

## EMINENT DOMAIN - KELO V. NEW LONDON

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In Kelo v. New London, the United States Supreme Court recently upheld the taking of certain parcels of land by the City of New London, Connecticut, for the purpose of carrying out an economic development plan designed to revitalize the City. Slip Op. No. 04-108 (June 23, 2005). In Kelo, the Supreme Court reviewed various principles of condemnation law under the Fifth Amendment to the United States Constitution.

The Court reiterated the longstanding rule that a municipality is prohibited under the "public use" restriction in the Fifth Amendment from taking land for the purpose of conferring a private benefit on a particular private party. Kelo, at 6. Similarly, a municipality may not take property under the pretext of a public purpose if the actual purpose is to bestow a private benefit. Kelo, at 7. A threshold issue in any eminent domain case, therefore, is whether the purpose of the condemnation is to confer a private benefit on a private party. See Rodgers Development Company v. Town of Tilton, 147 N.H. 57, 62 (2001); Merrill v. Manchester, 127 N.H. 234, 237 (1985) (if the "true benefits of the project will accrue only to its private sponsors and participants," the use of eminent domain is unconstitutional).

The exercise of eminent domain to transfer property from one private party to another, however, is permissible under the Fifth Amendment if the purpose of the taking is the future use by the public, such as the taking of land for a railroad. Kelo, at 6-7; see Malnati v. State, 148 N.H. 94 (2002) (land properly acquired by state for railroad). Under this reasoning, if the proposed condemnation contemplates a future use by the public, it may be upheld even though the property will be transferred to a private party.

In Kelo, the Supreme Court observed that it has long interpreted the public use requirement under the Fifth Amendment in a broad sense to mean a "public purpose" and that disposition of the New London case turned on whether the City's economic development plan served such a "public purpose," even though the City planned to lease or transfer land to private entities.

Kelo, at 9-10. Finding that the comprehensive character of the plan met the public purpose requirement notwithstanding that it also benefited private parties, the Court upheld the condemnation while emphasizing that nothing in its opinion would preclude a state from imposing stricter public use requirements than the federal standard. Kelo, at 13-19.

Part I, Article 12th of the New Hampshire Constitution provides that the power of eminent domain may be exercised only if the property taken is "applied to public uses." Whether a particular use qualifies as a "public use" is a question of law for the court. Rodgers Development Company v. Town of Tilton, 147 N.H. 57, 62 (2001); Merrill v. Manchester, 127 N.H. 234, 236 (1985). To determine if a proposed condemnation meets the "public use" requirement, the court must first consider whether the condemnation will primarily be for the benefit of private persons or private uses, or whether it will serve a public purpose sufficient to justify the expenditure of public funds. Merrill v. Manchester, 127 N.H. 234, 236 (1985).

Assuming a municipality can demonstrate a public purpose for the taking, the court must next balance the public benefits against the burdens and social costs on all affected property owners, in order to ascertain whether there is a probable net benefit to the public if the taking occurs for the intended purpose. Petition of Bianco, 143 N.H. 83, 86 (1998); Appeal of City of Keene, 141 N.H. 797, 802 (1997). The net benefit analysis involves an assessment of "the benefits of the proposed project and the benefits of the eradication of any harmful characteristics of the property in its present form, reduced by the social costs of the loss of the property in its present form." Merrill v. Manchester, 127 N.H. 234, 237 (1985). Although the legislative findings by the governing body do not conclusively establish a public benefit, they are entitled to weight in the court's determination. See Petition of Bianco, 143 N.H. 83, 86 (1998).

In sum, the New Hampshire Constitution limits the exercise of eminent domain to circumstances in which the municipality can demonstrate: (1) a public purpose; and (2) a probable net benefit to the public after balancing the public benefits against the burdens and social costs on all property owners affected by the proposed taking. E.g., Petition of Bianco, 143 N.H. 83, 86 (1998; Appeal of City of Keene, 141 N.H. 797, 802 (1997); Appeal of Cheney, 130 N.H. 589, 595 (1988).