

B. 'PUBLIC USE'

Money may not be all that matters. Some owners have no interest in selling because they possess sentimental reasons for wanting to stay put, deep attachments to their homes, to family and friends nearby, and to neighborhoods that may be uprooted by wholesale condemnations.

Businesses have similar reasons for wanting to stay put. Sometimes the business has been in the family for years, the business depends on a particular location, or the business is of a type that is impossible, or prohibitively expensive, to move. Many condemned businesses cannot reopen after condemnation.¹³²

In *Kelo v. City of New London*,¹³³ a handful of home owners challenged the city's right to use eminent domain for an economic development project anchored by the global research and development facility of the Pfizer Company. The city had managed to negotiate for the acquisition of 115 of the 130 parcels it needed for the redevelopment project that Pfizer would anchor. It couldn't come to terms with the owners of the other properties. They sued, challenging the city's effort to take their properties by eminent domain.

In upholding the taking against a challenge that condemning one person's property for the benefit of another private owner didn't count as a 'public use' in the Fifth Amendment sense, a 5-4 majority of the U.S. Supreme Court made clear that as long as the redevelopment agency's plans point to features of the project benefitting the public, they pass the Court's 'public use' test.

Though the Court doesn't explicitly equate 'public use' with 'public goods,' the majority opinion can be read as doing that by inference.¹³⁴ A 'public good' possesses two distinct aspects—"nonexcludability" and "nonrivalrous consumption." "Nonexcludability means that nonpayers cannot be excluded from the benefits of the good or service." "Nonrivalrous" means that additional consumers don't diminish the utility of the good or service to others or increase the cost of providing it. A project offering tangible benefits, such as public parks, transit stops or parking garages serves a public use. A project delivering a tax abatement or subsidy to a private developer does not.

The "public goods" mentioned in the majority opinion that were offered by the New London project included two marinas, public parks, an extension of the waterfront river walk to connect Fort Trumbull with downtown, a U.S. Coast Guard Museum and new condo units and a hotel linked by walkways to the rest of the project.¹³⁵ Five of six properties taken by contested eminent domain were in the way of new streets and public infrastructure, 'public uses' by any

¹³² Dana Berliner, *Public Use, Private Use—Does Anyone Know the Difference?*, SJ052 ALI-ABA 789, 807-08 (2004).

¹³³ 125 S. Ct 2655, 2668 (2005).

¹³⁴ See George Lefcoe, *Redevelopment Takings After Kelo: What's Blight Got to Do With It?*, 17 S. CAL. REV. L. & SOC. JUST. (2008); George Lefcoe, *After Kelo, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 TULANE LAW REVIEW 1 (2008).

¹³⁵ 125 S. Ct 2655, 2668 (2005).

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definition, a fact never mentioned in the media shower or by the U.S. Supreme Court—although the facts were in the record before the Court.¹³⁶

It can't have helped Suzette Kelo's case that none of the petitioners' properties were being taken for the Pfizer's research facility (though part of a parcel had been marked out for office space adjacent to the new Pfizer facility).¹³⁷ In fact, Pfizer hadn't initiated its coming to New London. It was the other way around. The New London Development Commission (NLDC) coaxed Pfizer to come aboard. Quite early in their deliberations, key members of the NLDC Board concluded that the project needed a Fortune 500 company to anchor the planned redevelopment. At the time, Pfizer had been searching for a suitable location for this facility, but New London hadn't been on its list until the chair of the NLDC convinced a senior Pfizer executive to pitch the site to the company as a possibility.¹³⁸

The majority opinion in *Kelo* also gave a big boost to carefully-drafted plans preceded by procedures guaranteeing maximum public exposure and participation.¹³⁹ The Supreme Court majority cited the NLDC's comprehensive redevelopment plan and public participation procedures as evidence that the economic development taking had not been instituted mainly for Pfizer's benefit.¹⁴⁰

State courts are reaching the same results as the *Kelo* majority and allowing condemnation of owner A's land for owner B when the project is of the civic betterment type. Property owners challenging civic enhancement projects as not being for a public use emphasize the important role that the private firm designated as the master developer plays in the formulation of these plans.¹⁴¹ But they discount the public benefits of the project.

A typical example was the challenge to the Atlantic yards project, described by the plaintiffs, a coterie of property owners threatened with condemnation, as a "publicly subsidized development project set to cover twenty-two acres in and around the Metropolitan Transit Authority's Vanderbilt Yards, an area in the heart of downtown Brooklyn, New York. The plan for the Project, which will be designed in part by the architect Frank Gehry, includes the construction of a sports arena that will play home to the National Basketball Association franchise currently known as the New Jersey Nets, no fewer than sixteen high-rise apartment towers, and several office towers."¹⁴²

¹³⁶ Email to author from John Brooks, Project Manager, Fort Trumhull, 06/29/07.

¹³⁷ *Kelo v. City of New London*, 125 S. Ct. At 2659-60.

¹³⁸ Peggy Cosgrove, *New London Development Corporation* (a case study prepared for the American Assembly).
http://www.clairegaudiani.com/Writings/documents/NLDC_Case_Study.pdf (last visited 06/30/07).

¹³⁹ 545 U.S. 469-70.

¹⁴⁰ *Ibid.*

¹⁴¹ One blogger's view carries this headline: *Bruce Ratner Calls the Shots. Bloomberg, Pataki and the Empire State Development Corporation Dance the Dance.*
<http://www.dailygotham.com/blog/mole333/>

¹⁴² *Goldstein v. Pataki*,—F.3d, 2008 WL 269100 (2d Cir. 2008).

Applying *Kelo*, the Second Circuit concluded that these public benefits qualified the project as a public use:

Few powers of government have as immediate and intrusive an impact on the lives of citizens as the power of eminent domain. For affected property owners, monetary compensation may understandably seem an imperfect substitute for the hardships of dislocation and the loss of a home or business. But federal judges may not intervene in such matters simply on the basis of our sympathies. Just as eminent domain has its costs, it has its benefits, and in all but the most extreme cases, Supreme Court precedent requires us to leave questions of how to balance the two to the elected representatives of government, notwithstanding the hardships felt by those whose property is slated for condemnation.¹⁴³

Some state legislatures are blocking condemnations for purely tax-driven, narrowly focused economic development projects.¹⁴⁴ One example: Indiana lawmakers protect homeowners from being ousted for tax or job driven economic development projects. Their recently enacted legislation bans transfers to private parties "for a use that is not a public use."¹⁴⁵ By statute, "the term does not include the public benefit of economic development, including an increase in a tax base, tax revenues, employment, or general economic health."¹⁴⁶ Similarly, in Colorado the legislature has banned condemnations for economic development and increasing tax revenues, labeling such projects not a 'public use.'¹⁴⁷ Voters in Michigan enacted a comparable prohibition as a constitutional amendment.¹⁴⁸

Locally, voters have sometimes organized initiative and referenda campaigns to block unpopular redevelopment projects, such as an attempt by the city of Lakewood, Ohio, desperate to increase the local tax base, to level a lovely neighborhood of beautifully maintained century old homes next to a park along

¹⁴³ Ibid.

¹⁴⁴ For a comprehensive description of state laws circumscribing 'public use,' see Steven J. Eagle and Lauren A. Perotti, *Coping with Kelo: A Potpourri of Legislative and Judicial Responses*, 42 REAL PROP., PROB. & TRUST J. 799 (2008).

¹⁴⁵ IND. CODE ANN. § 32-24-4.5-1(b)(3).

¹⁴⁶ IND. CODE ANN. § 32-24-4.5-1(a). An exception in the Indiana law allows condemnation to be used for parcels at least ten acres in size, not owner occupied, located in a designated economic development area, if the condemnor acquires title to ninety percent of the economic development area and "the legislative body for the condemnor" authorizes the condemnation by a two-thirds vote. In other words, after the condemnor has acquired through voluntary purchases ninety percent of the land needed for the project, local governments in Indiana can authorize condemnation for economic development by a super majority council vote. 'Holdout' property owners, negotiating in the shadow of eminent domain, would have an incentive to keep their demands within reason. And condemnors would be deterred from making low ball offers, barred from using eminent domain until they held title to ninety percent of the properties required for the project.

¹⁴⁷ COLO. REV. STAT. ANN. § 38-1-101-1(b)(I): "For purposes of satisfying the requirements of this section, 'public use' shall not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue. Private property may otherwise be taken solely for the purpose of furthering a public use."

¹⁴⁸ MICH. CONST., art. X, § 2, as amended by S.R.J., E, 93d Leg., 2005 Reg. Sess. (Mich. 2005) (approved 2006).

Lake Erie voters rejected a redevelopment project, declared a public use, at least three times. The project was possessed by the city and the mayor and city council.

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¹⁵¹ *Southwest*, 768 NE 2d Sales, Inc., 885 (Minn. 1999).

¹⁵² 99 Cent.

¹⁵³ F237 F.

Lake Erie to make way for a large condo and retail development.¹⁴⁹ Lakewood voters rejected the redevelopment plan and repealed a local ordinance that declared a house blighted and therefore eligible for condemnation if it lacked at least three bedrooms, two baths and an attached two car garage—features possessed by few historic homes in town including the homes occupied by the mayor and city council members.¹⁵⁰

State and federal courts have also questioned the use of eminent domain for purely tax driven or economic development ‘takings.’¹⁵¹ Perhaps the best example of this arose in a north Los Angeles county town called Lancaster. Years ago the city’s redevelopment agency established a power center anchored by Wal Mart and Costco. The center was a brilliant commercial success. Costco expressed an interest in expanding and wanted space in the center occupied by 99 Cent Only Stores on a lease with several renewal options. 99 Cent Only Stores sued to enjoin the redevelopment agency from condemning its leasehold interest. In an often cited federal court opinion, the court stayed the hand of the redevelopment agency.¹⁵² The court admonished the agency for having attempted a “naked transfer of property from one private owner to another... an unconstitutional taking for purely private purposes.”¹⁵³

QUESTIONS

Question 1. *Why Cities Become Land Developers.* Cities across the country undertake redevelopment projects. Describe the distinct types of projects they might undertake and what they hope to achieve through each type.

Question 2. *The Mechanics of Tax Increment Financing.*

- (a) How is the ‘tax increment’ calculated in a redevelopment project?
- (b) Why is redevelopment funded by TIF seldom feasible for hard core slums or blighted areas—areas populated by households with incomes far below the median, high rates of crime and many abandoned and decaying buildings?
- (c) What do redevelopment agencies accomplish by ‘bonding the increment’?

¹⁴⁹ 60 Minutes, CBS News, Eminent Domain: Being Abused? Is Seizure Of Private Property Always In Public’s Interest? July 4, 2004.

¹⁴⁹ <http://www.cbsnews.com/stories/2003/09/26/60minutes/main575343.shtml>; Lakewood, OH, *Eminent Domain, Saleet v. City of Lakewood, IJ Defeats Eminent Domain Abuse in Lakewood, Ohio*.

¹⁵⁰ http://www.ij.org/private_property/lakewood/index.html.

¹⁵¹ *Southwestern Illinois Development Authority v. National City Environmental, LLC*, 199 Ill 2d 225, 768 NE 2d 1 (2002); *Walser Auto Sales v. City of Richfield, Hous. & Redev. Auth. v. Walser Auto Sales, Inc.*, 630 N.W.2d 662, 669 (Minn. Ct. App. 2001), aff’d by an equally divided court, 641 N.W.2d 885 (Minn. 2002).

¹⁵² *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123 (2001).

¹⁵³ F237 F. Supp. at 1129.