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EMINENT DOMAIN AFTER *KELO V. NEW LONDON*: IS CHANGE IMMINENT?

By

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I. INTRODUCTION

The United States Supreme Court has historically played the critical role of hearing and deciding cases that ultimately define our society as one of law. Many of the Court's decisions have been handed down with little fanfare, and any national publicity and debate faded soon thereafter. Sometimes, however, the Court renders a landmark decision which involves such a fundamental right and has such immediate and long term implications that a firestorm of national publicity and debate continue long after the decision date. One June 23, 2005, the Supreme Court decided such a case, *Kelo v. New London,*[1] an eminent domain decision, and the firestorm of publicity and debate continues. In *Kelo,*[2] the Court dramatically expanded the eminent domain power of government to take private property for "public purposes" rather than "public use." The Court reasoned that a Connecticut city could constitutionally take private property in the name of economic development by a private developer.

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The purpose of this paper shall be to analyze the controversial case of *Kelo v. New London*[3] and to evaluate its clear implications. A brief historical overview of the law of eminent domain will be presented in order to gain a proper perspective of the *Kelo* decision. The *Kelo* decision will then be discussed. Finally, the implications of this decision will be evaluated.

II. BRIEF HISTORICAL OVERVIEW OF THE LAW OF EMINENT DOMAIN

The "Takings Clause" located in the Constitution's Fifth Amendment reads: "...Nor shall private property be taken for public use, without just compensation."[4] That Clause has been applied to the States through the Court's incorporation of the Takings Clause into the Fourteenth Amendment's Due Process Clause.[5] This Constitutional basis for the Government's eminent domain power is fundamentally important. But even before these Constitutional provisions were penned, the Founders embraced property ownership as a fundamental right of liberty. Philosopher John Locke believed that the right to property was a natural right to man. That "...governments were formed to protect the natural rights of man..."[6] was "most influential"[7] for the Founders. James Madison, Thomas Jefferson and John Adams embraced the Lockean view of property[8] and by the late eighteenth century the "Lockean" view was widely accepted in America.[9]

A. Early Decisions Protecting Private Property

Two Supreme Court decisions highlight the Court's primary concern with protecting private property interests. *Vanhorne's Lessee v. Dorrance*,[10] declared in 1795 a Pennsylvania statute unconstitutional that would have resolved a land dispute by taking property away from certain Pennsylvania citizens and transferring it to a group of

subsequent settlers.[11] The Court found it repugnant to seize the property of one citizen to give it to another citizen.[12] In the 1798 *Calder v. Bull* decision,[13] the Court again refused to support a decision that "...takes property from A and gives it to B."[14]

B. Clear Public Use Approach

Government, however, could take property and transfer title to itself for some public use such as a military facility, a public road or a park.[15] Furthermore, that public use interpretation was stretched to include condemnations and transfers of title from one private party to another when the subsequent use would be available to the public at large. Common examples include common carriers like railroads, a public utility, or a stadium.[16]

C. Public Benefit or Public Purpose Approach

Two landmark Supreme Court decisions dramatically expanded the meaning of "public use" to include "public benefit" or "public purpose" in eminent domain takings. In *Berman v. Parker*,[17] congress identified a blighted neighborhood in Washington D.C. and determined that it had become "injurious to the public health, safety, morals, and welfare" and that it was necessary to "eliminate all such injurious conditions by employing all means necessary and appropriate for the purpose," including eminent domain.[18] The case involved the wholesale taking of hundreds of urban dwellings, razing them, and then turning their sites over to private developers who would then build new improvements for their private, profit-making purposes. Mr. Berman objected to the taking of hi non-blighted department store. However, the Court allowed the taking of the neighborhood as a whole. In *Hawaii housing Authority v. Midkiff*,[19] the Court approved

an eminent domain taking of real property from lessors and transferring it to lessees on the Hawaiian island of Oahu, where it was said there was oligopolistic state of freehold title that was "skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare."[20] The Court had expanded its view of "public use."

In 1981, the Michigan Supreme Court allowed the City of Detroit to accomplish a pervasive eminent domain taking in the name of "economic development." In *Poletown Neighborhood Council v. City of Detroit*,[21] the City of Detroit sought to prevent a pending unemployment crisis and to spur "economic development." The City was allowed to condemn and take the entire residential community of *Poletown* and then sell the property at a dramatically reduced price to General Motors. The purpose of the sale was to guarantee that General Motors would not close operations in the area. the taking included churches, school, hospitals, and displaced over thirty-four hundred residents.[22]

In 2004, however, the Michigan Supreme court effectively overturned its *Poletown* decision in the case of *County of Wayne v. Hathcock.*[23] The County of Wayne started a project for the development of business and technology near its new Metropolitan Airport terminal and jet runway. The county commenced a series of condemnation proceedings to acquire the property for developers. The County claimed not blight removal but rather improvement of the local economy with projected new jobs and substantial additional tax revenue.

The Michigan Supreme Court rejected the condemnation claims and thus narrowed its interpretation of "public use." The Court established three tests, and of which would be sufficient to justify a condemnation under Michigan law. First, the Court announced a "Public Necessity Test."

Eminent domain must be limited to enterprises that generate public benefit, and whose very existence depends on land that can only be provided by the central government.[24] Second, the Court stated its "Public Accountability Test." When the private entity remains accountable to the public in its use of the property, a public use exists.[25] Finally, the Court identified its "Public Concern Test." A public use exists when the selection of the condemned land for a private interest is based on immediate public concerns and facts of independent public significance.[26] The Decision was in sharp contrast to the expanded *Poletown* construction of "public use" for an eminent domain taking. Instead, The *Hathcock* Court required that in order to justify an eminent domain taking of property near the new Metropolitan Airport runway, it would apply the three tests and require that at least one of them be satisfied.

III. KELO V. NEW LONDON

Should there be a broad definition of "public use" as opposed to applying tests and imposing greater scrutiny for an eminent domain taking of private property? The expanding and diverse case law involving eminent domain proceedings clearly showed that lower courts were struggling with this question. In *Kelo v. New London*,[27] the Supreme Court granted certiorari and seized the opportunity to answer this question in an eminent domain case from Connecticut. The Court would offer its modern day definition for an appropriate taking under the Fifth Amendment's Takings Clause applied to the States through the Fourteenth Amendment. The City of New London, Connecticut approved an integrated development plan designed to revitalize its ailing economy. Through its development agent, the City purchased most of the property targeted for the project from willing sellers, but initiated condemnation proceedings against certain unwilling sellers. Invoking a state statute that specifically authorized eminent domain to promote

economic development, and arguing that Supreme Court precedent and its expanded definition of "public use" should justify its condemnation claims, the City of New London prevailed before the Supreme Court of Connecticut.[28]

The City of New London intended the development plan to capitalize on the Pfizer Company building a major facility. It was expected to create jobs, increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas. Suzette Kelo had lived in the area since 1997 and had made extensive improvements to her water view home. In all, there were nine parties including Ms. Kelo who contested the condemnation claims. While the Connecticut Supreme Court ultimately approved the taking, the dissenting justices would have imposed a "heightened" standard of judicial review for takings justified by economic development. They would have found the takings unconstitutional because the City failed to establish by "clear and convincing evidence" that the economic benefits of the plan would have been realized."[29]

In affirming the *Kelo*[30]case, the Supreme Court not only embraced the broad definition of "public use" to include public purpose, but it also clearly rejected any "heightened" review for takings justified by economic development. Writing for the majority, Justice Stevens noted that a rational basis review was appropriate because, "there is...no principled way of distinguishing economic development from other public purposes we have recognized."[31] Furthermore, he noted that the Court has a "longstanding policy of deference to legislative judgments in the field."[32] He also emphasized "...that nothing in our opinion precludes any state from placing further restrictions on its exercise of the takings power."[33]

Justice Stevens delivered the opinion of a divided court. In a five to four decision, Justices Souter, Ginsburg, Breyer and Kennedy joined Justice Stevens. Justice Kennedy filed a concurring opinion. Justice Kennedy suggested that in certain cases a heightened standard of review should be used. In "...cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the benefits are so trivial or implausible, that courts should presume an impermissible private purpose."[34] He emphasized that *Kelo* was not such a case. The Chief Justice, Justice Scalia, Justice O'Connor, and Justice Thomas dissented. Justice O'Connor and Justice Thomas wrote separate dissenting opinions. Those dissenting opinions serve as a foundation of the next section of this paper, where the implications of the *Kelo* decision will be evaluated.

IV. IMPLICATIONS OF *KELO*

A. The Kelo Dissenting Opinions

There is no better place to begin the evaluation of the implications of the *Kelo* decision than to examine the separate dissenting opinions written in the case by Justice O'Connor and Justice Thomas. Justice O'Connor expressed her concerns about the decision in two remarkable observations:

> The spector of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.... The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process including large corporations and development firms.[35]

Justice O'Connor clearly felt the Court too broadly defined "public use" under the Takings Clause and that it abdicated its responsibility to properly enforce the Constitution when it suggested that the States could choose appropriate limits on economic development takings.

Justice Thomas warned that the *Kelo* decision was "far reaching, and dangerous."[36] He traced the law of government takings and reasoned that the Court had gone too far in defining "public use".[37] Furthermore, he referred to earlier urban renewal projects that some described as 'Negro removal.' He observed that a disproportionate percentage of lower income, elderly, and non-white people would likely be impacted by the Court's decision.[38]

Justice Thomas argued that "There is no justification...for affording almost insurmountable deference to legislative conclusions that a use serves a public purpose."[39] He stated that the Court has long had an "... overriding respect for the sanctity of the home ..."[40] and that the Court "... would not defer to a legislature's determination of the various circumstances that establish ... when a search of a home would be reasonable."[41] Yet, the Court cannot "... second-guess ... whether the government may take the infinitely more intrusive step of tearing down ... homes."[42] He poignantly observes, "Though citizens are safe from the government in their homes, the homes themselves are not."[43]

No less than two Supreme Court Justices then warned of the pending problems resulting from the *Kelo* decision. They were joined in their dissents by two additional justices, Chief Justice Rhenquist and Justice Scalia. Since the *Kelo* decision, Justice Roberts and Justice Alito have replaced Chief Justice Rhenquist and Justice O'Connor, but if left the *Kelo* majority intact. That being true, it is therefore highly unlikely

that the newly composed Court would agree to hear a new case testing the Takings Clause or that they would do anything other than affirm the *Kelo* decision.

While the ultimate *Kelo* decision and the strong dissenting opinions that were a part of it will long be remembered, perhaps the most significant aspect of the case was justice Stevens' statements in the opinion that the Court would defer to legislative judgments in the field and "... that nothing in our opinion precludes any state from placing further restrictions on its exercise of the takings power."[44] These are telling statements that leave the door wide open for state legislatures and state supreme courts to tailor their own state takings power. When the Supreme Court rendered a decision in the *Kelo* case, they essentially decided not to ultimately resolve the takings question, but rather to leave it to the states.

B. New Takings, Public Opinion, and State Governments

It is much too soon to properly gauge the ultimate impact of the *Kelo* decision. However, certain early observations suggest where things might be headed. Prior to the *Kelo* decision, there was an increase in the number of eminent domain claims. "According to the Institute for Justice, more than 10,000 properties were threatened or taken by eminent domain between 1998 and 2002."[45] Based on the Court's broader interpretation for "public use" and the number of communities who are interested in economic development to attract new business and expand tax revenue, the number of takings claims is likely to rise dramatically.

Another clear early observation is that the public generally reacted negatively to the *Kelo* decision and to the use of eminent domain takings to further economic development. According to Dana Berliner of the Institute for Justice, "Polls

show public opposition has ranged from 70 percent to more than 90 percent of respondents."[46] This would point toward people lobbying their state legislators for laws to restrict such takings and to fight legal claims in the area if their property is targeted.

Based on this overwhelming public opposition and the *Kelo* Court's ruling that states could choose appropriate limits on takings connected with economic development, it seems likely that state governments will address this issue with new legislation. In fact, according to Larry Morandi, who tracks eminent domain issues for the National Conference for State Legislators, that is precisely what is happening. "Lawmakers in 44 states have drawn up more than 320 eminent domain bills."[47] Alabama, Michigan and Ohio took steps to limit or place a moratorium on the use of eminent domain for economic development purposes. South Dakota sought to block takings for any private person or nongovernment entity. Pennsylvania proposed a ban on private development takings bu the measure would exempt Philadelphia and Pittsburgh for seven years. The early state bills are very restrictive.[48] Even the Federal Government has been considering bills that would restrict the use of federal funds to support condemnation that "primarily benefits private entities."[49]

C. First State Post Kelo Decision: Norwood v. Horney

On July 26, 2006, the Ohio State Supreme Court became the first state high court to decide a case involving eminent domain issues since the *Kelo* decision. In the case of *Norwood v. Horney*,[50] a development project in Norwood Ohio gave rise to the property owners' challenge. Norwood was a community near Cincinnati that had undergone changes that "... eroded its industrial base, diminished its financial strength, shifted its nature from residential to commercial and increased noise,

pollution, and traffic."[51] The City entered into an agreement with a private firm to plan economic development. The plan called for construction of apartments and condominiums, commercial office space and parking with substantial revenue earmarked for the city. The firm was able to purchase most of the affected property, but the City commenced eminent domain proceedings against owners who refused to sell. The City relied on a consultant's conclusion that the neighborhood was a "deteriorating area" in danger of becoming a blighted area and proceeded under the Norwood Code to take the property. A state trial court upheld the taking and an appeals court denied a stay of that judgment. The Ohio Supreme Court reversed those lower court decisions.

The Ohio Supreme Court steered away from the *Kelo* decision and instead cited the *Kelo* dissent and the *Hathcock*[52] Michigan Supreme Court decision to use a heightened scrutiny test in reviewing the eminent domain powers. The Court ruled that the fact the appropriation would provide an economic benefit to the government and community, standing alone, did not satisfy the public use requirement of the Ohio Constitution. Furthermore, the Court ruled that the use of "deteriorating area" as a standard for determining whether private property is subject to appropriation was unconstitutionally void for vagueness. Finally, the Court ruled that that part of the City of Norwood Code which permitted the taking and using of appropriated property after the compensation had been deposited but prior to appellate review was also unconstitutional in violation of the separation of powers doctrine.[53] This case clearly shows that the *Kelo* decision potentially might not signal a change in how state courts handle eminent domain cases.

V. CONCLUSION

The sharply divided Supreme Court *Kelo* decision, the public's generally negative reaction to that decision, and numerous states enacting new "takings" legislation are all factors that suggest that more litigation will continue. The Court's dramatic expansion of the interpretation of "public use" to include "public purpose" under the Fifth Amendment's Takings Clause in the name of economic development, and the common "blight" problems in America's larger cities invite such litigation. Furthermore, politicians and those in state and local governments will have difficult decisions in navigating a path to protect private property interests on the one hand and to promote economically healthy cities on the other hand. Wealthy developers and major corporations seeking government inducements to stay in one city or to relocate to another city will only add to the difficulty of those decisions.

The Court's decision in *Kelo* not to use a heightened scrutiny test in "Takings" cases involving economic development, its announced deference to state and local governments' decision in those cases, and its general abdication to state governments to pass more restrictive laws in this area has ultimately served to make a gray and cloudy area of law even more gray and cloudy. Indeed, the new state legislation, and likely increased litigation in numerous states suggests we have storm clouds forming and new decisions from the various states will be raining down on us soon.

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[1] *Kelo v. New London*, 126 S. Ct. 24, 162 L. Ed. 2nd 922, 2005 U.S. LEXIS 5331 (2005).

[2] Id.

[3] Id.

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[4] U.S. Const., amend. V.

[5] U.S. Const., amend. XIV, §1. See *Chicago, B. & Q.R. Co. V. Chicago*, 166 U.S. 226, 41 L. Ed. 979, 175.

[6] John Lock, *Second Treatise of Government* 19, at 15 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1960)

[7] Joshua E. Baker, *Quieting the Clang: Hatcock as a Model of the State-Based Protection of Property Which Kelo Demands*, 14 Wm. & Mary Bill of rts. J. 351 at 354. (2005)

[8] Id.

[9] Id.

[10] *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 311 (1795).

[11] Id. at 304.

[12] Id. at 311.

[13] *Calder v. Bull*, 3 U.S. 386 (1798).

[14] Id at 388.

[15] *Old Dominion Land Co. V. United States*, 269 U.S. 55 (1925).

[16] *National Railroad Passenger Corporation v. Boston & Maine Corp.*, 503 U.S. 407 (1992).

[17] *Berman v. Parker*, 348 U.S. 26 (1954).

[18] Id. at 28.

[19] *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

[20] Id. at 232.

[21] *Poletown Neighborhood Council v. City of Detroit*, 304 N.W. 2d 455 (Mich. 1981).

[22] Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L. Rev. 285, 295 (2000).

[23] *County of Wayne v. Hathcock*, 684 N.W. 2d 765 (Mich. 2004).

[24] Id. at 781.

[25] Id. at 782.

[26] Id. at 783.

[27] *Kelo v. New London*, 125 S. Ct. 2655 (2005).

[28] *Kelo v. New London*, 843 A. 2d 500 (2004).

[29] Id. at 587, 588.

[30] *Kelo v. New London*, 125 S. Ct. 2655 (2005).

[31] Id. at 2662.

[32] Id. at 2660.

[33] Id. at 2665.

[34] Id. at 2667.

[35] Id. at 2670,2671.

[36] Id. at 2687.

[37] Id. at 2678.

[38] Id. at 2687.

[39] Id. at 2684.

[40] Id. at 2685

[41] Id. at 2684.

[42] Id. at 2685.

[43] Id.

[44] Id. at 2668.

[45] Tresa Baldas, *States Ride Post-"Kelo" Wave of Legislation*, The NAT'L. L.J. 46 (Aug. 1, 2005) at http://web.lexis-nexis.com.

[46] Warren Ritchey, *Fracas Over Home Seizures Moves to States*, CH. SCI. MONT., (Dec. 15, 2005) at http://web.lexis-nexis.com.

[47] David Loos, *Legislatures Moving to Boost Property Rights in Kelo Wake*, 10 ENV"T & ENERGY PUB 9. (Mar. 2, 2006) at http://web.lexis-nexis.com.

[48] Id.

[49] Terry Pristin, *Developers Can't Imagine a World Without Eminent Domain*, N.Y. Times, January 18, 2006 at C8.

[50] *Norwood v. Horney*, 853 N.E. 2d 1115 (Oh. 2006).

[51] *In Ohio, 'Economic Benefit' Alone Does Not Justify Use of Eminent Domain*, Vol. 75, No. 6, The U.S. Law Week, (Aug. 15, 2006) at 1099 at http://pubs.bna.com.

[52] *County of Wayne v. Hathcock*, 684 N.W. 2d 765 (Mich. 2004).

[53] Norwood v. Horney, 853N.E. 2d 1115 (Oh. 2006).