Community Redevelopment, Public Use, and Eminent Domain

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I. Introduction

When government converts private property for public use, there are often dissatisfied property owners who may resent that the government has determined that their property is needed for a public purpose. Further, they may resent the level of compensation that government determines is due for this conversion. The Fifth Amendment to the U.S. Constitution places two limitations on the government when it takes private property: it must do so for public use and it must pay just compensation.1 The concept of what constitutes a public use has evolved over the decades from traditionally accepted uses such as public roads, buildings (e.g., government buildings and schools), and utilities to urban redevelopment. The broad concepts of community redevelopment have been stretched to encompass needed economic development projects that promise jobs, tax revenue, and other public benefits similar to those currently being debated before the courts of our country. Perhaps central to the current debate before the U.S. Supreme Court in Kelo v. City of New London2 is the critical question of whether government may condemn private property for use by private developers to advance a public purpose.3 According to the Institute for Justice, seven states allow for condemnation for private business development4 while eight states prohibit this practice.5

1. U.S. CONST. art V (The Fifth Amendment provides “... Nor shall private property be taken for public use without just compensation.”); see, e.g., Edward J. Sullivan & Nicholas Cropp, Sources of “Public Use” Limitations—Takings or Due Process? 21 ZONING & PLAN. L. REP. 1 (2004).
4. See Dana Berliner, Public Power, Private Gain, INSTITUTE FOR JUSTICE (2003). Berliner’s report contains a state-by-state analysis of laws dealing with condemnation for private business development. Id. The report can be downloaded in sections at http://www.castlecoalition.org/report (last visited Feb. 18, 2005). Berliner’s report indicates that the following states allow for condemnation for private business development: Connecticut, Kansas, Maryland, Michigan, Minnesota, New York, and North Dakota. According to Berliner’s report, there have been more than 10,000 filed or threatened condemnations involving transfers of property from one private owner to another in forty-one states between 1998 and 2002. Id. at 2.
5. See Berliner, supra note 4. Berliner’s report indicates that the following eight
Section II of this article begins by briefly examining the development of the “public use” clause with respect to eminent domain. Section III discusses a recent policy guide adopted by the American Planning Association (APA) on community redevelopment. This guide represents a sensible approach to planning for, and supporting the implementation of, community redevelopment initiatives. Section IV then examines three significant cases from 2004 that have crystallized around the question of what constitutes a valid public purpose under eminent domain when the government’s motivation is to promote economic development in the municipality. The first case, *County of Wayne v. Hathcock*, decided by the Michigan Supreme Court, reversed a long-standing national precedent, thus narrowing under state law when private property may be taken by the government to be transferred to another private owner for the purpose of economic development. The second case involved an effort by elected officials in Lakewood, Ohio, to condemn certain property for the purpose of bringing commercial development to the city’s West End. This ultimately failed when citizens spoke at the ballot box, rejecting the proposal. The third case, *Kelo v. City of New London*, had oral argument before the U.S. Supreme Court on February 22, 2005, and is awaiting a decision. All three cases involved plans by the government to promote community redevelopment by attracting commercial development that was expected to bring jobs and revenue into the impacted communities. In all three cases, however, there was significant community opposition to the use of eminent domain to accomplish these goals. Finally, Section V of this article concludes that the U.S. Supreme Court should confirm that economic development is a valid public use for the purpose of eminent domain, and that the public-private partnerships that have evolved to assist governments in meeting redevelopment needs are a necessary and appropriate strategy fostering a valid public use.
II. The Concept of “Public Use”

The debate over what constitutes a “public use” in the context of takings pursuant to the Fifth Amendment is a fiercely contested one. Relying on a trilogy of landmark cases—Berman v. Parker, Poletown Neighborhood Council v. City of Detroit, and Hawaii Housing Authority v. Midkiff—courts across the country routinely review condemnation actions where the government’s strategy involves a private entity to further the underlying public use for which the action was instituted. In the cases that have allowed these condemnations, the justification has been that although the property is being used by a private entity, it is serving a “public purpose.” These decisions have more recently sparked a debate over the difference, if any, between a “public use” and a “public purpose” or “public benefit.”

In their article, Sources of “Public Use” Limitations—Takings or Due Process?, Edward Sullivan and Nicholas Cropp analyze the different interpretations of the Takings Clause that have been employed by the courts. They set forth the notion that although many courts have interpreted the inclusion of the term “public use” as a prerequisite for the taking, this is not the only way to interpret the language. “By saying ‘nor shall private property be taken for public use without just compensation,’ the clause states that, when a government takes property for public use, it must compensate justly. . . . The clause does not specifically say what happens when a government takes for private use. . . .” Sullivan and Cropp state that property owners who make
the argument that the condemnation is not justified because it is not for a “public use” will face much resistance due to the expansive interpretation of the term by the courts.21

Berman is often cited as one of the leading cases in the exercise of the power of eminent domain for a public use. The landowners in this case attacked the constitutionality of the District of Columbia Redevelopment Act of 1945.22 Under this Act, the government was authorized to take property in order to eliminate substandard housing and blight.23 Section Two of the Act stated that “the acquisition and the assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan . . . is hereby declared to be a public use.”24

The Act created the District of Columbia Redevelopment Land Agency, which was granted the power to acquire property through the use of eminent domain in order to redevelop the blighted areas.25 The National Capital Planning Commission was directed to “make and develop ‘a comprehensive or general plan’ of the District, including ‘a land-use plan’ which designates land for use for housing, business, industry, recreation, education . . . and other general categories of public and private uses of the land.”26 Once the plan was adopted and “approved by the Commissioners, the Planning Commission certify[ed] it to the Agency,” which was then “authorized to acquire and assemble the real property in the area.”27 After the land was acquired, the Agency was authorized to transfer the land to be used for public purposes such as schools, streets, and utilities, to public agencies.28 The remainder of the land was to be leased or sold to a redevelopment company, individual, or partnership.29 The contracts were to provide that the land would not be used in any way which “[did] not conform to the plan.”30 “Preference [was] to be given to private enterprise over public agencies” for the execution of the redevelopment plan.31

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21. Sullivan & Cropp, supra note 18; See Nichols on Eminent Domain, supra note 13, at § 7.01[1], 7.02[3] (Many courts have broadly construed the “public use” clause to include actions that “further the public good or general welfare.”).
23. Id. at 28.
24. Id. at 29.
25. Id.
26. Id. at 29.
28. Id. at 30.
29. Id.
30. Id.
31. Id. at 30.