

**Public Use/Public Purpose**  
**After**  
*Kelo v. City of New London*

**By**

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### **Introduction: Public Purpose Today**

While the definition of public use has not changed significantly in the past twenty years, public perception of that change has. The federal rule, anticipated in *Berman v. Parker*, was established in *Hawaii Housing Authority (“HHA”) v. Midkiff*: so long as a public use (redefined as public purpose) is conceivable and possible, even if it never comes to pass, federal courts will accept it. The U.S. Supreme Court simply reiterated that rule in the 2005 case of *Kelo v. New London*, holding that economic revitalization was a sufficient public purpose to justify the taking of a non-blighted single family home under local eminent domain statutes. A number of state courts had established a more stringent test than the supreme court of Connecticut, (which the Court affirmed in *Kelo*), which, of course, the states may do since further protecting property rights beyond the minimum under federal law is a matter for the states, as indeed the Supreme Court noted in *Kelo*. Nevertheless, the decision set off a firestorm of criticism, leading to pending legislation in two-thirds of the states to establish a more strict public purpose test to avoid results such as that in *Kelo*.

### ***Kelo v. City of New London: Midkiff and Berman Followed: A Requiem for Public Use***

The Court in *Kelo* simply extended the reasoning in *Berman* and *Midkiff* to the economic revitalization condemnations that are increasingly common throughout urban areas in the United States. Indeed, the majority was singularly unimpressed with extreme uses of eminent domain for the purposes of providing employment and bettering the local tax base as the parties brought to its attention: “A parade of horrors is especially unpersuasive in this context since the Takings Clause largely operates as a conditional limitation permitting the government to do what it wants so long as it pays the charge.”<sup>1</sup>

The facts in *Kelo* are straightforward. In order to take advantage of a substantial private investment in new facilities by Pfizer, Inc., in an economically depressed area of New London along the Thames River, the City reactivated the private non-profit New London Development Corporation (NLDC) to assist in planning the area’s economic development.<sup>2</sup> Authorized and aided by grants totaling millions of dollars, NLDC held meetings and eventually “finalized an integrated development plan focused on 90 acres in the Fort Trumbull area.”<sup>3</sup> The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with the owners of 15 properties failed.<sup>4</sup> When the NLDC initiated condemnation

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<sup>1</sup> *Kelo*, 125 S. Ct. 2667, n.19 (citing *Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998)). For a compendious list of such “horrors” see Dana Berliner, *Public Power, Private Gain* (2003), available at <http://www.castlecoalition.org/publications/report/index.html>.

<sup>2</sup> *Id.* at 2659.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 2660.

proceedings the landowners filed suit.<sup>5</sup> Among them was Susette Kelo, who had lived in the Fort Trumbull area since 1997.<sup>6</sup> She has made extensive improvements to her house, which she prizes for its water view.<sup>7</sup> And Wilhelmina Dery, who was born in her Fort Trumbull house in 1918 and has lived there her entire life.<sup>8</sup> Although there was no allegation that any of these properties was blighted or otherwise in poor condition, they nevertheless condemned with the others “because they happen to be located in the development area.”<sup>9</sup> On these facts, petitioners claimed that the taking of their property violated the public use restriction in the Fifth Amendment.<sup>10</sup> A trial court agreed as to the parcel containing the Kelo house, but a divided Supreme Court of Connecticut reversed, holding that all of the City’s proposed takings were constitutional.<sup>11</sup> Noting that the proposed takings were authorized by the state’s municipal development statute and in particular the taking of even developed land as part of an economic development project was for a public use and in the public interest, the court relied on *Berman* and *Midkiff* in holding that such economic development qualified as a public use under both federal and state constitutions.<sup>12</sup> The U.S. Supreme Court granted certiorari “to determine

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 2660-61.

<sup>12</sup> *Id.* at 2660.

whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."<sup>13</sup>

The Court's answer: an unequivocal yes. While the Court noted that "the sovereign may not take the property of *A* for the sole purpose of transferring to another private part *B*. . . it is equally clear that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking."<sup>14</sup> The question, then, is what constitutes sufficient use by the public. Three factors appear to be important in reaching the conclusion that economic revitalization in New London constitutes such use: a rigorous planning process, the Court's precedents embodied in *Berman* and *Midkiff*, and deference to federalism and state decision making.

The Court steadfastly and bluntly rejected any suggestion that it formulate a more rigorous test.<sup>15</sup> Thus, for example, to require government to show that public benefits would actually accrue with reasonable certainty or that the implementation of a development plan would actually occur would take the Court into factual inquiries already rejected earlier in the term when the Court rejected the "substantially advances a legitimate state interest" test for regulatory takings in *Lingle v. Chevron U.S.A. Inc.*<sup>16</sup> Similarly, the Court declined to second-guess the city's determinations as to what lands it needed to acquire in order to effectuate the project.<sup>17</sup>

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<sup>13</sup> *Id.* at 2661.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 2667.

<sup>16</sup> 544 U.S. 528 (2005).

<sup>17</sup> *Kelo*, 125 S. Ct. at 2668.

Lastly, the Court rejected the invitation by some *amici* to deal with the appropriateness of compensation under the circumstances. While the Court acknowledged the hardships which the condemnations might entail in this case, “. . . these questions are not before us in this litigation” even though members of the Court itself raised the adequacy of compensation during oral argument.<sup>18</sup> In a nod to federalism and states rights, the Court closes by leaving to the states any remedy for such hardships posed by the condemnations in New Canaan: “We emphasize that nothing 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>19</sup>

## **Statutory and Constitutional Provisions Enacted to Limit Eminent Domain Power in the Wake of *Kelo***

### **The States Rebel: Public Purpose Redux**

#### **Legislative Action**

More than a year after the United State’s Supreme Court’s decision in *Kelo*, the public concern regarding eminent domain abuse is still going strong. Grass roots groups such as the Institute for

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<sup>18</sup> *Id.*, n.21 Other countries provide a measure of extra compensation where, as here, it is a private residence which is condemned and the landowner has a demonstrable emotional attachment to the improved land. *See, e.g.*, the Australian concept of solatium, amounting to up to 10% additional compensation beyond fair market value in such circumstances, briefly noted (among other compensation issues) in Lee Anne Fennell, *The Death of Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock: Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 1004 (2004), and referencing Murray J. Raff’s more lengthy description in Chapter 1 of Kotaka and Callies (ed) TAKING LAND: COMPULSORY PURCHASE AND LAND USE REGULATION IN ASIAN-PACIFIC COUNTRIES (2002).

<sup>19</sup> *Id.*

Justice and its property rights counterpart, the Castle Coalition, have been tracking and encouraging policy movements at the State and local level.<sup>20</sup>

Legislators in 47 states have introduced, considered or passed legislation limiting the government's eminent domain powers in instances of private use since the Court's unpopular decision in June of 2005.<sup>21</sup> Thirty states, out of the forty-five that were in session, enacted legislation aimed at curbing eminent domain abuse.<sup>22</sup> Of these thirty states, twenty-seven governors have signed reform legislation into law.<sup>23</sup> Iowa, Arizona and New Mexico are the only states whose governors vetoed eminent domain reform, and Iowa is the first to override such a veto.<sup>24</sup> Local governments are also taking measures to protect their homeowners, with more than 70 cities and counties introducing their own bills to restrict the use of eminent domain.<sup>25</sup>

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<sup>20</sup> See, for more information on these groups, [www.ij.org](http://www.ij.org) and [www.castlecoalition.org](http://www.castlecoalition.org).

<sup>21</sup> Lisa Knepper and John Kramer, *Iowa Legislature Overrides Eminent Domain Reform Veto: Historic Event Secures Greater Property Protection*, July 14, 2006, [http://www.castlecoalition.org/media/releases/7\\_14\\_06pr.html](http://www.castlecoalition.org/media/releases/7_14_06pr.html).

<sup>22</sup> Castle Coalition, *Legislative Action Since Kelo*, available at <http://www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf> (last visited at Oct. 7, 2006).

Alabama (2005 AL S.B. 68A), Alaska (2005 AK H.B. 319), Colorado (2006 CO H.B. 1411), Delaware (2005 DE S.B. 217), Florida (2006 FL H.B. 1567, 2006 FL H.B. 1569, 2006 FL V. 8), Georgia (2005 GA H.B. 1313, 2005 GA H.B. 1306), Idaho (2006 ID S.B. 1243, 2006 ID S.B. 1247, 2006 ID H.B. 555), Indiana (2006 IN H.B. 1010), Illinois (2005 IL S.B. 3086), Iowa (2005 IA H.B. 2351), Kansas (2005 KS S.B. 323), Kentucky (2006 KY H.B. 508), Louisiana (2006 LA S.B. 1, 2006 LA S.B. 43A, 2006 LA H.B. 707), Maine (2005 ME H.B. 1310), Michigan (2005 MI S.J.R. E), Minnesota (2005 MN S.B. 2750), Missouri (2006 MO H.B. 1944), Nebraska (2005 NE L.B. 924), New Hampshire (2005 NH S.B. 287), North Carolina (2006 NC H.B. 1965), Ohio (2005 OH S.B. 1667), Pennsylvania (2005 PA H.B. 2054, 2005 PA S.B. 881), South Carolina (2006 SC S.B. 1031), South Dakota (2006 SD H.B. 1080), Tennessee (2005 TN H.B. 3450), Texas (2005 TX S.B. 7B), Utah (2006 UT S.B. 117), Vermont (2005 VT S.B. 246), West Virginia (2006 WV H.B. 4048), Wisconsin (2005 WI A.B. 657).

<sup>23</sup> Lisa Knepper and John Kramer, *Iowa Legislature Overrides Eminent Domain Reform Veto: Historic Event Secures Greater Property Protection*.

<sup>24</sup> *Id.*

<sup>25</sup> See Castle Coalition's Legislative Center, available at <http://www.castlecoalition.org/legislation/local/index.asp> (last visited at October 17, 2006).

## **Ballot Measures**

Citizens in 12 states voted on measures aimed at curbing eminent domain abuse. (Arizona, California, Idaho, Florida, Georgia, Oregon Louisiana, Michigan, Nevada, New Hampshire, North Dakota and South Carolina). Montana, which was previously scheduled to vote on two constitutional initiatives aimed at private property rights and limiting the purposes for which the government may take private property respectively, did not vote on the ballot measures as they were both withdrawn by their sponsors.<sup>26</sup> After the election the number of states that have limited eminent domain has risen from 30 to 34.<sup>27</sup>

## **Passed Ballot Measures**

Voters in 10 of the 12 states (Arizona, Florida, Georgia, Louisiana, Michigan, Nevada, New Hampshire, North Dakota, Oregon, South Carolina) passed the ballot measures.<sup>28</sup>

Arizona's Proposition 207, statutory language proposed through a citizen initiative in Arizona, was approved by 65 percent of voters.<sup>29</sup> The proposition curbs the legislature's power to exercise eminent domain by making the public use question one for the judiciary to decide rather than the legislature.<sup>30</sup> Interestingly, it mandates that the judicial question of public use be

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<sup>26</sup> See [http://sos.mt.gov/ELB/archives/2006/Ballot\\_Issues.asp](http://sos.mt.gov/ELB/archives/2006/Ballot_Issues.asp). (last visited on Nov. 12, 2006).

<sup>27</sup> John Kramer and Lisa Knepper, *2006 Election Wrap Up: Voters Overwhelmingly Passed Eminent Domain Reform*, Nov. 8, 2006, available at [http://www.castlecoalition.com/media/releases/11\\_8\\_06pr.html](http://www.castlecoalition.com/media/releases/11_8_06pr.html).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Proposition 207 (Arizona), available at <http://www.castlecoalition.org/legislation/ballot-measures/index.html> (last visited on Oct. 7, 2006).



determined “without regard to any legislative assertion that the use is public.”<sup>31</sup> This language cuts against the current eminent domain case law which defers to legislative determinations of public use. Before the Supreme Court decided *Kelo*, *HHA v. Midkiff* and *Berman v. Parker* clearly indicated the Court’s preference for legislative deference.

Proposition 207, defines “public use” as meaning any of the following:

1. the possession , occupation, and enjoyment of the land by the general public, or by public agencies;
2. the use of land for the creation or functioning of utilities;
3. the acquisition of property in its current condition, including the removal of a structure that is beyond repair or unfit for human habitation of use; or
4. the acquisition of abandoned property.<sup>32</sup>

The most contentious portion of the measure, however, provides for compensation if existing rights in property are “reduced by the enactment or applicability of any land use law . . . and such action reduces the fair market value of the property[.]”<sup>33</sup>

The Arizona ballot measure was criticized as being costly to taxpayers, whose tax dollars ultimately go to compensate property owners, and to local communities and voters, who will no longer be able to decide what type of development is appropriate for them.<sup>34</sup> The measure was labeled a “Trojan horse” and “an assault on reasonable planning.”<sup>35</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Vote no on Proposition 207!, <http://www.noprop207.org> (last visited at Oct. 7, 2006).

<sup>35</sup> Letters to the Editor, *Prop. 207 is a Trojan horse*, THE ARIZONA REPUBLIC, Oct. 8, 2006, available at <http://www.azcentral.com/arizonarepublic/opinions/articles/1008sun1-08.html>.

Florida voters approved of a constitutional amendment that would prohibit the government from taking property for “blight” removal.<sup>36</sup> The amendment, which passed with nearly 70 percent approval, requires a three-fifths vote from each house of the Florida legislature in order to grant exemptions.<sup>37</sup>

In Georgia, more than 80 percent of the electorate voted in favor of a constitutional amendment requiring a vote by elected officials any time eminent domain will be used.<sup>38</sup>

In a close election, Louisiana citizens voted on September 30, 2006 to limit the government’s ability to take private property through amendments to its state constitution.<sup>39</sup> Louisianans passed measure number five, to restrict purposes for which government can take land from unwilling property owners, by a 55 percent to 45 percent vote.

Measure number five, limited the definition of “public purpose” to the following:

1. a general public right to a definite use of the property;
2. continuous public ownership of property dedicated to one or more of the following objectives and uses:
  - a. public buildings in which publicly funded services are administered, rendered, or provided,
  - b. roads, bridges, waterways, access to public waters and lands, and other public transportation, access, and navigational systems available to the general public,
  - c. drainage, flood control, levees, coastal and navigational protection and reclamation for the benefit of the public generally,

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<sup>36</sup> John Kramer and Lisa Knepper, *2006 Election Wrap Up: Voters Overwhelmingly Passed Eminent Domain Reform*.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Mark Ballard, *Property Proposal’s Supporters Claim Radio Turned Tide*, THE ADVOCATE, A4, Oct. 2, 2006.

- d. parks, convention centers, museums, historical buildings and recreational facilities generally open to the public,
- e. public utilities for the benefit of the public generally,
- f. public ports and public airports to facilitate the transport of goods or persons in domestic or international commerce;

3. the removal of a threat to public health or safety caused by the existing use or disuse of the property.<sup>40</sup>

The measure also makes it clear that “[n]either economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the taking . . . is for a public purpose[.]”<sup>41</sup>

Michigan voters approved a constitutional amendment that prohibits “the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues.”<sup>42</sup> The measure, which received 80 percent voter approval, also requires the government prove its authority to condemn property for blight removal by “clear and convincing evidence.”<sup>43</sup>

More than 60 percent of Nevada voters approved a constitutional amendment that would sharply limit the government’s exercise of eminent domain.<sup>44</sup> Nevada law, however, requires that a

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<sup>40</sup> S. Res. 851, 84th Leg., Reg. Sess. (La. 2006) (enacted). See Louisiana Secretary of State, *Statement of Proposed Constitutional Amendments*, September 30, 2006, [http://www.sos.louisiana.gov/elections/MISC/CA\\_Statements.pdf](http://www.sos.louisiana.gov/elections/MISC/CA_Statements.pdf) (last visited on Oct. 7, 2006).

<sup>41</sup> S. Res. 851, 84th Leg., Reg. Sess. (La. 2006) (enacted).

<sup>42</sup> John Kramer and Lisa Knepper, *2006 Election Wrap Up: Voters Overwhelmingly Passed Eminent Domain Reform*; Proposal 06-4 (Michigan), available at <http://www.legislature.mi.gov/documents/2005-2006/jointresolutionenrolled/Senate/pdf/2005-SNJR-E.pdf>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

constitutional amendment be passed in two consecutive general elections, so voters will need to approve of the measure again in 2008.<sup>45</sup>

New Hampshire's legislature passed a constitutional amendment earlier this year that prohibited the government from exercising eminent domain "if the taking is for the purpose of private development or other private use of the property."<sup>46</sup> The amendment was subsequently approved of by more than 85 percent of Nevada voters.<sup>47</sup>

North Dakota, which did have a legislative session this year, passed a constitutional amendment through a citizen initiative that prohibits private use of property taken through eminent domain.<sup>48</sup> The measure passed with over 65 percent approval.<sup>49</sup>

Measure 39, proposed through a citizen initiative in Oregon and supported by 65 percent of voters, restricts the use of eminent domain in order to convey property interests to a private party.<sup>50</sup> The measure prohibits any public body from condemning private property used as a residence, business establishment, farm or forest operation if it intends to convey any property interest to a private party.<sup>51</sup> However, conveyance to a private party is allowed where the real

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*; Question No. 1 (New Hampshire), available at <http://www.gencourt.state.nh.us/legislation/2006/CACR0030.html>.

<sup>47</sup> *Id.*

<sup>48</sup> John Kramer and Lisa Knepper, *2006 Election Wrap Up: Voters Overwhelmingly Passed Eminent Domain Reform*.

<sup>49</sup> *Id.*

<sup>50</sup> Measure 39 (Oregon), available at <http://www.castlecoalition.org/legislation/ballot-measures/index.html> (last visited on Oct. 7, 2006).

<sup>51</sup> *Id.*

property “constitutes a danger to the health and safety of the community by reason of contamination, dilapidated structures, or improper or insufficient water or sanitary facilities[.]”<sup>52</sup>

The measure states that “[a] court shall independently determine whether a taking of property complies with requirements of this section, without deference to any determination made by the public body.”<sup>53</sup> In addition, the measure provides that costs and reasonable attorney’s fees will be awarded to the landowner in compensation battles where the verdict in trial exceeds the initial written offer submitted by the condemner.<sup>54</sup>

The measure has been criticized as preventative of condemnation in most circumstances because land is usually handed over to private developers.<sup>55</sup> As such, the measure will set back economic development in the state.<sup>56</sup> Moreover, the government expects to pay an extra \$8 - \$17 million a year acquiring state highway rights of way, as well as \$8 -\$13 million a year in city and county property costs.<sup>57</sup> This is because more landowners will go to court, and taxpayers will have to pick up the tab.<sup>58</sup>

South Carolina’s constitution now specifically prohibits municipalities from condemning private property for “the purpose or benefit of economic development, unless the condemnation is for

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Editorial, *Don’t Deprive Oregon of A Key Economic Tool*, THE OREGONIAN, B6, Oct. 4, 2006.

<sup>56</sup> *Id.*

<sup>57</sup> Laura Oppenheimer, *Foes of Land Takings Widen Aim*, THE OREGONIAN, B1, Sept. 25, 2006.

<sup>58</sup> *Id.*

public use.”<sup>59</sup> The constitutional amendment, which passed with more than 85 percent approval, closed a loophole caused by the state’s eminent domain law.<sup>60</sup>

## **Failed Measures**

California and Idaho failed to pass constitutional amendments proposed through citizen initiatives.<sup>61</sup> These amendments, however, were viewed as not curbing the type of eminent domain abuse exemplified in *Kelo*.<sup>62</sup>

## **United States Congress**

Although both the House and the Senate have introduced numerous bills attempting to restrict eminent domain abuse since the Supreme Court decided *Kelo*, HR 3058 is the only one to actually become law.<sup>63</sup> The bill, which became law on November 30, 2005, made appropriations for the Departments of Transportation, Treasury, and Housing and Urban Development, the Judiciary, District of Columbia, and independent agencies for the fiscal year ending September 30, 2006.<sup>64</sup> The bill provided that “[n]o funds in this Act may be used to support any Federal, State, or local projects that seek to use the power of eminent domain, unless eminent domain is

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<sup>59</sup> John Kramer and Lisa Knepper, *2006 Election Wrap Up: Voters Overwhelmingly Passed Eminent Domain Reform*; Amendment 5 (South Carolina), available at, <http://www.castlecoalition.com/legislation/ballot-measures/index.html>.

<sup>60</sup> John Kramer and Lisa Knepper, *2006 Election Wrap Up: Voters Overwhelmingly Passed Eminent Domain Reform*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> See Castle Coalition, Legislative Center: Current Proposed Federal Legislation On Eminent Domain, available at <http://www.castlecoalition.org/legislation/federal/index.html> (last visited on Oct. 17, 2006).

<sup>64</sup> *Id.*; H.R. 3058, 109th Cong. (2005) (enacted).

employed only for a public use[.]”<sup>65</sup> The bill further specifically states that “public use shall not be construed to include economic development that primarily benefits private entities.”<sup>66</sup> In addition, the bill provided that the Government Accountability Office conduct a study on the nationwide use of eminent domain, including the procedures used and the results accomplished on a state-by-state basis as well as the impact on individual property owners and on the affected communities.<sup>67</sup> The study, which was supposed to be submitted to Congress within 12 months of the enactment of the Act, has yet to be submitted. Obviously, September 30, 2006 has come and gone. HR 5576, the appropriations bill for Fiscal Year 2007 for the same departments, is currently being debated.<sup>68</sup> If enacted as presently written, it will keep the restrictions in HR 3058 in place.

Other bills are more sharply critical of eminent domain abuse, such as the Private Property Protection Act of 2005, but it seems like the House and Senate can never quite agree. That Act, also known as HR 4128, provides that:

No State or political subdivision of a State shall exercise its power of eminent domain, or allow the exercise of such power by any person or entity to which such power has been delegated, over property to be used for economic development or over property that is subsequently used for economic development, if that State or political subdivision receives Federal economic development funds during any fiscal year in which it does so.<sup>69</sup>

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<sup>65</sup> H.R. 3058, 109th Cong. §726 (2005) (enacted).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Castle Coalition, *Legislative Action Since Kelo*, available at <http://www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf> (last visited at Oct. 7, 2006).

<sup>69</sup> See Castle Coalition, Legislative Center: Current Proposed Federal Legislation On Eminent Domain, available at <http://www.castlecoalition.org/legislation/federal/index.html> (last visited on Oct. 17, 2006).

It also prohibits the federal government from condemning property for economic development.<sup>70</sup> The bill passed the House on November 3, 2005 but was stalled in the Senate Judiciary Committee.<sup>71</sup> After failing to bring the bill to a vote H.R. 4128 was “hotlined”<sup>72</sup> on December 5 in an attempt to pass the legislation before the 109th Congress adjourned.<sup>73</sup> The bill, however, was again put on hold and the eminent domain reform was effectively killed on the Senate floor.<sup>74</sup>

### **Recent Court Decisions**

#### ***Board of County Commissioners of Muskogee County v. Lowery*, 136 P.3d 639 (2006).**

In one of the first state supreme court decisions issued after *Kelo*, the Oklahoma Supreme Court held that “economic development alone does not constitute a public purpose[.]”<sup>75</sup> In that case, Muskogee County brought condemnation proceedings against landowners for the purpose of acquiring right-of-way easements for the placement of three water pipelines, two of which would solely service Energetix, L.L.C, a private electric generation plant proposed for construction and

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<sup>70</sup> *Id.*

<sup>71</sup> Lisa Knepper and John Kramer, *U.S. Senate Eminent Domain Reform Deadline Tomorrow Time is Running Out For Federal Government to Stop Funding Abuse*, Sept. 29, 2006, [http://www.castlecoalition.org/media/releases/9\\_29\\_06pr.html](http://www.castlecoalition.org/media/releases/9_29_06pr.html).

<sup>72</sup> Hotlining is an expedited process that allows congressional leadership to present a bill to the entire chamber for unanimous approval.

<sup>73</sup> John Kramer and Lisa Knepper, *Senate Fails to Pass Eminent Domain Reform: Thousands Remain Subject To Federally Funded Eminent Domain Abuse*, Dec. 11, 2006, [http://www.castlecoalition.com/media/releases/12\\_11\\_06pr.html](http://www.castlecoalition.com/media/releases/12_11_06pr.html).

<sup>74</sup> *Id.*

<sup>75</sup> *Board of County Comm’rs of Muskogee County v. Lowery*, 136 P.3d 639, 650 (2006).



operation in the County.<sup>76</sup> The landowners objected to the proceedings “primarily on the basis that the takings were not for a valid public purpose, but rather an unlawful taking of private property for private purpose.”<sup>77</sup> The trial court sided with the County but the appellate court reversed, holding that the takings were unlawful because they were for the “direct benefit of a private company and not for ‘public purposes[.]’”<sup>78</sup> The County appealed.

Agreeing with the appellate court, the Oklahoma Supreme Court reasoned:

We adhere to the strict construction of eminent domain statutes in keeping with our precedent, mindful of the critical importance of the protection of individual private property rights as recognized by the framers of both the U.S. Constitution and the Oklahoma Constitution. If we were to construe “public purpose” so broadly as to include economic development within those terms, then we would effectively abandon a basic limitation on government power by “wash[ing] out any distinction between private and public use of property-and thereby effectively delet[ing] the words “for public use” from [the constitutional provisions limiting governmental power of eminent domain.]”<sup>79</sup>

The court specifically distinguished this case from *Kelo*:

Contrary to the Connecticut statute applicable in *Kelo*, which expressly authorized eminent domain for the purpose of economic development, we note the absence of such express Oklahoma statutory authority for the exercise of eminent domain in furtherance of economic development in the absence of blight.<sup>80</sup>

The court explained that its decision was “reached on the basis of Oklahoma’s own special constitutional eminent domain provisions[.]”<sup>81</sup> The court observed that “[w]hile the Takings Clause of the U.S. Constitution provides “nor shall private property be taken for public use without just compensation,” the Oklahoma Constitution places further restrictions by expressly

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<sup>76</sup> *Id.* at 641.

<sup>77</sup> *Id.* at 644.

<sup>78</sup> *Id.* at 645.

<sup>79</sup> *Id.* at 647. (quotations and brackets in original) (citing *Kelo*, 545 U.S. 469, (2005) (O’Connor, J., dissenting)).

<sup>80</sup> *Id.* at 650.

<sup>81</sup> *Id.* at 651.

stating “[n]o private property shall be taken or damaged *for private use*, with or without compensation.”<sup>82</sup> Although the Oklahoma constitution expressly lists exceptions for common law easements by necessity and drains for agricultural, mining and sanitary purposes, the proposed purpose of economic development falls within none of these categories:<sup>83</sup>

To permit the inclusion of economic development alone in the category of “public use” or “public purpose” would blur the line between “public” and “private” so as to render our constitutional limitations on the power of eminent domain a nullity. If property ownership in Oklahoma is to remain what the framers of our Constitution intended it to be, this we must not do.<sup>84</sup>

Accordingly, the court held that “economic development alone does not constitute a public purpose and therefore, does not constitutionally justify the County’s exercise of eminent domain.”<sup>85</sup>

***Burien v. Strobel Family Investments*, 2006 Wash. App. LEXIS 1136 (June 12, 2006) UNPUBLISHED OPINION, review denied by Washington Supreme Court, 149 P.3d 378 (Wash. 2006).**

The Court of Appeals of Washington affirmed a trial court decision holding that the City’s exercise of eminent domain to condemn a restaurant for a new “Town Square” development was not arbitrary or capricious.<sup>86</sup> The decision makes no mention of *Kelo* or the recent public use versus public purpose debate. The court simply applied Washington’s three-part test in evaluating eminent domain:

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<sup>82</sup> *Id.* at 652.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 650.

<sup>86</sup> *Burien v. Strobel Family Investments*, 2006 Wash. App. LEXIS 1136, \*12-13 (June 12, 2006).

For a proposed condemnation to be lawful, the condemning authority must prove that (1) the use is really public, (2) the public interest requires it, and (3) the property appropriated is necessary for that purpose.<sup>87</sup>

The landowner challenged whether the condemnation is “necessary,” specifically arguing that the City might turn around and sell a portion of the property to a private developer, which would benefit that private entity and not the City.<sup>88</sup> The court pointed out, however, that the City Council specifically set forth and determined that the property would be used *only* for public streets, public parks, or public parking.<sup>89</sup> Moreover, the court explained that “[w]here property is taken, . . . with the intention of using it for a certain purpose specified in the ordinance authorizing the taking, as was done in this case, the city, doubtless, has the authority to change said contemplated use to another and entirely different use, whensoever the needs and requirements of the city suggest.”<sup>90</sup> In holding that the city council’s determination that the property was “reasonably necessary and required” for the development, the court reasoned:

When it comes to such discretionary details as the particular land chosen, the amount of land needed, or the kinds of legal interests in that land that are necessary for the project, many Washington decisions have said that the condemnor’s judgment on these matters will be overturned only if there is proof of actual fraud or such arbitrary and capricious conduct as would amount to constructive fraud.

Given the absence of actual or constructive fraud, the court held that the City’s determination to condemn the entire property was necessary to facilitate a public use.

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<sup>87</sup> *Id.* at \*6. (citations omitted).

<sup>88</sup> *Id.* at \*8.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at \*9. (quotations and citations omitted).

***City of Norwood v. Horney*, 2006 Ohio LEXIS 2170 (July 26, 2006).**

The Ohio Supreme Court was the first state supreme court to accept an eminent domain case after *Kelo*.<sup>91</sup> In *City of Norwood v. Horney*, Ohio Supreme Court unanimously held, that “an economic or financial benefit alone is insufficient to satisfy the public-use requirement of [the Ohio Constitution].”<sup>92</sup> In this case, the City of Norwood entered into a contract with Rookwood Partners Ltd., (“Rookwood”) in order to redevelop the plaintiffs’ neighborhood.<sup>93</sup> When Rookwood could not negotiate the sales of certain properties the City initiated condemnation proceedings.<sup>94</sup> Pursuant to the City code, an urban-renewal study was completed before the City instituted the eminent domain proceedings.<sup>95</sup> The study concluded that the neighborhood was a “deteriorating area” as that term is defined in the Norwood Code.<sup>96</sup> At trial, the court found that the study “contained numerous errors and flaw” and the City’s planning director testified only that the neighborhood “probably would” deteriorate or was in danger of deteriorating or becoming a blighted area.<sup>97</sup> In light of this evidence, the trial court found that the City abused its discretion insofar as it had found that the neighborhood was a “slum, blighted or deteriorated

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<sup>91</sup> John Kramer and Lisa Knepper, *Ohio Supreme Court Accepts Eminent Domain Abuse Case*, Oct. 3, 2005, [http://www.ij.org/private\\_property/norwood/10\\_3\\_05pr.html](http://www.ij.org/private_property/norwood/10_3_05pr.html).

<sup>92</sup> *City of Norwood v. Horney*, 2006 Ohio LEXIS 2170, \*68-69 (July 26, 2006).

<sup>93</sup> *Id.* at \*13-14.

<sup>94</sup> *Id.* at \*15.

<sup>95</sup> *Id.* at \*14-15.

<sup>96</sup> *Id.* at \*15.

<sup>97</sup> *Id.* at \*17-18.

area.”<sup>98</sup> The court concluded, however, that the City did not abuse its discretion in finding that the neighborhood was a “deteriorating area.”<sup>99</sup> The landowners appealed.

In reversing the trial court’s decision, the Ohio Supreme Court specifically declined to hold “economic benefits alone to be a sufficient public use for a valid taking.”<sup>100</sup> The court found that analysis by the Supreme Court of Michigan in *County of Wayne v. Hathcock*<sup>101</sup> and the dissenting judges of the Supreme Court of Connecticut and the dissenting justices of the U.S. Supreme Court in *Kelo*, are “better models” for interpreting the Ohio Constitution.<sup>102</sup> In applying the analysis therefrom, the court held that “an economic or financial benefit alone is insufficient to satisfy the public-use requirement in the Ohio Constitution. In light of that holding, any taking based solely on financial gain is void as a matter of law and the courts owe no deference to a legislative finding that the proposed taking will provide financial benefit to a community.”<sup>103</sup> The court explained that “[a]lthough economic benefit can be considered as a factor among others in determining whether there is a sufficient public use and benefit in a taking, it cannot serve as the sole basis for finding such benefit.”<sup>104</sup>

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<sup>98</sup> *Id.* at \*19.

<sup>99</sup> *Id.* at \*20.

<sup>100</sup> *Id.* at \*64.

<sup>101</sup> 684 N.W.2d 765 (2004).

<sup>102</sup> *Horney*, 2006 Ohio LEXIS at \*66.

<sup>103</sup> *Id.* at \*68-69.

<sup>104</sup> *Id.* at \*68.

Next, the court turned to the City’s eminent domain statute. The court determined that the void-for-vagueness doctrine applies to statutes that regulate the use of eminent-domain powers and that courts should apply “heightened scrutiny” when reviewing such statutes.<sup>105</sup> The court held that the use of the term “deteriorating area” as a standard for determining whether private property is subject to appropriation was “void for vagueness and offends due process rights because it fails to afford a property owner fair notice and invites subjective interpretation.”<sup>106</sup> The court found that “deteriorating area” was a “standardless standard” and that the City code “merely recites a host of subjective factors that invite ad hoc and selective enforcement.”<sup>107</sup> The court further held that in any event the term could not be used as a standard for a taking because it “inherently incorporates speculation as to the future condition of the property into the decision . . . rather than focusing that inquiry on the property’s condition at the time of the proposed taking.”<sup>108</sup> The court reasoned that “[s]uch a speculative standard is inappropriate in the context of eminent domain, even under the modern, broad interpretation of ‘public use.’”<sup>109</sup> Moreover, “[a] municipality has no authority to appropriate private property for only a contemplated or speculative use in the future.”<sup>110</sup>

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<sup>105</sup> *Id.* at \*10.

<sup>106</sup> *Id.* at \*81-82.

<sup>107</sup> *Id.* at \*78.

<sup>108</sup> *Id.* at \*82.

<sup>109</sup> *Id.* at \*79.

<sup>110</sup> *Id.*

***Talley v. Housing Authority of Columbus, Georgia*, 630 S.E.2d 550 (Ga. Ct. App. 2006):**

The Court of Appeals of Georgia took the Supreme Court’s reasoning in *Kelo* to heart holding that the state’s Urban Redevelopment Law (“URL”) allowed property to be condemned for transfer to a private party.<sup>111</sup> In *Talley*, the Housing Authority of Columbus, Georgia (“HACG”) instituted condemnation proceedings against a subdivision lot and its owners.<sup>112</sup> The HACG paid \$17,500 for the property in 1994.<sup>113</sup> Five years later, the HACG sold the same property to a private citizen for \$42,800.<sup>114</sup> In 2003, Logie Talley, one of the former lot owners, instituted a pro se action claiming that the HACG unlawfully took his property and demanded its return.<sup>115</sup> Talley further argued that HACG abandoned all public use of the property in 1999 when it sold it to a private citizen.<sup>116</sup> The trial court granted summary judgment to the HACG without explanation.<sup>117</sup>

On appeal, the court held that the challenge to the legality of the 1994 taking was barred by principles of res judicata and collateral estoppel due to the condemnation proceedings that took

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<sup>111</sup> *Talley v. Housing Authority of Columbus, Georgia*, 630 S.E.2d 550, 553 (Ga. Ct. App. 2006).

<sup>112</sup> *Id.* at 551.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

place that year.<sup>118</sup> Talley’s claim regarding public use, however, was appropriate for consideration.<sup>119</sup> The court first looked at the URL:

Enacted in 1955, the URL authorizes Georgia municipalities and counties, either directly or through urban redevelopment agencies or housing authorities, to exercise the power of eminent domain for the acquisition and redevelopment of urban property which has been found to be a “slum area” as defined in the URL. To effectuate redevelopment of condemned property, the URL authorizes a housing authority to sell, lease or otherwise transfer condemned property “for public use”; or for various specified private uses, i.e., “residential, recreational, commercial, industrial”; or for “other uses.”<sup>120</sup>

The court then turned to *Kelo* for guidance and reiterated the Supreme Court’s reasoning that such takings are permissible under the Fifth Amendment of the United States Constitution, and it is left up to the states to enact more restrictive condemnation laws if they so choose.<sup>121</sup>

The court observed that “Georgia’s nonrestrictive URL and its underlying constitutional authorization remain in place. Therefore, the HACG was entitled to summary judgment on Talley’s complaint that it abandoned any ‘public use’ of the property [upon sale] to a private citizen for ‘other uses,’ as such disposition of condemned property is authorized by the URL.”<sup>122</sup>

***Rhode Island Economic Development Corp., v. The Parking Company, L.P.*, 892 A.2d 87 (R.I. 2006):**

The Rhode Island Supreme Court also took a cue from *Kelo*, when it stressed the importance of good faith and due diligence in determining public use. In *Rhode Island Economic Development*

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 552.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 553.



*Corporation (“RIEDC”) v. The Parking Company, Limited Partnership (“TPC”),* the RIEDC Board condemned a temporary easement over a parking garage for the duration of the term of the lease TPC held for the garage.<sup>123</sup> TPC was not informed of the hearing and the trial court, satisfied with the amount of compensation offered, found in favor of RIEDC.<sup>124</sup> Upon notice of the order, TPC appealed averring, inter alia, that the taking was not for a public use.

The Rhode Island Supreme Court agreed with TPC and held that the RIEDC “failed to satisfy the public use requirement of the *Takings Clause*.”<sup>125</sup> The court explained that:

The United States Supreme Court’s recent holding in [*Kelo*], while upholding a taking for economic development purposes, stressed the condemning authority’s responsibility of good faith and due diligence before it may start its condemnation engine. In determining whether an economic development project qualifies as a public use, under the Takings Clause, the Supreme Court focused on the City of New London’s deliberative and methodical approach to formulating its economic development plan.<sup>126</sup>

With this in mind, the court noted the “stark contrast” between the “exhaustive preparatory efforts” that the NLDC took in *Kelo*, and the RIEDC’s approach in this case by using the state’s quick-take statute.<sup>127</sup> The court concluded that condemnation was inappropriately “motivated by a desire for increased revenue and was not undertaken for legitimate public purpose.”<sup>128</sup>

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<sup>123</sup> *Rhode Island Economic Development Corp., v. The Parking Company, L.P.*, 892 A.2d 87, 93 (R.I. 2006).

<sup>124</sup> *Id.* at 94.

<sup>125</sup> *Id.* at 103.

<sup>126</sup> *Id.* at 104.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

***Didden v. Villiage of Port Chester*, 173 Fed. App. 931 (2d Cir. 2006) UNPUBLISHED OPINION, cert denied 2007 U.S. LEXIS 1036 (U.S. Jan. 16, 2007):**

Recently, the Supreme Court declined to hear an eminent domain extortion case. In *Didden*, a dispute arose between private developers over a development project.<sup>129</sup> In 1999, the Village of Port Chester authorized a land disposition agreement with G&S Port Chester, LLC ("G&S") for a redevelopment project.<sup>130</sup> The agreement covered the use of eminent domain incidental to the implementation of the project and the Port Chester Board of Trustees found that there was a legitimate public purpose for condemnation.<sup>131</sup> Plaintiffs claim that Gregory Wasser, the principle of G&S, demanded that they pay him the sum of \$800,000 or give him a partnership interest in their project, or else he would cause Port Chester to condemn their properties and thereby divest Plaintiffs of title at a meeting in 2003.<sup>132</sup> Plaintiff's refused and their property was condemned pursuant to the agreement G&S had with Port Chester. Plaintiff's challenged the proceedings but their claims were deemed time-barred by the three-year statute of limitations due to the fact that they had notice in 1999 of the likelihood of condemnation proceedings against them.<sup>133</sup> Plaintiff's appealed.

The Second Circuit agreed with the trial court regarding the time bar but went on to explain that the Plaintiff's would not have a claim even if the statute of limitation had not run. On appeal, the Plaintiffs claimed that Wasser's threat to condemn their property unless Plaintiffs gave him

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<sup>129</sup> *Didden v. Villiage of Port Chester*, 322 F. Supp. 2d 385, 387 (S.D. N.Y. 2004).

<sup>130</sup> *Id.* at 388. See, for a full restatement of the facts, *Didden v. Villiage of Port Chester*, 304 F. Supp. 2d 548 (S.D. N.Y. 2004).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 390.

<sup>133</sup> *Id.* at 389.

either \$800,000 or a partnership interest in the business on the property amounts to an unconstitutional exaction.<sup>134</sup> The court, however, held that “no exaction has occurred here” because the Plaintiffs did not have any conditions placed upon their property during their ownership that limited their ability to use their property.<sup>135</sup>

Moreover, the court held that the Plaintiff’s allegation of an extortionate demand of \$800,000 to avoid condemnation added nothing of legal significance to their claims.<sup>136</sup> G&S and Wasser have the authority under the agreement to obligate Port Chester to pursue condemnation of properties within the project’s boundaries.<sup>137</sup> As such, threats to enforce their legal rights are not actionable.<sup>138</sup> Therefore, even if Wasser did request payment in exchange for relinquishing the legal right to request condemnation, Plaintiffs have no recourse.<sup>139</sup> The court observed that the New York Eminent Domain Procedure Law “does not require the condemner to negotiate with a private property owner in good faith prior to seeking to acquire title to the property.” The Plaintiff’s appealed to the U.S. Supreme Court but cert was denied in January 2007.

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 390.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

## Commercial Pressure

Commercial companies have also gotten caught up in the public outcry over *Kelo*, and on January 25, 2006 BB&T Corporation said it will not lend to commercial developers that plan to build condominiums, shopping malls and other private projects on land taken from private citizens by government entities using eminent domain. BB&T operates more than 1,400 financial centers in 11 states and Washington D.C. - the Carolinas, Virginia, Maryland, West Virginia, Kentucky, Tennessee, Georgia, Florida, Alabama, and Indiana.<sup>140</sup> BB&T is the nation's ninth largest financial holding company with \$109.2 billion in assets.<sup>141</sup> In that same week, Montgomery Bank, which has \$800 million in assets, announced that "it will not lend money for projects in which local governments use eminent domain to take private property for use by private developers."<sup>142</sup> The century-old financial lending house which has six branches in St. Louis and five branches in Southeast Missouri, is the first Missouri bank to take a principled stand against eminent domain for private development.<sup>143</sup>

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<sup>140</sup> BB&T, News Release, January 25, 2006, <http://www.bbandt.com/about/media/newsreleasedetail.asp?date=1%2F25%2F06+9%3A48%3A52+AM>.

<sup>141</sup> *Id.*

<sup>142</sup> John Kramer and Lisa Knepper, *Montgomery Bank Won't Finance Eminent Domain Abuse: Second bank within week to reject eminent domain for private gain*, February 6, 2006, [http://www.castlecoalition.org/media/releases/2\\_6\\_06pr.html](http://www.castlecoalition.org/media/releases/2_6_06pr.html).

<sup>143</sup> *Id.*