



## Economic Development as a Public Use:

### *Kelo v. City of New London*

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**T**he Takings Clause of the Fifth Amendment to the federal Constitution provides, "[N]or shall private property be taken for public use, without just compensation." On June 23, 2005, the United States Supreme Court decided in *Kelo v. City of New London*, No. 04-108, that economic development is a valid public use that justifies the taking of private property. The impact of the Court's decision on eminent domain jurisprudence in Virginia is unclear.

### Background

Years of economic decline, capped by the closing of the Naval Undersea Warfare Center in 1996, prompted Connecticut and local officials to target New London for economic revitalization. The city activated the private non-profit New London Development Corporation (NLDC) to oversee the redevelopment project. In January 1998, the state authorized \$15 million in bonds to support planning activities and develop a state park. In February 1998, Pfizer announced plans for a \$300 million research facility on a site adjacent to the closed naval station.

In January 2000, the city approved a development plan for the area near Pfizer's project, which the city projected would create over 1,000 jobs, increase tax revenues, and revitalize the city. The plan called for a waterfront conference hotel, restaurants, shopping, residences, office space, and other uses. The city also authorized the NLDC to acquire property by condemnation.

After nine owners of real estate within the project area refused to sell, the NLDC filed condemnation proceedings. The landowners claimed that the taking of their properties violated the "public use" restriction in the Fifth Amendment. The trial court prohibited the taking of parcels earmarked for park or marina use, but allowed it for parcels in the area to be used for office space. The Connecticut Supreme Court upheld all of the proposed condemnations.

### Majority Opinion

Justice Stevens, writing for a five-member majority, held that the city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Takings Clause. The Court explicitly rejected a construction of "public use" that would require that condemned property be put into use for the general public. The "use by the public" test, to the majority, would be difficult to administer and impractical. Instead, the Court relied on precedent that "embraced the broader and more natural interpretation of public use as 'public purpose.'"<sup>1</sup> In this view, the concept of "public purpose" should be defined broadly, "reflecting our longstanding policy of deference to legislative judgments in this field."<sup>2</sup>

In finding that economic development was a public purpose that justified the taking of private property, the Court relied on two earlier decisions. In *Berman v. Parker*, 348 U. S. 26 (1954), the Court upheld the taking of a department store situated in a blighted area of Washington, D. C., pursuant to a development plan that called for the lease or sale of part of the land to private parties. The fact that the department store was not itself blighted was not persuasive; the court remarked that "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis--lot by lot, building by building."<sup>3</sup>

The second case upon which the Court relied is *Hawaii Housing Authority v. Midkiff*, 467 U. S. 229 (1984), where the Court upheld a statute that authorized the state to take title to real estate owned by large landowners and transfer it to the property's lessees. The Court found that the statute was a valid effort to eliminate the social and economic evils of a land oligopoly that created artificial deterrents to the normal functioning of the State's residential land market by reducing the concentration of land ownership. Because it is only the taking's purpose that matters in determining public use, the fact that Hawaii immediately transferred the properties to private individuals upon condemnation was found not to diminish the public character of the takings.

The Court's majority found that New London's purpose for taking the petitioner's property--that the area was sufficiently distressed to justify a program of economic rejuvenation--was entitled to the same deference granted to the public purposes of blight abatement (in *Berman*) and loosening concentrations of land ownership (in *Midkiff*). The Court found it relevant that the redevelopment plan was comprehensive and was preceded by thorough deliberation. It was also relevant to the Court that the city invoked a Connecticut statute that specifically authorizes the use of eminent domain to take land as part of an economic development project.<sup>4</sup>

Promoting economic development was observed to be a traditional and long accepted function of government, and the Court saw no principled way of distinguishing it from the other purposes that it has recognized as being "public." The Court declined to adopt a bright-line rule that economic development does not qualify as a public use, contending that it would be incongruous to hold that the city's interest in the economic benefits to be derived from the development has less of a public character than any of the interests upheld in *Berman* and other decisions.

The Court observed that the fact that private parties will benefit from the taking does not disqualify it from being in furtherance of a public purpose: "[T]he government's pursuit of a public purpose will often benefit individual private parties."<sup>5</sup> The Court faced the same issue in *Berman*, where it upheld a redevelopment plan that called for land to be leased or sold to private developers for redevelopment, and quotes from Justice Douglas that, "We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."<sup>6</sup>

The majority stressed that the government would be forbidden from taking the property of one private party for the sole purpose of transferring it to another private party, even if the owner is paid just compensation. Such a taking would serve no legitimate purpose of government and would thus be void. Likewise, a taking of property "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit," would be unconstitutional.<sup>7</sup> Justice Stevens noted that the lower courts found no evidence of an illegitimate purpose and the development plan was not adopted to benefit a particular class of identifiable individuals. While a transfer of property from one person to another, executed outside the confines of an integrated development plan, would raise a suspicion that a private purpose was afoot, such hypothetical cases can be confronted if and when they arise and were

held "not to warrant the crafting of an artificial restriction on the concept of public use."<sup>8</sup>

The majority declined to adopt the suggestion of three dissenting justices on the Connecticut Supreme Court that a heightened standard of judicial review be imposed on takings that are justified as furthering economic development. The dissenting state judges would require condemnors to show by clear and convincing evidence that the economic benefits of the plan would actually come to pass. Justice Stevens opined that postponing the judicial approval of every condemnation until the likelihood of success of the plan had been assured would be an impediment to the consummation of development plans.

### **Justice Kennedy's Concurring Opinion**

Justice Kennedy agreed that takings of private property should be upheld as being for a public use if they are rationally related to a conceivable public purpose. However, he wrote separately to urge courts to apply a meaningful rational basis review to ensure that takings are not intended to favor a particular private party, with only incidental or pretextual public benefits. He suggested that a more stringent standard of review, such as creating a presumption of invalidity, may be appropriate for takings where the risk of undetected impermissible favoritism of private parties is acute. However, he did not suggest that the heightened level of scrutiny should be required simply because the purpose of the taking is economic development.

Justice Kennedy noted that the trial court conducted an inquiry and found that benefiting Pfizer was not the primary motivation or effect of the plan, and that nothing in the record indicated a motivation to aid particular private entities. He noted that a substantial commitment of public funds to the project was made before most of the private beneficiaries were known and that respondents did not

select a particular developer beforehand. Thus, while there may be cases where "the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose," such circumstances were not present in this case.<sup>9</sup>

### **Dissenting Opinions**

Justices O'Connor, joined by the Chief Justice and Justices Scalia and Thomas, viewed the majority's opinion, as moving beyond prior decisions that sanctioned the condemnation of harmful property uses, and thereby significantly expanding the meaning of "public use". In her view, the Court abandoned the long-held, basic prohibition on taking property from one person and giving it to another. As a result:

Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded--i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public--in the process.<sup>10</sup>

In Justice O'Connor's view, the public use requirement "imposes a . . . basic limitation, circumscribing 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."<sup>11</sup> She recognized three categories of takings that comply with the public use requirement: transfers of private property to public ownership, such as for roads, hospitals, or military bases; transfers of private property to private parties, often common carriers, who make the property available for the public's use, such as railroads, public utilities, or stadiums; and takings where the "extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society," as in

*Berman* and *Midkiff*, and the legislative body found that eliminating the existing property use was necessary to remedy the harm. In such cases, a public purpose was realized when the harmful use was eliminated, and it did not matter that the property was later turned over to private use. New London's takings of the petitioners' homes did not, in her view, fall into the third category, as the city did not claim that the petitioners' homes are the source of any social harm.

Both Justice O'Connor and Justice Thomas, in his separate dissenting opinion, warn that the fallout from the majority's decision will not be random. Justice O'Connor cautions that:

The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.<sup>12</sup>

Justice Thomas makes a similar prediction:

The consequences of today's decision are not difficult to predict, and promise to be harmful. . . . Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.<sup>13</sup>

Justice Thomas would go further than Justice O'Connor's conclusion that the majority exceeds the precedent of the *Berman* and *Midkiff* line of cases that allow condemnations to eliminate harmful uses: "Our cases have strayed from the Clause's original meaning, and I would reconsider them."<sup>14</sup> He took issue with the decisions of the Court that adopted

the public purpose interpretation of the Public Use Clause and those that deferred to legislatures' judgments regarding what constitutes a valid public purpose. Justice Thomas would revisit these cases and consider returning to what he considers the Clause's original meaning: "that the government may take property only if it actually uses or gives the public a legal right to use the property."<sup>15</sup>

## Role of State Laws

The Court's majority stated that it did not seek to "minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation," and emphasized:

[N]othing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline.<sup>16</sup>

The Court recognized that its holding--that the Fifth Amendment is not violated by taking private property for economic development purposes--does not, by itself, subject all property to takings for such purpose. Rather, the decision is best viewed as denying landowners of one of several possible grounds for contesting a proposed condemnation of their property. A taking of property must still be authorized by the state constitution and eminent domain statutes.

The majority cited *County of Wayne v. Hathcock*, 2004 Mich. LEXIS 1693, 471 Mich. 445, 684 N.W. 2d 765 (2004), as an instance of where state constitutional law imposes "public use" requirements that are more strict than the federal baseline. In that case, the Michigan Supreme Court held that the requirement of the state constitution that property be taken for "public use" did not authorize Wayne County to acquire by condemnation parcels for a business park. In a decision that presages Justice O'Connor's dissenting opinion, the court overturned its prior decision in *Poletown*

*Neighborhood Council v. Detroit*, 410 Mich. 616, 304 N.W. 2d 455 (1981), that a generalized economic benefit justified the transfer of condemned property to a private entity.

## Virginia's Constitutional Provision

Article I, § 11 of the Virginia Constitution provides that "the General Assembly shall not pass any law . . . whereby private property shall be taken or damaged for public uses, without just compensation, the term 'public uses' to be defined by the General Assembly." The phrase giving the General Assembly the task of defining the term "public uses" is not replicated in the federal Constitution. It was adopted in 1928 as an amendment to § 58 of the 1902 Constitution, and represented a deliberate attempt to:

[T]ransfer from the courts to the General Assembly the power to declare what constitutes a public use. Now it is a judicial question; under the proposed amendment, it will be a legislative question.<sup>17</sup>

Section 15.2-1900 of the Code of Virginia defines the term "public uses" mentioned in Article I, § 11 of the Virginia Constitution "to embrace all uses which are necessary for public purposes." By defining "public use" as including uses necessary for public purposes, the General Assembly has articulated a test that is strikingly similar to Justice Stevens' interpretation of public use as "public purpose."

While on its face the Constitutional directive in Article I, § 11 charging the legislature with the task of defining public uses is clear, the extent to which the General Assembly's definition of "public uses" is subject to judicial oversight is unresolved. In *Rudee Inlet Authority v. Bastian*, 206 Va. 906, 909, 147 S.E. 2d 131, 134, 196 Va. LEXIS 169 (1966), the court recognized that the Virginia Constitution gives the General Assembly the power to

define "public uses." The court noted that a "declaration by the General Assembly [which we do not have here] that a contemplated use is a public one, is not conclusive and is subject to judicial review, but it is presumed to be right."<sup>18</sup> In agreeing that the Authority had the power to condemn property for the establishment of docks, wharves, and related facilities, the court attached "the presumption of right in the present case to the legislative act which granted powers to the appellant of a character sufficient to describe a public use, there being nothing on the face of the pleadings to overcome the presumption."<sup>19</sup>

In *Mumpower v. Bristol Housing Authority*, 176 Va. 426, 11 S.E. 2d 732 (1940), the court addressed the scope of the General Assembly's power to define public uses. The legislation establishing the Authority declared that its purposes are public uses. The court observed, however, that "the power to define is not the power to declare, and the declaration is not conclusive."<sup>20</sup> The court did not address the fundamental question of whether a legislative definition, rather than a declaration, would have been conclusive. The court, noting that the General Assembly fulfilled its duty to define "public uses" by the passage of Code § 3030b in 1940, stated that "the question still remains a judicial one," and observed that the Court has "consistently held whether a condemnation is for a public or a private use, it is a judicial question and is subject to the review of the courts (citations omitted)."<sup>21</sup> These cases led Professor Howard to caution that "legislative fiat, even with constitutional instigation, cannot, by calling it a public use, validate a taking for what the courts would consider a private use."<sup>22</sup>

The dissenting opinions in *Kelo* also evidence unease with the prospect of legislatures establishing the parameters of public use. Justice Thomas asserted that "a court owes no deference to a legislature's judgment concerning the quintessentially legal question of whether the government owns, or the public

has a legal right to use, the taken property."<sup>23</sup> Similarly, Justice O'Connor voiced concern that:

[W]ere the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.<sup>24</sup>

In 1993, the Virginia General Assembly considered and rejected Senate Bill 251, which would authorize Virginia Beach to acquire property by condemnation and resell or lease it for economic development purposes. During the 1993 Session, Senator Holland obtained an opinion as to whether the bill would violate the constitutional prohibition against taking property by condemnation for private use. The Attorney General opined that the bill was not unconstitutional on its face, but would be subject to judicial review. If the bill was enacted, the city would have to ensure that the dominant purpose of any condemnation is economic development of deteriorated areas of the city for the public benefit, and that resale or lease to private parties furthers that public purpose or is merely incidental to it.

### **"Public Use" under Virginia Case Law**

*Kelo* eliminates any requirement--under the federal Constitution's Fifth Amendment--that there be a principal public purpose other than economic development, such as blight abatement, to justify a taking of property. However, the Supreme Court's decision does not affect the validity of Virginia Supreme Court decisions requiring that the taking have a primary purpose that is public.

In *Charlottesville v. DeHaan*, 228 Va. 578, 323 S.E.2d 131, (1984), the Virginia Supreme

Court has recognized that economic development is a constitutionally valid public purpose under the Credit Clause of Article X, § 10. The court has not specifically addressed the issue in the context of a condemnation case.

The Virginia Supreme Court has stated that private property may not be taken from one person for the purpose of unconditionally transferring its ownership to another. In *Rudee Inlet Authority v. Bastian*, the court, after finding the Authority had the power to condemn property, nevertheless held that it could not condemn the petitioner's property because the enabling legislation did not prevent property being condemned for the purpose of selling or leasing it to private individuals for such use as the purchaser or lessee desires. After citing language in *City of Richmond v. Carneal*, 129 Va. 388, 106 SE 403 (1921), that "public use and public benefit are not synonymous terms," the court noted that nothing in the legislation restricts the sale or leasing of land condemned by the Authority to uses in furtherance of or incidental to the main purposes of the act. Such an "unconditional lease or sale would be, in effect, the exercise of the power of eminent domain for private use, not public use."<sup>25</sup>

In *Virginia Beach v. Christopoulos Family, L.C.*, 54 Va. Cir. 95; 2000 Va. Cir. LEXIS 551 (Cir. Ct. Virginia Beach 2000), the circuit court ruled that the city could not contract with a private landowner to condemn its neighbor's property for use as a parking garage that would serve the neighboring property and the public. The court based its decision on the fact that the city had not been granted the authority to enter into a private contract to acquire neighboring private property to benefit a private landowner. The court cited the General Assembly's failure to pass Senate Bill 251 in 1993 as evidence that the legislature did not intend to allow a city to condemn property solely for its economic benefit and development.

The Virginia Supreme Court recently summarized the state of public use jurisprudence in *Ottofaro v. City of Hampton*, 265 Va. 26, 574 S. E. 2d 235, 2003 Va. LEXIS 3 (2003). The landowner challenged the legality of a condemnation where 18 percent of the taken land will be used for road purposes and the rest will be leased to a developer for a retail shopping center. Justice Hassell, after observing that "whether a taking is for a public purpose is a judicial question, reviewable by the courts (emphasis added)," recited the principles pertinent to the issue of whether the property was taken for a public use:

[T]he public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it [from] the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it . . . . We have also stated recently that "to be public, a use must be one in which the terms and manner of its enjoyment are within the control of the governing body. The public interest must dominate any private gain."<sup>26</sup>

The court upheld the City's taking of the property as being for a public purpose, reasoning that the City acquired the property to build the public road, and that title to the residue will be in the Hampton Industrial Development Authority, which will lease the property to a private developer.

Thus Virginia's courts have approved takings of private property where the land ultimately may be owned by another private person engaged in a private enterprise. If takings are primarily to serve a public purpose, such as transportation or slum abatement,<sup>27</sup> the fact that the property may be transferred to a private enterprise after the public purpose is accomplished is viewed as merely incidental. For example, in *Hunter v. Redevelopment*

*Authority*, 195 Va. 326, 78 S.E.2d 893 (1953), the court held that the land in a redevelopment project could be made available for use by private enterprise. If the primary purpose of a taking is the elimination and rehabilitation of blighted areas, when the need for public ownership has ended, it is proper to transfer the land to private ownership because such resales are merely incidental to the primary purpose of the taking.<sup>28</sup> In contrast, in *Kelo* there was no allegation that any of the properties in the area were blighted or in poor condition; they were condemned only because they are located in the development area.

### **Statutory Limits on Takings for Economic Development**

Though *Kelo* makes it clear that the Takings Clause of the Fifth Amendment does not bar a taking for the purpose of economic development, such a taking could be contested on grounds that state law does not specifically authorize condemnations for such purpose. Justice Stevens cited a California law that permits a city to take land for economic development purposes only in blighted areas as an example of a state "public use" requirement that is stricter than the "federal baseline."<sup>29</sup>

Virginia statutes delegating the Commonwealth's power of eminent domain to local governments and other political subdivisions establish the purposes for which property may be condemned and the procedures to be followed. Generally, a local government may acquire property within its boundaries for any public use. Before initiating condemnation proceedings, the local governing body must adopt a resolution or ordinance approving the proposed public use and stating the use to which the property shall be put and the necessity for it.<sup>30</sup>

Local redevelopment and housing authorities are empowered to acquire, through the power of eminent domain, any real property

necessary for the authority's purposes, including redevelopment projects. Section 36-48 of the Code of Virginia provides that it is in the public interest that areas where the condition of title or other conditions prevent a proper development of the land, "as well as blighted areas, be acquired by eminent domain and made available for sound and wholesome development in accordance with a redevelopment plan, and that the exercise of the power of eminent domain and the financing of acquisition and preparation of the land by a public agency for such redevelopment is likewise a public use and purpose."

## Conclusion

It is too early to tell whether the majority's opinion in *Kelo v. New London* is merely a minor, logical next step in the development of Takings Clause jurisprudence, as the majority implies, or is a radical abandonment of Common Law restrictions upon government's power to deprive persons of their property. The Supreme Court's decision--that takings to further economic development projects are not prohibited by the Fifth Amendment's Takings Clause--provides an opportunity to review the scope of both Virginia's requirement that takings be for public uses and the statutory authorizations that govern exercises of the power of condemnation that the General Assembly has granted to localities and political subdivisions.

## Notes

Footnotes use LEXIS pagination, which is subject to change pending release of the final published version.

- 1 2005 U.S. LEXIS 5011 at 10.
- 2 *Id.* at 11.
- 3 *Id.*, quoting 348 U.S. at 35.
- 4 Conn. Gen. Stat. §8-186 et seq. (2005).
- 5 2005 U.S. LEXIS 5011 at 14.
- 6 *Id.*, quoting 348 U.S. at 34.
- 7 *Id.* at 9.
- 8 *Id.* at 15.

- 9 *Id.* at 19 (J. Kennedy, concurring).
- 10 *Id.* at 19-20 (O'Connor, J., dissenting).
- 11 *Id.* at 21 (O'Connor, J., dissenting).
- 12 *Id.* at 25 (O'Connor, J., dissenting).
- 13 *Id.* at 33 (Thomas, J., dissenting).
- 14 *Id.* at 25 (Thomas, J., dissenting).
- 15 *Id.* at 33 (Thomas, J., dissenting).
- 16 *Id.* at 17.
- 17 C.H. Morisette, "Proposed Amendments to the Constitution of Virginia," 39 Va. State Bar Ass'n Rep. 372, 381 (1927), quoted in A. E. Dick Howard, Commentaries on the Constitution of Virginia (University Press of Virginia, 1975) at 228.
- 18 206 Va. at 909.
- 19 *Id.*
- 20 176 Va. at 448.
- 21 *Id.*
- 22 Howard, Commentaries on the Constitution of Virginia, *supra*, at 229.
- 23 *Id.* at 31 (Thomas, J., dissenting).
- 24 *Id.* at 21 (O'Connor, J., dissenting).
- 25 206 Va. at 911-912. See also *Phillips v. Foster*, 215 Va. 543, 211 S.E.2d 93 (1975) (condemnation of a drainage easement violates the public use requirement if the easement would be used only by an adjacent private landowner).
- 26 265 Va. 31-32 (citations omitted).
- 27 See *Runnels v. Housing Authority*, 207 Va. 407, 149 S.E.2d 882 (1966).
- 28 195 Va. at 336-337.
- 29 2005 U.S. LEXIS 5011 at 17, n. 23, citing Cal. Health & Safety Code Ann. §§33030-33037 (West 1997).
- 30 Code of Virginia §§ 15.2-1901, 15.2-1903.

### Virginia Legislative Issue Brief

is an occasional publication of the  
Division of Legislative Services,  
an agency of the  
General Assembly of Virginia.

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