

'Despotism in New London,' Connecticut? Or Economic Development Along the Thames River? Susette Kelo in *Kelo v. New London* asks the Supreme Court to Hold Economic Development Unconstitutional under the Public Use Doctrine

by

Erin Elizabeth Hartigan

A Masters Project submitted to the faculty
of the University of North Carolina at Chapel Hill
in partial fulfillment of the requirements
for the degree of Master of Regional Planning
in the Department of City and Regional Planning.

Chapel Hill

2005

Approved by:

READER (optional)

ADVISOR

Introduction

Byron Athenian... had his little garage where he used to fix cars. People would hang out there. The area had the Italian Dramatic Club and a Spanish church. This was like an oasis away from the rest of the city. These were doers, not drifters.

Philip Langdon, *Eminent Domain Goes to Court*, PLANNING, Apr. 2005, at 14.

With these words, Richard Humphreville, a cabinetmaker who has operated a shop in the Fort Trumbull area in New London, Connecticut, for 22 years, described his neighborhood. But the City of New London and the New London Development Corporation (NLDC) had a different view of Fort Trumbull: “Twenty percent of the residential properties were vacant,” said an attorney for the NLDC, Edward O’Connell. “It was not a thriving area.” *Id.* When Pfizer, the pharmaceutical giant, announced its plans to build a \$270 million facility in New London, the City and the NLDC decided to piggyback on this revitalization of the tax base. The City envisioned a new, 90-acre development project consisting of a ‘Riverwalk,’ offices, a hotel, and ‘upscale’ housing, and the City envisioned this project being built right where Richard Humphreville and his neighbors lived. *Id.*

The problem inhered in the holdouts- those who refused to sell their land to New London, which would in turn sell the land to private developers, who would build the project. The City thought it had a solution: acting through the NLDC, it simply condemned the land, and thus created the impetus for a landmark case now before the Supreme Court, *Kelo v. New London*. Susette Kelo and eight of her neighbors argue that the Takings Clause of the Fifth Amendment to the U.S. Constitution forbids economic development in non-blighted neighborhoods like hers, because condemning the land in

order to transfer it to a private party offends the ‘public use’ requirement of the Clause (“nor shall private property be taken for public use, without just compensation”). The City and the NLDC argue that courts have always deferred to the decisions of local government in the exercise of eminent domain, and that to hold otherwise would be tantamount to legislation via judicial fiat. The following is an attempt to analyze the parties’ claims and to suggest whose view the Court will find more sympathetic, as well as a conclusion as to whose view the Court *should* find more sympathetic.

Statement of the Facts

Not surprisingly, the Petitioners’ (homeowners Susette Kelo, Wilhelmina Dery and others) recitation of the facts differs in character from that presented by the Respondents (the City of New London and the New London Development Corporation). The Petitioners begin with a description of the homeowners and their homes: “Petitioner Wilhelmina Dery was born in her house in the Fort Trumbull neighborhood of New London, Connecticut in 1918.” Petitioners’ Brief at 1, *Kelo v. New London* (Supreme Court of the United States 2005) (No. 04-108). In contrast, the Respondents open with a tale of economic woe: “New London, which is geographically the second smallest of the 169 municipalities in Connecticut, was once a center of the whaling industry and later a manufacturing hub. However, New London has suffered through decades of economic decline.” Respondents’ Brief at 1, *Kelo v. New London* (Supreme Court of the United States 2005) (No. 04-108). According to the Respondents’ brief, the NLDC’s motivation in planning a development project lay in the City’s “staggering economic woes,” caused by an unemployment rate “close to double that of the rest of the state,” a decreasing population and the loss of a major employer within the region (namely, the Naval

Undersea Warfare Center or NUWC), all of which resulted in the designation of New London as a “distressed municipality” by the State of Connecticut’s Office of Planning and Management (OPM). Resp. Br. at 1-2.

The Respondents claim that in addition to these city-wide conditions, the Fort Trumbull area, situated on a peninsula extending into the Thames River, was itself suffering from “numerous ills.” Resp. Br. at 2. Their brief cites several facts relating to the condition of the Fort Trumbull area itself:

- [There is an] 82 percent vacancy rate for non-residential buildings and a 20 percent rate for non-commercial property.
- Very low tax revenue for the MDP area (\$325,000)
- 55 percent of the buildings in the MDP area were built prior to 1950.
- Sixty-six percent of the non-residential buildings are in fair to poor condition and less than twelve percent of the residential buildings are in average or better condition.
- Since 1990, existing buildings in the area have undergone minimum private investment with some sections of Fort Trumbull suffering from disinvestment and owner neglect.

Resp. Br. at 3 (citations omitted).

It is curious that the Respondents, in listing these facts, focus first on the status of the non-residential sites and structures. The Petitioners in this case are almost all residential property owners, and case law is highly supportive of the use of eminent domain for widespread condemnation of blighted residential areas due to their negative implications for the public health. *See, e.g., Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98 (1954). It could be theorized that the City and NLDC made their case in this manner because the non-residential sites appear to be in worse condition than the residential sites, and thus bolster the City’s case more so than the residential sites. In addition, the Respondents declined to include some basic information that might be more helpful in

assessing the status of the Fort Trumbull area: for example, while the Respondents state that Fort Trumbull has an 82% vacancy rate for non-residential buildings- certainly, a negatively impressive figure in all respects- the Respondents never list the total number of non-residential structures in the Fort Trumbull area vis a vis the total number of residential structures, which might lend more weight to this statistic. The Petitioners refer to the Fort Trumbull area as the “Fort Trumbull neighborhood,” terminology which suggests that the non-residential buildings in Fort Trumbull are few in number, but Petitioners also do not cite specific statistics and Petitioners, of course, also have a special incentive to highlight those facts most positive and supportive of their case.

Respondents suggest that the seeds of the redevelopment plan at issue were planted when the NLDC, originally established in 1978, was re-formed in 1997 in order to plan an “economic rebirth” for the city at the site of the closed Naval Undersea Warfare Center. Resp. Br. at 3. The “first step in that rebirth” was the creation of Fort Trumbull State Park, and the second was the announcement in February 1998 that Pfizer, Inc. would build a research facility on a site adjacent to the Fort Trumbull area. Resp. Br. at 3. The Respondents’ brief is silent as to whether the City played any role in bringing Pfizer to New London, and if so, whether the City conceived of a redevelopment plan for the Fort Trumbull area in concert with any negotiations with Pfizer. However, the Petitioners’ brief suggests that the development plan for the Fort Trumbull area adjacent to the Pfizer facility was drafted in accordance with the “requirements” that Pfizer

set forth in agreeing to build its global research facility in New London: a luxury hotel for its clients, upscale housing for its employees, and office space for its contractors... as well as the overall ‘redevelopment’ of the Fort Trumbull neighborhood adjacent to Pfizer, [and] in addition to other upgrades to the area

that it demanded: renovation of the state park and sewage treatment plant upgrades.

Pet. Br. at 5.

An attorney for the NLDC also implied that the new redevelopment plan was designed to compliment the Pfizer facility and meet the needs of Pfizer employees:

We need to get housing at the upper end, for people like the Pfizer employees... They are the professionals, they are the ones with the expertise and the leadership qualities to remake the city -- the young urban professionals who will invest in New London, put their kids in school, and think of this as a place to stay for 20 or 30 years.

Iver Peterson, *As Land Goes to Revitalization, There Go the Old Neighbors*, N.Y. TIMES, Jan. 17, 2005.

In April 1998, the New London City Council gave approval to the NLDC to create an economic development plan for Fort Trumbull. The Respondents' brief states that a 90-acre section of Fort Trumbull "was selected as the best site for a planned development because of the availability of the NUWC and because the majority of Fort Trumbull is a 'regional center.'" Resp. Brief at 4. Regional centers, under the Connecticut General Statutes, are addressed in planning with the goal of revitalizing their economic base and encouraging the location of new industries. *Id.* The plan, which was developed after the City and the NLDC completed a series of neighborhood meetings and underwent an Environmental Impact Evaluation, divided the 90 acres into seven parcels:

- **Parcel 1:** a waterfront hotel and conference center, marinas for tourist boats and commercial vessels, and the Riverwalk (a public walkway along the waterfront)
- **Parcel 2:** Eighty new residential properties organized in a planned urban-style neighborhood and linked by a public walkway to the rest of the plan area; this parcel also includes space reserved for the new site of the United States Coast Guard Museum.

- **Parcel 3:** 90,000 square feet of high technology research and development office space and parking with direct vehicular access from outside the plan area.
 - **Parcel 4:** Divided into two subparcels – 4A, which will provide park support and marina support, including parking and retail services; and 4B, which will include a renovated marina for both recreational and commercial boating. In addition, the Riverwalk will continue through Parcel 4B.
 - **Parcel 5:** 140,000 square feet of office space, parking and retail space.
 - **Parcel 6:** Development of water-dependent commercial uses.
 - **Parcel 7:** Additional office space and/or research and development space.
- Resp. Brief at 6-7.

The plan was adopted in January 2000 by the New London City Council, with authorization to the NLDC to acquire the properties within the plan area by eminent domain if necessary (the NLDC is a non-profit development corporation; under Connecticut law, a city may designate corporations like the NLDC to act as its development agent and thus designate its power of eminent domain as well). Resp. Brief at 1, 9].

The Petitioners' property is located in Parcels 3 and 4A- four properties in Parcel 3, and eleven in Parcel 4A. Petitioner Susette Kelo was offered \$123,000 for her 1893 Victorian home, and said that when she was first approached by developers, "I had just bought the place. I never even wanted to negotiate." Joan Biskupic, *Conn. Residents fight for homes*, U.S.A. TODAY, Feb. 21, 2005 at 3A. In October 2000, with Kelo and the other Petitioners refusing to sell their properties voluntarily, the NLDC voted to use eminent domain to acquire those properties. Pet. Br. at 6. "What galls me," Susette Kelo said later, "is the developer is taking my land so someone else can live here." Langdon at 14.

Cause of Action

Petitioners brought suit in December of 2000 alleging that the Respondents' exercise of eminent domain violated the U.S. and Connecticut Constitutions, Connecticut General Statutes Chapter 132, under which the condemnation actions were brought, and the New London City Charter. Pet. Brief at 7. The Petitioners claimed that under the 5th Amendment of the U.S. Constitution ("nor shall private property be taken for public use, without just compensation") and Article 1 § 11 of the state Constitution ("The property of no person shall be taken for public use, without just compensation therefore"), the City and the NLDC could not take their property, give it to a private entity (the NLDC) and use the land for an essentially private purpose. The Petitioners argued that the actions at issue contravened the meaning of "public use": namely, the taking of the land by the NLDC and the NLDC's leasing it to private developers for \$1 a year, for the purpose of their constructing private development projects on the land such as office space and upscale housing. Pet. Brief at 6. In essence, the Petitioners asserted that under both the U.S. and Connecticut Constitutions, as well as the Connecticut General Statutes, economic development could not be a public use and thus one for which eminent domain could lawfully be employed.

Procedural History

The New London Superior Court dismissed the eminent domain action against the Petitioners on parcel 4A, holding that Respondents had not shown "reasonable necessity for the condemnations and that the condemnations lacked assurances of future use." Pet. Brief at 7. This holding was rooted in the fact that Respondents could not adequately explain to the Superior Court's satisfaction what land uses would occupy Parcel 4A under

the MDP; the Petitioners state that “[d]uring trial, no witness could explain what “Park Support” meant and all witnesses admitted that it could be a wide range of possible but undefined uses.” *Id.* at 4. The Superior Court noted that “[i]f a taking is based on a public purpose or use which is speculative and cannot be accomplished in a reasonable time, there can be no necessity for the taking.” *Kelo v. New London*, 2002 WL 500238, 64 (2002). The court seemed to find the testimony of witnesses, to the effect that there was neither a development plan nor a development agreement as to the 4A parcel, compelling. *Id.* The court found for the defendants on all other claims, meaning that it also upheld the eminent domain action against the petitioners on parcel 3.

The Petitioners appealed, and the Respondents cross-appealed, the decision to the Connecticut Appellate Court, but the Connecticut Supreme Court transferred the appeal and cross-appeal to itself. The majority opinion, issued on March 9, 2004, held that economic development was a ‘public use’ under the Fifth Amendment and under the Connecticut State Constitution, concluding that “an exercise of the eminent domain power would be an unreasonable violation of the public use clause if the facts and circumstances of the particular case reveal that the taking was primarily intended to benefit a private party, rather than primarily to benefit the public.” *Kelo v. New London*, 268 Conn. 1, 62-63, 843 A.2d 500, 541 (2004). Here, the Connecticut Supreme Court found that

the trial court's finding that the takings were not primarily intended to benefit a private party, namely, Pfizer, is not clearly erroneous. The trial court's finding derives ample support from the record, particularly the fact that Pfizer's "requirements," complained of by the plaintiffs, do not impact parcels 3 and 4A... Moreover, the trial court correctly identified the ample public benefits that the development plan, once implemented, was projected to provide. Assuming them to be correct, the development plan projected the

generation of hundreds of construction jobs, approximately 1000 direct jobs, and hundreds of indirect jobs... Most importantly, as the trial court astutely observed, these gains would occur in a city that, with the exception of the new Pfizer facility that employs approximately 2000 people, recently has experienced serious employment declines because of the loss of thousands of government and military positions... In light of these staggering economic figures, we conclude that the trial court did not commit clear error when it found that the development plan primarily was intended to benefit the public interest, rather than private entities.

Id. at 64-65, 843 A.2d at 542-543.

On September 28, 2004, the United States Supreme Court granted certiorari on the primary issue, which is whether the public use clause of the U.S. Constitution's Fifth Amendment permits the government to take land for private economic development.

Analysis of Petitioners' Arguments Before the Court

1. The use of eminent domain for economic development is categorically unconstitutional because it is a taking for private- not public- use.¹

A. 'Public Use' and the Constitutional Text

The petitioners argue, not unreasonably, that the inclusion of the term "public use" in the Fifth Amendment ("nor shall private property be taken for public use without just compensation") retains independent meaning, despite the expanded interpretation of that term in jurisprudence since the ratification of the Constitution. They cite a case on constitutional interpretation in which the Court wrote, "This Court presumes that every term in the Constitution has meaning and that nothing is superfluous." Pet. Br. at 28.

Petitioners note that the word "public" appears in other parts of the Constitution and that its use generally seems synonymous with 'governmental' or the public as a whole, the

¹ Petitioners argue in the alternative that even if the exercise of eminent domain for economic development is constitutional, it cannot be upheld in the instant case. This alternative argument will be reached later.

public at large. *Id.* at 29. They have a more difficult argument to make with regard to the word “use,” but they must address both words since the Connecticut Supreme Court below held that “public use” encompasses the indirect public benefits that accrue to the public at large from an economic development project. Nevertheless, Petitioners gamely make the attempt, claiming that other instances of the word “use” elsewhere in the Constitution “confirm[s] that the Framers used it to mean employment or utilization, not incidental benefit.” *Id.*

Respondents New London and the NLDC see an important omission in the Takings Clause that suggests to them that the Founders *assumed* that any property taken by eminent domain would, by the fact of its taking, be for a public use. Their logic seems tortured, but is apparently drawn from a work by the respected Constitutional scholar Laurence H. Tribe:

[The] text – ‘nor shall private property be taken for public use without just compensation’ – contains a clear syntactic signal that its primary purpose is not to regulate legislative determinations of public use. That signal is the placement of the word ‘without,’ which announces the emphasized prepositional phrase in the Clause, i.e., ‘without just compensation.’ In contrast, ‘public use’ appears in the Clause without any exclusionary word to complement ‘nor.’ Indeed, in its phrasing the Clause almost assumes that any private property taken by eminent domain would *ipso facto* be for a public use, otherwise one would expect ‘for public use’ to be preceded by ‘except,’ or some other exclusionary preposition.

Resp. Br. at 17.

However, even Amicus American Planning Association (APA), which filed a brief supporting the Respondents, admits that however one interprets the text and understands the Founders to have written the Takings Clause, “‘for public use’ has been read throughout our history as imposing an implied limitation on the exercise of eminent

domain – that it can be used only for public and not private uses – and this Court has accepted this interpretation.” Br. AC APA at 4.

B. Conflating Public Use and Private Takings: Petitioners’ Six Arguments as to why the Connecticut Supreme Court’s Opinion Cannot Stand

Petitioners’ next assertion is that the use of the term “public use” means that concomitantly, there must be a “private use” that is forbidden under the Takings Clause; “otherwise, ‘public use’ would have no content at all.” Pet. Br. at 28. Indeed, the Court has recognized that private takings exist as a potential for abuse of the Takings Clause, having held in several cases - *Hawaii Housing Auth. v. Midkiff*, *Thompson v. Consolidated Gas Utilities Corp.*, and *Missouri Pacific Railway Co. v. Nebraska* among them - that “purely private takings” are unconstitutional because they cannot withstand scrutiny under the public use requirement. Pet. Br. at 12. Susette Kelo and the other Petitioners’ argument that economic development does not satisfy the public use requirement can be distilled to five major points: 1) this view “nullifies” the public use clause by obliterating the difference between a public use and a private takings; 2) defining public use in this manner “places all home and small business owners at risk, especially property owners of more modest means,”; 3) condemnations for the purpose of economic development, unlike those for blight, have no geographic or other built-in limitations and are not tied to the condition of an area; 4) interpreting ‘public use’ as the Connecticut Supreme Court did invites abuse on the part of government; 5) eminent domain for economic development is not supported by case precedent; and 6) the Court should adopt the framework of analysis utilized by the Michigan Supreme Court in *County of Wayne v. Hathcock*, a 2004 case ruling the use of eminent domain for economic development unconstitutional under the Michigan Constitution.

The first four arguments are made in an intuitive manner by the Petitioners: they reason that the Connecticut Supreme Court's holding is problematic for these four reasons, but cite few cases in support of their propositions. A rather compelling exception is a case and newspaper article cited in general support of propositions two, three and four, concerning two cases wherein land was apparently condemned so that businesses which would be large contributors to the local tax base could build upon it. According to the Petitioners, in *Cottonwood Christian Center v. Cypress Redevelopment Agency* (218 F.Supp.2d 1203, C.D. Ca. 2002), the City of Cypress, California "resolved to file eminent domain proceedings against owners of a piece of vacant land upon which a church sought to build, so that Costco, a major warehouse-style discount retail outlet, which the City hoped would produce more tax revenue, could build there instead." Pet. Br. at 16, FN 12. In Swansea, Illinois, there was an apparent condemnation of a local Moose Lodge to clear land for a Home Depot. *Id.*

An online column published by the John Locke Foundation, a North Carolina think tank with conservative and libertarian leanings (www.johnlocke.org) quotes a study performed by the Institute for Justice (the same organization that has provided Petitioners with their attorneys) that found that "between 1998 and 2002 alone, there were over 10,000 filed or threatened condemnations with *Kelo*-like private-to-private transfers of property in 41 states."² The study found only one claimed taking for private use in North Carolina, in the case of a property owner whose property was condemned for the expansion of the Piedmont Triad Airport (the private party that the property owner claimed would benefit from the taking was FedEx). The Institute for Justice did not appear to consider this isolated case a potentially unconstitutional taking, noting that

cases of airport expansion involve “questions of safety” and are rare. *Id.* Nevertheless, these cases raise a fair question of whether a ruling that eminent domain for economic development is a public use could ultimately lead to its abuse by local governments eager to expand their tax base.

C. Argument Five: Case Precedent

Petitioners’ fifth and sixth argument blend together somewhat, since they primarily focus upon two Supreme Court cases (*Berman v. Parker*, 1954, and *Hawaii Housing Auth. v. Midkiff*, 1984), and examine them within the context of the Michigan State Supreme Court’s analysis in *Hathcock*. Nevertheless, it is important to isolate Petitioners’ treatment of Supreme Court case precedent and assess it for the argument’s viability, since this may be the weakest aspect of their argument. Petitioners are harmed by the Court’s repetition of two potentially conflicting themes in their eminent domain jurisprudence, yet concomitant failure to develop these themes into bright-line rules, and failure to articulate a test for how these concepts might be balanced in a situation wherein they might conflict.

The first theme is the rule that there can be no taking for a purely private use. As APA phrases it,

As an implied limitation on the power of eminent domain, the core case of a forbidden private use has always been clear: when the government takes A’s property and gives it to B, with no public justification other than the legislature’s preference for B over A. What has been less clear is just what sort of justification is necessary to elevate a taking from the A to B category and transform it into a public use.

Br. AC APA at 4.

² http://www.johnlocke.org/news_columns/display_story.html?id=1855

The second theme is implied by the above excerpt; namely, it is that courts will assess a challenged exercise of eminent domain under rational basis review. The Supreme Court reiterated this theme several times over in *Midkiff*:

In short, the Court has made it clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation'... where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.

467 U.S. 229, 241, 104 S.Ct. 2321, 2329-2330 (1984) (citations omitted).

If the locality is accorded great deference in exercising its power of eminent domain- so much so that any 'conceivable public purpose' will suffice to stamp the act as constitutional- then how are courts to *know* when a purely private taking has occurred? So long as the purely private taking is done under the guise of meeting some, not wholly irrational public purpose- even if actually done to benefit a private party- it would pass judicial muster, suggests *Midkiff*. While *Midkiff* admirably highlights the judiciary's time-honored (ever since the *Lochner* era) reluctance to 'legislate' from the bench, it leaves less clear what kinds of takings might "serve no legitimate purpose of government and... thus be void." *Id.* at 245, 104 S.Ct. at 2331.

i. Hawaii Housing Auth. v. Midkiff (1984)

The wealth of language hostile to their case in *Midkiff* forces Petitioners to distinguish it factually. *Midkiff* involved a challenge to Hawaii's Land Reform Act, which permitted the use of eminent domain as a mechanism of land redistribution. Hawaii's feudal land tenure system, which developed as the Islands were settled by Polynesian immigrants, had resulted in a high concentration of land ownership in only a

few landholders. *See id.* The Hawaii Legislature found that “concentrated land ownership was responsible for skewing the State’s residential fee simple market, inflating land prices, and injuring the public tranquility and welfare.” *Id.* at 232, 104 S.Ct. at 2325. Even though the effect of the Act was to take ownership away from large landholders and transfer ownership to their ‘tenants’ when the tenants applied for relief under the Act, the Court upheld it, writing that it could not “condemn as irrational the Act’s approach to correcting the land oligopoly problem.” *Id.* at 242, 104 S.Ct. at 2330.

ii. Berman v. Parker (1954)

The other major Supreme Court case raised by Petitioners, *Berman v. Parker*, is easier to square with the Petitioners’ case. In *Berman*, the Court upheld the District of Columbia Redevelopment Act of 1945, which entailed the condemnation of an area in D.C. in which

63.4% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating. In the judgment of the District’s Director of Health it was necessary to redevelop Area B in the interests of public health.

348 U.S. 26, 30, 75 S.Ct. 98, 101.

However, the appellant here owned a commercial property within Area B. Because the appellant’s property was not used for habitation, and because it would ultimately be taken by a private agency and redeveloped for private use, appellant argued that it could not be taken constitutionally in a condemnation meant to clear the area of blighted residential properties. “To take for the purpose of ridding the area of slums is one thing; it is quite another, the argument goes, to take a man’s property merely to develop a better balanced, more attractive community.” *Id.* at 31, 75 S.Ct. at 102. Thus the Supreme

Court characterized appellant’s argument, and then rejected it: “It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled... once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear.” *Id.* at 33, 75 S.Ct. at 102-103. The Court was persuaded by the argument that the area had to be entirely cleared so that it not revert to the same conditions, using language that compared the blighted housing to a disease and the process of redevelopment as a cure in order to re-create a healthy neighborhood.

There is some language in *Berman* that is less supportive of the *Kelo* Petitioners—namely, the Court in *Berman* reiterated its opposition to the notion that courts could strike down the project on the basis of its scope (“it is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area”). *Id.* at 35, 75 S.Ct. at 104. Nonetheless, *Berman* is generally a good case for Petitioners because it demonstrates that in situations of true blight, the legislature or locality will have almost full authority to condemn areas that suffer from the condition. The squalor described in *Berman* lies in stark contrast to the conditions described in Fort Trumbull, which even under the *Kelo* Respondents’ brief sounds like a working-class, older and slightly run-down neighborhood where the structures can be improved not by razing them to the ground, but by giving them an extra coat of paint.

iii. Use of Midkiff and Berman in the Kelo Parties’ Briefs

Petitioners do not cite the portions of *Midkiff* and *Berman* that are less supportive of their position, but they do see the two cases as analogous, representing constitutionally permissible takings because “the public use was the elimination of the undesirable

conditions, not the land's subsequent use.” Pet. Br. at 25. Conversely, Petitioners argue, there is no public purpose accomplished by the act of condemning non-blighted properties such as theirs. “Rather, in economic development condemnations, the only public benefits that might arise, if they ever come about, are completely reliant upon the private transferees of the properties putting it to private use...” *Id.* at 26.

In contrast, Respondents argue that the controlling principle yielded by *Midkiff* and *Berman* is the “recognition that unelected judges are ill-suited to the task of determining what is an appropriate public use.” Resp. Br. at 16. They acknowledge that both *Midkiff* and *Berman* recognized some role for the courts to play in determining what constitutes a public use, they insist that that role is a very narrow one and that the standard of review in cases implicating the Takings Clause is highly deferential. *Id.* at 15. Moreover, Respondents claim, “one of the primary lessons” of *Berman* and *Midkiff* “is that the need for such deference does not depend on the nature of the public use at issue.” *Id.* at 16. In other words, Respondents are not convinced by Petitioners’ distinguishing the permissibility and constitutionality of the condemnations in those cases by their argument that the public use requirement was met almost by the fact of the condemnation itself, and not by the future use of the land.

D. Petitioners’ Sixth Argument: Urging the Court to Adopt the *Hathcock* Framework of Analysis

In their sixth argument, Petitioners urge the Court to adopt the framework utilized by the Michigan Supreme Court in the 2004 case *County of Wayne v. Hathcock* when reviewing challenges to eminent domain, and to hold, as the *Hathcock* court did, that eminent domain cannot be justified under traditional categories of permissible takings.

The Michigan Supreme Court in *Hathcock* overruled a 1981 case called *Poletown Neighborhood Council v. City of Detroit*, adopting virtually verbatim the analysis of a dissenting Justice Ryan in *Poletown*.

i. Poletown Neighborhood Council v. City of Detroit (1981)

In *Poletown*, the Michigan Supreme Court upheld the City of Detroit's use of eminent domain for the purpose of creating a new factory site for General Motors. 410 Mich. 616, 304 N.W.2d 455 (1981). General Motors already owned two "old generation" facilities in Detroit, but they were outmoded due to new emission standards. Because it was more expensive to retrofit an existing plant than it was to build a new one, GM began to look for an appropriate site to build a new facility. *Id.* at 649, 304 N.W.2d at 466.

The City of Detroit was, at the time, in an economic crisis the magnitude of which was "difficult to overstate." *Id.* at 647, 304 N.W.2d at 465. Unemployment in Detroit was at 18%. *Id.* If GM chose to locate its new plant elsewhere- possibly in the Sunbelt, as was the growing trend among auto manufacturers- Detroit stood to lose at least 6,000 jobs. *Id.* at 651, 304 N.W.2d at 467. Accordingly, the City of Detroit "made its first overture" to GM in 1980, and GM responded with a detailed proposal, although the dissenting Justice clearly thought the "proposal" was more akin to a detailed list of requisite site features: "The evidence then is that what General Motors wanted, General Motors got. The corporation conceived the project, determined the cost, allocated the financial burdens, selected the site... and even demanded 12 years of tax concessions." *Id.* at 650, 304 N.W.2d at 466. The result, perhaps predictably, was Detroit's use of a 'quick-take' statute to demolish the neighborhood called Poletown, a "tightly-knit

residential enclave of first- and second-generation Americans, for many of whom their home was their single most valuable and cherished asset...” *Id.* at 658, 304 N.W.2d at 470.

Although the issue before the Michigan Supreme Court was the constitutionality of the taking as a public use and public purpose under the *Michigan State Constitution*, and not the federal one, the clauses are virtually the same. The plaintiffs in *Poletown*, like those in *Kelo*, also challenged the use of eminent domain for economic development, arguing that the incidental benefits accruing to the public via an economic development project accomplished through condemnation could not be a ‘public use.’ The Michigan Supreme Court rejected this claim, holding that although takings benefiting private interests should be examined with heightened scrutiny to ensure a public use, the condemnation of the Poletown neighborhood survived such heightened scrutiny. Despite this rule articulation, the majority opinion does not suggest that the Court applied any scrutiny at all, much less a ‘heightened’ form of scrutiny: its rationale for the holding was simply that the Michigan Legislature “has determined that governmental action of the type contemplated here meets a public need and serves an essential public purpose. The Court’s role after such a determination is made is limited.” *Id.* at 632, 304 N.W.2d at 470.

Justice Ryan issued his dissenting opinion some time after the decision was handed down, explaining that the speed with which the case had been argued and decided (there was a deadline for the City’s taking title to the property which necessitated haste) had resulted in a majority opinion which did not “adequately address” the constitutional issues. *Id.* at 646, 304 N.W.2d at 465. In Justice Ryan’s view, there could not have been

a clearer case of condemnation for the benefit of a private party. His opinion details the unfortunate position the City was in when negotiating to keep GM in Detroit and the extent to which GM was able to exploit that disadvantage- which Ryan does not denounce, noting that GM's obligations are to its shareholders and not to the City- and concludes that the case as decided amounts to "unintended jurisprudential mischief" which will "have echoing effects far beyond this case." *Id.* at 660, 304 N.W.2d at 471.

Ryan begins his analysis for the exceptions to the prohibition on takings for a private purpose by noting,

It is plain, of course, that condemnation of property for transfer to private corporations is not wholly proscribed. For many years, and probably since the date of Michigan's statehood, an exception to the general rule has been recognized. The exception, which for ease of reference might be denominated the instrumentality of commerce exception, has permitted condemnation for the establishment or improvement of the avenues of commerce [such as] highways, railroads and canals...

Id. at 670-671, 304 N.W.2d at 476.

Within this 'instrumentality of commerce' exception, Ryan writes, are three recurring themes in case law that suggest when the use of eminent domain for private corporations will be permissible: "1) public necessity of the extreme sort, 2) continuing accountability to the public, and 3) selection of land according to facts of independent significance." *Id.* at 674-675, 304 N.W.2d at 478. The first category includes situations wherein particular configurations of property are necessary (i.e., contiguous, narrow or straight tracts of land) for the private corporation to conduct its business, such as railroads. In the second category, the 'private' taking is justified by the retention of government control over the corporation; again, railroads provide an example because "railroad companies entitled to invoke eminent domain are subject to a panoply of

regulations.” *Id.* at 677, 304 N.W.2d at 479. Finally, ‘facts of independent significance’ refers to situations wherein the determination of the land to be condemned is made without consideration of the corporation’s private interests. The clearance of blighted or unsafe housing is an example of the last category. *Id.* at 680, 304 N.W.2d at 480.

ii. County of Wayne v. Hathcock (2004)

In 2004, the Michigan Supreme Court vindicated Justice Ryan by importing his dissenting opinion into their *County of Wayne v. Hathcock* holding, which overruled *Poletown* and held that the condemnation of property for ‘The Pinnacle Project’- a 1,300 acre business and technology park- was unconstitutional under the Michigan State Constitution. Here, the County occupied a fairly sympathetic position- it had been trying to comply with Federal Aviation Administration regulations in planning the park. Those regulations required any property acquired through a noise abatement program, which the County had implemented in the course of renovating and expanding its airport, to be “put to economically productive use.” 471 Mich. 445, 452, 684 N.W.2d 765, 770 (2004).

The trial court not unreasonably analogized the takings, which had occurred when the County attempted to acquire scattered parcels throughout the project area and some landowners refused to sell, to the *Poletown* case and upheld them as having a public purpose (namely, the development of the business and technology park, a form of economic development). The Michigan Supreme Court relied on the categories of permissible condemnation for private corporations, articulated by Justice Ryan in *Poletown*, in striking down the Pinnacle Project takings for a failure to implicate any of those categories: 1) there was no ‘public necessity’ in terms of the assembly of land, 2) the Project was not subject to public oversight similar to a highly regulated but private

corporation, and 3) there were no facts of independent significance and “nothing about the *act* of condemning defendants’ properties that serves the public good in this case.” *Id.* at 447, 684 N.W.2d at 783-784. The Court overruled *Poletown* with an argument that goes straight to the heart of the *Kelo* case:

Every business, every productive unit in society does... contribute in some way to the commonwealth. To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy’s health is to render impotent our constitutional limitations on the government’s power of eminent domain. *Poletown*’s economic benefit rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. After all, if one’s ownership of private property is forever subject to the government’s determination that another private party would put one’s land to a better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, ‘megastore’ or the like.

Id. at 482, 684 N.W.2d at 786

iii. Use of Poletown and Hathcock in the Kelo Parties’ Briefs

The *Kelo* Petitioners assert that the U.S. Supreme Court’s prior opinions fall into the same categories as those developed in *Poletown* and adopted in *Hathcock*, and urge the Court to hold the use of eminent domain for private development unconstitutional because it does not fit into any of these categories. The Respondents ignore *Poletown* and *Hathcock*, perhaps wisely since it makes a compelling argument against their position and since it is not controlling case precedent, coming from the Michigan Supreme Court. However, APA attacks Petitioners’ use of *Hathcock* in its amicus brief, terming the case “unworthy of emulation.” Br. AC APA at 14. APA’s primary concern with an adoption of *Hathcock*-style reasoning is that

it would seriously distort the process of development planning, by skewing economic development projects toward locations most plausibly characterized as blighted. Proper economic development planning looks to a wide range of factors, including not just the condition of existing properties, but also the potential for future economic activity in the area, population densities, proximity to transportation facilities, the presence or absence of public amenities, and other variables. The straightjacket *Hathcock* seeks to impose on eminent domain could undermine the quality of planning for economic development, to the detriment of all the community.

Br. AC APA at 17.

It is difficult to know which view the Court will find more compelling, especially since news reports of the arguments did not mention specific questions from the Justices on either *Poletown* or *Hathcock*. . However, APA's amicus brief mounts a strong attack against the rationale of the *Hathcock* majority, drawing on APA's expertise and highlighting some of the factors crucial to proper economic development planning that both Petitioners and Respondents are silent upon.

- 2. Even if the use of eminent domain for economic development is not per se unconstitutional, the Court should apply a heightened scrutiny to cases wherein there is a transfer to private corporations to ensure that there is a reasonable certainty of public benefits.**

Petitioners argue in the alternative that even if economic development can constitute a public use under the Takings Clause, the Court should scrutinize the takings closely to ensure there is a reasonable certainty that the claimed economic benefits will take place. It is perhaps the weakest of all of Petitioners' arguments, because it asks the Court to do something the Court attempts to avoid, which is getting entrenched in a position of oversight over policy matters. It would also require the Court to come to terms with the language it used in previous cases concerning great deference to local

government and the Legislature in the exercise of eminent domain. Overruling prior cases, or having to rationalize seemingly inconsistent lines of analysis among apparently similar cases, are results to be avoided if possible in constitutional jurisprudence. The Petitioners attempt to assure the Court that the reasonable certainty test will not result in judicial entanglement with policy, but they are not terribly convincing:

A reasonable certainty test does not require courts to decide if a particular project is a good idea. Instead, it asks courts to look at plans and timelines to see if there is a reasonably foreseeable use of the property and to look at standards and restrictions in contracts, statutes and other documents to see if they assure a substantial likelihood of the purported public benefits.

Pet. Br. at 37.

Petitioners may take up this line of argument because they won at the trial court level on the fact that there was apparently no set use planned for the properties on Parcel 4A. If the Court were to adopt a ‘reasonable certainty’ standard, that might save the Petitioners’ homes on Parcel 4A, even if they lost the larger battle as to the constitutional question. Petitioners reason that “conventional condemnations almost always have a reasonably foreseeable use,” whereas economic development does not, and cite some case law on ‘speculative’ condemnations struck down by state courts. Pet. Br. at 35.

Respondents make the counterargument that even under a higher standard of scrutiny and a ‘reasonable certainty’ standard- which they believe, probably correctly, is not supported by case precedent- the economic development planned for Fort Trumbull would survive the test. “[T]his case falls on the constitutional side of any reasonable line. New London is economically downtrodden and has given all of the assurances of successful development that reasonably can be expected of a city.” Resp. Br. at 49. The Respondents remind the Court that the plan was and is subject to numerous statutory

requirements and that it is designed to “capture the maximum benefit” from the area’s proximity to the Pfizer plant. Respondents conclude, “[t]o ask for any more would be asking for an absolute guarantee of the future – and that is a standard too harsh for any city to satisfy.” *Id.*

Forecasting the *Kelo* Result

The reports of the arguments before the Court were conflicting. An article printed in *U.S.A. Today* the day after arguments was entitled, “Justices wary of stopping land seizure,” while another article written for the *Legal Times* points in the opposite direction, headlined, “During *Kelo* Arguments, Justices Feel for Homeowners.” Both articles portrayed Justice Ginsburg as sympathetic to the Respondents; she appeared to have been convinced that New London was an economically depressed city as a whole and said in reference to the takings and development plan, “More than tax revenue was at stake.” Tony Mauro, *During ‘Kelo’ Arguments, Justices Feel for Homeowners*, LEGAL TIMES, Feb. 23, 2005.³

In contrast, Justice Scalia empathized with the homeowners. During the argument of the attorney for New London, he interjected, “You’re taking the home of someone who doesn’t want to sell. That counts for nothing?” *Id.*

Points made about the potential use of eminent domain to favor more desirable and economically productive land owners were not lost on Justice Sandra Day O’Connor, who asked the attorney for New London whether a city could condemn a Motel 6 in order to clear the land for a Ritz-Carlton Hotel. The attorney responded with a ‘yes.’ *Id.*

³ <http://www.law.com/jsp/article.jsp?id=1108992917099>

The arguments at one point indicated the Court's attraction to a compromise approach, by offering property owners whose property is taken for private development a premium above 'just compensation.' The *Legal Times* reports that both Justices Kennedy and Breyer questioned the attorney for New London on this point; the attorney's "only reply" was that in the instant case, the homeowners had been offered relocation loans "to assist them in moving to comparable properties." *Id.*

As discussed above, there are certain arguments likely to be attractive to the Court, and others that will probably be unattractive to the Court. Petitioners have the advantage of a substantial body of case precedent that clearly contemplated situations wherein a purely private taking would occur, and stated that such a taking would be unconstitutional. The fact that the Court granted certiorari on this case, despite the strength of the language in *Midkiff* as to the highly deferential, rational basis standard of review in eminent domain cases, suggests either that the Court may be open to revising the standard of review in these cases, or that the instant case does not satisfy even a rational basis standard.

However, Petitioners also rely on the envisioned horrors of economic development-type takings, whereas Respondents argue logically that there are built-in disincentives to the exercise of eminent domain that ensure it will not be abused by localities. Moreover, Respondents unquestionably retain an advantage in that they are attempting to address a social problem through eminent domain, a local police power, which is within the Respondents' realm of authority; the only dispute in that aspect appears to be the extent of the social problem, and even Petitioners do not go so far as to suggest that the Fort Trumbull area is untroubled and that New London is thriving

economically. Respondents' biggest advantage is probably that a Court ruling in their favor would require little in the way of overruling case precedent or distinguishing the instant case from *Berman* and *Midkiff*.

Ultimately, the author's prediction is that the Court will find for Respondents, but that it may do so in a way that provides some acknowledgement of the Petitioners' concerns. The most likely way the Court would do this would be to enact a 'premium' above and beyond 'just compensation' in cases where local government wishes to take land for a dubious public purpose. However the Court holds, it will have to find some way to describe economic development under the public use requirement, and the Court may reiterate, as it has in so many previous cases, that a truly private taking is unconstitutional. It is likely that the Court will look to the circumstances surrounding the taking to ascertain whether a 'truly private' taking has occurred, and that it will find no such offense to the Constitution here because of the conditions detailed by Respondents.

Conclusion: what the Court *should* hold in *Kelo*

Kelo may ultimately, whatever the Court holds, be a case without winning consequences for the field of planning. If the Petitioners prevail, local government will have to pursue other methods of effecting economic development that are more time-intensive and expensive, possibly resulting in the loss of valuable opportunities in those communities who need economic development the most. A ruling for Petitioners might also placing too much authority in the individual property owner to determine the long term planning of an entire city, thereby dealing a blow to the essence of the field, which is to take a comprehensive and long-term approach to growth and land use management.

However, a ruling for Respondents deals much the same blow to the field of planning by allowing *developers*, not planners, to dictate almost every planning-related aspect of a major land use venture. In particular, a ruling for Respondents validates developers' insistence upon the availability of vast, blank expanses of land for their creations and places them at the drafting board, rather than city and regional planners.

It is undeniably true that some forms of development do require larger tracts of land and that the developers of those forms have limited latitude to negotiate space requirements. The Pfizer facility in *Kelo* is probably a good example of this type of development; one of the world's largest pharmaceutical companies is going to require considerably more space for research, development and administration than a small-scale manufacturer of goods such as a furniture design store. But several of the other forms of development at issue in *Kelo*, such as offices and 'upscale' housing- are not so space-dependent; the creation of loft housing in a number of downtown areas in small to mid-sized cities (Durham, North Carolina and Daytona Beach, Florida among them) clearly demonstrate the unique ability of some land forms to function as infill development- traditionally, the type of development that slows urban sprawl and helps revitalize urban areas.

APA, surprisingly, does not appear to recognize infill development as a concept in its amicus brief in *Kelo*. The organization *starts* with the assumption that what developers want, developers must have: "developers of new shopping centers, townhouse complexes, and business centers need large tracts of land to configure their projects in ways that will attract customers." Br. AC APA at 18. The brief gives the impression that development on small tracts of land is simply impossible. But we *know*

that such development is not, technically, impossible- what we do not know, and what APA does not attempt to ascertain, is the number of ways in which American growth patterns, lending practices, consumer practices and ingrained planning practices might make such development practically impossible. Were we to know these obstacles, the planning field might be able to help cities and localities use their authority to foster conditions for this type of development- that is, various forms of development that can be adjusted to fit within smaller, urban tracts of land. In the *Kelo* case, APA's expertise in this area might have helped identify uses for the tracts of land resulting from those homeowners willing to sell- by all indications, this constitutes a substantial portion of the original plan area. Instead, APA steps back and hands control of the drafting board to the developers who, naturally, want to proceed with the greatest of ease and the fewest amount of obstacles. The brief is a surprising, and disappointing, abdication of the organization's responsibility to instruct American communities on ways to 'grow smarter.' For those reasons, the author hopes that the Court rules for Petitioners- if nothing else, perhaps such a holding would force a revolution in our ways of thinking about development in an era when big-box, football-field-sized development rules the land, and strips it daily of its features and character.