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Kelo-type condemnation cases.

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Kelo's Ever-Present Threat

A CALL TO ACTION FOR LEGISLATIVE RELIEF

As two of the lawyers who successfully defeated the City of Tempe's attempt last year to condemn-and-transfer the Tempe Marketplace site to private developers, we do not take issue with the general proposition stated by our colleagues Bob Kerrick and Jeff Gross that the result in *Kelo v. City of New London*[1] should not happen in this State under the Arizona Constitution.[2] However, although the result should not happen, it has happened in Arizona, and it will happen again without legislative intervention.

The problem is that the constitutional prohibition of takings for private use has not slaked the thirst of certain condemnors and their developer partners to abuse the power of eminent domain for their own purposes in derogation of the property rights of the individual. The Arizona Constitution and the Division One Court of Appeals' opinion in *Bailey v. City of Mesa*[3] have not sent enough of a message to those who have been delegated the power to condemn.

In our view, what happened to the innocent defendants in the *Tempe Marketplace*[4] case can and will happen again unless clear and unambiguous legislation is enacted, then signed into law by the Governor, to address the very real potential of further abuse of Arizona's slum and blight statutes to foster takings for purely private uses.

When Can Public Use Become Private Profiteering?

The accompanying article accurately and ably describes the development of the law of public use in the United States and Arizona. The outlook of colonial America, perhaps forged from having successfully thrown off the chains of a powerful central government, was that private property was considered to be an inviolate individual right. "Public benefit" was not seen as synonymous with "public use." Although the concept of takings for undeniably public projects such as roads or schools (in exchange for payment of full just compensation) was accepted, condemnation for transfer of property from an individual to another private owner was another matter.

By the time of *Berman v. Parker*[5] in 1954, upholding the District of Columbia Redevelopment Act of 1945, nary a whimper of protest was raised as Justice Douglas and the United States Supreme Court rubber-stamped the broad legislative recitals in the Act, finding that the District of Columbia slums needed to be eliminated "by employing all means necessary and appropriate for the purpose."[6] The most infamous language in *Berman v. Parker* (written without benefit of any citation to authority) is as follows:

> In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital shall be beautiful as well as sanitary, *there is nothing in the Fifth Amendment that stands in the way.*[7] (emphasis added)

History demonstrates that *Berman v. Parker* opened the floodgates of expanded use of the power of eminent domain for purposes that at times were more for private benefit than public use.

In the 1984 *Hawaii Housing Authority v. Midkiff* case, mentioned in the accompanying article, the U.S. Supreme Court approved an outright seize-and-redistribute-property scheme in Hawaii on grounds simply that the legislature had concluded that the takings "will serve a public use" and that the court "must defer to its determination."[8]

Three years earlier, Michigan had approved the use of eminent domain essentially to do General Motors' bidding in *Poletown Neighborhood Council v. City of Detroit.*[9] As the dissent in *Poletown* stated:

> The evidence then is what General Motors wanted, General Motors got. The corporation conceived the project, determined the cost, allocated the financial burdens, selected the site, established the mode of financing, imposed specific deadlines for clearance of the property and taking title, and even demanded 12 years of tax concessions.[10] (footnote omitted)

The human cost of using the power of eminent domain for economic development is set forth in the accompanying article:

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Thousands of people's homes and successful small businesses were wiped out with a stroke of the legislative pen, and the Michigan Supreme Court did nothing to stop it. The wisdom of the dissenting position was acknowledged 23 years later, in 2004, when the Supreme Court of Michigan reversed *Poletown* while concluding that condemnation powers could not be used constitutionally to condemn existing businesses for the construction of a 1,300-acre business and technology park that would generate more tax revenue than the existing uses.[11]

Then along came *Kelo* to set takings law back to the 1980s.

Condemnors and developers who cooperate with them are now poised once again to take control of private property rights. Under *Kelo*, there are virtually *no* constraints on taking private property. If *Kelo's* "public benefit equals public use" arguments prevail in Arizona, there are few if any defenses left to takings in our state. Justice O'Connor noted these problems caused by *Kelo* in her dissent:

> Any property may now be taken for benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from these with fewer resources to those with more. The Founders cannot have intended this perverse result.[12]

Loopholes in the Arizona Constitution

Are we as sanguine as our colleagues with the conclusion that the first nine words of the Arizona Constitution's Article 2, Section 17 ("Private property shall not be taken for private use …"), and the intermediate appellate court decision in *Bailey v. City of Mesa* forever cure the problem? We are not.

The reasons we do not rest so easy are based in Arizona case law and the historic actions of condemnors taken in spite of the seemingly clear dictates of our Constitution. They also are based on the misuse of "slum and blight" legislation to foster takings purely for economic development reasons.

Article 2, Section 17 does provide that the question of whether a contemplated use is really public should be a judicial rather than a legislative question, supposedly without regard to any legislative assertion that the use is public. However, as early as 1891, the Arizona Supreme Court recognized that "all condemnation acts are predicated on the proposition that private ownership must yield to public necessity" and that public necessity means simply "public convenience and advantage."[13]

The opinion in *City of Phoenix v. Phoenix Civic Auditorium and Convention Center Association, Inc.*[14] upheld the validity of a financing agreement for construction of the Phoenix Civic Center in the mid-1960s. In that case, the Arizona Supreme Court cited authority with approval that the general purpose of all municipalities is "to promote the general welfare and happiness of the people."[15] Not surprisingly, when the takings bar is set at proof of "making someone happy," the individual property owner's rights begin to be left in the dust.

Later, in 1983, the Arizona Supreme Court reversed the trial court's refusal to grant a taking in a condemnation case involving a redevelopment project. In allowing the redevelopment project to move forward, the high court found that the trial judge erred "in finding that the subject property was not part of a slum or blighted area in the face of the City's adoption of a resolution to the contrary."[16] There, the Court conflated the issue of "public use" with "necessity" and (consistent with the *Berman v. Parker* mantra of unquestioned allegiance to legislative findings) found that the question of necessity "is essentially legislative in nature and that a legislative declaration of necessity should be given weight."[17] The Court stated, "[W]e believe that the nature of the determination is better suited to legislative than judicial resolution."[18]

The problem is this: Curing true "slum and blight" is considered to be a public purpose, and the findings that a property or an entire neighborhood is supposedly afflicted with "slum or blight" is a legislative determination, arguably ending judicial inquiry. Thus, despite Article 2, Section 17, Randy Bailey had every reason to be concerned when, in 1999, at the behest of a nearby Ace Hardware store owner, Mesa passed a resolution expanding the boundaries of its redevelopment project to take Bailey's Brake Shop so that it could be turned over to the Ace Hardware developer after Mr. Bailey had refused to sell out to him. Likewise, the *Tempe Marketplace* defendants faced the fight of their lives over whether their neighborhood was a "slum," while the true nature of the taking for purely economic development purposes was minimized by the City.

The fairness and correctness of the result in *Bailey v. City of Mesa*, especially in light of Article 2, Section 17, seems to be beyond question. Yet that provision did not stop Mesa from trying to condemn Mr. Bailey's property and business to turn it over to another private user. It did not stop the trial judge from approving the taking for that purpose. Only the Court of Appeals' acceptance of special action jurisdiction and Judge John C. Gemmill's opinion stopped the bulldozers from leveling Bailey's Brake Shop.

Bailey v. City of Mesa set forth a list of factors that may be considered in evaluating the private or public character of the intended use of the property being condemned. The opinion has been roundly attacked by condemnors and the powerful and well-funded lobbying groups and associations that support them.

Our colleagues characterize the *Bailey* balancing test as "inherently weighted against a finding of public use." Another view might be that it is "inherently weighted toward an even-handed application of Article 2, Section 17 of the Constitution." In any event, because Mesa did not seek review by the Arizona Supreme Court, the opinion remains subject to attack, and is regularly attacked by condemnors who characterize it as an aberration that is inconsistent with decades of Arizona public use jurisprudence (much of which is cited above). The condemnors scream out for its reversal by the Arizona Supreme Court at the earliest opportunity.

In fact, just such an attack was undertaken by the City of Tempe in filing a special action petition directly with the Arizona Supreme Court late last year, after the *Tempe Marketplace* trial judge struck down the City's right to take under the *Bailey* fac-

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tors. *Kelo* formed the basis of the City's attempt to have *Bailey* overruled.

The City stridently argued that "public benefit" was the same as "public use"—a premise that forms the basis of the *Kelo* holding. The City argued that the "public benefits" accruing from the Tempe Marketplace project included fiscal and economic benefits, creation of more jobs, environmental remediation, construction of public infrastructure, correction of historic fire safety and emergency access problems, and passing the costs of providing such public benefits to developers in exchange for giving them the land that had been condemned. The City then argued that *Kelo* and the prior Arizona cases stood for the proposition that public benefits alone could fulfill public use requirements, and that the benefits inherent in the Tempe Marketplace mall project overwhelmingly evidenced that the takings were for a public use.

Consequently, the "public benefit" authority of *Kelo* lives on in Arizona today. Condemnors may only utilize the power of eminent domain for a statutorily enumerated purpose, and "slum and blight" is the currently popular vehicle for mass takings. The *Tempe Marketplace* trial judge ruled the slum-like conditions in certain of the condemned properties could have been rectified by the City's enforcement of its own health and safety codes, rather than by the forced taking of 120 acres and dozens of businesses for the mall.

Absent clearer law, condemnors will likely continue to try to condemn if they can create any "public benefits," regardless of whether the takings are statutorily authorized, and *Kelo* will be cited as authority. Arizona condemnors will press to have the same limited review and deference accorded to their decisions to condemn-and-retransfer to another private entity, as where property is transferred to a public body for a school, road or fire station.

For this reason, Arizona property owners

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cannot rest peacefully in comfort that the *Kelo* result cannot happen here. Numerous motivations drive condemnors and developers friendly with those governmental entities to take private property for private purposes.

First, as in *Tempe Marketplace*, taking small, individual and often industrial parcels for their "market value" is gross undercompensation because it is the developer and only the developer that will reap the profits gained from assembling the properties into a larger, more viable use, a process that can only be accomplished by either paying the property owner the property's assemblage value (which the developer does not want to do), or unfairly using the power of eminent domain under the guise of "slum and blight redevelopment" so that the developer and its condemnor partner reap that benefit.

Second, as has been noted by commentator Thomas Merrill,[19] there is a built-in constraint on the use of eminent domain power when it is confined to truly governmental projects, which is the public's willingness to pay taxes to fund the condemnations. However, once condemnation-and-retransfer is allowed, funded by assessments imposed on the transferees by way of confiscation of their assemblage value and additional private funds invested by the developer, eminent domain becomes an "off budget" form of governmental interference with markets that has no built-in constraint, leading to unchecked proliferation of that power.

The Need for Legislation

What the filing of the complaints in the *Tempe Marketplace* cases shows is that, at least in the minds of certain condemnors, there are so few real constraints on condemnation-and-retransfer in Arizona that they can dare small property owners to challenge the taking by retaining counsel and engaging in complex, lengthy and very expensive litigation. When weighed against the tremendous upside of assemblage profit to be made on the backs of those individual owners, and the fact that many Arizona cases still recite the "deferral to legislative findings" drumbeat of the federal cases, it is clear that statutory protection for the individual property owner is required.

House Bill 2675 was passed earlier this year to address these abuses. Predictably, it was vigorously opposed by the Arizona League of Cities and Towns and tax-funded condemnors. The bulk of the bill hardly contained provisions that would lead to "unintended and unforeseeable consequences"; rather, the statute basically codified common-sense principles that most Arizonans would find to be only fair. Among other things, the bill:

- Tightened the definition of "slum condition" to apply only to legitimately dilapidated and deteriorated buildings or those that are beyond repair[20]
- Required a determination that existing slum conditions could not be corrected by regulatory processes or the ordinary operations of private enterprise, to avoid the problem of deliberate, planned and systematic enforcement neglect (used to create or accelerate a slum for the condemnor's benefit)[21]
- Provided that "the fundamental purpose of any slum clearance project is to protect the physical health and safety of all citizens and not economic development"[22]
- Provided that the question of whether condemnation is necessary is a judicial question to be determined without regard to any legislative assertion (just as public use already is)[23]
- Provided that the showing of a slum condition must be made on a property-by-property basis, and that the existence of slum conditions cannot be presumed for an entire slum area[24]
- Stated unambiguously: "Notwithstanding any other law, this State or any political subdivision of this State may not use eminent domain to take private property for economic development."[25]

Again, if property owners had little to worry about concerning the obvious correctness of such propositions under current Arizona law, why did the condemnor community essentially become unglued over this bill? Why did they successfully lobby Governor Napolitano to veto it? Why did the same forces bring suit in an attempt to strike a similar proposition from the ballot for a public vote?

Conclusion

H.B. 2675 may have had other flaws, and it may have gone too far in certain procedural respects, but it accurately stated the will of the people to codify constraints on abuse of the eminent domain power for the transferring of one individual's property to another private party. For more than 90 years, virtually every level of government has shown a propensity to ignore the clear words of Article 2, Section 17. Until the Arizona Supreme Court conclusively addresses the issue, *Bailey v. City of Mesa* remains tenuous, at least in the minds of certain condemnors. Economic reality dictates that the condemnors' bulldozers will roll even when the correct legal analysis is that they should not, because most property owners cannot afford to oppose such large-scale takings.

We would like to share our colleagues' confidence that the "public backlash from *Kelo* and support for the result in *Bailey* have added a psychological barrier to the use of eminent domain by municipalities except in pure cases of public use," but we cannot. All the recent condemnor lobbying successes have done is fuel the resolve of private property rights advocates to draft as strong a protective measures as possible. Rather than adversarially working behind the scenes to promote vetoes and cut off the public's voice at the ballot box, all interested parties should work together to craft appropriate legislation, and have it enacted, to resolve these issues in Arizona. AZ AT

endnotes

1. 125 S. Ct. 2655 (2005).
2. "Private property shall not be taken for private use … ." ARIZ. CONST. art. II, § 17.
3. 76 P.3d 898 (Ariz. Ct. App. 2003).
4. *City of Tempe v. Valentine, et al.*, Maricopa County Superior Court, No. CV 05-003754 (Consolidated).
5. 348 U.S. 26 (1954).
6. *Id.* at 28.
7. *Id.* at 33.
8. 467 U.S. 229, 244 (1984).
9. 304 N.W.2d 455 (Mich. 1981).
10. *Id.* at 470.
11. *County of Wayne v. Hancock*, 684 N.W.2d

765 (Mich. 2004).
12. *Kelo v. City of New London*, 125 S. Ct. at 2677 (2005).
13. *Oury v. Goodwin*, 26 P. 376, 382 (Ariz. 1981).
14. 408 P.2d 818 (Ariz. 1965).
15. *Id*. at 822 (citing *City and County of Denver v. Hallett*, 83 P. 1066 (Colo. 1905)).
16. *City of Phoenix v. Superior Court*, 671 P.2d 387, 388 (Ariz. 1983).
17. *Id*. at 389.
18. *Id*. at 390.
19. Thomas Merrill, *The Condemn and Retransfer Problem* (draft)(2005), *cited in* James Burling, Pacific Legal Foundation, ALI–ABA Program on Eminent Domain and Land Value Litigation (2006).
20. H.B. 2675, 47th Leg., 2d Reg. Sess. (Ariz. 2006) (amending A.R.S. § 36-1471(20) (2003)).
21. *Id*. (amending A.R.S. § 36-1471(16) (2003)).
22. *Id*. (amending A.R.S. § 36-1472(5) (2003)).
23. *Id*. (amending A.R.S. § 36-1472(6) (2003)).
24. *Id*. (amending A.R.S. § 36-1478(C), (E) (2003)).
25. *Id*. (amending A.R.S. § 36-1478(F), (2003)).