

**BULLDOZERS AT YOUR DOORSTEP - WILL KELO v.  
CITY OF NEW LONDON STOP THEM IN THEIR TRACKS?**

**By: Michael Rikon**

You may love the home left to you by your parents, but did you ever, in your wildest nightmare, consider that it could be taken from you in condemnation to make way for a Costco? Consider the plight of an owner of a small family business, the goodwill of which was built up over the course of many years, who learns that upon condemnation to make way for a shopping mall, the owner will only be entitled to the sound value of the trade fixtures annexed to the premises. One day enjoying the entire group of rights inhering in the ownership of property, and the next day watching a bulldozer plow down your house. How can this happen in this country which prides itself on a Constitution and a Bill of Rights which is the envy of every other nation.

Eminent domain is the right of the sovereign to take your property. It is an inherent power of government that is necessary for the fulfillment of sovereign functions. Indeed, one will find nothing in the Constitution creating the power, only limitation on its exercise. That limitation is found within the Fifth Amendment to the United States Constitution "... nor shall private property be taken for public use, without just compensation." These limitations are made applicable to the States by the Fourteenth Amendment. The Fifth Amendment to the United States Constitution was adopted on December 15, 1791. The issue immediately presents itself, did our founding fathers ever consider that it would one day be appropriate to condemn a small family property to build a "Costco?"

How did a big box retail establishment become a permissible "public use?" There has been a metamorphosis of concept over the years. Once "public use" meant exactly what it says,

i.e., that

in order for a taking to be a “valid public use,” the property acquired must actually be used by the public. We understand the condemnation of land for a new school, highway or fire house. It is the “other public use” which truly enrages property owners, that is, the taking of private property to hand over to a private developer.

**PUBLIC PURPOSE AS DEFINED BY THE COURTS** Public purpose has enjoyed a broad definition in New York and other Courts. Building a four-way intersection for access to and from a shopping mall is a permissible public purpose. *Waldo’s Inc. v. Johnson City*, 74 N.Y.2d 718 (1989). Condemning residential property located at 45 Wall Street for an addition to the New York Stock Exchange is a public purpose and is not impaired by the circumstance that the proposed project will confer a private benefit. *Fisher v. New York State Urban Development Corporation*, 287 A.D. 262 (1<sup>st</sup> Dept., 2001). In 1975, the Court of Appeals decided *Yonkers Community Development Agency v. Morris*, 37 N.Y.2d 478 which allowed the condemnation of private property placed in an urban renewal plan for the removal of “substandard” conditions. In fact, the properties were not substandard but were taken for the expansion of *Otis Elevator Company*, a leading industrial employer in the City of Yonkers. The Court applied the liberal rather than literal definition of a “blighted” area and permitted the taking. If you think that this was outrageous, consider that even after receiving such municipal largess, *Otis* quit Yonkers in 1982. Yonkers then sued *Otis* in the United States District Court for the Southern District of New York only to have its suit for breach of contract, unjust enrichment and fraud dismissed with the imposition of sanctions since there was no colorable factual basis for filing a fraud claim. It seems that Yonkers failed to obtain any written specific commitment by Otis to

continue production at its Yonkers facility. *City of Yonkers v. Otis Elevator Company*, 844 F.2d 42 (2<sup>nd</sup> Cir., 1988). The same thing happened not too recently in the Bronx when Farberware convinced the New York State Urban Development Corporation to condemn its landlord's building for its own. Not too long after, Farberware quit the Bronx. Whose fault is it that such abuse of traditional property right concepts has occurred?

Professor Gideon Kanner, the editor of "Just Compensation" and a columnist to the National Law Journal has long decried the hypocrisy of the "Public Use" Law. The problem, according to Prof. Kanner is "... Judges (that) have abdicated their responsibility and are falling down on their job of safeguarding citizens' constitutional rights in this field of law. Instead of enforcing the 'public use' clause, they allow these new robber barons to wreak havoc on the lives of innocent people, and to raid municipal treasuries for subsidies in pursuit of private gain." The New Robber Barons, Kanner, Nat. L.J. May 21, 2001.

### **BLAME THE SUPREME COURT**

The blame can squarely be put in the Supreme Court's lap. The genesis for the change in definition came in *Berman v. Parker*, 348 U.S. 26 (1954) which upheld the District of Columbia Redevelopment Act of 1945. The plaintiffs objected to the taking of their Washington, D.C. department store which was not part of any "blight" and argued that the project was simply a taking from one businessperson for the benefit of another. The Supreme Court held that "[t]he concept of public welfare is broad and inclusive ..." The fact of the matter is that while there may have been low income housing before, which may have been substandard, the product of the project was high

income co-op housing and shopping mall development which certainly did little to improve the welfare of the local residents. Some years later, the Supreme Court had before it *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) and while stating that a taking for purely private use is unconstitutional no matter the amount of “just compensation” that may be given, the Court allowed the breakup of family owned land for sale to others. The Court stated, “\*\*\* where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the public use clause.”

The same Court when previously presented with an opportunity to uphold traditional notions of property rights stated, “[t]he dictomy 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, no less than the right to speak or the right to travel, is in truth a ‘personal’ right whether the ‘property’ in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.” *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). If one has basic civil rights in property, the threshold for losing ownership to one’s property for an alleged public use should not be the lowly standard of being merely related to any conceivable public purpose.

**KELO v. CITY OF NEW LONDON**

On February 22, 2005, the Supreme Court will hear argument in *Kelo v. City of New London*, 04-108. The case squarely presents the issue of whether it is permissible to take a person's property and transfer it to private developers. In this case, city officials in New London, Connecticut condemned a 29 acre neighborhood in the Fort Trumbull section of New London to lease the property for \$1.00 a year to several private developers, including the Pizer Pharmaceutical Company. The City did not condemn the property because it was "blighted." Rather, the development corporation and the City proceeded against the owners solely on the ground that it would be economically advantageous for New London to redistribute the land to private developers. The local law imposed no statutory standards to insure that the land is taken only for public use, only that it be used "in accordance with the project plan."

The case brought by the Institute for Justice urges in its brief that the Supreme Court end eminent domain abuse whereby government can take a person's property and hand that land over to another private party when there is no blight or other basis for the taking. Twenty-five organizations have filed amicus briefs, many arguing that the Court should restore the Public Use Clause's original public meaning. The City of New Long and the New London Development Corp. have filed a brief arguing that the use of eminent domain to take property for commercial development at Fort Trumbull is constitutional and in keeping with the prior use of the power. The respondents argued that courts had traditionally deferred to legislative bodies on the issue. It was also argued that spurring private growth is as much a public use of eminent domain as when the land is used for reservoirs or railroad tracks. "Such holding is no less valid merely because the economic improvements in question will be achieved by allowing private entities to lease the property taken through eminent domain." The brief states, "The principal

focus of the public use equation has always been whether the taking will produce a significant benefit to the public and not the means by which the benefit comes into being.” A substantial number of amicus briefs were filed supporting condemnation for economic development.

The issues has been presented to the Supreme Court many times before in petitions for certiorari. The fact that the Court agreed to hear the case leads most practitioners to believe that the Court will limit the power of eminent domain by requiring a true public use.

### **THE POLETOWN CASE REVERSED**

In *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (1981), the Michigan Supreme Court allowed the condemnation of some 465 acres, 1,176 buildings including 144 businesses, three schools, a 278 bed hospital, 16 churches and one cemetery so that General Motors could build a Cadillac factory. The project cost Detroit over \$200 million. General Motors paid \$8 million and also received a 12 year 50% tax abatement. There was very little evidence of “blight,” but the argument was that the economic benefit to General Motors would, eventually, trickle down to the public. Perhaps, “blight” is in the eyes of the beholder. Who is to say what is “blight?” Can anyone really suggest that a main street, fully rented with charming ethnic restaurants and antique shops, constitutes a blighted area? If a government earmarks a portion of a block for condemnation for many years, does it not itself create “blight?” However, the Michigan Supreme Court has now acknowledged that its decision in *Poletown* was wrong.

On July 30, 2004, the Michigan Supreme Court reversed its earlier *Poletown* decision in *County of Wayne v. Hathcock* holding that *Poletown* was wrongly decided and did so retroactively. While the Michigan Supreme Court stated that the case did not “require that this Court cobble together a single comprehensive definition of ‘public use,’” relating to its decision to the discrete facts in the case before it, nonetheless, relying on pre-1963 decisions, the Court described the exercise of the power as being limited to an actual public use such as roads, schools and parks except when it possessed one of three characteristics. The land could be transferred to a private entity generating public benefits “whose very existence depends on the use of land that can be assembled only by the coordination central government is alone capable of achieving.” The examples given were “highways, railroads, canals and other instrumentalities of commerce,” deeming such enterprises as “vital instrumentalities of commerce.”

The second exception is, “When the private entity remains accountable to the public in its use of that property.” An example given was when the receiving entity was “subject to direction from the Public Service Commission” in that in such a way, “The public retained a measure of control over the property.”

The third exception is “When the selection of the land to be condemned is itself based on public concern,” – “meaning that the underlying purpose for resorting to condemnation rather than the subsequent use of condemned land, must satisfy the Constitution’s public use requirement.” The example given was the clearance of “blight,” where the subsequent resale of the land cleared of the blight was “incidental” to this goal. Since the proposed business and

technology park proposed by the County of Wayne fit none of the exceptions, the Court struck down the attempted condemnation.

The implications of the *Hathcock* decision in other jurisdictions remain to be seen, but it would be wise for lawyers seeking to challenge a proposed taking on “public purpose” issues to re-read their State’s Constitution.

In a case that garnered a great deal of interest in Connecticut, Curley’s Diner objected to the proposed condemnation of its property based on a 1963 redevelopment plan which never included their parcel, which they had acquired in 1977. On appeal, the trial court was reversed and the matter remanded with an Order to enter a permanent injunction barring the condemnation. The Appellate Court stated that while a redevelopment agency need not redetermine the level of blight at each stage, it may not rely on its initial finding indefinitely, particularly where the subject property was not targeted for acquisition when the plan was adopted. The Court noted that new hearings might disclose that there was no longer any blight justifying condemnation of the subject property. *Apospornos v. Urban Redevelopment Comm.*, 790 A.2d 1167 (Conn., 2002).

Much has been written of the improper use of the power of eminent domain across the country. Taking property from a Toyota dealership in Merriam, Kansas to turn it over to a BMW dealer. “Take and Give,” Wall Street Journal, Dec. 2, 1998. In New London, Connecticut, the local development agency wanted to condemn some homes for a health club. “Property Seizures Overstep Boundaries of ‘Public Use,’” USA Today, March 21, 2001.

The Wall Street Journal, on its editorial page of May 30, 2002 titled, “The First Church of Costco,” wrote of the proposed condemnation of 17.9 acres of land in Cypress City, California owned by the Cottonwood Christian Center. The land would then be sold to Costco. The editorial noted, “[t]he powers of eminent domain are tricky enough when exercised for highways, schools, or other public uses. But when invoked on behalf of a private business, it represents the worst form of political collusion. Our advise to Cottonwood is not to turn the other cheek.”

### **THE TIDE MAY BE CHANGING**

In 1998, 99 Cents Only Stores moved into a vacant piece of property located next to a Costco in a newly developed shopping mall in Lancaster City, California. Costco wanted to expand and threatened to relocate unless it was provided with additional space in the shopping center. Costco wanted 99 Cents’ space. Viewing Costco as an “anchor tenant” and fearful of Costco’s relocation to another City, the redevelopment agency made a deal with Costco. It sought to buy out 99 Cents’ lease and when that failed, adopted resolutions which authorized the condemnation of the 99 Cents’ store site. In an action to enjoin the condemnation of its property brought in the United States District Court for the Central District of California, ***99 Cents Only Stores v. Lancaster Redevelopment Agency***, 00 Civ. 7572 (June 27, 2001), the plaintiff prevailed. The Court held that “the evidence is clear beyond dispute that ***Lancaster’s*** condemnation efforts rest on nothing more than a desire to achieve the naked transfer of property from one private party to another.” The Court also noted that there was no “existing blight” (emphasis in original).

Perhaps the tide is changing. Maybe the Courts have had enough of this abuse. Recent cases from across the country indicate a judicial backlash which is quite noticeable. In West St. Louis, Illinois there is Gateway International Motor Sports, a Nascar racetrack which over the years prospered and increased its seating capacity. It wanted to increase its parking capacity as well, so it called on its friendly development authority to condemn its neighbor's 148.5 acres. The proposed parking lot was owned by National City Environmental, L.L.C., which operates a metal recycling center. The recycler employed upwards of 100 people and had been in operation since 1975. The development agency, SWIDA offered \$1 million for the property. When that was rejected, SWIDA instituted condemnation proceedings.

The lower Illinois court held a hearing and found that the taking was for a public purpose as there were serious public safety issues involved. It appears that traffic backed-up during major race events and that pedestrians often crossed the highway from parking areas east of the racetrack. This safety risk would be eliminated by acquiring the property. And, of course, the development of the racing facilities had indirectly helped to eliminate blight in the area. The Court also made a preliminary finding that \$900,000 was just compensation for the property. Upon appeal to the Illinois Appellate Court, the decision was reversed. The Appellate Court determined that SWIDA had exceeded its constitutional authority in taking the recycler's land by eminent domain. The agency then filed a Petition for Leave to Appeal to the Supreme Court of Illinois, which granted the Petition and reversed the Appellate Court and remanded the cause. However, National City Environmental petitioned the Supreme Court for rehearing which was allowed. This, as most lawyers know, is extremely rare.

In a decision filed April 4, 2002, the Supreme Court of Illinois reversed itself and affirmed the decision of the Appellate Court. The Court stated that, “[b]efore the right of eminent domain

may be exercised, the law, beyond a doubt, requires that the use for which the land is taken shall be public as distinguished from a private use.” The Court also noted that while great deference should be afforded the Legislature and its granting of eminent domain authority, the exercise of that power is not entirely beyond judicial scrutiny and it is incumbent upon the judiciary to ensure that the power of eminent domain is used in a manner contemplated by the framers of the Constitution and by the Legislature that granted the specific power in question. The Court also noted that the taking was not for the purposes of eliminating blight. The Court continued, “[w]e do not require a bright-line test to find that this taking bestows a purely private benefit and lacks a showing of a supporting legislative purpose.” The agency had argued that the wisdom of the legislation and the means of executing the project are beyond judicial scrutiny once the public purpose has been established. The Court disagreed, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982). It stated, “the government does not have unlimited power to redefine property rights.” The Illinois Supreme Court concluded, “[t]he power of eminent domain is to be exercised with restraint, not abandon.” *Southwestern Illinois Development Authority v. National City Environmental, LLC*, \_\_\_ Ill.2d \_\_\_, \_\_\_ N.W.2d \_\_\_, (April 4, 2002).

### **CONCLUSION**

Public purpose should mean exactly what it says. The definition of a valid public purpose should not be stretched to an illogical conclusion to allow something that the authors of the Bill of Rights clearly prohibited - - the taking of private property for a private purpose. If the Courts are unwilling to stop this charade, then legislation should be adopted clearly defining what is a valid public purpose.