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SIGNIFICANT LAND USE DECISIONS WITH A
TRILOGY OF TAKINGS CASES**

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U.S. SUPREME COURT'S TERM INCLUDES SIGNIFICANT LAND USE DECISIONS WITH A TRILOGY OF TAKINGS CASES

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Zoning and Land Use Planning

PATRICIA E. SALKIN*

U.S. Supreme Court's 2004 Term Includes Significant Land Use Decisions with a Trilogy of Takings Cases

Introduction

Land use lawyers and planners have had much to read and debate since May 2005 when the U.S. Supreme Court started to hand down a number of anticipated land use related decisions. This column focuses on four decisions handed down during the last six weeks of the 2004 Term addressing the takings test, eminent domain, ripeness and the tension of state vs. federal court review of takings claims, and the Religious Land Use and Institutionalized Persons Act (RLUIPA). In the three takings cases (including

eminent domain), the pro-governmental regulation camp has claimed victories. The RLUIPA decision, although not a land use case, but rather a prisoner rights case, contains a footnote of interest to those involved in planning and zoning that is cause for some optimism (whether this is real or misplaced will have to wait for a future Court term). Clearly, the most controversial of the decisions, evident from the resulting media frenzy, is the ruling on eminent domain. Each of these cases is discussed below.

Takings Test is Clarified: *Agins* is Dead

Although not a land use case *per se*, the U.S. Supreme Court was called upon to apply a Fifth Amendment regulatory takings analysis to determine whether a Hawaii statute designed to limit the rent that oil companies could charge to dealers who lease service stations owned by the companies in order to protect independent dealers and resulting from concerns over the effects of market concentrations on retail gasoline prices

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effected an unconstitutional taking.

In *Lingle v. Chevron, U.S.A., Inc.*,¹ the Court's opinion began with a reminder that the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power," and that "it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." (citing to *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314-315 (1987)).

The Court noted that there are two categories of takings that will generally be deemed to constitute *per se* takings under the Fifth Amendment: 1) where the government action constitutes a physical invasion (e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419); and 2) where a regulation denies an owner of all economically viable use of his/her property (e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1019). Where the government action does not fall into either of these two cat-

egories, the Court states that regulatory takings challenges are governed by the standards or factors set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) ("[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."; "the character of the government action").

In reviewing its holding in *Agins v. City of Tiburon*, 447 U.S. 255, a case involving a facial takings challenge to certain municipal zoning ordinances, the Court noted that its holding (that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests") was derived from due process, not takings precedents. Writing for a unanimous Court, Justice O'Connor noted that "[a]lthough *Agins*' reliance on due process precedents is understandable . . . , the language the Court selected was regrettably imprecise." After explaining in greater detail the historical precedents leading up to the *Agins* analysis, Justice O'Connor declared

¹*Lingle v. Chevron USA, Inc.*, 125 S. Ct. 2074, 2005 WL 1200710 (U.S. 2005).

that with respect to the “substantially advances” inquiry, it “is not a valid method of discerning whether private property has been ‘taken’ for purposes of the Fifth Amendment.”

The Court explained that the “substantially advances” inquiry fails to consider the magnitude or character of the burden that a particular regulation imposes upon private property rights nor does it provide information about how a regulatory burden is distributed among property owners. Rather, the inquiry probes the regulation’s underlying validity. This, said the Court, is “prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.”

Before concluding its opinion, the Court took the time to state that this holding does not disturb any of the Court’s prior holdings, and that although a number of takings and exactions cases cited to *Agins*, such reference was in dicta only.

Ripeness

In *San Remo Hotel, L.P. v. City and County of San Francisco*,² the Court reviewed the rules for ripeness in getting a takings claim into federal court. The leading case on ripeness, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,³ requires that claimants must first obtain a final agency action (which, for example, may mean that after being denied a permit, the petitioner may be required to seek a variance before “final” agency action can be determined) and that claimants must first exhaust state takings claims prior to adjudication in federal court. It is the second prong of this test that has caused significant consternation for those seeking a federal remedy for alleged regulatory takings, as it has been near impossible procedurally to get the case into federal court after the state court has already decided the same allegation on the same set of facts.

The claimants in *San Remo* challenged a San Francisco ordinance designed to address the demand for affordable rental

²125 S. Ct. 2491 (2005).

³473 U.S. 172, 105 S. Ct. 3108 (1985).

housing in the city.⁴ Specifically, the San Remo Hotel was determined to be a “residential hotel,” and the owners sought designation as a “tourist hotel.”⁵ Under the existing ordinance, the hotel was required to apply for a permit to enable it to essentially “convert” the use of the hotel from residential to tourist.⁶ Because this would impact on the availability of affordable “residential rental” units, the city ordinance authorized the conditioning of the permit on the payment of an “in lieu” fee for the city’s affordable housing efforts.⁷ In this case, claimants were assessed a fee by the City Planning Commission of \$567,000 before they could obtain the reclassification.⁸ The City Board of Supervisors rejected the claimant’s appeal that alleged that the requirement was unconstitutional and

otherwise improperly applied to their hotel.⁹

Following the “final agency action” by the City Board of Supervisors, the petitioners took their case first to the California Supreme Court in March 1993, seeking a writ of mandamus.¹⁰ In addition, they filed suit in federal court in May 1993 alleging violations of substantive and procedural due process and facial and as-applied regulatory takings.¹¹ They sought compensation for the alleged takings and for their pendent state claim, which they had agreed to suspend pending the federal litigation.¹² The District Court granted summary judgment for the City of San Francisco, determining that the facial takings claim was untimely under the applicable statute of limitations, and that the as-applied claim was unripe under *Williamson County*.¹³

⁴125 S. Ct. 2491 (2005).

⁵*Id.*

⁶*Id.*

⁷*Id.*

⁸*Id.*

⁹*Id.*

¹⁰*Id.*

¹¹*Id.*

¹²*Id.*

¹³*Id.*

On appeal to the Ninth Circuit, the petitioners asked the Court not to decide their federal claims but rather to abstain under the “Pullman Abstention Doctrine”,¹⁴ as a return to state court could conceivably moot the remaining federal questions. The Ninth Circuit agreed with respect to the facial challenge, reasoning that the claim was ripe the instant that the city adopted the underlying ordinance, and that the abstention doctrine was appropriate, since the case hinged on the Commission’s zoning designation of the property as a “residential hotel” rather than a “tourist hotel” – which was the precise subject of the still pending state mandamus action.¹⁵ As to the as applied challenge, however, the Ninth Circuit agreed with the District Court that the claim was not ripe since the petitioners had not pursued an inverse condemnation proceeding in state court, and therefore they had not yet been denied just compensation as required under

Williamson County.¹⁶ A footnote in the Ninth Circuit opinion indicated that while the petitioners could raise their federal claims in state court, they could also make a reservation in state court of those federal claims for the purpose of retaining a right to return to federal court for adjudication of the federal claims.¹⁷ This is the tact that the petitioners ostensibly choose to pursue when they revived their dormant state case, however they “advanced more than just the claims on which the federal court had abstained.”¹⁸

Back in the state courts, the trial court dismissed the amended complaint, but the intermediate appellate court reversed.¹⁹ The California Supreme Court reversed and noted that petitioners had reserved their federal causes of action and did not seek relief for a violation of the federal constitution; however, the Court in discussing the Takings Clause stated, “we appear to have construed the clauses congruently . . .”, apparently

¹⁴See *Railroad Comm’n of Tex. v Pullman Co.*, 312 U.S. 496 (1941).

¹⁵*San Remo*, 125 S. Ct. 2491.

¹⁶*Id.*

¹⁷*Id.* citing, 145 F.3d at 1106, n. 7.

¹⁸125 S. Ct. 2491.

¹⁹*Id.*

analyzing the takings claim under both the state and federal constitutions.²⁰ Following the final state court decision, the petitioners returned to federal district court with an amended complaint.²¹

The federal district court determined that the facial attack on the local ordinance was barred by the statute of limitations and by the general rule of preclusion, since the state courts had interpreted the substantive state takings law coextensively with federal law, and this issue, then, had already been decided by the state courts.²² The Ninth Circuit Court of Appeals agreed.²³

The U.S. Supreme Court affirmed the courts below, declining to carve out an exception to the full faith and credit statute “in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just compensation.”²⁴ The Supreme Court determined that

although the petitioners could rely on the *Pullman* abstention doctrine to reserve certain claims for the federal courts, when petitioners chose to broaden their state action beyond the mandamus request to also include substantive “substantially advances” claims, they “effectively asked the state court to resolve the same federal issues they asked it to reserve.”²⁵ The Court viewed the as-applied claims in a similar light, noting that “there was no reason to expect that they could be relitigated in full if advanced in the state proceedings.”²⁶

The petitioners argued, relying on a recent decision from the Second Circuit (*Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118 (2003)) that “federal courts simply should not apply ordinary preclusion rules to state-court judgments when a case is forced into state court by the ripeness rule of *William-*

²⁰*Id.*

²¹*Id.*

²²*Id.*

²³*Id.*

²⁴*Id.*

²⁵*Id.*

²⁶*Id.*

son County.”²⁷ The Supreme Court found the court’s reasoning in *Santini* flawed, as it was not based upon the full faith and credit statute nor applicable caselaw (rather, the Supreme Court quotes the following rationale offered by the *Santini* court: “[i]t would be both ironic and unfair if the very procedure that the Supreme Court required [plaintiffs] to follow before bringing a Fifth Amendment takings claim . . . also precluded [them] from ever bringing a Fifth Amendment takings claim.”)²⁸ Writing for the majority, Justice Stevens said, “we have repeatedly held . . . that issues actually decided in valid state-court judgments may well deprive plaintiffs of the ‘right’ to have their federal claims relitigated in federal court This is so even when the plaintiff would have preferred not to litigate in state court, but was required to do so by statute or prudential rules.”²⁹ Justice Stevens went on to articulate that “[t]he relevant question in such cases is

not whether the plaintiff has been afforded access to a federal forum; rather, the question is whether the state court actually decided an issue of fact or law that was necessary to its judgment.”³⁰ Furthermore, the majority noted that the Courts could not carve out an exception to 28 U.S.C. § 1738, and that even if there was a laudable public policy goal of making federal forums available in these cases, that would be up to Congress to decide, not the courts.³¹ Lastly, perhaps indicating a preference for state court involvement in land use matters, Justice Stevens wrote, “State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex, factual, technical and legal questions related to zoning and land use regulations.”³²

One commentator noted that this case was remarkable because the Court went out of its way to lambaste the *Santini* de-

²⁷*Id.*

²⁸*Id.*

²⁹*Id.*

³⁰*Id.*

³¹*Id.*

³²*Id.*

cision which they had previously declined to review and because four justices (including O'Connor) filed a concurring opinion that urges a new look at *Williamson County*.³³ The one fact that is certain from the holding in *San Remo* is that it will likely be difficult to reserve federal claims in takings cases in state courts where the claims are made to meet the state compensation prong of the *Williamson County* test for ripeness.

Eminent Domain

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,³⁴ the U.S. Supreme Court, in a 5-4 decision, in *Kelo v. City of New London*,³⁵ 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* and *Midkiff v. Hawaii Housing Authority*, 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 to assist the City of New London in planning for economic development.³⁶ 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 Develop-

³³See Dwight H. Merriam, FAICP, CRE, "A Hat Trick in the U.S. Supreme Court for Government: Lingle, San Remo and Kelo," 28 Zoning and Planning Law Report No. 8 (September 2005).

³⁴268 Conn. 1, 843 A.2d 500 (Conn. 2004).

³⁵125 S. Ct. 2655 (2005), reh'g denied, 2005 WL 2000781 (2005).

³⁶*Id.*

ment Corporation.³⁷ In February 1998, Pfizer, Inc. announced that it was developing a global research facility on a site adjacent to the Fort Trumbull area.³⁸ 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.³⁹ In June 1998, the City conveyed to Pfizer the New London Mills site.⁴⁰

In July 1998, a consulting team began working on the development plan for New London.⁴¹ 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.⁴² The area

consists of about 115 lots, including both residential and commercial uses.⁴³ 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.⁴⁴ 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.⁴⁵

The development plan was expected to generate a significant number of jobs⁴⁶ and tax

³⁷*Id.*

³⁸*Id.*

³⁹*Kelo v. City of New London*, 843 A.2d at 508 (2004).

⁴⁰*Id.*

⁴¹125 S. Ct. at 2659.

⁴²843 A.2d at 509.

⁴³*Id.*

⁴⁴125 S. Ct. at 2659.

⁴⁵843 A.2d at 510.

⁴⁶*Id.* stating that there would be between 518 and 867 construction jobs; 718 and 1362 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

revenue for the City.⁴⁷ 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.”⁴⁸ The city approved the development plan in January 2000 and authorized the Development Corporation to acquire properties within the development area.⁴⁹ 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.⁵⁰

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.⁵¹

In addressing first the constitutionality of Chapter 132 of the Connecticut General Statutes that authorizes the use of eminent domain for private economic development,⁵² the Court noted a history of taking

about 2,000 people. The city’s unemployment rate is close to double the rate of the rest of the state.

⁴⁷*Id.* stating that property tax revenues were expected to be between \$680,544 and \$1,249,843. This represents a significant increase for an area that currently produces about \$325,000 in property taxes.

⁴⁸*Id.* These jobs were lost when the U.S. Naval Undersea Warfare Center closed, and 1,000 jobs were transferred to Newport, Rhode Island.

⁴⁹*Id.* at 510.

⁵⁰125 S. Ct. at 2660.

⁵¹*Id.*

⁵²Specifically, 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

a “flexible approach to the construction of the Connecticut public use clause.”⁵³ Citing to earlier precedent⁵⁴ 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.”⁵⁵ 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 “[t]he power requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever increasing necessities of society.”⁵⁶ The Court also noted that prior Connecticut caselaw 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 persons.⁵⁷ 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.⁵⁸ 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

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.”

⁵³268 Conn. 1 at 28, 843 A.2d 500 at 521.

⁵⁴The Supreme Court discussed their holding in the 1866 case of *Olmstead v. Camp*, 33 Conn. 532.

⁵⁵268 Conn. 1 at 30, 843 A.2d 500 at 522, quoting from *Olmstead*.

⁵⁶*Id.*

⁵⁷*Id.* citing to *Gohld Realty Co. v. Hartford*, 141 Conn. 139, 104 A.2d 365.

⁵⁸268 Conn. 1 at 47, 843 A.2d at 531.

state and federal constitutions.⁵⁹ 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.”⁶⁰

The Court also concluded that a valid public purpose is not defeated when the condemnation plan includes a transfer of land to private entities.⁶¹ 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 town to take advantage of a number of things that would happen at the site as a result of this move.⁶² 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,”⁶³ the Court determined that the takings were not primarily intended to benefit a private party.⁶⁴ 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

⁵⁹268 Conn. 1 at 39, 843 A.2d at 527. The Court cites to a laundry list of holdings in other state’s 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 (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).

⁶⁰268 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.”

⁶¹268 Conn. at 54, 843 A.2d at 536.

⁶²*Id.* at 56 and 538.

⁶³*Id.* at 58 and 539.

⁶⁴*Id.* at 63 and 541.

unreasonable.’’⁶⁵ 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.’’⁶⁶

The Court next rejected plaintiffs’ claim that the condemnation must fail as there was no assurance of future public use.⁶⁷ 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.⁶⁸ 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 imple-

mentation of the development plan, a valid public purpose, and that the Development Corporation is not acting to further its own operations.⁶⁹ In applying a 3-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,⁷⁰ 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 that turns the property over to private developers and tenants.⁷¹

The U.S. Supreme Court

The U.S. Supreme Court granted cert in September 2004 to determine ‘‘whether a city’s decision to take property for

⁶⁵*Id.* at 64 and 542.

⁶⁶*Id.* at 66 and 543.

⁶⁷*Id.*

⁶⁸*Id.* at 67-69 and 544-545.

⁶⁹*Id.*

⁷⁰*Id.* at 79-80 and 551.

⁷¹*Id.* at 80 and 552.

the purpose of economic development satisfies the ‘public use’ requirement of the Fifth Amendment.’⁷² 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”⁷³

The Supreme Court also rejected the notion that the phrase “‘public use’” must be equated with “‘use by the public,’” and, relying on *Berman v. Midkiff*, 467 U.S. 229, stated that the “‘court long ago rejected any literal requirement that condemned property be put into use for the general public.’”⁷⁴ 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.’”⁷⁵ 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.’”⁷⁶

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 “[b]ecause that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirements of the Fifth Amendment.”⁷⁷

In addressing the use of a local development corporation to implement and execute the economic development plan, Stevens quotes from *Berman v. Parker*: “‘We cannot say that public ownership is the sole method of promoting the public purposes of community re-

⁷²*Kelo v. City of New London*, 125 S. Ct. 2661 (2005).

⁷³*Id.*

⁷⁴*Id.* at 2263.

⁷⁵*Id.* at 2662.

⁷⁶*Id.* at 2664.

⁷⁷*Id.* at 2665.

development projects.”⁷⁸ 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.”⁷⁹ “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.”⁸⁰ Ralph Nader added that “[t]he 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.”⁸¹

The negative spin, however, was countered by thoughtful comments from leading land use planners and attorneys who noted that “[t]he best protection from unfair use of eminent domain is a thorough, open and transparent planning process.

⁷⁸*Id.* at 2666, citing to 348 U.S. at 34.

⁷⁹Statement of Scott Bullock, Esq., available at: www.ij.org/private_property/connecticut/6_23_05pr.html (site visited July 2005).

⁸⁰Statement of Dana Berliner, Esq., available at: www.ij.org/private_property/connecticut/6_23_05pr.html (site visited July 2005).

⁸¹<http://releases.usnewswire.com/GetRelease.asp?id=49368> (site visited July 2005).

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.”⁸² His 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.”⁸³ The Boston Redevelopment Authority noted that economic development is “an essential public purpose of cities and towns,” and that “[w]hile 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.” 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.”⁸⁴

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.

⁸²Statement of Paul Farmer, Executive Director, American Planning Association. Available at: www.planning.org (site visited July 2005).

⁸³National League of Cities, “Press Release Kelo 6-23-05” http://www.nlc.org/Newsroom/Press_Room/5506.cfm (last accessed Aug. 19, 2005).

⁸⁴<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.

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. Rep. 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 Sen. John Cornyn.

Representative Bonilla, along with 18 House co-sponsors, 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 Own-

ership 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 Reps. 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 the States: Will 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 31 states have introduced more than 70 bills with various responses to

the use of eminent domain.⁸⁵ 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.” Texas Senate Bill 7 would, among other things, restrict local governments from using eminent domain to take property that would be turned over to retail, industrial or residential developers.⁸⁶ 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. In New York, one proposal would give property owners 90 days instead of the current 30 days to appeal condemnations, and it also pro-

⁸⁵See Teresa Baldas, “States Ride Post-‘Kelo’ Wave of Legislation,” available at: www.law.com (site visited August 2, 2005); See also “Texas Lawmakers Pass Eminent Domain Bill,” Dallas Business Journal (August 17, 2005).

⁸⁶“Texas Lawmakers Pass Eminent Domain Bill,” Dallas Business Journal (August 17, 2005).

vides that property owners who are displaced must be paid at least 150 percent of the market value of their homes, while limiting the use of eminent domain to comprehensive economic development plans that have been discussed in public meetings and approved by local legislators.⁸⁷ Another New York proposal, S. 5936, would allow the use of eminent domain for economic development only in blighted areas.

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. Formulas and compensation theories will likely be debated in scholarly circles and in the courts over the next several years.

⁸⁷Melissa Mansfield, "Eminent Domain Protections Sought," *Newsday*, July 14, 2005, at A26.

In the aftermath of *Kelo*, the storm may be over, but the dust is still not settling. Local governments should exercise eminent domain with continued discretion, after careful deliberation and with sensitivity to the community and to individual homeowners.

Religious Land Use and Institutionalized Persons Act

On May 31, 2005, the Court handed down *Cutter v. Wilkinson*,⁸⁸ which involved a challenge to the constitutionality of the Religious Land Use and Institutionalized Persons Act brought under Section 3 of the Act pertaining to the rights of institutionalized persons. While the U.S. Supreme Court determined that this section of the Act was constitutional, with respect to Section 2 of the Act which specifically covers land use, Justice Ginsburg, writing for the unanimous Court, noted in footnote 3 that “Section 2 of RLUIPA is not at issue here. We therefore express no view on the validity of that part of the Act.”⁸⁹ The fact that the Court went out of its way to acknowledge that they were not

passing on the constitutionality of that portion of the statute that is applicable to land use has led some to believe that the Court would entertain a request to review this issue in the future. The federal district courts have been busy deciding land use cases under RLUIPA, and these are slowly making their way to the Circuit Courts. Most of the lower court decisions that have addressed the question of the constitutionality of Section 2 have determined that it does pass constitutional muster.

Justice O’Connor Retires: The Impact on Land Use Cases?

The recent retirement of Justice Sandra Day O’Connor may have an impact on future land use decisions. She authored the opinion in *Lingle*, joined in the concurring opinion in *San Remo* and issued a stinging dissent in *Kelo*. Land use pundits, however, will recall her as both a potential swing vote and as a champion of no bright-line tests in takings cases. In both the *Palazzolo*⁹⁰ and *Tahoe*⁹¹ cases, Justice O’Connor set forth the notion that absent a

⁸⁸125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005).

⁸⁹*Id.* at 2119 N 3.

⁹⁰*Palazzolo v. Road Island*, 533 U.S. 606 (2001).

physical invasion⁹² or a regulation that denies all economically viable use of property,⁹³ courts should apply an *ad hoc* factual inquiry into the facts and circumstances surrounding the governmental action and its impact when confronted with a takings challenge. This reluctance to draw bright-line tests has both delighted and frustrated advocates, who seek the same certainty that Justice O'Connor delivered in *Lingle*, but who also recognize that the different facts and circumstances necessitate individual review.

Conclusion

In the final analysis, although the Supreme Court's land use decisions garnered a lot of attention this year, the

majority opinions did not depart from previous constitutional and common law precedent, and the decisions do not represent a sea change in judicial philosophy. In short, despite the [political] hopes of property rights advocates, the Court continued to hold the line on regulatory takings, and it continued to show deference to state courts in the area of takings jurisprudence. That being said, the battle may be over, but the war is just getting started. State legislatures will undoubtedly be busy at the end of 2005 and at the beginning of 2006 trying to figure out how to appropriately respond to the media frenzy and the resulting public outcry in response the eminent domain ruling.

⁹¹Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

⁹²See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

⁹³See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).