, under certain conditions, to sell residential lots to individual citizens so that they could own their own homes. The unanimous Court, in an opinion by Justice O'Connor, recognized that the Constitution does not permit a compensated taking "for no reason other than to confer a private benefit on a particular private party." However, the Court said it had an obligation to uphold the use of eminent domain where it is "rationally related to a conceivable public purpose." Under that standard, Justice O'Connor concluded that the Hawaii statute was constitutional. "Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers."

Ruckleshaus v. Monsanto, 467 U.S. 986 (1984), involved a takings challenge to the Federal Insecticide, Fungicide, and Rodenticide Act. The Act authorizes the Environmental Protection Act to rely on trade secret data submitted by a prior pesticide applicant in considering the application of a subsequent applicant, subject to payment of compensation to the first applicant. While it acknowledged that subsequent applicants permitted to exploit confidential business information in this fashion were the "most direct beneficiaries," the Court had no difficulty concluding that this use of the eminent domain power served a public use.

Finally, Berman v. Parker, 348 U.S. 26 (1954), involved a major urban redevelopment project in southwest Washington, D.C. that displaced numerous homeowners, renters, and small businesses. The owner of a non-blighted department store in the redevelopment area challenged the taking as not being for a public use. The Court unanimously rejected the challenge, reasoning that the eminent domain power can be exercised to achieve any legitimate legislative objective. "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well–nigh conclusive.... This principal admits of no exception merely because the power of eminent domain is involved." The Court also rejected the argument that eminent domain can only be used to eliminate "slum" properties. "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

These modern decisions are consistent with a long line of Court decisions stretching back to the 19th century. Indeed, if anything, the older decisions even more emphatically uphold the power of government to take and retransfer property, upon payment of just compensation, in order to promote economic development. To cite a few examples, in Head v. Amoskeag Manufacturing. Co., 113 U.S. 9 (1984), the Court authorized a manufacturing company to build a mill pond that flooded upstream landowners so that it could produce hydropower to drive a manufacturing facility. In Strickley v. Highland Bay Gold Mining Co., 200 U.S. 527 (1906), the Court approved condemnation of a right of way over private property so that a private mining company could operate an aerial bucket line to its mine. And in Fallbrook Irrigation District v. Bradley, 164 U.S. 112 (1896), the Court upheld condemnation so an irrigation district could build an irrigation ditch across neighboring private property.

II. The Law After *Kelo*

In light of the state of the law prior to Kelo, it is incorrect to suggest that Kelo broke new ground and expanded government's power of eminent domain. If anything, Kelo moved the law in the direction of *more* restrictions, not fewer restrictions, on the use of eminent domain for economic development.

The Court affirmed a decision by the Connecticut Supreme Court upholding use of eminent domain to assemble over 100 separate parcels within a 90-acre area characterized by high vacancy rates, significant disinvestment and neglect. The City of New London has lost a substantial portion of its population and suffers an employment rate twice the state average. Seeking to take advantage of the economic spark generated by the decision of the Pfizer company to construct a major new facility on an adjacent site, the city sought to implement a comprehensive redevelopment of the area for residential, commercial, office, and recreational purposes.

The Court said that New London's redevelopment plan easily met the public use test. "It would be incongruous," the Court said, "to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of... [the] other interests" endorsed in prior cases. Applying its deferential standard for local legislative judgments about how and when to deploy the eminent domain power, the Court also rejected plaintiffs' novel argument that it should demand a "reasonable certainty" that the redevelopment program would actually succeed.

Significantly, none of the dissenters in Kelo made a strong argument that the majority opinion departed from longstanding precedent. Justice O'Connor acknowledged that her position was inconsistent with the language, if not the specific holdings, of Berman and Midkiff. She suggested that those decisions could be distinguished on the ground that eminent domain had been used to address an "extraordinary, precondemnation condition of the targeted property [that] inflicted affirmative harm on society." But, in reality, nothing in the analysis or facts of those cases – much less the full body of relevant Supreme Court precedent – supports a sharp distinction harm-preventing and benefit-conferring government action. Furthermore, as Justice Scalia observed in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), this difference is often "in the eye of the beholder," making it a weak potential basis for distinguishing action that serves a legitimate public use.

Justice Thomas argued, based on the language and original understanding of the phrase public use, that eminent domain should be used only when the public will own the property or have a legal right to use it. But this constitutional analysis is fundamentally flawed. Dictionaries (modern and old) include public "advantage" among the definitions of public use, meaning that actions which serve a legitimate public purpose fit comfortably within the language "taking for a public use." Moreover, other scholarly examinations of the constitutional history indicate the drafters intended the phrase "public use" to impose few, if any, constraints on the eminent domain power. See, e.g., Mathew P. Harrington, "'Public Use'" and the Original Understanding of the So-Called 'Takings' Clause," 53 Hastings L.J. 1245 (2002). Justice Thomas acknowledged that his position required overruling over a century of Supreme Court precedent. This candid statement confirms that Kelo does not expand the eminent domain power.

Even as it followed well-settled precedent in Kelo, the Court placed new limits on the use of eminent domain for economic development purposes. First, the Court emphasized that New London was seeking to implement a "carefully considered development plan" for the area based on "thorough deliberation," including several public hearings and explicit approvals by the city council. The Court indicated that while it approved this type of carefully considered redevelopment program, it would not necessarily uphold "a one-to-one transfer of property, executed outside the confines of an integrated development plan." The Court's virtual mandate that future exercises of eminent domain proceed in accord with a comprehensive, carefully considered plan represents an important new limit on the eminent domain power.

Second, the Court strongly suggested that it is critical that the developer chosen to implement the development be bound to carry out the redevelopment and serve as the public's agent. Opponents of redevelopment projects sometimes suggest that property is being turned over to private developers without strings, with the public benefiting solely through enhanced tax revenues and a general increase in economic activity. In fact, in Kelo the city will retain title to the property and lease the property to the redeveloper on a long-term basis. An enforceable agreement binds the developer to provide specific facilities and services in accord with the city's development plan. Public welfare and private profit are no doubt inextricably linked – as in any effective public/private partnership – but there is no question that firm controls are in place to ensure the public interest will be protected.[1]

Finally, the limits placed on the eminent domain power in Kelo are underscored by Justice Kennedy's concurring opinion. Because his fifth vote was necessary to make a majority in Kelo, Kennedy's concurring opinion is likely to be especially influential in determining how courts interpret and local jurisdictions apply the decision. Although the judicial standard is deferential, Justice Kennedy said, courts should review exercises of eminent domain using a "meaningful" rational basis standard. He also echoed the concerns about one-to one transfers, stating that there might be categories of eminent domain in which "a presumption (rebuttable or otherwise) of invalidity" might be warranted. He identified a set of factors that justified upholding use of eminent domain in this case, suggesting that the absence of these factors might lead to a different outcome in another case. These factors included that "[t]his taking occurred in the context of a comprehensive development plan," the plan was meant to address "a serious city-wide depression," the "economic benefits of the project cannot be characterized as *de minimis*," the identities of project beneficiaries "were unknown at the time the city formulated its plans," and the city followed various "procedural requirements" that facilitated review of the project's *bona fides*.

In sum, while Kelo, in line with prior precedent, upheld the city's use of eminent domain for economic development purposes, the decision represents a change in the direction of less, not more, deferential judicial examination of the use of the eminent domain by state and local governments.

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[1] The Court also suggested in a footnote that the traditional measure of just compensation, based on fair market value, might not be an appropriate measure of compensation when government takes private property for economic development purposes. The Court said that this issue, while "important," was not raised by the Kelo litigation.

Pollen, Raymond J.

From: Municipal Attorney List [ATTY-LIST@LISTSERV.MUNICODE.COM] on behalf of Arthur Gutekunst [agutekun@CI.WHITE-PLAINS.NY.US]
Sent: Thursday, July 28, 2005 10:37 AM
To: ATTY-LIST@LISTSERV.MUNICODE.COM
Subject: [ATTY-LIST] Kelo article

FYI the following is an opinion piece (community view) written by a local law school professor printed the Journal News (the local Gannett county paper last Sunday.

Undue alarm greets Kelo decision
By JOHN R. NOLON
(Original publication: July 24, 2005)

The U.S. Supreme Court recently upheld the condemnation of several single-family homes by the City of New London, Conn. When I was first called by a reporter to comment on the case, called Kelo vs. New London, I remarked that there was "no news" in the decision * that the court simply confirmed a century-old legal doctrine, one that recognizes the power of economically distressed cities to condemn private property when needed to revitalize blighted areas. From Times Square to Getty Square, from the South Street Seaport to the Beacon waterfront, urban redevelopment projects have provided some hope for financially strapped cities struggling to serve the needs of their low- and moderate-income neighborhoods.

Given the uneventful nature of the decision in the context of settled law, the intensity of the post-decision media coverage of Kelo * and the heated rhetoric of political leaders who now threaten "corrective legislation" * is puzzling. The press, public and politicians apparently believe that the Supreme Court has left mom-and-pop businesses and single-family homes of every American vulnerable to condemnation that serves mostly private economic development interests. This is simply not what the case holds.

There are several lessons to be learned from the widespread misunderstanding of the Kelo case. The first is how to read law cases. We teach first- year law students during orientation week that the decisions of courts are confined to their factual contexts. In Kelo, the Supreme Court determined that it is constitutional for New London to condemn title to 15 parcels of land needed to enable it to revitalize a significant waterfront area to create jobs, increase tax revenues and bring new life back to a distressed city. The court did not decide whether it was constitutional for a local government to condemn a brake shop in order to relocate a hardware store, to take title to private parcels to allow Donald Trump to expand his casino, or acquire a 99 Cents Only Store to enable Costco to expand, nor did it need to. These condemnations have been reviewed by state courts under existing law and found to violate the constitution because they primarily benefit private, as opposed to public, interests.

The second lesson is to think through the implications of seemingly simple

conclusions, often fed to the press and public by advocacy groups with agendas quite different from the matter at hand. If New London had lost, all types of redevelopment programs in our troubled urban areas would have been threatened. Consider Syracuse, where various industrial companies, including several oil refineries, challenged the city for condemning their properties to further a waterfront redevelopment plan on the south shore of Onondaga Lake. The state courts upheld the condemnations, reasoning that a mixed-use development in this lower-income portion of the city achieved important public benefits and complied with the standards contained in statutes adopted by the state Legislature.

The third lesson is the importance of understanding the complete legal story behind complicated matters such as urban revitalization. Under state statutes in New York, despite the inference of the post-Kelo alarmists, redevelopment projects don't gestate in back rooms with greedy politicians waiting as midwives to the birth of private wealth. They are subject to onerous, transparent and lengthy processes that provide all the details of the project and invite public participation and extensive debate. Under the State Environmental Quality Review Act, redevelopment projects generate foot-high environmental impact statements that include an examination of their impact on community character and neighborhood change, and that contain lengthy chapters on all the projects' economic and environmental consequences.

Finally, it is important to be clear about what is at stake in legal cases. The Kelo decision has been spun as an assault on middle-class homeowners in the pursuit of private-sector redevelopment interests. This ignores what the case is about more fundamentally. Kelo addresses the critical importance of the revitalization of cities from which affluent populations have fled. This demographic shift fuels sprawl, diminishes open space in exurban areas and drains critical regional centers of their financial strength.

One-dimensional reportage and discussion of what is involved in the Kelo case also ignores fundamental principles of government that the case raises. It is settled doctrine that state courts and state legislatures should determine property rights and land use matters * not the federal courts * and that elected legislators are more qualified to decide what is in the public interest than are judges, unless critical constitutional interests dictate otherwise.

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Supreme Court Upholds Use of Eminent Domain For Economic Development

In a decision largely mischaracterized in the media, the United States Supreme Court affirmed an earlier decision of the Connecticut Supreme Court that economic development is a constitutionally permissible public use under the Fifth Amendment of the United States Constitution. *Kelo v. City of New London*, 2005 WL 1469529, 545 US ___ (June 23, 2005).

The City of New London, Connecticut (City) adopted an integrated development plan in 2000, which was designed to address the severe economic injury to the City and its residents caused by decades of economic decline and take advantage of a proposal to locate a $300 million research facility of the Pfizer, Inc. pharmaceutical company in the City. The plan covered a 90-acre area and was projected to create in excess of 1000 jobs, increase tax and other revenues, revitalize the City's downtown, create leisure and recreational opportunities on the City's waterfront and in a park and make the City more attractive.

The City acquired most of the land in the ninety-acre development plan area by purchase. It then sought to acquire fifteen properties owned by Susette Kelo and eight others (Owners) in the City through eminent domain. Some of the Owners' property was owner or family occupied and some was held as an investment.

The Fifth Amendment of the U.S. Constitution provides that the government may take private property for a "public use" provided "just compensation" is paid. The Owners in *Kelo* filed suit against the City and claimed that the taking of their properties would violate the "public use" restriction of the Fifth Amendment.

The trial court found that the proposed takings by the City were permissible except in one area proposed for marina or park support. The Connecticut Supreme Court disagreed and found that the proposed takings in all areas in the plan were constitutionally permissible under the Connecticut and U.S. constitutions.

Supported by a conservative property rights organization, the Owners appealed. The US Supreme Court agreed to hear the case "to determine whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment." By a vote of five to four, the court affirmed the Connecticut Supreme Court decision.

The Court noted that its longstanding interpretation of the "public use" restriction in the Fifth Amendment did not require public use of the condemned land. Instead, it observed that "this 'Court long ago rejected any literal requirement that condemned property be put into use for the general public'" and, at the close of the nineteenth century, "it embraced the broader and more natural interpretation of public use as 'public purpose.'" Moreover, the Court explained that "our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field."

After briefly reviewing several key decisions highlighting the Court's interpretation of "public use" as public purpose and the deference afforded legislative determinations on that question, it concluded that the City's determination that the plan "area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference." In addition to the limited scope of its review, the Court noted the "comprehensive character of the plan" and "the thorough deliberation that preceded its adoption" rendered it appropriate to resolve the challenges "not on a piecemeal basis, but rather in light of the entire plan." Accordingly, it concluded that the "plan unquestionably serves a public purpose" and held "the takings challenged here satisfy the public use requirement of the Fifth Amendment" and, upon these determinations, rejected the Owners' key arguments.

The Court declined the Owner's request to create a bright line rule that economic development does not qualify as a public use. It reasoned that "[p]romoting economic development is a traditional and long accepted function of government" and "[t]here is ... no principled way of distinguishing economic development from other public purposes."

The Court also rejected the contention that using eminent domain for economic development impermissibly blurs the boundary between public and private takings. It noted that "the government's pursuit of a public purpose will often benefit individual private parties."

see Eminent Domain continued on page 269

see Eminent Domain from page 267

The Court then dismissed the argument that proscribing economic development takings is necessary to prevent one-to-one transfers. The Court explained that such a circumstance was not presented in the case and, acknowledging that "such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot," indicated that such hypothetical cases "can be confronted if and when they arise.

Finally, the Court declined to adopt the Owners' proposed requirement that the government demonstrate a "'reasonable certainty' that the expected public benefits would actually accrue" in economic development taking cases. It explained that the proposed rule is inconsistent with the judicial restraint traditionally exercised by the Court in such matters and a "constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of the success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans."

Justice Kennedy wrote a concurring opinion. In it he explained that "[a] court applying rational basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular party, with only incidental or pretextual benefits." Accordingly, he agreed with the trial court's observation that "Where the purpose [of a taking] is economic development and that development is to be carried out by private parties or private parties will be benefited, the court must decide if the stated public purpose — economic advantage to a city sorely in need of it — is only incidental to the benefits that will be confined on private parties of a development plan."

Applying this "meaningful rational basis review" framework, Justice Kennedy noted the trial court's conclusions that "benefiting Pfizer was not 'the primary motivation or effect of this development plan'; instead, 'the primary motivation for [respondents] was to take advantage of Pfizer's presence'" and "[t]here is nothing in the record to indicate that ... [respondents] were motivated by a desire to aid [other] particular private entities." Thus, Justice Kennedy concluded the case "survives the meaningful rational basis review that in my view is required under the Public Use Clause."

However, Justice Kennedy did note the possibility for "a more stringent standard of review ... for a more narrowly drawn category of takings cases." He explained that "there may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause" but declined to opine on the "sort of cases [that] might justify a more demanding standard" since the circumstances that might require such analysis were not present in the case.

Justice O'Connor wrote a dissenting opinion which Justices Rehnquist, Scalia and Thomas joined. In it, Justice O'Connor argues that the issue is whether economic development takings are constitutional and answers the question in the negative based on a distinction between condemnation of harmful property use (constitutional) and non-harmful use (unconstitutional).

Justice Thomas also wrote a dissenting opinion. In it, Justice Thomas sets forth his reasons to "revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that government may take property only if it actually uses or gives the public a legal right to use the property."

Despite the erroneous media characterization, the *Kelo* decision does not create some new unfettered government eminent domain power to seize homes and give the property to corporations and others who want to use it for non-residential purposes. Rather, *Kelo* simply reaffirms a longstanding rule of judicial restraint in a Public Use Clause case when it is asked to second-guess a "carefully formulated" legislative determination preceded by "thorough deliberation" that "unquestionably serves a public purpose." In such cases, the court will defer to the legislative judgment even if the public purpose is economic development. In a different case, not presented in *Kelo*, where the government seeks to take property from A and give it to B so that B would put the property to a more productive use and pay more taxes, the court specifically recognized the suspicion of a private purpose but appropriately left the analysis of such a case to the moment it arises.

Moreover, the characterization of *Kelo* as the vehicle for rampant bulldozing of homes across America is irreconcilable with the concurring opinion of Justice Kennedy which lays the groundwork for more, not less, judicial constraint on the exercise of eminent domain power. While not the heightened judicial scrutiny sought by the Owners in *Kelo*, Justice Kennedy's "meaningful rational basis review" requirement that the government show more than "incidental public benefit" in economic takings cases may prove more than minimally burdensome since it is inextricably linked to an evidentiary comparison of the public and private benefit to be achieved by the taking. Accordingly, the government must be prepared to provide adequate proof of its claimed public benefits to withstand a claim that they are merely incidental and, thus, insufficient under the narrower Kennedy analysis in *Kelo*.

Zoning 482

Legislature Turns its Attention to Eminent Domain Powers of Municipalities

In the wake of the U.S. Supreme Court's recent decision in the *Kelo v. City of New London* case, some members of the Legislature have been discussing whether to limit municipal condemnation powers. In *Kelo*, the court upheld the use of eminent domain for economic development, ruling that condemning property for the purpose of transferring it to a developer as part of a redevelopment plan to revitalize an economically depressed area satisfies the "public use" requirement of the Takings Clause.

Legislators such as Rep. Jeff Wood (R-Chippewa Falls) and Sen. Dave Zien (R-Eau Claire) have reacted to the decision by suggesting legislation is necessary to limit municipal condemnation powers. These legislators are particularly concerned about the possible use of condemnation to acquire an owner occupied residential home for purposes of transferring it to a developer for redevelopment. A group of 26 legislators met this week to discuss the issue. No legislation has been introduced yet. We will keep you informed of any future developments in this area as they arise.

per League of Wis Munic

Congressional reaction

On June 27, 2005, Senator John Cornyn (R-TX) introduced legislation, the "Protection of Homes, Small Businesses, and Private Property Act of 2005" (S.B. 1313), to limit the use of eminent domain for economic development. The operative language (1) prohibits the federal government from exercising eminent domain power if the only justifying "public use" is economic development; and (2) imposes the same limit on state and local government exercise of eminent domain power "through the use of Federal funds." Similar bills have subsequently been put forth in the House of Representatives by Congressman Dennis Rehberg (R-MO), Tom DeLay (R-TX), and John Conyers (D-MI) with James Sensenbrenner (R-WI). As most small-scale eminent domain condemnations (including notably those in the *Kelo* case) are entirely local in both decision and funding, it is unclear how much of an effect the bill would have if it passed into law[7]. House Minority Leader Nancy Pelosi (D-CA) believes that the proposed laws would violate separation of powers and that it would require a constitutional amendment to alter the meaning of the Fifth Amendment as interpreted by *Kelo:* "when you withhold funds from enforcing a decision of the Supreme Court you are, in fact, nullifying a decision of the Supreme Court... I would oppose any legislation that says we would withhold funds for the enforcement of any decision of the Supreme Court." She did not take a position on the decision itself.[8]

Eminent domain action postponed

Brookfield aldermen want more time on issue

By LISA SINK
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Posted: Aug. 16, 2005

Brookfield - Aldermen on Tuesday postponed action on a proposal to limit the city's power to seize private property, saying they needed more time to research and debate the issue.

A Brookfield alderwoman running for mayor has joined federal and state lawmakers in blasting a U.S. Supreme Court decision that upheld an expanded power of the government to seize land for economic development, even when it isn't blighted, as long as the landowner is fairly compensated.

The court decision has been lambasted by conservatives and liberals alike and spurred calls for legislative reform.

In Madison, state Rep. Jeffrey Wood (R-Chippewa Falls) and state Sen. David Zien (R-Eau Claire) are drafting a bill to limit the use of eminent domain.

In Brookfield, Ald. Cindy Kilkenny drafted a resolution declaring that the city "shall not take property by condemnation through eminent domain for the purpose of consolidating land parcels to resell to another in order to fulfill an executed economic development or neighborhood node plan."

The city generally has used eminent domain to acquire land for only roads and utilities, not for commercial development. But some city officials have raised the possibility of buying properties to facilitate redevelopment of an area a former mayor once dubbed "Schmuckville," near N. 124th St. and W. Capitol Drive.

The Common Council's Legislative & Licensing Committee was scheduled to discuss and possibly act on Kilkenny's proposal before a council meeting Tuesday night.

But Ald. Gary Mahkorn, the committee's chairman, said that the 20 minutes allotted for the topic was not enough time. Ald. Dan Sutton agreed.

"I certainly would like to more thoroughly research the issues," said Mahkorn, who serves on the city Plan Commission and said he had read the U.S. Supreme Court decision. "I think it's an important issue."

Mahkorn said he would schedule it for a special meeting on Sept. 28.

Kilkenny said she was "disappointed" in the delay and wanted the council to take a public stand on

whether it would use eminent domain powers to facilitate redevelopment.

"We're not going to get to dance around this one," she said.

Kilkenny used the issue in a mayoral campaign fund-raising letter she sent last week to county Republican Party members.

"Eminent domain for economic development is a bully tactic and mocks our American tradition of free enterprise," Kilkenny wrote.

She wrote that Mayor Jeff Speaker has said he was concerned about restricting the city's tools and that he might consider using eminent domain if a developer assembled all but a few properties needed for a great project.

Speaker said Tuesday that he has no plans or desire to buy property forcibly for redevelopment.

"I don't believe it's really a big campaign issue," he said. "I don't see where it affects the city of Brookfield. We don't have a big issue of using eminent domain."

He added: "I'm a big believer in private property rights. I'm not going to use it for anything."

Regarding Kilkenny's proposal, Speaker said: "I don't oppose it. In concept, I support it. I don't think it's necessary because I know the state will be taking care of it."

Kilkenny said the state Legislature won't convene until January, and the city should act sooner to reassure landowners.

From the Aug. 17, 2005, editions of the Milwaukee Journal Sentinel

DRAFT

Resolution No. _____
by the Legislative and Licensing Committee

WHEREAS the Fifth Amendment to the Constitution of the United States declares that private property shall not be taken for public use, without just compensation; and

WHEREAS the process of condemnation through eminent domain is sometimes necessary in a city for the purpose of building public roads and utilities; and

WHEREAS the United States Supreme Court ruling of Kelo v. New London expands the description of public use to include the purpose of economic development through an executed development plan; and

WHEREAS the Common Council of the City of Brookfield, Wisconsin disagrees with the ruling of Kelo v. New London:

NOW, THEREFORE BE IT RESOLVED, that the Common Council of the City of Brookfield, Wisconsin shall not take property by condemnation through eminent domain for the purpose of consolidating land parcels to resell to another in order to fulfill an executed economic development or neighborhood node plan; and

BE IT FURTHER RESOLVED that the City reserves the right to exercise all other powers of eminent domain conferred by state or federal law.