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by

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Case Law Update

I. *Kelo*

***Kelo v. City of New London,* ___ US ___ 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005)**

In *Kelo*, the US Supreme Court, by a 5-4 vote, held that the use of condemnation for economic development is a "public use" within the takings clause where the objective was to transfer the property to a private developer for an urban renewal project. Relying on a Connecticut statute that authorized condemnation to promote economic redevelopment, the City argued that providing jobs and increased tax revenues provided a sufficient public purpose.

The majority rejected the petitioners' argument that the court should adopt a "bright line" rule that condemnation for purely economic redevelopment is unconstitutional. Additionally, the court rejected the argument that the there must be "reasonable certainly" that benefits will accrue for the public. Relying on *Berman v. Parker*, 348 US 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 US 229 (1984), the court stated that it is expected that public benefits will accrue in economic development takings. The court reiterated that determining a "public use" is a legislative decision and once decided, the amount and character of land to be taken for a plan rests in the discretion of the City and should be left to the City.

The court emphasized that the taking at issue in *Kelo* was executed pursuant to a "carefully considered" development plan and that there was no evidence of an "illegitimate purpose" to indicate that the plan was "to benefit a particular class of identifiable individuals." The court acknowledged that there may be transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption of invalidity is warranted under the Public Use Clause. Further, the court allowed that state courts and legislatures remain free to restrict economic takings pursuant to state laws and constitutions.

II. Post Kelo

***City of Norwood v. Horney,* ___ N.E. 2d ___ 2006 – Ohio - 3799 (Ohio July 26, 2006)**

The backdrop to the *Horney* case involves the Ohio General Assembly's unanimous enactment of legislation in response to *Kelo.* The Ohio Assembly was concerned that its eminent domain

law could be interpreted to allow the taking of private property that was not within a blighted area, which was a violation of its Constitution. A moratorium on any takings was imposed while a task force studied the application of eminent domain law in Ohio.

Appellants' property was appropriated by the City of Norwood after the City determined that the appellants' neighborhood was a "deteriorating area" as defined by the city code. The court acknowledged that it had previously recognized the authority of a City to take a slum, blighted or deteriorated property for redevelopment. The court had also suggested that a taking may be proper when the property is transferred to a private property owner for redevelopment. However, the court had never been asked whether a city may appropriate property that the City determines is in an area that "may deteriorate in the future."

The lower court held that the void-for-vagueness doctrine applied to the eminent domain statutes and the court would apply "heightened scrutiny" when the eminent domain powers were applied. The court was critical of the evidence supporting the application of the eminent domain code. Testimony of company representatives who conducted the urban-renewal study acknowledged that the neighborhood was not a slum, blighted or even a "deteriorating area" as defined in the code. However, there was also testimony, including by the Planning Director, that the area was deteriorating as a single-family residence neighborhood and suffered from traffic and commercial development issues. The trial judge concluded that the City of Norwood had abused its discretion insofar as it had found that the neighborhood was a "slum, blighted or deteriorated." However, the trial court then concluded that there was no showing that the City had abused its discretion in finding that the neighborhood was a "deteriorating area." The trial court felt compelled to provide judicial deference to the City Council's legislative decision.

The Ohio Supreme Court disagreed. The term "deteriorating area" as a standard for an appropriation of property was held unconstitutional. The court noted that because the code "definition of deteriorating area describes almost any city, it is suspect." The definition offered little guidance and incorporated not only existing conditions of a neighborhood, but what the neighborhood might become. Not only was the code standard void for vagueness, the court held that it could not be used as a standard for a taking because it inherently incorporates speculation as to the future condition of the property into the decision rather than focusing that inquiry on the property's condition at the time of the proposed taking.

The court noted that it had permitted economic concerns to be considered in addition to other factors, such as slum clearance, in determining whether the public-use requirement was sufficient. Hence, economic factors may be considered in determining whether private property may be appropriated, however, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of the Ohio Constitution.

***In re Redevelopment Authority of the City of Philadelphia,* 891 A.2d 820 (Pa. Cmmw. 2006)**

The Redevelopment Authority (Authority) prepared a redevelopment proposal to acquire land in a blighted neighborhood. The case involved an eminent domain taking of a property that had been certified as blighted 35 years prior to the initiation of eminent domain proceedings. The property was condemned by the Authority and was to be transferred to the Hope Partnership for use by a private religious school. The trial court had held that the elimination of blighted areas constituted a proper public purpose for which the authority could use to apply its statutory power of eminent domain.

The property owner challenged the taking, including an objection to the transfer to Hope Partnership to construct a private religious school, which is an impermissible use of eminent domain power. The appellate court reversed the trial court on several grounds. First, the trial court erred in holding that when land is certified as blighted, there is authority to transfer to a private developer no matter "who" the future developer may be. Second, the trial court erred when it presumed that condemnee's failure to challenge the certification of blight resulted in a waiver of her challenge to the taking. Third, the trial court also erred in rejecting condemnee's claim that the taking implicated an impermissible entanglement of church and state. Finally, it erred in concluding that simply because the property was substandard and in a blighted condition, the Authority was authorized to take it.

The Authority taking "unequivocally" contravened the Establishment Clause. The primary purpose was to acquire land for the Hope Partnership, a religious organization, which was to construct and operate a private religious school. The Authority's land acquisition had a primary religious effect because the mission was to a private faith based education; therefore, land acquisition had the primary effect of advancing religion. There was, finally, no dispute that the Authority and Hope Partnership had worked jointly to acquire the property.

Although the court's reversal was premised on the Authority's violation of the Establishment Clause, the court commented that it could not ignore that, in *Kelo*, the court's decision was based on a comprehensive development plan that served a public purpose and thereby satisfied the public use requirement of the Fifth Amendment – the plan was designed to benefit the entire City of New London. This was in stark contrast to the plan here to acquire land with public funds for the benefit of a religious organization to build a private school. Thus, it did not satisfy the public use requirement.

***City of Guymon v Cal Farley's Boys Ranch,* 2005 US Dist. LEXIS 38506 (W.D. Okla. Dec 30, 2006)**

The City of Guymon sought a summary judgment that its exercise of eminent domain over surface and water rights associated with a parcel of land owned by a private landowner was a taking for a public purpose. The court held that the City had presented a prima facie showing of

public purpose because the taking related to the increased water needs for the City. The landowner asserted that the taking related solely to the increased water needs of a privately-owned corporation and that the City's increased needs were incidental. The court rejected this argument. The court noted that this argument assumed that a municipality's effort to attract private enterprise involves a "private purpose" rather than a "public purpose." This assumption was wrong because a business project may create jobs, provide infrastructure, and stimulate the local economy, all of which are legitimate public purposes that justify the use of the power of eminent domain.

Subsequent History: Objection overruled by *City of Guymon v. Cal Farley's Boys Ranch*, 2006 U.S. Dist. LEXIS 27259 (W.D. Okla., May 4, 2006)

***Fulmore v Charlotte County*, 928 So. 2d 1281 (Fla. Dist. Ct. App. 2d Dist. 2006)**

Landowners challenged the trial court's orders rejecting their constitutional challenge to the Community Redevelopment Act of 1969 (Act) which allowed the taking of their property through the exercise of eminent domain. The court affirmed the decision.

The Act authorized local governments to designated community development areas, but only after the governing body adopted a resolution, supported by data and analysis, that makes a legislative finding that slum or blight conditions exist and that redevelopment is necessary in the interest of the public health, safety, morals, or welfare of the residents. The court noted that, although the Act allowed for the exercise of eminent domain for community redevelopment, the government must first prove that the area meets the definition of slum or blighted area. The court commented that this requirement was in contrast to the recent *Kelo* decision that did not require the designation of an area as blighted or a slum.

***Board of County Commissioners of Muskogee County v Lowery*, ___P.3d___ (Okla., May 9, 2006)**

The Supreme Court of Oklahoma accepted review of an eminent domain action by the county for easements to facilitate water pipelines for a private utility company to facilitate an energy plant not subject to public utility regulation. The trial court found that the condemnation satisfied the "public use" requirement under economic development eminent domain statutes because of community jobs. The Supreme Court disagreed, noting that *Kelo* allowed for different views on "public use" under state constitution and statutory law. In absence of blight, the court rejected the contention that a private energy plant constituted a public utility and was thus entitled to use eminent domain, noting that this right was limited to regulated public utility companies under state law.

III. Recent Case of Interest

***Rhode Island Economic Development Corp v The Parking Co, L.P.*, 892 A.2d 87 (R.I. 2006)**

The Rhode Island Department of Transportation (the "Department") leased land next to an airport to a private company for 20 years for construction of a parking garage. The Department retained an option to purchase the garage at the end of the lease period. The Department transferred the airport to a subsidiary of the Rhode Island Economic Development Corp (RIAC). Later agreements between the RIAC and the company required the company to provide revenue from the parking garage to RIAC. By 2004 there were fiscal issues with reduced revenue and still several years on the lease period. When negotiations failed to resolve the issues RIAC, through the Economic Development Corp (EDC), used its "quick take" statute to condemn an easement over what it had in the pre-exiting contractual relationship. Thus, instead of waiting until the end of the leasehold term to take possession of the garage, EDC used condemnation to acquire an easement over the garage. After reviewing the record, the court concluded that by resorting to the quick-take statute, RIAC was able to gain control over the garage before the agreement expired and without complying with provisions of the contract.

The court stated that this was clearly not an exercise of the careful deliberation exercised by the City of New London in *Kelo.* "The City of New London's exhaustive preparatory efforts that preceded the takings in Kelo stand in stark contrast to EDC's approach in the case before us." The principal purpose and objective in a given enactment must be public in nature and be "designed to protect the public health, safety and welfare." If these conditions are met, then judicial approval is mandated, whether or not "there will be an incidental benefit to private interests." Viewing the condemnation of the garage in the context of the Rhode Island Economic Development Corporation Act, and the quick-take statute, the court was not persuaded that the principal purpose for the taking in this case was a valid public use. The court held that the condemnation of the temporary easement over the garage was inappropriate, motivated by a desire for increased revenue, and was not undertaken for a legitimate public purpose.

***McCarran Int'l Airport v Sisolak*, 2006 Nev LEXIS 80, 122 Nev. Adv Rpt 58 (2006)**

The court concluded that a county height restriction ordinance effected a "per se" taking of the airspace above private land that was located within the departure critical area of the airport approach zone. The landowner brought an inverse condemnation case after the County adopted additional height restriction ordinances further limiting the development of the property owners' land. The appellate court upheld the lower court's ruling that the height restriction ordinances authorized airplanes to make a permanent physical invasion of the landowner's airspace. A jury awarded the property owner $6.5 million.