

Probate and Property  
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**Feature**  
**Poletown Overruled: Recent Michigan Case Tighten the Rein on the Public Use Requirement**

**\*18 A RESURGENT "PUBLIC USE" CLAUSE IS CONSISTENT WITH FAIRNESS**

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In 1798, U.S. Supreme Court Justice Samuel Chase declared that "a law that takes property from A. and gives it to B... cannot be considered a rightful exercise of legislative authority." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.). A century later, the Court confirmed that "[t]he taking ... of the private property of one person ... for the private use of another, is not due process of law ...." *Missouri Pacific R.R. Co. v. Nebraska*, 164 U.S. 403, 416 (1896).

In two landmark cases, *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984), the Supreme Court's enthusiasm for eradication of slum housing and remnants of feudalism, respectively, led it to enunciate very broad dicta on the meaning of "public use." *Berman* said that once it was decided that elimination of blight was a "public purpose," the taking of private land to achieve it "rests in the discretion of the legislative branch." 348 U.S. at 35-36. *Midkiff* echoed the same thought and added that "[t]he 'public use' requirement is ... coterminous with the scope of a sovereign's police powers." 467 U.S. at 240.

In recent years, however, government entities increasingly have employed condemnation for purposes far removed from alleviation of blight or the more traditional construction of government buildings and facilities used by the public. Eminent domain "has become a marketing tool for governments seeking to lure bigger business." Dean Starkman, *Condemnation Is Used to Hand One Business Property of Another*, *Wall St. J.*, Dec. 2, 1998, at A1. A subsequent study asserted that, during the five-year period 1998-2002, condemnation actions for the benefit of private parties were filed in at least 3,722 instances and threatened in at least 6,560. Dana Berliner, *Public Power, Private Gain* (Institute for Justice 2003).

Condemnation of land for use by the general public or government agencies is constrained by the public purpose. Condemnation for resale is not so limited, however, because subsequent transferees often pay the costs of condemnation plus agency expenses. Although the extent of abuse is unclear, the possibility of corruption is evident. The Supreme Court of Illinois found, for instance, that a local development agency "advertised that, for a fee, it would condemn land at \*19 the request of 'private developers' for the 'private use' of developers." *Southwestern Ill. Dev. Auth. v. National City Envtl., L.L.C.*, 768 N.E.2d 1 (Ill. 2002). In another case, a powerful retailer coveted a competitor's parcel. The court found evidence "clear beyond dispute" that the ensuing condemnation represented "nothing more than the desire to achieve the naked transfer of property from one private party to another." *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001).

The expanding realm of eminent domain results in part from judicial conflation of "public purpose" and "public use." On the one hand, "public purpose" indicates that a proposed government project enhances the public health, safety, and welfare, so that it is a proper object of government expenditures. On the other, "public use" refers to the need by the public for a particular parcel, despite recognition that this typically will result in uncompensated losses to the owner beyond the market value of the parcel, which is the constitutional measure of "just compensation."

Public expenditures to achieve public purposes are paid from tax revenues, for which public officials are accountable to the voters. Low-visibility decisions on condemnation for resale to private developers often

generate little attention. The fact that the locality and the developer share the gains resulting from the consolidation of small parcels must be coupled with the fact that the landowners whose lands were taken often bear considerable uncompensated losses. However, "[t]he Fifth Amendment's [takings] guarantee ... was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Increased awareness of the use of condemnation for retransfer of land to other private parties has brought this previously sleepy area of public use into judicial concern. Most dramatically, the Michigan Supreme Court recently repudiated its iconic holding in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), in which an entire ethnic neighborhood had been condemned to satisfy the demand of General Motors that the assembled parcels be conveyed to it for construction of an auto assembly plant. In *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), the court limited condemnation for retransfer to genuine slum clearance, cases of necessity, such as the construction of railroads and pipelines, and instances when the subsequent transferee's continued accountability to the public would help ensure that the land performed the public functions intended.

Although the *Hathcock* approach is hardly perfect, it does illustrate that only in rare instances does a town's economic survival depend on condemnation of a few specific parcels for resale. More frequently, condemnation-for-retransfer is associated with attempts by well-connected redevelopers to capture the gains from the assembly of condemned small parcels into larger ones. As Professor Thomas Merrill wrote almost two decades ago: "In cases where ... one or a small number of persons will capture a taking's surplus-- courts should closely scrutinize a decision to confer the power of eminent domain." Thomas W. Merrill, *The Economics of Public Use*, 72 *Cornell L. Rev.* 61, 87 (1986).

It is true that increased judicial scrutiny might discourage some worth-while redevelopment projects, but the alternative is reflexive deference to municipal decision-making. Such deference might be fine in the case of comprehensive rezoning of the entire community, in which media coverage and the electorate are fully engaged. It is unsuited for low-level decision-making that more closely resembles administrative determinations than general legislation. Also, to the extent that promised benefits from public-private redevelopment projects occur at all, they often represent mere shifting of consumption from one type of consumer good to another. Similarly, they might represent a shifting of jobs from another community where they might more efficiently have been located were they not lured away by subsidies arising in part from the condemnations for retransfer that resulted in uncompensated losses to others.

The procedural safeguard of an appropriate level of scrutiny provides necessary, but insufficient, assurance that takings for retransfer to private parties will not be abused. A substantive safeguard is needed as well. This means that eminent domain should not be used to achieve public goals if the spending power would reasonably suffice.

On February 22, the Supreme Court was scheduled to hear two cases pertaining to government power to exercise unconstrained discretion over private property rights. The first, *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), cert. granted, 125 S. Ct. 27 (2004), considers whether condemnation of the homes of longtime residents for construction of a private industrial and commercial center constitutes a public use. The second, *Chevron, U.S.A. Inc. v. Bronster*, 363 F.3d 846 (9th Cir. 2004), cert. granted sub nom. *Lingle v. Chevron, U.S.A. Inc.*, 125 S. Ct. 314 (2004), will consider whether a judicial finding by a preponderance of the evidence that commercial rent control that does not substantially advance a legitimate state interest is sufficient grounds for finding a compensable taking.

Together, *Kelo* and *Lingle* promise to address the extent to which the Public Use Clause protects private property rights, together with the extent to which the courts might exercise meaningful review of local public use determinations.

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