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The strength of Ruskin Moscou Faltischek's resources greatly enhances what we can accomplish for our clients – to not only solve problems, but to create opportunities. We take pride in going beyond what is expected from most law firms. The invaluable contacts and relationships we have nurtured in the financial, venture capital and business communities heighten our value-added services. Our knowledge of technology and business models enables us to guide clients to the next level in their business evolution. Our intellectual capital, multidisciplinary approach, and our ability to navigate through the complexities of each court and administrative forum in which we practice, enable us to efficiently and cost effectively provide professional excellence and achieve success for our clients.



Arthur "Jerry" Kremer

Arthur "Jerry" Kremer presently serves as special counsel to the City of Long Beach and the Town of Oyster Bay, and has tried to verdict more than a dozen condemnation trials during his career. As outside counsel to LIPA, Mr. Kremer handled one of the most complex condemnation disputes in Long Island history during LIPA's epic takeover battle. During 23 years of elected service in the State Assembly, Mr. Kremer chaired the prestigious Ways and Means Committee, and today as a partner at Ruskin Moscou Faltischek, Mr. Kremer chairs the firm's Municipal and Regulatory Affairs Department.



Mark S. Mulholland

Mark S. Mulholland presently serves as Special Condemnation Counsel for West Hempstead U.F.S.D. in a major condemnation suit pending in Nassau Supreme Court, concerning seizure of land for West Hempstead's new Public Library. Mr. Mulholland chairs the firm's Litigation Department, widely recognized as the largest and most sophisticated commercial practice serving Long Island, and Nassau and Suffolk Counties. Mr. Mulholland has advised and represented numerous clients in land use cases.



Joshua L. Kirsch

Joshua L. Kirsch is an associate in the firm's Litigation Department and assisted with the preparation of this article. Mr. Kirsch is experienced in Long Island condemnation cases and his articles appear frequently in the *New York Law Journal*.

Condemnation Landscape Following The Supreme Court's *Kelo* Decision

by Arthur "Jerry" Kremer, Mark S. Mulholland, and Joshua L. Kirsch

The power of eminent domain, colloquially known as the power to condemn, vests government with the power to permanently dispossess a landowner of all title and right to his or her property in exchange for "just compensation." The Federal Government's power to condemn is circumscribed by the Fifth Amendment to the Constitution, which requires that the land be taken for public use. The States are similarly prescribed by this restriction through application of the Fourteenth Amendment to the Constitution and, frequently, their own constitutions and statutory enactments.

The meaning ascribed to "public use" in its application is not without controversy – and for good reason. The broader the sweep of the phrase, the broader the sweep of the power to condemn. Not surprisingly, property owners have often disputed whether the government takes their land for a "public use." The Supreme Court spoke directly to this issue in June through the case of *Kelo v. City of New London Connecticut*.ⁱ *Kelo* has been decried by many as an unwarranted expansion of the power of eminent domain. Though technically not a dramatic departure from modern condemnation jurisprudence, the conclusion reached in the case predictably will lead to more aggressive condemnation activity.

Kelo arose in New London, Connecticut, which was designated a "distressed municipality." An economic development plan called for the redevelopment of several parcels of land, resulting in condemnation of fifteen private residences near the Long Island Sound. Some of these residences were occupied by their owners, while others were held for investment value. The city of New London planned to revitalize the neighborhood with condominiums, office buildings, a hotel and conference center – all at the promise of much higher real estate taxes to bolster the city's budget. An element of suspicion was added to the condemnation, in that the ultimate decision to condemn the property followed Pfizer's announcement that it would be building a research facility immediately adjacent to a portion of the city containing the aforementioned parcels. But the primary controversy arose because the condemning authority intended that certain of the parcels in the redevelopment plan would not be truly public, but would entail substantial quantities of both residential and commercial space.

"The specter of condemnation hangs over all property."

With these words, Associate Supreme Court Justice O'Connor characterized the consequences of the Court's recent Kelo decision. In the wake of Kelo, property owners' ability to stave off condemnation – more than ever – will require active participation in all levels of condemnation proceedings aimed at the critical "public use" question.

ⁱ ___ S. Ct. ___, 2005 WL 1469529 (June 23, 2005).
ⁱⁱ *Id.*, 2005 WL 1469529, at n.4 (majority opinion).
ⁱⁱⁱ *Id.*, at *5 (majority opinion).
^{iv} *Id.* (majority opinion).
^v *Id.*, at *6 (majority opinion), citing *Berman v. Parker*, 348 U.S. 26 (1954).
^{vi} *Id.*, at *7 (majority opinion), citing *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).
^{vii} *Id.*, at *6.
^{viii} *Id.*, at *4.

^{ix} *Id.*, at *8.
^x *Id.*, at *12 (Kennedy concurrence).
^{xi} *Id.*, at *13 (O'Connor dissent).
^{xii} *Id.*, at *15 (O'Connor dissent).
^{xiii} *Id.*, at *20-21 (Thomas dissent).
^{xiv} *Id.*, at *28 (Thomas dissent).
^{xv} *Id.*
^{xvi} *Id.*
^{xvii} *Id.*, at *9 (majority opinion).
^{xviii} *Id.* at *10 (majority opinion).

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This fact was compounded when it was revealed during the pendency of the matter at the state court level that some of the parcels would be leased to “private developers in exchange for their agreement to develop the land according to the terms of the development plan.”ⁱⁱ

The petitioners in *Kelo* objected to the taking of their land, contending that their land was not slated for a “public use.” They initially challenged the taking at the state level, where the trial court permanently enjoined the taking of some, but not all of the parcels. The Connecticut Supreme Court, however, affirmed the validity of all of the proposed takings. An appeal to the U.S. Supreme Court followed. The fact that the Supreme Court split five to four in upholding the proposed takings highlights the divisiveness that surrounds the issue of what *should* constitute a public use.

The most obvious of permissible takings are those which contemplate the retention and development of condemned property for a public project, such as a public town library. Following closely behind are those which contemplate a taking that takes land from one private property owner and gives it to another private party, where the ultimate use intended is a public one; “the condemnation of land for a railroad with common-carrier duties is a familiar example.”ⁱⁱⁱ On the opposite extreme, “it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.” In *Kelo*, the taking, although giving property directly from private party A to B, occurred pursuant to a plan of economic development to revitalize a community – which arguably inured to the benefit of the public as a whole. The majority of the Court found the takings aimed toward a “public use.”

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The majority construed “public use” to mean “public purpose.” The majority opinion states that, “when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as ‘public purpose.’”^{iv} Before *Kelo*, the Court had upheld the taking

of a non-blighted department store located in a blighted area cited for revitalization through a redevelopment plan.^v The Court also had sanctioned the transfer of real property from lessors to the lessees in Hawaii, in order to dissipate a land ownership oligarchy.^{vi} The policy of broadly interpreting what serves the public purpose according to the majority is intimately tied to a “longstanding policy of deference to legislative judgments.”^{vii}

The takings at hand were supported in principle by a Connecticut statute which expresses a “legislative determination that the taking of land, even developed land, as part of an economic development project is a ‘public use’ and in the ‘public interest.’”^{viii} The Court concluded that the city’s “determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference... given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us... to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.”^{ix}

Kelo contains four separate opinions: the majority opinion, one concurrence and two dissents. The concurrence authored by Justice Kennedy voiced support for a heightened standard of review with regard to takings “in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.”^x Justice Kennedy wrote that *Kelo* was not an appropriate case to employ a heightened standard of review.

The first dissenting opinion was authored by Justice O’Connor. Justice O’Connor thought the majority’s ruling broadened the power of eminent domain so as to jeopardize all private property. She wrote, “Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded – *i.e.*, given to an owner who

will use it in a way that the legislature deems more beneficial to the public – in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development taking ‘for public use’ is to wash out any distinction between private and public use of property—and thereby effectively to delete the words ‘for public use’ from the Takings Clause of the Fifth Amendment.”^{xi} Nonetheless, even Justice O’Connor was constrained to admit that “‘public ownership’ and ‘use-by-the-public’ are sometimes too constricting and impractical ways to define the scope of the Public Use Clause. Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use.”

Justice Thomas authored the second dissent in *Kelo*. While also contending that the majority’s decision eviscerated the meaning of the “public use” clause, Justice Thomas’s dissent entailed two key arguments. Adhering to a strict construction of the Takings Clause, Justice Thomas stated, “[t]he most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever... The Constitution’s text, in short, suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking.”

Justice Thomas was also deeply concerned with the ability of Government to, under the pretext of benefiting the public as a whole, employ the power of eminent domain to favor the privileged. He stated, “Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities.”^{xiv} He went so far as to call the Court’s deferential standard “deeply perverse.”^{xv}

“It is further argued that without a bright-line rule nothing would stop a city from transferring citizen A’s property to citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes.”

However, even Justice Thomas was confined to recognize that the Court’s recent precedents were not in line with his interpretation, stating, “I would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause... .”^{xvi}

Justices O’Connor’s and Thomas’s dissents criticized the majority holding in *Kelo*. The majority opinion does leave room to challenge future condemnations. The majority’s opinion provides foundation to challenge ill motivated takings, or takings designed simply to raise greater taxes. For instance, the majority notes that “It is further argued that without a bright-line rule, nothing would stop a city from transferring citizen A’s property to citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an

unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise.”^{xvii} Thus, not all takings are per se valid under the rubric of a public purpose. Moreover, as the majority reminded, States remain free to impose restrictions on condemnation more demanding than those of the Fifth Amendment.^{xviii}

In conclusion, *Kelo* may signal stormy seas in the condemnation field, as emboldened municipalities aggressively plot out future seizures using eminent domain authority. Participants in these proceedings, more than ever, will need to focus on the quality, character and comprehensiveness of the local government’s underlying plans, the asserted rationale for the government’s proposed action, accumulated data supporting the proposal, and potential evidence of bad faith or suspicious intent undermining the professed claim of public use. Predictably, *Kelo* may lead to a sea change in the condemnation field, as overly aggressive municipalities seek to stretch their eminent domain powers to unwarranted lengths.