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**Summer 2005**

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# Municipal Lawyer

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## U.S. Supreme Court Upholds Use of Eminent Domain for Economic Development and Spurs a Firestorm of Legislative Activity to Limit Such Authority

By Patricia E. Salkin

### Introduction

On June 23, 2005, the U.S. Supreme Court handed down a long-awaited decision in the controversial Connecticut eminent domain case that challenged the constitutional authority of state and local governments to exercise the power of eminent domain for economic development purposes absent a finding of blight. In affirming a March 2004 decision of the Connecticut Supreme Court,<sup>1</sup> the U.S. Supreme Court in a 5-4 decision in *Kelo v. City of New London*,<sup>2</sup> confirmed that the goal of economic development can be a valid "public purpose" to justify the use of eminent domain under the Fifth Amendment. In reaching this conclusion, the Court relied on its precedent in *Berman v. Parker*<sup>3</sup> and *Hawaii Housing Authority v. Midkiff*,<sup>4</sup> noted that the phrase "public use" cannot be defined rigidly, and expressed deference to the decision of legislative bodies in making these determinations.



### Background—The New London Economic Development Plan

The New London Development Corporation (hereinafter referred to as "Development Corporation"), a private, non-profit economic development

corporation was established in 1978 to assist the City of New London in planning for economic development.<sup>5</sup> The State Bond Commission authorized bonds in 1998 to support, among other things, planning activities in the Fort Trumbull area of the city and property acquisition to be undertaken by the Development Corporation.<sup>6</sup> In February 1998, Pfizer, Inc. announced that it was developing a global research facility on a site adjacent to the Fort Trumbull area.<sup>7</sup> In April 1998, the City gave initial approval for the preparation of a development plan for the Fort Trumbull area, and one month later the City authorized the Development Corporation to proceed.<sup>8</sup> In June 1998, the City conveyed to Pfizer the New London Mills site.<sup>9</sup>

In July 1998, a consulting team began working on the development plan for New London.<sup>10</sup> The development plan area consists of approximately 90 acres on the Thames River, adjacent to the proposed Fort Trumbull State Park and the Pfizer facility, which opened in June of 2001.<sup>11</sup> The area consists of about 115 lots, including both residential and commercial uses.<sup>12</sup> In its preface to the development plan, the Development Corporation stated that its goals were to create a development that would complement the Pfizer facility, create jobs, increase tax and other revenues, encourage public access to the waterfront and work towards revitalization of the city.<sup>13</sup> The development plan organized the land area into seven parcels of land, and planned to retain ownership of the land and lease parcels to private

developers, requiring that developers comply with the terms of the development plan.<sup>14</sup>

The development plan was expected to generate a significant number of jobs,<sup>15</sup> and tax revenue for the City.<sup>16</sup> With the exception of the new Pfizer facility that had recently been built, the City had experienced major economic declines with the loss of almost 2,000 government jobs in 1996, and the state had designated the City as “distressed.”<sup>17</sup> The City approved the development plan in January 2000, and authorized the Development Corporation to acquire properties within the development area.<sup>18</sup> In October 2000, the development corporation voted to use the power of eminent domain to acquire properties within the development area whose owners had not been willing to sell, and in November 2000 they filed condemnation proceedings that led to the litigation.<sup>19</sup>

### The Connecticut Supreme Court Ruling

Finding that in each case, the Development Corporation had proper authority to institute condemnation proceedings, the State Supreme Court held that the public use clauses of the Connecticut and federal constitutions (which are identical) authorize the exercise of eminent domain power in furtherance of a significant economic development plan that will result in benefits to the distressed city.<sup>20</sup>

In addressing first the constitutionality of Chapter 132 of the Connecticut General Statutes that authorizes the use of eminent domain for private economic development,<sup>21</sup> the Court noted a history of taking a “flexible approach to the construction of the Connecticut public use clause.”<sup>22</sup> Citing to earlier precedent<sup>23</sup> to define what is meant by a “public use,” the Court reiterated, “‘Public use’ may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community, is a taking for public use.”<sup>24</sup> The Court went on to uphold the deferential approach that is afforded to legislative declarations of public use, noting that it is difficult to draw a precise line between what is a public use and what is a private use, preferring to follow precedent stating that “The power requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever increasing necessities of society.”<sup>25</sup> The Court also noted that prior Connecticut case law stands for the proposition that when the government exercises its eminent domain power and allows the land to be sold or leased to private developers, so long as the initial public purpose for the action was for a public use, that same public use continues after the property is transferred to private per-

sons.<sup>26</sup> Furthermore, the Court noted that any benefit to the private developer is secondary to the public benefit that results from economic growth and community revitalization.<sup>27</sup> The Court concluded that where the legislative body has rationally determined that an economic development plan will promote significant economic development, this constitutes a valid public use for the exercise of the eminent domain power under both the state and federal constitutions.<sup>28</sup> In addressing concerns over the potential for abuse as to what constitutes a valid public purpose, the majority concluded “that responsible judicial oversight over the ultimate public use question does much to quell the opportunity for abuse of the eminent domain power.”<sup>29</sup>

The Court also concluded that a valid public purpose is not defeated when the condemnation plan includes a transfer of land to private entities.<sup>30</sup> Noting that integral to the plan was Pfizer’s decision to locate in the town, the Court relied on testimony from the record below that Pfizer was key to the plan as it was unusual for a major employer to move into a “brown site” in a major urban area, and that this offered a unique opportunity to the City to take advantage of a number of things that would happen at the site as a result of this move.<sup>31</sup> In upholding the trial court’s determination that “in the context of severe economic distress faced by the city, with its rising unemployment and stagnant tax revenues, the benefits to the city will outweigh those to Pfizer,”<sup>32</sup> the Court determined that the takings were not primarily intended to benefit a private party.<sup>33</sup> In fact, the Court noted in response to criticism that the City responded to Pfizer’s specific development requirements, that “had the development corporation failed to consider demands by the Pfizer facility, its planning would have been unreasonable.”<sup>34</sup> The Court makes clear that their holding does not give a license for eminent domain simply for the purpose of greater tax revenues, but that rather, “rationally considered municipal economic development projects such as the development plan in the present case pass constitutional muster.”<sup>35</sup>

The Court next rejected plaintiffs’ claim that the condemnation must fail as there was no assurance of future public use.<sup>36</sup> In upholding the trial court’s finding that the city’s lack of future involvement does not mean that the development corporation and the developers are not bound to use the property in accordance with the approved plan, the Court relied on the existence of sufficient written agreements to this effect.<sup>37</sup> The Court also upheld the City’s delegation of the eminent domain power to the development corporation finding that the development corporation is the statutorily authorized agent for the implementation of the development plan, a valid

public purpose, and that the development corporation is not acting to further its own operations.<sup>38</sup> In applying a three-prong test: 1) whether the entity is a private entity; 2) whether a public purpose is being advanced; and 3) where the benefit of the property taken is considered to be available to the general public,<sup>39</sup> the court noted that there was no disagreement over the private entity status of the development corporation; that the public purpose was advanced by giving the development corporation authority to acquire property to implement the development plan; and that the public as a whole benefits from the actions of the private development corporation who turns the property over to private developers and tenants.<sup>40</sup>

## The U.S. Supreme Court

The U.S. Supreme Court granted review in September 2004 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.”<sup>41</sup> Answering this question affirmatively, the Court placed great emphasis on the fact that a public planning process was employed, noting that the eminent domain takings here were “executed pursuant to a ‘carefully considered’ development plan . . .”<sup>42</sup>

The Supreme Court also rejected the notion that the phrase “public use” must be equated with “use by the public,” and relying on *Hawaii Housing Authority v. Midkiff*,<sup>43</sup> stated that the “court long ago rejected any literal requirement that condemned property be put into use for the general public.”<sup>44</sup> Writing for the majority, Justice Stevens explains that by the close of the 19th Century, the Court “embraced the broader and more natural interpretation of public use as ‘public purpose.’”<sup>45</sup> Turning to the question of whether the City’s redevelopment plan is a valid public purpose, the Court acknowledged that over the years it has recognized that the needs of society have varied and have evolved over time to reflect changing circumstances, and that “public use jurisprudence has widely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”<sup>46</sup>

Justice Stevens mentions numerous times the fact that the city had a plan, that the plan was comprehensive, and that it was developed using a thorough deliberative process. He concludes that “Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirements of the Fifth Amendment.”<sup>47</sup>

In addressing the use of a local development corporation to implement and execute the economic

development plan, Stevens quotes from *Berman v. Parker* that, “We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.”<sup>48</sup> Further, the Court rejected the petitioners’ argument that the government should have to prove with “reasonable certainty” that the redevelopment plan will produce the expected public benefits. This, said the Court, was best left to the legislatures and not to the judiciary.

## Kelo Attracts Unusual Media Attention

Immediately following the decision, the Institute for Justice, a self-described Libertarian Law Firm, along with other organizations sympathetic to the plight of Suzette Kelo and others similarly situated, launched a national media campaign berating the Supreme Court’s decision. The following admonitions came from Institute staff: “The Court simply got the law wrong today, and our Constitution and country will suffer as a result. . . . With today’s ruling, the poor and middle class will be most vulnerable to eminent domain abuse by government and its corporate allies. The 5-4 split and the nearly equal division among state supreme courts shows just how divided the courts really are. This will not be the last word.”<sup>49</sup> “It’s a dark day for American homeowners. While most constitutional decisions affect a small number of people, this decision undermines the rights of every American, except the most politically connected. Every home, small business, or church would produce more taxes as a shopping center or office building. And according to the Court, that’s a good enough reason for eminent domain.”<sup>50</sup> Ralph Nader added that, “The U.S. Supreme Court’s decision in *Kelo v. City of New London* mocks common sense, tarnishes constitutional law and is an affront to fundamental fairness.”<sup>51</sup>

The negative spin, however, was countered by thoughtful comments from leading land use planners and attorneys who noted that, “The best protection from unfair use of eminent domain is a thorough, open and transparent planning process. The Court reaffirmed this at the same time it correctly ruled that the proper place to decide whether eminent domain should be used or not is in the hands of local communities, not federal courts.”<sup>52</sup> These comments were echoed by Washington, D.C. Mayor Anthony A. Williams: “[Eminent domain] has been indispensable for revitalizing local economies, creating much-needed jobs, and generating revenue that enables cities to provide essential services. With cities and towns facing ever-shrinking resources, we need all the help we can to redevelop our neighborhoods and provide jobs for our citizens.”<sup>53</sup> The Boston Redevelopment Authority (BRA) noted that economic development is “an essential public purpose of cities and towns,”

and that “While the BRA does not utilize eminent domain in the same manner as New London, we do believe that this ruling affirms the importance of maintaining a strong planning and economic development agency to help create and implement the public vision for growth.”<sup>54</sup> University of Chicago Law Professor Lior Strahilevitz explained that the decision “. . . means the federal courts are going to stay out of these disputes except in the most egregious circumstances. Had the court gone the other way, I think it would have meant the federal courts would have had their dockets full of challenges to the exercise of eminent domain.”<sup>55</sup>

Perhaps Paul Farmer explained it best in a recent Op Ed:

The Court’s decision did not expand government power to use eminent domain. It maintained over 200 years of practice and relied on over 100 years of precedents. No new tests were enunciated, no new powers given to local governments. The Court affirmed that a thorough and engaged planning process protects the values of citizens and their community. The Court affirmed that these are local matters, decided within the context of each state’s laws.

### **Congress Gets Into the Action**

Immediately following the Court’s decision, members of Congress joined the media frenzy declaring war against the use of eminent domain. House Majority Leader Tom DeLay said that the Supreme Court’s ruling would go down in history as a travesty as the House of Representatives voted 365-33 to condemn the decision. The resolution (H.R. 340) was just the first step. Representative Phil Gingrey introduced the “Protection of Homes, Small Businesses, and Private Property Act” (H.R. 3087) which provides that eminent domain powers shall be used only for “public use,” and the bill specifically provides that this “shall not be construed to include economic development.” A companion bill (S. 1313) was introduced by Senator John Cornyn.

Representative Bonilla, along with 18 House cosponsors, introduced H.R. 3405 that would bar federal economic development assistance to any state or local government that uses the power of eminent domain to obtain property for private commercial development. The bill, known as the “Strengthening the Ownership of Private Property (STOPP) Act,” would cut off all federal financial assistance under any federal economic development program to any

unit of government that uses its eminent domain power to promote economic development.

The Private Property Rights Protection Act (H.R. 3135) sponsored by Representatives James Sensenbrenner and John Conyers, would bar the use of federal economic development funding for any economic development project where a governmental unit has used its eminent domain power. The bill has 119 co-sponsors in the House. A bill introduced in the State of Rhode Island (H.R. 6636) asks Congress to amend the Constitution to address *Kelo*.

### **The Impact of *Kelo* in New York: Will State Legislation Alter the State of the Law?**

Congress is not the only legislative body to respond, as dozens of proposals have been introduced in statehouses across the country. According to one count, just weeks after Court handed down the decision, lawmakers in 28 states have introduced more than 70 bills with various responses to the use of eminent domain.<sup>56</sup> For example, legislators in Alabama, California, Florida, Louisiana, Michigan, New Jersey, Ohio and Texas have currently proposed or are drafting state constitutional amendments prohibiting the use of eminent domain for private development. In Georgia, one bill would prohibit using eminent domain for the purpose of “improving tax revenue.” Delaware has legislation to create a task force in the aftermath of *Kelo* and it is charged with making recommendations to restrict eminent domain for a bona fide public use. A second bill would require that a public use be described at least six months before the proposed taking in a planning document. The Governor in Mississippi created a task force on eminent domain by Executive order. In Alabama, one bill would prohibit using eminent domain for “retail, office, commercial or residential development.” In addition, two house resolutions have been introduced to disapprove of the *Kelo* decision. A constitutional amendment in Texas would prohibit “taking private property for the primary purpose of economic development.” Legislation in Minnesota would similarly prohibit the use of eminent domain for economic development purposes. A bill in Massachusetts would also prohibit eminent domain for economic development unless there is finding of blight. In New Jersey, lawmakers have introduced proposals to provide that just compensation for single-family residences be based on the cost of comparable relocation properties, and another approach suggests preventing the use of condemnation to acquire residential properties altogether.

Although the decision in *Kelo* did not change the law in New York, the state is not immune from legislative attempts to restrict the ability of local govern-

ments to exercise this power. Assemblyman Richard Brodsky announced a proposal that would give property owners 90 days instead of the current 30 days to appeal condemnations. Brodsky's proposal also provides that property owners who are displaced must be paid at least 150 percent of the market value of their homes, and the proposal limits the use of eminent domain to comprehensive economic development plans that have been discussed in public meetings and approved by local legislators.

Another proposal, S.5936, would allow the use of eminent domain for economic development only in blighted areas. Since the decision came down at the end of the legislative session in New York, it is likely that this proposal is the first of many to come.

### The Future of Eminent Domain

The sky is not falling. Municipal attorneys can continue to advise their clients that eminent domain remains available as one of the tools, used appropriately, to enable localities to engage in community redevelopment. Consistent with the position of the American Planning Association, eminent domain should be considered a tool of last resort. Municipalities should look for ways to enable redevelopment and facilitate land reassembly without the severity of eminent domain.

Prior to using eminent domain, municipal attorneys should ensure that the local government has engaged in a comprehensive public planning process, and that the proposed redevelopment plan has been fully vetted with the impacted communities. Public notice, education and outreach are critical components of this process. Careful consideration must be afforded to issues involving social equity. Particularly where low-income and minority populations may be subjected to displacement, government has a moral responsibility to address relocation options and to assist in facilitating any necessary moves. Often, displaced residents are not the landowners and therefore they may be left with no financial compensation yet forced to find shelter elsewhere.

The next frontier in the eminent domain battle is likely to bring the subject of fair compensation to the forefront. Whether fair market value of the property before the redevelopment takes place is fair and adequate compensation when eminent domain is used is subject to debate. Assemblyman Brodsky places the number at 150 percent of fair market value regardless of the particular situation. Factors—including longevity of title to the property, whether the property is used as a primary residence, the purchase price (including all expenses), and the estimated value of

the property after the implementation of the redevelopment plan—could all become part of a new method for calculating fair market value. It may be easy (and perhaps practical) to assign an arbitrary number as indicative of fair market value, but this may not always be accurate. Formulas and compensation theories will likely be debated in scholarly circles and in the courts over the next several years.

In the aftermath of *Kelo*, the storm may be over but the dust is still settling. Local governments need not fear eminent domain, but it should be exercised with continued discretion, after careful deliberation and with sensitivity to the community and to individual homeowners. While there is no denying that opponents can point to individual situations where the eminent domain power was clearly abused by local governments, the fact remains that these are exceptions rather than representative of government actions as a whole. The practice of law in the public sector is based upon the public trust, and municipal attorneys must continue to provide advice and counsel to localities consistent with this trust.

### Endnotes

1. 268 Conn. 1, 843 A.2d 500 (Sup. Ct. 2004).
2. \_\_\_U.S.\_\_\_ (2005).
3. 348 U.S. 26 (1954).
4. 467 U.S. 229 (1984).
5. 843 A.2d at 508.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 509.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 510.
15. *Id.*, stating that there would be between 518 and 867 construction jobs; 718 and 1,362 direct jobs; and 500 and 940 indirect jobs. The Court later noted that the plan would generate hundreds of construction jobs, approximately 1,000 direct jobs and hundreds of indirect jobs, commenting how significant this was for a city that, not counting those employed by Pfizer, only employs about 2,000 people. The city's unemployment rate is close to double the rate of the rest of the state.
16. *Id.*, stating that property tax revenues were expected to fall between \$680,544 and \$1,249,843. This represents a significant increase for an area that currently produces about \$325,000 in property taxes.
17. *Id.* These jobs were lost when the U.S. Naval Undersea Warfare Center closed, and 1,000 jobs were transferred to Newport, Rhode Island.
18. *Id.* at 510.

19. *Id.* at 511.
20. *Id.*
21. Specifically, sec. 8-186 provides, “that the economic welfare of the state depends upon continued growth of industry and business within the state; that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives; that such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes . . . are public uses and purposes for which public moneys may be expended; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination.”
22. 268 Conn. 1 at 28, 843 A.2d 500 at 521.
23. The Supreme Court discussed its holding in the 1866 case of *Olmstead v. Camp*, 33 Conn. 532 (1866).
24. 268 Conn. 1 at 30, 843 A.2d 500 at 522, quoting from *Olmstead*.
25. *Id.*
26. *Id.*, citing to *Gohld Realty Co. v Hartford*, 141 Conn. 139, 104 A.2d 365 (1954).
27. 268 Conn. 1 at 47, 843 A.2d at 531.
28. 268 Conn. 1 at 39, 843 A.2d at 527. The Court cites to a laundry list of holdings in other states’ courts that essentially support the outcome, including the New York case of *Vitucci v. New York City School Construction Authority*, 289 A.D.2d 479 (2d Dep’t 2001) (where a municipality determines that a new business may create jobs, provide infrastructure, and stimulate the local economy, these are all legitimate public purposes that justify the use of eminent domain).
29. 268 Conn. at 52, 843 A.2d at 535. The Court notes that the academic literature is rich with articles on both sides of the debate, and further acknowledges that there have been some particularly egregious cases, but concludes that these cases are the exception not the norm, and are therefore readily distinguishable from projects such as the “carefully considered development plan at issue in the present case.”
30. 268 Conn. at 54, 843 A.2d at 536.
31. *Id.* at 56 and 538.
32. *Id.* at 58 and 539.
33. *Id.* at 63 and 541.
34. *Id.* at 64 and 542.
35. *Id.* at 66 and 543.
36. *Id.*
37. *Id.* at 67–69 and 544–545.
38. *Id.*
39. *Id.* at 79–80 and 551.
40. *Id.* at 80 and 552.
41. *Kelo v. City of New London*, \_\_ U.S. \_\_ (2005).
42. *Id.*
43. 467 U.S. 229 (1984).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*, citing to 348 U.S. at 34.
49. Statement of Scott Bullock, Esq., available at [http://www.ij.org/private\\_property/connecticut/6\\_23\\_05pr.html](http://www.ij.org/private_property/connecticut/6_23_05pr.html) (site visited July 2005).
50. Statement of Dana Berliner, Esq., available at [http://www.ij.org/private\\_property/connecticut/6\\_23\\_05pr.html](http://www.ij.org/private_property/connecticut/6_23_05pr.html) (site visited July 2005).
51. Available at <http://releases.usnewswire.com/GetRelease.asp?id=49368> (site visited July 2005).
52. Statement of Paul Farmer, Executive Director, American Planning Association, available at <http://www.planning.org> (site visited July 2005).
53. New Jersey League of Municipalities, “Supreme Court Decision in Eminent Domain Case a Victory for Cities,” (June 23, 2005) available at [http://www.njslom.org/NLCpress\\_release\\_06-23-05.html](http://www.njslom.org/NLCpress_release_06-23-05.html) (site visited August 2005).
54. Available at [http://www.boston.com/news/nation/washington/articles/2005/06/24/high\\_court\\_backs\\_seizure\\_of\\_land\\_for\\_development/](http://www.boston.com/news/nation/washington/articles/2005/06/24/high_court_backs_seizure_of_land_for_development/) Boston Globe. High Court backs seizure of land for development. By Peter S. Canellos, June 24, 2005.
55. Available at <http://www.suntimes.com/output/news/cst-fin-property24.html> Chicago Sun-Times; June 24, 2005; by Abdon M. Pallsch, David Roeder and Eric Herman. Court Shows Homeowners Door.
56. See Teresa Baldas, “States Ride Post-‘Kelo’ Wave of Legislation,” available at <http://www.law.com> (site visited August 2, 2005).

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