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**PRIVATIZATION AND DEMOCRATIZATION—REFLECTIONS ON
THE POWER OF EMINENT DOMAIN**

PETER W. SALSICH, JR.*

Carol Rose's concluding point that privatization, while important, is but one of a whole array of political reforms necessary for democracy to flourish,¹ is well taken. Her caution that privatization by itself does not guarantee success in democratic endeavors is reflected in the current controversy over the use of eminent domain by local governments to foster economic development.

The widespread inclusion of eminent domain in local government economic development toolboxes is due in large part to the privatization of the redevelopment process. From the urban renewal projects of the 1940s and 1950s to the tax increment finance (TIF) projects of today, the public-private partnership has been the favored vehicle for local redevelopment efforts. Such partnerships usually consist of a city agency, such as an urban renewal authority or a public housing authority, one or more limited partnerships made up of private developer general partners and private investor limited partners, and in some cases not-for-profit community-based development organizations (CBDOs).²

A critical component of these partnerships is the active participation by private developers and investors in a redevelopment process organized and planned by governmental agencies, usually an arm of local government. For example, in *Berman v. Parker*,³ the case that triggered the modern controversy over the use of eminent domain for economic development purposes, a public agency, the District of Columbia Redevelopment Land Agency (Agency), was authorized by a federal statute to "acquire and assemble the real property in the

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1. Carol M. Rose, *Privatization—The Road to Democracy?*, 50 ST. LOUIS U. L.J. 691, 693–94 (2006).

2. For discussion of various aspects of the public-private partnership phenomenon in the housing and community development context, see Kirk McClure, *The Low-Income Housing Tax Credit As an Aid to Housing Finance: How Well Has It Worked?*, 11 HOUSING POL'Y DEBATE 91 (2000); Susan J. Popkin et al., *The HOPE VI Program: What About the Residents?*, 15 HOUSING POL'Y DEBATE 385 (2004); Jane Ennis Sheehan, *Mixed Finance: A Real Estate Lawyer's "Field of Dreams,"* 7 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 289 (1998); Sean Zielenbach, *Catalyzing Community Development: HOPE VI and Neighborhood Revitalization*, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 40 (2003).

3. 348 U.S. 26 (1954).

area,” by eminent domain if necessary, to implement redevelopment plans that had been approved by the District’s governing body.⁴ Among the congressional findings was the declaration that eliminating slums and blight could not be accomplished “by the ordinary operations of private enterprise alone without public participation.”⁵ Once the land was assembled, the Agency was authorized to lease or sell property not needed for streets and other public facilities to private entities who agreed to carry out the redevelopment plan.⁶ As noted by the Court, “Preference [was] to be given to private enterprise over public agencies in executing the redevelopment plan.”⁷

While the urban renewal program that was approved by the *Berman* Court was widely condemned as destructive of low income, albeit stable, communities,⁸ and was eliminated as an active program by the Housing and Community Development Act of 1974,⁹ the privatization concept inherent in the public-private partnership approach to urban redevelopment continues to be emphasized in federal programs such as the Community Development Block Grant (CDBG) program,¹⁰ the Section 8 Certificate and Voucher programs,¹¹ the Low Income Housing Tax Credit (LIHTC) program¹² and the HOPE VI program to convert distressed public housing developments into mixed-income communities,¹³ as well as state programs such as the sale of tax-exempt municipal bonds to finance affordable housing developments,¹⁴ and tax increment financing (TIF), a state-authorized program enabling municipalities

4. *Id.* at 29–30 (citing relevant portions of the District of Columbia Redevelopment Act of 1945, D.C. CODE §§ 5-701–719 (1951)).

5. *Id.* at 28–29 (quoting section 2 of the District of Columbia Redevelopment Act of 1945).

6. *Id.* at 30 (citing section 7 of the District of Columbia Redevelopment Act of 1945).

7. *Id.* (citing section 7(g) of the District of Columbia Redevelopment Act of 1945).

8. See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 311–14 (Vintage Books 1992) (1961) (containing perhaps the most articulate condemnation by criticizing urban renewal and public housing programs as “inherently wasteful ways of rebuilding cities, [that] in comparison with their full costs make pathetic contributions to city values”).

9. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 116, 88 Stat. 652 (codified at 42 U.S.C. § 5316 (2000)); see 42 U.S.C. §§ 1450–1451 (sections omitted pursuant to § 5316).

10. 42 U.S.C. §§ 5301–5317 (2000).

11. 42 U.S.C. § 1437f (2000).

12. 26 I.R.C. § 42 (2002).

13. 42 U.S.C. § 1437v (2000).

14. For example, the Missouri Housing Development Commission, authorized by Chapter 215 of the Revised Statutes of Missouri, reported in 2004 that during its thirty-five year life it had invested almost \$4 billion raised by the sale of municipal bonds in affordable rental and for-sale housing. MO. HOUS. DEV. COMM’N, 2004 ANN. REP., available at http://www.mhdc.com/about/financials/FY2004_MHDC_Annual_Report.pdf; see also MO. REV. STAT. § 215.020 (2000). The report notes that most of the Commission’s programs involve “public-private partnership[s].” MO. HOUS. DEV. COMM’N, 2004 ANN. REP. 2.

to capture property and sales tax receipts generated by new development to fund public improvements within the development area.¹⁵

These programs often are used in concert, and eminent domain has been utilized in a number of situations, particularly with tax increment financing, in which a public-private partnership is using some or all of the above-referenced programs. For example, in New London, Connecticut, a private nonprofit organization, the New London Development Corporation (NLDC) prepared an economic development plan to revitalize a ninety-acre area of the city.¹⁶ Preparation of the plan was funded in part by a \$5 million state bond issue, and the plan was approved by city and state officials.¹⁷ The plan called for a mixed-use development of public and private facilities and had goals of creating “in excess of 1,000 jobs . . . and revitaliz[ing] an economically distressed city.”¹⁸ Following approval of the plan, the New London city council named the NLDC its development agent to implement the plan and authorized the NLDC to acquire property, either by purchase or by eminent domain in the name of the city, as authorized by Connecticut law.¹⁹

A half-century after *Berman*, the Supreme Court touched off a firestorm²⁰ with its decision in *Kelo v. City of New London, Connecticut*,²¹ that economic development could be a “public use” supporting the acquisition of private property by municipalities through the exercise of eminent domain on behalf of a public-private partnership.²² In affirming a decision of the Supreme Court of Connecticut,²³ the Court noted that the use of eminent domain to acquire private property in furtherance of an economic development plan is authorized

15. For discussion and constitutional approval of tax increment financing, see *Meierhenry v. City of Huron*, 354 N.W.2d 171 (S.D. 1984); see also Richard F. Dye & David F. Merriman, *The Effect of Tax Increment Financing on Land Use*, in *THE PROPERTY TAX, LAND USE AND LAND USE REGULATION* 37 (Dick Netzer ed., 2003) (casting doubt on the effectiveness of TIF as a stimulant of new economic growth); Fred Allen Forgey, *Tax Increment Financing: Equity, Effectiveness, and Efficiency*, 60 ICMA MUNICIPAL YEAR BOOK 25, 32 (1993) (providing an example of how the tax increment is calculated).

16. The description of the New London redevelopment plan is drawn from the Supreme Court’s opinion in *Kelo v. City of New London, Conn.*, 125 S. Ct. 2655, 2659 (2005).

17. *Id.*

18. *Id.* at 2658 (quoting from the Supreme Court of Connecticut’s opinion in the case, 843 A.2d 500, 507 (2004)).

19. *Kelo*, 125 S. Ct. at 2659–60; CONN. GEN. STAT. ANN. § 8–193 (West 2001).

20. See, e.g., *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 1 (2005) [hereinafter *Hearing*] (testimony of Thomas A. Merrill, Charles Keller Beekman Professor of Law, Columbia Law School) (asserting that *Kelo* is “unique in modern annals of law in terms of the negative response it has evoked”).

21. 125 S. Ct. 2655 (2005).

22. *Id.* at 2665–67.

23. *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004).

by Connecticut's municipal development statute.²⁴ The Court reiterated its previous conclusions in *Hawaii Housing Authority v. Midkiff*²⁵ and *Berman v. Parker*²⁶ that the public use test was broader than the "use by the public" test popular in the mid-19th century and rejected by the Supreme Court 100 years ago in an opinion by Justice Holmes as "inadequate[] . . . as a universal test."²⁷ The Court emphasized that "[f]or more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."²⁸

In accepting the city's argument that the use of eminent domain was justified even though the property it sought to acquire was not blighted, Justice Stevens, writing for the 5–4 majority, rejected the petitioners' call for a "new bright-line rule that economic development does not qualify as a public use," asserting that "[p]romoting economic development is a traditional and long accepted function of government."²⁹ But in sustaining the city's use of eminent domain to foster its economic development plan, Justice Stevens "emphasize[d] that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."³⁰

24. CONN. GEN. STAT. ANN. §§ 8-186, 8-193 (West 2005). Chapter 132 begins with a statement of policy that

the acquisition and improvement of unified land and water areas [in accordance with local, regional and state planning objectives] . . . often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economics of cost; . . . [and] permitting and assisting municipalities to acquire and improve unified land and water areas . . . for industrial and business purposes . . . within a project area in accordance with such planning objectives are public uses and purposes . . .

Id. at § 8-186; *see also Kelo*, 125 S. Ct. at 2659–60. In § 8-193, the legislature specifically authorizes local development agencies, "with the approval of the legislative body, and in the name of the municipality, [to] acquire by eminent domain real property located within the project area . . ." CONN. GEN. STAT. ANN. § 8-193.

25. 467 U.S. 229 (1984).

26. 348 U.S. 26 (1954).

27. *Kelo*, 125 S. Ct. at 2662–63 (quoting *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906)). The Court also quoted at length from an 1876 Nevada Supreme Court opinion about the "overly restrictive" nature of the "use by the public" test in evaluating takings to support the private mining industry to which "[t]he present prosperity of the state is entirely due." *Id.* at 2662 n.8 (quoting *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394, 409–10 (1876)).

28. *Id.* at 2664.

29. *Id.* at 2665.

30. *Id.* at 2668. The Court subsequently cited *County of Wayne v. Hathcock*, 684 N.W.2d 765 (2004), which overruled *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), and concluded that Michigan's constitution prohibits the use of eminent domain for economic development. The Court also cited CAL. HEALTH & SAFETY CODE §§ 33030–33037

As noted above, a groundswell of criticism has erupted across the country since the Court handed down its decision in *Kelo*.³¹ I recently had a first-hand exposure to the intense emotions that have been unleashed by *Kelo*. As a member of a panel invited to discuss the implications of *Kelo* at a public forum sponsored by a citizen's advocacy group in St. Louis, I attempted to present a neutral, academically oriented analysis of the Supreme Court's ruling with particular emphasis on the Court's point that the state is the ultimate decision-maker and can choose to place limits on the use of eminent domain by municipalities and other government entities.

Many in the audience were home owners and business owners who either had lost their property to eminent domain or the threat of eminent domain, or lived in areas targeted by municipalities and developers for redevelopment. One particularly controversial development in the St. Louis suburb of Sunset Hills had galvanized a number of the people in attendance. A private developer had been awarded development rights to a working class residential area the city wants to have redeveloped primarily as a retail shopping center in order to generate more sales tax for the city's coffers. The city delegated the power of eminent domain to the developer under a state statute authorizing the use of eminent domain for redevelopment of "blighted," "conservation," or "economic development" areas.³² With the power of eminent domain in reserve, the developer persuaded a number of home and business owners to sign contracts to sell their property to the developer. Subsequently, the developer disclosed that it had been unable to secure permanent financing for its proposed shopping center and office complex and that it did not have the

(West 1997), which states that land may be taken for economic development purposes only if the area is blighted.

31. As this Note was being written, legislation was pending in both houses of Congress and over half the states to sharply curtail the use of eminent domain for urban revitalization and economic development. See, e.g., Jim Abrams, *House Moves to Counter Supreme Court's 'Kelo' Decision*, Nov. 4, 2005, available at <http://www.law.com/jsp/article.jsp?id=1131012310814&rss=newswire>; Tresa Baldas, *States Ride Post-'Kelo' Wave of Legislation*, THE NAT'L L.J., Aug. 1, 2005, at 1.

32. MO. REV. STAT. §§ 99.800, 99.820 (2000 & Supp. 2004). A blighted area is defined as an area that for a number of listed reasons "retards the provision or housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition or use." § 99.805(1). A conservation area is an area in which more than half of the structures exceed thirty-five years in age. While not yet a blighted area, it may become one because of the presence of a number of enumerated factors such as dilapidation, obsolescence, etc. § 99.805(3). An economic development area is an area that does not meet the qualifications of a blighted or conservation area, but in which the municipality concludes that redevelopment would discourage businesses from leaving the state, or create jobs in the municipality or "result in preservation or enhancement" of the municipality's tax base. § 99.805(5). Sunset Hills designated the area in question as blighted. Martin Van Der Werf, *If at First You Can't Blight Sunset Manor, Try, and Try Again*, ST. LOUIS POST-DISPATCH, Sept. 29, 2005, at C1.

funds to complete the purchases of the residents' property. This left many of the residents with commitments to buy other property but unable to generate funds to complete their transactions because the funds for the new purchases were to come from the sale of their properties to the developer³³—a situation that one lawyer involved in the dispute described as “an American tragedy.”³⁴

In the discussion session following the panel presentations, several persons who identified themselves as residents of the Sunset Hills neighborhood or other neighborhoods in the St. Louis area undergoing similar redevelopment³⁵ made passionate pleas for understanding of their hardships. Academic legal arguments about precedent, original intent, judicial deference and the like had little relevance to them. A neighborhood businessman and resident captured the mood of many in the audience when he declared: “It is very hard to appreciate the fear, concern and downright terror that people experience when they are threatened with the loss of their home or business. We have failed to identify the intangible human element in eminent domain.”³⁶

While much of the anger was directed at real estate developers, local public officials who supported current redevelopment efforts and who made the decisions to authorize the use of eminent domain in redevelopment projects, were also heavily criticized. A local planner who had the courage to present the cities' arguments for use of eminent domain to support economic development was greeted with disdain.³⁷

The irony of the situation, and what makes it relevant to Professor Rose's presentation, is that the main disputants, the developers and the land owners, both are beneficiaries of the privatization concept—developers as beneficiaries of local government's willingness to use eminent domain to assist private developers in the acquisition of property deemed essential or desirable for implementation of an economic development plan in order to induce those private actors to join a public-private partnership (a deregulation or, perhaps more accurately, a divestment form of privatization),³⁸ and land owners as beneficiaries of the recognition (titling) form of privatization.³⁹

33. Phil Sutin & Eric Heisler, *No Novus Partner Means No Meeting*, ST. LOUIS POST-DISPATCH, Sept. 28, 2005, at B1.

34. Telephone Conversation with Gerard T. Carmody, Esq., Principal, Carmody MacDonald, in St. Louis, Mo. (Sept. 22, 2005).

35. Things got so hot in the “Dogtown” neighborhood of St. Louis that the sitting alderman was voted out of office in a special election on Sept. 20, 2005. Jake Wagman, *Alderman is Recalled in Special Election; Eminent Domain Cited*, ST. LOUIS POST-DISPATCH, Sept. 21, 2005, at B4.

36. James Roos, Remarks at public forum in St. Louis, Missouri, sponsored by Adequate Housing for Missourians (AHM) (Sept. 27, 2005).

37. Nancy Ullman, Urban Planner, Remarks at same AHM meeting (Sept. 27, 2005).

38. Rose, *supra* note 1, at 696–97.

39. *Id.* at 694–95.

The controversy over eminent domain, particularly as it is being played out in St. Louis, illustrates dramatically Professor Rose's main point that privatization is but one of a number of concerns that must be addressed in advancing a democratic agenda. Much of the criticism of local and state officials has focused on a perceived lack of accountability, competency, and most importantly, transparency. People who spoke at the public meeting at the Salvation Army headquarters repeatedly expressed distrust of local and state elected and appointed officials because of their perception that those officials did not respect the opinions of the affected land owners nor did those officials empathize with their sufferings as a result of the redevelopment process as it is currently prosecuted.

Unfortunately, public officials feed this sense of distrust and ostracism with their actions. The *St. Louis Post-Dispatch* carried a story recently concerning the decision by the City of Sunset Hills to declare the Sunset Manor subdivision, a residential neighborhood of small single-family homes built in the period after World War II, blighted.⁴⁰ According to the story, the city hired a consulting firm to examine the neighborhood for evidence of blight.⁴¹ The consulting firm concluded that, while homes were small and "getting on" in years, the neighborhood did not meet the criteria of blight in the city's TIF ordinance.⁴² Whereupon another firm was hired and the second firm found sufficient evidence of blight, in part because some houses had bedrooms in basements, porch stairs had settled and some windows were too small to permit people to climb out in the event of an emergency.⁴³

The privatized urban redevelopment process popular in many cities today often depends on the power of eminent domain, not necessarily its use, but rather the threat of its use. As noted earlier,⁴⁴ bad experiences in the 1950s and 1960s with urban renewal and public housing programs,⁴⁵ dramatized by critics such as Jane Jacobs,⁴⁶ led governments at all levels to privatize as much as possible the urban redevelopment process. Programs in the 1960s such as the federal 221(d), 235, and 236 programs⁴⁷ and the state housing bond programs seeded the process of transformation. Passage of the 1974 Housing and

40. Van Der Werf, *supra* note 32, at C1.

41. *Id.*

42. *Id.*

43. *Id.*

44. See *supra* notes 8–15 and accompanying text.

45. See *supra* note 9 and accompanying text (referring to urban renewal); Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201, 88 Stat. 653 (codified at 42 U.S.C. § 1437 (2000)) (referring to public housing).

46. JACOBS, *supra* note 8, at 313.

47. 12 U.S.C. § 1715i (2000) (Section 221(d) mortgage insurance for moderate income rental development); *Id.* at § 1715z (2000) (Section 235 homeownership interest subsidy); *id.* at § 1715z-1 (2000) (Section 236 interest subsidy for rental unit development).

Community Development Act⁴⁸ containing the Section 8⁴⁹ and CDBG⁵⁰ programs cemented the redevelopment process in a private sector mode. The Section 8 and CDBG programs remain key elements of national, state, and local housing and urban development policy,⁵¹ and when used in conjunction with the TIF program described earlier,⁵² may be included in the financing of developments assisted by the use, or threat, of eminent domain.

Calls to prohibit the use of eminent domain in aid of economic development projects in the wake of *Kelo* have struck a public nerve, primarily because such use strikes many people as unconstitutional government collaboration in the forced transfer of private property from one private person to another private person.⁵³ But *Kelo* served a useful purpose—it reminded us that the appropriate decision-maker on the extent of the use of eminent domain by local governments is the state legislature.⁵⁴ Rather than an absolute prohibition of eminent domain in the economic development context,⁵⁵ the legislature can and should place prudent limits on its use.

Professor Rose offers a blueprint of those prudent limits in her discussion of some of the values of privatization.⁵⁶ To listen to private property owners affected by local use of eminent domain in redevelopment efforts, one gets the sense that the “civilizing ‘give-and-take’” of commerce that she equates with privatization⁵⁷ often is missing from these encounters. Would there be less controversy and less sense of government favoring the interests of the wealthy and powerful at the expense of the less well-to-do if state law required local governments to offer residents of a potential redevelopment area seats at the planning table and a first opportunity to prepare a plan, similar to the request

48. Pub. L. No. 93-383, §101, 88 Stat. 633 (codified as 42 U.S.C. § 5301–5321 (2000)).

49. 42 U.S.C. § 1437f.

50. *Id.* §§ 5301–5317.

51. For example, a key aspect of the recovery process for the New Orleans and other areas of the Gulf regions devastated by Hurricane Katrina is a special allocation of Section 8 vouchers to house low income evacuees as well as low income residents who have returned to their home areas. Eric Lipton, *Hurricane Evacuees Face Eviction Threats at Both Their Old Homes and New*, N.Y. TIMES, Nov. 4, 2005, at A1.

52. *See supra* notes 15–19 and accompanying text.

53. This sense is captured dramatically by Justice Sandra Day O’Connor’s stinging dissent in *Kelo*: “The specter of condemnation hangs over all property. Nothing 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.” *Kelo v. City of New London, Conn.*, 125 S. Ct. 2655, 2676 (2005) (O’Connor, J., dissenting).

54. *Id.* at 2664 (majority opinion) (stating that “[f]or more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power”).

55. Without eminent domain, how does a city respond to the rent-seeking holdout who is attempting to inflate the price of his or her land well beyond its market value?

56. Rose, *supra* note 1, at 715–19.

57. *Id.* at 718.

for proposals given to developers, *before* seeking proposals from professional developers?⁵⁸

Would there be fewer holdouts/opponents and/or more attention paid to alternatives to eminent domain if state law required local governments contemplating the use of eminent domain in economic development activities to offer property owners a premium above fair market value that represents the years in which they have resided at the location the city or its developer seeks to acquire?⁵⁹

Economic development is, and probably should remain, primarily a private enterprise process. But the private market is not perfect and governments should, and do, intervene when market imperfections cause harm to people. The trick is to know when and how to intervene in order to maximize the benefits while minimizing the costs of such intervention. State legislators and local government officials would do well to heed Professor Rose's caution about the limits of privatization and the importance of accountability, competency, and transparency in their economic development endeavors.

58. Marvin Nodiff, a St. Louis attorney with extensive experience representing homeowners and developers of common-interest communities, has made this suggestion to a state legislator. Letter from Marvin J. Nodiff to Mo. Rep. Rachel Storch (Sept. 7, 2005) (copy on file with author).

59. Professor Thomas A. Merrill made this suggestion in his testimony before the Senate Judiciary Committee. *Hearing, supra* note 20.

