Calendar of Events:

HDLI's Personnel and Employment Law Training
October 9, 2005
Chicago, IL

HDLI's 2005 Fall CLE Conference
October 10, 2005
Chicago, IL

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LOCAL GOVERNMENT EMINENT DOMAIN POWER UNDER SIEGE ACROSS THE NATION

State and Local Legislatures Quickly Respond to Supreme Court's *Kelo* Decision

By Lisa Walker Scott
HDLI Executive Director & General Counsel

As I began writing this article, it struck me that governments have been using their eminent domain power for decades in a way that has adversely impacted poor and minority families with relative impunity. This was done for the higher good and in many ways accomplished that purpose. Only when such power begins to interfere with the property rights of more affluent homeowners with the means to fight are lawmakers even considering constitutional amendments and other measures to limit local governments' eminent domain power. What now of the higher good? This article reviews the concept of eminent domain power, and considers the appropriateness of judicial deference to the legislative process within the realm of eminent domain. More specifically, we discuss the United States Supreme Court's most recent pronouncement regarding eminent domain power in the context of a local government's condemnation of the property of one private party in order to transfer it to another private party for economic development purposes. This considers whether such a transfer of property from one private party to another is for a "public use" or "public purpose," or simply an impermissible and unconstitutional taking.

Background on Eminent Domain Power

Local governments' power of "eminent domain" derived from natural law as an inherent power of the sovereign. It is the power to appropriate private property without the owner's consent. The term "condemnation" is used to describe the government's exercise of its eminent domain power. The exercise of eminent domain is not limited merely to real property, and may apply to contractual interests, as well. Traditionally, eminent domain power has been used to support public infrastructure projects, such as public roads, rights-of-way, and the like. In the context of public and affordable housing, eminent domain power has been a critical tool to secure property necessary for large scale redevelopment so that the project makes sense. Indeed, the ability to secure property through eminent domain could decide the economic feasibility and success of many development projects in urban areas.

While customarily known for its promises of due process for persons accused of crimes, the Fifth Amendment to the U.S. Constitution also serves as a check and balance to eminent domain power, requiring that "private property [shall not] be taken for public use, without just compensation." This clause is commonly referred to as the

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TODAY'S POSITIVE QUOTATION

"It is amazing what you can accomplish if you do not care who gets the credit."

Harry S. Truman

Lisa Walker Scott, Esq.

A Letter from the Executive Director and General Counsel

It has been a short, hot summer! I hope that it was as productive for you as it has been for us at HDLI. We've been busy planning for our next Fall Conference and employment law training, working on our publications, and providing on-site fair housing training for our members, among other activities. HDLI is also planning a General Counsel's Forum this winter.

On behalf of the Board of Directors and staff of HDLI, our thoughts and prayers go out to the housing authorities and residents of the states hit by Hurricane Katrina.

HEART-FELT MEMBER CALL TO ACTION: HDLI MEMBER SPONSORS. Like many of you, HDLI is experiencing very tight fiscal challenges and is working to find additional methods of funding our services to our members. We operate with a very lean staff and a very modest budget. We *so greatly* appreciate your continued support of our organization through payment of your member dues and registrations for our conferences and trainings. But we also understand the fiscal challenges that you, our members, are undergoing, so we have made a decision not to increase member dues or conference registrations. Rather, we are pursuing other revenue-generating activities, including initiating a new *member sponsorship opportunity* that we hope will be attractive to current members, as well as new prospective members.

We are reaching out to you with the hope that you will *help us to identify potential sponsors for our organization..* We offer three sponsorship categories - - Gold, Silver, and Bronze - - each with its own attractive virtues. Sponsorship provides a great marketing opportunity for persons and entities that can provide useful services to our membership through prominent recognition as a Sponsor in HDLI's publications, at all of our conferences and trainings, and at our annual dinners and receptions. Please take a minute to review the enclosed sponsorship flyer. If you know any person, foundation, organization, or other group that might care to hear more about sponsoring HDLI, please send me an e-mail (lwalker@hdli.org) and let me know their contact information. Thank you very much in advance.

FALL CONFERENCE! It's that time again: HDLI's next Fall Conference is Monday, October 10, 2005 as part of NAHRO's annual conference in Chicago, Illinois. Note that the all-day conference is being held on Monday, as opposed to our customary Tuesday, because NAHRO changed its conference schedule. This year's conference theme is "*MOVING TOWARD INDEPENDENCE: Legal Strategies for Surviving with Less Dependence on HUD."* The focus of this conference is to discuss alternative funding sources and strategies and the legal pitfalls and strategies that often ensue in pursuing these options. Of course, I will provide our usual *Annual Review of Case Law Affecting Housing and Redevelopment Agencies* and we will open the floor to addressing the latest industry developments in our *HDLI Forum.* Come and hear a variety of experts and seasoned PHA officials discuss important legal issues arising out of deals such as:

> "Divorcing" from HUD altogether – why it might make sense to do it;
>
> The PHA as Developer: Capturing profit from the deal; trappings;
>
> Maximizing the use of traditional and unique sources of funding.

PERSONNEL & EMPLOYMENT TRAINING: *All About Disabled Employees and Reasonable Accommodations!* In response to our members' requests for more enhanced training regarding the multitude of issues surrounding disabled employees and prospective hires, HDLI is happy to offer its latest Personnel and Employment Law Training. This training is offered on Sunday, October 9, 2005 as an add-on to our Fall Conference. Persons registered for NAHRO's conference get reduced registration for this training. Note: you must register for this training through HDLI, rather than NAHRO. A registration form is enclosed.

SIGN UP FOR ON-SITE FAIR HOUSING TRAINING & CLE- - PHAs in Los Angeles, Florida, and Texas recently have done so! In order to bolster its members understanding of fair housing responsibilities, HDLI has a new benefit for all members. For a very reasonable cost, HDLI will come *to your site* and conduct fair housing training tailored specifically for your local staff. It is vitally important for all levels of PHA staff to be aware of their fair housing responsibilities – everyone from maintenance staff, to housing managers, to executive staff and legal counsel. Training will vary depending upon the audience, and all participants will receive

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CASE CORNER

Following are summaries of recent noteworthy cases

EVICTION – Extended Absence From Unit/ Mental Disabilities

***Toa Construction Co. v. Tsitsires*, 2005 NY Slip Op 25268, 798 N.Y.S. 2d 674, 2005 NY Misc. LEXIS 1403 (N.Y. Civ. July 7, 2005)**

COURT: New York City Civil Court

BRIEF FACTS: A tenant of a New York rent controlled apartment had mental disabilities, and as a result preferred homelessness to living in his unit, which he claimed to "hate." He used the apartment to store his belongings, receive mail, and let his girlfriend shower. Indeed, during the period of his tenancy the tenant applied for public housing stating that he was homeless. New York law provides that rent controlled apartments not used as a primary residence be returned to the marketplace. After the tenant did not regularly occupy his apartment for two years, the landlord served the tenant with a combined termination notice and nonrenewal notice. At trial, the tenant argued that 1) the landlord was required, but failed, to prove that the tenant had another primary address, 2) the apartment was indeed his primary residence, and 3) that if the court finds that he did not live in his apartment as his primary residence, his mental disabilities provide an excusable reason for his extended absences.

KEY ISSUE 1: Whether a landlord must prove that the tenant lived at an alternative address.

HOLDING/RATIONALE: No. A landlord has the burden to prove by a preponderance of the evidence that the tenant did not use the unit as his primary residence. Under New York rent control law, in order to prove this, the landlord must prove that the tenant does not have an ongoing, substantial, physical nexus with the unit for actual living purposes. Among the factors courts will consider are whether the tenant uses an alternative primary address on any tax return, for voter registration, motor vehicle registration, driver's license, or other document filed with a public agency. The will also consider whether the tenant used the telephone or other utilities from the unit.

Nonetheless, a landlord need not prove that the tenant lived elsewhere. It is enough that the landlord prove that the tenant abandoned the apartment. The legislature's intent of protecting housing would not be served by allowing the tenant to use the apartment to store his belongings, receive mail, and let his girlfriend shower.

KEY ISSUE 2: Whether the tenant's mental disabilities constitute an excusable reason for his absence from the apartment.

HOLDING/RATIONALE: No. For an extended absence to be excusable, a tenant must prove that either professional obligations, a prison sentence, or medical treatment prevented him from residing in the unit. With regard to professional obligations, the tenant must prove that they live in the unit when in town, and they intend to continuously live in the apartment when not on travel. With regard to a prison sentence, a tenant must prove that he has familial, professional and residential ties to the area. However, absences due to a lengthy prison sentence are not excusable since the tenant is unlikely to return to the unit in the near future. With regard to medical treatment, a tenant must show that his relocation was involuntary, that he did not abandon the unit to live elsewhere, and that he soon will resume living in the unit as a primary residence. With regard to whether this tenant's mental disabilities were an excusable reason for his absence, the court noted that the two most common factors to consider are whether the tenant will live in the unit when able to do so, and whether the reason for their absence will end so as to allow the to use the unit. The court found that, because the tenant refused to take medication or undergo treatment that might allow him to return to his apartment, and otherwise failed to show that he would return and use the apartment as a primary residence, his mental disabilities did not constitute an excusable reason for his absence from the apartment. Notably, the court stated that the tenant's "physical nexus to the unit is not a subjective standard to be tailored to his mental outlook and lifestyle."

CASE RELEVANCE: This case, while not involving public housing, is relevant to our industry. An issue that logically extends from this case is whether, prior to initiating eviction proceedings, a tenant with mental disabilities who abandons his unit must first be permitted to try medications and treatment as a reasonable accommodation.

continued on next page

CASE CORNER CONT'D

This court considered whether these options might enable the tenant to use the apartment, and made its decision based upon the fact that the tenant was not willing to undergo medication or treatment. A different result may have been had if the tenant were willing to do so. Courts are becoming increasingly concerned for the welfare of tenants with mental disabilities, and will ensure that they are provided ample due process and additional concessions as reasonable accommodations where warranted.

JUDGMENTS – Payment from PHA Assets

Walker v. San Francisco Housing Authority, No. A108349, 2005 Cal.App. Unpub. LEXIS 5161 (Cal. App. June 13, 2005)

COURT: California Court of Appeals, First Appellate District, Division Four

BRIEF FACTS: Plaintiff employee received a default judgment in a sexual harassment case against a PHA. The court denied the PHA's motion to set aside the default, and awarded the tenant a 2 million dollar judgment. When the tenant attempted to collect the judgment through a petition to compel, PHA argued that it lacked ability to pay the judgment due to legal restrictions on the use of its assets. Specifically, it argued that virtually all of its funds and property belong to HUD and it cannot encumber its property without HUD's consent. It also argued that it lacked the power or practical ability to levy taxes or otherwise raise money to satisfy the judgment. The trial court disagreed and granted the petition, ordering PHA to pay within 60 days pursuant to local law requiring that judgments be paid within the current fiscal year, or during the next if funds are insufficient. The court further ordered PHA, *inter alia*, to seek permission from HUD to use existing assets and revenue streams to satisfy the judgment. PHA appealed, arguing that the writ was too broad, demanding a futile act, and contrary to law. PHA also argued that federal case law involving writs of execution, garnishment or attachment trumps state law.

KEY ISSUE: Whether federal law places constraints on the use of grant funds to satisfy the judgment.

HOLDING/RATIONALE: No. The court analyzed OMB Circular A-87, which discusses allowable costs which may be paid with federal grant money. The court found that the list of allowable costs was not exhaustive and that the Circular did not even mention civil judgments. The court further noted that "legal expenses required in the administration of Federal programs" were allowable under the Circular. The court considered the PHA's argument that a civil judgment is not allowable since Section 20 of the Circular provides that fines, judgments and penalties against a PHA for violation of laws were not allowable, finding that that language focuses on administrative enforcement proceedings rather than civil judgments, which were not mentioned. While the court conceded that allegations in this suit would fall within the Section 20 bar, it went on to hold that the Circular nonetheless allows HUD to consent to the use of funds for this purpose. With regard to the issue of using tenant rents to pay the judgment, the court was skeptical that Section 20 of the ACC makes them unavailable, and fell back on its position that the PHA could ask HUD for permission to use them. Finally, the court concluded that the writ did not compel an idle act as PHA suggested, finding that the writ was necessary "to move [PHA] into action mode with respect to its statutory obligation to satisfy the judgment" and cited a litany of inactions on the PHA's part. Among other suggestions as to how PHA might obtain the necessary funds, the court noted that it could, as part of its annual report to HUD, recommend that legislation be pursued that would permit PHAs to tax or assess in order to fund judgments. It also suggested raising rents.

CASE RELEVANCE: Unfortunately, this case is a carbon copy of a decision in a case we previously reported which required this same PHA to pay a $12 million judgment. *Joseph v. San Fran. Hous. Author.*, 127 Cal. App. 4th 78 (2005). Indeed, the court in this case cites *Joseph* and references a letter from HUD's former Associate General Counsel stating that HUD would consider approving the use of HUD funds and property to satisfy the judgment. *Joseph* and this case affirm that PHAs are not immune from civil judgments, and that operating funds, rents, and other precious assets are fair game to satisfy these judgments if HUD deems it appropriate to give its consent. It will be interesting to see what HUD's position will be when faced with other than a hypothetical.

DISCRIMINATION – Familial Status

Williams v. American Homestead Management, No. 4:04-2CV-56, 2005 LEXIS (May 11, 2005)

COURT: U.S. District Court for the Western District of Michigan, Southern Division

BRIEF FACTS: A management company had a policy not to rent one bedroom units to an adult and minor because it could lead to improper or abusive behavior. Plaintiff sought a one bedroom apartment for herself and one child and was denied based on the policy. She sued under the Fair Housing Act for familial status discrimination.

continued on next page

CASE CORNER CONT'D

KEY ISSUE: Whether a landlord can refuse to rent a one bedroom unit to an adult and minor child in order to prevent possible improper or abusive behavior.

HOLDING/RATIONALE: No. While noting that the company's reasons for its policy may well have been sincere, the court granted summary judgment in favor of the plaintiff and awarded actual and punitive damages, as well as damages for emotional distress and attorneys fees. The compensatory damages included the final month's rent at her former apartment since she was unable to give 30 days' notice since the management company refused to rent to her. They also included the difference between the respective rents. She was awarded $5000 for emotional distress. The court said that the management company's conduct was "motivated by evil motive or intent, or was reckless or was in callous indifference to the federally-protected rights of others" because it maintained an illegal policy and should have known that it was illegal, and awarded $5000 in punitive damages, as well Finally, the court awarded $10,850 in attorneys' fees, the full amount requested.

CASE RELEVANCE: This case demonstrates how costly fair housing violations can be, even where they are based upon seemingly pure motives.

SECTION 8

Gumanovsky v. Diagonal Realty, 2005 NY Slip Op 25267, 2005 N.Y. Misc. LEXIS 1379 (Sup. Ct. N.-Y. July 1, 2005)

COURT: Supreme Court of New York

BRIEF FACTS: Based on QHWRA's 1998 amendments to the Section 8 program eliminating the "endless lease," and recent decisions by a county court and the state department, five Section 8 landlords of tenants with rent stabilized leases believed that they could opt out of the Section 8 program. They notified their tenants and the PHA that, at the expiration of the leases, they would no longer participate in the Section 8 program, but would offer the tenants renewal rent stabilized leases. Without the Section 8 subsidy none of the tenants could afford the apartments. The applicable state tax abatement law proscribed housing "discrimination" against members of a number of protected classes, including Section 8 recipients. Tenants, believing that the Section 8 subsidy was an essential condition of the rent stabilized lease and that landlords of occupied rent stabilized apartments must offer a continuation of Section 8 subsidy as a condition of renewals under state law, objected, as did the PHA. When the landlords continued to refuse to renew their Section 8 HAP contracts, seven tenants residing in the rent stabilized apartments and receiving Section 8 subsidies sued the landlords to prevent them from rejecting their Section 8 subsidies.

KEY ISSUE 1: Whether QHWRA amendments to the Section 8 program eliminating the "endless lease" preempt state anti-discrimination laws.

HOLDING/RATIONALE 1: No. Neither the tax abatement nor rent stabilization law was preempted. With regard to the tax abatement law, QHWRA's implementing regulations specifically provide that nothing in the Section 8 scheme is intended to preempt State and local laws prohibiting discrimination against Section 8 tenants. *See* 24 C.F.R. 982.53(d). With regard to the rent stabilization law, the court found that the Section 8 statute contained no express preemption provisions. It found that the Section 8 statute was not so comprehensive as to leave no room for state or local regulation in the area, and believed that the Section 8 statute did not conflict with, and indeed could be harmonized with, the rent stabilization law because the Section 8 statute is devoid of any requirement that participation in the Section 8 program be voluntary.

KEY ISSUE 2: Whether landlords of rent stabilized apartments, who also received J-51 tax abatements, could opt-out of the Section 8 program at the expiration of the leases.

HOLDING/RATIONALE 2: No. The court found that "any landlord in New York City receiving a J-51 tax abatement is legally mandated under the anti-discrimination protections of the J-51 law, to accept and continue accepting a tenant's Section 8 rent subsidy." The court determined that failure to offer a renewal on the same terms and conditions of the original lease, i.e., along with acceptance of Section 8 subsidies, constituted discrimination proscribed by the state tax abatement law.

CASE RELEVANCE: This decision by the Supreme Court of New York settles the conflict among lower New York courts regarding whether Section 8 landlords receiving both J-51 tax abatements and Section 8 subsidies on rent stabilized apartments can "opt out" of the Section 8 program at the end of a lease term. Accordingly, landlords of rent stabilized apartments in New York City who also receive J-51 tax abatements must first give up their tax benefits before opting-out of the Section 8 program.

LOCAL GOVERNMENT EMINENT DOMAIN... Cont'd

"Pubic Use Clause." At the time that our country was founded, many state laws did not contain a compensation requirement and takings were sometimes accomplished without compensation. So the Fifth Amendment's compensation requirement, as applied to the states later through the Fourteenth Amendment, was significant. There also remains a long-standing, bedrock principle that one private person's property cannot be taken for the benefit of another private person, even where the owner is compensated for it. *See Thompson v. Consolidated Gas. Util. Corp.*, 300 U.S. 55, 80 (1937).

The Fifth Amendment and many state statutes specifically require that eminent domain only be exercised for a "public use." Some state statutes, such as those in Idaho, Nevada, Utah, and West Virginia, specify what constitutes a "public use" for eminent domain purposes. The majority of states do not. Many state and local statutes also require that the property to be condemned be "blighted." However, critics state that the definition of "blight" is often too vague and permits local government to seize any land it chooses.

Beginning in the early 19th Century, the concept of "public use" began to evolve and has expanded to include activities that don't necessarily have to be available for public use if they have a "public purpose." *See Fallbrooke Irrigation Dist. v. Bradley*, 164 U.S. 112, 161-162 (1896). Courts employ the rational basis test, such that they must find that a taking is consistent with the Public Use Clause when the taking is "rationally related to a conceivable public purpose." *Hawaii Hous. Auth. v. Midkiff,* 467 U.S. 229, 241 (1984).

There also is a longstanding policy of judicial deference to legislative judgments in this area. *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668 (1896)("when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation"). More recently, city economic development plans that include commercial development that will generate higher tax revenues for the local government have been considered for a "public purpose," even where the property is not itself blighted and is ultimately transferred and owned by another private party. This construction was recently challenged in the state of Connecticut in the case of *Kelo v. New London*, 125 S. Ct. 2655, 545 U.S. __ (June 23, 2005)(slip op.). You can access the full slip opinion at http://www.supremecourtus.gov/opinions/04pdf/04-108.pdf

***"The concept of the public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary . . . " Berman v. Parker*, 348 U.S. 26, 33 (1954)**

Kelo v. City of New London

Kelo, supra, involved a challenge to the city of New London, Connecticut's eminent domain power to seize private homes for commercial development. The city planned to redevelop the Fort Trumball area of New London, an area previously designated as a "distressed municipality" due to high unemployment and economic decline. However, the private homes at issue in this case were not themselves blighted. The proposed development, which was to include a park, marina, office space, a waterfront hotel and a shopping village, was to be constructed by a private nonprofit entity established by the city years earlier. It would be located next to a new private pharmaceutical research facility. New London planned to use its eminent domain powers to seize the property of owners unwilling to sell their properties at any cost, and began condemnation proceedings.

The Institute of Justice, a nonprofit legal center funded a suit brought by nine owners of fifteen parcels of property to be condemned. They sued the city in state superior court, challenging the city's power to seize their property for commercial development when their property was not blighted. The owners claimed that the proposed condemnation violated the Public Use Clause. The superior court agreed with the owners whose properties lay within the parcel designated for a park and marina, and granted a temporary restraining order prohibiting the taking of those properties. However, the trial court denied the TRO with respect to other owners whose properties lied outside of those areas, deferring to the judgment of the legislature in enacting the local redevelopment statute and plan.

Both parties appealed to the Supreme Court of Connecticut which, in a split decision, overturned the ruling and held that all of the takings were valid. The majority also relied on the state development statute which specifically stated that a taking of developed land as part of an economic development plan is a "public use" and in the "public interest." The court went on to hold that economic development is a valid public use under both the federal and state constitutions. Finally, the court determined that the

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LOCAL GOVERNMENT EMINENT DOMAIN... Cont'd

specific takings at issue were pursuant to a carefully considered and comprehensive development plan that was developed through deliberation, and was "reasonably necessary" to achieve the economic development purpose. The Court found no merit in the homeowners' broad position that economic development should not qualify as a public use because it blurs the boundary between public and private takings. The court noted that Congress can conclude that "[t]he public end may be as well or better served through an agency of private enterprise than through a department of government."

In support of its holding, the unanimous Connecticut Supreme court cited the analogous case of *Berman v. Parker*, 348 U.S. 26 (1954), which involved a Washington, D.C. department store that challenged condemnation on the ground that the store, itself, was not blighted and that the creation of "a better balanced community" was not a valid public use. The Court also deferred to the judgment of the city agency, stating that "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis – lot by lot, building by building," *quoting Berman, supra,* 348 U.S. at 35.

The Connecticut court's deference to government is long-standing, and was made clear in cases upholding condemnation for the purpose of reducing the concentration of land ownership by redistributing title, *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984), and for the purpose of encouraging commercial competition, *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), for example. In sum, courts at all levels have been reticent to second-guess a local government's decision whether eminent domain is a necessary means to pursue its public charge.

The Connecticut Supreme Court's decision addresses the fact that the homeowners' properties were not blighted head-on, yet concludes that the city's decision - that the area was sufficiently distressed to justify the need for economic rejuvenation - is entitled to the Court's deference. The Court recognized the city's interest in "coordinating a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts." Three dissenting judges argued that a heightened standard of judicial review required a finding by clear and convincing evidence that the economic benefits of the plan would come to pass. The dissenters determined that the city had failed to meet that standard and considered the takings unconstitutional.

> ***"Community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis – lot by lot, building by building." Berman v. Parker*, 348 U.S. 26, 35 (1954)**

Both parties appealed again, this time to the U.S. Supreme Court. The narrow issue before the high Court was whether takings inspired for economic development purposes satisfies the Public Use Clause, or more simply, whether economic development takings are constitutional. The Supreme Court was not unified in its analysis. Justice Stephens wrote the majority opinion (5-4) affirming the decision in favor of the city. He was joined by Justices Souter, Ginsburg, Breyer and Kennedy. The majority found it appropriate to defer to the determination of the local legislature, and found that takings for economic development are constitutional. Indeed, the Court made clear that it is not the court's purview to "oversee the choice of the boundary line nor to sit in review on the size of a particular project area . . . [o]nce the question of public purpose has been decided. . ." *Kelo, supra,* quoting from *Berman,* 348 U.S. at 35-36.

However, the majority opinion also emphasizes that nothing in the opinion precludes state legislatures from placing further restriction on takings of private property. This statement has been a lightening rod for legislative activism post the decision (discussed *infra*). Justice Kennedy also wrote a concurring opinion providing more fodder for the proposition that the rational basis test, rather than a more stringent standard of review, applies.

Kelo Dissents

Four Supreme Court Justices dissented. In perhaps one of her last opinions, Justice O'Connor authored one dissent, joined by Justices Rehnquist, Scalia and Thomas. Justice Thomas also wrote a separate 19-page dissent. The dissenters were very concerned about governments exceeding their power and taking real property from one private party (often with fewer resources)and giving it to another (often with more resources) in cases where the government deems the use more acceptable or "higher." Indeed, Justice O-Connor wrote "[n]othing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." She scoffed at Justice Stephens' suggestion that, to perhaps limit the application of this decision, state legislatures might impose additional limitations on eminent domain power, suggesting that such is an abdication of the courts' responsibility

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LOCAL GOVERNMENT EMINENT DOMAIN... Cont'd

to enforce the federal Constitution.

Justice Thomas' professor-like dissent argues for a more "natural" reading of the Public Use Clause. He states that a natural reading is that the Clause allows the government to take property only if the government owns, or the public has a legal right to *actually use*, the property. He disagrees with permitting a taking for any public purpose or necessity whatsoever. He declares that the majority opinion amounts to a replacement of the Fifth Amendment's "Public Use Clause" with a "Public Purpose Clause," effectively erasing the Public Use Clause from the Constitution. Much of his dissent compares the phraseology of "public use" as used in the Fifth Amendment with its use elsewhere in the Constitution, as compared with other terms, such as "General Welfare," or as used by early state constitutions. Justice Thomas finds the majority's reliance on the "public purpose" analyses espoused in *Berman* and *Midkiff* "weak." As for deference to legislative acts, Justice Thomas finds no justification in affording "almost insurmountable deference to legislative conclusions that a use serves a 'public use.'" Agreeing with Justice O'Connor, he believes that the determination of whether the government owns, or the public has a legal right to use, property, or even whether the Public Use Clause is satisfied under the public purpose standard, is a court function.

Moratorium

On behalf of the plaintiffs, the Institute for Justice has petitioned for a rehearing. In the interim, New London officials have stated publicly that they have placed a moratorium on using the city's eminent domain powers until state officials decide whether to limit the powers. The Fort Trumball project is thus on hold.

The Lawmakers' Response

National Congressional leaders have widely condemned the Supreme Court's majority ruling and are in action. They are seeking, through a number of house and Senate bills already introduced and pending in various committees, to limit the use of federal funds in any state or local project that uses eminent domain powers for economic development, and to prohibit the federal government from using its eminent domain powers in such a way. For example, HR 3135 IH and its companion bill S.1313, which have garnered sponsorship and/or support by more than a hundred Congresspeople, both specifically denounce the *Kelo* decision within the terms of the bill. These bills define "economic development" to mean any activity other than making private property available in substantial part for use by the general public or by an entity that makes the property available for use by the general public, or as a public facility, or to remove harmful effects." Currently, pending bills are as follows:

> ***"Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded. . . Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."***
> **Justice O'Connor's dissent in *Kelo v. New London***

House bills:

"The Private Property Rights Protection Act of 2005, HR 3135 IH;
"Strengthening the Ownership of Private Property Act, H.R. 3405;
Untitled, H.R. 3083;
"Protection of Homes, Small Business, and Private Property Act, H.R. 3087;

Senate bill:

"The Protection of Homes, Small Business, and Private Property Act of 2005", S.1313.

The aforementioned bills are accessible online at http://thomas.loc.gov , where you can access the text and current status of each bill. PHAs should consider weighing in on this issue now while the bills are pending in committee.

On a local level, so far, at least fifteen (15) states have legislative efforts underfoot to limit or stay eminent domain power (Alabama, California, Delaware, Georgia, Illinois, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Pennsylvania, Tennessee, Texas, and Virginia). For instance, California lawmakers already have introduced a state constitutional amendment that would prohibit governments from seizing private property for anything other than actual public use. The legislation would prevent private property from being sold to retailers, commercial developers, and other

continued on next page

LOCAL GOVERNMENT EMINENT DOMAIN... Cont'd

private entities. Property not used for public purposes would have to be offered back to the original owner at the lesser of the price paid or fair market value. The constitutional amendment specifically references the *Kelo* decision and reads:

> It is the intent of the Legislature that private property shall not be taken or damaged for the use, exploitation, or management of any private party, including, but not limited to, the use, exploitation, or management of property taken or damaged by a corporation or other business entity for private profit, as is current permitted under the United States Constitution under Kelo v. City of New London . . ."

Georgia Republicans also plan to introduce a constitutional amendment banning condemnations for economic growth. Another recent bill that did not pass would have required governments to create a hearing process for inverse condemnation when zoning and land-use decisions affect how a property could be used. Georgia is considering these changes even though a 2003 report of the Castle Coalition, an initiative of the Institute for Justice, finds that Georgia is one of a handful of states with no reported instances of using eminent domain for private parties between 1998 and 2002.

Richmond, Virginia delegates also have introduced a state constitutional amendment that would prohibit governments from seizing private property for anything other than public use. In Alabama the state legislature has unanimously passed legislation to prevent state, city, and county governments from condemning property to use for private development. The bill prohibits use of eminent domain for commercial, office, retail or industrial developments and is headed to the Governor for signature. Those lawmakers are still seeking a constitutional amendment limiting eminent domain power in this manner.

Even local instrumentalities are taking action. For example, while Florida already has stringent eminent domain laws that restrict the power to blighted property and that for public use, some Florida cities are vowing to seize only commercial, rental, or vacation homes, and many others are reviewing their local ordinances.

Conclusion

Kelo represents the highest court's imprimatur, albeit by a sheer majority, on a rather significant expansion of eminent domain power for economic development purposes. This expansion has been in process for a number of years. Prior to the *Kelo* decision, a number of courts had upheld the use of eminent domain powers to seize private property for economic development. *See, e.g., Gen. Bldg Contractors v. Bd. Of Shawnee Cty. Comm'rs*, 66 P.3d 873 (Kan. 2003)(upholding development of industrial park to create jobs and tax revenues); *City of Shreveport v. Chanse Gas Corp*, 794 so.2d 962 (La. Ct. App. 2001), *writ den.*, 805 So.2d 209 (La. 2002)(upholding development of convention center for economic development purposes) ; *P.G. County v. Collington Crossroads, Inc.*, 339 A.2d 278 (Md. 1975)(upholding development of industrial park for economic development purposes); *City of Duluth v. State*, 390 N.W.2d 757 (Minn. 1986)(upholding development of private land for use as a paper mill in order to spur employment and urban revitalization); *City of Kansas City v. Hon*, 972 S.W.2d 407 (Mo. Ct. App. 1998)(upholding development of airport as a valid public use); *N.J. Hous. & Mort. Fin. Agency v. Moses*, 521 A.2d 1307 (N.J. Super Ct. App. Div. 1987)(upholding development of shopping center was valid public purpose); *Vitucci v. New York City Sch. Constr. Auth.,* 735 N.Y.S.2d 560 (App. Div. 2001)(upholding development of plant for economic development purposes); and *City of Toledo v. Kim's Auto & Truck Serv., Inc.,*, No. L-02-1318, 2003 Ohio App. LEXIS 4995 (Ohio Ct. App. 2003). *See also* the recent case of *Evans v. City of San Jose*, 128 Cal. App. 4th 1123, 27 Cal. Rptr. 3d 675 (Call. App. Mar. 29, 2005)(inclusion of non-blighted areas in redevelopment plan was proper).

Certainly, there also are cases that have prohibited the use of eminent domain for economic development. However, the *Kelo* decision will require courts to take a second look at those decisions. There may not be much that we can do to stop state and local legislators from attempting to reign in eminent domain powers. But, by educating them on the beneficial uses for which local governments are using their eminent domain powers, particularly in the provision of public and affordable housing, we might be successful in narrowing future restrictions on eminent domain powers. Given the important tool that eminent domain is to your charge as PHAs, is it not worth a letter to your Congressperson and/or Senator?

AUGUST 2005 MEDITATIONS

(A.K.A. STRESS NEUTRALIZERS)

O.K., RIGHT NOW . . . stop multi-tasking (e.g., typing, writing, eating, and talking on the phone while you're reading this), take a deep soothing breath, exhale, read the following and take heed . . .

AMBITION

Ambition has been important to many of us. When we were little, we realized that it was important that we work hard and become somebody. We wanted to get ahead, and we were willing to go to any lengths to be competent and important. In the last few years we have had many more options for our lives, and we wanted to take advantage of these opportunities. When did things change? When did we cross over the line from having ambition, which was good, to being had by our ambition, which is killing us? Often, the very skills which kept us alive when we were younger (like dishonesty, control, and manipulation) are now lethal and are draining the life from us. This may be true about our ambition. If it now is running our lives, it may be time to take another look.

WHAT WAS GOOD FOR US AT ONE STAGE OF OUR LIVES MAY BE LETHAL NOW. WE NEED TO TAKE STOCK AND SEE WHERE WE ARE WITH OUR LIVES.

YOUR CUP RUNNETH OVER

There is a Zen story about a college professor who came to a Zen master seeking knowledge. The old Zen master looked over the professor carefully and then asked a student to go fetch her a pot of tea and two cups. She then placed a cup in front of the professor and began to pour. The tea filled the cup and spilled out over the table. Seeing this, the professor shouted, "Stop, can't you see the cup is full? It can hold no more!" The old Zen master smiled and said, "And so it is with you. Your mind, too, is full of too many things. Only when you empty it will there be room for more knowledge to come in." Asking for help is a way of "emptying" our lives. Stopping and seeing that our lives have become too full may well be the beginning of a process that can empty us and make way for new ways of being.

EMPTYING YOUR CUP IS AS IMPORTANT AS FILLING IT.

DREAMING

If we are to have any hope of being in touch with the process of the universe or with a power greater than ourselves, we must learn to move beyond our rational, logical minds and to let ourselves "dream." That does not mean that there is anything wrong with our rational, logical minds, but we can have trouble connecting with a force greater than ourselves when we lead with our rational minds. There are so many things in this universe that affect us and with which we are connected. Sometimes the only way we can be aware of that connection is to let ourselves dream beyond our knowing. We have so much to learn from everything around us, if we just open ourselves to that which may be.

I ADMIT THAT I DON'T KNOW IT ALL YET. LEARNING COMES IN MANY FORMS.

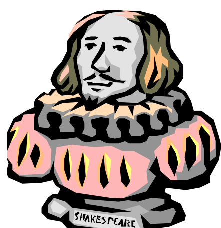
**The foregoing is adapted from Anne Wilson Schaef's *Meditations for Women Who Do Too Much,* Harper& Row, 1990.

Letter from the Executive Director... Cont'd

a certificate of completion. Attorneys can get CLE credit. Contact HDLI at (202) 289-3400 for more information. We are finalizing our fall training schedule, so don't delay and reserve the date(s) of your choosing!

WELCOME! HDLI heartily welcomes a new team of collaborators for HDLI's *Authority* publication. For years, Professor Michael Schill spearheaded our collaboration effort at NYU Law School, and we are grateful for his leadership. Professor Schill has moved on to University of California, and is handing over the reins to Professor Brenda Bratton-Blom and her nationally renowned Economic, Housing and Community Development Clinic at the University of Maryland School of Law. We welcome Professor Blom and her student editors to the HDLI team. HDLI is happy to work with yet another group of able students interested in affordable housing as they enhance their research and writing skills. The latest issue of the *Authority* is on its way to you now.

Let's get energized for a phenomenal Fall!



SHAKESPEARE'S REVENGE

"The first thing we do, let's kill all the lawyers."

-- William Shakespeare

We are told that this *really* happened:

A New Orleans lawyer sought an FHA loan for a client. He was told the loan would be granted if he could prove satisfactory title to a parcel of property being offered as collateral. The title to the property dated back to 1803, which took the Lawyer three months to track down. After sending the information to the FHA, he received the following reply:

"Upon review of your letter adjoining your client's loan application, we note that the request is supported by an Abstract of Title. While we compliment the able manner in which you have prepared and presented the application, we must point out that you have only cleared title to the proposed collateral property back to 1803. Before final approval can be accorded, it will be necessary to clear the title back to its origin."

Annoyed, the lawyer responded as follows:

"Your letter regarding title in Case No. 189156 has been received. I note that you wish to have title extended further than the 194 years covered by the present application. I was unaware that any educated person in this country, particularly those working in the property area, would not know that Louisiana was purchased by the U. S. from France in 1803, the year of origin identified in our application. For the edification of uninformed FHA bureaucrats, the title to the land prior to U. S. ownership was obtained from France, which had acquired it by Right of Conquest from Spain. The land came into the possession of Spain by Right of Discovery made in the year 1492 by a sea captain named Christopher Columbus, who had been granted the privilege of seeking a new route to India by the Spanish monarch, Isabella. The good queen, Isabella, being a pious woman and almost as careful about titles as the FHA, took the precaution of securing the blessing of the Pope before she pawned her jewels to finance Columbus' expedition. Now the Pope, as I'm sure you may know, is the emissary of Jesus Christ, the Son of God, and God, it is commonly accepted, created this world. Therefore, I believe it is safe to presume that God also made that part of the world called Louisiana. God, therefore, would be the owner of origin and His origins date back to before the beginning of time, the world as we know it, AND the FHA. I hope you find God's original claim to be satisfactory. Now, may we have our damn loan?"

The loan was approved.

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