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LOCAL GOVERNMENT LAW

The newsletter of the ISBA's Section on Local Government Law

The changing meaning and purposes of the Public Use Limitation on Eminent Domain

By Aaron N. Gruen

The United States Constitution permits the condemnation of private property for "public use"; a power enumerated in the "Takings Clause of the Fifth Amendment." The meaning and purposes of eminent domain have changed over time. A review of eminent domain case law, however, does not suggest a gradual, accelerating erosion of property rights as front-page articles and editorials of some newspapers might suggest.

A categorical rule has not existed that private property can never be taken for economic development purposes. Depending upon the economic and social currents, the definition of public use has been more narrowly or more expansively interpreted and therefore

used to strengthen or weaken the protection afforded property owners under the Takings Clause. When priority has been placed on economic development, the balance has been weighted in favor of the perceived needs of the community over the rights of individual property owners. The resulting permissive interpretation of the public use limitation has frequently led to overreaching through the aggressive use of eminent domain.

For example, more property might be taken than needed to accomplish the legitimate public objective or the exercise of eminent domain could be primarily for the advantage of private interests and only incidentally for public benefit (see e.g., *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896)) with the powerful or well connected disproportionately benefiting at the expense of smaller, less well-connected property owners. The outrage over overreaching the latest Supreme Court eminent domain ruling reviewed below has started to provoke in conjunction with changed economic circumstances that produce a lower priority on economic development, tends to eventually cause the pendulum to tilt back toward a better balance between the rights of communities to achieve legitimate public goals and the protection of property rights of individuals.

In pre-colonial times and early after the founding of the United States, gov-

ernment exercised its right of eminent domain to provide for roads, canals, and other infrastructure frequently created by private producers. Use of eminent domain by colonial governments was modest by modern standards, but property was acquired by eminent domain to promote the economic development of a community. For example, Colonial Mill Acts permitted owners of water-powered gristmills, upon payment of compensation, to erect dams across streams and to flood neighboring land. Such infrastructure benefited the public and therefore the initial notion of the exercise of eminent domain equated public use with public benefit.

However, in 1795, in *Vanhorn's Lessee v. Dorrance* 2 U.S. 304, 311 (1795), the United States Supreme Court stated it could not contemplate circumstances "in which the necessity of a state can be of such a nature as to authorize or excuse the seizing of landed property belonging to one citizen and giving it to another citizen. . . . Where is the security, where the inviolability of property, if the legislature . . . can take land from one citizen, who acquired it legally, and vest it in another?" In *Calder v. Bull*, 3 U.S. 386, 288 (1798) Justice Chase articulated the emerging view that it was an illegitimate use of governmental authority to take property from one person for the private benefit of another, when he stated: "a law that

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takes property from A, and gives it to B" is "contrary to the great first principles of the social compact" and "cannot be considered a rightful exercise of legislative authority."

While Justice Chase restricted the non-voluntary transfer of property from one private owner to another through eminent domain based on principles of natural justice, subsequent Supreme Court decisions (e.g., *Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403, 417 (1896)) prohibiting legislation transferring property from one private person to another, even with payment of compensation, were based on the violation of the Due Process Clause of the Fourteenth Amendment. Under this line of authority, courts began to adopt a stringent concept of public use. No longer did public use equal public benefit. Instead, public use was interpreted to mean government functions for the public. This public use concept was typically confined to transfers of property for the creation of bridges, dams, public buildings, and other public works.

Following the War of 1812, priority was placed on economic development and the creation of a national market through an improved transportation system. Railroad companies or other private entities were permitted to create infrastructure related to turnpikes, railroads, and canals. For example, courts sustained railroad companies appropriating private property under authority granted by state legislatures under the principal that as common carriers and by furthering the purpose of improving transportation, they acted as agents for the public. This line of authority rejected arguments that property was taken for private gain and established the concept that public use did not mean public ownership and that legislators could determine the means to employ to accomplish the public interest or benefit.

Over time, then, the Supreme Court did not limit the concept of public use to cases where the public was entitled to use the property but adopted a more expansive notion of public use to encompass public interest or public benefit. The equating of public use with public benefit led to the wider use of eminent domain. The weakening of the public use limitation reflected the determination that the perceived needs of the public outweighed the rights of property owners.

In 1954, in *Berman v. Parker*, 348

U.S. 26 (1954), the Supreme Court affirmed the expansive notion of public use by establishing a standard highly differential to legislatures for making land use policy and defining what constitutes a public use. The Court stated that the "role of the judiciary in determining whether the power is being exercised for a public purpose is an extremely narrow one." The case arose when District of Columbia officials sought to clear an area south of the Capitol considered blighted. Sam Berman, the department store owner, whose property was not blighted or a cause of the blight, sought to prevent the condemnation on the basis that the taking of land from one owner for transfer to a private development agency violated the public use limitation. The department store owner's public use argument was dismissed. The Supreme Court ruled that city officials were free to condemn property through eminent domain provided "that power is being exercised for a public purpose." The Court found the City had broad authority to take private property in order to remove blight.¹

In 1981, the Supreme Court of Michigan in *Poletown Neighborhood Council v. Detroit*, 304 N.W. 2d 455 (Mich 1981) followed the United States Supreme Court's permissive use of the public use concept by affirming the right of the City of Detroit to condemn and raze the Poletown neighborhood to make way for a General Motors plant. *Poletown* represented the proposition that public use meant any conceivable public benefit. That decision cleared the way for Detroit to condemn the 1,000 homes, 600 businesses, churches, schools and hospitals of Poletown for the development of a Cadillac plant. Ironically, employment at the plant never approached its promised levels and General Motors has idled the plant for which the neighborhood was displaced. Like the *Berman* case, by shifting the test from public use to public benefit, and therefore expanding the justifications for eminent domain and providing for minimal judicial scrutiny of the public use rationale, *Poletown* emboldened coalitions of private developers and municipalities to exercise eminent domain resulting in the taking of property of one typically smaller owner to give to another typically larger private owner.²

In 2004, however, the Michigan Supreme Court overturned *Poletown*

and blocked the condemnation of properties held by small businesses surrounding a county airport. *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich 2004). After assembling 1,260 acres of a site for a proposed business park development, the City sought to condemn an additional 40 acres owned by local property owner Edward Hathcock and others and transfer the entire 1,300 acres of land to private developers. In overturning *Poletown*, the Michigan Supreme Court decided that the potential economic benefits of reducing unemployment and revitalizing a community's economic base is not sufficient under the takings clause of the Michigan Constitution to justify transferring condemned property to a private entity. The Court held that use of the eminent domain power to transfer property from one private owner to another satisfies the public use test only when (1) "public necessity of the extreme sort" requires collective action; (2) the property will be "subject to public oversight after transfer to a private entity"; and the property is selected because of "facts of independent public significance" about the property being taken, rather than advantage to the private entity to whom the property is transferred, such as a conclusion that the area is blighted and in need of redevelopment that is unlikely to occur without the exercise of eminent domain.

In the most recent Supreme Court eminent domain case, *Kelo v. City of New London*, 545 U.S.__(2005), for economic development goals, the City Council created a redevelopment plan for the Fort Trumbull neighborhood that included razing the neighborhood and the development of a waterfront hotel, new office parks, townhouses, and a retail complex. The City created a development corporation to buy or condemn the 90-acres of land included in the redevelopment plan and then lease the land to a private developer for \$1 per year for 99 years. The area to be razed included homes found not blighted or the cause of blight. A registered nurse, Suzette Kelo, owned one of the homes (which she extensively had improved) the City sought to condemn through the exercise of its right of eminent domain and to transfer it and other well maintained homes to a private developer. The redevelopment plan called for new homes to be built on the very street where Ms. Kelo's

home is located. The key issue was whether any limits exist on government's eminent domain power under the public use requirement of the Fifth Amendment. The Court ruled in favor of the City and expanded the concept of eliminating blight as a public use to include economic development as a public use. The Court affirmed its belief in the appropriateness of deciding challenges "in light of the entire plan" rather than on an individualized property-by-property basis. In addition to not reviewing the City's determination of what land it condemns, the Court declined to require a showing of a "'reasonable certainty' that the expected public benefits will actually accrue."

The five-to-four *Kelo* decision may reflect differing understandings about the ability of the political process to provide protection to private owners. At the state or national levels, the democratic political process tends to constrain government excess. This is because these levels of government are reasonably broadly representative. Many of those who stand to gain and those who stand to lose from a regulation or project potentially have a voice in the process. The Founders intended to prevent the powerful to be able to take property from those less well connected. The democratic political process, however, often tends to not work to constrain local governments. Local governments lack the electoral diversity and the checks and balances associated with larger units of government.

As the patterns of decisions suggest, tension exists between the perceived needs of the public versus the rights of individual owners to be free of the intrusive, potentially despotic power of government. If history runs its course, *Kelo* will lead to further overreaching, that as Justice Stevens has recently warned, will encourage inferior public plans to replace market driven results that would be more beneficial to the public welfare. We should heed Justice Stevens' warning to avoid the over-reaching that has followed past expansions in the use of eminent domain.

A test of heightened scrutiny should apply when a private developer or other private entity is identified to obtain a specific advantage as the result of a transfer of property through

the exercise of eminent domain. When the property of a typically small and less well connected owner ends up in the control of a larger, well connected private owner, the courts should take a closer look to be sure substantial net economic, fiscal, and social benefits are very likely to follow from the exercise of eminent domain. This is especially the case because involuntary exchanges, as contrasted with voluntary transactions such as owners participating in redevelopment plans, have greater potential for creating inefficient land use or economic development plans. In addition, eminent domain for economic development does not typically receive adequate scrutiny through the political process because of its nontransparent nature. Typically, the absence of binding obligations on the developers or owners to whom the property is transferred to actually produce the promised economic benefits provides incentives for overreaching and manipulation. Moreover, the use of federal or other non-local financing subsidy mechanisms to pay for much of the condemnation or subsequent development (such as was the case in *Poletown*) contributes to fiscal illusion and misleading claims of benefits.

Legislatures and courts should carefully consider the appropriate meaning and purposes of the Public Use Clause and review the use of eminent domain to make sure that property is not taken primarily for private benefit under the cloak or pretext of a public use. The larger constitutional purpose of protecting the ownership of private property suggests that eminent domain should be exercised with restraint.

Efficiency concerns also suggest the public use limitation should apply so that the full social benefits and costs of redevelopment and economic development plans will be considered. These costs include the opportunity costs, including loss of good will, going-concern value and subjective values of owners like Ms. *Kelo* reflected in voluntary transactions but frequently not in compelled transfers. Requiring government to prove that the use to which the condemned property will be put is for the public and justified will reduce the incidence of eminent domain by local government units to help private developers avoid voluntary transac-

Local Government Law

Published at least four times per year.

Annual subscription rate for ISBA members: \$20.

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tions that reflect the reservation prices of the sellers. This will not only promote fairness and the preservation of property rights but also tend to increase the market responsiveness and creativity of redevelopment and economic development plans.

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1. This ruling encouraged other cities to seek to eliminate blight through urban renewal projects in the 1960s and 1970s that in many cases stimulated further blight and produced negative economic, social, and fiscal results. For example, the City of Chicago condemned entire neighborhoods to build what became infamous public housing along the Dan Ryan Expressway. Much of the housing has subsequently been demolished.

2. In 1984, in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) under a public use case to correct a market flaw related to excessive concentration of land ownership in Hawaii, the Court ruled that the public use requirement is as broad as the government's traditional police power and the courts should be highly deferential to legislative judgments about the exercise of eminent domain. The Supreme Court ruled that eminent domain can be used for "any project rationally related to a conceivable public purpose."

Mandamus and the lilac bush: *Jamison v. City of Zion* 2-04-1050 (August 12, 2005); 2005WL2045603

By Alfred M. Swanson, Jr.

Mark Jamison was upset when his neighbor on Sharon Place in Zion, Illinois, erected a fence and planted large lilac bushes in the public right of way along their street. The bushes extended into the roadway. Jamison claimed the bushes and the fence obstructed the vision of people driving out of his driveway.

Jamison complained to the City, which then sent the neighboring property owner a standard notice to trim the bushes. When the owner did not trim the bushes and the City declined to take further action, Jamison filed suit. Count I of the amended complaint for mandamus was against the City and relied upon certain statutes, City ordinances, and a common law duty for the City to remove the obstruction. The trial court dismissed Count I, holding that any duty the City might have owed was discretionary.

The appellate court agreed with the City that the language in its ordinance that it "may" abate an obstruction gave the City discretion whether to do so. Therefore, the City's ordinance did not provide grounds for a mandamus action. The appellate court also agreed with the City that plaintiff could not rely upon the public nuisance statute because the State's Attorney, and not the city, has the authority to prosecute crimes.

However, the appellate court was not finished with its analysis of the case. The issue subject for de novo review was whether plaintiff had sufficiently

pleaded a cause of action for mandamus pursuant to common law.

The appellate court found three requirements for a cause of action for mandamus: 1) facts that establish a clear right to the relief requested; 2) a clear duty of defendant to act; and, 3) clear authority in the defendant to comply with the court's order. The appellate court found that Jamison satisfied all three criteria.

Plaintiff alleged he is a member of the public who owns property abutting Sharon Place, a public road, and who depends upon an unobstructed view from his driveway for ingress and egress from Sharon Place. Plaintiff also attached to his complaint a survey showing the encroaching lilac bushes. The appellate court found plaintiff has sufficiently alleged the existence of a purpresture, "an encroachment upon public rights and easements by appropriation to private use of that which belongs to the public."

The appellate court noted long settled case law that allows mandamus to compel a municipality to discharge its duty to remove purprestures and obstructions from public streets.

When a public highway is once established all the beneficial uses of it vest in and devolve upon the public, and where, as in incorporated cities, the title to the streets is vested in the municipality, they are nevertheless charged

with the public right...[T]he city could have no authority to accept public streets upon any other conditions than that they should be for public use, and what is meant by public use is that the public shall have the uninterrupted, unimp3eded and unobstructed use of every portion and part of such public way.

People ex rel Faulkner v. Harris, 203 Ill. 272, 279, 67 N.E. 783 (1903).

Use includes the right to safely enter the roadway. Thus, plaintiff has pleaded that the city has a clear duty to remove the obstruction.

The appellate court also found that a purpresture is akin to a public nuisance and that the City has the right to regulate the use of its streets. Moreover, the City demonstrated its ability to comply with a court order when it sent the notice to plaintiff's neighbor that he trim the lilac bushes.

In dissent, Justice Bowman recognized that the bushes and fencing were within the road's "unpaved" right-of-way. However, he termed plaintiff's allegations of reduced vision creating a dangerous condition as conclusions unsupported by sufficient facts. He also expressed concern that the majority decision could result in a flood of mandamus suits against local governments every time neighbors have a dispute about vegetation interfering with the visibility of a road from a driveway.