Public-Private Partnerships ~ in *Kelo's* Wake

by Lisa Bova-Hiatt

Most municipal lawyers would agree that eminent domain is a vital economic tool that allows local governments to acquire and assemble land for public development projects that generate new housing, new jobs, and increased tax revenue. The use of eminent domain for this purpose is crucial to the fiscal health of any city, and is often a necessary part of a carefully considered plan of economic development. In municipalities both large and small, most significant public redevelopment projects are facilitated by public-private partnerships. Indeed, without private resources, many government initiatives designed to improve the municipal landscape would never be realized. For example, in New York, private investment used in conjunction with eminent domain helped facilitate the rebirth of Times Square into a tourist friendly location. As you may recall, in the 1970s, Times Square -- one of the great symbols of New York City -- became a national showcase for urban decay and blight. Crime was rampant and the Broadway theaters struggled to exist in the midst of peep shows and rundown buildings. In the 1990's, with the assistance of eminent domain, the City and State, in partnership with private developers, revitalized the area and eradicated the blight. Today, the area has more than 33,000 residential households, one in four Midtown-Manhattan employees work in the area, and pedestrian activity has increased 200%.

However, the reaction to the decision of the United States Supreme Court in *Kelo v. City of New London,* 545 U.S. 469 (U.S. 2005), which upheld, by a 5-4 vote, the power of the City of New London, Connecticut to condemn private property for an economic development project, places the future of public-private partnerships in jeopardy. Today, there is virtually no public policy issue facing local governments, especially those in large urban environments, as

important as the question of the circumstances under which it should be permissible for the government to condemn property for the purpose of conveying it to a private developer who will use it to develop new sites for housing and employment.

If the City of New York wanted to facilitate a project like the Times Square Development Project now, it is likely that the City's plan would face intense challenges. The project would be delayed and might never come to fruition. This is in part because, in the aftermath of the Supreme Court decision in *Kelo*, legislation has been introduced and enacted which would restrict the involvement of the private sector in government projects. Challenges to condemnations on the ground that they serve a private, rather than a public purpose abound. If projects that require both private and public partnership are going to succeed in a post-*Kelo* world, as they must, municipalities must plan these initiatives in a manner that makes it abundantly clear that the projects in question have been initiated to serve the needs of the public at large, rather than a particular private party.

Urban renewal projects are the most common form of public-private partnerships which have been historically utilized across the country. The 1954 US Supreme Court decision in *Berman v Parker* 348 U.S. 26 (1954), paved the way for urban renewal across the country when the Court affirmed that the acquisition of a non-blighted property included within a generally blighted urban renewal area was a valid public purpose justifying the exercise of eminent domain. In an urban renewal context, a municipality, rather than condemning the land for a school or a public park or some other traditional public purpose, identifies a particular area as deteriorated or "blighted." More often than not, a municipality partners with private developers to eliminate the blight and develop the land for housing or commercial uses. If a particular property owner within the area refuses to sell his or her land to the designated

developer, the municipality may acquire it through eminent domain. Understandably, a developer will only invest in these blighted areas and assume the financial risk, if a municipality can deliver the land, infrastructure, and a sound and practical plan for redevelopment in a timely fashion. Since the *Kelo* decision, these types of projects are under attack, and the future of public-private partnerships is in jeopardy. This is because there is a widespread misperception that local governments, desperate for increased tax revenue, are forcing homeowners from their property in huge numbers in order to turn their property over to private developers whose sole motivation is their own financial gain. These unfortunate misperceptions are inaccurate and overlook the fact that societal benefits produced by these public-private projects greatly outweigh any incidental benefit that a private developer might receive.

Ironically, despite the backlash caused by the decision, the facts in *Kelo* are actually a good illustration of how a public-private partnership should evolve. In 1978 New London, Connecticut, established a local development agency, the New London Development Corporation (NLDC), to assist the city in revitalizing New London's depressed economy. Twenty years later Pfizer, Inc. decided to build a major research facility in the Fort Trumbull area of New London. Hoping to capitalize on the economic opportunity a major new employer offers, the city authorized NLDC, pursuant to chapters 130, 132, and 588 of the Connecticut General Statutes, to go forward with an extensive economic redevelopment plan of the Fort Trumbull area, which required the acquisition of private property. Chapter 132 declares that economic development is, by itself, a public use that justifies acquisition of private property, including acquisition by eminent domain.[1]

[1] Chapter 132 of the Connecticut General Statute -- the Municipal Development Projects Law -- declares that "economic welfare of the state depends upon the continued growth of industry and business. . . [and] that permitting and assisting municipalities to acquire and improve unified land and water areas . . .for industrial and business

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Several New London residents, whose property was being condemned under the plan, sued the city, alleging that the statute and development plan violated the takings clauses of the U.S. and Connecticut Constitutions because economic development was not a valid public use. A bench trial granted permanent injunctive relief to four of the plaintiffs, but the Connecticut Supreme Court overturned the decision and held that Chapter 132 was constitutional and that the economic development project could proceed. *Kelo v. City of New London,* 2002 Conn. Super. LEXIS 789 (Conn. Superior Court, Judicial District of New London, March 13, 2002), affirmed in part and reversed in part, 268 Conn. 1, 843 A.2d 500 (Conn. Sup. Ct. 2004).

The United States Supreme Court granted certiorari to resolve whether the city's taking was for a valid public use under the Fifth Amendment to the Federal Constitution. In June 2005, the Court upheld, by a 5-4 vote, the power of the City of New London, Connecticut to condemn private property for an economic development project. Relying heavily on the precedents set by the Court in *Hawaii Housing Authority v. Midkiff* [2] and *Berman*[3], the Supreme Court stated that courts must give legislatures broad latitude in determining public use.

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purposes. . .are public uses and purposes. . . ." Conn. Gen. Stat. § 8-186. The statute allows a municipality's legislative body to designate a development agency, which then gains specified powers through the Municipal Development Projects Law. § 8-188. The law requires that the development agency prepare a plan that "shall include: . . .(k) a statement of the number of jobs which the development agency anticipates would be created by the project . . . (l) . . .that the project will contribute to the economic welfare of the municipality and the state; and that to carry out and administer the project, public action under this section is required." § 8-189. After the plan is approved by the municipality's legislative body, the development agency may begin to acquire land, and "may, with the approval of the legislative body, and in the name of the municipality, acquire by eminent domain real property located within the project area and real property and interests therein for rights-of-way and other easements to and from the project area. . ." § 8-193. While the statute requires findings that a municipality is distressed for special financial grants, a municipality may acquire property through eminent domain for economic development without any findings of blight or findings that the municipality is distressed.

[2] 467 U.S. 229 (1967)

[3] 348 U.S. 26 (1954)

From one perspective, there was nothing new about the ruling. The Court was simply re-affirming prior case law to the effect that the Due Process Clause of the Fifth Amendment was not violated if a state condemned property for economic development purposes. As Justice Stevens emphasized, the boundaries of an acceptable public use are best determined by state and local governments, and each state was free to limit its eminent domain power. *Kelo,* 545 U.S. at 489. In *Kelo,* the Court held that the condemnation was rationally related to a valid public purpose because it was part of a carefully formulated economic development plan. *Kelo,* 545 U.S. at 483-84. While a private party may incidentally benefit, achieving the public good must be the primary intent. *Kelo*, 545 U.S. at 477-78.

But it was Justice O'Connor's dissent that created nationwide alarm and misunderstanding. She wrote that as a result of the Court's decision, "[T]he specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton." *Kelo,* 545 U.S. at 503. The public outcry in the wake of this dissent was nothing short of hysterical. Articles about eminent domain were abundant; even *Parade Magazine* and *Women's Wear Daily* ran articles about Suzette Kelo's plight. Thereafter, challenges to condemnations on the ground that a private, not public purpose, was being served, ensued, hundreds of bills that would severely restrict the government's power of eminent domain were introduced in over 40 state legislatures, and in at least 35 states, legislation was passed. Equally disturbing were the federal bills pending in Washington which would severely limit a municipality's ability to use eminent domain, or risk the loss of federal funding.

Undue restriction or outright prohibition of eminent domain for economic development purposes would limit the ability of a municipality to partner with a private developer to facilitate its plan for redevelopment. The hysteria of the moment should not be

allowed to force ill-considered action. Without eminent domain and the use of public-private partnerships, the ability to clean up blighted neighborhoods in urban areas will be severly curtailed, and municipalities will lose much of their ability to rebuild depressed areas into multi-use communities, where small businesses and middle income housing can thrive.

New York State and New York City have used eminent domain to improve neighborhoods, foster home ownership and provide affordable housing. New York has not permitted the use of eminent domain solely for economic development but has always required that there be a finding of blight. If the public purpose is the elimination of "blight," in New York, it must be shown that the project area is substandard, insanitary, deteriorated, or deteriorating (GML § 502[4]). An area may be blighted because of such factors as crime, lack of sanitation, fire hazards, traffic congestion, or pollution. *Yonkers Community Development Agency v. Morris*, 37 NY2d 478, 483 (1975). An area may also be blighted if it is economically under-developed and stagnant. *Yonkers*, 37 NY2d at 481. However, a conclusory assertion of "blight" is not sufficient. Specific facts supporting a conclusion of blight must be "spelled out." *Yonkers*, 37 NY2d at 484.

The finding of blight enabled New York City to use eminent domain as a tool to rebuild many neighborhoods that had been abandoned by private owners in the 1970s. The nationally famous Nehemiah program, which created thousands of owner-occupied units in the devastated neighborhoods of East Brooklyn, utilized eminent domain, as needed, to allow private developers to build on large tracts of land, which made development economically viable. The result of this public-private partnership was the revitalization of East Brooklyn and the transformation of hundreds of former renters into new homeowners. This is one example of a

project which would not have been possible without the use of eminent domain to support a public-private partnership.

In the wake of *Kelo,* states and cities across the country have faced many battles when trying to utilize eminent domain as a tool to facilitate projects involving public-private partnerships. The following cases serve as examples of what factors governments should consider when contemplating developments that will utilize a public-private partnership.

Rhode Island Airport Parking (Rhode Island)

Rhode Island Economic Development Corp. v. Parking Company, L.P., 892 A.2d 87 (R.I. Sup. Ct. 2006)

The Rhode Island Economic Development Corporation ("EDC") condemned a leasehold held by The Parking Company, L.P. ("TPC") pursuant to a quick-take condemnation statute, after a dispute arose regarding the profitability of a valet parking arrangement. The Rhode Island Airport Corporation ("RIAC"), a public corporation organized as a subsidiary to the EDC, wanted to end valet parking and use the garage space for daily parking to "produce a significant increase in parking revenues for both TPC and RIAC." Id. at 93. On appeal, appellants challenged the constitutionality of the quick-take provisions in G.L. 1956 § 42-64-9 and whether the taking was for a public use. Id. at 91. The court compared the facts in the case with those in *Kelo*. Id. at 104.

The court observed, "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. Although we accord deference to the findings of the condemning authority in a declaration of condemnation as well as the enabling statute upon which the taking rests, these findings are far from dispositive." Id. It concluded that the condemnation was inappropriate because it was "motivated by a desire for increased revenue and was not undertaken for a legitimate public purpose." Id. Actions taken by the EDC represented an "arbitrary and bad-faith taking of private property," which bore "little resemblance to the comprehensive and thorough economic development plan that was undertaken and upheld by the United States Supreme Court in *Kelo*." Id. at 106.

Atlantic Yards (Brooklyn, New York)

Goldstein v. Pataki, 488 F. Supp. 2d 254 (E.D.N.Y. 2007) (Appeal pending before the Second Circuit)

For decades, the Project area was identified as an area which suffered from physical deterioration and economic inactivity. It was included within the "Atlantic Terminal Urban Renewal Area" or "ATURA," an area that the City of New York first designated as blighted in the late 1960's. The part of the ATURA that falls within the Project boundaries consists chiefly of a below-grade Metropolitan Transit Authority rail yard and a depot for retired buses. As late as April 2004, the City reconfirmed, for the tenth consecutive time, the ATURA's blight designation and accompanying renewal plan. More than half of the Project site falls inside the ATURA, while the balance is made up of privately owned commercial and residential property.

In December of 2003, the Empire State Development Corporation ("ESDC"), the economic development arm of New York State, sponsored a plan for the development of the Atlantic Terminal area of Brooklyn (the "Atlantic Yards Project" or the "Project"). Memoranda of understanding concerning the Project were signed by ESDC and its private sector partner, the Forest City Ratner Companies ("FCRC"), in early 2005. The plan proposed the construction of a sports arena, over 6,000 housing units, approximately 600,000 square feet of office space, and a hotel. In order to facilitate the development, property owned by the plaintiffs would need to be acquired. Plaintiffs opposed the condemnation on the basis that the takings were not for a valid public purpose, but rather an unlawful taking of private property for a private purpose and sought judicial review of the ESDC's determination and findings in federal court. The Court dismissed the complaint on the merits, finding that the complaint failed to state a claim, because the complaint alleged public benefits from the condemnations, even though plaintiffs challenged the value of those benefits. Specifically, the Court found that a taking fails the public use requirement if the sole purpose is to benefit a private party, or the asserted purpose of the condemnation is a mere pretext. "Because plaintiffs concede that the project will create large quantities of housing and office space, as well as a sports arena, in an area that is mostly blighted," Id. at 290, the Court held that no reasonable juror could conclude "that the 'sole purpose' of the project is to confer a private benefit." Id.

Downtown Revitalization Plan (Freeport, Texas)

Western Seafood Company v. United States, et al., 202 Fed. Appx. 670 (5th Cir. 2006)

In September 2001, the City of Freeport began to develop a revitalization plan. The plan sought to create a marina to stimulate the City's economy and downtown area. The City planned to finance the marina with public money; and, the construction, ownership and operation of the marina would be carried out by Freeport Waterfront Properties ("FWP"), a private entity. The plan included a partial taking of property owned by Western Seafood Company. Western Seafood moved to prevent the City from commencing a condemnation suit. After the court denied the requested relief, Western Seafood commenced a federal action alleging that the proposed taking of its property violated the Texas Constitution and the United States Constitution. The district court granted the City's motion for summary judgment, relying on *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). Western Seafood appealed the decision and the appeal was stayed pending the *Kelo* decision. After *Kelo* was decided, on October 11, 2006, the Court of Appeals dismissed Western Seafood's federal constitutional claim, finding that the facts were analogous to those in *Kelo.* However, the Court remanded Western Seafood's claim under the Texas Constitution for reconsideration in light of the enactment of Texas Government Code §2206.001, the Limitations on Use of Eminent Domain Act, which was enacted in response to *Kelo.* The act states, in pertinent part:

> (b) A governmental or private entity may not take private property through the use of eminent domain if the taking:
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> > (1) confers a private benefit on a particular private party through the use of property;
> >
> > (2) is for a public use that is merely a pretext to confer a private benefit on a particular private party; or
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> > (3) is for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an exisiting affirmative harm on society from slum or blighted areas….

No decision has been issued on the remanded case.

Water Pipelines Project in Muskogee, Oklahoma

The Board of County Commissioners of Muskogee County v. Lowery, et al., 2006 OK 31; 136 P.3d 639 (Oklahoma Sup. Ct., 2006)

Muskogee County initiated condemnation proceedings against landowners in order to acquire temporary and permanent right-of-way easements for the installation of three water pipelines. Two of the proposed water pipelines would solely serve Energetix, a privately owned electric generation company, who planned to build a plant in Muskogee County. The County entered into a contract with Energetix which provided that Energetix would pay for the construction of the pipelines at no cost to the County if the County first succeeded in obtaining all rights-of-way needed to construct the private pipelines. In the condemnation proceedings, the landowners objected to the condemnation on the basis that the takings were not for a valid public purpose, but rather an unlawful taking of private property for a private purpose The lower court granted the condemnation petitions. The landowners appealed and the Oklahoma Court of Civil Appeals reversed. The Supreme Court of Oklahoma granted *certiorari* and affirmed the appellate court's reversal. The Court held that the construction of two pipelines that would serve and benefit only one private entity failed to satisfy the public purpose test under the Oklahoma Constitution. The Court explained that the public purpose would not be met unless and until the condition precedent of successful acquisition of land for construction of the private pipelines would be satisfied. The court wrote that "the law does not support such a cart-before-the horse type of extension of the County's general eminent domain power." Id. at 647 n. 14. While the County argued that there was a public purpose because the existence of the plant would provide jobs and tax revenue to the County, the Court held that under Oklahoma's eminent domain provisions, economic development, in the absence of blight, is not a valid public purpose.

The Hope Partnership School (Philadelphia, Pennsylvania)

A Condemnation Proceeding in Rem, 891 A.2d 820, 830-31 (Pa. Commonwealth Court. 2006).

The court ruled that the Redevelopment Authority of the City of Philadelphia could not condemn private property and turn it over to a private religious organization to build a private school. The court distinguished *Kelo* by observing that the "comprehensive economic development plan there served a public purpose and thereby

satisfied the public use requirement of the Fifth Amendment"…because it benefited the entire City of New London. Id. at 830 n. 3. "In stark contrast, the taking here resulted from a plan to acquire land with public funds for the benefit of a religious organization to build a private school; hence, it cannot satisfy the public use requirement." Id.

In light of the foregoing examples, what can a municipality do to ensure its continued use of public-private partnerships to facilitate its plans for redevelopment? As with many other things in life, timing is crucial. It is critical for a municipality to have a carefully considered plan for redevelopment prior to entering into a partnership with a private developer. The following footnote, which appeared in the *Kelo* decision, is instructive as to why timing is so important:

> [W]hile the City intends to transfer certain of the parcels to a private developer in a long-term lease -- which developer, in turn, is expected to lease the office space and so forth to other private tenants -- the identities of those private parties were not known when the plan was adopted. It is, of course, difficult to accuse the government of having taken *A*'s property to benefit the private interests of *B* when the identity of *B* was unknown.

Kelo, 545 U.S. at 478, footnote 6 (emphasis added).

In *Kelo*, the facts show that the city of New London created the New London Development Corporation in 1978, however, it was not until twenty years later that Pfizer, Inc. was identified and decided to build a major research facility in the area. I believe that this was crucial factor which lead to the court's decision. The public recognition of the need for re-development preceded the entry of the private party onto the scene. This fact precluded a finding that the development plan was just a pretext for aiding a private party by means of eminent domain.

Indeed, the majority of post-*Kelo* case law focuses on three factors – (1) the existence of a comprehensive and thorough plan which is driven by the needs of the municipality; (2) the timing surrounding when the relationship with the designation developer is established, and (3) the public gain as contrasted with the private benefits which may be realized. Projects that involve the partnership between the public and private sectors are crucial to the growth and development of a municipality. The success of these projects are dependent on careful and thoughtful planning that takes into account the factors considered by the *Kelo* Court and the concerns that led to Justice O'Connor's dissent and the public reaction to the court's decision.