update

Staying Ahead
with Saul Ewing

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Environmental Law

The Intersection of Takings, Land Use and Brownfields

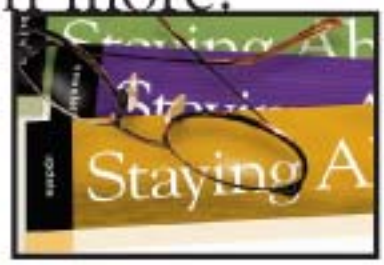
What happened?

The Supreme Court's *Kelo* decision has sparked outcries from the public, but also concerns from landowners over whether developable land -- such as Brownfields property -- might be taken by the government and turned over to other private landowners.

What does it mean?

Because the Supreme Court's decision gives government more latitude in exercising "eminent domain," land that may be developed under Brownfields laws by the current owner may be "taken" by the government and turned over to other private owners for development purposes. This article traces some of the case law surrounding the controversial issue.

Learn more.



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Introduction

Government has embraced the idea that abandoned or underutilized industrial properties ("Brownfields") ought to be revitalized and utilized for a multitude of purposes. At the same time, a number of concerns relating to these properties have been raised by various parties.

The owners of such abandoned or underutilized properties often are happy to convert such properties to better uses or to sell them to others who will undertake to use them for higher and better uses. We have observed instances of brownfields properties being converted into new industrial uses, residential uses, golf courses and more.

Sometimes, however, owners of brownfields properties are not at all interested in rehabilitating the property or have a different notion regarding the use of the property than government planners. While a government planner might see a property as a terrific location for commercial development, the current owner might envision the property being used for warehousing or some other less physically-attractive (but profitable) use. Some owners of brownfields properties are "afraid" of what might be found if a thorough subsurface evaluation of the property were performed. They would rather put a high fence round the property, pay whatever taxes are assessed, and not deal with contamination that may be lurking in the ground. Others simply are not interested in development since that is not the business of the company. Yet others may be speculating that if they hold onto the derelict property long enough then the currently worthless property will be valuable– some day.

Government planners may be eyeing a valuable, underutilized tract and envisioning a use that enhances the community, provides taxes, is a source of jobs or housing and is made into something beneficial for the community. The time frame for such development may be much sooner than is envisioned by the current owner of the brownfields site. The use may be quite different than is envisioned by the owner. More significantly, government planners may envision that the proposed owner and/or developer of the revitalized property is someone other than the current owner of the property.

To what extent can government condemn property that is considered a brownfields property? The answer, for at least fifty years has been that government can condemn "blighted" property for redevelopment purposes. Furthermore, once the blighted property has been condemned, the Supreme Court has allowed the property to be taken from the existing private owner and turned over to another private developer for redevelopment purposes.

A recent– and celebrated– Supreme Court decision has held that government is permitted to take properties that are ***not*** blighted for distribution to different private owners, so long as the taking is not intended solely to benefit the particular private developer, but is a part of a plan to redevelop an area for economic development purposes and so long as the owner is paid just compensation. This case has held that economic development is sufficient to satisfy the "public use" requirement of the Fifth Amendment. With the Supreme Court defending the right of government to take non-blighted property for economic development purposes, I cannot imagine the courts interfering with governments taking blighted– i.e. brownfields– property for development purposes.

This article traces some of the case law surrounding this controversy.

Takings and Public Use

The Takings Clause is a mere twelve words: "nor shall private property be taken for public use, without just compensation."[1] The Supreme Court has repeatedly held that "this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power."[2] While the Court has explicitly insisted that the courts determine what constitutes "just compensation," it nevertheless has deferred to the legislature when determining what constitutes a "public use" in *Berman v. Parker*:[3]

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature,

> not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs.

The most significant U. S. Supreme Court cases on "public use" are *Berman v. Parker* (1954), *Hawaii Housing Auth. v. Midkiff*[4] and *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*[5] In the fifty years since *Berman*, the U.S. Supreme Court has deferred to the statements of the legislature (regardless of whether it was Congress, a state legislature, a city council or a board of selectmen) regarding whether or not a particular use constitutes a public use. Governments and redevelopment corporations have relied heavily on the precedent established by these cases for half a century to justify the taking of privately held land for redevelopment purposes.

Over fifty years ago, in *Berman*, the Supreme Court set out a new standard of almost complete deference to the legislature in which the legislative determination of "public use" is "well nigh conclusive."[6] In such cases, "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."[7] Subsequently, in *Midkiff*, the Court further elucidated the role of the courts in reviewing "public use" determinations:

> There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is 'an extremely narrow' one. The Court in *Berman* cited with approval the Court's decision in *Old Dominion Co. v. United States*, which held that deference to the legislature's 'public use' determination is required 'until it is shown to involve an impossibility.' The *Berman* Court also cited to *United States ex rel. TVA v. Welch*, which emphasized that '[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.' In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'[8]

The Supreme Court has repeatedly stated that the courts play a limited role in determining whether a legislature has properly determined that a use is consistent with the Constitution. That role is limited to a determination of whether the taking "is rationally related to a conceivable public purpose."[9] In a post-*Berman* condemnation case, *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, the Supreme Court asserted that the condemnation power is constitutional "as long as the condemning authorities were rational in their positions that some public purpose was served."[10] In *National R,R. Passenger Corporation*, the Court examined a statutory condemnation scheme that transferred 48.8 miles of tract from one privately owned railroad company to another. The Court made a superficial examination (that is to say, it did not make "a specific factual determination"[11]) of whether the ICC was "irrational" in determining that the condemnation at issue would serve a public purpose and determined that it did serve a public purpose. On that basis, the Court held that this cursory review "suffices to satisfy the Constitution, and we need not make a specific factual determination whether the condemnation will accomplish its objectives."[12]

Kelo v. City of New London

On June 23, 2005, the United States Supreme Court issued its much anticipated ruling in *Kelo v. City of New London*,[13]- ruling in favor of the City and against the landowners.[14] The *Kelo* case has vast importance for land developers, private property owners, governments, redevelopment agencies and others who are impacted by governmental redevelopment efforts.

At the very least, the Supreme Court upheld fifty years of judicial precedence in ruling in favor of the City of New London. Justice John Paul Stevens wrote the opinion for the Court in a 5-4 decision joined by Justices Stephen G. Breyer, Ruth

Bader Ginsburg, Anthony M. Kennedy, and David H. Souter. Justice Sandra Day O'Connor wrote a stinging dissent (joined by late Chief Justice Rehnquist and Justices Scalia and Thomas) in which she maintained that the Court went much further than previous decisions of the Court have allowed.

As previously stated, since the 1954 decision of the Supreme Court in *Berman v. Parker*,[15] government and quasi-governmental agencies, such as private development corporations, have been permitted to take blighted private property and have paid "just compensation," but then have redistributed that property to other private parties who redeveloped the property. More recent decisions have permitted the taking of private property so long as the taking was not "a purely private taking." The ability of governmental agencies to continue this practice was called into question by the Supreme Court's decision to review the Connecticut Supreme Court's decision in *Kelo*. A decision in *Kelo* that did anything other than affirm the Connecticut Supreme Court would have modified the way government has done business in the redevelopment area and had an impact on property owners, land developers, land redevelopers and governmental units.

Factual Background

In *Kelo*, the City of New London, Connecticut and the New London Development Corporation commenced condemnation proceedings against property owners consistent with a plan to redevelop their property. The city's plan was to tear down the plaintiffs' homes and to turn the land over to a private developer who would implement a master plan for the site. The trial court granted to some of the plaintiffs (those in parcel 4A, see below) the relief they were seeking by issuing a permanent injunction preventing the condemnation.[16] The trial court, however, refused to issue a permanent injunction to other plaintiffs (those in parcel 3) in the case.[17]

Signaling how it was about to rule, the Connecticut Supreme Court, in the opening sentence of its lengthy ruling, framed the issue as follows:

> The principal issue in this appeal is whether the public use clauses of the federal and state constitutions authorize the exercise of the eminent domain power in furtherance of a significant economic development plan that is projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.[18]

Simply stated, the Connecticut Supreme Court affirmed the trial court in its rulings against the property owners and reversed the trial court in its rulings in favor of the property owners and against the city and development corporation.[19]

The Connecticut court identified New London as a city that Connecticut has designated as a "distressed municipality." To help reverse this situation, the state and city had accommodated Pfizer, Inc. in its effort to construct a "global research facility" in the area adjacent to the Fort Trumbull section of New London. Pfizer opened its facility in June 2001. The city and the development corporation, a private urban redevelopment company established by the city, planned a major redevelopment of the Fort Trumbull section. The land needed for this redevelopment required ninety acres and is comprised of 115 land parcels. The development plan calls for the construction of a new state park, a waterfront hotel and conference center, a "major" health club facility, marinas, eighty new residences, the United States Coast Guard Museum, a high technology research and development park, and significant office and retail space. The plan further called for the development corporation to own the land located within the development area. Private developers would lease the land from the development corporation and be required to comply with the plan. At least one developer was identified who would lease three of the parcels, develop them and market the new development to tenants.[20]

The development corporation estimated that if its plan were fully implemented, it was expected to generate between 518 and 867 construction jobs, 718 and 1362 direct jobs, and 500 and 940 indirect jobs.[21] When fully implemented, the plan would generate between $680,544 and $1,249,843 in property tax revenue, annually, for the city.[22] The court noted that all of this benefit would occur in a city that recently experienced the loss of nearly 2,000 jobs and other deterioration.

After approval of the plan by the development corporation and City, many land owners willingly sold their property to the development corporation. The plaintiffs refused to sell their properties and eminent domain proceedings were commenced against them. Four parcels owned by three of the plaintiffs were located in an area designated for the high technology and development office space (parcel 3). Eleven properties owned by four of the plaintiffs were located in an area designated to support the new state park, which might also include parking or retail space (parcel 4A). All of these properties included the personal residences of the property owners and properties that were leased for residential purposes. The plaintiffs sought an injunction stopping the eminent domain proceedings. The trial court upheld the eminent domain taking against the owners in parcel 3 and dismissed the pending eminent domain proceedings against the plaintiffs in parcel 4A.

The plaintiffs appealed the refusal of the trial court to grant the preliminary injunction for parcel 3 and the defendants cross-appealed the preliminary injunction issued for parcel 4A. The plaintiffs contended that condemnation of property for economic development by private parties was inconsistent with both the Connecticut Supreme Court's prior decisions and the United States Constitution.[23] In particular, the plaintiffs argued that the new owner would not provide a public service or utility and the condemnation will not remove blight conditions that are, in and of themselves, harmful to the public. The court concluded, however, that "economic development projects created and implemented pursuant to [the Connecticut statute that authorized development corporations to condemn private property] that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions."[24]

Connecticut Supreme Court Ruling

The Connecticut court identified what it considered to be a public use:

> "'Public use' may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community is a taking for public use."[25]

The Connecticut court noted that: "[t]he [legislative] power [of declarations of public use] requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever increasing necessities of society."[26] It also acknowledged that, "there can be no doubt that the elimination of such substandard, insanitary [sic], deteriorated, slum or blighted areas… is for the public welfare. Private property taken for the purpose of eradicating the conditions which obtain in such areas is taken for a public use."[27] The court went on to quote from its earlier decision in *Gohld Realty Co. v. Hartford* that the "same public use continues after the property is transferred to private persons."[28] The court quoted with approval a more recent case allowing government to take private property and turn that private property over to another private landowner for redevelopment, noting that its test of a public use had broadened over time and that the "modern trend" is to expand and liberally construe the meaning of public purpose: "The test of public use is not how the use is furnished but rather the right of the public to receive and enjoy the benefit."[29]

The plaintiffs argued that economic development in and of itself cannot be a public use that justifies the use of eminent domain. The Connecticut court rejected this argument.[30] The plaintiffs' argument was that the primary legislative purpose is to transfer the property to private entities which will become the primary beneficiary of the taking, thus the benefit to the public is secondary. This was contrasted by the plaintiffs with the blight cases in which the primary benefit was to the public with any benefit to private entities being secondary.[31] The Connecticut court rejected this argument reminding that "municipal economic development can be, in and of itself, a constitutionally valid public use under the well established broad, purposive approach that we take on this issue under both the federal and state constitutions."[32] Any private benefit was identified by the court as secondary to the public benefit, just as in the blight cases.

Plaintiffs also argued that, assuming the economic development was a valid public use, these particular condemnations did not serve a public use as the effect was to benefit private entities, namely the development corporation, the private developer and Pfizer.[33] The court held that the mere subsequent transfer of the land to private entities, especially when successful achievement of the public purpose of economic development requires private sector involvement, did not defeat the public purpose.[34] The court analyzed a distinction that was drawn by the trial court, that much of the development would only indirectly benefit Pfizer (although it was acknowledged that at least some of it would directly benefit Pfizer). Thus, because there was, at most "tangential[] benefit" to Pfizer, the "distressed city," not Pfizer, was the primary beneficiary.[35] Relying on Connecticut precedent, the court held that "[w]here the public use which justifies the taking of the area in the first instance exists… that same public purpose continues even though the property is later transferred to private persons."[36]

In this context, the plaintiffs argued that a ruling against them would form a pretext by government to allow private parties, through friendly governmental entities, to allow the condemnation of low-tax generating homes to be replaced by businesses that would generate greater tax revenues. The plaintiffs argued that "[a]ny home will be up for grabs to any private business that wants the property."[37] The court took the opportunity to warn governments against unreasonable or non-public use takings:

> [A]n exercise of the eminent domain power is unreasonable, in violation of the public use clause, if the facts and circumstances of the particular case reveal that the taking specifically is intended to benefit a private party. Thus, we emphasize that our decision is 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.[38]

The court examined the specific circumstances surrounding the taking of the properties in parcels 3 and 4A. It concluded that the record supported the taking of the properties for a "public use" and that the property owners could not block the exercise of eminent domain.

Supreme Court Grants Petition for Certiorari

The plaintiffs filed a petition for certiorari with the United States Supreme Court and on September 28, 2004, the Court granted the petition. The single question that was accepted for review by the Court was:

> What protection does Fifth Amendment public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of "economic development" that will perhaps increase tax revenues and improve local economy?

On February 22, 2005, the case was argued before the United States Supreme Court.

United States Supreme Court Determination

Justice Stevens noted that Ms. Kelo's and her neighbors' properties had not been alleged to have been blighted or otherwise in poor condition, "rather, they were condemned only because they happen to be located in the development area."[39] The Court went on to note "two polar propositions" that it maintained "are perfectly clear":

> [I]t 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. On the other hand, it is equally clear that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking….[40]

The majority maintained that neither of these propositions determined the outcome of this case and that pretextual takings solely to benefit private parties "could not withstand the scrutiny of the public use requirement."[41]
The Court noted that even though all of the condemned property would not ultimately be opened to the general public, "this 'Court long ago rejected any literal requirement that condemned property be put into use for the general public.'"[42] The Court went on to point out that it had "embraced the broader and more natural interpretation of public use as 'public purpose.'"[43] Significantly, the Court then made the following comment:

> The disposition of this case therefore turns on the question whether the City's development plan serves a 'public purpose.' Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.[44]

The Court then essentially summarized the Supreme Court's case law since *Berman*. It stated that Federal Courts would and should defer to legislative bodies (whether they are Congress, state legislatures or city councils) when those legislative bodies make determinations regarding what constitutes a public purpose:

> Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs.[45]

The Court then focused on the City's "carefully formulated… economic development plan that it believes will provide appreciable benefits to the community, including– but by no means limited to– new jobs and increased tax revenue."[46]

> 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, as it was in Berman, 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.[47]

Furthermore, ruled the Court, "[p]romoting economic development is a traditional and long accepted function of government."[48] The Court went on to hold that it would be "incongruous" to view the City's interest in economic development as having less of a public character then other interests, such as those it had previously ruled upon in earlier cases (e.g. redeveloping blighted property, breaking up a land "oligarchy" as existed in Hawaii at one time, and eliminating a significant barrier to entry in the pesticide market):

> Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.[49]

The Court rejected the petitioners' arguments that the mere promotion of economic development was not a function of government. The Court rejected the argument that the taking was impermissible because it would benefit individual parties. The Court also rejected the argument that the primary purpose of the taking was to transfer private property from one landowner to another who "will put the property to a more productive use and thus pay more taxes."[50] The Court did note that where a transfer for purely private purposes occurred, "[c]ourts have viewed such aberrations with a skeptical eye."[51]

Finally, and lest there be any doubt about it, the Court quoted from *Berman* that it was not for the judiciary to decide whether a determination of "public use" was proper:

> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided [by the legislature], 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.[52]

Dissents

Two dissents accompany the decision. Justice O'Connor (joined by the late Chief Justice, and Justices Scalia and Thomas) wrote a scathing rebuke to the majority. Justice O'Connor viewed the majority's opinion as effectively eliminating the "public use" clause from the Constitution:

> To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings '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."[53]

Justice O'Connor pointed out that "[t]he public use requirement, in turn, imposes a more basic limitation, circumscribing the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the *public's* use, but not for the benefit of another private person. This requirement promotes fairness as well as security."[54]

Justice O'Connor wrote that the Court had:

> mov[ed] away from our previous decisions sanctioning the condemnation of harmful property use [and that] the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public– such as increased tax revenue, more jobs, maybe even aesthetic pleasure.[55]

The dissent stated that its concern was that the Court abdicated so much responsibility and that "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[56] Justice O'Connor wrote:

> Today nearly all real property is susceptible to condemnation on the Court's theory… Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resource to those with more. The Founders cannot have intended this perverse result.[57]

Justice Thomas wrote a dissent that supported the position of Justice O'Conner and the other dissenters. His view was that the lines of cases relied upon by the majority were "misguided."[58] The result of the majority's decision, he wrote was "far-reaching, and dangerous."[59]

Conclusion

The *Kelo* decision set off howls of rebuke from many quarters of the public. Suddenly, people who rarely paid attention to

the decisions of the Supreme Court were reacting to this particular decision. Nevertheless, landowners are left wondering what relief remains for them if they are faced with an eminent domain taking of their property– brownfields or not. The majority noted that states are free to set limits on what they or their subdivisions may take by eminent domain and, in fact, it has been widely reported that some state legislatures are doing just that.

It is unlikely that the Supreme Court will tackle this issue again for many years. Thus, *Kelo* likely will be the last word from the Supreme Court for many years to come on the subject of whether economic development constitutes a public use. The result of this decision is that governments will condemn property through eminent domain (being certain to state that the taking is for a "public use") and the Federal courts likely will refrain from imposing their view on whether a proposed use is a public use, except in the most extreme cases.

The battleground for property owners who are challenging a taking of their property will be in determining the amount of "just compensation" that is due, not whether the taking was for a public use. This means that in the brownfields context, property may be taken by municipalities despite the interest or inclination of the landowner. The determination will then be over the value of the property. Will the property be valued on the basis of its decrepit, run-down state or as valuable development land that is in the ideal location for a particular intended use? In most cases, the challenge facing landowners and governments alike will be over determining the value of the property– not whether it can be taken.

Footnotes

[1] U.S. Const. amend. V.
[2] *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 314, 96 L. Ed. 2d 250, 263 (1987); *see Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194, 87 L. Ed. 2d 126, 143-44 (1985); *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 297 n.40, 69 L. Ed. 2d 1, 29 n.40 (1981); *Hurley v. Kincaid*, 285 U.S. 95, 104, 76 L. Ed. 637, 642-43 (1932); *Monongahela Nav. Co.*, 148 U.S. at 336, 37 L. Ed. at 471; *United States v. Jones*, 109 U.S. 513, 518, 27 L. Ed. 1015, 1017 (1883).
[3] *Berman v. Parker*, 348 U.S. 26, 32, 99 L. Ed. 27, 37 (1954) (citations omitted)
[4] 467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984).
[5] 503 U.S. 407, 423 (1992).
[6] 348 U.S. at 32.
[7] *Id*.
[8] *Midkiff*, 467 U.S. at, 240-42 (citations omitted).
[9] *Id.*at 240-41.
[10] 503 U.S. at 423.
[11] *Id*. at 422-23
[12] *Id*.
[13] __ U.S. __, 125 S.Ct. 2655 (2005).
[14] *Aff'g* 268 Conn. 1, 843 A.2d 500 (2004).
[15] 348 U.S. 26 (1954).
[16] 268 Conn. at 5, 843 A.2d at 508.
[17] *Id*.
[18] *Id.* at 5, 843 A.2d at 507.
[19] *Id.* at 6, 843 A.2d at 508.
[20] *Id.* at 9, 843 A.2d at 510.
[21] *Id.* at 10, 843 A.2d at 510.
[22] *Id*.
[23] *Id.* at 26, 843 A.2d at 519.
[24] *Id.* at 26-27, 843 A.2d at 519.
[25] *Id*. at 30-31, 843 A.2d at 522, quoting *Olmstead v. Camp*, 33 Conn. 532, 546 (1866).
[26] *Kelo* at 32, 843 A.2d at 523, quoting *Olmstead*, 33 Conn. at 551 (emphasis in Kelo).
[27] *Kelo* at 33, 843 A.2d at 524, quoting *Gohld Realty Co. v. Hartford*, 141 Conn. 135, 143, 104 A.2d 365 (1954).
[28] (Emphasis in *Kelo*.)
[29] *Kelo* at 35, 843 A.2d at 525, quoting *Katz v. Brandon*, 156 Conn. 521, 532-33, 245 A.2d 579 (1968).
[30] *Id.* at 46, 843 A.2d at 531.
[31] *Id.* at 46-47, 843 A.2d at 531-32.
[32] *Id*.
[33] *Id.* at 55, 843 A.2d at 536-37.
[34] *Id.* at 55-56, 843 A.2d at 537.
[35] *Id.* at 60, 843 A.2d at 540.

[36] *Id.* at 62, 843 A.2d at 541.
[37] *Id.* at 66, 843 A.2d at 543.
[38] *Id.* at 65-66, 843 A.2d at 543.
[39] 125 S.Ct. at 2660.
[40] *Id.* at 2661.
[41] *Id.*
[42] *Id.* at 2662, quoting *Midkiff*, 467 U.S. at 245, 104 S.Ct. 2321.
[43] *Id.* at 2662.
[44] *Id*. at 2663.
[45] *Id.* at 2664.
[46] *Id*. at 2665.
[47] *Id.*
[48] *Id.*
[49] *Id*. at 2665-66.
[50] *Id.* at 2666-67.
[51] *Id.* at 2667 n.17.
[52] *Id.* at 2668, quoting *Berman*, 348 U.S., at 35-36, 75 S.Ct. 98.
[53] *Id.* at 2671 (O'Connor, dissenting).
[54] *Id.* at 2672 (emphasis in original) (O'Connor, dissenting).
[55] *Id*. at 2675 (O'Connor, dissenting).
[56] *Id.* at 2676 (O'Connor, dissenting).
[57] *Id.* at 2677 (O'Connor, dissenting).
[58] *Id.* at 2685 (Thomas, dissenting).
[59] *Id.* at 2687 (Thomas, dissenting).