ISSUE BRIEF

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***Susette Kelo et. al. v. City of New London, Connecticut, et. al.*:**
Economic Development as a "Public Purpose" for Takings

On June 23, 2005 a divided U.S. Supreme Court issued a ruling permitting the New London, Connecticut Development Commission to take 15 properties in the Fort Trumbull area of the city by eminent domain – strictly for purposes of economic development. *Kelo v. New London*, 545 U.S. ___ (2005). The decision surprised many because it substantially expands the scope of the "public use" requirement for eminent domain takings in the United States. This *Issue Brief* attempts to summarize the opinion and provide context for its importance to Massachusetts law.

Background (summarized from the Court's opinion)

New London, Connecticut has been in economic decline for more than a decade, hit hard by stagnant unemployment and the closure of the Fort Trumbull Naval Undersea Warfare Center in 1996. In the late 1990s, the state organized a private, non-profit New London Development Corporation (NLDC) to formulate economic development plans for the Fort Trumbull area. Initial plans called for the creation of a state park supported by public bond funds.

Shortly thereafter, Pfizer, Inc. announced it would build a $300 million research facility adjacent to the area being targeted by the NLDC. This announcement prompted NLDC to submit an extensive economic development plan to the state for its approval.

The NLDC plan called for development on 7 parcels along the Thames River, as follows:

- Parcel 1 – a "small urban village" including a restaurant, shopping and a waterfront conference area, together with private and commercial marina areas and a riverwalk;
- Parcel 2 – 80 new residences linked to the state park for pedestrian access, together with a new U.S. Coast Guard museum;
- Parcel 3 – 90,000 square feet of research and development office space, located immediately adjacent to the Pfizer facility;
- Parcel 4A – parking and retail services to support the state park and marinas;
- Parcel 4B – renovated marina and riverwalk space;
- Parcels 5-7 – office and retail space, parking space, and water-dependent commercial use.

The NLDC plan required the acquisition of certain privately-held property to enable development on the targeted parcels. Most of the property was acquired through negotiated purchases; however, 4 lots in Parcel 3 (office space) and 11 lots in Parcel 4A (park and marina support) were slated for eminent domain because the property owners did not wish to sell them. Among the properties was the home of a couple in their 80s who have lived in the same house for more than 50 years and small family businesses owned for generations. *See* Boston.com, "Court: Cities may seize homes for economic development", June 23, 2005. The stated purpose of the takings was to capitalize on the Pfizer development and to "build momentum for the revitalization of downtown New London" by "creating new jobs, generating tax revenue, making the city more attractive and creating new leisure and recreational opportunities."

The 9 property owners petitioned the courts to block the takings of their property. A lower state court blocked takings for the development of Parcel 4A (park or marina support) but upheld takings for the development of Parcel 3 (office space). The Supreme Court of Connecticut upheld all of the designated takings, holding that economic development is a valid public use under the Federal and State Constitutions. The Supreme Court then agreed to hear the case.

Legal Issues

Tradition respects the authority of the government to take private property by eminent domain as an inherent power of the sovereign. *See e.g. U.S. v. 7.92 Acres of Land, More or Less, Situated in the Towns of Provincetown and Truro, County of Barnstable, Comm. of Mass.*, 769 F.2d 4 (1st Cir. 1985) (power of eminent domain is "unquestioned attribute of sovereignty," subject only to constitutional limits). However, democratic respect for private property rights compels the power to be restrained. On the national level, the assurance of such restraint is contained in the Fifth Amendment to the U.S. Constitution.

The Fifth Amendment restrains federal eminent domain power in 2 important ways. First, it places a limit on the scope of the power by requiring that property be taken only for "public use." Second, it respects property interests and spreads public burdens by mandating that "just compensation" be given in exchange for seized property ("nor shall private property be taken for public use, without just compensation"). *Kelo* focused on the requirement of "public use."

Dating back to the 19th century, federal public use eminent domain cases were decided using a literal interpretation of the "public use" doctrine. This doctrine required actual use or occupation of the seized property by the public for a taking to be permissible. Over time, however, literal interpretation of the Takings Clause began to erode. Initially, this erosion led to cases which upheld takings for common carriers, such as railroads, because of the quasi-public nature of their use. This line of cases then evolved into decisions completely abandoning public use and occupation as a test in favor of consideration of the "public purpose" of takings – a more amorphous and open-ended standard. For example, in *Hawaii Housing Authority v. Midkiff*, 467 US 229 (1984), the Court recognized the legitimacy of eminent domain takings "rationally related to a conceivable public purpose," even if there is no specific public use. *See also Berman v. Parker*, 348 U.S. 26 (1954) (takings for purposes of urban renewal are justified public uses).

The question before the Court in *Kelo* was whether this line of cases should be further extended to allow the taking of land for economic development purposes at Fort Trumbull under the public purpose doctrine, or whether the use was too private to be permitted under the Takings Clause.

In conducting this analysis, the Court also had to factor in a Connecticut statute which specifically declared legislative intent for permitting takings in the name of economic development. The language of the relevant statute was as follows:

> *Connecticut Gen. Stat. Sec.8-186. Declaration of policy.* It is found and declared that the economic welfare of the state depends upon the 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 and, in distressed municipalities, to lend funds to businesses and industries within a project area in accordance with such planning objectives 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.

The Majority Decision and Dissents

A five-member majority of the Court ruled in favor of the state of Connecticut taking private property for economic development under the Takings Clause of the Constitution, holding that the economic development purpose claimed by the NLDC satisfied the public purpose doctrine. In so doing, the majority implicitly adopted a more expansive definition of "public use" than has been used in past cases, using the facts in *Kelo* to build upon *Midkiff* and *Berman* and to include economic development as a permissible public purpose.

Essentially, the majority viewed the takings from the top down, focusing on the NLDC's redevelopment plan itself and the broader economic goals outlined therein, rather than analyzing the case from the perspective of property owners and their land. *See* Majority Opinion. According to the majority, focusing too much on the nature of the property interests themselves would have confused the purpose of a taking with its mechanics. *Id.* at 16 n. 16. Thus, the majority was persuaded by the fact that the NLDC's takings would be "executed pursuant to a 'carefully considered' development plan", which it claimed enhanced the legitimacy of the takings at issue. *Id.* at 7-8. The majority also noted the plan was "not adopted 'to benefit a particular class of identifiable individuals,'" and expressed the opinion that the public interest might be better served through private enterprise than by public control. *Id.* at 7-8, 15.

To reach these conclusions the majority employed very deferential rationale. For example, the majority expressed a desire to defer to legislative determinations of public purpose without consideration of motivations. *Id.* at 3, 17. The majority was unwilling to supplant its own judgment of purpose for that of policymakers, and felt unable to distinguish rationally between economic development motives and those underlying other public purposes the Court has upheld in the past. The majority's reasoning also was very open-ended. For example, it realized public purposes can be very broad in scope, encompassing virtually anything within the public welfare, including values which are "spiritual as well as physical, aesthetic as well as monetary". *Id.* at. 10. The majority also insisted upon a fact-specific inquiry, stating that the concepts underlying public purpose vary with time and location. *Id.* at 12. However, the Court did limit its approach by acknowledging and sustaining traditional bars against takings which offer only pretextual or incidental public benefits. *See also* Kennedy, J. Concurring Opinion at 1.

The majority summarized its decision as follows:--

> Given the comprehensive character of the plan, the thorough deliberation which preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment. *Id.* at 13.

Justice O'Connor authored a strong dissenting opinion, in which she was joined by Chief Justice Rehnquist and Justices Scalia and Thomas. Essentially, Justice O'Connor accused the majority of diluting the public use doctrine to permit legislative action aimed at achieving what it considers to be the highest and best use of private property. *See* O'Connor Dissent at 1. In her opinion, aside from running contrary to well-established democratic principles, the Court's decision was unfortunate because it could subject virtually any private property to takings "under the banner of economic development", and because it stripped judicial checks from the process. *Id.* at 12 ("Today nearly all real property is susceptible to condemnation on the Court's theory"). Of particular concern to Justice O'Connor was the fact the NLDC was a private, nonprofit group whose members were not elected and therefore were not accountable to the public; political will is traditionally seen as the most potent check to the government's power of eminent domain. *Id.* at 2. She expressed concern this decision would dilute the Court's power to review takings cases and also work to benefit those with "disproportionate influence and power in the political process, including large corporations and development firms" at the expense of economic, social and political minorities. *Id.* at 5, 13.

Justice Thomas also wrote a separate dissenting opinion, expressing his strong belief that the Court's decision "effectively erased the Public Use Clause from our Constitution." *See* Thomas Dissent at 1. Justice Thomas quoted Blackstone for the principle that "the law of the land… postpone[s] even public necessity to the sacred and inviolable rights of private property." *Id.* Instead of allowing economic development takings, Justice Thomas employed a literal, textual interpretation to encourage "absolute fidelity" to liberties contained in the Constitution, rather than a policy of abandoning them. *Id.* at 2. In particular, Justice Thomas advanced the notion that takings may occur only when necessary and proper to the exercise of an expressly enumerated power of Congress. *Id.* at 7. Furthermore, he stated takings should occur only when the public is given a legal right to use the property, not simply if the public "realizes any conceivable benefit from the taking." *Id.* at 5, 7-10. According to Thomas, the public use requirement puts the government in the shoes of a private party purchasing property, requiring it not to take land by eminent domain unless it actually intends to use it for its own purposes. *Id.* at 6.

Massachusetts Law

As stated previously, the majority in *Kelo* acknowledged the concepts underlying public purpose may vary with time and location. *Id.* at 12. Mindful that economic development takings might be ill-suited for some areas, the Court explicitly reminded states of their ability to place limits on the takings power which are more restrictive than that expressed in *Kelo*, either as a matter of constitutional law or statute. *Id.* at 19. This begs the question whether there are already economic development restrictions against takings under Massachusetts law and, if not, whether there is an opportunity to enact such measures to prevent results similar to *Kelo* in this state.

The Massachusetts Constitution defines the power of eminent domain in a way which is similar to the Fifth Amendment. Article X of Part I of the Constitution (Declaration of Rights) states:

> Article X. Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor (emphasis added).

Qualifying these generic protections, various other provisions permit takings in specific circumstances of use. For example, language inserted into Article X by way of Article XXXIX of the Articles of Amendment permits the commonwealth to take land by special act for the construction of highways and streets. Article XLIII of the Articles of Amendment allows the general court to authorize takings of land to hold, improve, sub-divide, build upon and sell the same, for the purpose of relieving congestion of population and providing homes for citizens. And Article XCVII of the Articles of Amendment permits the taking of land and easements for conservation purposes, in recognition of the peoples' "right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and aesthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources".

Chapter 79 of the General Laws sets forth various procedural protections regarding eminent domain, such as the requirement of an Order of Taking setting forth a description of the property and the avowed public purpose. *See* GL. c. 79 sec. 1. However, these provisions do little to further limit the definition of a "public use".

Massachusetts case law provides some additional guidance. In the earlier part of the 20th century, "public uses" were defined by Massachusetts courts as those "the enjoyment and advantage of which are open to the public on equal terms, and, if only relatively small portions of inhabitants participate in its benefits, the use or service must be of such nature that in essence it affects them as a community and not merely as individuals." *Machado v. Board of Public Works of Arlington*, 321 Mass. 101 (1947). Later, however, it was made clear that eminent domain takings are justified if effected for a public purpose instead of merely for such public use. *See Blakely v. Gorin*, 365 Mass. 590 (1974). Similar to the majority in *Kelo*, the Supreme Judicial Court has upheld limits on takings preventing property from being taken simply for the purpose of giving it to another private individual, *Opinion of the Justices*, 331 Mass. 771 (1954), and forbidding property from being taken ostensibly for public use and thereafter diverted to private use, *Sellors v. Town of Concord*, 329 Mass. 259 (1952). *But see McLean v. City of Boston*, 327 Mass. 118 (1951) (holding that property may be reconveyed to a private party if the sale is in furtherance of a public purpose).

Massachusetts courts traditionally consider the necessity of a taking to be a legislative and not a judicial function. *See* *Hayeck v. Metropolitan District Commission*, 335 Mass. 372 (1957). However, takings are subject to judicial review of their stated public purpose. *See* *Burnham v. Mayor and Aldermen of Beverly*, 309 Mass. 388 (1941). This has permitted Massachusetts courts to create a judicial prohibition against takings which are perpetrated in "bad faith". *See* *HTA Ltd. Partnership v. Mass. Turnpike Authority*, 51 Mass. App. Ct. 449 (2001). Examples of bad faith include cases where the taking authority does not follow "usual practices" to effect the taking, where the site chosen was not considered or considered suitable for the stated purpose of the taking, and where there is a taking solely or dominantly for the private benefit of an adjacent landowner. *See* *id.* To date, takings for economic development purposes have not been ruled improper under the bad faith exemption.

Recent cases of the Supreme Judicial Court have been somewhat contradictory and cast doubt over the current mindset of the court on eminent domain. On the one hand, the SJC has expressed strong support for private property rights. For example, in *Goulding v. Cook*, 422 Mass. 276 (1996), the SJC stated its strong commitment to maintaining the line between legitimate restrictions on the use of private property in the interest of the public, and the permanent physical occupation of land amounting to the transfer of estates. The stated purpose of this commitment was to keep with the "moral and political commitment" of the court to concepts of private property. *See* *id.* If this approach were applied to a situation such as existed at Fort Trumbull, it seems hard to believe the SJC would reach the same result as the Supreme Court in *Kelo*. However, the Court also has ruled that takings are not void merely because the disposition of property indirectly benefits private individuals, so long as the benefits to the private individuals are incidental to the main public benefits of the plan. *See* *Benevolent and Protective Order of Elks Lodge # 65 v. Planning Board of Lawrence*, 403 Mass. 531 (1998). This language is fairly similar to parts of the majority's opinion in *Kelo* and casts doubt over how strong the SJC's commitment to private property rights would be if faced with a similar case under Massachusetts law.