

Economic Development, Eminent Domain and the Property Rights Movement

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As the battle against using eminent domain for economic development reaches the Supreme Court, litigants on both sides have raised serious legal and policy questions. As the authors explain, the Supreme Court is now faced with how to balance individual property rights with the need of cities to encourage public/private redevelopment projects.

“Public/private partnerships” have become the watchwords for urban revitalization projects in American cities. The public sector has used its unique resources and powers—including condemnation for land assembly—to leverage private sector capital and development expertise for projects that have reshaped the skylines of cities and changed the landscape of neighborhoods. From the Pennsylvania Avenue redevelopment in the Nation’s capital to downtown San Diego, eminent domain has been a critical tool in economic redevelopment projects.

Like other ambitious, well-intentioned efforts of government, the results of these public/private ventures have included many highly successful projects and some that have been economic and social failures.

For more than a half century, courts have avoided the largely political question of trying to distinguish between good and bad projects, instead upholding broad local government condemnation powers in support of economic development and deferring to the government officials’ determination of what furthers the public interest. At the risk of dramatic oversimplifi-

cation, the situation in New York at one time might have been described: Rockefeller Center could have condemned Saks Fifth Avenue so long as Robert Moses said it was okay.

Recently, however, several state appellate and lower courts have rejected attempts by municipalities to use condemnation for economic development, applying a more exacting level of scrutiny to such transfers. Last October when the U.S. Supreme Court convened for another term, the Court surprised a lot of real estate executives and government officials by taking a case that raised this issue squarely. In *Kelo v. City of New London*, Docket No. 04-108, the United States Supreme Court now is considering whether, or under what circumstances, a municipal authority can condemn private property for transfer to another private owner for economic development. The oral arguments in the Supreme Court on February 22, 2005 received widespread national press coverage the next day.

The *Kelo* plaintiffs assert that condemnation for private economic development projects does not constitute a “public use” under the Constitution or, secondarily, that the Court should significantly limit government discretion in this context. The City of New London and the New London Development Corpora-

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tion (NLDC) argue that condemnations for economic development should be subject to the Supreme Court's longstanding deference to legislative public use determinations and, in the alternative, that the condemnation in *Kelo* would still pass constitutional muster under a more rigorous level of scrutiny. Thirty-eight amicus briefs have been filed by a diverse group of organizations and individuals interested in the resolution of the issues presented in *Kelo*, with 26 briefs supporting the property owners and 12 on the side of the City.

The outcome of *Kelo* could redefine the way in which redevelopment projects are structured, with important practical consequences for developers, lenders, and others involved in urban revitalization. Even before the Supreme Court announces its decision, developers and lenders involved in current and future redevelopment projects can take steps to reduce the potential risks posed by recent litigation.

A Growing Property Rights Movement

The Fifth Amendment of the Constitution clearly allows the government to take private property for public use, "... [N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. Based on the language and history of the Amendment, many have argued that its principal focus is to provide compensation to those whose land is taken, rather than to act as a substantial restraint on government determination of what is in the public interest.

In recent years, some courts have more narrowly defined the meaning of term "public use" in condemnation disputes for economic property. In *Kelo*, the Connecticut Supreme Court narrowly held that economic development satisfies the Constitution's public use requirement, if the primary reason for the exercise of eminent domain is to benefit the community at-large. Since that ruling, property rights advocates have put the full force of the movement behind Susette Kelo and her plight to save her home, which has become a focal point for t-shirts and bumper stickers, in addition to more traditional legal advocacy.

The Kelo Controversy

Kelo involves a large economic redevelopment plan in the city of New London, Connecticut. The plan, prepared by the NLDC, a private non-profit corporation, in conjunction with the city government, seeks to revitalize a ninety-acre area of this economically distressed city, to complement a nearby Pfizer research facility. Under Connecticut law, a city may designate a non-profit corporation to act as its development agent for an economic development project. The plan includes a waterfront hotel and conference center, office space for high tech research and development, retail space, and eighty new residences, all intended to build

momentum for city revitalization. Although the NLDC would own the land at issue, the plan calls for long term ground-leasing of various parcels to private parties for development. The plan is projected to create in excess of one thousand jobs, in addition to increasing tax and other revenues for the city.

Designated a "distressed municipality" by Connecticut's Office of Planning and Management, New London is one of the state's poorest cities. However, government officials did not complete a formal process to designate the project area as blighted but there is no question that the city has experienced three decades of economic and population decline and, with 56 percent of city real property exempt from real estate taxes, few options exist to reverse this downward trend. The departure of one of the region's principal employers in 1996 left New London with an unemployment rate that is close to double that of the rest of the state. In the Fort Trumbull neighborhood where the *Kelo* Plaintiffs reside, tax revenue is low, most construction predates 1950, and more than 88 percent of buildings were in "worse than average" condition in December 1998.

Before the Connecticut Supreme Court, the *Kelo* homeowners argued that the condemnation of private property for economic development is inconsistent with prior public use cases. The homeowners also asserted that any public benefits flowing from the condemnations were merely speculative, despite extensive economic impact reports supporting the redevelopment that forecasted the creation of between 1000 and 1500 new jobs for the community. The Connecticut high court disagreed with the plaintiffs, holding that economic development qualifies as a valid public use justifying the exercise of eminent domain power under the nearly identical provisions of the Connecticut and federal constitutions. The Court reasoned that any private gain to developers was secondary to the public benefit of significant economic growth in the New London community.

An Emerging Public Use Puzzle

For several decades, most judicial decisions have upheld broad local government power to condemn sites for private redevelopment. On five occasions in the past half-century, the Supreme Court has upheld the transfer of private property to private redevelopers. In the seminal case, *Berman v. Parker*, 348 U.S. 26 (1954), the Supreme Court upheld comprehensive housing redevelopment legislation in the District of Columbia allowing the condemnation of slums and blighted areas for redevelopment in private hands. In *Berman v. Parker*, the property owner contesting the condemnation was located in an area that had been designated as blighted even though his building, a department store, did not itself constitute blight. *Berman* established a standard of extreme judicial deference to legislative public use determinations. Once a legislative public use determination has been made,

the Court reasoned, “the public interest has been declared in terms well-nigh conclusive.” 348 U.S. at 32.

The Supreme Court echoed its endorsement of broad state condemnation power thirty years later in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), confirming that condemned property transferred to private beneficiaries can still evince a public purpose. The unanimous *Midkiff* Court ruled that the public use requirement is coterminous with the scope of a sovereign’s police powers. *Id.* at 240. The Court also reaffirmed *Berman*’s holding that the judicial role in reviewing public use determinations is extremely narrow; great deference must be shown to such legislative judgments. *Id.* at 240-241. Importantly, in reaching its conclusion, the *Midkiff* Court also opined that “it is only the Taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.” *Id.* at 244 (emphasis added). These two Supreme Court cases established a standard of broad local government power to determine the scope of “public use” for condemnation that has, until *Kelo*, remained untouched by the Supreme Court for over half a century.

However, the Court’s decision to hear *Kelo* follows on the heels of several recent state and lower federal court decisions applying a less deferential approach to local government use of condemnation power for economic development. These cases apply a more stringent level of scrutiny, even when citing *Berman* and *Midkiff*, to legislative determinations of public use. *See, e.g., Southwestern Ill. Dev. Auth. v. Nat’l City Envtl., L.L.C.*, 768 N.E.2d 1, 7-11 (Ill.) (rejecting economic-development argument for the use of eminent domain to expand parking at a privately-owned sports facility under similar state and federal constitutional provisions) *cert. denied*, 537 U.S. 880 (2002); *Bailey v. Myers*, 76 P.3d 898 (Ariz. Ct. App. 2003) (striking down, under the Arizona Constitution, a city use of eminent domain to transfer private property for redevelopment by private developers).

Most notably, the Michigan Supreme Court reversed its landmark *Poletown* decision, which authorized the municipal condemnation of an entire neighborhood in Detroit to build a new General Motors plant, last July. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981). In reversing *Poletown*, the Michigan Supreme Court ruled that generalized economic benefits, such as alleviating unemployment and revitalizing the economic base of a community, were insufficient under the takings clause of the Michigan Constitution to justify the transfer of condemned property to a private entity. *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004). This seismic shift for the Michigan Supreme Court was a key victory for the property rights movement and suggests the possibility of a shift in takings jurisprudence and the meaning of “public use.”

The High Stakes in Kelo

Property rights advocates argue that the words “public use” in the Fifth Amendment require courts to place a meaningful limitation on term “public use,” and give less deference to legislative judgment in this arena. The Institute for Justice, a District of Columbia-based nonprofit organization representing the *Kelo* plaintiffs, asserts that the “economic development condemnation” at issue in the case exceeds the proper scope of local government condemnation power and violates the constitutional rights of New London property owners.

Reversal of the Connecticut Supreme Court *Kelo* decision has the potential to undo more than fifty years of Supreme Court precedent endorsing broad local government condemnation power and judicial deference to legislative public use determinations. This half century of precedent established that the focus of any public use inquiry should be on whether the taking will produce significant public benefits, rather than on the means by which those benefits come to fruition. Broad condemnation power, and specifically the government’s power to condemn property for transfer to another private owner for redevelopment, has been a critical tool in public-private partnerships for civic redevelopment. Without these powers, the assembly of land for development projects necessary to revitalize distressed communities would, at a minimum, be exceedingly difficult.

Eminent domain allows the proponents of redevelopment projects to prevent lone “holdout” property owners from standing in the way of large projects intended to benefit entire communities. Through condemnation proceedings, municipalities can force otherwise reluctant property owners to sell, and provide them with just compensation for their land. Threatened condemnation also has greatly facilitated negotiated purchases for redevelopment projects. If the Supreme Court were to significantly limit this power in *Kelo*, a single “holdout” could thwart a project that offers great economic benefits to the community as a whole. In fact, if the Supreme Court places far more weight private property rights than it has in the past half-decade, *Kelo* could change the basic assumptions and structure of many redevelopment efforts throughout the country.

What Can Be Done Now

Even before the Supreme Court announces its decision, developers and lenders undertaking civic redevelopment projects should consider taking specific steps to reduce the potential exposure for both current and future projects. Redevelopment projects should be structured and documented in a way that maximizes the likelihood that they could meet stricter standards. Here is what investors, developers and lenders can do now:

1. *Blight or Economic Distress.* Courts have been more supportive of condemnation for economic development where condemned areas are either blighted or in severe economic distress. Developers and lenders should review state statutes regarding blight and economic distress carefully because in many jurisdictions blight would include, for example, vacant land and underutilized land.

2. *Public Benefits.* For any condemnation for economic development, the primary purpose should be to benefit the public. Developers, bankers and government officials should show that the public benefits accruing from a redevelopment project are direct, rather than merely incidental to private gains. The public record should include economic impact reports, illustrating specific benefits to the immediate area being condemned, as well as broader benefits to the community as a whole.

3. *Condemnation as a Tool of Last Resort.* Document prior attempts to negotiate purchases from property owners. It is important to be able to prove that condemnation is necessary to achieve the desired public benefit, because of each individual owner's unwillingness to accept fair market value for the property.

4. *Statutory Procedures.* Most state and local redevelopment statutes employ detailed procedures to ensure that owners of condemned property are treated fairly. These procedures sometimes include offering the property owner the chance to participate in the project, as well as prohibitions against pre-determining the outcome of a redevelopment contract before a property owner accepts or declines such an offer. Developers should make efforts to ensure that no such pre-determination occurs, even if the developer and the city think pre-determination has some desirable elements.

5. *Developer Selection Process.* Developers should be selected in a manner that protects the integrity of the redevelopment process and inspires public confidence. It is better to have transparency and a detailed public record of how the public interest is served in the selection of a particular developer. Open competition often is preferable, but in certain cases it may be appropriate to make a developer selection based on an unsolicited proposal or on a sole-source basis.

6. *Public Involvement.* Redevelopment projects should include broad public involvement not only to show citizens received notice and an opportunity to comment on these public endeavors but also to create a project that better serves the public interest. Developers and government officials should reach out to the public to ensure that the interests of affected property owners, as well as the general community, are heard and considered. Supports from community organizations and leaders will also help bolster the public nature and benefits of any redevelopment project.

7. *Why Project Will Be Developed After Condemnation.* Attorneys for the *Kelo* plaintiffs point out that in a number of cities speculative economic development projects never did move forward after condemnation. It would be helpful to have such evidence as economic studies, developer commitment letters, financing commitment letters and other evidence that can show that the hoped-for redevelopment is reasonably expected to occur after condemnation.

8. *Governmental Role in Redevelopment.* One factor cited by some courts taking a less deferential approach to the use of eminent domain for redevelopment is the lack of continued governmental involvement after a transfer of property to private parties. Ground leases, where the government maintains ownership of the fee interest in the property and may share in redevelopment profits, provide one mechanism to increase the governmental role. Other redevelopment efforts provide that a public agency retains some control over the project, and that the developer must act according to a legislatively-approved plan. A continuing governmental role in the project would provide additional evidence of the continuing public purposes served by condemnation for economic development.

9. *Exhaustion of Administrative Remedies.* Sometimes blight and redevelopment determinations are made years before condemnation proceedings begin. In such instances, developers and government officials should ensure that challengers have followed the required procedures, including the exhaustion of administrative remedies, before challenge in court.

Tough Questions

As the battle against using eminent domain for economic development reaches the Supreme Court, litigants on both sides have raised serious legal and policy questions. Some urban economic development efforts have been successful, while others have been case studies in what government should not do.

There have been some terrible abuses of eminent domain in America. Urban renewal bulldozed historic neighborhoods in some cities, uprooting families while all too often failing to realize ambitious project goals. However, those personal hardships and project failures often did not relate to whether the next use was by a private redeveloper or for a public highway. There have been just as many tragic urban renewal stories involving condemnation for highways, infrastructure and government office centers.

The nature of real estate development in American cities today will make it difficult for courts—in *Kelo* and in other cases—to divide “public use” from “public benefit” or “public purpose.” Public/private partnerships often blur the line between public and

private, raising questions that will make it difficult for judges to adopt a narrow definition of public use:

- If a developer builds on publicly-owned land, with the fee interest remaining in the government but subject to long-term ground leases that facilitate financing and private development, is this situation “public use” because the government holds the fee? If a private developer “master leases” an entire building to the government, is there a “public use” even though ownership of the land and building remains vested in the private sector?
- How should judges deal with the fact that the private sector now develops and owns toll roads, arcades, plazas, stadiums and streets that previously were thought of as “purely” public?
- Should a judge permit condemnation of private property to transfer land ownership to a city for a municipal stadium but prohibit condemnation to transfer land for a privately-owned stadium that is open to the public on substantially the same terms as a municipally-owned stadium would be?
- If courts were to block condemnation that would transfer land from one private owner to another for a mixed-use development project, then would it be constitutionally permissible to use condemnation to acquire private property for the roads and infrastructure serving only the new mixed-use development project located on private land?
- If condemnation for private industrial development would not be permitted under the Constitution, could a city lawfully use tax revenues to buy the property for the same project without condemnation?¹
- As Justice Scalia asked during the *Kelo* oral argument, is it clear that “elevating the city from depressed to prosperous is a better justification than elevating a city from prosperous to more prosperous?”² How depressed must a city be in order for condemnation to be justified?
- How different are condemnations for “blight removal” from those for “economic revival”? As Justice Kennedy observed during oral argument for *Kelo*, “Blight is in the eye of the beholder.”³

One of the arguments repeatedly made by the property rights side of the *Kelo* case is that the concept of “public benefits” is much more susceptible to manipulation than the actual words “public use” used in the Constitution. Recognizing that it may be difficult to get the Supreme Court to turn away from over half a century of law and overturn *Berman v. Parker*, the *Kelo* plaintiffs distinguished *Berman* as a case involving a determination of blight. This line of argument would suggest that it is not unconstitutional to have condemnation to eliminate blight for the purpose of private economic redevelopment but, the Constitution does not permit condemnation for economic redevelopment where there is no finding of blight in the area.

There are several problems with requiring a finding of blight. The property owner in *Berman* had a department store that was not itself blighted but was located in a blighted neighborhood. Moreover, as Justice Ginsberg noted in the first question from the Court during the *Kelo* oral argument, New London is in “a depressed economic condition” and “a depressed community.”⁴ In many states, the depressed economic condition of a community would appear to support a formal blight declaration. Limiting condemnation for economic development to blighted areas could also make poor and minority citizens more vulnerable to condemnation and push projects into poor neighborhoods rather than locations that best further city planning and other public policy goals. Justice O’Connor asked whether condemnation could be used to condemn a Motel 6 for redevelopment as a Ritz-Carlton.⁵

Moreover, in a number of states, the definition of blight includes not only slum but also “under productive” and “vacant” land. And if condemnation is permissible for blighted areas, why should condemnation not be permitted to avoid foreseeable blight in the near term future?

Attorneys for the property owners in *Kelo* suggested that the Supreme Court add a test of whether the intended economic development uses are reasonably expected to occur. Briefs for the property owners point out that many economic development projects do not come to fruition and, before taking a citizen’s house for private redevelopment, a court should look closely to determine whether there is a reasonable basis to believe the redevelopment will occur.

Urban renewal efforts do not always have a happy ending. In the 1960s, for example, the City of Paterson, New Jersey condemned large portions of a predominantly residential neighborhood for a heliport that would have provided regularly scheduled helicopter service from Paterson to all of the major airports in the New York metropolitan area. The Paterson newspapers talked about the future of a city in which you could board a helicopter and fly swiftly to what is now Kennedy International Airport for a plane to almost anywhere in the world. Unfortunately, the city had no agreement with the New York helicopter company that supposedly was going to provide the helicopter service. In Paterson, residents were uprooted and displaced from their homes while the land remained vacant for decades. Paterson today remains in serious economic decline.

Some of the most important economic development projects of our time that have relied on condemnation did not go forward on schedule. On the other hand, sometimes the delays have resulted in projects that have provided far greater public benefits than originally planned.

The Pennsylvania Avenue development took decades to go forward. Had this project proceeded on time, two historic hotels—The Willard and the Hotel Washington—would have been razed, a gigantic

square—critically dubbed “Red Square”—would have been built, and the rest of the Nation’s Main Street would have been boxy brutalist office buildings not unlike the FBI Building. Instead, Pennsylvania Avenue is lined with a mix of old and new office buildings, rental apartments, condominium units, shops and restaurants that today represents one of the most successful urban economic redevelopment projects in America.

Similarly, New York’s 42nd Street redevelopment benefited greatly from the fact that economic conditions caused the original planned office development project to languish. Today, lively entertainment, retail and other commercial uses from a later plan have revitalized this area in a way that large, austere office buildings would not have accomplished. In these instances and many others, the challenging projects that can do the most to help a city could not be implemented on the original timetable.

In many jurisdictions faced with a scarcity of local resources, cities have looked to the redeveloper to pay the costs of acquiring private property for economic development “up front.” Many jurisdictions permit and encourage redeveloper funding of condemnation land acquisition costs. The practice eliminates what some have viewed as an additional restraint on government use of eminent domain—i.e., that eminent domain would be used to help a private developer only when absolutely necessary because the city itself would have to pay for the property. Having the redeveloper fund the acquisition costs may provide additional evidence that the project is reasonably expected to proceed, but such developer funding also may complicate the analysis of whether the project is primarily for the benefit of the private developer or primarily for public benefit.

The Supreme Court justices will consider many of these questions in *Kelo*. The court will seek to balance property rights with the need of cities to encourage public/private redevelopment projects to improve the economic conditions of cities and neighborhoods. In *Kelo* and in other similar cases, the real estate industry should watch closely to see how judges carve out an appropriate role for the courts, and while deferring, when appropriate, to elected officials and administrative agencies.

Possible Kelo Outcomes

Prognostication is an inexact science, particularly when it comes to predicting what the Supreme Court of the United States will decide. Many people have been wrong in trying to call a case based on the oral argument, and prediction is even more difficult here because Chief Justice Rehnquist and Justice Stevens, who could not attend the argument, have indicated that they will participate in the decision.

The Court is likely to take one of four approaches:

- First, and most drastically, the Court could re-

verse *Berman v. Parker* and prohibit the use of eminent domain to take property unless the property is transferred to a government entity or public carrier.⁶

- Second, the Court could reaffirm its long-standing practice of strong judicial deference to legislative public use determinations. In upholding New London’s public use determination, the Court could find no difference between the economic development goals in *Kelo* and the blight removal and land redistribution goals in *Berman* and *Midkiff*. Under this scenario, the current redevelopment process would continue largely unchanged.
- Third, the Court could overturn the Connecticut Supreme Court’s decision in *Kelo* and bar the use of eminent domain to transfer property from one private owner to another as a tool for economic development in the absence of either: (a) the finding of severe blight evidenced in *Berman*; or (b) other public harms, like the land oligopoly in *Midkiff*. This approach would allow the condemnation of private property for transfer to another private owner only in such limited circumstances and would narrow the definition of “public use” accordingly.
- Fourth, the Court could articulate an approach somewhere between the previous two positions, imposing some level of heightened scrutiny on the review of condemnations for transfer of land from one private owner to another for redevelopment. Under this approach, which reflects the analysis of some state courts and the dissenting justices of the Connecticut Supreme Court, the scope of “public use” would remain broad, but the burden on proponents of redevelopment projects to prove purported public benefits would increase. The court could require proof that eminent domain is reasonably necessary, in nature and extent, to justify the use of eminent domain for economic development.

If the Court turns away from a long history of case law and holds that condemnation cannot be used to further private economic development with substantial public benefits, then we will enter a new era of public/private partnerships reshaped by the Court’s decision. Even if the Court does not prohibit the use of condemnation for economic development, investors and lenders should understand the issues raised in this article because some state supreme courts will still have the opportunity to act as the Michigan Supreme Court did and prohibit condemnation for economic development based on state constitutional protections.

The Future

Eminent domain, the ability to take one’s private home or private business to further a public good, is one of

the most coercive powers of government in a free society. If the property rights movement does not win in *Kelo*, what can be done to reduce the trauma of special hardship in eminent domain relocations? Most likely, the property rights movement would be more effective if it focused its talents, resources and energies on legislative bodies and state and local officials. The pain of condemnation is largely unrelated to who builds what on that land that a relocated family once called home. There are many potential legislative solutions that could expand current relocation benefits to provide assistance beyond the Constitutional minimum compensation for a family who suffers additional consequential damages and subjective injuries. Important legislative and administrative improvements could become the primary means for dealing with eminent domain abuse.

The history of government efforts to improve the economic condition of American cities has long created tension between private and public interests. The simple words “public/private partnerships” result in complex transactions in which public and private responsibilities are heavily negotiated and documented. The complicated financial structure of urban development projects makes it particularly difficult to adopt a narrow definition of public use.

In the public use debate, the interests of government often align with the interests of major developers, bankers and investors. Both the real estate industry and government often support judicial deference to government agency determinations that public/private development projects satisfy the public use requirement by providing the means to achieve public benefits.

Beyond the “public use” language, there are other portions of the Just Compensation Clause in which the real estate industry will find common ground with the property rights movement. The property rights movement has also challenged “regulatory takings,” the fact that regulations so intrude on the rights of private property owners that they require just compensation under the Constitution. In regulatory takings, the interests of major developers, investors and lenders on the one hand, and the property rights movement on the other, often align against overreaching government regulation. This concept of regulatory takings is likely to be the focal point of future takings litigation under the U.S. Constitution.

The government routinely regulates property and generally may do so without paying compensation. However, “if regulation goes too far it will be recognized as a taking.” *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The leading modern precedent is *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), in which a property owner sought to build a skyscraper above an historic railroad terminal. The New York Landmarks Preservation Commission had rejected the proposal because of its impact on the historic Grand Central Terminal. The property owner

filed suit, claiming that the Landmarks Commission had “taken” its property without just compensation by significantly diminishing the value of the site. The Supreme Court upheld both the New York Landmarks Preservation Law and its application to Grand Central.

In *Penn Central*, the Supreme Court recognized that government regulations can go too far and require just compensation, setting the stage for later land regulation opinions that protect the rights of property owners from overreaching government regulation of private property. *Penn Central* requires that a judge consider (i) the character of the governmental regulation, (ii) its economic impact, and (iii) its interference with the owner’s distinct investment-backed expectations. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). The determination of whether a regulation has “go[ne] ‘too far’” and effects a taking is an “essentially ad hoc factual inquir[y],” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992), but the touchstone of the inquiry is whether the government has “forc[ed] 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). Whether individual laws and regulations trigger a regulatory taking under these standards likely will be the continuing focus of takings litigation.

There is some irony in the fact that *Kelo* puts the property rights movement in a position that is adverse to most of the banker, developer, investor and other professionals who read the *Real Estate Finance Journal*. In the future, the constitutional battleground in which the interests of the real estate industry and the private property movement align will be in the area of regulatory takings litigation against the government. The federal courts will face questions about how far regulation must go before it constitutes a taking requiring the payment of just compensation. The litigation under the U.S. Constitution will be over when government can avoid paying for far-reaching regulations, not whether government can take property after paying just compensation.

¹ Justice Souter explored this possibility in questions to plaintiffs’ counsel during the oral argument for *Kelo*. See Transcript of *Kelo* oral argument, at pp. 8-9 (Feb. 22, 2005).

² Transcript of *Kelo* oral argument, at p. 4 (Feb. 22, 2005).

³ Transcript of *Kelo* oral argument, at p. 13 (Feb. 22, 2005).

⁴ Transcript of *Kelo* oral argument, at pp. 1-2 (Feb. 22, 2005).

⁵ Transcript of *Kelo* oral argument, at p. 30 (Feb. 22, 2005).

⁶ See, e.g., University of Chicago Law School Professor Richard Epstein’s Brief of the Cato Institute as *Amicus Curiae* in Support of the Petitioners, *Kelo v. New London*, (2005) (No. 04-108).

