In The Land of Kelo: Still No Meaningful Protection for Property Owners

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ABSTRACT

This article analyzes Connecticut’s legislative response to the Supreme Court’s decision in
Kelo v. City of New London. Following a brief summary of the Kelo case, the article
describes the municipal economic development statutes in
effect in 2000 when the New London project was approved
and how these statutes were changed in response to the popular
8-193(b)(1), eminent domain may not be used to acquire
property for economic development if its primary purpose is to
increase local tax revenue. The New London development
plan in Kelo is put to the new statutory test to see if it would
protect the affected property owners. The clear conclusion is
that Connecticut’s statutory reform provides no meaningful
protection for property owners against the use of eminent
domain for private commercial projects.

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INTRODUCTION

In *Kelo v. City of New London*, the U.S. Supreme Court held that private economic development is a permitted public use under the Fifth Amendment to the U.S. Constitution. *Kelo* arose from the exercise of eminent domain under an economic development plan adopted by the City of New London, Connecticut in November 2000. The City condemned the property of Susette Kelo and eight other property owners pursuant to its plan for the Fort Trumbull section of the City in which property would be transferred to a private developer to build a project consisting of a hotel and conference center, private residences and office buildings. The purpose was to create jobs and increase tax revenues for the City. The use of eminent domain for such private economic development was explicitly authorized under Connecticut law.2

The Supreme Court’s decision in *Kelo* created a popular backlash against the use of eminent domain for private economic development. In response to this national outcry, many states have enacted reform measures to limit the power of eminent domain.

This article provides a brief background of the *Kelo* case including a summary of the Supreme Court decision. Its primary focus, however, is an analysis of the reform enacted by the State of Connecticut in response to *Kelo*. To determine whether the statutory reform provides any meaningful protection to property owners, the article also asks the fundamental question: If the identical New London development plan were adopted today, would the revised Connecticut law protect property owners from a compulsory purchase of their homes?

BACKGROUND

A. Property Rights

The legal issue raised in *Kelo* reflects a clash of two bedrock principles - the government’s authority to exercise the power of eminent domain and the individual’s right to use and enjoy his private property. The right of private property is among the most revered in the common law tradition. In fact, the protection of property rights against government interference can be traced as far back as the Magna Carta in the thirteenth century.3 The provisions in the U.S. Constitution that protect property rights, including the Fifth Amendment, reflect the paramount value placed by the Founding Fathers on the right to acquire and own property.4

In 1795, the Supreme Court emphasized the importance of property rights as follows: “the right of acquiring and possessing property and having it protected is one of the natural, inherent and inalienable rights of man... [T]he preservation of property then is a primary object of the social compact.”5

For more than two hundred years, the Supreme Court has consistently held that it is unlawful for the government to take property from *A* and give it to *B*. In the oft-cited case *Calder v. Bull*, Justice Chase wrote:

An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. ... A few instances will suffice to explain what I mean... [A] law that takes property from *A* and gives it to *B*: It is against all reason and justice, for a people to entrust a Legislature with such powers;
and, therefore, it cannot be presumed that they have done it.⁶

B. Eminent Domain

While the sanctity of property rights is a long-standing tradition dating back to early English law, the state's power of eminent domain also has a long history. It derives from the sovereign's inherent power to acquire private property and purportedly dates back to Roman times.⁷

The Fifth Amendment limits the government's power of eminent domain by requiring that a taking be for a public use and that just compensation be paid to the owner.⁸ Similar protections are also embodied in state laws.⁹ As Justice O'Connor stated in her dissenting opinion in Kelo: "The public use requirement . . . circumscribes[...s] the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the public's use, but not for the benefit of another private person. This requirement promotes fairness as well as security."¹⁰

What then constitutes public use? The interpretation of public use has been greatly expanded over the last fifty years.¹¹ This issue became the key battleground between the individual's right to possess and use his property and the state's competing interest in taking it for the public use.

It is well-established that eminent domain can properly be used to take property which will be owned by the government and open to the public (such as for a school or a highway).¹² Under what circumstances, however, is the exercise of eminent domain constitutionally permitted when the property will be transferred to a private party? There is no general consensus on this issue.¹³ It is the constitutionality of this expanded use of eminent domain which is at the heart of the Kelo case where property was taken for the purpose of transferring it to a private party to build a private commercial development.

C. New London and Susette Kelo

That the City of New London was in economic decline was evidenced by its designation by the State as a distressed municipality in 1990. In particular, the City had suffered from the closing of the Naval Undersea Warfare Center in 1996 which resulted in the loss of over 1,500 jobs. In an effort to revive the city, the New London Development Corporation (NLDC) was reactivated in 1998 and authorized to act as the City's development agent. In early 1998, Pfizer Inc., the pharmaceutical company, announced that it would build a $300 million research facility on the New London Mill site immediately adjacent to the City's Fort Trumbull waterfront district. The project was projected to provide nearly 2,000 jobs.¹⁴

Following Pfizer's announcement, the NLDC prepared an integrated municipal economic development plan for the Fort Trumbull area pursuant to Connecticut General Statutes (CGS) section 8-189. The development plan encompassed approximately 90 acres consisting of 115 privately owned properties and the 32 acres of land formerly occupied by the naval facility. The plan included a waterfront conference hotel, a 90,000 square foot research and development facility, new houses, office, retail space, and other commercial uses.¹⁵

The plan's purpose was to complement the new Pfizer project, create jobs, increase tax revenues, encourage public access to the city's waterfront and eventually build momentum for the revitalization of the rest of the City including its downtown area. The plan was also designed to make the City generally more attractive and provide leisure and recreational opportunities on the waterfront and in the park.¹⁶
The plan required the acquisition of the 90-acre project area by the City and its subsequent transfer to a private party who would be responsible for developing the property. The plan was approved by the New London City Council in January 2000 and the NLDC was authorized to purchase the property or acquire it using eminent domain. The NLDC was able to negotiate the purchase of most of the property in the project area but it was unable to purchase fifteen parcels. Nine owners refused to sell their properties to the City. The NLDC exercised its power of eminent domain on behalf of New London to condemn these properties.

These fifteen properties in the Fort Trumbull neighborhood were not blighted. There is no claim that they were in poor condition. They were condemned solely because they were located within the area of the development plan adopted by New London.

Susette Kelo and the eight other affected property owners filed suit against the City of New London challenging the condemnation of their properties. They argued that the takings did not constitute a public use and were therefore invalid under the Constitution of the State of Connecticut and the U.S. Constitution. New London argued that the taking of non-blighted property to transfer it to a private developer for the purpose of private economic development which was intended to increase tax revenues and create jobs was a public use and, therefore, a constitutionally permitted taking.

The case was appealed to the Connecticut Supreme Court which rejected the homeowners' arguments. The court held that an economic development plan that the City had rationally determined would promote significant municipal economic development constituted a valid public use, thus permitting the exercise of eminent domain under both the federal and state constitutions. The homeowners appealed to the U.S. Supreme Court.

THE SUPREME COURT DECISION

In addressing the issues raised in Kelo, the Supreme Court pointed out two polar propositions at the heart of the case. First, the sovereign may not take the property of A for the sole purpose of transferring it to another private party B even though compensation is paid to A. However, the State may transfer property from one private party to another if the purpose is public use such as condemnation for a railroad with common-carrier duties. The Court traced the history of its interpretation of public use concluding that, having rejected a literal requirement that condemned property be put into use for the general public, it had adopted instead a broader interpretation of public use as public purpose.

The issue in Kelo was whether the New London plan served a public purpose. In making this determination, the Court afforded substantial deference to the legislature's determination of what public needs justify the use of the takings power.

The Kelo decision relied heavily on Berman v. Parker, a case which affirmed the exercise of eminent domain to transform a blighted area of Washington D.C. into a well-balanced community through redevelopment. In addition, the Court relied on Hawaii Housing Authority v. Midkiff which upheld the compulsory transfer of fee title from property owners to their tenants in order to reduce the concentration of land ownership in Hawaii. Relying on the reasoning of both these cases, the Court stated: "It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests. Clearly,
there is no basis for exempting economic development from our traditionally broad understanding of public purpose. 31

In upholding the constitutionality of the takings in Kelo, the Court concluded that the comprehensive development that New London believed would provide new jobs, increase tax revenues and provide other appreciable benefits to the community satisfied the public use requirement of the Fifth Amendment. 32

In its majority opinion, the Supreme Court noted that property owners can turn to their own state governments to obtain more stringent restrictions on the exercise of the taking power. 33 In direct response to Kelo, many states did enact legislation to limit the power of eminent domain.

CONNECTICUT'S LEGISLATIVE REFORM

By January 1, 2008, thirty-nine states had enacted legislation or passed ballot measures in response to Kelo. 34 Many polls taken following the Kelo ruling reflect an overwhelming negative response to the use of eminent domain for private economic development. 35 In Connecticut, a 2005 Quinnipiac University poll showed that 88% of the poll participants disagreed with the use of eminent domain for private economic development. 36 The Connecticut legislature adopted its own post-Kelo reform measures in 2007. 37

A. Reform to Connecticut Municipal Economic Development Statutes

The policy underlying municipal economic development in Connecticut is to promote the growth of industry and business by helping cities acquire and improve property. Cities are authorized to acquire property for industrial and business purposes and, under certain circumstances, to obtain state funds for development projects all of which are identified as public uses and purposes. 38

The statutes governing municipal economic development in effect in 2000 provided a detailed framework for a plan's contents, 39 a public hearing process, 40 and a plan's adoption by the city council. 41 Upon approval of a plan, the development agency is authorized to acquire the real estate in the project area but, if eminent domain will be used to acquire property, the agency must obtain the prior approval of the city council. 42 The agency is specifically authorized to transfer property in the project area to private parties provided such transfer is at fair market value. 43 This statutory scheme was in effect in 2000 and remains in effect today subject to the recent reform measures discussed below.

In 2007, the Connecticut legislature enacted revisions to the statutes governing municipal economic development projects (such as the one in New London) as well as to the statutes governing municipal blight eradication projects.

1. Adoption of Primary Purpose Test.

The recently adopted reform measures impose a limitation on the government's power to condemn non-blighted property for economic development. Under newly-adopted CGS section 8-193(b)(1), eminent domain may not be used to acquire property for an economic development project if its primary purpose is to increase local tax revenue. 44

In addition, under new statutory provisions, a development plan must contain:
A description of the public benefits of the project including the estimated property tax benefits, its intended role in increasing or sustaining market value of land in the municipality and in maintaining or enhancing the competitiveness of the municipality; and

A finding that the public benefits of the plan outweigh any private benefits, that the use of eminent domain is reasonably necessary, and that the plan is not for the primary purpose of increasing tax revenues.

Cities are authorized under this statutory framework to adopt and implement a plan to develop non-blighted property. This includes the right to acquire such property by eminent domain and transfer it to private persons for development in accordance with the approved plan. The only new substantive limitation on this authority is that the proposed project may not be 'for the primary purpose of increasing local tax revenue.'

In addition, the newly-enacted statute requires the development agency and the municipal legislative body to make a finding that the public benefits outweigh any private benefits and identifies additional project goals which constitute public benefits. These new goals include: (i) increasing or sustaining market value in the municipality; and (ii) maintaining or enhancing the competitiveness of the municipality. It is interesting to note that the legislature specifically added property tax benefits as a public benefit, a project goal that was not previously made explicit.

Therefore, under the post-\textit{Kelo} reform measures, increasing local tax revenues may not be the primary purpose of a project, but the goal of increasing tax revenues is explicitly authorized as a permitted purpose. In other words, a goal to increase local (property) taxes by a private economic development project will satisfy the legislative requirements so long as it not the primary goal. A project will meet the new statutory test if its primary purpose, for example, is to increase or sustain market value in the municipality or to maintain or enhance the competitiveness of the municipality (both of which criteria have been added as permitted goals). The goal of increasing tax revenues is now explicitly permitted as long as it is not first on the list of project goals.

2. Analysis of Legislative Reform in Municipal Economic Development.

Does recent reform to the statutes governing municipal economic development provide any meaningful protection to Connecticut property owners? If the same plan at the heart of \textit{Kelo} were adopted today and a challenge brought by the New London homeowners to the use of eminent domain, would their homes be protected? The validity of the plan would be based entirely on its compliance with the revised statutes.

In the wake of changes made to the governing statutes, the City need only show that increasing tax revenues is not the primary goal of the project. In the statement of project goals contained in the 2000 development plan, increased tax revenue is listed as only one of the project goals. If creating jobs were the primary goal of the project, then it satisfies the revised statutory requirements and the use of eminent domain is authorized. If building momentum for the revitalization of downtown New London were the project’s primary goal, then it satisfies the newly revised statutes and the use of eminent domain is authorized. Moreover, the stated project goal of revitalizing downtown New London falls squarely within the new statutory criterion of ‘enhancing the competitiveness of the municipality.’ In light of the new statutory limitation on the use of eminent domain for economic development, New London might simply omit ‘increased tax revenue’ from its list
of project goals if it were adopting such a plan today. But, assuming this was a project goal, placing it anywhere but first on the list would satisfy the new statutory limitation.

It is clear that the New London development plan would be authorized under the newly-revised statutes. If these statutory revisions were in effect in the year 2000, the property of Susette Kelo and the eight other homeowners in Fort Trumbull, would not be any safer from seizure by the government. The ‘primary purpose’ test adds no meaningful protection to Connecticut property owners. The measures adopted by the Connecticut legislature in response to Kelo provide no substantive protection limiting the government’s authority to exercise eminent domain for the purpose of private economic development. Indeed, it seems unlikely that anyone but the ‘stupid staffer’ would fail to satisfy the statutory requirements governing a taking for private economic development in the State of Connecticut today. Connecticut property owners have no more substantive protection against government seizure of their property for private economic development today than they did in 2000.

In addition to condemnations for economic development projects, municipalities are authorized to condemn property to eradicate blight. The New London plan in Kelo did not involve blighted properties and was not undertaken pursuant to the blight eradication statutory provisions. However, as part of its post-Kelo legislative reform, the Connecticut legislature also enacted revisions to the blight eradication statutes.

B. Reform to Connecticut Blight Removal Statutes

The statutes governing blight removal have been revised to prohibit the acquisition of property by eminent domain for a blight removal project for the primary purpose of increasing tax revenue. For the reasons discussed above regarding the new primary purpose test in economic development projects, this reform provides no substantive protection to property owners. By its very nature of blight removal, the project’s primary goal will undoubtedly be - removal of blight. Even if increased tax revenue is a stated project goal, this would in all likelihood be reflected as a non-primary goal.

Adding the primary purpose test as a limitation on eminent domain takings under both economic development and blight removal projects provides no meaningful protection to property owners. However, the expanded definition of blight recently enacted by the Connecticut legislature has the potential to expand a city’s power of eminent domain substantially.

1. Broad Blight Definition.

The long-standing public policy of the statutes governing blight eradication in Connecticut is redevelopment of blighted areas. Municipalities are specifically authorized to use eminent domain to acquire properties within a blight redevelopment area with approval of the city’s legislative body. Properties which are unsafe, unsanitary or otherwise substandard are deemed blighted under the statute. In addition, property that is deteriorated or deteriorating is considered blighted.

Prior to recent legislative reform, there was no statutory definition of ‘deteriorated’ or ‘deteriorating’ in the governing statutes. Now these terms are defined in revised CGS section 8-125 to include factors such as unsafe plumbing, heating and electrical facilities and unsafe streets. More importantly, under the new statute, an area is considered deteriorated or deteriorating if at least twenty percent of the buildings in the area contain defects that warrant clearance. These defects include improper location of structures, obsolete building types
and detrimental land uses. This new statutory provision redefining blight greatly expands the government's eminent domain power in Connecticut.

2. Analysis of Legislative Reform in Blight Removal Projects.

Connecticut cities have long had the power to use eminent domain to acquire property in blighted areas for redevelopment. Under the new statutory definition, an area can be designated as blighted if twenty percent of the properties meet the nebulous condition of deteriorated property or the even more nebulous condition of deteriorating property. A neighborhood will be considered blighted even though eighty percent of the properties are well maintained. It has been suggested that, under this type of broad definition of blight, some of the country's most exclusive neighborhoods, such as Beacon Hill and Greenwich Village, could be considered blighted.

It is not unusual for a city to sponsor private economic development under the statutory framework of blight eradication. Including such vague criteria as detrimental land use in defining blight makes it even easier for a city to use eminent domain for private commercial projects. Using a broad definition of blight, Times Square was declared blighted in the 1980's which paved the way for the City of New York to use eminent domain to acquire property for a commercial project including a new headquarters for the New York Times, additional office space, condominiums, and retail space. A large portion of downtown Las Vegas was declared blighted under a broad blight definition with the result that private property was taken for the purpose of building a parking garage to be operated by, and for the benefit of, a casino consortium.

Similarly, private property is subject to taking under the recently-expanded eminent domain authority governing blight removal in Connecticut. Property owners achieved no protection by the legislature's adoption of this expansive definition of deteriorated or deteriorating properties. In fact, this reform likely results in a further erosion of property rights in the state.

REFORM IN OTHER STATES

Many states have enacted meaningful limitations on the use of eminent domain to protect property owners. The Florida legislature enacted reforms which effectively abolish the use of eminent domain for private economic development. In addition, Florida citizens passed a referendum to amend the state constitution so that enactment of any law that allows the transfer to a private party of any private property taken by eminent domain would require a three-fifths supermajority vote of the state legislature.

Nevada has also enacted strong limitations on the use of eminent domain. Projects that transfer the property to a private person/entity are specifically excluded from permitted public uses. Limited exceptions in the legislation permit transfer to a private entity for such uses as utilities, railroads, airports or to abate an immediate threat to public safety.

State Supreme Courts have also recently addressed the constitutionality of condemnation for private economic development interpreting their own state constitutions. Shortly after the Connecticut Supreme Court decided Kelo, the Michigan Supreme Court decided Wayne v. Hathcock. The project in Hathcock provided for construction of a conference center, hotel and a recreational facility with private property to be condemned and transferred to private parties. The project
was estimated to create 30,000 jobs and $350 million in tax revenues. The Michigan Supreme Court held that the taking violated the public use limitation contained in the Michigan State Constitution and explicitly overruled the state's landmark Poletown decision, effectively prohibiting the use of eminent domain for private economic development.66

The Michigan legislature subsequently endorsed Hathcock by adopting Joint Resolution E proposing an amendment to the Michigan State Constitution that provides: ""Public Use" does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues."67 The Supreme Courts of Ohio68 and Oklahoma69 have also recently held that takings for private economic development are unconstitutional under their state constitutions.

In addition, many states have addressed the issue of blight removal projects in response to Kelo (even though Kelo did not deal with blight removal). For instance, under revisions adopted by the Ohio legislature, a "blighted area" is now defined as "an area in which at least seventy percent of the parcels are blighted parcels."70 Florida explicitly prohibits the use of eminent domain for blight removal.71 If the Connecticut legislature intended to restrict the power of eminent domain for economic development or blight projects, there are many ways this could have been accomplished.

CONCLUSION

In the wake of Kelo, Connecticut enacted revisions to its statutes governing both municipal economic development and blight removal. These reform measures may at first glance appear to provide protection to property owners in the state. However, an examination of the substance of the state's reform measures reveals that the legislature has provided no substantive limitation on the state's power of eminent domain. In fact, in the area of blight condemnation, the state's eminent domain power may well have been expanded. In the area of takings for private economic development, Connecticut legislative reform provides no meaningful protection to property owners.

ENDNOTES

1 545 U.S. 469 (2005).
3 Magna Carta (1297 version, § 29) available at http://www.archives.gov/exhibits/interactive/magna_carta/translation.html ("No freeman is to be ... dissised of his free tenements, save by lawful judgment of his peers, or by the law of the land.").
5 Van Horn v. Domestic, 2 U.S. (2 Dall.) 304, 310 (1795).
6 Calfee v. Bull, 3 U.S. (3 Dall.) 384, 388 (1798) (emphasis deleted). It is interesting to note that this basic legal principle was quoted in the Kelo majority opinion, 545 U.S. at 478 n.5, and is Justice O'Connor's dissent. Id. at 494 (O'Connor, J., dissenting).
7 See Nicholas, The Law of Eminent Domain § 1.12 (Julius L. Sackman et al. eds. rev. 3d ed. 2008).
8 U.S. Const., amend. V.
9 Ely, supra note 4, at 31.
11 See infra note 25.
12 See generally 2A Nicholas, The Law of Eminent Domain § 7.06 (Julius L. Sackman et al. eds. rev. 3d ed. 2008).
13 In Wayne v. Hathcock, the Michigan Supreme Court overturned the landmark case of Poletown Neighborhood Council v. Detroit, citing with approval Justice Ryan's Poletown dissent for its well-reasoned historical analysis of three established categories of permitted transfers to private entities: (i) a transfer to a private party for
instrumentalization of commerce such as a pipeline; (b) a transfer to a private party subject to public oversight following the transfer, such as for a water pipeline owned by a regulated company; and (c) a transfer to a private party based on "facts of independent public significance" such as taking property for storm sewer. Wayne v. Hathcock, 884 N.W.2d 765, 781 (Minn. 2016). See also Kelo, 545 U.S. at 497-98 (O'Connor, J. dissenting).


15 The focus of Kelo is on these private-commercial uses designated in the development plan. Note, however, that the development plan also provided for a public right-of-way through the development, a state park, and the possibility of a new U.S. Coast Guard Museum, all of which would constitute public uses under long-standing constitutional theory.

16 Kelo, 545 U.S. at 474-75. According to the NLDC, the development was expected to generate: (a) between 519 and 867 construction jobs; (b) between 718 and 1,360 direct jobs; (c) between 700 and 940 indirect jobs; and (d) between $880,000 and $1,249,843 in annual property tax revenues for the City. Kelo, 843 A.2d at 510.

17 At the time of the trial in the Connecticut Supreme Court, the NLDC was negotiating with Corcoran Industries, a private developer, to enter into a twenty-nine-year ground lease of property designated as parcels 1, 2, and 3 in the development plan for a rental fee of one dollar per year. Id. at 510.

18 Id. at 511.

19 Susette Kelo and made extensive improvements to her house. Another property owner, William Fery, was born in New Brunswick home in 1918 and had lived there all her life. Kelo, 545 U.S. at 475.

20 CONN. CONST. art. I, § 11 ("The property of no person shall be taken for public use, without just compensation [hereinafter].”). Note that the court did not separately address the just-compensation argument because the plaintiff did not assert that the Connecticut state constitution's public-use clause offered them any greater protection than that of the federal constitution. Kelo, 843 A.2d at 522 n.29.

21 The Fifth Amendment to the U.S. Constitution provides in relevant part: "No private property shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fifth Amendment’s public use restriction has been applied to the states through the Fourteenth Amendment to the U.S. Constitution. Mo. Pac. Ry. v. Nelmaka, 164 U.S. 403, 417 (1896). See Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 236 (1897).

22 Kelo, 843 A.2d at 528. At the Connecticut Supreme Court, Kelo was a 4-3 decision. Justice Zarella's dissent takes the position that private economic development projects do not constitute public use in the absence of clear and convincing evidence that the property will actually be developed to achieve a public purpose. Id. at 460-61 (Zarella, J., dissenting). Note also that in upholding the constitutionality of the takings in New London, the court specifically singled out the case of Professor Neighborhood Council v. Detroit. Id. at 528 (majority opinion) citing Pedersen, 304 N.W.2d 453 (1983). Pedersen is a landmark case which upheld, under the Michigan State Constitution, the taking of private homes for the construction of a major car manufacturing assembly plant in Detroit.

Shortly after the Connecticut Supreme Court released its decision in Kelo, however, Pedersen was overturned by the Michigan Supreme Court in Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). See infra note 66.

23 Kelo, 545 U.S. at 477.

24 Id.

25 See id. at 479-80 (quoting In re Ness, 400 U.S. 203, 208 (1971)). ("[T]he Court long ago rejected any literal requirement that continued property be put into use for the public good.") Indeed, while many state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time. Not only was the "use by the public" test difficult to administer (e.g., what proportion of the public need have access to the property at what price?), but it proved to be impractical given the diverse and always evolving needs of society. Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as "public purpose." (internal citations omitted).

26 See id. at 488 (quoting Midkiff, 467 U.S. at 242-43) ("When the legislature's purpose is legitimate and its means are not irrational, our cases have held that, despite the wisdom of other kinds of sociological legislation—are not to be carried out in the fetid sweat courts.").

27 Berman v. Parker, 348 U.S. 26 (1954). In Berman, the Court upheld a redevelopment plan for a blighted area of Washington, D.C. Under the plan, the area would be condemned and part of it utilized for the construction of streets, schools, and other public facilities. The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of low-cost housing. The owner of a department store located in the area challenged the condemnation, arguing that his store was not itself blighted and that the creation of a "better balanced, more attractive community" was not a valid public use. The Court rejected his constitutional argument and unanimously held that the taking was a public use.

28 See Kelo, 545 U.S. at 480-81.

29 Midkiff, 467 U.S. 229 (1984) (holding that the expropriation of a land owner's home was a public benefit).

30 Kelo, 545 U.S. at 481-482.

31 Id. at 485.

32 Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Thomas dissented vigorously from the majority opinion. See id. at 494 (O'Connor, J., dissenting) ([T]o reason, as the Court does, that the occidental public benefits resulting from the subsequent ordinary use of private property under economic development takings for a public use is to wash out any distinction between private and public use of property.""). See also id. at 506 (Thomas, J., dissenting) ([I]f such "economic development" takings are for a public use, any taking in the Court has enacted the Public Use Clause from our Constitution ..., .”). Justice O'Connor also reasonably reiterated her concern expressed at oral argument, warning "[nothing but to prevent the State from replacing any Model S with a Tesla带着, any homes with a shopping mall, or any farm with a factory."") Id. at 503 (O'Connor, J., dissenting).
41 Id. at 489 ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the taking power. Indeed many States already impose 'public use' requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. As the submission of the parties and their amicus curiae make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate.").

34 For an extensive summary of legislative reform and other initiatives adopted by states in response to Kelo, see the website of the National Conference of State Legislatures at http://www.ncsl.org. See also http://www.castlecoalition.org; http://www.quinnipiac.edu.


38 Conn. Gen. Stat. Ann. § 8-186 (West 2001). (Note, this statute has not been modified since the Kelo case.) (‘It is found and declared that the economic welfare of the state depends upon the continued growth of industry and business within the state, ... the acquisition and improvement of property often cannot be accomplished through the ordinary operations of private enterprise in competitive mass of private enterprise or economic conditions, that permitting and requiring municipalities to acquire property ... will further serve the public welfare and purposes for which public surplus may be expended ... ’) (The statutes governing economic development are compiled in Chapter 132 of the Connecticut General Statutes).

39 Conn. Gen. Stat. Ann. § 8-189 (West 2003). (Furthermore detailed requirements of the project plan must be a statement of the number of jobs which the development project anticipates being created by the project ... a finding that the purpose will be served ‘principally for industrial or business purposes,’ and a finding that ‘the project will contribute to the economic welfare of the municipality and the state.’ ...) (This statute was subsequently amended by Conn. Pub. Act 07-141 § 10 which added to the required content of a development plan but did not delete any of the plan requirements in effect under prior law. See infra note 85.)

40 Conn. Gen. Stat. Ann. § 8-191(a) (West 2001). (Minor changes were made to this statute by Conn. Pub. Act 07-141 § 11.)

41 Id.

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Deficient streets; (L) inadequate public utilities or community facilities that contribute to unsatisfactory living conditions or economic decline; or (M) other equally significant building deficiencies or environmental deficiencies."

57 CONN. GEN. STAT. ANN. § 8-123 (West 2001).

58 Norwood v. Honey, 853 N.E.2d 1153, 1154 n.13, 1154-1156 (Ohio 2006). The Norwood Court examined the taking of homeowners' property based on a local ordinance defining blight to include a "deteriorating area". The Court held the term "deteriorating area" to be unconstitutionally void for vagueness and offending the due process right. "In essence, 'deteriorating area' is a standardless standard." Id. at 1154-1156. See also infra note 88.


61 See supra note 34.

62 FLA. STAT. § 73.013 (enacted by HB 1167 effective May 11, 2006) (providing in part: "No provision of law . . . ownership or control of property acquired pursuant to an eminent domain petition may not be conveyed by the condemning authority or any other entity to a natural person or private entity, by lease or otherwise, except that ownership or control of property acquired pursuant to such petition may be conveyed, by lease or otherwise, to a governmental entity (for public use purposes), public transportation, public infrastructure,")


64 Nevada Assembly Bill No. 102, § 4 amending REV. STAT. § 37.010 (adopted May 23, 2007) (This bill provides in part: "Notwithstanding any other provision of law and except as otherwise provided in this subsection, the public uses for which private property may be taken by the exercise of eminent domain do not include the direct or indirect transfer of any interest in the property to another person or entity . . . ." Transfers to a private party are permitted in limited circumstances including use for a utility, railroad, airport and the like, and a taking required to abate an immediate threat to the safety of the public or remediate hazardous waste. The Nevada Legislature also adopted in Assembly Joint Resolution 1 a proposed amendment to the Nevada Constitution incorporating the provisions of Assembly Bill No. 102.


66 Id. at 787 (explicitly overruling Palmore v. Neighborhood Council v. Detroit, 304 N.W.2d 455 (Mich. 1981)). In Pontiac, the Michigan court held constitutional the condemnation of private residential properties for inclusion in a private corporation for the construction of a General Motors assembly plant in Detroit which was intended to add jobs "to the city and state."

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68 Norwood v. Honey, 853 N.E. 2d 1112 (Ohio 2006). In addition to holding the definition of deteriorated and deteriorating areas to be void for vagueness, Norwood held that providing an economic benefit to the City, standing alone, does not satisfy the public use requirement of the Ohio State Constitution. In Norwood, the City condemned property in an area that it determined to be “deteriorating” to transfer it to a private developer for construction of apartments, condominiums, office space, retail space, and City-owned parking garages. The City estimated the project would result in nearly $2 million in annual revenues for it. The Norwood court cited with approval the analysis of Pickwood, the dissenting opinion of the Supreme Court Justices in Kelo, and the dissenting opinions of the Connecticut justices in Kelo at 1140-41. See supra note 38.

69 Muskogee County v. Lowery, 136 P.3d 639 (Okla. 2006); see also id. at 650-51 ("[W]e hold that economic development alone does not constitute a public purpose and therefore does not constitutionally justify the County’s exercise of eminent domain . . . . [W]e view the transfer of property from one private party to another in furtherance of potential economic development or enhancement of a community in the absence of blight as a purpose, which must yield to our greater constitutional obligation to preserve and protect the individual fundamental interest of private property ownership.").


71 Fla. Stat. § 73.041(2) (enacted by HB 1267 effective May 11, 2006) (providing in part: “Notwithstanding any other provision of law . . . the state . . . may not exercise the power of eminent domain for the purpose of preventing or eliminating slum or blight conditions . . . .”).

KNUDSEN v. LAX: RESCISSION OF A LEASE AGREEMENT WHEN A SEX OFFENDER MOVES NEXT DOOR

by
Sharlene A. McEvoy*

ABSTRACT

When a registered sex offender moves next door, does a tenant have a right to terminate a lease for violation of the covenant of quiet enjoyment?

INTRODUCTION

Sometimes a Small Claims Court case can lead to a decision with important implications for landlords and tenants among others. Knudsen v. Lux1 which dealt with the issue of whether or not a family with three young daughters could terminate its lease for an apartment when a Level Three sex offender moved next door.

The case presented a novel question for the New York County Court and for the lease agreement itself.

While those who rent apartments are often confronted with disruptive or disagreeable neighbors, such a situation is not enough to permit a tenant to terminate the lease.2 But when a sex offender moves next door, the notion of the implied covenant of quiet enjoyment takes on a whole new meaning.

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