Article

Public Use / Public Purpose After Kelo v. City of New London*

David L. Callies**
Christina N. Wakayama***

Introduction

One of Professor Kotaka's many interests and legacies in the field of administrative law was and is his work in the field of compulsory purchase, known as eminent domain in the United States. It is thus timely and appropriate for this contribution to deal with this subject, and in particular the issue of the sufficiency of public purpose to support the governmental exercise of its compulsory purchase powers, about which there has been much recent discussion, caselaw, and state statutory and constitutional amendment in the United States. This article commences with a summary of the law of eminent domain in the United

* This article is a revised and longer version of a paper delivered in March at the annual conference of the Rocky Mountain Land Use Institute, Sturm College of Law, Denver, Colorado. The authors thank Joe Dane and Marissa Lum at the William S. Richardson School of Law for their able research assistance on this and earlier drafts.
** FAICP, ACREL, Kudo Professor of Law, William S. Richardson School of Law, University of Hawaii at Manoa.
*** Casenote Editor, The University of Hawaii Law Review.

States, then proceeds to a full discussion of a recent (2005) U.S. Supreme Court case about public use, and finally the reaction of state legislatures and state courts to that case.

Generally, any unit of government in the United States—federal, state or local—can use its sovereign powers to take private land for public use. The same is true for quasi-governmental agencies and public corporations and utilities. The limits placed on the exercise of that power are defined in the statutes that created them.[1] The technical term most often used, "eminent domain," does not imply that a government's right to take such real estate interests is based on a preeminent sovereign title or prerogative.[2] Rather, most authorities agree it is based on the concept that the power is necessary to fulfill a sovereign governmental function, in the interests of all the people which that government, as a general purpose government, represents.[3] The power is thus based not on ultimate ownership by the state, but on the exercise of its sovereign powers, vested in the legislature but exercised by the executive branch of government.[4]

However, to say that eminent domain is a fundamental attribute of sovereignty clashes with the concept of individual rights, particularly those to private property: if government may take property for a public use, then the individual has no guarantee that private property is safe from confiscation. Indeed, there is no such guarantee under the British system of government. The American solution to the dilemma was to adopt such a guarantee of private property rights in the Fifth Amendment to the United States Constitution, which provides that government shall not take private property except for a public use and upon payment of just compensation.[5] Thus, the U.S. Constitution limits the exercise of eminent domain by the federal government (public use and compensation) which is presumed to have such power (though never expressly granted) which limitation is extended to the states by the Federal Constitution's 14th Amendment.

The power to initiate the exercise of eminent domain ordinarily resides

exclusively in the legislature.[6] In some cases the legislature itself, by mere enactment of a statute or resolution, affects the taking of certain land or interest in land for public use.[7] In cases where a constitutional provision is self executing and declares that land can be condemned for certain specified uses, proceedings to take land for such purposes may be instituted without waiting for authority from the legislature.[8] For example, municipal corporations have no prerogative right to exercise the power of eminent domain and cannot take land for public uses unless the power has been conferred on them by the legislature.[9] However, there have been cases where a state constitution authorizes cities to write their own charters. In such instances, a city may give itself the power of eminent domain and provide that it may exercise the power beyond its own limits, without the aid of any legislative act.[10]

Both private and public corporations have the right to take property if that right is delegated to them by the state. Legislatures can create different classes of corporations that are authorized to use eminent domain.[11] Government imposes different burdens in the exercise of eminent domain under the same conditions for municipal corporations and private corporations because there is sufficient difference between them.[12]

Public Purpose Today

While the definition of public use has not changed significantly in the past twenty years, public perception of that change has. The federal rule, anticipated in Berman v. Parker,[13] was established in Hawaii Housing Authority ("HHA") v. Midkiff[14]: so long as a public use (redefined as public purpose) is conceivable and possible, even if it never comes to pass, federal courts will accept it. The U.S. Supreme Court simply reiterated that rule in the 2005 case of Kelo v. New London,[15] holding that economic revitalization was a sufficient public purpose to justify the taking of a non-blighted single family home under local eminent

domain statutes. A number of state courts had established a more stringent test than the supreme court of Connecticut, (which the Court affirmed in Kelo), which, of course, the states may do since further protecting property rights beyond the minimum under federal law is a matter for the states, as indeed the Supreme Court noted in Kelo. Nevertheless, the decision set off a firestorm of criticism, leading to pending legislation in two-thirds of the states to establish a more strict public purpose test to avoid results such as that in Kelo.

The State of the Federal Law on Public Use Before *Kelo* : *Berman v. Parker and HHA v. Midkiff*

The members of the Court expressed different views on the historical antecedents of public use and how far back to go in deriving an appropriate definition to apply in Kelo.[16]

Nevertheless, all (except perhaps Justice Thomas) agree that the most relevant precedents are the decisions of the Court in Berman v. Parker and Hawaii Housing Authority v. Midkiff. In both decisions, the Court wrote expansively about the public use requirement of the Fifth Amendment.

In Berman the Court dealt with the condemnation of a thriving department store contained in a large parcel condemned by a redevelopment agency for the statutory (Congressional in this case) purpose of eliminating blight, all in accordance with a required redevelopment plan.[17] Justice Douglas for the majority commenced by observing famously that a community could decide to be attractive as well as safe, and that in thus justifying eminent domain to accomplish these goals, "We deal, in other words ... with the police power,"[18] a controversial joining of the two powers which has affected definitions of public use ever since by obviating any need for the public to actually use the property condemned so long as it furthered a public purpose. Indeed, the landowners pointed out that their land would simply be turned over to another private owner.[19] No matter,

said Douglas:

> But the means of executing the project are for Congress and Congress along to determine, once the public purpose has been established. The public end may be as well or better served through an agency of private enterprise than through a department of government－or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.[20]

To the landowners' argument that their particular parcel was unblighted and that therefore its condemnation violated the Fifth Amendment's public purpose clause, Justice Douglas responded that if experts concluded the area must be planned as a whole in order to prevent reversion to a slum, so be it.[21]

Despite this broad language, many conceived the decision to apply largely to redevelopment projects, and in particularly those which were well-planned in accordance with clear statutory mandates. Not so after HHA v. Midkiff.

In 1967 the Hawaii State Legislature passed a land reform act the principle purpose of which was to eliminate a perceived oligopoly in available residential land which was thought to adversely affect the price and availability of housing for its citizens.[22] Eminent domain was the means chosen to solve the problem. The act authorized a state agency－the Hawaii Housing Authority－to condemn the fee simple interest in land which was leased to individual homeowners, for the purpose of conveying that interest to some other private owner, usually the existing owner's lessee who owned the house on the land.[23] The main target of the legislation was the Bishop Estate (as it was then known), a charitable trust created by Princess Bernice Pauahi Bishop, a descendent of King Kamehameha the Great and whose large landholdings she eventually inherited. The Estate challenged the act's condemnation process as a taking without the public use required by the U.S. Constitution's Fifth Amendment.[24] While the Federal District

Court upheld the statute, the Ninth Circuit Court of Appeals held that the statute essentially provided for a "naked" transfer from one private individual to another, and so lacked the requisite public use.[25]

In a unanimous decision, the U.S. Supreme Court reversed the Ninth Circuit, citing Berman for the proposition that once a legislative body had declared a public purpose, it was not for federal courts to interfere unless that purpose were "inconceivable" or an "impossibility."[26] The means were irrelevant; this was simply a mechanism or process to accomplish the legislatively-declared public purpose. Indeed, it would make no difference, said Justice O'Connor writing for the Court, if that public purpose never came to pass, so long as the legislature could reasonably have thought it would when enacting the statute.[27] Note throughout the frequent use of public purpose, instead of public use. These words would come back to haunt Justice O'Connor in Kelo, as appears below.

Kelo v. City of New London: Midkiff and Berman Followed: A Requiem for Public Use

The Court in Kelo simply extended the reasoning in Berman and Midkiff to the economic revitalization condemnations that are increasingly common throughout urban areas in the United States. Indeed, the majority was singularly unimpressed with extreme uses of eminent domain for the purposes of providing employment and bettering the local tax base as the parties brought to its attention: "A parade of horribles is especially unpersuasive in this context since the Takings Clause largely operates as a conditional limitation permitting the government to do what it wants so long as it pays the charge."[28]

The facts in Kelo are straightforward. In order to take advantage of a substantial private investment in new facilities by Pfizer, Inc., in an economically depressed area of New London along the Thames River, the City reactivated the private non-profit New London Development Corporation (NLDC) to assist in

planning the area's economic development.[29] Authorized and aided by grants totaling millions of dollars, NLDC held meetings and eventually "finalized an integrated development plan focused on 90 acres in the Fort Trumbull area."[30] The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with the owners of 15 properties failed.[31] When the NLDC initiated condemnation proceedings the landowners filed suit.[32] Among them was Susette Kelo, who had lived in the Fort Trumbull area since 1997,[33] who made extensive improvements to her house, which she prizes for its water view,[34] and Wilhelmina Dery, who was born in her Fort Trumbull house in 1918 and has lived there her entire life.[35] Although there was no allegation that any of these properties was blighted or otherwise in poor condition, they nevertheless condemned with the others "because they happen to be located in the development area."[36] On these facts, petitioners claimed that the taking of their property violated the public use restriction in the Fifth Amendment.[37] A trial court agreed as to the parcel containing the Kelo house, but a divided Supreme Court of Connecticut reversed, holding that all of the City's proposed takings were constitutional.[38] Noting that the proposed takings were authorized by the state's municipal development statute and in particular the taking of even developed land as part of an economic development project was for a public use and in the public interest, the court relied on Berman and Midkiff in holding that such economic development qualified as a public use under both federal and state constitutions.[39] The U.S. Supreme Court granted certiorari "to determine whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."[40]

The Court commenced its analysis by reiterating that private-private transfers alone are unconstitutional and any pretextual public purposes meant solely to accomplish such transfers would fail the public use test.[41] However, the Court observed that the governmental taking before it was meant to "revitalize the local economy by creating temporary and permanent jobs, generating a

significant increase in tax revenue, encouraging spin-off activities and maximizing public access to the waterfront"[42] all in accordance with a "carefully considered"[43] and "carefully formulated"[44] development plan in accordance with a state statute "that specifically authorizes the use of eminent domain to promote economic development."[45] Therefore, the "record clearly demonstrates that the development plan was not intended to serve the interests of Pfizer, Inc., or any other private entity."[46] Indeed, the Court was particularly impressed by "the comprehensive character of the plan [and] the thorough deliberation that preceded its adoption."[47] Although little in the plan demonstrated any actual use by the public, the Court observed that it had embraced a broader and more "natural" interpretation of public use as public purpose at least since the end of the 19th Century and "we have repeatedly and consistently rejected that narrow [use by the public] test ever since."[48]

Next, the Court observed that this broad definition of public use accorded with its "longstanding policy of deference to legislative judgments in this field."[49] The Court then discussed its decisions in Berman and Midkiff as demonstrations of such legislative deference, quoting heavily from the language in Berman about "'the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.'"[50] The Court concluded that its "jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[51]

The Court's answer: an unequivocal yes. While the Court noted that "the sovereign may not take the property of A for the sole purpose of transferring to another private part B ... it is equally clear that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking."[52] The question, then, is what constitutes sufficient use by the public. Three factors appear to be important in reaching the conclusion that economic revitalization in New London constitutes such use: a rigorous planning process, the Court's precedents embodied in Berman and Midkiff, and deference to federalism and state decision making.

The Court steadfastly and bluntly rejected any suggestion that it formulate a more rigorous test.[53] Thus, for example, to require government to show that public benefits would actually accrue with reasonable certainty or that the implementation of a development plan would actually occur would take the Court into factual inquiries already rejected earlier in the term when the Court rejected the "substantially advances a legitimate state interest" test for regulatory takings in Lingle v. Chevron U.S.A. Inc.[54] Similarly, the Court declined to second-guess the city's determinations as to what lands it needed to acquire in order to effectuate the project.[55]

Lastly, the Court rejected the invitation by some amici to deal with the appropriateness of compensation under the circumstances. While the Court acknowledged the hardships which the condemnations might entail in this case, "... these questions are not before us in this litigation" even though members of the Court itself raised the adequacy of compensation during oral argument.[56] In a nod to federalism and states rights, the Court closes by leaving to the states any remedy for such hardships posed by the condemnations in New London: "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many states already impose 'public use' requirements that are stricter than the federal baseline."[57]

Only Justice Kennedy's concurrence suggests some small role yet for federal courts in determining that a particular exercise of eminent domain might fall short of the required public use requirement: "There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause."[58] This is, however, largely a due process argument rather than a Fifth Amendment argument, and in any event, continued

Kennedy: "This demanding level of scrutiny is not required simply because the purpose of the taking is economic development."[59]

The Dissents

The argument for a judicial hands-off is not so strong as the Court majority suggests, however, as the vigorous dissents from Justices O'Connor and Thomas demonstrate. Particularly strong is the dissent by Justice O'Connor who wrote the broadly-worded Midkiff opinion for a unanimous Court in 1984. Observing that the question of what is a public use is a judicial, not a legislative one,[60] Justice O'Connor commences by declaring that if economic development takings meet the public use requirement, there is no longer any distinction between private and public use of property, the effect of which is "to delete the words 'for public use' from the Takings Clause of the Fifth Amendment."[61]

But what then of Berman and her own language in Midkiff ? These decisions, according to O'Connor, were exceptions to the Court's jurisprudence which required public use to be actual use by the public. The Court, says O'Connor, has "identified" three categories of public use takings of private property: (1) transfers to public ownership for such as roads, hospitals and military bases; (2) transfers to private common carriers or utilities for railroads or stadia (both of which she characterizes as "straightforward and uncontroversial")[62] and (3) the rare "public purpose" case "in certain circumstances and to meet certain exigencies" like the eradication of blight and slums in Berman and the elimination of oligopoly in Midkiff, where deference to legislative determinations were warranted because the " extraordinary precondemnation use of the targeted property inflicted affirmative harm on society."[63] In other words, these were exceptional circumstances clearly not replicated in New London, and the application of this third exceptional category in these circumstances "significantly expands the meaning of public use."[64] If, as the majority suggests, government

can take private property and give it to new private users so long as the new use is predicted to generate some secondary public benefit like increased tax revenues or more jobs, then "for public use" does not exclude any takings.[65] Dismissing Justice Kennedy's test as one in which no one but a "stupid staffer" could fail, Justice O'Connor finds the logic of the Court's decision such that "Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[66] Leaving any tougher standards designed to limit such possibilities to the states is "an abdication of our responsibility. States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution ... is not among them."[67] She ends with concerns for those with fewer resources who will suffer in contests over exercises of eminent domain with those with "disproportionate influence and power in the political process, including large corporations and development firms ...."[68]

Justice Thomas raises similar concerns in his dissent, but in considerably more detail. Picking up on Justice O'Connor's concern for the politically least powerful and characterizing the Court's deferential standard as "deeply perverse,"[69] Justice Thomas provides several examples indicating that those uprooted in even the urban renewal cases were overwhelmingly poor, elderly, black, or all of the above.[70] His disagreement with the Court goes much deeper than that of Justice O'Connor, however. Reviewing a series of court opinions and writings from the late 18th Century, Justice Thomas concludes that the cases cited by the majority for the proposition that public use meant public purpose rather than use by the public in the early years of the republic were exceptions—aberrations that varied from the usual rule. Thomas concludes that the Court's current public use jurisprudence therefore rejects the original meaning of the public use clause, to which he urges the Court to return, and from which it has clearly deviated.[71]

Statutory and Constitutional Provisions Enacted to Limit Eminent Domain Power in the Wake of *Kelo*—The States Rebel: Public Purpose Redux

Legislative Action

More than two years after the United State's Supreme Court's decision in Kelo, the public concern regarding eminent domain abuse is still going strong. Grass roots groups such as the Institute for Justice and its property rights counterpart, the Castle Coalition, have been tracking and encouraging policy movements at the State and local level.[72]

Legislators in 47 states have introduced, considered or passed legislation limiting the government's eminent domain powers in instances of private use since the Court's unpopular decision in June of 2005.[73] Forty-one states have enacted legislation aimed at curbing eminent domain abuse.[74] The states that have failed to pass any degree of eminent domain reform are: Arkansas, Connecticut, Hawaii, Massachusetts, Mississippi, New Jersey, Oklahoma, and Rhode Island.[75] Iowa, Arizona and New Mexico are the only states whose governors vetoed eminent domain reform, and Iowa is the first to override such a veto.[76] Local governments are also taking measures to protect their homeowners, with more than 70 cities and counties introducing their own bills to restrict the use of eminent domain.[77]

Ballot Measures

Citizens in 12 states voted on measures aimed at curbing eminent domain abuse. (Arizona, California, Florida, Georgia, Idaho, Louisiana, Michigan, Nevada, New Hampshire, North Dakota, Oregon, and South Carolina). Montana, which was previously scheduled to vote on two constitutional initiatives aimed at private property rights and limiting the purposes for which the government may take private property respectively, did not vote on the ballot measures as they were both withdrawn by their sponsors.[78]

Passed Ballot Measures

Voters in 10 of the 12 states (Arizona, Florida, Georgia, Louisiana, Michigan, Nevada, New Hampshire, North Dakota, Oregon, South Carolina) passed the ballot measures.[79]

Arizona's Proposition 207, statutory language proposed through a citizen initiative in Arizona, was approved by 65 percent of voters.[80] The proposition curbs the legislature's power to exercise eminent domain by making the public use question one for the judiciary to decide rather than the legislature.[81] Interestingly, it mandates that the judicial question of public use be determined "without regard to any legislative assertion that the use is public."[82] This language cuts against the current eminent domain case law which defers to legislative determinations of public use. Before the Supreme Court decided Kelo, HHA v. Midkiff and Berman v. Parker clearly indicated the Court's preference for legislative deference.

Proposition 207, defines "public use" as meaning any of the following:

1. the possession , occupation, and enjoyment of the land by the general public, or by public agencies;
2. the use of land for the creation or functioning of utilities;
3. the acquisition of property in its current condition, including the removal of a structure that is beyond repair or unfit for human habitation of use; or
4. the acquisition of abandoned property.[83]

The most contentious portion of the measure, however, provides for compensation if existing rights in property are "reduced by the enactment or applicability of any land use law ... and such action reduces the fair market value of the property[.]"[84]

The Arizona ballot measure was criticized as being costly to taxpayers, whose

tax dollars ultimately go to compensate property owners, and to local communities and voters, who will no longer be able to decide what type of development is appropriate for them.[85] The measure was labeled a "Trojan horse" and "an assault on reasonable planning."[86]

Florida voters approved of a constitutional amendment that would prohibit the government from taking property for "blight" removal.[87] The amendment, which passed with nearly 70 percent approval, requires a three-fifths vote from each house of the Florida legislature in order to grant exemptions.[88]

In Georgia, more than 80 percent of the electorate voted in favor of a constitutional amendment requiring a vote by elected officials any time eminent domain will be used.[89]

In a close election, Louisiana citizens voted on September 30, 2006 to limit the government's ability to take private property through amendments to its state constitution.[90] Louisianans passed measure number five, to restrict purposes for which government can take land from unwilling property owners, by a 55 percent to 45 percent vote.

Measure number five limited the definition of "public purpose" to the following:

1. a general public right to a definite use of the property;
2. continuous public ownership of property dedicated to one or more of the following objectives and uses:
   a. public buildings in which publicly funded services are administered, rendered, or provided,
   b. roads, bridges, waterways, access to public waters and lands, and other public transportation, access, and navigational systems available to the general public,
   c. drainage, flood control, levees, coastal and navigational protection and reclamation for the benefit of the public generally,
   d. parks, convention centers, museums, historical buildings and recreational facilities generally open to the public,
   e. public utilities for the benefit of the public generally,
   f. public ports and public airports to facilitate the transport of goods or persons in domestic or international commerce;
3. the removal of a threat to public health or safety caused by the existing use or disuse of the property.[91]

The measure also makes it clear that "[n]either economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the taking ... is for a public purpose[.]"[92]

Michigan voters approved a constitutional amendment that prohibits "the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues."[93] The measure, which received 80 percent voter approval, also requires the government prove its authority to condemn property for blight removal by "clear and convincing evidence."[94]

More than 60 percent of Nevada voters approved a constitutional amendment that would sharply limit the government's exercise of eminent domain.[95] Nevada law, however, requires that a constitutional amendment be passed in two consecutive general elections, so voters will need to approve of the measure again in 2008.[96]

New Hampshire's legislature passed a constitutional amendment earlier this year that prohibited the government from exercising eminent domain "if the taking is for the purpose of private development or other private use of the property."[97] The amendment was subsequently approved of by more than 85 percent of Nevada voters.[98]

North Dakota, which did have a legislative session this year, passed a constitutional amendment through a citizen initiative that prohibits private use of

property taken though eminent domain.[99] The measure passed with over 65 percent approval.[100]

Measure 39, proposed through a citizen initiative in Oregon and supported by 65 percent of voters, restricts the use of eminent domain in order to convey property interests to a private party.[101] The measure prohibits any public body from condemning private property used as a residence, business establishment, farm or forest operation if it intends to convey any property interest to a private party.[102] However, conveyance to a private party is allowed where the real property "constitutes a danger to the health and safety of the community by reason of contamination, dilapidated structures, or improper or insufficient water or sanitary facilities[.]"[103]

The measure states that "[a] court shall independently determine whether a taking of property complies with requirements of this section, without deference to any determination made by the public body."[104] In addition, the measure provides that costs and reasonable attorney's fees will be awarded to the landowner in compensation battles where the verdict in trial exceeds the initial written offer submitted by the condemner.[105]

The measure has been criticized as preventative of condemnation in most circumstances because land is usually handed over to private developers.[106] As such, the measure will set back economic development in the state.[107] Moreover, the government expects to pay an extra $8 - $17 million a year acquiring state highway rights of way, as well as $8 -$13 million a year in city and county property costs.[108] This is because more landowners will go to court, and taxpayers will have to pick up the tab.[109]

South Carolina's constitution now specifically prohibits municipalities from condemning private property for "the purpose or benefit of economic development, unless the condemnation is for public use."[110] The constitutional amendment, which passed with more than 85 percent approval, closed a loophole caused by the state's eminent domain law.[111]

Failed Measures

California and Idaho failed to pass constitutional amendments proposed through citizen initiatives.[112] These amendments, however, were viewed as not curbing the type of eminent domain abuse exemplified in Kelo.[113]

United States Congress

Although both the House and the Senate have introduced numerous bills attempting to restrict eminent domain abuse since the Supreme Court decided Kelo, HR 3058 is the only one to actually become law.[114] The bill, which became law on November 30, 2005, made appropriations for the Departments of Transportation, Treasury, and Housing and Urban Development, the Judiciary, District of Columbia, and independent agencies for the fiscal year ending September 30, 2006.[115] The bill provided that "[n] o funds in this Act may be used to support any Federal, State, or local projects that seek to use the power of eminent domain, unless eminent domain is employed only for a public use[.]"[116] The bill further specifically states that "public use shall not be construed to include economic development that primarily benefits private entities."[117] In addition, the bill provided that the Government Accountability Office conduct a study on the nationwide use of eminent domain, including the procedures used and the results accomplished on a state-by-state basis as well as the impact on individual property owners and on the affected communities.[118] This study has now been completed, but the lack of centralized or aggregate data on eminent domain proceedings hampered the GAO's ability to provide a comprehensive overview.[119] HR 5576, the appropriations bill for Fiscal Year 2007 for the same departments, is currently being debated.[120] If enacted as presently written, it will keep the restrictions in HR 3058 in place.

Other bills are more sharply critical of eminent domain abuse, such as the

Private Property Protection Act of 2005, but it seems like the House and Senate can never quite agree. That Act, also known as HR 4128, provides that:

> No State or political subdivision of a State shall exercise its power of eminent domain, or allow the exercise of such power by any person or entity to which such power has been delegated, over property to be used for economic development or over property that is subsequently used for economic development, if that State or political subdivision receives Federal economic development funds during any fiscal year in which it does so.[121]

It also prohibits the federal government from condemning property for economic development.[122] The bill passed the House on November 3, 2005 but was stalled in the Senate Judiciary Committee.[123] After failing to bring the bill to a vote H.R. 4128 was "hotlined"[124] on December 5 in an attempt to pass the legislation before the 109th Congress adjourned.[125] The bill, however, was again put on hold and the eminent domain reform was effectively killed on the Senate floor.[126]

In July 2007, Private Property Rights Protection Act of 2007 was introduced in the House of Representatives to stop taxpayer funding of eminent domain abuse.[127] This bipartisan bill would deny for two fiscal years economic development funds to state and local governments that use eminent domain for private development.[128]

Recent Court Decisions

***Franco v. Nat'l Capital Revitalization Corp.*, 2007 WL 2001652 (D.C. App, July 2007).**

In this recent case, a development corporation initiated condemnation proceedings against the owner of a store in an allegedly blighted shopping mall.

The owner answered that the taking was a private use and that the "public purpose" was a pretext. The Superior Court struck the owner's defenses, holding that once the legislature has declared that there is a public purpose behind a taking, defenses claiming otherwise are foreclosed as a matter of law.[129]

The appellate court declined to read Kelo so broadly.[130] Although courts must play a limited role after Kelo, that case did not address the sufficiency of pleadings. "Kelo recognized that there may be situations where a court should not take at face value what the legislature has said."[131] It is not sufficient for a finding of pretext that a private entity will be doing the redevelopment. On the other hand, Kelo allows that some alleged public purposes may in fact be pretexts. "A reviewing court must focus primarily on benefits the public hopes to realize from the proposed taking."[132] The case was remanded for further consideration of the pretext defense.

***In the matter of 49 WB, LLC v. Village of Haverstraw*, 2007 WL 1775976 (N.Y.A.D., June 2007)**

In this opinion by the Appellate Division of the State of New York, discussion of Kelo in the first sentence of the opinion. Kelo has "reshaped, in certain respects, the concept of eminent domain."[133] The court also notes that this case "may represent one of the earliest post-Kelo litigations in the State of New York."[134]

The City, seeking to "revitalize" its downtown, wants to condemn a certain building. Neither the building nor the area is blighted in any way. There is some mention by the City of the purpose of providing affordable housing.

The Court acknowledged that legislative determinations are "well-nigh conclusive" and judicial review must be narrow.[135] The owner alleged that the purpose here is to benefit the developer. The Court says that the burden on the owner is high: "that the Village's determination and findings do not rationally relate to a conceivable public use, benefit, or purpose, or whether it merely

confers private benefits to third parties."[136]

Nevertheless, the Court characterized the public purposes here as "illusory" and even "pretextual."[137] The Court held that the true purpose was to benefit the developer, and invalidated the taking.[138]

***Goldstein v. Pataki*, 488 F. Supp. 2d 254 (E.D.N.Y, June 2007)**

This was an action by property owners opposing condemnations for the enormous "Atlantic Yards" sports and mixed-use complex. The defendants moved for dismissal. The case includes a long discussion of Berman, Midkiff, and a very long and detailed look at Kelo.

The court rejects the argument made by plaintiffs that the sole purpose of the development was property transfer to a private party. The court says that the project may fail in its goals (including affordable housing) but that is irrelevant to the matter before court.[139] The court says that Kelo didn't define "mere pretext", but in this case plaintiffs have surely not pled sufficient facts.

The Court cites Bell Atlantic Corp. v. Twombly[140] ( ) for the standard that facts must be pled such that the claim is "plausible" on the face of those facts. Although this standard hasn't been used in eminent domain cases, the court finds it appropriate. Under this standard, plaintiffs have failed to make a case.

***Centene Plaza Redevelopment Corp. v. Mint Properties*, 2007 WL 1695163 (2007)**

The City of Clayton, Missouri, give redevelopment powers, including eminent domain, to a redevelopment corporation. Mint properties (appellants here) resisted, said that their property was not blighted. The trial court held for the redevelopment corporation, which judgment is reversed here.

The majority opinion does not cite Kelo at all, but simply looks to the relevant statute defining "blight", which requires "social liabilities." Whatever that means, it wasn't found here.

A concurring opinion mentions that after Kelo the legislature made an effort

at limiting "blight" designations and eminent domain in general, but in 2006 these efforts were rejected.[141] This opinion is more deferential, but feels that Centene just didn't present enough evidence of "social liability".[142] There was also a dissent, which said that there was sufficient evidence presented to support a finding of blight.[143]

***Litva v. Village of Richmond*, 2007 WL 1976592 (Ohio App. June 2007)**

Plaintiffs appeal a decision holding certain ordinances valid and enforceable. Plaintiffs keep horses and animals on their properties. Citizens of the Village pass an initiative/ordinance prohibiting the keeping of animals in the village. Plaintiffs claim a regulatory taking, citing their "drastically" reduced property value. However, this argument was apparently not made a trial, will not be considered here. Therefore, the decision is affirmed.

Kelo is cited obliquely in dissent. According to the dissent, the majority seems to say that if the citizens vote, they can take anyone's property at all.[144] The dissent asks is to consider what happened after Kelo, when an attempt was made by citizens to condemn the home of one of Kelo's majority Justices. "This action, according to the majority's rationale, would not be a taking."[145]

***Mayor and City Council of Baltimore City v. Valsamaki*, 397 Md. 222, 916 A. 2d 324 (Feb 2007)**

This case, containing a thorough discussion of Kelo, arose from a "quick take" condemnation of a property containing a bar and "package goods" store. The circuit court granted the City's condemnation petition, without any notice to the owner. The owner appealed, prevailed, and the City appealed directly to the Supreme Court. The City asks: does the city have the burden to prove 'necessity' to proceed with a quick take condemnation? The answer: yes.

The court finds that the City needs to work harder in quick take proceedings to show a public purpose.[146] Ordinances authorizing the procedure notwith-

standing, "a government entity must provide some assurance that the urban renewal will constitute a public use or public purpose for the property taken. It is not enough, especially in quick take situations, for the City to simply say that it is conducting urban renewal and leave it at that."[147] The court makes the point that the quick take nature of this case is important, and means a higher burden for the city. But even in a "regular" eminent domain taking, the evidence of public purpose here was "sparse".[148] O'Connor's Kelo dissent is cited for the notion that in Midkiff and Berman it was the "extraordinary precondemnation use of the targeted property" that validated the taking.[149]

***Housing and Redevelopment Authority of the City of Bloomington v. Bloomington Professional Building, LLC*, 2007 WL 224272 (Minn. App., Jan 2007)**

An appeal of district court grant of quick take condemnation. A building owner claimed that the take was unauthorized, that his property was not "blighted", that the take was not for a public purpose, and was unnecessary. The take is affirmed here.

There is little discussion of Kelo here, and the case is not a terribly interesting one. The owner in fact had previously been in negotiations with the City to perform the redevelopment, and it was only when those talks broke down that he opposed the process.[150] The court cites Kelo approvingly for the proposition that economic redevelopment is a valid public purpose.[151]

***MHC Financing Ltd. Part. v. City of San Rafael*, 2006 WL 3507937 (N.D. Cal., Dec. 2006)**

This case provides a good overview of how Kelo and Lingle[152] might work together in practice. MHC owns a trailer park, and claimed that a rent and vacancy control ordinance is a taking, in that it fails to "substantially advance" a legitimate state interest. Proceedings were suspended pending the decision in Lingle. After Lingle destroyed the "substantially advance" test in takings claims, MHC was permitted to amend its complaint.[153] The amended complaint, covering all bases, alleges a physical taking, a Penn Central regulatory taking, a private taking, illegal exactions, and substantive due process violations. The City moved for summary judgment, which the court here grants in part but denies on the regulatory taking, private taking, and substantive due process claims.[154]

A through discussion follows of Lingle, and how it may drastically effect 9th Circuit jurisprudence. The City cites Kelo, and claims that legislative determinations can't be second guessed by the courts. The court here clearly doesn't favor "premium granting" rent control ordinances.[155]

Most of the discussion of Kelo is with respect to the private taking claim. The court cites Justice Kennedy's concurrence that "careful and extensive inquiry into whether, in fact, the development plan is of primary benefit to the developer and only incidental benefit of the City" may be required.[156] Since such an inquiry is needed here, summary judgment is denied.[157]

***City of Baltimore Development Corp. v. Carmel Realty Assoc.*, 395 Md. 299 (Nov. 2006)**

A case with only fairly marginal connection to Kelo, the issue here was whether a corporation invested with condemnation powers is subject to "open government" standards and regulations. Kelo is briefly summarized, with particular emphasis on the dissents.[158] The court notes that when one is forced under condemnation to convey property, especially to private parties, it is even more important that the proceedings be open to public scrutiny.[159]

***Western Seafood Company v. U.S.*, 202 Fed. Appx. 670 (5th Cir. Oct. 2006)**

This case arose from a redevelopment effort, to be built and operated by a private company. The owner of some riverfront property to be condemned filed for injunctive relief against the US Corps of Engineers and the city to prevent them

from building marina piers in front of their property. The owner claimed that the taking violated the US and Texas constitutions.[160] The City claimed that the principal purpose was to revitalize the city, a valid purpose.[161]

The action was initiated before Kelo. After Kelo, Western filed for reconsideration. By this time, Texas has also passed the "Limitations on the Use of Eminent Domain Act," passed in response to Kelo.[162]

The court held that the taking does not violate the US Constitution. The court generally follows Kelo, which it says is "directly on point".[163] However, the recent Act does restrict eminent domain, so this case is remanded for reconsideration in light of that Act.[164]

***Nevadans for the Protection of Property Rights, Inc. v. Heller*, 141 P.3d. 1235 (Nev. Sep, 2006)**

This is another case citing Kelo which is not directly about eminent domain. There had been a citizen's initiative to amend the Nevada constitution to restrict the powers of eminent domain, and to otherwise strengthen "property rights".[165] It was alleged that the proposed amendment violated a statutory limitation on such amendments to concerns themselves with single issues only. Kelo was relevant only to the extent that it had been admitted that the initiative was launched in response to that decision.[166] As such, the majority felt it appropriate to judicially trim the proposed amendment to its core issue of restricting eminent domain, to the exclusion of other issues such as regulatory takings.[167]

***Hoffman Family, LLC v. City of Alexandria*, 272 Va. 274, 634 S.E.2d 722 (Sep. 2006)**

The City attempted to condemn land to relocate a storm water sewer, as part of a redevelopment plan. An owner sued, claiming that the plan was for the benefit of a private party, the developer. The trial court found that the taking was for a public use.[168]

The court here had little difficulty affirming the finding of public use. "Here, ... the City's proposed use of the condemned property is exclusively a public use that will function as a part of the City's storm water sewer system."[169]

Kelo was cited only in a footnote, where it was found not applicable.[170] Condemnation here will not entail any private occupancy of the condemned property. Also, Kelo was based entirely on the US Const., which was not at issue here.

***Century Land Group, LLC v. Mayor & Council of the Borough of Keyport*, 2006 WL 2457846 (N.J. Super. L., Aug 2006)**

A developer and Keyport signed a Memorandum of Understanding, establishing a "cooperative relationship" regarding the development of a former landfill.[171] The landfill is leaching contamination into surrounding waterways. There is also a deserted industrial complex. The developer sought to build multi-family residential buildings. The City labeled the site as in need of "redevelopment," pursuant to statute. The site needed rezoning, and after the developer and city were unable to agree on density, the developer terminated the MOU. The City opened the redevelopment to bid, inviting developer to submit a bid. Developer sued, claiming that the redevelopment designation was arbitrary and capricious, ultra vires, and illegal.[172]

The developer cited Kelo for the proposition that "redevelopment designation cannot be sustained where private development is likely."[173] The court disagreed, saying that Kelo's broad conception of public purpose rather helps the city here.[174]

***Board of County Commissioners of Muskogee County v. Lowery*, 136 P.3d 639 (2006).**

In one of the first state supreme court decisions issued after Kelo, the Oklahoma Supreme Court held that "economic development alone does not

constitute a public purpose[.]"[175] In that case, Muskogee County brought condemnation proceedings against landowners for the purpose of acquiring right-of-way easements for the placement of three water pipelines, two of which would solely service Energetix, L.L.C, a private electric generation plant proposed for construction and operation in the County.[176] The landowners objected to the proceedings "primarily on the basis that the takings were not for a valid public purpose, but rather an unlawful taking of private property for private purpose."[177] The trial court sided with the County but the appellate court reversed, holding that the takings were unlawful because they were for the "direct benefit of a private company and not for 'public purposes[.]'"[178] The County appealed.

Agreeing with the appellate court, the Oklahoma Supreme Court reasoned:

> We adhere to the strict construction of eminent domain statutes in keeping with our precedent, mindful of the critical importance of the protection of individual private property rights as recognized by the framers of both the U.S. Constitution and the Oklahoma Constitution. If we were to construe "public purpose" so broadly as to include economic development within those terms, then we would effectively abandon a basic limitation on government power by "wash[ing] out any distinction between private and public use of property-and thereby effectively delet[ing] the words "for public use" from [the constitutional provisions limiting governmental power of eminent domain.]"[179]

The court specifically distinguished this case from Kelo:

> Contrary to the Connecticut statute applicable in Kelo, which expressly authorized eminent domain for the purpose of economic development, we note the absence of such express Oklahoma statutory authority for the exercise of eminent domain in furtherance of economic development in the absence of blight.[180]

The court explained that its decision was "reached on the basis of Oklahoma's own special constitutional eminent domain provisions[.]"[181] The court observed that "[w]hile the Takings Clause of the U.S. Constitution provides "nor shall private property be taken for public use without just compensation," the Oklahoma Constitution places further restrictions by expressly stating "[n]o private property shall be taken or damaged for private use, with or without compensation."[182] Although the Oklahoma constitution expressly lists exceptions for common law easements by necessity and drains for agricultural, mining and sanitary purposes, the proposed purpose of economic development falls within none of these categories:[183]

> To permit the inclusion of economic development alone in the category of "public use" or "public purpose" would blur the line between "public" and "private" so as to render our constitutional limitations on the power of eminent domain a nullity. If property ownership in Oklahoma is to remain what the framers of our Constitution intended it to be, this we must not do.[184]

Accordingly, the court held that "economic development alone does not constitute a public purpose and therefore, does not constitutionally justify the County's exercise of eminent domain."[185]

***Burien v. Strobel Family Investments*, 2006 Wash. App. LEXIS 1136 (June 12, 2006) UNPUBLISHED OPINION, review denied by Washington Supreme Court, 149 P. 3d 378 (Wash. 2006).**

The Court of Appeals of Washington affirmed a trial court decision holding

that the City's exercise of eminent domain to condemn a restaurant for a new "Town Square" development was not arbitrary or capricious.[186] The decision makes no mention of Kelo or the recent public use versus public purpose debate. The court simply applied Washington's three-part test in evaluating eminent domain:

> For a proposed condemnation to be lawful, the condemning authority must prove that (1) the use is really public, (2) the public interest requires it, and (3) the property appropriated is necessary for that purpose.[187]

The landowner challenged whether the condemnation is "necessary," specifically arguing that the City might turn around and sell a portion of the property to a private developer, which would benefit that private entity and not the City.[188] The court pointed out, however, that the City Council specifically set forth and determined that the property would be used only for public streets, public parks, or public parking.[189] Moreover, the court explained that "[w]here property is taken, ... with the intention of using it for a certain purpose specified in the ordinance authorizing the taking, as was done in this case, the city, doubtless, has the authority to change said contemplated use to another and entirely different use, whensoever the needs and requirements of the city suggest."[190] In holding that the city council's determination that the property was "reasonably necessary and required" for the development, the court reasoned:

> When it comes to such discretionary details as the particular land chosen, the amount of land needed, or the kinds of legal interests in that land that are necessary for the project, many Washington decisions have said that the condemnor's judgment on these matters will be overturned only if there is proof of actual fraud or such arbitrary and capricious conduct as would amount to constructive fraud.

Given the absence of actual or constructive fraud, the court held that the City's determination to condemn the entire property was necessary to facilitate a public use.

***City of Norwood v. Horney*, 2006 Ohio LEXIS 2170 (July 26, 2006).**

The Ohio Supreme Court was the first state supreme court to accept an eminent domain case after Kelo.[191] In City of Norwood v. Horney, Ohio Supreme Court unanimously held, that "an economic or financial benefit alone is insufficient to satisfy the public-use requirement of [the Ohio Constitution]."[192] In this case, the City of Norwood entered into a contract with Rookwood Partners Ltd., ("Rookwood") in order to redevelop the plaintiffs' neighborhood.[193] When Rookwood could not negotiate the sales of certain properties the City initiated condemnation proceedings.[194] Pursuant to the City code, an urban-renewal study was completed before the City instituted the eminent domain proceedings.[195] The study concluded that the neighborhood was a "deteriorating area" as that term is defined in the Norwood Code.[196] At trial, the court found that the study "contained numerous errors and flaw" and the City's planning director testified only that the neighborhood "probably would" deteriorate or was in danger of deteriorating or becoming a blighted area.[197] In light of this evidence, the trial court found that the City abused its discretion insofar as it had found that the neighborhood was a "slum, blighted or deteriorated area."[198] The court concluded, however, that the City did not abuse its discretion in finding that the neighborhood was a "deteriorating area."[199] The landowners appealed.

In reversing the trial court's decision, the Ohio Supreme Court specifically declined to hold "economic benefits alone to be a sufficient public use for a valid taking."[200] The court found that analysis by the Supreme Court of Michigan in County of Wayne v. Hathcock[201] and the dissenting judges of the Supreme Court of Connecticut and the dissenting justices of the U.S. Supreme Court in Kelo, are "better models" for interpreting the Ohio Constitution.[202] In applying the

analysis therefrom, the court held that "an economic or financial benefit alone is insufficient to satisfy the public-use requirement in the Ohio Constitution. In light of that holding, any taking based solely on financial gain is void as a matter of law and the courts owe no deference to a legislative finding that the proposed taking will provide financial benefit to a community."[203] The court explained that "[a]lthough economic benefit can be considered as a factor among others in determining whether there is a sufficient public use and benefit in a taking, it cannot serve as the sole basis for finding such benefit."[204]

Next, the court turned to the City's eminent domain statute. The court determined that the void-for-vagueness doctrine applies to statutes that regulate the use of eminent-domain powers and that courts should apply "heightened scrutiny" when reviewing such statutes.[205] The court held that the use of the term "deteriorating area" as a standard for determining whether private property is subject to appropriation was "void for vagueness and offends due process rights because it fails to afford a property owner fair notice and invites subjective interpretation."[206] The court found that "deteriorating area" was a "standardless standard" and that the City code "merely recites a host of subjective factors that invite ad hoc and selective enforcement."[207] The court further held that in any event the term could not be used as a standard for a taking because it "inherently incorporates speculation as to the future condition of the property into the decision ... rather than focusing that inquiry on the property's condition at the time of the proposed taking."[208] The court reasoned that "[s]uch a speculative standard is inappropriate in the context of eminent domain, even under the modern, broad interpretation of 'public use.'"[209] Moreover, "[a] municipality has no authority to appropriate private property for only a contemplated or speculative use in the future."[210]

***Talley v. Housing Authority of Columbus, Georgia*, 630 S.E.2d 550 (Ga. Ct. App. 2006):**

The Court of Appeals of Georgia took the Supreme Court's reasoning in Kelo to heart holding that the state's Urban Redevelopment Law ("URL") allowed property to be condemned for transfer to a private party.[211] In Talley, the Housing Authority of Columbus, Georgia ("HACG") instituted condemnation proceedings against a subdivision lot and its owners.[212] The HACG paid $17,500 for the property in 1994.[213] Five years later, the HACG sold the same property to a private citizen for $42,800.[214] In 2003, Logie Talley, one of the former lot owners, instituted a pro se action claiming that the HACG unlawfully took his property and demanded its return.[215] Talley further argued that HACG abandoned all public use of the property in 1999 when it sold it to a private citizen.[216] The trial court granted summary judgment to the HACG without explanation.[217]

On appeal, the court held that the challenge to the legality of the 1994 taking was barred by principles of res judicata and collateral estoppel due to the condemnation proceedings that took place that year.[218] Talley's claim regarding public use, however, was appropriate for consideration.[219] The court first looked at the URL:

> Enacted in 1955, the URL authorizes Georgia municipalities and counties, either directly or through urban redevelopment agencies or housing authorities, to exercise the power of eminent domain for the acquisition and redevelopment of urban property which has been found to be a "slum area" as defined in the URL. To effectuate redevelopment of condemned property, the URL authorizes a housing authority to sell, lease or otherwise transfer condemned property "for public use"; or for various specified private uses, i.e., "residential, recreational, commercial, industrial"; or for "other uses."[220]

The court then turned to Kelo for guidance and reiterated the Supreme

Court's reasoning that such takings are permissible under the Fifth Amendment of the United States Constitution, and it is left up to the states to enact more restrictive condemnation laws if they so choose.[221] The court observed that "Georgia's nonrestrictive URL and its underlying constitutional authorization remain in place. Therefore, the HACG was entitled to summary judgment on Talley's complaint that it abandoned any 'public use' of the property [upon sale] to a private citizen for 'other uses,' as such disposition of condemned property is authorized by the URL."[222]

***Rhode Island Economic Development Corp., v. The Parking Company, L.P.*, 892 A.2d 87 (R.I. 2006):**

The Rhode Island Supreme Court also took a que from Kelo, when it stressed the importance of good faith and due diligence in determining public use. In Rhode Island Economic Development Corporation ("RIEDC") v. The Parking Company, Limited Partnership ("TPC"), the RIEDC Board condemned a temporary easement over a parking garage for the duration of the term of the lease TPC held for the garage.[223] TPC was not informed of the hearing and the trial court, satisfied with the amount of compensation offered, found in favor of RIEDC.[224] Upon notice of the order, TPC appealed averring, inter alia, that the taking was not for a public use.

The Rhode Island Supreme Court agreed with TPC and held that the RIEDC "failed to satisfy the public use requirement of the Takings Clause."[225] The court explained that:

> The United States Supreme Court's recent holding in [Kelo], while upholding a taking for economic development purposes, stressed the condemning authority's responsibility of good faith and due diligence before it may start its condemnation engine. In determining whether an economic development project qualifies as a public use, under the Takings Clause, the Supreme Court focused on the City of New London's deliberative and methodical approach to formulating its economic development plan.[226]

With this in mind, the court noted the "stark contrast" between the "exhaustive preparatory efforts" that the NLDC took in Kelo, and the RIEDC's approach in this case by using the state's quick-take statute.[227] The court concluded that condemnation was inappropriately "motivated by a desire for increased revenue and was not undertaken for legitimate public purpose."[228]

***Didden v. Villiage of Port Chester*, 173 Fed. App. 931 (2d Cir. 2006) UNPUBLISHED OPINION, cert denied 2007 U.S. LEXIS 1036 (U.S. Jan. 16, 2007):**

Recently, the Supreme Court declined to hear an eminent domain extortion case. In Didden, a dispute arose between private developers over a development project.[229] In 1999, the Village of Port Chester authorized a land disposition agreement with G&S Port Chester, LLC ("G&S") for a redevelopment project.[230] The agreement covered the use of eminent domain incidental to the implementation of the project and the Port Chester Board of Trustees found that there was a legitimate public purpose for condemnation.[231] Plaintiffs claim that Gregory Wasser, the principle of G&S, demanded that they pay him the sum of $800,000 or give him a partnership interest in their project, or else he would cause Port Chester to condemn their properties and thereby divest Plaintiffs of title at a meeting in 2003.[232] Plaintiff's refused and their property was condemned pursuant to the agreement G&S had with Port Chester. Plaintiff's challenged the proceedings but their claims were deemed time-barred by the three-year statute of limitations due to the fact that they had notice in 1999 of the likelihood of condemnation proceedings against them.[233] Plaintiff's appealed.

The Second Circuit agreed with the trial court regarding the time bar but went on to explain that the Plaintiff's would not have a claim even if the statute of limitation had not run. On appeal, the Plaintiffs claimed that Wasser's threat

to condemn their property unless Plaintiffs gave him either $800,000 or a partnership interest in the business on the property amounts to an unconstitutional exaction.[234] The court, however, held that "no exaction has occurred here" because the Plaintiffs did not have any conditions placed upon their property during their ownership that limited their ability to use their property.[235]

Moreover, the court held that the Plaintiff's allegation of an extortionate demand of $800,000 to avoid condemnation added nothing of legal significance to their claims.[236] G&S and Wasser have the authority under the agreement to obligate Port Chester to pursue condemnation of properties within the project's boundaries.[237] As such, threats to enforce their legal rights are not actionable.[238] Therefore, even if Wasser did request payment in exchange for relinquishing the legal right to request condemnation, Plaintiffs have no recourse.[239] The court observed that the New York Eminent Domain Procedure Law "does not require the condemner to negotiate with a private property owner in good faith prior to seeking to acquire title to the property." The Plaintiff's appealed to the U.S. Supreme Court but cert was denied in January 2007.

A Requiem for Public Use

There was very little left of the public use clause—at least in federal court—even before the Kelo decision. While a growing handful of state (and federal decisions applying state law on property) decisions found economic revitalization public purposes invalid on constitutional grounds,[240] an equal number of decisions agreed with the Connecticut Supreme Court that this was a valid public use. Clearly this is the view of hundreds of state and local revitalization and redevelopment agencies.[241] Whether one reads the Court's previous jurisprudence on public use broadly, as Justice Stevens does for the Court's majority, or more narrowly, as does the dissent, it is difficult to argue with the conclusions reached separately by Justices O'Connor and Thomas: the public use clause is

virtually eliminated in federal court. What yellow light of caution the handful of recent cases signaled has now turned back to green, and government may once more acquire private property by eminent domain on the slightest of public purpose pretexts unless such a use is inconceivable or involves an impossibility, the tests following Midkiff in 1984. In other words, it's now all about process, and process only. There is no doubt that state and local governments will do much good in terms of public welfare and public benefits flowing from economic revitalization under such a relaxed standard, as they have often done in the past. They will do so with increased attention to carefully-drafted plans and procedures guaranteeing maximum public exposure and participation, both emphasized in the majority opinion. Moreover, members of the Court during oral argument suggested rethinking how to calculate and award "just" compensation in extenuating circumstances such as those in New London now that the public use clause is a mere procedural hurdle. And yet, the public use clause is more than simple policy; it is a bedrock principle contained in the Bill of Rights amendments to our Federal Constitution, designed not to further the goals and desires of the majority, but as a shield against majoritarian excesses at the expense of an otherwise defenseless minority—like the Kelos. Surely we could have found grounds to preserve that shield in federal court.[242]

Notes

1 Dankert, Ch. 11, Planning for Codemnation—the Condemnor's Problems, in Institute on Planning, Zoning and Eminent Domain, 1989, at s. 11. 03. See Albert Hanson Lumber Co. v. U.S., 261 U.S. 581, 587 (1923) and U.S. v. Carmack, 329 U.S. 230, 241-242 (1946).

2 See Erasmus, Eminent Domain Jurisprudence, at 1-2 (ALIABA Course of Study, 1993).

3 West River Bridge Co. v. Dix, 47 U.S. 507 (1848).

4 29A Corpus Juris Secumdum 2. 169.

5 United States Const., Amend. V.

6 1A Nichols, Eminent Domain, §3.03 [3]; Cline v. Kansas Gas & Elec. Co., 260 F.2d 271 (10th Cir. 1958).

7 1A Nichols, Eminent Domain, §3.03 [3]; Mott v. Eno, 181 N.Y. 346, 14 N.E. 808 (1905).

8 1A Nichols, Eminent Domain, §3.03 [1]; An unauthorized taking may be validated by a subsequent ratification. Swayne v. Hoyt, Ltd. V. U.S., 300 U.S. 297, 81 L.Ed. 659, 57 S.Ct. 478 (1937).

9 1A Nichols, Eminent Domain, §3.03 [1]; Cincinnati v. Vester, 281 U.S. 439, 74 L.Ed. 950, 50 S. Ct. 360 (1930).

10 1A Nichols, Eminent Domain, §3.03 [1]; Tacoma v. State, 4 Wash. 64, 29 P. 847 (1892).

11 1A Nichols, Eminent Domain, §3.04 [2].

12 1A Nichols, Eminent Domain, §3.04 [2]; Steinhart v. Mendocino County Ct., 137 Cal. 575, 70 P. 629, 59 L.R.A. 404, 92 Am. St. Rep. 183 (1902).

13 348 U.S. 26 (1954).

14 467 U.S. 229 (1984).

15 545 U.S. 469 (2005).

16 Ranging from the lengthy historical analysis provided by Justice Thomas in dissent (he would have the Court return to original meaning in the 18th century in which most eminent domain cases appear to require actual use by the public, though Justice Stevens reads some of the same history quite differently by choosing other cases from that period upon which to rely) to concentration only on mid to late 20th century cases by Justice Stevens for the majority and Justice O'Connor in dissent.

17 Berman, 348 U.S. at 31.

18 Id. at 32.

19 Id. at 31.

20 Id. at 33-34.

21 Id. at 34-35.

22 Midkiff, 467 U.S. at 232-233.

23 Id. at 233.

24 Id. at 234-235.

25 Id. at 235.

26 Id. at 240.

27 Id. at 241.

28 Kelo, 545 U.S. at 487, n.19 (citing Eastern Enterprises v. Apfel, 524 U.S. 498, 545 (1998)). For a compendious list of such "horribles" see Dana Berliner, Public Power, Private Gain (2003), available at http://www.castlecoalition.org/publications/report/index.html.

29 Id. at 473-74.

30 Id.

31 Id. at 475.

32 Id.

33 Id.

34 Id. However, it now seems that some of the condemned parcels owned by plaintiffs were in fact in the path of proposed new streets and roads—which, of course, would have always qualified them for public purpose takings. See George?, Redevelopment Takings After Kelo: What's Blight Got To Do With It? __ L.R. __.

35 Id.

36 Id.

37 Id.

38 Id. at 476.

39 Id. at 476-77.

40 Id. at 477.

41 Id. at 478, n.6.

42 Id.

43 Id, at 478.

44 Id, at 483.

45 Id, at 484.

46 Id, at 478, n.6.

47 Id, at 484. While widely touted as a victory for planning and planners, at least one commentator thinks not. See Daniel H. Cole, Why Kelo Is Not Good News For Local Planners and Developers, 22 Ga. St. U. L. Rev. 803 (2006).

48 Id, at 480.

49 Id.

50 Id. (quoting Berman, 348 U.S. at 33 (1954)).

51 Id, at 483.

52 Id. at 477.

53 Id. at 487-88.

54 544 U.S. 528 (2005).

55 Kelo, 545 U.S. at 488-89.

56 Id. at 490, n.21 Other countries provide a measure of extra compensation where, as here, it is a private residence which is condemned and the landowner has a demonstrable emotional attachment to the improved land. See, e.g., the Australian concept of solatium, amounting to up to 10% additional compensation beyond fair market value in such circumstances, briefly noted (among other compensation issues) in Lee Anne Fennell, The Death of Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock: Taking Eminent Domain Apart, 2004 MICH. ST. L. REV. 957, 1004 (2004), and referencing Murray J. Raff's more lengthy description in Chapter 1 of Kotaka and Callies (ed) TAKING LAND: COMPULSORY PURCHASE AND LAND USE REGULATION IN ASIAN-PACIFIC COUNTRIES (2002).

57 Id. at 489.

58 Id. at 493 (Kennedy, J., concurring).

59 Id.

60 Id. at 497 (O'Connor, J., dissenting) (citing Cincinnati v. Vester, 281 U.S. 439 (1930)).

61 Id. at 494.

62 Id. at 496.

63 Id. at 500.

64 Id. at 501.

65 Id. Justice O'Connor also confesses error (her own as well as the Court's) in ever equating public use and the police power, from which, she accurately observes, much of the expanded doctrine of public use into broad public purpose, and particularly deference to legislative determinations of public purpose, derive.

66 Id. at 503.

67 Id. at 504.

68 Id. at 505.

69 Id. at 522 (Thomas, J., dissenting).

70 Id.

71 Id. at 523.

72 See, for more information on these groups, www.ij.org and www.castlecoalition.org.

73 Lisa Knepper and John Kramer, Iowa Legislature Overrides Eminent Domain Reform Veto: Historic Event Secures Greater Property Protection, July 14, 2006, http://www.castlecoalition.org/media/releases/7_14_06pr.html.

74 Castle Coalition, 50 State Report Card, available at http://www.castlecoalition.org/publications/report_card/index.html (last visited at July 26, 2007); Castle Coalition, Legislative Action Since Kelo, available at

http://www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf (last visited at Oct. 7, 2006).

Alabama (2005 AL S.B. 68A), Alaska (2005 AK H.B. 318), Colorado (2006 CO H.B. 1411), Delaware (2005 DE S.B. 217), Florida (2006 FL H.B. 1567, 2006 FL H.B. 1569, 2006 FL V. 8), Georgia (2005 GA H.B. 1313, 2005 GA H.B. 1306), Idaho (2006 ID S.B. 1243, 2006 ID S.B. 1247, 2006 ID H.B. 555), Illinois (2006 IL S.B. 3086), Indiana (2006 IN H.B. 1010), Iowa (2005 IA H.B. 2351), Kansas (2005 KS S.B. 323), Kentucky (2006 KY H.B. 508), Louisiana (2006 LA S.B. 1, 2006 LA S.B. 43A, 2006 LA H.B. 707), Maine (2006 ME L.D. 1870), Maryland (2007 MD S.B. 3), Michigan (2005 MI S.J.R. E), Minnesota (2005 MN S.B. 2750), Missouri (2006 MO H.B. 1944), Montana (2007 MT S.B. 41, 2007 MT S.B. 363), Nebraska (2005 NE L.B. 924), Nevada (2007 NV A.B. 102), New Hampshire (2005 NH S.B. 287), New Mexico (2007 NM H.B. 393, 2007 NM S.B. 401), North Carolina (2006 NC H.B. 1965), North Dakota (2007 ND S.B. 2214), Ohio (2005 OH S.B. 167), Pennsylvania (2005 PA H.B. 2054, 2005 PA S.B. 881), South Carolina (2006 SC S.B. 1031), South Dakota (2006 SD H.B. 1080), Tennessee (2005 TN H.B. 3450), Texas (2005 TX S.B. 7B), Utah (2006 UT S.B. 117), Vermont (2005 VT S.B. 246), Virginia (2007 VA H.B. 2954), Washington (2007 WA H.B. 1458), West Virginia (2006 WV H.B. 4048), Wisconsin (2005 WI A.B. 657), Wyoming (2007 WY H.B. 124).

75 Castle Coalition, 50 State Report Card.

76 Id.

77 See Castle Coalition's Legislative Center, available at http://www.castlecoalition.org/legislation/local/index.html (last visited at July 26, 2007).

78 See http://sos.mt.gov/ELB/archives/2006/Ballot_Issues.asp. (last visited on Nov. 12, 2006).

79 John Kramer and Lisa Knepper, 2006 Election Wrap Up: Voters Overwhelmingly Passed Eminent Domain Reform, Nov. 8, 2006, available at http://www.castlecoalition.org/media/releases/11_8_06pr.html.

80 Id.

81 Proposition 207 (Arizona), available at http://www.castlecoalition.org/legislation/ballot-measures/index.html (last visited on Oct. 7, 2006).

82 Id.

83 Id.

84 Id.

85 Vote no on Proposition 207!, http://www.noprop207.org (last visited at Oct. 7, 2006).

86 Letters to the Editor, Prop. 207 is a Trojan horse, THE ARIZONA REPUBLIC, Oct. 8, 2006, available at http://www.azcentral.com/arizonarepublic/opinions/articles/1008sun1-08.html.

87 John Kramer and Lisa Knepper, 2006 Election Wrap Up: Voters Overwhelmingly Passed Eminent Domain Reform.

88 Id.

89 Id.

90 Mark Ballard, Property Proposal's Supporters Claim Radio Turned Tide, THE ADVOCATE, A4, Oct. 2, 2006.

91 S. Res. 851, 84th Leg., Reg. Sess. (La. 2006) (enacted). See Louisiana Secretary of State, Statement of Proposed Constitutional Amendments, September 30, 2006, http://www.sos.louisiana.gov/elections/MISC/CA_Statements.pdf (last visited on Oct. 7, 2006).

92 S. Res. 851, 84th Leg., Reg. Sess. (La. 2006) (enacted).

93 John Kramer and Lisa Knepper, 2006 Election Wrap Up: Voters Overwhelmingly Passed Eminent Domain Reform; Proposal 06-4 (Michigan), available at http://www.legislature.mi.gov/documents/2005-2006/jointresolutionenrolled/Senate/pdf/2005-SNJR-E.pdf.

94 Id.

95 Id.

96 Id.

97 Id.; Question No. 1 (New Hampshire), available at http://www.gencourt.state.nh.us/legislation/2006/CACR0030.html.

98 Id.

99 John Kramer and Lisa Knepper, 2006 Election Wrap Up: Voters Overwhelmingly Passed Eminent Domain Reform.

100 Id.

101 Measure 39 (Oregon), available at http://www.castlecoalition.org/legislation/ballot-measures/index.html (last visited on Oct. 7, 2006).

102 Id.

103 Id.

104 Id.

105 Id.

106 Editorial, Don't Deprive Oregon of A Key Economic Tool, THE OREGONIAN, B6, Oct. 4, 2006.

107 Id.

108 Laura Oppenheimer, Foes of Land Takings Widen Aim, THE OREGONIAN, B1, Sept. 25, 2006.

109 Id.

110 John Kramer and Lisa Knepper, 2006 Election Wrap Up: Voters Overwhelmingly Passed Eminent Domain Reform; Amendment 5 (South Carolina), available at, http://www.castlecoalition.com/legislation/ballot-measures/index.html.

111 John Kramer and Lisa Knepper, 2006 Election Wrap Up: Voters Overwhelmingly Passed Eminent Domain Reform

112 Id.

113 Id.

114 See Castle Coaltion, Legislative Center: Current Proposed Federal Legislation On Eminent Domain, available at http://www.castle-coalition.org/legislation/federal/index.html (last visited on Oct. 17, 2006).

115 Id.; H.R. 3058, 109th Cong. (2005) (enacted).

116 H.R. 3058, 109th Cong. §726 (2005) (enacted).

117 Id.

118 Id.

119 GAO-07-28, Eminent Domain: Information About Its Uses and Effects On Property Owners and Communities Is Limited, available at http://www.gao.gov/new.items/d0728.pdf

120 Castle Coalition, Legislative Action Since Kelo, available at http://www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf (last visited at Oct. 7, 2006).

121 See Castle Coaltion, Legislative Center: Current Proposed Federal Legislation On Eminent Domain, available at http://www.castlecoalition.org/legislation/federal/index.html (last visited on Oct. 17, 2006).

122 Id.

123 Lisa Knepper and John Kramer, U.S. Senate Eminent Domain Reform Deadline Tomorrow
Time is Running Out For Federal Government to Stop Funding Abuse, Sept. 29, 2006, http://www.castlecoalition.org/media/releases/9_29_06pr.html.

124 Hotlining is an expedited process that allows congressional leadership to present a bill to the entire chamber for unanimous approval.

125 John Kramer and Lisa Knepper, Senate Fails to Pass Eminent Domain Reform: Thousands Remain Subject To Federally Funded Eminent Domain Abuse, Dec. 11, 2006, http://www.castlecoalition.com/media/releases/12_11_06pr.html.

126 Id.

127 John Kramer and Lisa Knepper, Eminent Domain Reform To Be

Introduced in U.S. House of Representatives: Property Owners Still Left Unprotected from Federally Funded Abuses Two Years After Kelo, July 12, 2007, http://www.castlecoalition.com/media/releases/7_12_07pr.html (last visited on July 27, 2007).

128 Id.

129 Franco v. Nat'l Capital Revitalization Corp., 2007 WL 2001652, *5 (D.C. App, July 2007).

130 Id.

131 Id.

132 Id. at *9.

133 In the matter of 49 WB, LLC v. Village of Haverstraw, 2007 WL 1775976, *3 (N.Y.A.D., June 2007).

134 Id.

135 Id. at *7-8.

136 Id. at *10.

137 Id. at *10-11.

138 Id. at *12.

139 Goldstein v. Pataki, 488 F. Supp.2d 254, 287 (E.D.N.Y, June 2007).

140 127 S.Ct. 1955 (2007).

141 Centene Plaza Redevelopment Corp. v. Mint Properties, 2007 WL 1695163 (Mo., June 2007) (en banc).

142 Id. at *5.

143 Id. at *6.

144 Litva v. Village of Richmond, 2007 WL 1976592, *5 (Ohio App. June 2007).

145 Id.

146 Mayor and City Council of Baltimore City v. Valsamaki, 397 Md. 222, 255-56 (Feb 2007).

147 Id. at 263.

148 Id. at 268.

149 Id. at 270.

150 Housing and Redevelopment Authority of the City of Bloomington v. Bloomington Professional Building, LLC, 2007 WL 224272, *3 (Minn. App., Jan 2007)

151 Id. at *6.

152 Lingle v. Chevron, 544 U.S. 528 (2005).

153 MHC Financing Ltd. Part. v. City of San Rafael, 2006 WL 3507937, *1 (N.D. Cal., Dec. 2006).

154 Id. at *2.

155 Id. at *10.

156 Id. at *14.

157 Id.

158 City of Baltimore Development Corp. v. Carmel Realty Assoc., 395 Md. 299, 316-18 (Nov. 2006).

159 Id. at 318.

160 Western Seafood Company v. U.S., 202 Fed. Appx. 670, 672 (5th Cir. Oct. 2006).

161 Id.

162 Id. at 677.

163 Id. at 674.

164 Id. at 677.

165 Nevadans for the Protection of Property Rights, Inc. v. Heller, 141 P.3d. 1235, 1238-39 (Nev. Sep, 2006).

166 Id. at 1244.

167 Id. at 1247.

168 Hoffman Family, LLC v. City of Alexandria, 272 Va. 274, 281 (Sep. 2006).

169 Id. at 289.

170 Id. at 290, n7.

171 Century Land Group, LLC v. Mayor & Council of the Borough of Keyport, 2006 WL 2457846, *2 (N.J. Super. L., Aug 2006).

172 Id. at *5.

173 Id. at *9.

174 Id.

175 Board of County Comm'rs of Muskogee County v. Lowery, 136 P.3d 639, 650 (2006).

176 Id. at 641.

177 Id. at 644.

178 Id. at 645.

179 Id. at 647. (quotations and brackets in original) (citing Kelo, 545 U.S. 469, (2005) (O'Connor, J., dissenting)).

180 Id. at 650.

181 Id. at 651.

182 Id. at 652.

183 Id.

184 Id.

185 Id. at 650.

186 Burien v. Strobel Family Investments, 2006 Wash. App. LEXIS 1136, *12-13 (June 12, 2006).

187 Id. at *6. (citations omitted).

188 Id. at *8.

189 Id.

190 Id. at *9. (quotations and citations omitted).

191 John Kramer and Lisa Knepper, Ohio Supreme Court Accepts Eminent Domain Abuse Case, Oct. 3, 2005, http://www.ij.org/private_property/norwood/10_3_05pr.html.

192 City of Norwood v. Horney, 2006 Ohio LEXIS 2170, *68-69 (July 26, 2006).

193 Id. at *13-14.

194 Id. at *15.

195 Id. at *14-15.

196 Id. at *15.

197 Id. at *17-18.

198 Id. at *19.

199 Id. at *20.

200 Id. at *64.

201 684 N.W.2d 765 (2004).

202 Horney, 2006 Ohio LEXIS at *66.

203 Id. at *68-69.

204 Id. at *68.

205 Id. at *10.

206 Id. at *81-82.

207 Id. at *78.

208 Id. at *82.

209 Id. at *79.

210 Id.

211 Talley v. Housing Authority of Columbus, Georgia, 630 S.E.2d 550, 553 (Ga. Ct. App. 2006).

212 Id. at 551.

213 Id.

214 Id.

215 Id.

216 Id.

217 Id.

218 Id.

219 Id.

220 Id. at 552.

221 Id.

222 Id at 553.

223 Rhode Island Economic Development Corp., v. The Parking Company, L.P., 892 A.2d 87, 93 (R.I. 2006).

224 Id. at 94.

225 Id. at 103.

226 Id. at 104.

227 Id.

228 Id.

229 Didden v. Villiage of Port Chester, 322 F. Supp. 2d 385, 387 (S.D. N.Y. 2004).

230 Id. at 388. See, for a full restatement of the facts, Didden v. Villiage of Port Chester, 304 F. Supp. 2d 548 (S.D. N.Y. 2004).

231 Id.

232 Id. at 390.

233 Id. at 389.

234 Id.

235 Id.

236 Id. at 390.

237 Id.

238 Id.

239 Id.

240 See, e.g., the decisions in Hathcock, supra n.5; Southwestern Illinois Dev. Auth. v. Nat'l City Envtl., 768 N.E.2d 1 (Ill. 2001).

241 See Berliner, supra n.18.

242 For examples of commentary on both sides of the national debate on the decision, see, e.g., Daniel H. Cole, Kelo's Legacy, 37 E.L.R. 10540 (2007); Michael M. Berger, COURT GOES "CLUELESS": NOW PUBLIC USE MEANS WHATEVER! IN REAL ESTATE PERSPECTIVE, (Manatt, Phelps and Phillips, LLP, July 2005); John R. Nolon and Jessica Bacher, Fallout from Kelo, NEW YORK LAW JOURNAL, Oct. 19, 2005. For a full treatment of the issues raised by the Kelo decision, see Dwight H. Merriam and Mary Massaron Ross (eds) EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT (2006)