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TAKINGS IN MISSISSIPPI

A Consideration of *Kelo v. New London*

BY
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The United States Supreme Court decision in *Kelo v. New London*, 545 U.S. 469 (2005) has turned the nation's attention to the precarious nature of property rights in the face of a government takings effort. What is Mississippi's response?

Takings Generally.

The United States Constitution guarantees that private property will not be taken without compensation. The Fifth Amendment to the Constitution reads in part: "nor shall private property be taken for public use, without just compensation." The legal process through which the governmental taking occurs is called *eminent domain*. While the founding fathers were thinking in terms of actual seizure of private property, the federal courts provided compensation for other than actual takings – known as regulatory takings. The doctrine of regulatory taking was first advanced by Justice Oliver Wendell Holmes in *Pennsylvania Coal v. Mahon* (1922) and refined by the US Supreme Court decision in *Penn. Central Trans. Co. v. NYC* (1978). Regulatory takings can be best described as *de facto* takings. They are restrictions on the owner's ability to use his land in ways that were viable and appropriate when the land was purchased, thus reducing the property's value and, in some cases, imposing economic hardship.

Kelo in Particular.

The decision in *Kelo v. New London* afforded a new slant on the broad authority given in some state legislation for actual seizures of private property. The United States Supreme Court was called on to analyze the statute that allowed the town of New London, Connecticut, to take private property by *eminent domain* and ultimately re-convey the property to a private developer for the purpose of facilitating economic development. The question before the Court was whether the city's proposed disposition of the private property qualified as a "public use" within the takings clause of the Connecticut statute. The Court's discussion of what was meant by public use reverberated throughout the nation.

Public entities are forbidden from taking private property through *eminent domain* proceedings for the purpose of conferring a private benefit on a particular private party. For example, Homeowner A's home – adjacent to Homeowner B's home – cannot be taken from Homeowner A and re-conveyed to Homeowner B just because Homeowner B wants to expand his residence and needs Homeowner A's parcel of land. In the general scheme of things, when private property was taken in an *eminent domain* proceeding and re-conveyed to a private entity, that private entity was performing a necessary public function. A traditional example would be conveyance of private property to a private entity such as a common carrier, for example, a railroad.

In the particular case of New London, however, the city was turning over the contemned property – or at least a part of it, to lessees who are not obligated to open the land to the general public. The question, however, is not the universal test of whether the property will be used by the general public – a test which has been long abandoned as inadequate – but whether there will be a public purpose. In fact, the U.S. Supreme Court embraced "public purpose" as the natural interpretation of a public use in the late 19th century, noting the inadequacy of use by the general public as a universal test in a 1905 decision of *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1905). Under this line of decisions, the Court determined that, given the comprehensive nature of the development plan, its scope and the deliberation in its adoption, the plan as a whole "unquestionably serves a public purpose."

The real problem with the taking was that several homeowners urged that economic development did not qualify as public use. The argument: *Why should I be required to abandon my home so that it can be razed and a private commercial development built in its place? So what if I am compensated for my loss? It is my home! Is*

my home not as important as a private commercial development? And there is something rather stinging in the criticism that New London did, in fact, find that private commercial development was more important than the *Kelo* home, and the homes of dozens of other New London residents.

Essentially, the decision stands for the proposition that local entities with supporting legislation have the right to seize private homes and businesses in order to generate economic redevelopment, which will result in a stronger tax base and higher tax revenues. But there was something about the decision that didn't sit well with the American public.

To understand the Supreme Court opinion, several facts that impacted upon the decision in *Kelo* must be clarified.

1. New London, Connecticut was in an economic decline and had been designated as a "distressed municipality".

2. The city approved a development plan which had various advantages, including a projection of 1,000 new jobs, increased tax revenues, and city revitalization. This development plan was did not operate to "benefit a particular class of identifiable individuals".

3. A pertinent Connecticut statute states a legislative determination that taking of land – even developed land – as part of an economic development project is a "public use" and in the "public interest". Conn. Gen. Stat. § 8-186 *et seq.* 2005.

4. A portion of the development plan required that the property in question, after taken by the municipal authority, would be re-conveyed to another private entity for purposes of development which would not, in all parts and contexts, be open to the public.

These facts are clearly established in the decision. Of particular significance is Conn. Gen. Stat. § 8-186 *et seq.* 2005. This section is quite unlike Mississippi law, which leaves the determination of "public use" and "public purpose" as a judicial decision alone, while public necessity remains a legislative decision.

Kelo and America's Response.

Within a year after the *Kelo* decision, 47 of the 50 states had begun reviewing their *eminent domain* laws in some way. Mississippi was one of the 47; a resolution to amend section 17 of the Constitution of 1890 died in committee during the 2006 session. What sorts of actions had been taken within a year of the *Kelo* decision? A variety of tacks were taken to solve the same problem, such as banning the use of *eminent domain* for private projects, redefining "public use", "economic development" or "blight" in their own statutes, or some combination. Meanwhile, state Supreme Court rulings in the various states at the time of the *Kelo* decision were worthy of note. Nine state Supreme Courts did not allow condemnation of property to increase tax revenue. Six Supreme Courts suggested (in *dicta* primarily) that government might not be able to take property to increase tax revenue, while six of the highest state courts hold that the government may take property to increase tax revenue.[1]

Despite the backlash against the Supreme Court's decision, the pace of takings has not abated. Even in the wake of the *Kelo* decision, statistics reveal that over 5,700 takings through *eminent domain* proceedings have been threatened in the 12 months immediately succeeding the *Kelo* decision for economic development purposes. That number is surprisingly high; roughly 10,000 proceedings were threatened or accomplished for purposes of economic development during the five year period, 1998 to 2002.

The U.S. House of Representatives passed HR 4128 – the Private Property Rights Protection Act of 2005 – which would cut off federal funding to jurisdictions who use *eminent domain* for economic development purposes. The act, which has been stymied in the Senate, seeks to restrict the use of federal development assistance or CDBG block grants in communities which allow property to be seized for private development.

Mississippi's *Eminent Domain* Legislation.

This session, resolutions have been filed seeking to amend § 17 of the Mississippi Constitution of 1890. A resolution similar to one of these was offered last session, which died in committee.

There are subtle differences between the legal basis for takings in Connecticut and that of Mississippi, but these differences are significant. As

[1] www.ij.org (Institute for Justice).

has already been mentioned, § 17 unabashedly leaves the determination of "public use" to the judiciary. Moreover, our Supreme Court has consistently reiterated that "when land is taken for a public purpose which is primary and paramount, such a taking will not be defeated by the fact that incidental thereto a private use or benefit will result which would not of itself warrant the exercise of power." [*Horne v. Pearl River Valley Water Supply District*, 249 Miss. 358, 162 So. 2d 504 (1964)] In this particular case, a portion of property taken for the reservoir was leased to private entities for the development of service centers, restaurants, service stations and stores; the court found that these leases to private entities for private business development does not detract from the public use. This reasoning suggests that the amendment of § 17 to rules out the use of *eminent domain* in order to facilitate private economic development, may not outlaw incidental private benefit that might inure as a result of a *bona fide* public use. Our court has recognized that while there must be a public purpose for the taking, property obtained for public use can be conveyed to private individuals so long as the conveyance for private enterprise is conditioned for public purpose. [*Mayor and Aldermen of the City of Vicksburg v. Thomas*, 645 So. 2d 940 (Miss. 1994)]

Legislative Considerations.

Consider the wording of §17 of the Constitution of 1890: "Private property shall not be taken or damaged for public use, except on due consideration being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property fur a use alleged to be public, the question whether the contemplated use shall be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public." In light of the facts that the determination of what is a public use is reserved to the courts, and that our courts have recognized that property obtained by *eminent domain* can be conveyed to private enterprise, would amendments such as those offered in the last two sessions result in the intended effect?

It is certainly difficult to know the answer to that question. Speculatively, the Justices of the Mississippi Supreme Court are aware of the state of the public conscience on the *Kelo* decision. What remains is the judiciary's right to determine what is a "public use" as well as the judiciary's reliance on past decisions – which, in Mississippi, includes cases that clearly stand for the proposition that incidental private benefit in the wake of legitimate public takings is okay.

It may also be prudent to consider language in Mississippi's urban renewal legislation for definitions of "blight" and the like. Legislative decisions made by municipalities under urban renewal legislation are afforded much deference; incidental and partial private utilization in areas of taking under the auspices of urban renewal and development of blighted areas would, most likely, be treated deferentially by the courts, as New London's plan ultimately was by the United States Supreme Court.

One wonders how to proceed in an effort to confront so vast a target. We would argue that the current action should be broadened, as under its terms, the question of public use will remain a judicial one.

A further consideration for the Legislature is whether the U.S. Supreme Court's embrace of "public purpose" in the late 19th and early 20th centuries – decisions moving from "use" to "purpose" – has an effect on §17 of our Constitution. Consider, for example, if the section read, as a matter of application of federal case law: Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner prescribed by law; and whenever an attempt is made to take private property for a *public purpose*, the question whether the contemplated use *is for a public purpose* shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is *for a public purpose*. When called upon to determine the meaning of public use in light of the *Kelo* analysis, would our Court consider public purpose – a much broader concept by far? Based on language in *Vicksburg v. Thomas*, one could argue that it would.

CONCLUSION.

It seems to us that in order to ensure that a result such as in *Kelo* would not transcend to Mississippi property owners, more is perhaps required. While the decision of whether any resolution amending any section of the constitution is a consideration for the Legislature, if the intent is to respond to *Kelo's* possible impact on Mississippi property owners, craftier measures may be necessary.

The proposed variety of constitutional amendments clearly assault the end result – no private property should *ever* be taken for private economic development purposes or to raise the tax base. But the issue, we fear, is greater. The issue is whether this proposed language constricts a judicial determination of public use. We fear that it does not.

The remedy? We are unsure. But we suggest a number of considerations. First, consider a definition of public use and/or public purpose within the section itself which proscribes any result that is beyond the legislative intent. Example: Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner prescribed by law. A public purpose shall never include a purpose which may result in conveyance of the land so taken in order to directly or indirectly benefit a private developer. This example, no doubt, is overbroad and would result in a detriment to economic development. We must remember that a significant portion of the angst attached to the *Kelo* decision resulted from the taking of owner-occupied (sometimes for generations) single family residences.

Second, consider the argument made in the *Kelo* dissent, that if there is no harm to be eliminated by the taking, the public justification is absent. The dissent argued that the *Kelo* majority was moving away from prior decisions which sanctioned condemnation of harmful property use – that when a harmful use is eliminated, a public benefit is achieved. Should *eminent domain* for any developmental purpose be tied to ridding the community of a "harm"?

Third, can the State of Mississippi afford to acquiesce further in the U.S. Supreme Court's expansion of the meaning of public use as public purpose? For as the dissent argues: "Nearly any lawful use of real private property can be said to generate some incidental benefit to the public."

The issue may be far larger than it seems, the target less precise, and a concerted assault on a number of Mississippi statutes required.

ABOUT THE AUTHOR:

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Quarles remains active in bar work, and currently chairs the Women in the Profession Committee, a standing committee of the Mississippi Bar. She also serves as co-chair of the Mississippi Supreme Court's "Gender Fairness Implementation Study Committee" and acts as the Chief Operating Officer of the Workers' Compensation Section of the Mississippi Bar. She is a fellow of the Mississippi Bar Foundation, a recipient of the Mississippi Bar's Distinguished Service Award, a member of the Mississippi School for Math and Science Foundation Board and a member of the MUW Alumni Board. Quarles was recently honored by the American Bar Association's Administrative Law and Regulatory Practice Section, receiving the Mary C. Lawton Award for lasting contributions to the Mississippi Workers' Compensation Commission in the areas of alternative dispute resolution and access for Hispanic workers.

In 2004, Quarles was named one of Mississippi's 50 Leading Business Women by the Mississippi Business Journal; the Journal recognized her service to the State as a Commissioner as well as entrepreneurial skills developed in her property management business in Starkville, Spruill Property Management, LLC

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