

# Have Redevelopment Agencies Gone Too Far Using the Power of Eminent Domain?

*The Supreme Court May Soon Tell Us*

BY SEAN O'CONNOR

FEW WOULD DISAGREE THAT REDEVELOPMENT—in its traditional context—can be beneficial to society. Redevelopment has been responsible for revitalizing blighted and dilapidated communities where the previous property owners were either unwilling or economically unable to improve the property on their own. But while few would deny the possible benefits of redevelopment, few would also disagree that redevelopment, with its attendant power of eminent domain, is subject to abuse. This is primarily because although the Fifth Amendment places a “public use” limitation on the power of eminent domain, the term “public use” is largely undefined and left to the determination of local governmental entities.

The result is inconsistent and contradictory case law across the country, leaving property owners, practitioners and developers in a state of confusion. The United States Supreme Court may provide some much-needed guidance in this regard, as on September 28, 2004, it agreed to hear the case of *Kelo v. City of New London*, a case involving redevelopment and the expansive use of the power of eminent domain. The Supreme Court is expected to determine whether the Constitution allows the government to use eminent domain to take property for the purpose of economic development. This case will also provide the Supreme Court with an opportunity to provide a workable

definition of “public use” in the context of the Fifth Amendment.

## TRADITIONAL REDEVELOPMENT AS A PUBLIC USE

The Fifth Amendment prohibits the “taking” of private property for anything other than “public use.” In the redevelopment context, the Supreme Court has held that this “public use” limitation is satisfied when eminent domain is used to eliminate slum housing. *Berman v. Parker*, 348 U.S. 26 (1954). The redevelopment act at issue in *Berman* allowed for private enterprise to redevelop properties once they were acquired by the government through eminent domain. Because private enterprise was involved, the property owners in *Berman* contended the “public use” requirement of the Fifth Amendment was not satisfied. But the Supreme Court concluded that because the taking was for the public purpose of clearing blighted areas, the means of redevelopment through private enterprise did not violate the public use clause of the Fifth Amendment.

## About the Author

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Although Berman dealt with the exercise of eminent domain to redevelop a severely troubled area, Berman also spoke in terms of judicial deference toward legislative determinations of public use. Accordingly, many jurisdictions interpreted Berman to allow for a more expansive use of eminent domain in the redevelopment context.

### **THE MORE EXPANSIVE USE OF EMINENT DOMAIN IN REDEVELOPMENT**

Following Berman, there are innumerable examples of the expansive use of eminent domain in the redevelopment context. For example, in 1981, the Michigan Supreme Court allowed the City of Detroit to take an entire neighborhood, complete with more than 1,000 residences, 600 businesses and numerous churches in order to give the property to General Motors for an auto plant. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (1981). In Poletown, General Motors had announced its intention to close a plant, thereby losing more than 6,000 jobs, but General Motors offered to build a new assembly complex in the city if a suitable site could be found. The City of Detroit used its power of eminent domain to acquire the necessary properties, but the property owners contended that the taking was not for a public use.

The Michigan Supreme Court concluded that the taking of a residential neighborhood, for the purpose of conveying that property to General Motors for construction of an assembly plant, was a public use under the state constitution because of the economic benefits of the jobs and tax revenue that would result from the plant's construction. The case had national implications, and stood for the broad proposition that, for the most part, courts would not interfere with the local government's determination of "public use." Poletown is considered by many to be the beginning of an era marked by government's willingness to expansively interpret "public use" to fit its own redevelopment needs. Ironically, however, the Michigan Supreme Court could be setting another trend in the opposite direction as, discussed below, it just overturned its Poletown decision.

The United States Supreme Court also assisted in the broad interpretation of "public use" with its decision in *Hawaii Housing Auth. v. Midkiff* (1984) 467 U.S. 229. In that case, the Hawaii State Legislature attempted to address economic problems caused by land ownership in the form oligopoly. In response to this, the legislature

allowed for the condemnation of the affected lands. The United States Supreme Court concluded that the legislation was a constitutional exercise of Hawaii's police powers. But, the Court also stated in the same decision that, "a purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Id.* at p. 265. Nevertheless, Midkiff has been relied upon by states and local governments seeking broad definitions of public use.

The increasingly broad interpretation of public use led to the Connecticut Supreme Court's recent decision that is now under review by the United States Supreme Court. This case, *Kelo v. City of New London* (2002) 843 A.2d 532, demonstrates how far some local governments are willing to go to take property through the power of eminent domain. The redevelopment plan at issue in Kelo involved an area approximately 90 acres in size and included residential and commercial areas. Unlike most redevelopment cases, the redevelopment agency in Kelo did not claim that the subject area was blighted. Instead, in a 4-to-3 majority opinion, the Kelo court held that the public use clauses of the United States and state constitutions authorized the use of eminent domain for economic development that would supposedly increase tax revenue and improve the local economy. Accordingly, Kelo represents a substantial expansion of the traditional notion of redevelopment where governments used eminent domain powers to condemn—and then improve—blighted areas. Under a strained interpretation of public use, the Kelo court approved the use of eminent domain merely to improve an area.

But the United States Supreme Court's decision to take the Kelo case may signal concern by some justices that local governments have gone too far.

### **RECENT EXAMPLES OF REIGNING IN THE USE OF EMINENT DOMAIN FOR REDEVELOPMENT**

Certainly not all—or many, for that matter—local governments have gone as far as did the redevelopment agency in Kelo. California, a state not known for its restraint in using the power of eminent domain, has had two recent decisions where courts are skeptical of granting deference to questionable legislative determinations of public use. In *99 Cents Only Stores v. Lancaster Redevelopment Agency* (2001) 237 F.Supp.2d 1123, the Court held the redevelop-

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ment agency's efforts were in violation of the "public use" limitation of the Fifth Amendment, as the efforts were directed toward a private rather than a public use. The case involved the use of eminent domain to acquire property occupied by an operating discount store so that the property could be transferred to Costco, another commercial user. The redevelopment agency argued that the taking was necessary to prevent "future blight." The Court found this argument to be too speculative, and found that the real reason for the redevelopment agency's willingness to exercise the power of eminent domain was to appease Costco.

A similar situation occurred in *Cottonwood Christian Center v. Cypress Redevelopment Agency* (2002) 218 F. Supp. 2d 1203. In Cottonwood, the City of Cypress attempted to take through eminent domain vacant property that the church had acquired with the intention of building a church campus. As part of the redevelopment project, the City of Cypress intended to transfer the church's property to Costco, the same commercial user at issue in 99 Cents Only Stores. The Court granted Cottonwood's request for an injunction, holding that the City's proposed condemnation violated the "public use" limitation of the Fifth Amendment. The Court in Cottonwood was also suspicious of the City's contention that the taking was necessary to eliminate blight in the redevelopment area. Instead, the Court found the City's determinations "pre-textual" and done merely "to appease" another private property owner (Costco).

Earlier this year, the Michigan Supreme Court reversed its Poletown decision in *County of Wayne v. Hathcock* (2004) 471 Mich. 445. Hathcock involved the condemnation of numerous properties to build a 1,300-acre business and technology park. The property owners challenged the taking on public use grounds. The government argued that under the reasoning of Poletown, the taking was a valid exercise of the power of eminent domain. Reversing the position it had taken 23 years earlier, the Michigan Supreme Court ruled that the government's power of eminent domain must be in the interest of bona fide "public use" rather than some ill-defined notion of "public purpose" or "public benefit." Hathcock called Poletown a "radical departure from fundamental constitutional principles." "We overrule Poletown," the Court wrote, "in order to vindicate our constitution, protect the peoples' property rights and preserve the legitimacy of the judicial branch as the expositor, not creator, of fundamental law."

### **THE NEED FOR GUIDANCE ON THE LIMITS OF EMINENT DOMAIN FOR REDEVELOPMENT**

As shown above, the lack of an understandable definition of "public use" has led to contradictory decisions across the land. Even the leading treatise on eminent domain acknowledges that there are two competing definitions of the term "public use"—a "narrow" definition and a "broad" definition (2A P. Nichols, *Eminent Domain* 3d Ed. Rev. 2003 § 7.02 [2]-[7], pp. 7-26 through 7-37). This treatise further acknowledges that neither definition can explain all eminent domain public use holdings and that "further efforts at providing a precise definition of 'public use' are doomed to fail, and many courts have recognized this . . ." Id. Section 7.02[7], p. 7-37. It is perhaps for this reason that many people believe that Kelo will be among the most closely watched cases of the United States Supreme Court's 2004-2005 term.

### **THE AUTHOR'S VIEW**

The narrow question before the Supreme Court in Kelo is whether "economic development" (raising jobs and tax revenues) is constitutional under the "public use" limitation of the Fifth Amendment. While the Supreme Court may opt for the easy route of only answering this narrow question, it should use this opportunity to provide workable guidelines in the entire redevelopment context as to how it relates to the "public use" limitation.

Cases such as the Connecticut Supreme Court's decision in Kelo have seemingly replaced "public use" with a malleable concept of "public benefit." These are not the same, and the Connecticut Supreme Court's interpretation in this regard renders the public use limitation of the Fifth Amendment essentially meaningless. If merely raising jobs and tax revenue can pass constitutional muster, then governments will have carte blanche to take virtually any property, as virtually any property could be put to a more profitable use. The power of eminent domain—to take property against someone's will—is an awesome power, and with that power should come commensurate responsibility. "Economic development" alone should never be enough to satisfy the "public use" limitation of the Fifth Amendment.

The Fifth Amendment very much belongs amidst the nine other amendments in the Bill of Rights where it is found. Its public use requirement upholds property rights and thereby ensures personal liberty. As the United States

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Supreme Court has explained (*Lynch v. Household Finance Corp.* (1972) 405 U.S. 538, 552):

“the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation . . . is in truth a 'personal' right . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.”

The public use requirement is, at its heart, a guarantee that individuals and their property will be treated equally under the law. Should the public use requirement serve as nothing more than a needless formality, inequality would surely result. Well connected persons, looked upon with favor by insiders to government, would become the sole governing criterion of whether or not one could own property. If the public use requirement were ignored, any citizen's property could be commandeered for someone's private enrichment. As a California court has held, “one man's land cannot be seized by the government and sold to another man merely in order that the purchaser may build upon it a better house or a house which better meets the government's idea of what is appropriate or well designed.” *Redevelopment Agency v. Hayes* (1954) 122 Cal.App.2d 777, 793.

Indeed, it is for this reason that the federal and state constitutions allow condemnation only for “public use,” not merely for better private use. And this is a critical distinction that the United States Supreme Court should recognize. The Court should not, in this author's view, allow the traditional notion of redevelopment to extend to “economic redevelopment,” where a legislature, such as that in California, is free to come up with something called “economic blight.” The Supreme Court can clarify matters by stating that “public use” is not the same as “public benefit.” The former allows for the power of eminent domain to be invoked, the latter does not. The Supreme Court should define public use in the redevelopment context as it was contemplated at the time of *Berman v. Parker*, supra. Namely, the power of eminent domain should be constrained to the “traditional” redevelopment context, meaning to clear slum and truly dilapidated areas that are socially undesirable and create health risks. By limiting the use of eminent domain in this manner, the Supreme Court would preserve the relatively unobjectionable aspects of redevelopment, while at the same time give protection to property owners against over-zealous governments. ■