RECENT NEW JERSEY EMINENT DOMAIN DECISION
TAKES A RUN AT THE BOUNDARIES OF KELO v. CITY OF NEW LONDON

In *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) ("*Kelo*"), the United States Supreme Court held that, under the Fifth Amendment to the Federal Constitution, commercial economic development can constitute a "public use" for which eminent domain may be exercised. As a result, private property may be taken by government and transferred to another private party under certain circumstances to create jobs and generate tax revenue.

The 5-4 decision was not without controversy within the Court. Justice O'Connor, a supporter of a broad conception of "public use," nevertheless authored a dissent arguing that the Court's opinion rendered the words "public use" in the Fifth Amendment ineffectual.

Moreover, the decision produced a great deal of controversy in the public arena, as well. Movements were commenced to condemn properties of Supreme Court Justices Breyer and Souter. Some have sought to turn Justice Souter's personal residence into a "Lost Liberty" museum and hotel.

A recent decision from the New Jersey Supreme Court raised a question regarding the degree of rationality, *i.e.*, the extensiveness of planning, required to justify condemnation of property owned by a developer. *Mount Laurel Twp. v. Mipro Homes, LLC*, 379 N.J. Super. 358 (App. Div. 2005), *aff'd*, 188 N.J. 531 (2006), *cert. denied*, ___ S.Ct. ___ (2007) ("*MiPro*"). This paper provides an overview of the *Kelo* and *MiPro* decisions and attempts to draw some conclusions from the interaction of those two cases.

Brief Overview of Kelo and its Foundations

In *Kelo*, the City of New London, Connecticut, had been experiencing decades of economic decline. In 1990, a state agency had declared the city to be a "distressed municipality." Then, in 1996, New London suffered a significant blow when the Federal Government closed the Naval Undersea Warfare Center, located in the Fort Trumbull area, which had employed 1,500 people.

These events led both the city and the state to target New London for economic revitalization, particularly the Fort Trumbull area. The city's plans were aided by the announcement in February 1998 that Pfizer, Inc., the pharmaceutical company, planned to build a $300 million research facility immediately adjacent to Fort Trumbull. Hoping to use the Pfizer announcement as a catalyst for further development, and in accordance with a Connecticut state statute, the city designated the New London Development Corporation ("NLDC"), a private nonprofit entity, to design an integrated development plan for the area and, ultimately, assigned NLDC the power of eminent domain to carry out that plan.

The redevelopment plan consisted of a ninety-acre area along the city's waterfront and included new commercial, retail, and residential space, as well as a new state park. New London's stated goal for the redevelopment was "creating new jobs, generating tax revenue, and helping to build momentum for the revitalization of downtown New London."

Of the 115 privately owned properties in the redevelopment zone, the NLDC was able to acquire all but 15 through negotiation. Four of the remaining properties were located in that area of the redevelopment zone slated for construction of a 90,000 square foot building to house research and development offices. The remaining eleven properties were located in the area slated to become a parking lot and retail services in support of either the park or the marina.

After negotiation over the acquisition of the fifteen properties belonging to the petitioners failed, condemnation proceedings were initiated. Despite the designation of the city as a "distressed municipality," there was no evidence of blight or slum conditions on the condemned properties.

The question presented to the United States Supreme Court was whether the city's subsequent plans for the petitioners' property satisfied the requirements of the public use clause of the Fifth Amendment.

Openly recognizing that the interpretation of the public use clause has been expanding over the last 150 years, the Supreme Court embraced the broader, and what it termed "more natural," interpretation of "public use" to equate that phrase with "public purpose." Given that the New London takings were to be executed pursuant to a carefully considered development plan and that there was no evidence of an illegitimate purpose, the Court focused on whether the city's redevelopment plan served a "public purpose." The Court concluded that economic development is a long-accepted purpose of government and within the bounds of what is traditionally understood to be a "public purpose."

The Supreme Court then reiterated the deference historically granted to legislative judgments in determining which purposes serve the public, going so far as to equate "public purpose" with "public welfare." Once the Court concluded that economic development and/or redevelopment of the depressed city was a legitimate end, the Court maintained the long-standing belief that the federal courts should refrain from questioning the means chosen by the legislature in achieving such rational ends. Based on this holding, the Court deferred to the city's determination that the area was sufficiently distressed to justify a program of economic rejuvenation.

In reaching its decision, the Court noted that the taking occurred as part of an "integrated development plan" resulting from extensive planning, studies by state agencies and evaluation of a number of different proposals.

Justice Kennedy's *Kelo* Concurrence

In a concurring opinion, Justice Kennedy rejected the petitioners' arguments regarding the potential for a blurred boundary between public and private takings. Clarifying the position of the Court, Justice Kennedy noted that rational basis review was applicable to cases involving the public use clause. Despite this, courts should review charges of favoritism intending to benefit a particular party or benefits to the public that were only incidental or pretextual. In other words, courts must decide whether the government's stated public purpose of economic advantage is only incidental to the benefits bestowed on private parties. If the petitioners could show that the economic advantages to a city were merely incidental to the benefits bestowed

upon private developers, the taking could never be sustained under the public use clause. Justice Kennedy noted that because the identity of specific private entities to which the condemned property would go was unknown, the actions of New London were not an attempt to take A's property to bestow a benefit upon B. Based on the facts, Justice Kennedy concluded the benefits bestowed upon the private entity in *Kelo* were incidental to the greater objective of economic development; therefore, the taking was constitutional.

Justice Kennedy strongly emphasized the importance of extensive planning in the exercise of eminent domain, concluding that the Fifth Amendment prohibits takings that have only "incidental or pretextual public justifications." The taking at issue is *Kelo* passed muster because New London employed procedures that were not prone to abuse and had undertaken "elaborate procedural requirements" in the "context of a comprehensive development plan" that facilitated review of the city's motives.

Berman v. Parker

In reaching its holding, the Supreme Court relied on two prior precedents. In *Berman v. Parker*, 348 U.S. 26 (1954), the Supreme Court upheld a comprehensive urban renewal plan that allowed the condemnation and transfer of property to private developers. *Berman* was the first case to analyze in-depth the meaning of public use with regard to the government's exercise of eminent domain to take private property for a subsequent private use, upholding a redevelopment plan targeting a blighted area of Washington, D. C., in which most of the housing for the area's 5,000 inhabitants was beyond repair.

In *Berman*, the Congress, acting as the local legislature for the District of Columbia, passed legislation enabling the local planning commission to develop a comprehensive redevelopment plan. The redevelopment plan's primary purpose was to rid the District of Columbia of blighted property and slums. To achieve its goals, the act permitted property to be acquired and assembled through eminent domain. Once the property was acquired, the land to be devoted to public purposes such as streets, utilities, recreational facilities, and schools was to be transferred to public agencies. The remainder was to be leased or sold to private redevelopment companies, individuals, or partnerships. Preference was to be given to private enterprise over public agencies in executing the redevelopment plan.

The challenge in Berman came from the owner of a department store located in the redevelopment area, whose land had been condemned and slated for private redevelopment. The owner maintained that his store was not itself blighted and argued that the creation of a "better balanced, more attractive community" was not a valid public use.

Rather than force redevelopment on a piecemeal, lot-by-lot basis, Justice Douglas, writing for a unanimous Court, refused to evaluate this claim in isolation, deferring instead to the legislative and agency judgment that the area "must be planned as a whole" for the plan to be successful. The Court noted that the determination whether power is being exercised for a public purpose is an extremely narrow question and once the question had been answered, it was essential that the judiciary refrain from second-guessing the means by which the legislature achieved its public purpose ends.

The Court essentially defined "public use" as "public welfare," and exhibited great deference to the legislature in its determination whether the use to which the condemned property would be put benefited the public. Using this broad definition, the Court found that slum conditions are injurious to public health, safety, welfare, and morals, and that redevelopment plans targeting slums and severely blighted areas fall squarely within the police power of the legislature. Thus, the *Berman* Court determined that the legislature has the power to ensure beauty, health, spacious and clean living, and a well-balanced and well-patrolled neighborhood through a comprehensive redevelopment plan, and could therefore condemn non-blighted properties located within the redevelopment zone.

The *Berman* decision resulted in a broad determination of the legislature's police power and a clear indication the Supreme Court would not tolerate federal courts replacing the wisdom of the legislature with that of its own regarding the manner in which the public interest would be accomplished.

Hawaii Housing Authority v. Midkiff

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), a unanimous Supreme Court validated a Hawaii statute under which fee title was taken from lessors and transferred to lessees in order to reduce the concentration of land ownership, which had its roots in Hawaii's original feudal land system. The Hawaii state legislature discovered that only twenty-two individuals owned over seventy percent of the private land in Hawaii. Believing skewed land prices resulting from concentrated land ownership to be injurious to the public, the Hawaii legislature instituted a plan to compel large landowners to break up their estates.

Reaffirming Berman's deferential approach to legislative judgments, the Court concluded that Hawaii's purpose of eliminating the "social and economic evils of a land oligopoly" was well within its police powers and thus qualified as a valid public use. The Court refused to find that the taking was "a naked attempt on the part of the state of Hawaii to take the property of A and transfer it to B solely for B's private use and benefit," despite the fact that Hawaii immediately transferred the properties to private individuals upon condemnation. The Court concluded that it was concerned only with the purpose of the taking, "not its mechanics" in determining public use. However, the Court seemed to expand the holding of *Berman* by declaring that, "the 'public use' requirement is coterminous with the scope of a sovereign's police power."

The *Kelo* Dissents

However, unlike the *Berman* and *Midkiff* decisions, the *Kelo* decision was far from unanimous. Although Justice Sandra Day O'Connor authored *Midkiff*, she wrote the principal dissenting opinion in *Kelo*.

Justice O'Connor feared that the majority's decision turned the public use clause into a mechanism by which the taking of private property could be justified as long as subsequent use of the property could be said to "upgrade" the property. She also expressed concern that the beneficiaries of the majority decision would be those holding political power and influence, rather than the ordinary populace.

But Justice O'Connor's dissent did not question the means by which the legislature was attempting to achieve its ends. Rather, Justice O'Connor questioned the ultimate purpose or ends the legislature was attempting to achieve, and attempted to limit the power of the legislature to use eminent domain to acquire property for subsequent private use. She distinguished *Berman* and *Midkiff* by arguing that those decisions involved a taking that "directly achieved a public benefit," i.e., the elimination of accepted and existing social ills, and argued that an affirmative finding of a "justifying public purpose" must be present. Justice O'Connor ultimately concluded that the power of eminent domain should be reserved for transfers of private property to (1) public ownership (for roads, hospitals, and the like); (2) private ownership for public use (such as railroads or public utilities); or (3) private ownership to remedy a prior harmful use (such as blight resulting from extreme poverty or an oligopoly resulting from extreme wealth).

Justice Thomas not only joined in Justice O'Connor's dissent, but also dissented separately, focusing on the Constitution and the original meaning of phrase "public use." Justice Thomas ascribed a narrow interpretation to the historic meaning of the term "public use." He then pinpointed the divergence from that original narrow meaning in our caselaw, arguing that the 1896 case of *Fallbrook Irrigation Dist. V. Bradley*, 164 U.S. 112 (1896), had ignored prior caselaw that had utilized the "actual use" test. Justice Thomas also argued that a second line of cases had deviated from the public use clause's original meaning by allowing legislatures to define the scope of valid uses. These two "misguided" lines of cases converged, according to Justice Thomas, in *Berman* and *Midkiff*. Justice Thomas also found that *Berman*, *Midkiff*, and the majority opinion erred by commingling the use of the power of eminent domain for takings with the police power for regulatory purposes.

Mount Laurel Twp. v. MiPro Homes, LLC

While *Kelo* was winding its way through the courts, on May 24, 2002, the Township of Mount Laurel brought a condemnation action against a 16-acre tract of land, located in a residential zone, owned by MiPro Homes, LLC ("MiPro"). At the time the condemnation action was filed, MiPro had already received final subdivision approval on the property and had performed a significant amount of site preparation work in order to construct a residential development consisting of 23 single-family homes.

MiPro countered the condemnation action by arguing that the true purpose of the condemnation action was to stop residential development in the township and the condemnation was, therefore, unlawful. The Builders League of South Jersey intervened in the condemnation action as a defendant, in support of MiPro's position.

The Trial Court Finds in Favor of MiPro

The trial court agreed with MiPro. In an unpublished written opinion, the trial court recognized that Mount Laurel had initiated proceedings to condemn Mipro's property "for a facially valid purpose, namely, the acquisition of Mipro's tract to be held in perpetuity as a passive open space." However, the court concluded that Mount Laurel's "real purpose" in condemning Mipro's property "was to prevent yet another residential development in a township already under severe development pressure." The court stated that "the public purpose articulated for the taking of Mipro's property for passive open space was not based on a true

public need but solely in response to the community's sentiment expressed at the polls, coupled with clear indications from township officials that the property be acquired to stop residential development."

The court concluded that although Mount Laurel could purchase open space from willing sellers, condemning MiPro's property for open space in order to stop residential development was arbitrary and unreasonable. The court stated:

> There is nothing legally wrong with the chosen approach as long as the township purchases the property from a willing seller. The abuse of discretion and arbitrary, capricious and unreasonable action by the Township occurred when it abused the awesome power of eminent domain for a purpose not contemplated by, and indeed proscribed by, our Eminent Domain Law. . . . If the Township desires to continue to purchase property for open space, it may do so. Those purchases may only be made from willing sellers, not by resort to condemnation of tracts under development from private owners unwilling to give up their properties and vested approvals.

The New Jersey Appellate Division Reverses the Trial Court

Mount Laurel Township appealed the trial court ruling to the Appellate Division. The Appellate Division disagreed with the trial court and concluded that Mount Laurel could condemn MiPro's property for open space, in a published opinion issued in August 2005. *Mount Laurel Twp. v. Mipro Homes, LLC*, 379 N.J. Super. 358 (App. Div. 2005), *aff'd*, 188 N.J. 531 (2006), *cert. denied*, ___ S.Ct. ___ (2007). The Appellate Division concluded that Mipro did not present evidence to support a finding that Mount Laurel's decision to condemn its property constituted an abuse of the Township's eminent domain power and specifically determined that:

- a municipality has statutory authority to condemn property for open space;
- a municipality may exercise this authority even though it does not presently have a plan to devote the property to active recreational uses; and
- the selection of properties for open space acquisition on which residential development is planned does not constitute an improper exercise of the eminent domain power.

The Appellate Division therefore reversed the trial court's judgment in favor of MiPro.

The Appellate Division even sanctioned the Township's motive to slow residential development. The Appellate Division concluded that even if the primary motive of the Township's open space acquisition program in general, and the condemnation of the MiPro site in particular, was to slow the pace of residential development in the municipality, the condemnation would be permitted. According to the court, Mount Laurel had a reasonable basis for concern that additional residential development would aggravate traffic congestion and

pollution problems in the municipality and impose added stress on its school system and other municipal services. These reasons did not support a finding that the municipality's use of eminent domain constituted fraud, bad faith or manifest abuse, as such concerns are reflected in New Jersey's public policy "to halt suburban sprawl."

The New Jersey Supreme Court Affirms

MiPro Homes and Builders League filed separate Petitions for Certification, asking the New Jersey Supreme Court to hear and reverse the Appellate Division decision. The Supreme Court agreed to hear the case. The Burlington County Board of Chosen Freeholders, the State of New Jersey, and the New Jersey League of Municipalities filed amicus curiae briefs in support of Mount Laurel Township. MiPro and Builders League were supported by amicus briefs filed by the New Jersey Builders Association and the National Association of Home Builders.

Before the New Jersey Supreme Court, MiPro argued that Mt. Laurel had not engaged in the type of rational and comprehensive planning required by the state's Municipal Land Use Law's ("MLUL"). For example, the township failed to include the MiPro site in its master plan, capital improvement program, official map, or open space suitability map. In fact, MiPro argued, Mt. Laurel had not objected to the prior owner's plan to build an assisted living facility on the site.

In a short, *per curiam* opinion, the New Jersey Supreme Court affirmed the Appellate Division's decision, largely for the reasons expressed by the Appellate Division. *Mount Laurel Twp. v. MiPro Homes, LLC*, 188 N.J. 531 (2006), *cert. denied*, ___ S.Ct. ___ (2007). The Supreme Court confirmed that the decision of the Appellate Division had been correctly based on the public policy that New Jersey residents prefer open space to development. The Court indicated that the citizens of New Jersey have expressed a strong and sustained public interest in the acquisition and preservation of open space by repeatedly voting at the polls to fund open space acquisition. The Court found this expression embodied in numerous statutes enacted since the 1960s authorizing loans and grants to expand open space and some of those statutes had provided for the acquisition of open space by condemnation.

The New Jersey Supreme Court reiterated the Appellate Division's conclusion that Mount Laurel's motive in limiting development was not improper. Limiting the overcrowded schools, traffic congestion and pollution that accompanies development was not inconsistent with the motive driving the public interest in open space acquisition generally. In so holding, the Supreme Court relied upon an New Jersey Department of Environmental Protection anti-sprawl website.

Finally, the Supreme Court determined that the property was to be valued at its fair market value by the condemnation commissioners. That fair market value was to include the value associated with MiPro's final subdivision approval.

Only one justice dissented from the Supreme Court's opinion. Justice Rivera-Soto concluded that the trial court correctly determined that Mount Laurel's stated policy reasons for the condemnation were "transparent after-the-fact explanations" that did not withstand serious scrutiny. Justice Rivera-Soto concluded that the public purpose articulated for the taking of

MiPro's property for passive open space was not based on a true public need, but rather was undertaken to stop residential development, based in response to the community's sentiment expressed at the polls. According to Justice Rivera-Soto, these facts demonstrated bad faith and arbitrary and unreasonable conduct by Mount Laurel, as the trial court found. This determination by the trial court should not have been overturned, particularly "in pursuit of some ill-defined social goal."

Finally, Justice Rivera-Soto noted that MiPro had engaged in development of the property to make a profit. He would, therefore, have valued the condemnation damages by forcing the Township to pay MiPro's restitution and expectation damages (*i.e.*, MiPro's lost profits), unless the Township could show that MiPro was unable or unwilling to complete the development.

Petition for Certiorari

Earlier this year, MiPro and the Builders League petitioned the United States Supreme Court for certiorari. Relying on the Court's opinion and Justice Kennedy's concurrence requiring comprehensive and straightforward planning to justify a taking, MiPro and the Builders League argued that Mt. Laurel's condemnation of MiPro's property was pretextual, since the township's goal was to prevent development, not preserve open space, and that the condemnation was *ad hoc* and not pursuant to a comprehensive plan for the preservation of open space, since the township did not have a need for additional open space and had only become interested in the property for use as open space after subdivision approval had been granted.

On October 1, 2007, the Supreme Court denied the petition for certiorari.

What It All Means

As far as New Jersey is concerned, rationality and planning do not take center stage. The New Jersey Supreme Court has affirmed that a public policy to halt suburban sprawl exists. That policy appears to command significant strength, so much so that, at least on the facts in *MiPro*, the policy will excuse pretextual reasons for condemnation and override any vested statutory rights to develop a parcel of land.

As far as the future of Fifth Amendment takings is concerned, it is always dangerous to try to read too much into a denial of certiorari by the United States Supreme Court. There are a myriad of potential reasons for the denial and the Court has provided little guidance on its reasons for the denial.

For example, it is possible that the Court simply felt that there were other, more pressing, that required redress and that it was too soon to revisit *Kelo.* It is also possible that too much is being read into those aspects of the various opinions that appear to require extensive planning and stringent protections in the exercise of eminent domain. Perhaps the Supreme Court wasn't really that concerned about planning. After all, if the Court was searching for a fact pattern to signal its commitment to extensive planning as a prerequisite to condemnation, the *MiPro* trial court's findings of fact provided fertile ground.

But more likely, the Court did not want to address the planning requirements it discussed in *Kelo* in the context of a tasking for a public purpose. The significant difference between *MiPro* and *Kelo* is that Mt. Laurel took MiPro's land for use as open space, a vague and poorly defined purpose, but ostensibly a public use. Although it is too early to know, the Court may be signaling that the stringent planning requirements mentioned in *Kelo* are limited to the context where the taking transfers the property from one private party to another.