E M I N E N T

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SUBMITTED: Arizona is safe from

Should *Kelo* Be Condemned?

ARIZONA'S EXPERIENCE WITH THE PUBLIC USE REQUIREMENT

IN *Kelo v. City of New London*[1] the United States Supreme Court upheld a very broad use of the power of eminent domain to permit the City of New London to condemn Susette Kelo's home for what it considered to be an economically necessary redevelopment. The Court's decision has created more public interest and outrage than perhaps any other eminent domain case in U.S. history. By one count, as of April 2006, legislatures in 47 states had introduced 325 bills in its controversial wake.[2] The Arizona legislature followed suit, and even sent a bill to the Governor placing severe restrictions on certain uses of the power of eminent domain, including prohibiting its use for economic development.[3]

Kelo, of course, was decided under the Fifth Amendment to the United States Constitution. Does the public in Arizona, or our legislature, truly have cause for concern that *Kelo* would open the door to rampant condemnation of private property for shopping malls, office buildings or other arguably "private" use? That is the question this article attempts to answer.

The History of the Federal Public Use Requirement

Credit for first using the term "eminent domain" usually is attributed to Hugo Grotius. In 1625, Grotius wrote, "The property of subjects is under the eminent domain of the state, so that the state or he who acts for it may use and even … destroy such property … for the ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way."[4]

Since the time of the Greeks and Romans, governments have taken private property for the greater public good for roads, aqueducts, temples or public buildings. Through Roman occupation, the concept became part of the English common law, although not a very favorable one. In fact, the Magna Carta included a prohibition against a freeman's property being disseized "save by the lawful judgment of his peers or by the law of the land," language that rings of due process.

In self-sufficient colonial America, private property often was seen as an inviolate individual right. After the United States broke from England, the taking of property by the government was debated but ultimately assumed to be an inherent attribute of government. However, the government's role was to preserve property rights.[5] Indeed, the Fifth Amendment does not grant the power of eminent domain, but instead limits its exercise: "No person shall … be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Until the late 19th century, eminent domain was a relatively little-used governmental power. Social forces in the late 1800s and early 1900s soon changed that.

Railroads needed to lay tracks over large areas and could not negotiate quickly enough with the many landowners in their way. Wartime demanded facilities and materials. The increasing use of the automobile created a need for a national network of roads and highways. The Depression gave us the New Deal and an expanded notion of the function of government. Immigration and industrialization also brought people to cities, which were ill equipped to house them. The U.S. population increased from a largely rural-based five million at the beginning of the 19th Century to 76 million in 1900, 40 percent of whom lived in cities. Zoning laws came too late, and local governments found themselves with expanding tenements, inadequate infrastructure and decaying buildings.

As the country expanded, so did the concept of "public use." Rather than focusing on the nature of the use itself, in the 19th century courts began analyzing the public benefit of the proposed use. By the 20th century, courts largely were equating "public use" with "public purpose." The need to redress the urban ills laid the groundwork for the first battle over whether redevelopment formed the "public purpose" necessary to be considered a "public use."

In 1950, a federal agency declared a portion of the District of Columbia to be blighted slum and condemned property within it for a redevelopment project that was to be managed by a private, not public, entity. One of the condemned parcels was owned by Mr. Berman, who operated a

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department store that was not blighted. Mr. Berman challenged the condemnation, arguing that redevelopment was not a public use.

In *Berman v. Parker*,[6] the United States Supreme Court disagreed and gave almost unlimited discretion to local governments to determine whether the use was public. Instead of looking to the character of the end use, the Court turned its attention to whether the legislative body could legitimately have found that the condemnation served a "public purpose." As the Court wrote, "Once the question of public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."[7]

After *Berman*, local governments increasingly turned to eminent domain for redevelopment projects, and they were met with little judicial resistance. In *Hawaii Housing Authority v. Midkiff*,[8] the Court upheld a law condemning private property to redistribute it directly into other private hands, based solely on the desire to break up large land holdings.[9] In Michigan, after General Motors threatened to close its plant and eliminate 6,000 jobs, the City of Detroit passed a resolution condemning 465 acres of land, which ultimately would displace 4,200 people, 1,300 homes, 140 businesses, six churches and a hospital.[10] In *Poletown Neighborhood Council v. City of Detroit*,[11] the Michigan Supreme Court upheld this exercise of the eminent domain power, finding that the public use requirement was met because the condemnation accomplished an essential public purpose of alleviating unemployment and revitalizing the economic base of the community.

The *Kelo* Firestorm

This history brings us to *Kelo*. Susette Kelo had renovated a 19th-century home in a historic residential area of New London, Connecticut, known as Fort Trumbull. Her home, and the homes of several other longtime residents, were condemned to make way for an expansion of a Pfizer pharmaceutical plant and an associated commercial development. According to the City of New London, the redevelopment was necessary to bring jobs and economic vitality to a crumbling area.

Over blistering dissents by Justice O'Connor and Justice Thomas, the 5–4 majority held that New London could condemn Ms. Kelo's property for private redevelopment because the proposed use of eminent domain served a public purpose. In a rather straightforward application of *Berman* and *Midkiff*, the Court noted that local legislatures have broad latitude to determine whether a proposed use of land serves a public purpose, and that redevelopment is one such legitimate public purpose.

The majority, however, explicitly noted that this was not a case in which a city transferred citizen A's property to citizen B for the sole reason that citizen B would put the property to more productive use, and the Court conceded that "such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot."[12]

Kelo generated an intense negative public reaction around the country, including Arizona. In the 2006 Arizona legislative session, no fewer than 15 bills were introduced to control or prohibit the use of eminent domain for economic development.[13] Only one of these bills made it the Governor, who vetoed it. Which brings us to the question of whether our legislature's reaction (or overreaction) to *Kelo* was justified.

Arizona's Treatment of the Public Use Requirement

Like the United States Constitution, the Arizona Constitution imposes limitations on the power of eminent domain. However, our state constitution, drafted by populist founders wary of government power, is more explicit and restrictive: "Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes."[14]

The Arizona Constitution also differs in the approach, adopted judicially by the Court in *Berman*, in the discretion accorded to the legislative finding of public use. The Constitution provides, "Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."[15]

In other words, the legislature may say the use is public, and it may even *appear* to be public, but it is up to a court to determine whether the use is "really" public. Territorial courts had followed the "public use = public benefit" formula that was then becoming judicial fashion.[16] As late as 1972, the Arizona Supreme Court suggested that Arizona had rejected a narrow view of public use and cited, with a qualified endorsement, the approach that "Public use is considered public benefit."[17] However, the Court recognized that Arizona did not go as far as some state courts in defining public use as public benefit, and it sidestepped the issue by holding that each case must be decided on its own facts.

The first high-profile case directly testing the boundaries of Arizona's public use clause in the context of economic development occurred in *Bailey v. City of Mesa*,[18] when the City of Mesa condemned Bailey's Brake Shop as part of a redevelopment project. Mesa intended to aggregate Mr. Bailey's property with other parcels for a new Ace Hardware store.

The Court of Appeals rejected at the outset any precedential value of *Berman* and *Midkiff* based on the difference between the state and federal constitutions. The court also implicitly rejected the notion that public use was proven by demonstration of a public benefit. On the other hand, the court also refused to adopt a "bright-line" rule that the public use clause is violated by the mere fact that the condemned property will ultimately be conveyed to a private party. Instead, the court created a balancing test for redevelopment projects, which was inherently weighted against a finding of public use:

> [W]hen a proposed taking for a redevelopment project will result in private commercial ownership and operation, the Arizona Constitution requires that the anticipated public benefits must substantially outweigh the private character of the end use so that it may truly be said that the taking is for a use that is "really public."[19]

To determine whether the public benefits substantially predominate over the private nature of the use, the court posited a

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litany of questions to be answered for each condemnation for redevelopment purposes. Although the court suggested that the 18-item list was not exhaustive, it was certainly thorough:

- For what purpose or purposes will the property be used?
- Will title to the property be held by a public entity?
- If one or more private parties will own or lease the property, will the property be used for private profit, nonprofit or public purposes?
- Will the end use of the property provide needed public services?
- What degree of control will the condemning authority retain over the use of the property?
- What are the anticipated public uses or benefits?
- What is the ratio of public to private funds to be expended for the redevelopment?
- Will the community as a whole benefit or only a few of its members?
- Who stands to gain most by the taking—private parties or the public?
- Are private developers the driving force behind the redevelopment project?
- Is profit the overriding motivation?
- Are there public health or safety issues involved?
- Is there a true slum or blight to be removed?
- Is the property to be taken unique?
- To what extent, if any, will the proposed taking result in loss, detriment or harm to members of the community?
- How necessary is the property to the achievement of the public purposes?
- Do the anticipated public purposes or benefits outweigh the private purposes or benefits of taking the property?
- Has the protection afforded private-property owners under Article 2, Section 17 been fully considered?

After posing these questions, the court concluded that Mesa had not met its burden of showing that the proposed redevelopment, which would put Mr. Bailey's property in the hands of another private property owner for a different commercial use, was a "public use." The City of Mesa did not seek review by the Arizona Supreme Court.

When placed in context of the issue these questions were intended to address—do the public benefits from a proposed redevelopment project substantially outweigh the private character of the end use—the 18-factor *Bailey* test creates a *de facto* presumption that economic redevelopment is not a public use. Unless future redevelopment projects are dramatically restructured, it will be almost impossible to answer most of the questions on the side of finding a public use. For example, title typically will end up being held by a private entity, the property generally will be used for profit purposes and the taking usually will not be directly necessary for the public safety or health.

Bailey Applied

In the one application of *Bailey*, this was the final result. In *Tempe v. Valentine*,[20] Judge Kenneth L. Fields considered 19 consolidated condemnation complaints filed by the City of Tempe to condemn largely industrial land near the northwest corner of the Loop 101 and Loop 202 highways for redevelopment. Tempe intended to replace the existing industrial uses with a retail development known as Tempe Marketplace.

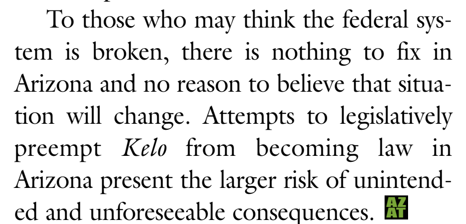
The area, located on an old landfill, was experiencing release of methane gas and soil subsidence, which caused buildings to become dilapidated. In addition, the area had contaminated soils and a general lack of infrastructure, including roads, fire hydrants and water lines.

The trial court found that these conditions could threaten life and property. Nevertheless, after applying the *Bailey* factors, the trial court found that the public safety concerns could "readily be addressed by exercise of the police powers without resort to taking private property.[21] Therefore, the trial court ruled that the public benefits from the taking did not substantially outweigh the private nature of redevelopment for a retail shopping center.

Tempe filed a special action petition asking the Arizona Supreme Court to overrule *Bailey*, but the court declined to accept the invitation. Had the court disagreed with *Bailey*, the Tempe Marketplace case presented a perfect platform for overruling it. Thus, by default, *Bailey* appears to be the law in Arizona. *Kelo* is not.

Arizona property rights advocates who believe *Kelo* is bad law and should be legislatively overruled have little to worry about in Arizona. The more restrictive Arizona Constitution has been interpreted to make use of eminent domain for economic development difficult, if not impossible. In addition, 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, such as roads or public facilities.[22]

To those who may think the federal system is broken, there is nothing to fix in Arizona and no reason to believe that situation will change. Attempts to legislatively preempt *Kelo* from becoming law in Arizona present the larger risk of unintended and unforeseeable consequences.



endnotes

1. 125 S. Ct. 2655 (2005).
2. Elizabeth Mehren, *States Scramble To Deflect Eminent Domain Ruling,* L.A. TIMES, April 16, 2006, at A1.
3. The Governor vetoed the bill, citing its dire and potential unintended consequences.
4. Hugo Grotius, *De Jure Belli et Pacis*, in PROPERTY RIGHTS AND EMINENT DOMAIN 94-95 (Ellen Frankel Paul ed., 1987).
5. *See, e.g., Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 , 311 (1795).
6. 348 U.S. 26 (1954).
7. *Id.* at 36.
8. 467 U.S. 229 (1984).
9. The Court in *Midkiff* found the crucial underlying fact to be that 96 percent of land in Hawaii was in the hands of the government or 72 private landowners, an "oligopoly" that inflated land prices. *Id.* at 233. The *Midkiff* opinion was written by Justice O'Connor, who later severely criticized the *Kelo* majority for approving the transfer of land from one private property owner to another "so long as the new use is predicted to generate some secondary benefit for the public," which is difficult to distinguish from the rationale of the *Midkiff* holding. *Kelo,* 125 S. Ct. at 2675.
10. The City of Detroit paid more than $200 million for the property and sold it to GM for $6.5 million. *Poletown* was overruled by *County of Wayne v. Hancock*, 684 N.W.2d

765 (Mich. 2004).

11. 304 N.W.2d 455 (Mich. 1981).
12. 125 S. Ct. at 2666-2667.
13. For example, one bill would have made public use a jury question; another would have created a presumption that the proposed use was not public and forced the government to present clear and convincing evidence that the use was public.
14. ARIZ. CONST. art. 2, § 17.
15. *Id*.
16. The territorial court in *Oury v. Goodwin*, 26 P. 376 (Ariz. 1981), considered whether a irrigation was a "public use" under territorial law and held that it was, because it conveyed a public benefit.
17. *Citizens Utils. Water Co. v. Superior Court*, 497 P.2d 55, 57 (Ariz. 1972), *quoting* 2A NICHOLS ON EMINENT DOMAIN, at 7-30.
18. 76 P.3d 898 (Ariz. Ct. App. 2003).
19. *Id*. at 904.
20. No. CV 05-003754 (Maricopa County Superior Court) (Consolidated).
21. Minute Entry, Sept. 12, 2005 at 31.
22. In another trial court case, *City of Tempe v. Pillow*¸ No. CV 02-092521 (Maricopa County Superior Court), an action for condemnation of private property for redevelopment was dismissed by the City after *Bailey* was decided.