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Rebuttal

Our colleagues in the condemnation bar raise some valid points—in theory. However, we respectfully disagree with their premise that legislative action must be taken because no present legal impediment exists to prevent the *Kelo* doctrine from being adopted by Arizona courts. There is no convincing evidence of any such risk:

- In 140 years of published Arizona cases,¹ the purported “loophole” in the Arizona Constitution that our colleagues fear has never been exploited. Although our Supreme Court has recognized since territorial days that “public benefit” is a factor that can support the exercise of the power of eminent domain, there is no Arizona precedent that supports a broad *Kelo*-type test. In the only published Arizona case directly addressing the

issue, the court in *Bailey* rejected it.

- In *Tempe Marketplace*, the City of Tempe filed a special action asking the Arizona Supreme Court to overrule *Bailey*, but the court declined to accept jurisdiction. There is no reason to believe that the *Bailey* test, which our colleagues agree applies the public use requirement in an even-handed, non-*Kelo* manner, is in danger of being overturned.
- Even if the cities of Tempe and Mesa had misused their eminent domain power in filing the *Bailey* and *Tempe Marketplace* cases,² the existing system worked. In neither case was the government permitted to take private property. In *Tempe Marketplace*, all of the aggrieved property owners ulti-



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mately sold their property to the city at a negotiated price, and Mr. Bailey was reimbursed for his attorneys' fees.³

- *Bailey* is no anomaly. State courts continue to isolate *Kelo* and apply state public use standards that are more protective of private property rights than the federal constitution. The Michigan Supreme Court overruled its prior unfortunate decision in *Poletown*. The Ohio Supreme Court recently rejected the “economic benefit = public use” test in a similar redevelopment context.⁴

Given these unchallenged facts, we believe the public and our legislature have overreacted to *Kelo*. The legislation our colleagues advocate would bar the use of eminent domain for what historically has been, and will continue to be, legitimate and necessary redevelopment projects. Only if an area were in an unalterable “slum condition” could condemnation be invoked.

Anyone who remembers the condition of downtowns in Phoenix, Tempe, Glendale, Scottsdale or many other cities in the 1970s and 1980s would agree that redevelopment offers valid public benefits. Were all of those areas “slums” under the restrictive definition of that term in legislation proposed in *Kelo*'s wake? Certainly not. Without the ultimate hammer of condemnation, most if not all of these worthwhile redevelopment projects simply would not have occurred.⁵

Unless our courts either reject *Bailey* or bastardize its test, handcuffing local authorities to anticipate a problem that does not exist could take away what may be government's most crucial redevelopment tool.

Where is the public benefit in that? 

endnotes

1. *Davis v. Simmons*, 25 P. 535 (Ariz. 1866), was the first reported Arizona decision.
2. As attorneys primarily representing property owners, we are as concerned as our colleagues about protection of private property rights and the possible abuse of the power of eminent domain. However, the question of whether the cities abused their power in these cases is complex and goes far beyond the scope of this article. The point is that in both cases the courts prevented the potential mischief our colleagues envision.
3. A.R.S. § 12-1129(B)(1) requires the court to award attorneys' fees if “the final judgment is that the plaintiff cannot acquire the real property by condemnation.” The statute also prohibits the unsuccessful condemnor from instituting another condemnation proceeding against the same property for the same or related project for two years.
4. *City of Norwood v. Horney*, 2006 Ohio 3799, 2006 Ohio LEXIS 2170 (2006).
5. For example, in connection with the redevelopment of downtown Tempe, which dramatically transformed the area into a vibrant business community, the condemnation cases encompassed approximately 130 parcels of land. According to Brad Woodford, the Assistant City Attorney at the time, the redevelopment could not have occurred without the power of condemnation.