KELO V. CITY OF NEW LONDON: HOW WE GOT HERE AND WHERE WE'RE GOING

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Since the United States Supreme Court's decision in *Kelo v. City of New London*,[1] holding that governmental agencies may use the power of eminent domain to take land from one owner and transfer it to another owner for economic development purposes, significant criticism and even anger have been directed at the court and its decision. *Kelo*, a Connecticut case in which the City of New London attempted to use its power of eminent domain to take a number of non-blighted properties for economic development, may represent the most explicit statement yet that eminent domain can be used for such purposes. But it is not the first case to approve the use of eminent domain for development-related transfers. Rather, cases from both the United States Supreme Court and state courts dating back over fifty years approved the use of eminent domain in economic development projects, even to accomplish land transfers from one private owner to another. Nevertheless, *Kelo* may have sowed the seeds of its own undoing: it recognized that states may adopt "public use" standards that prohibit such transfers, as the Michigan Supreme Court did in *Wayne County v. Hathcock*,[2] and *Kelo*'s emphatic statement that eminent domain can be used to transfer land has prompted a number of states, as well as Congress, to pursue new standards that would render *Kelo* obsolete.

The Historic Narrowing of the "Public Use" Limitation

During the mid-nineteenth century, a number of courts held that the public use limitation required that any property taken through eminent domain must actually be used by the public.[3] But problems in enforcing that standard, including determining the portion of the public that must be permitted to actually use a property to make the use a "public use," as well as the need to accommodate growing milling and railroad industries, led to the erosion of the actual public use standard.[4] In fact, by the early twentieth century, when the United States Supreme Court began applying the Fifth Amendment to the states, the Supreme Court explained that "use by the general public" had proven inadequate for determining whether an exercise of eminent domain complied with the "public use" limitation.[5]

These decisions led to concern that the "public use" limitation's importance was in decline,[6] which the Supreme Court practically confirmed with its 1954 opinion in *Berman v. Parker*.[7] There, a congressional act declared that an area of Washington, D.C., was "blighted," and provided that the entire area would be acquired, through eminent domain if necessary, with some properties in the area scheduled to be sold to new private owners for redevelopment.[8] The owner of a department store within the area challenged the attempt to condemn his property, arguing that it was not blighted and that turning his property over to new private owners for redevelopment was inconsistent with the public use limitation.[9] But the Supreme Court rejected this challenge, stating that the "concept of public welfare is broad and inclusive," and that it was required to defer to the legislative judgment that the entire area required redevelopment.[10] By holding that "nothing in the Fifth Amendment" would "stand in the way" of the taking, the court essentially equated "public use" with a "broad concept" of "public welfare."

The Supreme Court's decision in *Berman* paved the way for states to begin using eminent domain to transfer land between private owners for redevelopment.[11] Perhaps the most famous example of that came with the Michigan Supreme Court's 1981 decision in *Poletown Neighborhood Council v. City of Detroit*.[12] Pursuant to a Michigan statute allowing the use of eminent domain to provide for the general health and welfare by assisting industry and economic development,[13] the City of Detroit resolved to take an entire neighborhood, known as

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"Poletown" due to many of its residents' Polish ancestry, and convey it to General Motors for the construction of a new assembly plant. While purporting to apply "heightened scrutiny" to the city's taking, the court cited *Berman* for the principle that it was required to defer to the legislative judgment that such a taking was for a "public use." It held that the constitutional term "public use" was synonymous with "public purpose," and that both were efforts to "describe the protean concept of public benefit."[14] Because the new assembly plant would provide jobs and alleviate unemployment, the court concluded that the plant would provide a public benefit and therefore, the city's use of eminent domain was proper.[15]

Poletown pushed the floodgates open. After that decision, a number of state courts decided cases allowing the government to use eminent domain to take land from one private owner and convey it to another, hoping that the conveyances would lead to more jobs, tax revenue, and other economically desirable goals.[16] Decisions like those, together with the United States Supreme Court's decision in *Hawaii Housing Authority v. Midkiff*,[17] which approved the use of eminent domain to transfer land from its owners to its lessees to reduce the concentration of land ownership, left little that the government could not accomplish through its power of eminent domain. Indeed, in 1985 one commentator noted that the function of the "public use" limitation was "an empty question,"[18] as the limitation had been withered such that nearly any taking would satisfy its minimal requirements.

Hope for New Substance in the Public Use Limitation

After the understanding of "public use" had been expanded for a number of years, the Michigan Supreme Court decided *Wayne County v. Hathcock*, providing an indication that courts may begin to rein in the power of eminent domain. In *Hathcock*, Wayne County attempted to take a number of properties south of Detroit Metropolitan Airport, which it wanted to assemble with land that the county already owned, for a high-tech industrial park. The county planned to take properties to assemble the park, and then sell parcels in the park to private companies. A number of owners challenged the county's power to take their properties for such purposes. The trial court and the court of appeals both relied on *Poletown* in ruling in the county's favor, but the Supreme Court granted the owners leave to appeal, asking whether *Poletown* should be overruled.[19]

Unanimously, the Michigan Supreme Court held that *Poletown* misinterpreted the Michigan constitution in permitting the use of eminent domain to take land from one owner to transfer it to another for economic development. The court held that *Poletown* erred in relying on *Berman*, as Michigan law did not require deference to a legislative decision on whether a taking was for a public use.[20] Rather, "public use" had to be defined based on the historical understanding of that term under the Michigan Constitution. Defining the precise contours of "public use" was unnecessary to decide *Hathcock*, however, as the court focused on whether Wayne County's purported taking qualified under any of the three historic instances when Michigan law allowed a condemned property to be taken from one private owner and transferred to another. Those instances are (1) taking land to transfer to an owner, like a railroad, that provides services that would be unavailable absent the ability to assemble land, (2) taking land to transfer to institutions that remain accountable to the public, like heavily-regulated pipelines, and (3) taking land based on the land's own characteristics, such as genuine blight, which results in transferring the land to new owners after the blight is eliminated.[21] The county's purported taking was not analogous to any of these three permitted categories of takings, and found support only in the economic development rationale from *Poletown*. But the court held that the *Poletown* rationale had no basis in Michigan law, overruling *Poletown* and eliminating the possibility that eminent domain can be used to take property from one owner for transfer to another solely for purposes of economic development.[22]

When the same court that had decided *Poletown*, the case that for so long had served as the icon of the unlimited and even abusive power of eminent domain, repudiated the use of eminent domain to take land for economic development purposes, the decision created anticipation that other courts would again follow Michigan's lead and breathe new life into the public use requirement.[23] Specifically, the United States Supreme Court's grant of certiorari in *Kelo* created anticipation of a more restrictive "public use" analysis. The Connecticut courts had held that the taking in *Kelo* was lawful, but the United States Supreme Court agreed to hear the property owners' argument that the taking violated the Fifth Amendment's public use limitation.

The *Kelo* Decision

In *Kelo*, however, the Supreme Court declined to alter its interpretation of the Constitution's public use limitation. There, the City of New London had experienced several decades of economic decline, leading the state of Connecticut to declare it a "distressed municipality."[24]

State and local officials therefore attempted to promote the city's economic revitalization, in part through New London's development corporation. The development corporation created a development plan focusing on 90 acres of land on a peninsula in New London. That plan called for construction of public access to the waterfront, new dining, retail, and residential components, as well as a park at the site of a former naval installation. New London's city council approved the plan and authorized the development corporation to acquire the property necessary for the plan, including authorizing the use of eminent domain.[25] The development corporation purchased much of the property, but filed condemnation actions to take properties from several owners that did not wish to sell. Those properties, which New London did not allege were blighted, were designated for development as offices, parking, and retail uses. The owners sought to enjoin the takings, and prevailed at trial. But the Connecticut Supreme Court, citing *Berman* and *Midkiff*, reversed and held that the takings were valid.[26]

Writing for the majority, Justice Stephens began the analysis of the takings' validity by acknowledging that the power of eminent domain cannot be used to take property from one person "for the sole purpose of transferring it to another private party," but that taken land can be transferred to private owners when "use by the public," as with a railroad, is the taking's purpose.[27] According to the court, New London's takings were not designed to benefit some private party, but resulted from a "carefully considered" development plan that was designed to create jobs and tax revenue, and create public access to the waterfront.[28] Thus, the court concluded that the takings were not definitively barred. On the other hand, the takings also were not designed for actual "public use," so they were not definitively permitted. The takings fell somewhere in between, leading the court to explain that their validity turned on whether New London's development plan served a "public purpose."[29] By so narrowing the issue, and again equating "public use" with "public purpose," the court sealed the case's outcome: deciding whether some governmental action is consistent with "public purposes" involves the court's deference to the political branches of government.

In focusing on "public purpose," the court again turned to *Berman, Midkiff*, and other cases in which the court deferred to legislative judgments. It noted that the court's "public use 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 the takings power."[30] Here, the court observed that a Connecticut statute permitted New London's takings, and that New London had thoroughly deliberated in adopting its comprehensive redevelopment plan under that statute. The court believed that it was required to assess the challenges to the takings in light of the entire development plan, and because the court concluded that the overall plan served public purposes, the use of eminent domain to execute the plan was proper.[31]

In rejecting the property owners' argument that taking land for economic development by definition, is not a public use, the court stated that promoting "economic development is a traditional and long accepted function of government."[32] It explained that takings for economic development could not necessarily be distinguished from recognized public uses, as governmental pursuit of public purposes will often benefit private parties. Further, in response to an argument that the court's decision would allow a taking from one property owner to transfer land to another owner just because the other would "put the property to more productive use and thus pay more taxes," the court stated that courts could deal with such cases as they arise, but that the possibility of such a scenario did "not warrant the crafting of an artificial restriction on the concept of public use."[33] The court also declined to require "reasonable certainty" that public benefits will accrue from economic development takings. It stated that such a rule was an even greater departure from precedent than an "actual public use" requirement, and would digress into debates over the wisdom of takings, which are within the legislative, and not the judicial, domain. Therefore, the court affirmed the Connecticut Supreme Court's decision, permitting the takings.

Five members of the court agreed with that analysis, but Justice O'Connor offered a dissent that the Chief Justice and two other Justices joined. She argued that the deference that the majority showed to other branches in deciding whether a taking was for a public use reduced the public use clause to "little more than hortatory fluff."[34] For the public use clause to have any meaning, she argued, there must be an external, judicial check on the other branches' use of the power of eminent domain. She distinguished *Kelo* from cases like *Berman* and *Midkiff* as involving "extraordinary" pre-condemnation uses of property that were affirmatively harming society, while the properties in *Kelo* did no such harm. Rather, the existing uses of the properties in *Kelo* simply were not as economically productive as other uses might be.[35] Justice O'Connor would have held that taking a property

to "upgrade" its economic use, however, is constitutionally prohibited by the public use limitation.[36]

Kelo's Limitations, and Downfall?

Although it decided to allow the takings in *Kelo*, the United States Supreme Court left the door open for states to adopt "public use" standards that are more restrictive than the standard under the United States Constitution. The court explicitly stated that its decision that the Fifth Amendment permitted the takings in *Kelo* did not preclude "any state from placing further restrictions on its exercise of the takings power."[37] In this respect, the court resolved the public use issue in the same manner that it has recently resolved a number of other issues: treating the federal constitution as a "floor" above which states may adopt more stringent standards.[38]

In fact, the *Kelo* majority specifically cited *Hathcock* as an example of the type of restriction that states may impose on the power of eminent domain.[39] So in states like Michigan, where the state supreme court has held that the state constitution does not allow use of the power of eminent domain to take property from one private owner and transfer it to another solely for purposes of economic development, *Kelo* has virtually no impact.

Because of the widespread sentiment that *Kelo* was wrongly decided, a number of other states have begun initiatives to join Michigan in rendering *Kelo* inapplicable under their law. For example, in response to *Kelo*, Alabama has already adopted legislation that prohibits the use of eminent domain to take "property for the purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity."[40] Similarly, states including California, Delaware, Florida, Georgia, Louisiana, Massachusetts, Minnesota, New Jersey, Ohio, Oklahoma, Rhode Island, and Texas, as well as Connecticut, where *Kelo* originated, are considering changes to their eminent domain laws, through either legislation or amendments to the state constitutions, to limit the use of eminent domain for economic development.[41] Even Michigan, where *Hathcock* prohibits takings for transferring a property from one owner to another on an economic development rationale, is considering legislation and constitutional amendments designed to ensure that no future court could decide to reverse *Hathcock* and allow such takings.[42]

Further, while *Kelo* sets the federal standard for the use of eminent domain, Congress is also considering measures to curb takings for economic development. The Senate recently held hearings to examine *Kelo*'s impact,[43] and is considering legislation that would eliminate federal funding for any construction project in which eminent domain is used to take land for transfer from one private owner to another for purposes of economic development.[44]

Conclusion

In sum, when *Kelo* allowed the power of eminent domain to be used to take land from one private owner to transfer it to another solely for purposes of economic development, it adopted a permissive standard for the takings power. While that standard was not exactly an innovation, the decision nevertheless enflamed the passions of property owners across the country. Under *Kelo*'s express recognition that states may adopt more restrictive eminent domain standards, a wave of such standards are now sweeping the country, and may sweep *Kelo* into the dust bin.

Endnotes

1. 125 S Ct 2655; 162 L. Ed. 2d 439 (2005).
2. 471 Mich 445; 684 NW2d 765 (2004).
3. *See Kelo, supra* at 2662.
4. *See id.* (discussing historic cases); *see also Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain* 170-75 (1985).
5. *Strickley v. Highland Boy Gold Mining Co.,* 200 US 527, 531; *26 S. Ct. 301; 50 L. Ed. 581*(1906) (upholding mining company's use of aerial transport line crossing land that company did not own).
6. *See, e.g.,* Note, *The "Public Use" Limitation on Eminent Domain: An Advance Requiem,* 58 Yale L.J. 599, 613-14 (1949).
7. 348 U.S. 26; 75 S Ct 98; 99 L Ed 27 (1954).
8. *See id.* at 29-31.
9. *See id.* at 31.
10. *Id.* at 33.
11. *See, e.g., State ex rel. Bruestel v. Rich,* 159 Ohio St. 13; 110 NE2d 778 (Ohio, 1953); *see also Epstein, supra* note 4, at 179 ("Once *Berman v. Parker* is on the books, the question remains whether any

condemnation of land can be attacked for want of a public purpose").

12. 410 Mich 616; 304 NW2d 455 (1981).

13. *See id.* at 630.

14. *Id.*

15. *See id.* at 635.

16. *See, e.g., City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (Nev. 2003); *State ex rel. Tomasic v. Unified Gov't of Wyandotte County*, 962 P.2d 453 (Kan. 1998); *State ex rel. Washington Convention & Trade Ctr. v. Evans*, 966 P.2d 1252 (Wash. 1998); *Atlantic City v. Cynwynd Invs.*, 148 N.J. 55; 689 A.2d 712 (N.J. 1997); *City of Jamestown v. Leevers Supermarkets, Inc.*, 552 N.W.2d 365 (N.D. 1996); *Maready v. City of Winston-Salem*, 467 S.E.2d 615 (N.C. 1996); *City of Duluth v. State*, 390 N.W.2d 757 (Minn. 1986); *Common Cause v. State*, 455 A.2d 1 (Me. 1983).

17. 467 US 229, 235; 104 S Ct 2321; 81 L Ed2d 186 (1984).

18. *Epstein*, *supra* note 4, at 161.

19. *See Hathcock*, 471 Mich at 451-455.

20. *See id.* at 480.

21. *See id.* at 473-75.

22. *See id.* at 483 ("*Poletown*'s conception of a public use – that of 'alleviating unemployment and revitalizing the economic base of the community' – has no support in the Court's eminent domain jurisprudence") (footnote omitted).

23. *See, e.g.,* Adam Mossoff, *Foreword, The Death of* Poletown*: The Future of Eminent Domain and Urban Development After* Wayne County v. Hathcock, 2004 MICH. ST. L. REV. 837, 844.

24. *Kelo*, 125 S Ct at 2658.

25. *See id.* at 2659-60.

26. *See id.* at 2660.

27. *Id.* at 2661.

28. *Id.* at 2661 n. 6.

29. *Id.* at 2663.

30. *Id.*

31. *See id.* at 2665.

32. *Id.*

33. *Id.* at 2667.

34. *Id.* at 2673 (O'Connor, J., dissenting).

35. *Id.* at 2674-75 (O'Connor, J., dissenting).

36. *See id.* at 2677 (O'Connor, J., dissenting). Justice Thomas also offered a dissent from the majority's opinion, in which he criticized *Berman* and *Midkiff*. *See id.* at 2686 (Thomas, J., dissenting).

37. *Id.* at 2668.

38. *See, e.g., United States v. Lopez,* 514 US 549, 552 (1995). This is ironic in that federalism principles, which generally favor setting federal minimums and allowing states to adopt their own policies, *see id.,* are usually associated with the Justices that dissented from *Kelo*. On this issue, however, those Justices favored a more restrictive federal standard. *See Kelo,* 125 S Ct at 2677 ("States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state action, no less) is not among them") (O'Connor, J., dissenting).

39. *See Kelo*, 125 S Ct at 2668.

40. ALA. CODE § 11-47-170 (amended August 2005); *see* also *Id.* § 11-80-1 (amended August 2005).

41. *See* Baldas, *States Ride Post-Kelo Wave of Legislation,* NAT'L L.J. (Aug. 2, 2005).

42. *See* S.J. Res. E, 93d Leg., 1st Sess. (2005) (proposing to amend Const 1963, art 10, §2); H.R.J. Res. N, 93d Leg., 1st Sess. (2005) (same); H.R.J. Res. P, 93d Leg., 1st Sess. (2005) (same); *see also* S. 693, 694, 93d Leg., 1st Sess. (2005) (proposing to amend MCL 213.23, MCL 213.54, respectively); H.R. 5060, 5078, 93d Leg., 1st Sess. (2005) (proposing to amend MCL 213.23).

43. *See* 151 CONG. REC. DIGEST D936, 109th Cong., 1st Sess. (daily ed. Sep. 20, 2005).

44. *See* S. 1313, 109th Cong. (2005).