



**TOURO COLLEGE**  
JACOB D. FUCHSBERG LAW CENTER  
*Where Knowledge and Values Meet*

Digital Commons @ Touro Law  
Center

---

Scholarly Works

Faculty Scholarship

---

2005

## Community Redevelopment, Public Use, and Eminent Domain

Patricia E. Salkin

*Touro Law Center*, [psalkin@tourolaw.edu](mailto:psalkin@tourolaw.edu)

Lora A. Lucero

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Land Use Law Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

37 Urb. Law. 201 (2005)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

# Community Redevelopment, Public Use, and Eminent Domain

Patricia E. Salkin\*

Lora A. Lucero\*\*

## Table of Contents

I. Introduction .....	202
II. The Concept of “Public Use” .....	204
III. Community Redevelopment—The Planners’ Perspective .....	208
IV. Eminent Domain Reaches Public Referendum, State High Court, and U.S. Supreme Court in 2004 .....	212
A. <i>County of Wayne v. Hathcock</i> —“Public Use” in Michigan .....	212
1. Background .....	212
2. The Michigan Supreme Court Decision .....	214
a. Review Under the Michigan Statutes .....	214
b. Review Under the Michigan Constitution .....	215
B. Lakewood, Ohio—The Public Speaks at the Ballot Box ...	218
1. Background .....	218
2. The Case for Redevelopment .....	220
3. Opposition to the Plan .....	221
4. Election Day 2003 and After .....	222
C. The U.S. Supreme Court Agrees to Hear Connecticut Case in 2005 .....	223
1. Background .....	224
2. The Connecticut Supreme Court Decision .....	226
3. The Question Before the U.S. Supreme Court .....	231
4. <i>Amici Curiae</i> Chime in On Both Sides .....	233
V. Where Do We Go from Here? .....	240

\*Patricia E. Salkin is Associate Dean and Director of the Government Law Center of Albany Law School. Dean Salkin chairs the American Planning Association’s *Amicus Curiae* Committee. Dean Salkin gratefully acknowledges the research assistance of Albany Law School students Michael Donohue, Allyson Phillips, Alejandra Rosario, and Stacey Stump. This article is based in part on a paper delivered by Patricia E. Salkin at the American Institute for Economic Research in Great Barrington, Massachusetts, on November 5, 2004. It has been updated to reflect more recent developments.

\*\*Lora A. Lucero, AICP, is a land use attorney and planner with a consulting practice in Albuquerque, New Mexico. Ms. Lucero staffs the American Planning Association’s *Amicus Curiae* Committee.

## I. Introduction

WHEN GOVERNMENT CONVERTS PRIVATE PROPERTY for public use, there are often dissatisfied property owners who may resent that the government has determined that their property is needed for a public purpose. Further, they may resent the level of compensation that government determines is due for this conversion. The Fifth Amendment to the U.S. Constitution places two limitations on the government when it takes private property: it must do so for public use and it must pay just compensation.<sup>1</sup> The concept of what constitutes a public use has evolved over the decades from traditionally accepted uses such as public roads, buildings (e.g., government buildings and schools), and utilities to urban redevelopment. The broad concepts of community redevelopment have been stretched to encompass needed economic development projects that promise jobs, tax revenue, and other public benefits similar to those currently being debated before the courts of our country. Perhaps central to the current debate before the U.S. Supreme Court in *Kelo v. City of New London*<sup>2</sup> is the critical question of whether government may condemn private property for use by private developers to advance a public purpose.<sup>3</sup> According to the Institute for Justice, seven states allow for condemnation for private business development<sup>4</sup> while eight states prohibit this practice.<sup>5</sup>

---

1. U.S. CONST. art V (The Fifth Amendment provides “. . . Nor shall private property be taken for public use without just compensation.”); see, e.g., Edward J. Sullivan & Nicholas Cropp, *Sources of “Public Use” Limitations—Takings or Due Process?*, 27 ZONING & PLAN. L. REP. 1 (2004).

2. *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), cert. granted, 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04–108).

3. See Associated Press, *Supreme Court Will Determine When Cities May Seize Private Land*, DETROIT FREE PRESS, Sept. 28, 2004, available at [http://www.freep.com/news/statewire/sw104821\\_20040928.htm](http://www.freep.com/news/statewire/sw104821_20040928.htm) (last visited Feb. 17, 2005) (“The Supreme Court agreed Tuesday to decide when governments may seize people’s homes and businesses for economic development projects, a key question as cash-strapped cities seek ways to generate tax revenue.”); see also Lyle Denniston, *A New Look at Property Rights, and Other Issues*, SCOTUSBLOG, Sept. 28, 2004, at [http://www.goldsteinhowe.com/blog/archive/2004\\_09\\_26\\_SCOTUSblog.cfm](http://www.goldsteinhowe.com/blog/archive/2004_09_26_SCOTUSblog.cfm) (last visited Mar. 3, 2005) (noting that “[s]uch private-to-private transfers have become almost commonplace across the Nation, as hard-pressed communities look for ways to create jobs, increase tax revenue and revitalize their economies . . .”).

4. See Dana Berliner, *Public Power, Private Gain*, INSTITUTE FOR JUSTICE (2003). Berliner’s report contains a state-by-state analysis of laws dealing with condemnation for private business development. *Id.* The report can be downloaded in sections at <http://www.castlecoalition.org/report> (last visited Feb. 18, 2005). Berliner’s report indicates that the following states allow for condemnation for private business development: Connecticut, Kansas, Maryland, Michigan, Minnesota, New York, and North Dakota. According to Berliner’s report, there have been more than 10,000 filed or threatened condemnations involving transfers of property from one private owner to another in forty-one states between 1998 and 2002. *Id.* at 2.

5. See Berliner, *supra* note 4. Berliner’s report indicates that the following eight

Section II of this article begins by briefly examining the development of the “public use” clause with respect to eminent domain. Section III discusses a recent policy guide adopted by the American Planning Association (APA) on community redevelopment. This guide represents a sensible approach to planning for, and supporting the implementation of, community redevelopment initiatives. Section IV then examines three significant cases from 2004 that have crystallized around the question of what constitutes a valid public purpose under eminent domain when the government’s motivation is to promote economic development in the municipality. The first case, *County of Wayne v. Hathcock*,<sup>6</sup> decided by the Michigan Supreme Court, reversed a long-standing national precedent,<sup>7</sup> thus narrowing under state law when private property may be taken by the government to be transferred to another private owner for the purpose of economic development.<sup>8</sup> The second case involved an effort by elected officials in Lakewood, Ohio, to condemn certain property for the purpose of bringing commercial development to the city’s West End.<sup>9</sup> This ultimately failed when citizens spoke at the ballot box, rejecting the proposal.<sup>10</sup> The third case, *Kelo v. City of New London*,<sup>11</sup> had oral argument before the U.S. Supreme Court on February 22, 2005, and is awaiting a decision. All three cases involved plans by the government to promote community redevelopment by attracting commercial development that was expected to bring jobs and revenue into the impacted communities. In all three cases, however, there was significant community opposition to the use of eminent domain to accomplish these goals. Finally, Section V of this article concludes that the U.S. Supreme Court should confirm that economic development is a valid public use for the purpose of eminent domain, and that the public-private partnerships that have evolved to assist governments in meeting redevelopment<sup>12</sup> needs are a necessary and appropriate strategy fostering a valid public use.

---

states prohibit condemnation for private business development: Arkansas, Florida, Illinois, Kentucky, Maine, Montana, South Carolina, and Washington. *Id.*

6. 684 N.W.2d 765 (Mich. 2004).

7. See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981). *Hathcock* overruled this case. See *Hathcock*, 684 N.W.2d at 787.

8. *Hathcock*, 684 N.W.2d at 484.

9. Stephen Gross, *The Rise and Fall of the Shops at West End 2* (May 9, 2004), at <http://lkwdpl.org/currentevents/westend/gross.pdf> (last visited Mar. 3, 2005).

10. *Id.*

11. *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04–108).

12. See AMERICAN PLANNING ASSOCIATION, POLICY GUIDE ON PUBLIC REDEVELOPMENT (2004), available at <http://www.planning.org/policyguides/pdf/Redevelopment.pdf> (last visited Feb. 17, 2004) [hereinafter *APA Policy Guide*]. The American Planning Association’s Policy Guide on Public Redevelopment explains, “Public agencies be-

## II. The Concept of “Public Use”

The debate over what constitutes a “public use” in the context of takings pursuant to the Fifth Amendment is a fiercely contested one.<sup>13</sup> Relying on a trilogy of landmark cases—*Berman v. Parker*,<sup>14</sup> *Poletown Neighborhood Council v. City of Detroit*,<sup>15</sup> and *Hawaii Housing Authority v. Midkiff*<sup>16</sup>—courts across the country routinely review condemnation actions where the government’s strategy involves a private entity to further the underlying public use for which the action was instituted. In the cases that have allowed these condemnations, the justification has been that although the property is being used by a private entity, it is serving a “public purpose.”<sup>17</sup> These decisions have more recently sparked a debate over the difference, if any, between a “public use” and a “public purpose” or “public benefit.”

In their article, *Sources of “Public Use” Limitations—Takings or Due Process?*,<sup>18</sup> Edward Sullivan and Nicholas Cropp analyze the different interpretations of the Takings Clause that have been employed by the courts. They set forth the notion that although many courts have interpreted the inclusion of the term “public use” as a prerequisite for the taking, this is not the only way to interpret the language.<sup>19</sup> “By saying ‘nor shall private property be taken for public use without just compensation,’ the clause states that, when a government takes property for public use, it must compensate justly. . . . The clause *does not* specifically say what happens when a government takes for private use. . . .”<sup>20</sup> Sullivan and Cropp state that property owners who make

---

lieve that these partnerships present the most legitimate, effective and successful practices of implementing public objectives, public purposes, and public benefits.” *Id.* at 4.

13. See 2A NICHOLS ON EMINENT DOMAIN § 7.02[1] (J. Sackman ed., 3d ed. 2003). In fact, scholars point to the fact that there is no precise or fixed definition within the context of eminent domain.

14. 348 U.S. 26 (1954). The Court in *Berman* noted, “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.” *Id.* at 33–34.

15. 304 N.W.2d 455 (1981).

16. 467 U.S. 229 (1984). In this case, the Court stated, “where the exercise of the eminent domain power is rationally related to a conceivable public purpose, [this] Court has never held a compensated taking to be proscribed by the Public Use Clause.” *Id.* at 241.

17. See *Berman*, 348 U.S. 26 (holding that condemnation was permissible in order to revitalize a blighted area in Washington D.C.); *Midkiff*, 467 U.S. at 246 (holding that condemnation was necessary in order to remedy the “evils of concentrated property ownership in Hawaii”).

18. Edward J. Sullivan & Nicholas Cropp, *Sources of “Public Use” Limitations—Takings or Due Process?*, 27 ZONING & PLAN. L. REP. 8 (2004).

19. *Id.*

20. *Id.* But see RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER

the argument that the condemnation is not justified because it is not for a "public use" will face much resistance due to the expansive interpretation of the term by the courts.<sup>21</sup>

*Berman* is often cited as one of the leading cases in the exercise of the power of eminent domain for a public use. The landowners in this case attacked the constitutionality of the District of Columbia Redevelopment Act of 1945.<sup>22</sup> Under this Act, the government was authorized to take property in order to eliminate substandard housing and blight.<sup>23</sup> Section Two of the Act stated that "the acquisition and the assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan . . . is hereby declared to be a public use."<sup>24</sup>

The Act created the District of Columbia Redevelopment Land Agency, which was granted the power to acquire property through the use of eminent domain in order to redevelop the blighted areas.<sup>25</sup> The National Capital Planning Commission was directed to "make and develop 'a comprehensive or general plan' of the District, including 'a land-use plan' which designates land for use for housing, business, industry, recreation, education . . . and other general categories of public and private uses of the land."<sup>26</sup> Once the plan was adopted and "approved by the Commissioners, the Planning Commission certifi[ed] it to the Agency," which was then "authorized to acquire and assemble the real property in the area."<sup>27</sup> After the land was acquired, the Agency was authorized to transfer the land to be used for public purposes such as schools, streets, and utilities, to public agencies.<sup>28</sup> The remainder of the land was to be leased or sold to a redevelopment company, individual, or partnership.<sup>29</sup> The contracts were to provide that the land would not be used in any way which "[did] not conform to the plan."<sup>30</sup> "Preference [was] to be given to private enterprise over public agencies" for the execution of the redevelopment plan.<sup>31</sup>

---

OF EMINENT DOMAIN 162 (Harvard Univ. Press 1985) (stating that "[a]t a minimum the public use requirement is a strict limitation upon the power of government to take private property.")

21. Sullivan & Cropp, *supra* note 18; See NICHOLS ON EMINENT DOMAIN, *supra* note 13, at § 7.01[1], 7.02[3] (Many courts have broadly construed the "public use" clause to include actions that "further the public good or general welfare.").

22. *Berman*, 348 U.S. at 28; see also D.C. CODE ANN. §§ 5-701 to 5-719 (1951).

23. *Id.* at 28.

24. *Id.* at 29.

25. *Id.*

26. *Id.* at 29.

27. *Berman*, 348 U.S. at 30.

28. *Id.* at 30.

29. *Id.*

30. *Id.*

31. *Id.* at 30.

The landowners in *Berman* owned a department store located on property acquired through the Act.<sup>32</sup> “They claim[ed] that their property [could] not” constitutionally be taken because “it is commercial, not residential property; it is not slum housing; it will be put into the project under the management of a private, not a public, agency and redeveloped for private, not public, use.”<sup>33</sup> The district court defended the Act “by construing it to mean that the Agency could condemn property only for the reasonable necessities of slum clearance and prevention, its concept of ‘slum’ being the existence of conditions ‘injurious to the public health, safety, morals and welfare.’”<sup>34</sup>

The Supreme Court affirmed the decision of the district court holding that “once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.”<sup>35</sup> Therefore, the Agency was permitted to acquire whatever property it deemed necessary in order to implement the redevelopment project.<sup>36</sup>

While the Court in *Berman* set precedent for the redevelopment of blighted areas, the Court in *Midkiff* recognized that the regulation of an oligopoly and the evils associated with it was a valid public use of the condemned land. The Court in *Midkiff* addressed the issue of whether the Public Use Clause “prohibit[ed] the State of Hawaii from taking, with just compensation, title in real property from [the owners] and transferring it to lessees in order to reduce the concentration of ownership of fees simple in the State.”<sup>37</sup>

The Hawaii Legislature enacted the Land Reform Act of 1967<sup>38</sup> to remedy land distribution problems responsible for “skewing the State’s residential fee simple market, inflating land prices, and injuring the public tranquility and welfare.”<sup>39</sup> The Act was passed after the legislature discovered that due to the way the land in Hawaii had been distributed when it was first settled, 49% of the land was owned by state and federal governments while another 47% was owned by only seventy-two private landowners.<sup>40</sup> The Act authorized the condemna-

---

32. *Berman*, 348 U.S. at 31.

33. *Id.*

34. *Id.*

35. *Id.* at 35–36.

36. *Id.* at 36.

37. *Midkiff*, 467 U.S. at 231–32.

38. HAW. REV. STAT. §§ 516–1 to 516–9 (2003).

39. *Midkiff*, 467 U.S. at 232.

40. *Id.*

tion of residential tracts in order to transfer ownership to existing lessees.<sup>41</sup> Under the Act, tenants living on single-family residential lots within developmental tracts at least five acres in size were entitled to ask the Hawaii Housing Authority (HHA) to condemn the property on which they lived.<sup>42</sup> A public hearing would then be held by the HHA to “determine whether acquisition by the State of all or part of the tract will ‘effectuate the public purposes’ of the Act.”<sup>43</sup> If the condemnation was approved, the land would then be sold to the existing lessee.<sup>44</sup>

The Supreme Court held that the Act was constitutional.<sup>45</sup> In its opinion, the Court stated that “the mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose.”<sup>46</sup> The Court found that the “public purpose” served by the Act, the regulation of an oligopoly and the evils associated with it, was a classic exercise of a state’s police powers.<sup>47</sup>

Until it was overruled by *County of Wayne v. Hathcock*<sup>48</sup> in 2004, *Poletown* was one of the leading cases cited for the proposition that the acquisition of property through the use of eminent domain for economic development was permissible. In *Poletown*, the Detroit Economic Development Corporation planned on acquiring, by condemnation if necessary, a large tract of land to be conveyed to General Motors Corporation as a site for construction of an assembly plant.<sup>49</sup> The landowners in the case brought suit in Wayne Circuit Court to challenge the project on a number of grounds.<sup>50</sup> Judgment was granted for the municipality and the landowners’ claim was dismissed.<sup>51</sup> The Michigan Supreme Court granted a motion for immediate consideration. The main question addressed in the appeal was whether “a municipality [can] use the power of eminent domain granted to it by the Economic Development Corporations Act, to condemn property for transfer to a private corporation to build a plant to promote industry and commerce, thereby

---

41. *Id.* at 233.

42. *Id.*

43. *Id.*

44. *Midkiff*, 467 U.S. at 234.

45. *Id.* at 244.

46. *Id.* at 243–44.

47. *Id.* at 242; *See Kelo*, 843 A.2d at 578 (stating in the dissent that “under this more expansive interpretation of the term, the United States Supreme Court has held that the scope of eminent domain is ‘coterminous with the scope of the sovereign’s police powers.’”).

48. 339 N.W.2d 403 (Mich. 2004).

49. *Poletown*, 304 N.W.2d at 457.

50. *Id.*

51. *Id.*



adding jobs and taxes to the economic base of the municipality and state.”<sup>52</sup>

The landowners argued that in the law of eminent domain there must be a distinction between “public use” and “public purpose.”<sup>53</sup> They challenged the constitutionality “of using the power of eminent domain to condemn one person’s property to convey it to another private person in order to bolster the economy.”<sup>54</sup> In holding that the use of eminent domain was permissible, the *Poletown* court stated that “the power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental.”<sup>55</sup> Citing *Berman*, the court stated that “the United States Supreme Court has held that when a legislature speaks, the public interest has been declared in terms ‘well-nigh conclusive.’”<sup>56</sup>

These three cases did not settle this area of the law of eminent domain and public use; rather, the landscape has become increasingly controversial and divisive in the state courts. Cases such as *Hathcock* and *Kelo* are proof that the rules governing this area of law continue to evolve.

### III. Community Redevelopment—The Planners’

#### Perspective

In April 2004, the American Planning Association<sup>57</sup> adopted a policy guide on public redevelopment, stating that “[g]overnment-initiated redevelopment activities serve a valid public purpose when the public agency can demonstrate through an adopted plan or other public process that existing conditions make it impractical or impossible for market forces to act in the public’s best interest.”<sup>58</sup> The guide explains that often times the private sector is better equipped to accomplish community redevelopment goals, and when public-private partnerships ex-

---

52. *Id.*

53. *Id.*

54. *Poletown*, 304 N.W.2d at 458.

55. *Id.* at 459.

56. *Id.*

57. The American Planning Association is a nonprofit public interest and research organization representing more than 37,000 professional planners nationwide.

58. *APA Policy Guide*, *supra* note 12, at 2. The policy was precipitated by, among other things, the increasing complexity of redevelopment that now requires a large and complex team of financing specialists, underwriters, fiscal analysts, and others; the opportunity to redress issues of environmental justice; to avoid abuse and the perception of abuse of process; and to promote effective planning for redevelopment. *Id.* at 6–7.

ist, they may best promote the larger public interest.<sup>59</sup> The guide asserts that “[g]iven traditionally distinguishable skill sets, and the mixed experience of success and failure of governments acting as redevelopers, it has become increasingly popular for governments to act in concert with private developers to effectively take advantage of the best that both have to offer.”<sup>60</sup> The guide further notes that the public and private sectors each have things that they may separately be better suited to address, but that “[w]orking together, the public and private sectors can achieve more than working independently or at cross purposes.”<sup>61</sup>

The courts have long recognized the validity of public-private partnerships. Many states and local governments have contracted with private entities to manage facilities such as prisons, with an estimated average savings between 20 percent and 50 percent.<sup>62</sup> Philadelphia, for example, saved \$26.6 million by privatizing its nursing homes, a 54 percent cost reduction.<sup>63</sup> Private corporations are most often able to manage state facilities in a more efficient way because they are faced with competition.<sup>64</sup> Governments have also created partnerships with private corporations to provide services to the public. These partnerships are aimed at lowering the costs of providing the public services, and can also be used to generate financial gains for the municipality.<sup>65</sup> Some examples of these partnerships are as follows:

---

59. *Id.* Noting that:

Many communities have observed through experience that the private sector is most often more nimble, more capable of making appropriate risk/reward decisions, and, in general, more effective at being developers or redevelopers than is the public sector. At the same time, the use of the authority and power of the public to act in the best interests of the community may be, in some circumstances, the only means by which development or redevelopment may overcome market forces in a way that best promotes the larger public interest.

*Id.* at 3–4.

60. *Id.* at 4. The policy further comments that these “public/private partnerships are typically not recognized as a ‘partnership’ as defined by state laws governing incorporation and liability” and that their form and function varies widely, at times consisting of formal “written agreements that articulate the roles, responsibilities, liabilities and commitments,” and at other times a one-time arrangement where the government takes “action to assemble or prepare property in advance of desired private redevelopment activity.” *Id.*

61. *Id.* “The unique nature of community growth and development in the United States is a product of the balance between public rights and responsibilities and private property rights and motivations.” *Id.*

62. Paul Kengor, *Pennsylvania: The Privatization State; Ed Rendell is Uniquely Placed to Bring About the Most Important Reform*, PITTSBURGH POST-GAZETTE, Jan. 17, 2003, at A15.

63. *Id.*

64. *Id.* But see Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003) (cautioning that these agreements may lead to the diminution of public accountability for services).

65. See Dave Saltonstall, *Park Ads Plan a Sign of Tough Times*, N.Y. DAILY NEWS,

- New York State has leased Stewart and Niagara Falls airports to private operators;
- New Hampshire and Georgia have leased state parks to private firms;
- Indianapolis awards city contracts to churches to maintain neighborhood parks;
- Bryant Park in New York City was revitalized by a voluntary local business association;
- New York's Central Park is maintained by a private nonprofit organization;
- Riverside County in California contracts with a private company to manage its library system;
- City Municipal Services, Inc., a private company in Michigan, is serving as the public works department for several towns;<sup>66</sup> and
- NASA uses private contractors to monitor its unmanned satellites in space.<sup>67</sup>

Creating partnerships with the private sector has been met with opposition in some places. For example, in 1995, in response to threats from the Seattle Mariners that they would leave the state, the Washington State Legislature passed the Stadium Act, which appropriated \$445 million for the building of a new stadium with a retractable dome to be used by the club.<sup>68</sup> This legislation was in response to a county-wide referendum rejecting the same proposed sales tax on residents of King's County.<sup>69</sup> Despite a state constitutional ban on loans to private corporations, the Washington law represented a series of private and public partnerships designed to spur economic development.<sup>70</sup> The authorization of public funds for private development in Washington State was met with several legal challenges.<sup>71</sup>

---

Feb. 15, 2002, at 20 (discussing New York City Mayor Bloomberg's plan to allow private companies to sponsor city parks).

66. See City Municipal Services, Inc., *City Management Corporation*, at <http://www.path-way.com/marino/fmunicpl.html> (last visited Feb. 17, 2005) (describing some of the contracts they handle for maintaining and repairing sewers, water mains, roads, snow removal and salting, garbage collection, recycling, and building demolition).

67. E.S. Savas, *Privatization and the New Public Management*, 28 *FORDHAM URB. L.J.* 1731, 1734 (2001).

68. O. Casey Corr, *The Subsidy Court—Mariner's Stadium Deal Example of Permissiveness with Public Funds*, *SEATTLE TIMES*, Aug. 30, 1998, at B5.

69. Nick Beermann, *Legal Mechanisms of Public-Private Partnerships: Promoting Economic Development or Benefiting Corporate Welfare?*, 23 *SEATTLE U. L. REV.* 175, 176 (1999).

70. *Id.* at 177.

71. See *Citizens for More Important Things v. King County*, 932 P.2d 135 (Wash. 1997); *CLEAN v. State*, 928 P.2d 1054 (Wash. 1996); *City of Tacoma v. Taxpayers of Tacoma*, 743 P.2d 793 (Wash. 1987).

Many states have amended their laws to allow for partnerships between municipalities and private companies. For example, the school board in Falls Church, Virginia, was able to contract with Public Private Alliances to take over the entire process of building the city a new middle school rather than going through the traditional route of acquiring land and then soliciting bids for design and construction.<sup>72</sup> This was a result of a new state law allowing local governments to partner with private developers to build schools and other public facilities.<sup>73</sup>

The APA supports a statutory requirement that redevelopment areas may only be established when the local government agency performing the redevelopment has adopted a local comprehensive land-use plan, and when the redevelopment plan for the area conforms to this comprehensive plan.<sup>74</sup> The APA also supports state legislation that includes specific “authority to engage in redevelopment projects” that include both the “prevention and elimination of blight and a provision for public-private partnerships.”<sup>75</sup> The APA encourages state legislation aimed at “preserving the ability of cities to use redevelopment tools and techniques, including eminent domain, when appropriate to achieve a well-defined public purpose adopted through an inclusive public process.”<sup>76</sup>

---

72. David Cho, *Falls Church Schools Giving Builder Control; Partnership a Test of New State Law*, WASH POST, Feb. 12, 2003, at B5.

73. Public-Private Education Facilities and Infrastructure Act of 2002, VA. CODE ANN. § 56-575.16 (Michie 2004).

74. APA POLICY GUIDE, *supra* note 12, at 7. Policy One states that “[r]edevlopment should also be recognized as a tool that local government can use to implement its comprehensive plan.” *Id.*

75. *Id.* at 8. Policy Two states that “[f]urthermore, the Guide asserts that state legislation should provide a means of choosing private partners that is “fair, open, equitable and transparent,” and provide assurances that the public-private partnerships adhere to the adopted plans of the jurisdiction.” *Id.*

76. *Id.* at 10. The following justification is offered in Policy Five:

Redevlopment is an appropriate use of public resources to promote public purposes. . . . The correction of blighted conditions or preventive measures to forestall blight should be the primary motivating factors for the use of redevelopment powers where there are conditions that make it impossible for market forces to act in the public interest. . . . To the extent possible, communities should choose incentives as their primary redevelopment tool and rely on their eminent domain powers as a tool of last resort when incentives are insufficient to implement redevelopment plans.

*Id.*

#### IV. Eminent Domain Reaches Public Referendum, State High Court, and U.S. Supreme Court in 2004

##### A. County of Wayne v. Hathcock—“Public Use” in Michigan

###### 1. BACKGROUND

After investing approximately \$2 billion to renovate the county airport, including the addition of a new terminal and jet runway, in an effort to obviate perceived problems related to noise from increased air traffic, Wayne County began a program of purchasing neighboring properties through voluntary sales to accomplish noise abatement.<sup>77</sup> “Funded by a partial grant of \$21 million from the Federal Aviation Administration (FAA) . . . the county purchased approximately five hundred acres in non-adjacent plots scattered in a checkerboard pattern throughout an area south of [the] Metropolitan airport.”<sup>78</sup> The agreement between the county and the FAA provided that any properties acquired through this program “were to be put to economically productive use.”<sup>79</sup> To meet this mandate, the county supported the concept of developing “a large business and technology park with a conference center, hotel accommodations, and a recreational facility” known as the “Pinnacle Project.”<sup>80</sup> Construction of this state-of-the-art business and technology park was proposed in a 1,300-acre area adjacent to the airport, and it was believed that it would create thousands of jobs, millions of dollars in tax revenue, and would accomplish the goal of “broadening the county’s tax base from predominantly industrial to a mixture of industrial, service, and technology.”<sup>81</sup> In an effort to acquire more land needed to assemble the 1,300-acre site, the county again sought voluntary sales from landowners, resulting in the purchase of an additional 500 acres.<sup>82</sup>

“The County determined that an additional forty-six parcels distributed in a checkerboard fashion throughout the project area were needed” and these parcels were not likely to be acquired through the voluntary program.<sup>83</sup> Therefore, in July 2000, “the Wayne County Commission adopted a Resolution of Necessity and Declaration of Taking author-

---

77. County of Wayne v. Hathcock, 684 N.W.2d 765, 770 (Mich. 2004).

78. *Id.*

79. *Id.* at 770.

80. *Id.*

81. *Id.* According to expert testimony at trial, it was asserted that the project would create 30,000 jobs and add \$350 million in tax revenue for the county. *Id.* at 771.

82. *Hathcock*, 684 N.W.2d at 771.

83. *Id.*

izing the acquisition of the remaining three hundred acres.”<sup>84</sup> Twenty-seven property owners accepted written offers of purchase from the county, leaving nineteen additional parcels still needed for the project.<sup>85</sup> In April 2001, the county formally initiated condemnation actions for each of these parcels,<sup>86</sup> resulting in the litigation challenging the public necessity for the eminent domain action and challenging the constitutionality of the action on the grounds that this project would not serve a public purpose.<sup>87</sup>

Both the trial court and appellate court upheld the county’s actions and, relying on the *Poletown* decision from Michigan, found that there was a valid public purpose served by the Pinnacle Project.<sup>88</sup> The Michigan Supreme Court directed the parties to brief the following three issues (which were also briefed by the fourteen amicus curiae): (1) whether the county has the authority to take the property under state statute;<sup>89</sup> (2) whether the proposed takings were for a “public purpose” given that the property was likely to be transferred to private entities;<sup>90</sup> and (3) whether the “public purpose” test in *Poletown* is consistent with the state constitution,<sup>91</sup> and if not, whether the case should be overturned.<sup>92</sup>

---

84. *Id.*

85. *Id.*

86. *Id.* The county condemned the properties for the following purposes:

(1) the creation of jobs for its citizens; (2) the stimulation of private investment and redevelopment in the county to insure a healthy and growing tax base so that the county can fund and deliver critical public services; (3) stemming the tide of disinvestment and population loss; and (4) supporting development opportunities which would otherwise remain unrealized.

*Id.* at 775–76.

87. *Hathcock*, 684 N.W.2d at 771.

88. *Id.* at 454.

89. *Id.* at 772; see MICH. COMP. LAWS §§ 213.25, 213.56(1)-(2) (2004) (To be constitutional, a condemnation must be authorized, necessary, and for public purpose.); MICH. COMP. LAWS § 213.23 (2004). The statute provides that:

Any public corporation or state agency is authorized to take private property necessary for a public improvement or for the purposes of its incorporation or for public purposes within the scope of its powers for the use or benefit of the public and to institute and prosecute proceedings for that purpose. When funds have been appropriated by the legislature to a state agency or division thereof or the office of the governor or a division thereof for the purpose of acquiring lands or property for a designated public purpose, such unit to which the appropriation has been made is authorized on behalf of the people of the state of Michigan to acquire the lands or property either by purchase, condemnation or otherwise. For the purpose of condemnation the unit may proceed under the provisions of this act.

MICH. COMP. LAWS § 213.23.

90. *Hathcock*, 684 N.W.2d at 772.

91. See MICH. CONST. art. X, § 2 (“Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law.”).

92. *Hathcock*, 684 N.W.2d at 772.

The case was argued before the Supreme Court of Michigan on April 21, 2004; on July 30, 2004, the court handed down its decision.

## 2. THE MICHIGAN SUPREME COURT DECISION

### a. Review Under the Michigan Statutes

In reviewing the statutory authority for condemnation, the court noted that it must “determine only whether the proposed condemnations are *necessary for public purposes*, whether those purposes are *within the scope of the county’s powers*, and whether the takings are *‘for the use or benefit of the public. . . .’*”<sup>93</sup> Turning first to the question of whether the statute authorizes the county to exercise the power of eminent domain in general, the court quickly concluded that it does.<sup>94</sup> The second inquiry focused on whether the particular condemnation action was within the scope of the county’s powers, and the court again concluded that it was.<sup>95</sup>

The court next examined whether the county exercised its power in accordance with the statutory requirement of advancing a “public purpose.” Concluding that it did, the court found that transforming from a rust-belt to a technologically driven economy would “promote prosperity and general welfare.”<sup>96</sup> “Consequently, the county’s goal of drawing commerce to metropolitan Detroit and its environs by converting the subject properties to a state-of-the-art technology and business park is within this definition of public purpose.”<sup>97</sup>

Under Michigan statute, the exercise of eminent domain must also be found to be “necessary.”<sup>98</sup> The condemning authority must make the determination of public necessity, which can only be overturned with a showing of “fraud, error of law, or abuse of discretion.”<sup>99</sup> The landowners advanced three arguments. First, that the county is impermissibly stockpiling land for speculative future use since specific purchasers were not identified for the parcels to be condemned, and since there was no proof that these parcels would be put to productive use.<sup>100</sup> The court found this argument unpersuasive because the county had a definite plan of erecting a “business and technology park as soon as pos-

---

93. *Id.* at 773 (emphasis in original).

94. *Id.* at 772–73.

95. *Id.* at 773–74.

96. *Id.* at 776.

97. *Hathcock*, 684 N.W.2d at 776.

98. *Id.*

99. *Id.* (citing MICH. COMP. LAWS § 213.56(2) (“With respect to an acquisition by a public agency, the determination of public necessity by that agency is binding on the court in the absence of a showing of fraud, error of law, or abuse of discretion.”)).

100. *Hathcock*, 684 N.W.2d at 776.

sible,” and the acquisition of the needed parcels would enable the county to assemble the “critical mass of property” needed.<sup>101</sup> The second argument was that the condemnations were not necessary because the county had not cleared all procedural hurdles for the project.<sup>102</sup> The court found that this argument does not relate to what is “necessary” to advance one of the specified purposes.<sup>103</sup> Third, the landowners argued that the county did not prove that a business and technology park was necessary for the public.<sup>104</sup> The court determined that this argument too was unpersuasive and it impermissibly shifted the burden of proof to the county.<sup>105</sup>

Next the court addressed the statutory requirement that condemnation powers must also be for the “use or benefit of the public.”<sup>106</sup> The court had no difficulty in finding that the Pinnacle Project would benefit the public, noting that the project would bring jobs to a struggling economy, add tax revenues to “increase resources available for public services,” and it would “attract investors and business to the area” to reinvigorate the local economy.<sup>107</sup> The landowners argued that the benefit that private parties would receive under the project outweighs any benefit the public might receive, and that therefore the action is outside the “public use or benefit” requirement of the statute.<sup>108</sup> The court found this argument unpersuasive, stating that the defendants simply did not prove that the condemnations would fail to provide a “public benefit.”<sup>109</sup>

#### b. Review Under the Michigan State Constitution

Concluding that Wayne County acted in accordance with applicable statutory provisions, the court turned to the state constitution, which also limits the state’s power of eminent domain, to determine whether the condemnations met the state constitutional requirement of “public use.”<sup>110</sup> Determining that the phrase “public use” is a legal term of art,

---

101. *Id.* at 777.

102. *Id.* The defendants cited to the fact that the county needed a special exclusion from the FAA to use the land for the project, that environmental issues had to be reviewed, and that a local district financing authority, along with a tax increment finance plan, had to be put in place. *Id.*

103. *Id.*

104. *Id.* at 777–78.

105. *Hathcock*, 684 N.W.2d at 778. Furthermore, the court noted that the defendants failed to brief this issue, so the court could simply consider it abandoned. *Id.*

106. *Id.* at 778.

107. *Id.*

108. *Id.*

109. *Id.* at 778.

110. *Id.*; see MICH. CONST. art. X, § 2 (“Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law.”).



the court noted that the meaning had to be discerned respecting the intent of the drafters and the meaning of the phrase at the time it was ratified in 1963.<sup>111</sup> The court identified the constitutional issue as whether the condemnation of the subject properties and the subsequent transfer of those properties to private entities lay within the common understanding of the “public use” requirement at the time of ratification.<sup>112</sup>

Noting that the constitutional “public use” requirement does not prohibit the transfer of condemned property to private entities, the court stated that the constitution does prohibit the transfer of condemned property to private entities for private use.<sup>113</sup> Citing to the dissent in *Poletown*, the court noted that there are three factors that have been identified to determine whether a private entity is putting the condemned property to public or to private use.<sup>114</sup> First, whether the exercise of eminent domain involving private enterprises is limited to those enterprises whose very existence depends upon the use of land that can only be assembled by the coordination of a governmental body (i.e., whether “collective action is needed to acquire land for vital instrumentalities of commerce”).<sup>115</sup> These have included “highways, railroads, canals and other instrumentalities of commerce.”<sup>116</sup> Second, whether the “private entity remains accountable to the public in its use” of the condemned property (i.e., where the entity is subject to public oversight).<sup>117</sup> And third, whether the selection of the land for condemnation is based upon a public concern (i.e., whether there are “facts of independent significance” that turn on the act of condemnation itself rather than on the use to which the property might ultimately be put).<sup>118</sup>

The court concluded that the subject condemnations did not meet any of those criteria and were, therefore, unconstitutional under what the public would have understood the phrase “public use” to mean at the time of the constitution’s ratification in 1963.<sup>119</sup> Specifically, the court determined that the business and technology park was “not an enterprise ‘whose very existence depends on the use of land that can

---

111. *Hathcock*, 684 N.W.2d at 779.

112. *Id.*

113. *Id.* at 781.

114. *Id.*

115. *Id.* at 782.

116. *Hathcock*, 684 N.W.2d at 781.

117. *Id.* at 782.

118. *Id.* at 782–83. The court cited, as an example, a condemnation by the City of Detroit where the controlling purpose was “to remove unfit housing and thereby advance public health and safety,” noting that the “subsequent resale of the land cleared of blight” was “incidental” to the goal. *Id.* at 783.

119. *Id.* at 784.

be assembled only by the coordination central government alone is capable of achieving.’”<sup>120</sup> Also, the court determined that the Pinnacle Project was not subject to public oversight; after the parcels were sold, it was intended that the private entities would use the property to pursue their own financial welfare.<sup>121</sup> Moreover, the court found that there was nothing about the act of condemning the property that would have served the public good.<sup>122</sup>

Addressing the *Poletown* case, the court found that the decision was a “radical” departure from pre-1963 eminent domain jurisprudence and that it departed from the “common understanding” of “public use” at the time of ratification.<sup>123</sup> The court further determined that *Poletown* inappropriately concluded that a generalized economic benefit was sufficient to justify the transfer of condemned property to a private entity; consequently, the *Poletown* decision—and the proposition that alleviating unemployment and revitalizing the economy of a community constitutes a public use—were specifically overruled.<sup>124</sup> As a result, the court finally concluded that its decision shall have a retroactive effect upon all pending cases that have raised and preserved a *Poletown* challenge.<sup>125</sup>

One of the practical effects of this ruling is that it will likely cost taxpayers more when government exercises its eminent domain power.<sup>126</sup>

---

120. *Id.* at 783. As the court noted:

[T]he landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce. We do not believe, and plaintiff does not contend, that these constellations required the exercise of eminent domain or any other form of collective public action for their formation.

*Id.* at 783–84.

121. *Hathcock*, 684 N.W.2d at 784. The court explained that:

The public benefit arising from the Pinnacle Project is an epiphenomenon of the eventual property owners’ collective attempts at profit maximization. No formal mechanisms exist to ensure that the businesses that would occupy what are now defendants’ properties will continue to contribute to the health of the local economy.

*Id.*

122. *Id.* The court found no facts of independent public significance to justify the condemnations, noting that the only public benefits cited by the county would arise only after the lands were put to public use. *Id.*

123. *Id.* at 785.

124. *Id.*

125. *Id.* In overturning this significant precedent, the court stated that:

[B]ecause *Poletown* itself was such a radical departure from fundamental constitutional principles and over a century of this Court’s eminent domain jurisprudence leading up to the 1963 Constitution, we must overrule *Poletown* in order to vindicate our Constitution, protect the people’s property rights, and preserve the legitimacy of the judicial branch as the expositor—not creator—of fundamental law.

*Id.* Two of the judges in their concurring opinions indicated that they would apply the decision prospectively instead of retroactively. *Id.* at 788.

126. See John Gallagher, *Poletown Seizures are Ruled Unlawful: State Supreme*

Municipalities in Michigan will also face much more of a challenge in implementing sorely needed community redevelopment projects.<sup>127</sup>

B. *Lakewood, Ohio—The Public Speaks at the Ballot Box*

I. BACKGROUND

Residents have been moving out of Cleveland's inner city for decades, relocating to outlying areas or inner-ring suburbs like Lakewood, Ohio, in order to escape the growing urban poverty and decay.<sup>128</sup> Lakewood, one of the first suburbs established in the greater Cleveland area,<sup>129</sup> has been described as a "new urbanist" style city where residents can live comfortably within walking distance of small business and other attractions.<sup>130</sup> However, in recent years, the "City of Homes"<sup>131</sup> has fallen victim to many of the ailments that plagued Cleveland in previous decades, suffering from "an outdated infrastructure, an aging housing stock, decreas[ed] commercial investment and an eroding tax base."<sup>132</sup>

In order to update its infrastructure, and to keep residents from leaving Lakewood, in 2003 the city council unanimously approved a draft proposal for a development agreement with two developers, focusing on commercial development of the city's West End.<sup>133</sup> Specifically, the proposal called for the construction of a new shopping center, movie theater, and upscale townhouse complex.<sup>134</sup> The developers were re-

---

*Court Restricts Government Rights to Take Land*, DETROIT FREE PRESS (July 31, 2004), available at [http://www.freep.com/news/mich/land31\\_20040731.htm](http://www.freep.com/news/mich/land31_20040731.htm) (last visited Feb. 17, 2005). As Gallagher noted:

What the decision does mean is that the cost of land just went up for municipalities trying to accomplish economic development. Now that governments can no longer use the threat of seizure, private owners and speculators could demand higher prices to get out of the way of projects that government leaders deem essential.

*Id.*

127. *Id.* (quoting Wayne County Executive Robert Ficano as saying "the Michigan Supreme Court's decision to change Michigan law and divest municipalities from their ability to create jobs for their citizens is a disappointment not only for Wayne County, but for all of the Michigan communities struggling to address these difficult economic times").

128. Dan Slife, *Redeveloping Lakewood: The West End Project 2*, at <http://www.lkwdpl.org/currentevents/westend/sliffe.pdf> (last visited Mar. 3, 2005).

129. *Id.*

130. Don Iannone, *Lakewood, Ohio: Struggle to Get Land for Development*, ECON. DEV. FUTURES WEB J., Oct. 20, 2003, at [http://www.don-iannone.com/edfutures/2003\\_10\\_19\\_ed-futures\\_archive.html](http://www.don-iannone.com/edfutures/2003_10_19_ed-futures_archive.html) (last visited Feb. 17, 2005).

131. Jen Melby, *Eminent Domain Abuse in Lakewood*, BUCKEYE INST. (Sept. 30, 2003), at <http://www.buckeyeinstitute.org/article.php?id=187> (stating that "City of Homes" is the city motto).

132. Slife, *supra* note 128, at 2.

133. Gross, *supra* note 9, at 2.

134. *Id.*

quired “to make diligent efforts for six months to attract national, ‘mid-scale to upper-scale’ retailers as well as commit more than \$100 million in private financing.”<sup>135</sup> The city, in turn, agreed to spend \$35 million to raze West End houses, or purchase them through eminent domain, and to build new roads.<sup>136</sup> To further this end, the Lakewood City Council officially designated the West End as “blighted” in order to begin eminent domain proceedings against homeowners who refused to sell.<sup>137</sup>

The designation of the West End neighborhood as “blighted” incited a tremendous amount of opposition from property owners.<sup>138</sup> The West End is described as a “cute neighborhood”<sup>139</sup> that consists of over fifty colonial style homes (which homeowners regularly invest in and improve), an apartment complex, several small businesses, and approximately 1,200 residents. “The West End also has a vibrant business community, without a single commercial vacancy—compared to more than 100 commercial vacancies in the rest of Lakewood.”<sup>140</sup> According to one account, using the criteria adopted by the city council, a home in Lakewood could be deemed blighted if it didn’t have two bathrooms, three bedrooms, an attached two car garage, central air-conditioning, or if the house or yard didn’t meet minimum size requirements.<sup>141</sup> Accordingly, 90 percent of the homes in Lakewood could have been considered “blighted,” including the home of the then mayor and all seven city council members.<sup>142</sup>

In addition to homeowners’ opposition to the designation of West End as a blighted area, many residents were angered by the private nature of the negotiations between the city and the developers, and they alleged that this was an abuse of the eminent domain power because homes were being taken for the sole purpose of handing the property over to private developers.<sup>143</sup> Despite vocal opposition, negotiations between the city, the school board, and the developers were initially successful, and the plan was approved by the city council in May

---

135. *Id.*

136. *Id.*

137. *Id.*

138. Gross, *supra* note 9, at 10.

139. V. David Sartin, *West End Deal Going to Lakewood Council*, THE PLAIN DEALER, Apr. 21, 2003, at B1 (quoting former mayor Madeline Cain).

140. Institute for Justice, *Ohio’s “City of Homes” Faces Wrecking Ball of Eminent Domain Abuse*, LITIGATION BACKGROUNDER, [http://www.ij.org/private\\_property/lakewood/backgrounder.html](http://www.ij.org/private_property/lakewood/backgrounder.html) (last visited Feb. 17, 2004).

141. WCBS Newsradio 880, *Eminent Domain: A 60 Minutes Special Report*, Sept. 28, 2003, at [http://wcbs880.com/rooney/sixtyminutes\\_story\\_271210317.html](http://wcbs880.com/rooney/sixtyminutes_story_271210317.html) (last visited Mar. 3, 2005) [hereinafter *60 Minutes Report*].

142. *Id.*

143. Gross, *supra* note 9, at 2.

2003.<sup>144</sup> Although many West End homeowners had agreed to sell their properties to the developers, a determined minority vowed to fight the plan, enlisting the help of the Institute for Justice.<sup>145</sup> “The Institute filed suit in Cuyahoga County [Court of Common Pleas], seeking an injunction against the West End development plan.”<sup>146</sup> In addition, a grassroots organization of Lakewood residents, the Committee for Lakewood, “successfully filed a petition to place a referendum (“Issue 47”) on the November [2003] ballot that asked voters to approve or reject the official development plan.”<sup>147</sup> Another petition, Issue 48, which would have required all development projects in the future to be approved by a vote of the citizens, was also approved for the same ballot.<sup>148</sup> Finally, they succeeded in getting yet another referendum on the March 2004 ballot that, if approved, would remove the West End’s blighted status.<sup>149</sup>

## 2. THE CASE FOR REDEVELOPMENT

Former Mayor Madeline A. Cain (Cain), the Lakewood City Council, the Greater Cleveland Growth Association, and the Cleveland business community all supported the proposed development plan for Lakewood’s West End, and the city council actively promoted the project by initiating the “Campaign for Lakewood’s Future.”<sup>150</sup> The main reasons for approving the development plan were financial. But in addition to increasing the city’s tax revenue, supporters stressed that the development would also increase the “quality of life” and “[create] a vibrant and attractive community.”<sup>151</sup> They also claimed that the development

---

144. *Id.* at 2–3.

145. *Id.* at 3. The Washington, D.C. based Institute for Justice is a nonprofit, public interest law firm that routinely engages in litigation opposing the perceived abuse of eminent domain for private parties. The institute has created The Castle Coalition to provide a central bank of information that helps activists connect with each other in fighting eminent domain.

146. *Id.* at 3.

147. *Id.* On May 29, 2003, the Committee for Lakewood submitted a letter of intent to allow the citizens of Lakewood to vote for or against Ordinance 38–03. Then on June 27, the Committee submitted 2,025 signatures to the city. On July 3, the Committee received notification from the city that 1,543 of the 2,025 signatures submitted to the city were valid signatures. On July 11, the Committee submitted an additional forty-five signatures after reading a *Sun Post* article in which the law director for the City of Lakewood stated that there may be over twenty signatures that could be declared invalid. Committee for Lakewood, *History*, at <http://www.forlakewood.org/history.html> (last visited Feb. 17, 2005).

148. Gross, *supra* note 9, at 3.

149. *Id.*

150. *See id.*

151. Melby, *supra* note 131 (reporting Mayor Cain’s remark that “[tax base] is the bottom line”).

project would lead to the creation of new jobs within the city, and slow the migration of residents to other outlying areas.<sup>152</sup> Although it was argued that information in this respect was somewhat speculative, Bonne Bell, a cosmetics manufacturer located in West End as well as one of the biggest employers in Lakewood, announced its intention to establish its world headquarters in the new development.<sup>153</sup>

As for the “blight” designation, the mayor maintained that it is a term of art, or a statutory phrase generally invoked to describe whether or not the structures in the area “meet today’s standards,” and that the designation was necessary to enable the city to exercise its eminent domain powers.<sup>154</sup> Ultimately, the mayor said it all came down to whether or not the West End could be used for a better or higher purpose than it was currently being used for, and she concluded that the redevelopment project was a public good.<sup>155</sup>

The development proposal received some support from West End homeowners. City Council minutes from the spring of 2003 show that many people had “concerns [about] Lakewood’s tax base, further deterioration of streets, future of schools, and need for jobs,” and that the opponents of the project were a “vocal minority.”<sup>156</sup> The city’s position also received support from experts, including Edward W. Hill, a professor at Cleveland State University’s Levin College of Urban Affairs, who asserted that Lakewood had to act assertively to “grow its tax base” in order to preserve the town.<sup>157</sup>

### 3. OPPOSITION TO THE PLAN

The main opposition to the plan came from an organized and persistent group of Lakewood residents.<sup>158</sup> They claimed that the expected increase in tax revenues and jobs was speculative, they resented the fact that the city was going to be paying private entrepreneurs with taxpayer funds, and they believed that approving the plan would give bureaucrats unlimited power to seize property in the future.<sup>159</sup> Council minutes show that residents also voiced concern about increases in traffic<sup>160</sup> and

---

152. *Id.*

153. Gross, *supra* note 9, at 6–7.

154. *60 Minutes Report*, *supra* note 141.

155. *Id.*

156. Minutes of the Regular Meeting of Lakewood City Council (Apr. 21, 2003), at <http://www.lkwdpl.org/city/cc/mt030421.htm> (last visited Feb. 17, 2005).

157. Blaine Harden, *In Ohio, a Test for Eminent Domain*, WASH. POST, June 22, 2003, at A03.

158. Institute for Justice, *supra* note 140.

159. *Id.*

160. Minutes of the Regular Meeting of Lakewood City Council (May 5, 2003), at <http://www.lkwdpl.org/city/cc/mt030505.htm> (last visited Feb. 17, 2005).

the loss of safe, clean, and affordable homes for families with modest means.<sup>161</sup>

As for the “blight” designation, this was probably the most emotional aspect of the plan for many residents. Newspaper accounts report that some residents felt shamed and humiliated by the designation.<sup>162</sup> They asserted that Lakewood had traditionally “been a bedroom community of working class people,” and that long time residents were being forced out to accommodate a “growing upper-class (‘yuppie’) population.”<sup>163</sup> Consequently a “deep schism across class lines” became a defining characteristic in the battle over the West End.<sup>164</sup>

#### 4. ELECTION DAY 2003 AND AFTER

On July 21, 2003, the Lakewood City Council voted to place the referendum on the ballot for the November 4, 2003, general election.<sup>165</sup> On election day, 15,000 citizens voted and Mayor Cain lost her mayoral position by 1,134 votes.<sup>166</sup> Issue 48, which would require voter approval of development projects in the future, lost by a total of 608 votes.<sup>167</sup> Issue 47, which would require voter approval of the West End development project was too close to call—8,252 (50.14%) against, and 8,205 (49.86%) in favor.<sup>168</sup> The results triggered an automatic recount, and on December 4, 2003, the issue was ultimately defeated.<sup>169</sup> On March 2, 2004, Lakewood residents overwhelmingly voted to remove the West End’s blight designation.<sup>170</sup>

The experience in Lakewood has led to many news reports and media accounts focusing on eminent domain abuse across the United States. The Committee for Lakewood was credited with executing a grassroots campaign that won the hearts and minds of a majority of Lakewood voters in less than six months. In addition, their success in getting the

---

161. Minutes of the Regular Meeting of Lakewood City Council (Mar. 17, 2003), at <http://www.lkwdpl.org/city/cc/mt030317.htm> (last visited Feb. 17, 2005).

162. See *60 Minutes Report*, *supra* note 141; see also CBSNEWS.com, *Eminent Domain: Being Abused?* (July 4, 2004), <http://www.cbsnews.com/stories/2003/09/26/60minutes/main575343.shtml> (last visited Mar. 4, 2005).

163. Gross, *supra* note 9, at 10.

164. *Id.*

165. Minutes of the Regular Meeting of Lakewood City Council (July 21, 2003), at <http://www.lkwdpl.org/city/cc/mt030721.htm> (last visited Feb. 17, 2005).

166. Gross, *supra* note 9, at 4.

167. *Id.*

168. WKYC-TV, *Unofficial Final Recount of Lakewood West End Vote: Issue Fails* (Dec. 4, 2003), at [http://www.wkyc.com/news/news\\_fullstory.asp?id=13358](http://www.wkyc.com/news/news_fullstory.asp?id=13358) (last visited Feb. 17, 2005).

169. *Id.*

170. Committee for Lakewood, *We Won*, <http://www.forlakewood.org/index.html> (last visited Feb. 17, 2005).

blight designation removed in March of this year was also seen as a major victory for the organization. Many of the homeowners also credited the early work of the Institute for Justice with getting the opposition ball rolling, which ultimately led to a public outcry over the plan. Today, Lakewood is cited as an example of how a grassroots effort can succeed in the fight against eminent domain abuse.

*C. The U.S. Supreme Court Agrees to Hear Connecticut Case in 2005*

In March 2004, the Connecticut Supreme Court decided *Kelo v. City of New London*.<sup>171</sup> The court addressed “whether the public use clauses of the federal and state constitutions” can be used to justify the “exercise of eminent domain power in furtherance of a significant economic development plan that is expected to create jobs, increase tax and other revenues, and revitalize an economically distressed city.”<sup>172</sup> In a 249-page opinion (including appendices), by a 4–3 majority, the court handed a strong victory to the city. It concluded, among other things, that the goal of economic development can be a valid “public purpose” to justify the use of eminent domain, and that a city may delegate its power of eminent domain to a nonprofit, private economic development corporation to further the city’s goal of economic development.<sup>173</sup> Following the Connecticut Supreme Court’s denial of a motion to reconsider, the petitioners filed a petition for a writ of certiorari with the U.S. Supreme Court in July 2004 asking the Court to review “the limits under the public use requirement of the U.S. Constitution when government takes land for private economic development.”<sup>174</sup> The Court granted certiorari in September 2004.

---

171. 843 A.2d 500 (Conn. 2004). The significance of this case is underscored by the fact that it is the first eminent domain case in fifty years that the U.S. Supreme Court has decided to hear.

172. *Id.* at 507.

173. *Id.* The court stated, “[w]e conclude that economic development projects created and implemented pursuant to chapter 132 that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions.” *Id.* at 593.

174. Petition for Writ of Certiorari at 5, *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04–108), 2004 WL 1659558; Greg Stohr, *Property-Rights Disputes Gets U.S. High Court Review*, Bloomberg.com, at [http://quote.bloomberg.com/apps/news?pid=10000103&sid=aEqqxjAT\\_dB4&refer=us](http://quote.bloomberg.com/apps/news?pid=10000103&sid=aEqqxjAT_dB4&refer=us) (last visited Feb. 17, 2005). Stohr reported that:

The Justices agreed to hear an appeal by a group of homeowners who say the city of New London illegally tried to raze a residential neighborhood to make room for a five-star hotel, luxury condominiums and office buildings near the Pfizer facility. The city says it is trying to reverse decades of economic decline.

*Id.*



## 1. BACKGROUND

The New London Development Corporation (“the development corporation”), a private, nonprofit economic development corporation, was established in 1978 to assist the City of New London in planning for economic development.<sup>175</sup> The State Bond Commission authorized bonds in 1998 to support, among other things, planning activities in the Fort Trumbull area of the city, and property acquisition to be undertaken by the development corporation.<sup>176</sup> In February 1998, Pfizer, Inc. “announced that it was developing a global research facility on the . . . New London Mills site which is adjacent to the Fort Trumbull area.”<sup>177</sup> In April 1998, the city gave initial approval for the preparation of a development plan for the Fort Trumbull area, and one month later the city authorized the development corporation to proceed.<sup>178</sup> In June 1998, the city conveyed the New London Mills site to Pfizer.<sup>179</sup>

A consulting team began working on the development plan for New London in July 1998.<sup>180</sup> The development plan area consists of approximately 90 acres on the Thames River adjacent to the proposed Fort Trumbull State Park and the Pfizer facility, which opened in June 2001.<sup>181</sup> The area consists of about 115 lots, including both residential and commercial uses.<sup>182</sup> “In its preface to the development plan, the development corporation stated that its goals were to create a development that would complement [the Pfizer facility], create jobs, increase tax and other revenues, encourage public access to the waterfront and work towards revitalization of the city.”<sup>183</sup> The development plan organized the land area into seven parcels: parcel one was designated for a waterfront hotel and conference center, as well as marinas for tourist and commercial vessels and a walkway along the waterfront; parcel two was designated as the site of eighty new residences organized into an urban neighborhood and linked by a public walkway to the rest of the plan, including the park; parcel three was designated for 90,000 square feet of high technology research and development office space and parking; parcel four was designated for parking or retail services for the adjacent state park and for the renovation of an existing

---

175. *Kelo*, 843 A.2d at 508.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Kelo*, 843 A.2d at 508–09.

181. *Id.* at 509.

182. *Id.*

183. *Id.*

marina; parcel five was designated for 140,000 square feet of office space, parking, and retail space; parcel six was designated for a variety of water-dependent commercial uses; and parcel seven was designated for additional office or research and development use.<sup>184</sup> The development corporation planned to own the land and lease the parcels to private developers, requiring that developers “comply with the terms of the development plan.”<sup>185</sup>

The development plan was expected to generate a significant number of jobs<sup>186</sup> and tax revenue for the city.<sup>187</sup> What made this more significant was the fact that, with the exception of the new Pfizer facility that had recently been built, the city had experienced major economic declines with the loss of approximately 1,900 government jobs in 1996, and the state had designated the city as “distressed.”<sup>188</sup> The city approved the development plan in January 2000, “and authorized the Development Corporation to acquire properties within the development area.”<sup>189</sup> “In October 2000, the development corporation voted to use the power of eminent domain to acquire properties within the development area whose owners had not been willing to sell,” and in November 2000, they filed condemnation proceedings that led to the present action.<sup>190</sup>

The trial court noted that:

“each of the plaintiffs testified and said they wished to remain in their homes for a variety of personal reasons. Two of the people referred to the fact that their families have lived in their homes for decades . . . . Several have put a lot of work into their property and all of them appeared . . . to be sincerely attached to their homes. . . . All testified that they were not opposed to new development in the Fort Trumbull area . . . two of the plaintiffs own their property as business investments—the rental of apartments.”<sup>191</sup>

After issuing a decision upholding some of the condemnation of proceedings and dismissing others, both the petitioners and the city appealed.

---

184. *Id.* at 509–10.

185. *Kelo*, 843 A.2d at 510.

186. *Id.* (noting that there would be between “(1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs . . .”). The court later stated that the plan would generate “hundreds of construction jobs, approximately 1000 direct jobs, and hundreds of indirect jobs[.]” noting how significant this was for a city whose unemployment rate is close to double the rate of the rest of the state, not counting the Pfizer facility, which employs about 2,000 people. *Id.* at 544.

187. *Id.* at 542 (stating that property tax revenues were expected to fall between \$680,544 and \$1,249,843. This represents a significant increase for an area that currently produces about \$325,000 in property taxes.)

188. *Id.* at 510. These jobs were lost when the U.S. Naval Undersea Warfare Center closed, and 1,000 jobs were transferred to Newport, Rhode Island. *Id.*

189. *Id.* at 510.

190. *Kelo*, 843 A.2d at 510.

191. *Id.* at 511.

## 2. THE CONNECTICUT SUPREME COURT DECISION

Finding that in each case the development corporation had proper authority to institute condemnation proceedings, the Connecticut Supreme Court held that the public use clauses of the state and federal constitutions (which are identical) authorize the exercise of the power of eminent domain in furtherance of a significant economic development plan that will result in benefits to the distressed city.<sup>192</sup> The plaintiffs argued that the condemnation of property for economic development by private parties (the development corporation) is inconsistent with prior court decisions on the following two grounds: (1) the new owner would not be providing a public service or utility; and (2) the condemnation would not remove blight conditions.<sup>193</sup>

Addressing first the constitutionality of Chapter 132 of the Connecticut General Statutes, which authorizes the use of eminent domain for private economic development,<sup>194</sup> the court noted a history of taking a “flexible approach to the construction of the Connecticut public use clause.”<sup>195</sup> Citing to earlier precedent<sup>196</sup> to define what is meant by a “public use,” the court reiterated that “[p]ublic use” may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community, is a taking for public use.<sup>197</sup> The court went on to uphold the deferential approach that is afforded to legislative declarations of public use, noting that it is difficult to draw a precise line between what is a public use and what is a private use. The court preferred to follow precedent, stating that “[t]he power requires a de-

---

192. *Id.*

193. *Id.* at 520.

194. 132 CONN. GEN. STAT. § 8-186 (2004). Specifically, section 8-186 provides: [T]he economic welfare of the state depends upon continued growth of industry and business within the state; that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives; that such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes . . . are public uses and purposes for which public moneys may be expended; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination.

*Id.*

195. *Kelo*, 843 A.2d at 522.

196. *Olmstead v. Camp*, 33 Conn. 532 (1866).

197. *Kelo*, 843 A.2d at 522 (quoting *Olmstead*, 33 Conn. at 546).

gree of elasticity to be capable of meeting new conditions and improvements and the ever increasing necessities of society.”<sup>198</sup> The court also noted that prior Connecticut case law stands for the proposition that when the government exercises its eminent domain power and allows the land to be sold or leased to private developers, so long as the initial public purpose for the action was for a public use, that same public use continues after the property is transferred to private persons.<sup>199</sup> Furthermore, the court noted that any benefit to the private developer is secondary to the public benefit that results from economic growth and community revitalization.<sup>200</sup> The court concluded that when the legislative body has rationally determined that an economic development plan will promote significant economic development, it constitutes a valid public use for the exercise of the power of eminent domain under both the state and federal constitutions.<sup>201</sup> In addressing concerns over the potential for abuse as to what constitutes a valid public purpose, the majority concluded “that responsible judicial oversight over the

---

198. *Id.* at 523 (quoting *Olmstead*, 33 Conn. at 551).

199. *Id.* (quoting *Gohld Realty Co. v. Hartford*, 104 A.2d 365 (1954)).

200. *Kelo*, 843 A.2d at 531.

201. *Id.* at 527. The court then cited to a laundry list of holdings in other state courts that essentially support the outcome: *Oakland v. Oakland Raiders*, 646 P.2d 835 (Cal. 1982) (explaining a city can take a professional football franchise by eminent domain to keep it from moving to another city; the case was remanded for a determination of the public benefit involved); *Shreveport v. Chasse Gas Corp.*, 794 So. 2d 963 (La. Ct. App. 2001) (explaining economic development in the form of a convention center and headquarters hotel satisfies public purpose and public necessity requirements of the Louisiana Constitution); *Prince George’s County v. Collington Crossroads, Inc.*, 339 A.2d 278 (Md. 1975) (stating condemnation for an industrial park is a public purpose where the plan is reasonably designed to benefit the general public by significantly enhancing economic growth); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (upholding the taking of private homes for the construction of a General Motors car manufacturing plant for the public purpose of alleviating unemployment and revitalizing the economic base of the community, noting that “the benefit to the private interest [was] merely incidental”); *Duluth v. State*, 390 N.W. 2d 757 (Minn. 1986) (explaining construction of a large privately operated paper mill that would alleviate unemployment and contribute to local economic revitalization was a valid public purpose); *Kansas City v. Hon*, 972 S.W.2d 407 (Mo. Ct. App. 1998) (stating airport expansion is a valid public use where the land is transferred to a private aviation corporation); *Vitucci v. N.Y. City School Constr. Auth.*, 289 A.D.2d 479 (N.Y. App. Div. 2001) (stating that when a municipality determines that a new business may create jobs, provide infrastructure, and stimulate the local economy, these are all legitimate public purposes that justify the use of eminent domain); *Jamestown v. Leever*, 552 N.W.2d 365 (N.D. 1996) (explaining acquisition on nonblighted property for the purpose of stimulating commercial growth and economic stagnation satisfies the public use and purpose requirement of the constitution). *Id.* at 528–30. The Court dismissed cases from Arkansas, Florida, Kentucky, Maine, New Hampshire, South Carolina, and Washington that maintain economic development alone may not be enough to demonstrate a public use for eminent domain purposes. *Id.*

ultimate public use question does much to quell the opportunity for abuse of the eminent domain power."<sup>202</sup>

The court also concluded that a valid public purpose is not defeated when the condemnation plan includes a transfer of land to private entities.<sup>203</sup> Noting that integral to the plan was Pfizer's decision to locate in the town, the court relied on testimony from the record below that Pfizer was key to the plan as it was unusual for a major employer to move into a "brown site" in an urban area, and that this offered a unique opportunity to the town to take advantage of a number of things that would happen at the site as a result of this move.<sup>204</sup> In upholding the trial court's determination that, "in the context of severe economic distress faced by the city, with its rising unemployment and stagnant tax revenues, the benefits to the city will outweigh those to Pfizer,"<sup>205</sup> the court determined that the takings were not primarily intended to benefit a private party.<sup>206</sup> In response to criticism that the city responded to Pfizer's specific development requirements, the court noted that "had the development corporation failed to consider demands created by the new Pfizer facility, its planning would have been unreasonable."<sup>207</sup> The court made clear that their holding did not give a license for eminent domain simply for the purpose of greater tax revenues, but rather that "rationally considered municipal economic development projects such as the development plan in the present case pass constitutional muster."<sup>208</sup>

The court next rejected plaintiffs' claim that the condemnation must fail as there was no assurance of future public use.<sup>209</sup> In upholding the trial court's finding that the city's lack of future involvement does not mean that the development corporation and the developers are not bound to use the property in accordance with the approved plan, the court relied on the existence of sufficient written agreements to this effect.<sup>210</sup> The plaintiffs next argued that the city's delegation of the eminent domain power to the development corporation was unconstitutional.<sup>211</sup> The court dismissed this claim finding that the development

---

202. *Kelo*, 843 A.2d at 536. The court noted that the academic literature is rich with articles on both sides of the debate, and further acknowledged that there have been some particularly egregious cases. But it concluded that these cases are the exception, not the norm, and are therefore "readily distinguishable from projects such as the carefully considered development plan at issue in the present case." *Id.*

203. *Id.* at 536.

204. *Id.* at 538.

205. *Id.* at 539.

206. *Id.* at 541.

207. *Kelo*, 843 A.2d at 542.

208. *Id.* at 543.

209. *Id.*

210. *Id.* at 544-45.

211. *Id.* at 546.

corporation is the statutorily authorized agent for the implementation of the development plan, a valid public purpose, and that the development corporation was not acting to further its own operations.<sup>212</sup> In applying a three-pronged test: (1) whether the entity is a private entity, (2) whether a public purpose is being advanced, and (3) whether the benefit of the property taken is considered to be available to the general public,<sup>213</sup> the court noted that there was no disagreement over the private entity status of the development corporation; that the public purpose was advanced by giving the development corporation authority to acquire property to implement the development plan; and that the public as a whole benefits from the actions of the private development corporation turning the property over to private developers and tenants.<sup>214</sup>

The dissenting judges, while concurring with the majority's opinion regarding the applicability of the state statute and the constitutionality of delegating the eminent domain power to the development corporation, argued that private economic development is not a valid public use under the state and federal constitutions.<sup>215</sup> While the dissent did "conclude that . . . the legislature should be accorded great deference in determining what constitutes a public use,"<sup>216</sup> and that courts have a limited role in reviewing this determination,<sup>217</sup> they asserted that "as the category of public use changes from one of direct public use to indirect public benefit derived from private economic development, the level of judicial inquiry must increase in order to protect the legitimate interests of the condemnee."<sup>218</sup>

The dissent agreed with the conclusion of the majority that "private economic development projects . . . that create new jobs, boost tax rev-

---

212. *Kelo*, 843 A.2d at 547.

213. *Id.* at 551.

214. *Id.* at 551–52.

215. *Id.* at 575.

216. *Id.* at 576. Further, the dissent agreed with the majority's observation that "[a] public use defies absolute definition, for it changes with varying conditions of society, new appliances in the sciences, changing conceptions of the scope and functions of government, and other differing circumstances brought about by an increase in population and new modes of communication and transportation." *Id.* at 525.

217. *Kelo*, 843 A.2d at 587. The dissent acknowledged, relying on *Berman*, that "[i]t is well established that judicial deference to determinations of public use by state legislatures is appropriate." *Id.* at 581. Citing to *Midkiff*, the dissent continued, "judicial deference to legislative declarations of public use does not require complete abdication of judicial responsibility." *Id.* at 582. Although, the dissent did acknowledge that the review role by the courts is very narrow. *Id.*

218. *Id.* The dissent noted that "there is a gathering storm of public debate about whether the use of eminent domain power to acquire property for private economic development in nonblighted areas is justified. . . . The complementary roles of the legislature and the judiciary as interpreters and guardians, respectively, of the takings power thus require further examination." *Id.* at 581.

enue and other revenues, and contribute to urban revitalization satisfy the takings clauses of the federal and state constitutions.”<sup>219</sup> The dissent also conceded that there was “very little evidence” that the development plan “was created primarily for the benefit of private interests.”<sup>220</sup> However, the dissent viewed the analytical process employed by the majority as too deferential. In place of the majority’s “purposive” test, the dissent called for a heightened degree of judicial scrutiny to ensure that a taking for economic development will result in a public benefit.<sup>221</sup>

The dissent offered a four-part test in which the burden of proof shifts.<sup>222</sup> The first inquiry, they asserted, should be whether the statutory scheme is facially constitutional, and the party challenging the constitutionality should shoulder the burden of proof.<sup>223</sup> When the court concludes that the proposed economic development is a valid public use, the party challenging the condemnation should further shoulder the burden of proof to show that the primary intent of the plan is to benefit private, rather than public, interests.<sup>224</sup> Should the court conclude the plan is constitutional at this stage of inquiry, the burden should shift to the government to prove that “the specific economic development contemplated by the plan will, in fact, result in public benefit.”<sup>225</sup> The dissent suggested that the standard of proof should be that of clear and convincing evidence.<sup>226</sup> Lastly, the dissent proposed, if the court finds that the condemned property will be used for a public purpose, the burden should shift to the party opposing the action to prove that the specific condemnation is not reasonably necessary to implement the plan.<sup>227</sup>

---

219. *Id.* at 593.

220. *Id.* at 600.

221. *Id.* at 587. The dissent asserted:

[J]ust as the taking of nonblighted property in a blighted area is subject to additional scrutiny to determine whether the taking is “essential” to the redevelopment plan; so too, should a heightened standard of judicial review be required to ensure that the constitutional rights of private property owners are protected adequately when property is taken for the purpose of private economic development under chapter 132 of the General Statutes. Justice demands no less.

*Id.*

222. *Kelo*, 843 A.2d at 587.

223. *Id.*

224. *Id.* at 588.

225. *Id.*

226. *Id.* The dissent justified this higher level of scrutiny by noting that it is the same standard used for civil cases where individual rights are in dispute, and it is the standard of proof required in adverse possession cases. The dissent offered, “I also believe that the clear and convincing standard is required in this context because of the tremendous social costs of the takings, costs that are difficult to quantify, but nonetheless real.” *Id.* at 589.

227. *Kelo*, 843 A.2d at 591.

Applying this test, specifically when the dissent gets to the third prong—the clear and convincing standard—the dissent parted company from the majority. The dissent conceded that there is an intent for the project to have a public benefit, but that the government could not in fact prove that this would materialize by clear and convincing evidence.<sup>228</sup> The practical effect of the third prong, or the “clear and convincing evidence” standard, is that it would bar the government from engaging in economic development using eminent domain unless it, or the proposed developer, could guarantee that the anticipated revenue would materialize.

### 3. THE QUESTION BEFORE THE U.S. SUPREME COURT

The question presented to the U.S. Supreme Court is: “What protection does the Fifth Amendment’s public use requirement provide for individuals whose property is condemned, not to eliminate slums or blight, but for the sole purpose of ‘economic development’ that will perhaps increase tax revenues and improve the local economy?”<sup>229</sup> In their petition for writ of certiorari, Kelo and the other petitioners argued that this case presents a vital constitutional question that has not been addressed by the Supreme Court: whether the public use clause of the Fifth Amendment authorizes the exercise of eminent domain to help a government increase its tax revenue and to create jobs.<sup>230</sup> Kelo claimed that the Connecticut Supreme Court’s use of *Berman* and *Midkiff* as precedent is improper because “*Berman* addressed the use of eminent domain to clear slums and blighted areas while *Midkiff* addressed the ability of Hawaii to alleviate oligopolistic land holdings.”<sup>231</sup> Kelo also claimed that by allowing urban renewal condemnations in an area that is not a slum or a blighted area, the court has allowed the broadest expansion of eminent domain authority yet realized.<sup>232</sup> Since this is an issue that has been dealt with differently in many states, Kelo urged the Supreme Court to step in to set a uniform standard.<sup>233</sup>

---

228. *Id.* at 602.

229. Petition for Writ of Certiorari at 1, *Kelo v. City of New London*, 843 A.2d 500, (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04–108), 2004 WL 1877787 (Aug. 18, 2004).

230. *Id.* at 6.

231. Reply Brief for Petitioners at 1, *Kelo* (No. 04–108).

232. Petition for Writ of Certiorari at 6, *Kelo* (No. 04–108).

233. *Id.* at 29. The Petition for Writ of Certiorari sets forth the different tests that have been utilized by the many states that have addressed this issue. *Id.* at 11–20. Some states have held that economic benefits are dependent on private ones and therefore incidental. When the public benefit occurs only as an indirect or derivative effect of the private development, then a number of states find that the public benefit is “incidental” and insufficient to sustain a finding of public use. *Id.* at 18. Petitioners stated that “according to Connecticut, as long as the city has come up with a chain of causation



In her brief on the merits, *Kelo* framed the issue for the Court in this way: “this is not a case about whether economic development is a valid public policy goal,” but instead “whether the government and private corporations can forcibly acquire property for the sole reason that someone else may be able to put the land to more ‘productive’ use that will produce more tax revenue and jobs.”<sup>234</sup> She argued that “[t]he majority opinion below incorrectly equated ‘public use’ with the ordinary ‘public’ benefits—taxes and jobs—that typically flow from private business enterprises” and urged the Court to adopt a “bright-line rule that the possible increase in taxes and jobs does not qualify as a public use.”<sup>235</sup>

The City of New London, Connecticut (“New London”), on the other hand, argued that “unless the proffered public use is palpably without reasonable foundation, a reviewing court should not go beyond its established role and second guess the legislature’s determination of public use or a city’s good faith attempt to achieve it.”<sup>236</sup> New London emphasized that the Connecticut legislature has declared economic development to be a public purpose,<sup>237</sup> and that it “is entitled to great deference from a reviewing court.”<sup>238</sup> This is founded on the principles “that courts are ‘unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them’” and “that the primary purpose of the Takings Clause is not to act as a substantive restraint on government behavior, but to assure compensation for any affected property owners should the government choose to exercise its eminent domain power.”<sup>239</sup> Following these principles, only once in its existence has the Court held a compensated taking to be unconstitutional.<sup>239</sup> Therefore, to “preserve the appropriate balance between the legislative and judicial branches” and “in keeping with the division between federal and state authority that is at the core of our federalist system of government[,]” New London urged the Court to “hold that economic development constitutes a public use within the meaning of the Fifth Amendment” and that the “particular condemnations at issue in the present case satisfy the Public Use Clause.”<sup>240</sup>

---

that could eventually lead to some public benefits in the form of tax revenues and jobs, then that is the primary purpose.” *Id.* at 19.

234. Petitioner’s Brief on the Merits at 11, *Kelo* (No. 04–108).

235. *Id.* at 10.

236. Respondent’s Reply to Petition for Certiorari at 1, *Kelo* (No. 04–108).

237. *Id.* at 13–14.

238. Respondent’s Brief on the Merits at 11–12, *Kelo* (No. 04–108).

239. *Id.*

240. *Id.* at 12–13.

4. *AMICI CURIAE* CHIME IN ON BOTH SIDES<sup>241</sup>

This case attracted odd bedfellows. In November and December of 2004, twenty-five *amicus curiae* briefs<sup>242</sup> were filed in support of Petitioner Kelo, and the following month, twelve *amicus curiae* briefs<sup>243</sup> were filed in support of the City of New London. On behalf of Kelo, self-proclaimed private property rights organizations, such as the Prop-

---

241. The co-authors of this article participated in this case on the side of the City of New London.

242. Brief of Amici Curiae America's Future, Inc. and Somerset Transmission & Repair Center, *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), *cert. granted* 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04-108), 2004 WL 2750340; Brief of Amici Curiae American Farm Bureau Federation et al., *available at* 2004 WL 2787138; Brief of Amici Curiae Becket Fund for Religious Liberty, *available at* 2004 WL 2787141; Brief of Amici Curiae Better Government Association, Citizen Advocacy Center et al., *available at* 2004 WL 2787142; Brief of Amici Curiae Professors David L. Callies, James T. Ely et al., *available at* 2004 WL 2803192; Brief of Amici Curiae Cascade Policy Institute, American Association of Small Property Owners et al., *available at* 2004 WL 2802969; Brief of Amici Curiae Cato Institute, *available at* 2004 WL 2802972; Brief of Amici Curiae Claremont Institute Center for Constitutional Jurisprudence, *available at* 2004 WL 2802971; Brief of Amici Curiae Develop Don't Destroy (Brooklyn), Inc. and the West Harlem Business Group, *available at* 2004 WL 2811058; Brief of Amici Curiae Mary Bugryn Dudko et al., *available at* 2004 WL 2811056; Brief of Amici Curiae Goldwater Institute et al., *available at* 2004 WL 2803193; Brief of Amici Curiae Jane Jacobs, *available at* 2004 WL 2803191; Brief of Amici Curiae King Ranch, Inc., *available at* 2004 WL 2803448; Brief of Amici Curiae Laura B. Kohr and Leon P. Haller, Esq., Trustee, Owners of Lauxmont Farms, *available at* 2004 WL 2802970; Brief of Amici Curiae Mountain States Legal Foundation and Defenders of Property Rights, *available at* 2004 WL 2802968; Brief of Amici Curiae NAACP, AARP et al., *available at* 2004 WL 2811057; Brief of Amici Curiae National Association of Home Builders and the National Association of Realtors, *available at* 2004 WL 2787139; Brief of Amici Curiae New London Landmarks, Inc., the Coalition to Save the Fort Trumbull Neighborhood et al., *available at* 2004 WL 2812099; Brief of Amici Curiae New London R.R. Co., Inc., *available at* 2004 WL 2802973; Brief of Amici Curiae John Norquist, President, Congress for New Urbanism, *available at* 2004 WL 2811055; Brief of Amici Curiae Property Rights Foundation of America, Inc., *available at* 2004 WL 2787137; Brief of Amici Curiae Reason Foundation, *available at* 2004 WL 2787140; Brief of Amici Curiae Robert Nigel Richards et al., *available at* 2004 WL 2802967; Brief of Amici Curiae Rutherford Institute, *available at* 2004 WL 2605096; Brief of Amici Curiae Tidewater Libertarian Party, *available at* 2004 WL 2803190.

243. Brief of Amici Curiae American Planning Association et al., *available at* 2005 WL 166929; Brief of Amici Curiae Brooklyn United for Innovative Local Development (BUILD) et al.; Brief of Amici Curiae California Redevelopment Association, *available at* 2005 WL 166942; Brief of Amici Curiae City of New York, *available at* 2005 WL 166943; Brief of Amici Curiae Connecticut Conference of Municipalities et al., *available at* 2005 WL 176426; Brief of Amici Curiae Law Professors Robert H. Freilich et al., *available at* 2005 WL 176672; Brief of Amici Curiae K. Hovnanian Companies, LLC, *available at* 2004 WL 2811123; Brief of Amici Curiae Massachusetts Chapter of the National Association of Industrial and Office Properties, *available at* 2004 U.S. Briefs 108; Brief of Amici Curiae Mayor and City Council of Baltimore, *available at* 2005 WL 166931; Brief of Amici Curiae the National League of Cities et al., *available at* 2005 WL 166931; Brief of Amici Curiae New York State Urban Development Corporation; Brief of Amici Curiae States of Vermont, Delaware, Hawaii, Illinois, Maryland, Montana, New York, Oklahoma, Oregon, Rhode Island, South Dakota, and Tennessee, and the District of Columbia, *available at* 2005 WL 166945.

erty Rights Foundation, the Cascade Policy Institute, the Cato Institute, the Tidewater Libertarian Party, and the Mountain States Legal Foundation, were joined by John Norquist,<sup>244</sup> president of Congress for New Urbanism,<sup>245</sup> Jane Jacobs,<sup>246</sup> the NAACP,<sup>247</sup> and AARP,<sup>248</sup> and a number of property owners<sup>249</sup> either fearful of, or “victimized” by, the use of eminent domain.

The City of New London saw support from organizations that are more typically aligned, such as the National League of Cities, City of New York, New York State Urban Development Corporation, the Mayor and City Council of Baltimore, and the Connecticut Conference of Municipalities. In addition, the National Association of Industrial and Office Properties (NAIOP), which might have been expected to share the perspective of the National Association of Home Builders and the National Association of Realtors on Kelo’s side, submitted an *amicus curiae* brief on New London’s side specifically to “rebut the assertion of the Property Rights Foundation of America, Inc. that the Takings Clause precludes states from promoting the public welfare by transferring taken property to private parties for the purpose of economic development.”<sup>250</sup> The American Planning Association,<sup>251</sup> which often shares the same concerns about issues of urban design, smart growth, and gentrification with the Congress for New Urbanism, John Norquist, and Jane Jacobs, took a different view from them on this case and filed an *amicus curiae* brief on behalf of the City of New London.

While the Court encourages *amicus curiae* briefs that might shed

---

244. Mr. Norquist was mayor of Milwaukee from 1988–2003, the author of *The Wealth of Cities* (1998), and taught courses in urban policy and urban planning.

245. Congress for New Urbanism is a nonprofit organization with members who are primarily architects, planners, engineers, and developers. More information about them is available on their website at <http://www.cnu.org> (last visited Feb. 17, 2005).

246. Jane Jacobs is perhaps best known for her 1961 book, *The Death and Life of Great American Cities*. She has also written *The Economy of Cities* (1969), *Cities and the Wealth of Nations* (1984), *Systems of Survival* (1993), and *The Nature of Economies* (2000). Her most recent book, *Dark Age Ahead* (2004), describes the “monumental crossroads” we now find ourselves at as agrarianism gives way to a technology-based future.

247. National Association for the Advancement of Colored People.

248. A national association that provides information, advocacy, and benefits for people aged 50 and over.

249. New London R.R. Company, America’s Future Inc. and Somerset Transmission & Repair Center, King Ranch Inc., Lauxmont Farms, and Develop Don’t Destroy.

250. Brief of Amicus Curiae the Massachusetts Chapter of the National Association of Industrial and Office Properties at 2.

251. Brief of Amicus Curiae American Planning Association at 1. The American Planning Association is a nonprofit public interest and research organization representing practicing planners, officials, and citizens involved on a day-to-day basis in formulating and implementing planning policies and land-use regulations. *Id.* at 1.

new light on the issues and arguments, repetitive arguments and “me too” briefs are not favored.<sup>252</sup> Did more than 1,000 pages of argument by the various *amici* add anything new? We may only know the impact of the arguments made by *amici* after the Supreme Court issues its opinion later this spring.

The *amici* supporting *Kelo* asked the Court to either eliminate the “private-to-private” transfer of property altogether for economic development under the power of eminent domain,<sup>253</sup> or to enunciate a more stringent standard of review for such condemnations.<sup>254</sup> They also

---

252. SUP. CT. R. 37. Brief for an *Amicus Curiae*—An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.

253. See, e.g., Brief of Amicus Curiae John Norquist, President, Congress for New Urbanism; Brief of Amici Curiae NAACP et al.; Brief of Amici Curiae American Farm Bureau Federation et al.; Brief of Amicus Curiae Claremont Institute Center for Constitutional Jurisprudence; Brief of Amicus Curiae Property Rights Foundation; Brief of Amici Curiae Better Government Association et al.

254. Brief of Amici Curiae National Association of Home Builders et al. (urging the court to adopt an intermediate level of scrutiny); Brief of Amicus Curiae New London R.R. Co. (discussing eight different tests currently used in various state courts and urging the Court to fashion a stringent standard that applies, not only to economic development cases, but to all condemnation cases, particularly where the taking disproportionately benefits a private party); Brief of Amici Curiae Cascade Policy Institute et al. (believing that the Public Use Clause and the just compensation claims warrant the same heightened level of scrutiny and should receive parallel interpretations); Brief of Amicus Curiae Claremont Institute at 4. The Claremont Institute believes the Court should enforce the original meaning of public use with this “simple test”:

Government takes property for a public use if it retains ownership of the property, or if it assigns the property to a private party subject to common carrier duties of public access. But if the government transfers property to a private party not subject to common carrier duties, the taking is for a private use and violates the Public Use Clause.

*Id.*; Brief of Amici Curiae New London Landmarks, Inc. et al. (believing that heightened scrutiny should be applied to takings for a private benefit, or for general, undefined economic benefits, or when property is taken for an uncertain or unduly vague intended use); Brief of Amicus Curiae King Ranch, Inc. King Ranch believes the power of eminent domain should only be exercised for a public necessity. The government must show its present need for the property—not speculative, hypothetical, or uncertain uses. Absent a specific plan for the property to be taken, there can be no meaningful judicial review of the taking of property. *Id.*; Brief of Amicus Curiae Lauxmont Farms at 20:

The test that should be applied in the takings context should be first for the court to determine whether the property to be taken is blighted. If the court determines the property is not blighted, then it ought to decide whether the proposed economic development or other justification for the taking amounts to a significant and legitimate public purpose. Finally, if the court determines that there is a significant and legitimate public purpose, it should then decide whether the scope of the taking is appropriate (i.e., whether the taking is or ought to be an easement, fee, or some other interest in land).

*Id.*; Brief of Amici Curiae Develop Don’t Destroy et al. (wanting the Court to formulate a narrow definition of “public use” which excludes “economic benefit”); Brief of Amici Curiae Robert Nigel Richards et al. (wanting the Court to adopt heightened scrutiny

provided the Court with examples of condemnation abuse when property is taken for economic development,<sup>255</sup> as well as examples of successful redevelopment that occurred without the use of eminent domain.<sup>256</sup> The Becket Fund for Religious Liberty asserted that religious institutions suffer special disadvantage from government abuse of eminent domain powers because they “will always be targets for eminent domain actions under a scheme that disfavors non-profit, tax-exempt property owners and replaces them with for-profit, tax-generating businesses.”<sup>257</sup>

The various *amici* who filed briefs supporting New London’s side argued, among other things, that “the dramatic change in federal law sought by petitioners would short-circuit the evolution of public use law in the state courts and unnecessarily impose a uniform federal rule in an area that has traditionally been governed by state law.”<sup>258</sup> The Mayor and City Council of Baltimore, who together have shared the long history of the successful redevelopment of Baltimore’s Inner Harbor, advised the Court that urban renewal (which the petitioners claim is a legitimate public use) and economic development (which they claim is not) are not distinct processes but “are almost always inextricably linked.”<sup>259</sup>

The Connecticut Conference of Municipalities and the State Municipal Leagues of Alabama focused on the determination made by the State of Connecticut and other states that:

The assembly of urban lands for economic growth is a “public use,” as if it eliminates the accretion of small parcels that has acted to hinder older cities like New London from competing in the market for economic development projects. . . . As such, it plainly falls within the police powers of the State of Connecticut, which has determined that its municipalities need the power to assemble lands to create developable

---

for exercises of eminent domain justified by promises of a better economy, just as it has established for suspect regulatory takings, because a heightened review will be useful to “smoke out” illegitimate criteria when the condemning authority is using the “suspect tool” of eminent domain).

255. For example, Block 37 in Chicago cleared more than fifteen years ago and sold this year at a loss; a city block on Wisconsin Avenue cleared by the City of Milwaukee in 1985 for a hotel has remained a parking lot ever since; four elderly siblings in Bristol, Connecticut, were forced to leave their Christmas tree farm to make way for a new industrial park; several elderly African-American families in Canton, Mississippi, were forced to leave the homes they had lived in for over sixty years to make room for a new Nissan auto plant.

256. For example, Pine Street Associates implemented a private redevelopment plan for downtown Seattle, Washington; a mall in Providence, Rhode Island; twenty-six blocks in West Palm Beach, Florida; Disney World in Orlando, Florida; and the City of Columbia, Maryland.

257. Brief of Amici Curiae Becket Fund for Religious Liberty at 3.

258. Brief of Amici Curiae States of Vermont et al. at 4.

259. Brief of Amici Curiae Mayor and City Council of Baltimore at 4.

urban parcels that the market itself has been unable to supply. Mindful of the states' greater familiarity with local land conditions, this Court has been properly loath to disturb such determinations.<sup>260</sup>

A national homebuilder, K. Hovnanian Companies, LLC, showed how the State of New Jersey has adopted a policy of "smart growth" to encourage redevelopment and revitalization in areas that are already developed because there is a limited availability of undeveloped land. However, the public's need for housing, jobs, and economic development illustrates that eminent domain for so-called "private economic development" is sometimes necessary.<sup>261</sup> The National League of Cities explained that "[t]he private sector often cannot accomplish the job alone due to a range of market failures, including holdouts; obstacles to assembling an appropriate development site in urban and suburban areas; the risks associated with cleaning up 'brownfield' sites; clouded property title on key parcels; and the need to improve street patterns."<sup>262</sup> They pointed to the Kansas City Speedway and associated retail development, as well as the Nissan auto plant in Canton, Mississippi, as examples.<sup>263</sup> The Empire State Development Corporation recently used its power of eminent domain to permit the expedited rebuilding of 7 World Trade Center, and successfully revitalized approximately thirteen acres in the Times Square area of Manhattan "in response to decades of rampant economic disinvestment in Times Square by the private sector."<sup>264</sup> "Now, despite private benefits, the predominant economic and social benefits have accrued to the public."<sup>265</sup>

Most unusual of all the *amicus curiae* briefs, perhaps, were the two filed by the law professors, one for Kelo<sup>266</sup> ("Callies *amicus* brief") and the other for the City of New London<sup>267</sup> ("Freilich *amicus* brief"). These were unusual because, although law professors frequently draft and file *amicus curiae* briefs before the U.S. Supreme Court, they rarely do it on their own behalf, speaking as a group of law professors. Perhaps

---

260. Brief of Amici Curiae Connecticut Conference of Municipalities at 2–3.

261. Brief of Amici Curiae K. Hovnanian Companies, LLC.

262. Brief of Amici Curiae National League of Cities et al. at 2.

263. *Id.*

264. Brief of Amici Curiae New York State Urban Development Corporation at 18.

265. *Id.* at 20. The New York Stock Exchange is another example cited. "[T]he New York State Legislature expressly authorized ESDC to use eminent domain to acquire non-blighted property in Lower Manhattan for the construction of a new, state-of-the-art securities trading facility for the New York Stock Exchange" in order to retain the NYSE in the city. *Id.* at 21.

266. Brief of Amici Curiae Professors David L. Callies et al., *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04–108), 2004 WL 2803192.

267. Brief of Amici Curiae Law Professors Robert H. Freilich et al.

no other pair of *amicus curiae* briefs highlight the opposite positions of petitioners and respondents in this case in a more stark fashion than these two. The Callies *amicus* brief urges the Court to revisit the rational basis test “and to articulate a more appropriate intermediate standard of review.”<sup>268</sup> The Freilich *amicus* brief argues that the existing rational basis test remains the appropriate test for judicial review of condemnations for economic development and revitalization.<sup>269</sup>

---

268. Brief of Amici Curiae Professors David L. Callies et al. The Callies *amicus* brief summarizes their argument for petitioners as follows:

The Connecticut Supreme Court’s decision was in keeping with *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), which provides that legislative assertions of public use should be subjected to rational basis review. The application of such broadly deferential review in public use cases is inappropriate. Application of rational basis review to the exercise of eminent domain in cases such as this effectively eviscerates the Fifth Amendment’s public use limitation. Moreover, lower courts’ responses to the exponential increase in the use of eminent domain for generalized “economic development” has resulted in a hodgepodge of decisions variously upholding and striking down such condemnations on similar facts. These cases make clear that many state courts are uncomfortable with granting governmental entities *carte blanche* authority to condemn property for speculative “economic development” projects.

This case offers the Court an important opportunity to revisit the application of rational basis review in public use cases and to articulate a more appropriate intermediate standard of review that will reinvigorate the protections guaranteed by the Fifth Amendment’s Takings Clause. An appropriate standard would protect the prerogatives of legislatures to establish the appropriate ends of government action (e.g., to decide that certain areas of New London, Connecticut should be redeveloped). It would merely require that a government justify a decision to resort to eminent domain as the means of achieving those goals.”

*Id.* at 3–4.

269. Brief of Amici Curiae Law Professors Robert H. Freilich et al. at 3–4. The Freilich *amicus* brief summarizes its argument for the respondent as follows:

This Court for over 100 years has reviewed cases under the Fifth Amendment public use takings clause . . . using the rational basis test, and this test remains, in our view, the appropriate test, especially for state and local government legislative determinations to use condemnation to achieve the social and economic redevelopment and revitalization of a city. This Court has never used higher scrutiny for eminent domain or takings except in a limited range of cases involving unconstitutional conditions attached to development approval, and there is no reason to apply it to direct condemnation under the Fifth Amendment. In determining whether property may be acquired by condemnation for social and economic redevelopment and revitalization, the requisites of our Constitution are fully satisfied if a court evaluates whether the legislative determination supporting the condemnation is rational, and the legislative decision must be upheld unless it is patently arbitrary or lacks valid statutory authority. Intermediate scrutiny is highly inappropriate in our federalist form of government. This Amicus Brief urges this Court to reiterate its prior holdings, establishing that so long as:

- (1) there is state statutory or home rule authority establishing the goals and means of achieving social and economic redevelopment and revitalization;
- (2) the state or local government has utilized a comprehensive planning process and analysis assessing the goals and means; and

It is probably fair to say that all *amici* on both sides agree on one thing: just compensation may not be “just” in some cases. Although the APA urges the Court to stay the course and retain the rational basis test and a broad view of “public use,” the APA acknowledges that eminent domain is an “unsettling power,” not only for those plaintiffs that can convince a court that the taking is not for a public use, but it is “disruptive for all who experience it.”<sup>270</sup> The answer is not, in the opinion of the planners, for the courts to jump in and second-guess legislative determinations made by local city councils, which is the ultimate consequence they fear if the U.S. Supreme Court adopts a higher standard of review in public use cases. Rather, the dangers of eminent domain should be addressed by encouraging careful planning and public participation and “by building on current legislative requirements that mandate additional compensation beyond the constitutional minimum for persons who experience uncompensated subjective losses and consequential damages.”<sup>271</sup>

The final word, before oral argument,<sup>272</sup> was in petitioner’s Reply Brief, where they argued that “public use actually means something” and asserted that respondent’s clear position is that “public use” has no substantive meaning.<sup>273</sup> They reiterated their contention that many condemnations are not for a public use, pointing out that respondent and many *amici* appear to confuse condemnations for blight with condemnations for economic development, which petitioners believe are distinctly different.<sup>274</sup> Condemnations, they explain, that may provide “trickle-down benefits are not a public use.”<sup>275</sup> Neither are condemnations that lack a reasonably foreseeable use.<sup>276</sup> Economic development projects particularly need safeguards and minimum standards to ensure they are for a public use.<sup>277</sup>

Replying to the point made by respondents and some *amici* that the U.S. Supreme Court should not attempt to hamstring the experimentation and different approaches being undertaken at the state level, pe-

---

(3) the state or local government retains regulatory or contractual or ownership control over the project and a private redeveloper, there is valid public use and purpose to meet the Fifth Amendment’s rational basis review.

*Id.*

270. Brief of Amici Curiae American Planning Association at 3.

271. *Id.* at 3.

272. Oral argument was held on February 22, 2005, after the writing of this article.

273. Reply Brief of Petitioners at 1.

274. *Id.* at 8–9.

275. *Id.* at 4.

276. *Id.*

277. *Id.*



tioners assert that “[i]f this Court declines to place any limits on condemnations for private use, state courts will be much less likely to put a check on abuses.”<sup>278</sup> They merely ask for “a limited restriction on the use of eminent domain for private business, while respondents seek unlimited powers.”<sup>279</sup> This is the last word—at least until the Justices speak.

#### V. Where Do We Go from Here?

While it is impossible to predict how the Supreme Court will decide *Kelo*, there are some avenues the Court could take to reaffirm the eminent domain power as a vital tool for needed community redevelopment and at the same time articulate some guiding principles to minimize the potential for abuse. In our opinion, the Court should adopt the following principles and applications of law:

1. Specifically uphold the exercise of the eminent domain power for economic development as a valid public use under the U.S. Constitution.
2. Recognize that governments need flexibility to enter into public-private partnerships to accomplish certain legitimate goals such as economic development. Government itself is not in the “business of economic development,” but rather more appropriately provides a regulatory climate to enable economic development to occur; eminent domain is one tool governments have to help create this climate.
3. Reiterate that when governments enter into public-private agreements, they do not unconstitutionally delegate their eminent domain powers to a private enterprise when government retains control over the approval and adoption of the redevelopment plan and when contracts/agreements memorialize how the plan will be implemented. There are numerous examples of public-private partnerships/privatization across the country, and it has been settled that these are not illegal delegations of government authority to private entities.
4. Recognize that partnering with the profit-driven private sector benefits municipal goals of successful implementation of the redevelopment plans. The public benefits as a whole when this occurs.

---

278. Reply Brief of Petitioners at 17.

279. *Id.* at 18.

5. Support the principle that limitations on the use of eminent domain are best left to the states. A number of states are already addressing their own concerns through statutory reform. For example, legislative proposals introduced recently in Arizona and California have sought to limit or restrict the authority of local governments to sell condemned property to local developers. Also, in Maryland, the legislature created a Task Force on Business Owner Compensation in Condemnation Proceedings to, among other things, examine the circumstances in which condemnation can be used.
6. Require that the government have a duly adopted economic development plan for the subject area that demonstrates the public purpose of the use of eminent domain powers and indicates the continuing public use of the subject property. While government should not be required to prove that these plans, when adopted, will guarantee anticipated results, the development of these plans with full citizen participation, and a competitive selection of the key private sector partner, will further the likelihood of success.
7. Continue to apply a rational basis test for government legislative determinations to use condemnation to achieve social and economic community redevelopment and revitalization.

The outcome in *Kelo* will undoubtedly have a profound impact on municipalities and on the private sector including municipal finance.<sup>280</sup> Given the facts of the case, and the absence of evidence of abuse, the Supreme Court should uphold the decision below.

---

280. See Matthew Vadum, *An Eminent Concern?: Case Could Change Redevelopment Landscape*, THE BOND BUYER ONLINE, Oct. 1, 2004, at <http://www.bondbuyer.com/article.html?id=20041001JO83FQ0H&from=home> (last visited Feb. 17, 2005) (“The case . . . is of interest to cash-strapped localities that want to condemn land in order to clear the way for redevelopment projects that promise jobs and increased tax revenues. It is also of interest to the municipal bond market because municipal debt is often used in redevelopment financing packages, so any narrowing of the criteria used in eminent domain cases could have an impact on that market.”).