

Takings of Private Property for Private Redevelopment

Are They A Constitutionally Valid "Public Use"

by Daniel J. Klau

Whether the government can constitutionally condemn private property and transfer ownership, not to itself, but to another private entity, has long been a controversial issue. *Kelo v. City of New London*, 268 Conn. 1 (2004), offered the Connecticut Supreme Court the first opportunity in 35 years to consider the question, under both the United States and the Connecticut constitutions.

The case arose from a major development project in the Fort Trumbull area of New London, adjacent to a large research facility being developed by Pfizer, Inc. In November 2000, the New London Development Corporation — a private company to whom the City had delegated its eminent domain powers — initiated condemnation proceedings to acquire property in the Fort Trumbull area as part of the development project. The development corporation intended to use the property for, among other things, a waterfront hotel and conference center, marinas, commercial office space, retail facilities, residences, and a public walkway. The corporation's stated goal was to "create a development that would complement the facility that Pfizer was intending to build, create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront, and eventually "build momentum" for the revitalization of the rest of the city, including its downtown area."

The plaintiffs — owners of property on two of the parcels that the development corporation wanted to condemn — sought to enjoin the takings as, among other things, an unconstitutional exercise of the eminent domain power.

The trial court rejected the constitutional challenge to the taking in general, but granted the plaintiffs' request for

injunctive relief with respect to one of the two parcels of land, concluding that the defendants had not established that taking that particular parcel was reasonably necessary to accomplish the development plan. An appeal and cross-appeal followed.

On appeal, the Supreme Court concluded that the takings passed federal and state constitutional muster with respect to all of the parcels of land at issue. Writing for the Court (the case split 4-3), Justice Norcott first reviewed the state constitutional precedents, observing that the Court had long taken "a flexible approach to the construction of the Connecticut public use clause." As early as 1866, in *Olmstead v. Camp*, 33 Conn. 532, the Court had recognized that a "public use" could mean anything of "public usefulness, utility or advantage, or what is productive of general benefit. . . ." Similarly, the Court observed that the federal precedents supported "broad treatment to the federal public use clause," further noting that the broad approach to the clause "reached its zenith in 1984" in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 239-40 (1984). In that case, the United States Supreme Court considered the constitutionality of legislation addressing economic problems created by highly over-concentrated land ownership in Hawaii, which was a vestige of the feudal land tenure system of the original Polynesian settlers. The legislation provided for the condemnation of residential tracts of land, which would then be sold to the tenants residing there, or to other prospective purchasers. The Supreme Court concluded, with "no trouble," that the legislation was a constitutional exercise of Hawaii's police powers and that the "public use" requirement for takings was "coterminous with the scope of a sovereign's police powers." The Supreme Court elaborated further that, "[w]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, [this] Court has never held a compensated taking to be proscribed by the Public Use Clause."

Given this broad constitutional standard for determining whether a taking is for a "public use," the Connecticut

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Supreme Court concluded that, in general, “an economic development plan that the appropriate legislative authority rationally has determined will promote significant municipal economic development constitutes a valid public use for the exercise of the eminent domain power under both the federal and Connecticut constitutions.”

In so concluding, the Court addressed a line of cases from other states, most notably *Southwestern Illinois Development Authority v. National City Environmental, LLC*, 199 Ill.2d 225, 768 N.E.2d 1 (2002), which, the plaintiffs argued, held that economic development projects do not, by themselves, constitute a public use. The Court, however, “disagree[d] with the plaintiffs’ contention that, the *Southwestern Illinois Development Authority* stands for the proposition that economic development is never a constitutionally valid public use.” (Emphasis added). Rather, the Court concluded that the case simply represented an instance in which the particular development project at issue did not constitute a public use.

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The Court turned next to the plaintiffs’ argument that, even if private economic development could constitute a valid public use in general, “the condemnations at issue in the present case do not serve that purpose because . . . the effects of those condemnations primarily will benefit private entities” and that any public benefit would be “incidental and insignificant.” Invoking a credible “slippery slope” argument, the plaintiffs asserted that if the “generation of greater tax revenues alone becomes a sufficient basis for condemnations in Connecticut, then Connecticut homeowners will lack any constitutional protection against eminent domain. Any home will be up for grabs to any private business that wants the property.”

In resolving this issue, the Court articulated the following legal standard: “We conclude that an exercise of the eminent domain power would be an unreasonable violation of the public use clause if the facts and circumstances of the particular case reveal that the taking was primarily intended to benefit a private party, rather than primarily to benefit the public.” Applying

this test, the Court concluded that the evidence supported the trial court’s findings that the takings were not primarily intended to benefit Pfizer, a private party. The Court emphasized, however, that its decision “was not a license for the unchecked use of the eminent domain power as a tax revenue raising measure; rather, our holding is that rationally considered municipal economic development projects such as the development plan in the present case pass constitutional muster.”

Finally, the plaintiffs also argued that the taking of their properties was unconstitutional because it was not supported by “reasonable assurances of future public use.” The Court’s resolution of this argument marked a point of significant disagreement for the three dissenting justices — Zarella, Sullivan and Katz. Applying a clearly erroneous standard of review, the majority held that the evidence supported the trial court’s conclusion that there were “sufficient statutory and contractual constraints in place to assure that private sector participants [would] adhere to the provisions of the development plan.”

By contrast, the dissenting justices argued that a proper analysis of the issue “must focus not only on the possible statutory, contractual and planning constraints that would ensure a public use, but also on the *temporal* question of whether there is any reasonable prospect that, the expected development will, *in fact*, occur.” (Emphasis in original.) They further argued that the standard of proof applicable to this question was a clear and convincing evidence standard. Reviewing the record in light of this heightened standard, the dissenting justices concluded that the evidence did not support a finding that the takings would actually lead to implementation of the private development plan.

The Court’s decision in *Kelo v. City of New London* clears the way for a major redevelopment project in one of Connecticut’s most economically distressed cities. While courts across the country will look to *Kelo* for constitutional guidance when similar takings cases come before them, history will likely judge the *Kelo* decision by the success of that redevelopment effort, rather than by its legal reasoning.

Prosecutorial Misconduct Held Harmless Error

by Richard F. Wareing

In *State v. Peeler*, 267 Conn. 611 (2004), the latest (but probably not the last) in a series of cases addressing the question of prosecutorial misconduct, the Supreme Court held an improper statement in closing argument was harmless error and affirmed the conviction of Adrian Peeler for conspiracy to commit murder in the death of seven year old Leroy Brown, Jr. and his mother, Karen Clarke.

On appeal, Peeler raised a number of arguments, all of which were ultimately rejected. Included by Peeler was a claim that the State's Attorney made numerous improper statements to the jury. After rejecting Peeler's other arguments, the Court turned to his claim that the State's summation: (i) improperly commented on Peeler's post-arrest silence; (ii) improperly suggested that Peeler posed a threat to Josephine Lee, the State's star witness; and (iii) improperly argued that Peeler would have killed Lee as well, had he not run out of ammunition.

The court began by noting that the duty of a prosecutor goes beyond zealous advocacy, and also includes an obligation to ensure that a criminal trial is conducted in a fundamentally fair manner, according to the well-established principles of law which govern such proceedings. The court also noted, however, that, although a prosecutor is so charged, the prosecutor must nevertheless "argue the state's case forcefully" and that, "[t]he occasional use of rhetorical devices is simply fair argument"

Turning to Peeler's arguments, the court first held that the state's attorney had not impermissibly suggested that Peeler's post-arrest silence was evidence of his guilt. Examining the facts, the Court instead concluded that the prosecutor's reference to the 48 hour interval between Peeler's arrest and his statement to an FBI agent about his whereabouts on the day of the murders was for the purpose of asking the jury to infer that Peeler's wait, together with other acts by Peeler, were part of a bogus alibi that Peeler had attempted to forward.

The Court then turned to Peeler's claim that, in attempting to explain why Ms. Lee initially disclaimed knowledge of the killings, the state's attorney had

improperly suggested that Peeler represented a threat to Lee. The Court began by referencing the "extensive" evidence of Peeler's nefarious motive in killing Brown and Clarke — they were witnesses to an attempted murder allegedly committed by Peeler's brother and had spoken with the police. The Court also noted that Lee had also testified that one of Peeler's associates had threatened her life, as well as the lives of her family, should she tell the police what she knew. The Court then pointed out that defense counsel had attacked Lee's credibility in his summation, such that the state was entitled to argue in its rebuttal for an alternative explanation of her inconsistent statements; *i.e.* that Lee initially disclaimed knowledge of the killings fearing that she, like Brown and Clarke, would be killed.

Finally, turning to Peeler's claim that the prosecutor had impermissibly suggested that Peeler would have also killed Lee had he not run out of ammunition, the Court held that, this statement was "highly improper" because there was no evidence that Peeler had attempted or even intended to kill Lee. Nevertheless, reviewing the whole record — and noting the failure of Peeler's trial counsel to object to the statement — the Court concluded that the remark was harmless because the trial court had specifically instructed the jury that the arguments of counsel are not evidence and because "[a]lthough, in other circumstances, the argument might be so prejudicial as to require a new trial, in the present case, there was ample evidence properly before the jury regarding the willingness of the defendant and his coconspirators to resort to murder to silence prospective witnesses."

The decision in *State v. Peeler* represents a subtle retrenching by the Court. Specifically, the Court was careful to note that, however egregious, the prosecutor's improper statement could not overcome the overwhelming evidence of the defendant's guilt, holding "the state's evidence established convincingly that Brown and Clarke were murdered" because they had spoken to the police. Simply put, while the Court is sensitive to claims of prosecutorial misconduct, *State v. Peeler* is a clear signal that such a claim is not a "get-out-of-jail-free" card.

On Deck

by Eileen R. Becker

The common law has long afforded absolutely immunity to persons for statements made in judicial and quasi-judicial proceedings. On Monday, March 22, 2004, the Connecticut Supreme Court heard oral argument in *Chadha v. Charlotte Hungerford Hospital, et al*, a case that asks the Court to decide whether the Legislature abrogated that established common law rule with respect to individuals who provide information of quasi-judicial proceedings involving healthcare providers, such as medical peer review hearings. If the Supreme Court affirms the Appellate Court's decision — which held that the Legislature had abrogated absolute immunity in that context — participants in Connecticut Department of Health (“DPH”) and other healthcare licensure proceedings, including physicians and hospitals, with a mandatory duty to report any information they may have regarding a physician's inability to practice medicine safely, would be denied absolute immunity for their testimony. Given the decision's potential impact on patient safety, the Connecticut Hospital Association, the Connecticut State Medical Society and the American Medical Association filed *amicus curiae* briefs asserting the adverse effects of the Appellate Court's ruling.

The plaintiff is a psychiatrist formerly on the medical staff of Charlotte Hungerford Hospital. While affiliated with the Hospital, DPH issued a statement of charges against him and asked the Connecticut Medical Examining Board to revoke or suspend his license to practice medicine. In support of its statement of charges, DPH submitted affidavits of the defendants — four physicians who raised concerns about the plaintiff's ability to practice psychiatry with reasonable skill and safety. In reliance on the affidavits, the Board summarily suspended his medical license.

Thereafter, the plaintiff sued the defendants and the Hospital for defamation based upon the statements in the affidavits. The defendants moved for summary judgment, claiming common law absolute immunity because the affidavits were submitted in the course of a quasi-judicial proceeding. The defendants also argued that, because the plaintiff lacked any evidence that the defendants made the allegedly defamatory statements with malice, they were entitled to qualified immunity under Conn. Gen. Stat. § 19a-17b (the “Peer Review Act”) and Conn. Gen. Stat. § 19a-20.

The trial court denied the summary judgment motion. It concluded that the Legislature, by expressly providing only for qualified immunity in these statutes, had implicitly abrogated common law absolute immunity. The court further concluded that summary judgment was not appropriate on the grounds of qualified immunity because the defendants did not submit any evidence to rebut the plaintiff's allegations that the statements were maliciously made. The Appellate Court, with a strong dissent by Judge Landau, affirmed, reasoning that the Legislature's expressed will in the above-referenced statutes was to provide only qualified immunity, and that the Legislature had implicitly abrogated the absolute immunity that the common law had long afforded. Judge Landau argued that, as a matter of public policy, absolute immunity was essential to encourage healthcare providers to give testimony about other providers without fear or reprisal.

Pepe & Hazard represented CHA in connection with this submission.

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