Making Great Communities Happen

Connecticut Chapter of the American Planning Association

Testimony regarding HB 5123
AN ACT PROHIBITING THE USE OF EMINENT DOMAIN FOR COMMERCIAL PURPOSES

CCAPA opposes this proposed legislation because it is unnecessary and would needlessly restrict the use of eminent domain even when such use would meet the valid "public use" test. Case law supports broad interpretation of "public use" to include development that serves the public benefit (including economic development). In 2004, the American Planning Association, CCAPA, and National Congress for Community Economic Development submitted an amicus curiae on the *Kelo vs. New London* case supporting the findings of the Connecticut Supreme Court that New London was exercising eminent domain for a valid public use. The brief argued that the economic development purpose was supported by previous case law, and that the City's planning process documented the project's public benefit impact.

We believe that a statute restricting the use of eminent domain for commercial purposes is unnecessary-- use of eminent domain already must pass the "public use" test-- and would put limitations on the ultimate use of property taken for eminent domain, potentially complicating redevelopment plans that have a public/private component or the disposition of surplus land taken by eminent domain but no longer needed by the government entity.

An excerpt from the 2004 APA amicus brief follows.

WHO WE ARE

The Connecticut Chapter of the American Planning Association (CCAPA) has over 420 members who are governmental and consulting planners, land use attorneys, citizen planners, and other professionals engaged in planning and managing land use, economic development, housing, transportation, and conservation for local, regional, and State governments, private businesses and other entities. CCAPA has long been committed to assisting the legislature and State agencies with developing and furthering responsible growth management principles. The American Planning Association is an independent, not-for-profit, national educational organization that provides leadership in the

development of vital communities.

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Excerpt: BRIEF OF THE AMERICAN PLANNING ASSOCIATION, THE CONNECTICUT CHAPTER OF THE AMERICAN PLANNING ASSOCIATION, AND THE NATIONAL CONGRESS FOR COMMUNITY ECONOMIC DEVELOPMENT AS AMICI CURIAE IN SUPPORT OF RESPONDENTS
2004

https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/amicus/pdf/kelo.pdf

History Teaches That “Public Use” Should Be Given A Broad Interpretation That Includes Economic Development

Historically speaking, three different interpretations of “public use” can be discerned. The most restrictive interpretation requires that the government actually hold title to the property after the condemnation. The next most-restrictive definition is that public use means “use by the public.” Under this definition, public title to the property is irrelevant; what is decisive is whether the property is accessible as a matter of right to the public. The third and broadest definition is that public use means public benefit or advantage. Under this conception, neither title to the property after condemnation, nor access to the property by the general public, is necessary. Instead, property can be taken for any objective that the legislature rationally determines to be a sufficient public justification. The narrowest possible definition – that public use means public ownership – has always been regarded as a fairly uncontroversial type of taking. Many routine examples of eminent domain – such as the acquisition of land for a highway – fit this definition. But public ownership has almost universally been regarded as too narrow to serve as a comprehensive definition of public use. Starting in the early years of the nineteenth century, States frequently delegated the power of eminent domain to privately-owned turnpike, canal and railroad corporations. Later, such delegations were extended to privately-owned gas, electric, and telephone utilities. The widespread practice of delegating the power of eminent domain to these sorts of privately-owned common carriers and public utilities meant that courts almost never regarded public title to condemned property as a complete definition of public use.

Throughout the roughly 100 years that witnessed the rise and fall of the “use by the public” standard in the state courts, this Court never once sought to impose such a restriction on eminent domain as a matter of federal constitutional law. Four cases decided by this Court around the turn of the twentieth century involving the development of natural resources are particularly instructive. These cases involved challenges to the use of eminent domain to construct a ditch to remove water from a drainage district, O’Neill v. Leamer, 239 U.S. 244 (1915); to construct ditches to bring water to irrigation districts, Clark v. Nash, 198 U.S. 361 (1905); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896); and to build an aerial bucket line to transport minerals taken from a mine, Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906).

...The public rationale for the takings in each of these cases was the State’s determination that the property was needed in order to enhance the productivity of particular resources. The Court

recognized that the takings in these cases could not be justified on public health and safety grounds, see Fallbrook Irrigation Dist., 164 U.S. at 163, or on the ground that large numbers of persons directly benefited from the takings, see Clark, supra; Stickley, supra. Instead, in each case the condemnation was justified because of its impact on "the growth and prosperity of the state," Clark, supra, 198 U.S. at 368, or "the prosperity of the community," Fallbrook Irrigation Dist., 164 U.S. at 163 – in other words, because it was needed to promote economic development. Each of these decisions therefore stands for the proposition that condemnation for the sole purpose of economic development is a legitimate public use, provided a State so determines and this judgment is a rational one in light of the circumstances of the property and the needs of the public.

...Integrating the decision to use eminent domain into a sound planning process has a number of desirable consequences. Such a process can help minimize the use of eminent domain, by identifying alternatives to proposed development projects, such as relocating or re-sizing projects, or perhaps forgoing them altogether. It can also reduce public concerns about the use of eminent domain, by providing a forum in which the reasons for opposition can be considered, offering explanations for the proposed course of action and possible alternatives, and perhaps instilling a greater degree of understanding on the part of both the proponents and opponents of the proposed project. To the extent the need to undertake a planning process including public participation magnifies the cost differential between eminent domain and market transactions, these processes also provide a further disincentive to use eminent domain.

We do not suggest that a mandate to engage in a sound planning process can be extracted from the "public use" requirement of the Fifth Amendment. Planning processes, including public participation and a requirement of considering alternatives, have other roots, most prominently the administrative law traditions surrounding the local land use planning. We do think, however, that the presence of these features is relevant to this Court's consideration of whether the public use determination of New London and the New London Development Corporation was a rational one. New London and its Development Corporation engaged in an extensive planning process before determining that it was necessary to exercise the power of eminent domain; they provided multiple opportunities for public participation in the planning process; and they gave extensive consideration to alternative plans before settling on the final plan. See Resp. Br. at 4-9. We would urge the Court to note these features of the instant case as relevant factors confirming that the public use determination was rational – without of course necessarily suggesting that they are constitutionally required. We would also suggest that the Court note other recent decisions in the lower courts, such as S.W. Ill. Dev. Auth. v. Nat'l City Envt'l, L.L.C., 199 Ill.2d 225, 768 N.E.2d 1 (2002), where eminent domain decisions were not accompanied by any significant degree of planning or public participation, and where the state courts held that the taking was not for a public use – without of course necessarily suggesting that the same result would be required by the Federal Constitution. The Court can instruct by example as well as by mandate.