REMARKS TO INTERNATIONAL MUNICIPAL LAWYERS
ASSOCIATION CONFERENCE, SAN ANTONIO, TEXAS,
RELATING TO THE RECENT DEVELOPMENTS IN THE "PUBLIC USE" DOCTRINE
(October 5, 2004)

Tim Dowling will speak with you shortly on constitutional challenges regarding compensation claims for regulatory takings. I'm here to speak about another species of constitutional claims, i.e., those relating to "real" takings with just compensation, but which are also challenged on constitutional grounds.

The chief basis for such a challenge is that the taking is not for a "public use," a term which has never been off the legal, or political, radar screen. Even when just compensation is paid, people do not normally like to leave their homes or businesses. So when right-wing think tanks and the Institute for Justice play on these resentments, it makes trouble for the local governments, urban renewal authorities, and non-profit development corporations attempting to improve the lot of the citizenry as a whole.

Public use is the latest battleground of counter majoritarian theorists who emphasize property over community, a minimalist government, and continuing a guerrilla war against the New Deal through the resurrection of substantive due process. As you listen to the summary of most of the cases that follow, see if you can find of that combination of vague paternalism and judicial interventionism to prevent the perceived excess of democracy that characterize the disastrous "too far" rule of *Pennsylvania Coal v. Mahon* in 1922.

To understand the contrast presented by the new version of public use in some cases, it is necessary to review two cases interpreting the term as it appears in the Fifth Amendment. It is important to note that state constitutional law may set out or use the term differently than it is used in the federal context. And, while the term may be set out or interpreted differently in a

given state, the term is frequently construed in a manner consistent with federal precedent. Thus a review of that precedent and the Fifth Amendment is in order.

The first federal case was the venerable *Berman v. Parker* (1954) in which a unanimous United States Supreme Court upheld the application of the District of Columbia urban renewal process passed by Congress for slum clearance through the acquisition, redevelopment and transfer of private property. The owner of a non-dilapidated building in a blighted area chose to refuse compensation and keep his building. Just as Douglas speaking for a unanimous court said that judicial deference would be given both to the ends and, largely, to the means chosen by Congress or its delegate to undertake urban renewal. The decision is an anti-substantive due process position which looked to the area and the planning as a whole, instead of individual properties. We may recall the famous language from that opinion to the effect that values are "spiritual as well as physical" and "aesthetic as well as monetary." These values are set by Congress and the *Berman* court said it would not reappraise them.

The second case was *Hawaii Housing Authority v. Midkiff* in 1984 in which a unanimous Supreme Court (with one justice not participating) upheld, through an opinion by Justice O'Connor, the Hawaii Land Reform Act of 1967. This Act was passed to diversify private ownership in this very small state. I refer you to footnote 7 of my paper, which shows the pre-Act ownership patterns. The court's opinion moved the standard a bit so that no judicial interference would occur in acquisition with just compensation under the public use doctrine unless the acquisition were "palpably unreasonable." If the legislature could have believed that the purpose were reasonable, then the court said it would uphold it. More significantly, the court said that a social purpose in land acquisition was constitutional and that the public need not either enjoy or use the benefits of that acquisition directly.

The bottom line is that the United States Supreme Court reads the public use clause of the Fifth Amendment in a way so as to defer to the judgment of local legislative bodies on ends and, generally, the means to achieve those ends.

My written materials summarize five cases which take different view of public use. Let me move quickly to mention those cases and then concentrate on two additional cases which have made the news recently.

In *Casino Reinvestment Development Authority v. Sabatini*, a New Jersey trial court refused to allow a land acquisition for a casino because the ultimate transferee – a Donald Trump enterprise -- did not have any limits on what it could do with the property once acquired. The court found the benefit was private, rather than public, and did not equate to public use.

In *99 Cents Only Stores v. Lancaster Redevelopment Agency*, a California federal court viewed a David versus Goliath contest in which a small store took on an urban renewal agency and Costco which desired to expand its nearby facility and for which the urban renewal authority was only too happy to accommodate. When David filed its own lawsuit in federal court filing the initiation of condemnation proceedings, the urban renewal authority stopped the state court efforts but refused to say it would not do so again. The court found this state proceeding was for a private use and that the public use claim was "pretextual." The court found that the urban renewal authority had no present blight on which to respond nor was so called future blight a basis for the use of the eminent domain authority.

In *Southwest Illinois Development Authority ("SWUDA") v. National City Environmental, LLC*, the Illinois Supreme Court noted that plaintiff had initiated eminent domain proceedings to help an existing car racetrack to expand by taking defendant's land and existing business to add to the parking for the racetrack. The economic development agency got local

legislative approval for the eminent domain but the Illinois Supreme Court found no public purpose, which it termed a judicial determination and not co-extensive with public use, as it would be in the slum clearance context. SWUDA said that when condemned land for industry, so long as it was paid a fee for that purpose and the court noted there was no study on public need available. Simply stated, the economic development agency was the "default broker" for uses which were to expand. There was a dissent which emphasized both *Berman* and *Midkiff* and said that economic development constituted a public use.

In *Bailey v. Myers*, the Arizona Court of Appeals struck down a city of Mesa effort to help a hardware store chain to expand through the use of eminent domain of defendants' property. The case turned on the wording of the Arizona constitutional provision on public use, which was taken from the Washington State Constitution, under which the court interpreted whether a particular use were "really" a public use, particularly found to be important if the public were not the ultimate user. A use creating a public benefit, the court said, is not always a public use and public benefits in the context of transferring property to a private person must "substantially outweigh" the private character of the end use.

Finally, in *Cottonwood Christian Center v. Cypress Redevelopment Agency*, a California federal court reviewed the situation in which a church owned 18 acres of undeveloped land which it wished to use ultimately for a mega church facility. The defendant urban renewal agency, the city council, wanted the land for a Costco development. The City deferred action on the church's application for various uses finding it technically insufficient, then imposed a moratorium and began revisions to its local plan to make the church impossible and to make a Costco development the desired use. The court questioned whether this was done for a public use purpose and said that it makes an independent judgment on the public use question, finding

there to be sufficient evidence to allow a preliminary injunction. The Religious Land Use and Institutionalized Persons Act Of 2000 was a factor in this case. The parties later settled before the matter came to trial on the merits.

Now let me speak to two cases that illustrate the divide in treatment of public use, both of which were decided this year.

In *Kelo v. City of New London,* the Connecticut Supreme Court reviewed a challenge to the acquisition of private land by a non-profit redevelopment corporation designated by the City of New London to revitalize an area through provision of public facilities, planning, and the use of eminent domain. The plan was ultimately adopted excluded some properties and took other homes and businesses including that of the principal plaintiff, who challenged the plan alleging that there was no public use, no removal of blight, and suggesting that economic development was not the basis for public use land acquisition. The court found economic development to be sufficient under the Connecticut constitution as a public use. The public benefit was sufficient even if the land were transferred to a private entity, such as, in this case, the Pfizer Corporation. Some lands were leased to private corporations public facilities, public facility improvements were made, and the redevelopment corporation sought to add additional office uses not requested by the corporation's placing the investment in the location but because the redevelopment corporation believed that office space would be necessary if the area were to be developed and there was a market shortage. The majority found an adequate distinction between those buildings which were included and excluded from public acquisition and found adequate post acquisition mechanisms to assure the land would be consistent with public use. The delegation to the economic development corporation was acceptable under Connecticut law as a means of implementing the City's economic development plan. The court emphasized the adequacy of the

safeguards to assure public use and said that there was only limited judicial review of public use issues which only included unreasonableness, bad faith, or abuse of delegated powers. The burden of proof, said the court, was on the plaintiff to show that an injunction should issue. This act of discretion by the trial court in denying most aspects of the injunction requested was upheld and the court found that the trial court had improperly granted an injunction for other portions of the project and affirmed the development corporation's efforts to acquire private property.

There was a dissent which distinguished public use and public benefit and found them not to be equivalent and questioned the use of economic development as a basis for eminent domain. The dissent would have raised the burden on those agencies that had eminent domain power delegated to them. One should note that the United States Supreme Court has granted certiorari in this case.

The last, and most recent, case is *Wayne County v. Hathcock*, in which the Michigan Supreme Court reviewed the efforts by a county to condemn land for a business/tech park on economic development grounds and conceded that the county had followed state statutory law in the acquisition efforts. The court undertook a *de novo* review with regard to the constitutional question as to whether the acquisition was for a public use. In the light of the fact that the public necessity for the project was challenged and that the land was to go to a private entity. The court said that in these circumstances there were three alternative means for a private agency to undertake acquisition under the public use clause of the Michigan constitution:

1. That there was extreme public necessity requiring collective public action;

2. That there was public oversight following the transfer of the land to the private party; or

3. There were facts of independent public significance (such as slum clearance) that justified the acquisition.

The court overruled in 1981 case entitled *Poletown Neighborhood Council v. City of Detroit,* which had approved the use of eminent domain to facilitate a Ford Motors plant. The Court said that, under its new interpretation of the 1963 Michigan constitution, a collective need was not a justification for land acquisition under the public use clause. It appears that concepts of Jeffersonian property monads apparently trump the public interest and the decision of locally elected bodies.

This was a four to three case with two concurring and dissenting opinions. One of those opinions objected to the standards used overruled Poletown and said that in lieu of the majority's view that those sophisticated in state constitutional law in 1963 would not have adopted the interpretation of Wayne County in this case, this descent would have used the common understanding of law as the standard. It would have reached the same result, however. The other concurring and descending opinion would not make the decision retroactive in nature.

There you have it. There are a variety of views of public use under state constitutional law, but a fairly consistent, at least to this point, view a public use under the Fifth Amendment under United States Supreme Court precedent. Whether *Kelo* does a *Lucas* and takes a 180 degree turn while, at the same time stating that judicial second guessing of state or local government choices on land acquisition was what the court meant all along, remains to be seen. It should be an exciting year ahead.

Thank you for your time and attention.