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Who Cares What the Pundits Think of Kelo Commentary Essays

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Essay

Who Cares What the Pundits Think of *Kelo*?

TIMOTHY S. HOLLISTER

In this Essay, Attorney Hollister reflects on more than thirty years of involvement with eminent domain in Connecticut, primarily representing property owners. He asserts that Kelo was correctly decided, but notes that the exercise of eminent domain is ripe for misuse, and thus property owners require advocacy and judicial oversight to protect their rights. He summarizes Connecticut eminent domain procedure and analyzes the General Assembly's 2007 Kelo-inspired amendments. The Essay then explains the importance in Connecticut of conducting a separate state law analysis of property owner rights when challenging eminent domain, particularly with regard to the "necessity" of the taking. The Essay discusses Emery v. City of Middletown, the first court case to test a municipality's compliance with the 2007 amendments and in which Attorney Hollister, representing the property owner, obtained an injunction against the city's proposed taking.

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Who Cares What the Pundits Think of *Kelo*?

TIMOTHY S. HOLLISTER*

I. INTRODUCTION

I, Hollister, could care less whether the result in *Kelo v. New London* has been picked apart by conservative or liberal pundits, or apologized for or fulminated about by Supreme Court justices. I'm a Connecticut land use lawyer. While the federal Constitution and the Fifth Amendment's Takings Clause constitute the "floor" of the shop in which I work, I am more concerned with the tools I use regularly—the Connecticut Constitution, state statutes, and municipal ordinances. What matters to me is: if a municipal government or state agency files a notice of condemnation, and an impacted property owner asks me for an evaluation of the legality of the government's use of eminent domain, what is the current state of the law, and how do I protect her rights? This Essay, therefore, is mainly an effort to summarize current Connecticut law *in the wake of* the procedural reforms that our state adopted in 2007 in response to *Kelo*. My advice on such matters is colored by my professional experience with eminent domain and my tangential involvement in *Kelo*, and thus, in this Essay, I do begin by weighing in on whether *Kelo* was correctly decided, but only as a comment on whether the floor has been properly installed.

II. EMINENT DOMAIN AND ME

In the late 1990's and early 2000's, I represented property owners/developers in two cases in which Connecticut municipalities initiated eminent domain proceedings to preempt affordable housing applications filed with local zoning commissions under the Affordable Housing Land Use Appeals Act.¹ In the first case, under the guise of

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¹ CONN. GEN. STAT. § 8-30g (2010). The Act provides that if a developer agrees to preserve a certain percentage of proposed residential units for moderate- or low-income households but a municipal land use commission denies the application, the developer can appeal to the Superior Court and the state agency has the burden of showing that its denial was based on a substantial public interest in health or safety, and one that "clearly outweigh[s]" the town's need for more lower cost housing. *Id.*; see also *Quarry Knoll II Corp. v. Planning & Zoning Comm'n*, 780 A.2d 1, 17, 20 (Conn. 2001) (determining that the commission properly stated that the reasons for its decision clearly outweighed the need for affordable housing); *River Bend Assocs., Inc. v. Zoning Comm'n*, 856 A.2d 973, 986

economic development, a town hastily prepared a development plan for a so-called industrial park and then commenced eminent domain proceedings with respect to the part of the overall parcels specifically proposed for affordable housing, claiming that it was assembling land for economic purposes.² A trial judge enjoined the plan as “hastily assembled, poorly envisioned and incomplete” and the Connecticut Supreme Court affirmed.³ In a second case, a town initiated eminent domain to stop a developer’s appeal from the denial of an apartment development that allocated thirty percent of its development to affordable housing, but the taking required a town-wide referendum because the town was committing itself to pay just compensation. When voters finally figured out that a vote to condemn the land would result in a trial to establish the land’s value, and that the amount of compensation was unknown but likely to be substantial, they voted to terminate the taking.⁴

I then had a minor role in the run-up to the *Kelo* case. In New London, the road into the ninety-plus acre area where Mrs. Kelo’s house was located extends under a railroad bridge. In the early 2000’s, under that bridge and on the site, there was a junkyard on the right and left sides. To get the redevelopment underway, the New London Development Corporation, in 2001, flush with state money and pushed by state and local officials eager to begin implementing “the Plan” (the one that Attorneys Horton and Levesque extol in their lead article here), needed to acquire that junkyard. My partner Alan Lieberman and I represented the junkyard owner.

We were delighted to be dealing with politically-pressured, amply-funded government officials, who telegraphed their name-your-price anxiety. We obtained for our client a compensation package that, shall we say, exceeded fair market value. Our client happily retired to Florida. Yet, I will always wonder whether, if he had held out for even more money, the Development Corporation and the City might have commenced eminent domain proceedings against the junkyard owner instead of Mrs. Kelo, the seminal case would have been *Calamari v. New London*, and my place in American legal history would have been secured. Sigh.

I also attended the *Kelo* U.S. Supreme Court argument in 2005. As a member of the U.S. Supreme Court bar, I got in early and by a stroke of luck, was shown to the seat directly behind the podium. Attorneys Horton

(Conn. 2004) (noting that the proper standard of review regarding whether the commission had sustained its burden of proof was plenary review).

² *AvalonBay Cmty., Inc. v. Town of Orange*, 775 A.2d 284, 290 (Conn. 2001).

³ *Id.* at 289, 300.

⁴ *See Town of Darien v. Estate of D’Addario*, 784 A.2d 337, 346 (Conn. 2001) (“[T]he voters overturned the . . . decision to condemn the subject property.”). Attorney Jay Sandak argued the appeal for the Estate in the Supreme Court.

and Bullock, the oral advocates, would have landed in my lap had they taken two steps back while arguing.

Then, in 2005–06, I advised the Connecticut General Assembly on proposed amendments to the eminent domain statutes, an effort fueled by the public outrage over the *Kelo* decision.⁵

In 2011, in an op-ed piece in the *Connecticut Law Tribune*, I raised the issue that Mrs. Kelo's house might have been saved had the Institute for Justice, which had taken over representation of her and her neighbors at trial (and later in the Connecticut Supreme Court), pursued a claim that the Takings Clause of the Connecticut Constitution⁶ provides a higher level of protection for property owners than the federal Takings Clause.⁷ I argued that because the trial court held that Mrs. Kelo's home was not necessary for the redevelopment,⁸ the Institute could have focused, as a matter of state constitutional interpretation, on the principle that government may take only what is necessary for its stated public purpose.⁹ The Connecticut Supreme Court, in its 2004 majority opinion, twice expressly noted the Institute's failure to provide a separate state constitutional analysis.¹⁰ In fact, the justices seemed to telegraph that they might have considered staking out a higher or different level of protection of Mrs. Kelo's home on the ground that New London could have pursued its plan while allowing her home to remain.¹¹

In my op-ed article, I surmised that the Institute, a national legal advocacy organization, made a tactical decision to focus only on the issue of whether the Takings Clause of the federal Fifth Amendment allows the use of eminent domain to promote economic development.¹² That is, I raised the issue of whether the Institute purposely bypassed a state constitutional claim that might have saved Mrs. Kelo's home in order to pursue the bigger, national, federal constitutional claim.¹³

⁵ As noted by Horton and Levesque, to date, more than forty states have implemented some type of procedural reform for eminent domain in response to *Kelo*. Wesley W. Horton & Brendon P. Levesque, *Kelo Is Not Dred Scott*, 48 CONN. L. REV. 1405, 1420 (2016); see also Ilya Somin, *Let There Be Blight: Blight Condemnations in New York After Goldstein and Kaur*, 38 FORDHAM URB. L.J. 1193, 1193, 1195 (2011) (describing how the New York Court of Appeals' two recent blight condemnation cases adopted an extremely broad definition of blight, which is in line with "many other states that define blight expansively").

⁶ CONN. CONST. art. I, § 11.

⁷ Tim Hollister, *The Little Secret of the Kelo Case*, CONN. L. TRIB., Oct. 17, 2011, at 35.

⁸ *Kelo v. City of New London*, No. 557299, 2002 WL 500238, at *69 (Conn. Super. Ct. Mar. 13, 2002).

⁹ Hollister, *supra* note 7.

¹⁰ *Kelo v. City of New London*, 843 A.2d 500, 521 n.29, 563 nn.91–92 (Conn. 2004).

¹¹ In fact, New London's plan proposed residential townhomes, among other planned future uses.

¹² Hollister, *supra* note 7.

¹³ See *infra* Part IV (noting that a separate state constitutional analysis might have saved Mrs. Kelo's house).

My article drew a spirited disagreement from the Institute.¹⁴ Its attorneys stated that they considered a separate state constitutional analysis, but found no basis for it in Connecticut law, either in precedent or in the text of Connecticut's takings clause, Article I, § 11.¹⁵ The Institute also pointed out that it had, on appeal to the Connecticut Supreme Court, asserted other state statutory and common law claims; if these claims had been successful the case might have ended at the state court level.¹⁶

I responded in an op-ed rejoinder.¹⁷ I pointed out that the Institute had conceded my main point, which was that they had not offered a separate state constitutional analysis on the core issue of whether eminent domain may be used to promote private economic development.¹⁸ They also did not provide the Supreme Court a state constitutional analysis on an equal protection claim.¹⁹ I also took issue with their explanation that they had not pursued the separate state analysis because they had researched the law and found no basis for differentiation.²⁰ I pointed out (in addition to the Supreme Court's apparent exasperation) that under the seminal case of *State v. Geisler*,²¹ there are at least six bases for a separate state constitutional argument, including federal precedent, decisions from other jurisdictions, and economic/sociological considerations.²² Thus, the Institute's own argument ignored three of the six *Geisler* factors. Moreover, I could not fathom the claim that Connecticut precedent did not support arguing for a higher state standard; in fact, in the six years directly preceding *Kelo*, the Connecticut Supreme Court *three times* had struck down abuses of eminent domain.²³ Lastly, I noted that the Institute's other state law claims were statutory or common law, and thus peripheral at best

¹⁴ Scott Bullock & Dana Berliner, *Setting the Record Straight on the Kelo Case*, CONN. L. TRIB., Nov. 14, 2011, at 39.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Timothy S. Hollister, *Kelo Case Tactics Receive Further Scrutiny*, CONN. L. TRIB., Dec. 5, 2011, at 31.

¹⁸ *Id.*

¹⁹ See *Kelo v. City of New London*, 843 A.2d 500, 563 n.92 (Conn. 2004); Bullock & Berliner, *supra* note 14.

²⁰ Hollister, *supra* note 17.

²¹ 610 A.2d 1225 (Conn. 1992).

²² See *id.* at 1231–32 (explaining the six factor analysis which should be used to determine the contours of fourth amendment protections under the state constitution); Hollister, *supra* note 17.

²³ See *Aposporos v. Urban Redevelopment Comm'n*, 790 A.2d 1167, 1174–76 (Conn. 2002) (curtailing use of eminent domain because it was based on a redevelopment plan that was decades old and had not been updated); *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 790 A.2d 1178, 1187–88 (Conn. 2002) (stopping a condemnation because the redevelopment agency did not try to incorporate the yacht club into the plan before using eminent domain); *AvalonBay Cmty., Inc. v. Town of Orange*, 775 A.2d 284, 300, 312 (Conn. 2001) (enjoining use of eminent domain proposed under a municipal economic development plan that was “hastily assembled” and “poorly envisioned,” and for which plaintiffs presented sufficient evidence to conclude that the plan was created in bad faith to discriminate against families with children).

to the central issue of the constitutionality of using eminent domain to boost private economic development.²⁴

Finally, in 2012–13, I litigated in Connecticut Superior Court the first case to test a municipality’s compliance with the 2007 legislative amendments.²⁵

Thus, as to eminent domain and *Kelo*, I have a vantage point arising from professional experience. My view is that *Kelo* was probably correctly decided by the U.S. Supreme Court, in the sense that the operation of government for the public good at times may require the taking of private property, over an owner’s objection, for economic development purposes. In some instances, the justifications for the use of eminent domain will include increasing property values, attracting private economic investment, assembling parcels so the sum is more valuable than the pieces, augmenting tax revenue, or some combination of these. Conversely, my conclusion is that government planning and operations would suffer if any use of eminent domain that is even partly based on an economic development justification was categorically off-limits (even assuming we could adequately define “economic development,” which is difficult at best). Thus, as a citizen and land use attorney, I conclude that *Kelo*’s basic endorsement of using eminent domain for private economic development purposes—perhaps more accurately called the Court’s refusal to establish a categorical prohibition on such use—was the right result.

But the *Kelo* holding was also the lesser of two evils. In my experience, government’s use of eminent domain is not only untrustworthy, but often an invitation to abuse. Few things can smell as badly as the use of eminent domain to benefit a private business initiative. The words “public good” and “public use” can easily paper over trumped up justification studies, corruption, conflicts of interest, and trampling of the rights of innocent property owners. Simply put, the power of eminent domain is too easily used, and because it is wielded by politicians, sometimes blatantly misused.²⁶ I have witnessed town officials fabricate a story about environmental contamination to justify a taking.²⁷ I have seen a town claim that its motive in taking land for a parking lot was only to

²⁴ Hollister, *supra* note 17.

²⁵ *Emery v. City of Middletown*, No. MMXCV126008058S, 2013 WL 1943823, at *1, *5 (Conn. Super. Ct. Apr. 17, 2013).

²⁶ A related problem is the issue of what constitutes a constitutionally-protected property interest. Rights to defend against eminent domain often depend upon whether the plaintiff—a contract purchaser or long-term lessee, for example—has a sufficiently robust property as to have standing to challenge abuse. But such property interests are often defined by government land use regulations. In other words, government may not only stretch or misuse the power of eminent domain, but also undermine who has a property interest.

²⁷ See *New England Estates, LLC v. Town of Branford*, 988 A.2d 229, 256–57 (Conn. 2010) (affirming a jury award of attorney’s fees in part because “the town had been dishonest when it asserted that one of its reasons for the taking was to investigate and remediate environmental contamination”).

relieve traffic congestion, only to find later in discovery an email showing that the real purpose was to help a private business owner shore up a new commercial venture that had been approved and built with insufficient parking.²⁸ I have watched an elected official champion the use of eminent domain to diminish the value of a business operated by a political opponent. And I've seen government officials hide behind exceptions in the Freedom of Information Act to conceal eminent domain steps that should be public and transparent.²⁹

Eminent domain has been described by the courts as an “awesome power.”³⁰ It is, because it is the government’s authority to divest a citizen of ownership of real property against his or her objection.³¹ All of the facts about the aspects of the process in the City of New London that belie favoritism or corruption—the Horton/Leydon invocation of precedent, federalism, compensation, and democracy and Justice Zarella’s advocacy of a “clear and convincing” benefits test³²—are relevant but in the end not responsive to the fundamental problems of the power mismatch between the government and private citizens when government aligns with private economic interests and deploys eminent domain to aid the private entity’s financial goal. Thus, the U.S. Supreme Court’s 5-4 endorsement in *Kelo* of the use of eminent domain in conjunction with private economic development,³³ and the state legislative reaction to *Kelo*³⁴ (making eminent domain procedurally harder in combination), seem to be the right result: use of eminent domain to promote economic goals is at bottom constitutional, but the power should be subject to a transparent process of checks and balances, and available only as a last resort.

²⁸ See *infra* Part V (describing communications between a mayor and town planner about “grabbing . . . property” to provide parking for a commercial construction project).

²⁹ The Connecticut Freedom of Information Act allows government officials who are negotiating for the purchase of land to keep all documents that are part of the negotiation confidential. CONN. GEN. STAT. § 1-210(b)(7) (2015). One key problem is that government officials are empowered to decide unilaterally when negotiations have begun, and sometimes claim to have done so at a very preliminary stage.

³⁰ See *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 875 (Minn. 2010) (“A state’s ability to use eminent domain to take an individual’s property is an awesome power.”); *Atlantic City v. Cynwyd Investments*, 689 A.2d 712, 721 (N.J. 1997) (“The condemnation process involves the exercise of one of the most awesome powers of government.”); *Winger v. Aires*, 89 A.2d 521, 522 (Pa. 1952) (“The power of eminent domain, next to that of conscription of man power for war, is the most awesome grant of power under the law of the land.”).

³¹ See *Kelo v. City of New London*, 545 U.S. 469, 472 (2005) (noting that the case involved a development agent who proposed using eminent domain to wrest property from unwilling owners).

³² See *Kelo v. City of New London*, 843 A.2d 500, 602 (Conn. 2002) (Zarella, J., dissenting in part) (explaining in dissent that the burden should be on the taking authority to prove that a public interest will be served).

³³ *Kelo*, 545 U.S. at 470.

³⁴ INSTITUTE OF JUSTICE, FIVE YEARS AFTER *KELO*: THE SWEEPING BACKLASH AGAINST ONE OF THE SUPREME COURT’S MOST-DESPISED DECISIONS 3–4 (2010), <http://ij.org/report/five-years-after-kelo/> (follow “Download” hyperlink).

III. A PRIMER ON USING AND CHALLENGING EMINENT DOMAIN IN CONNECTICUT

To trace how *Kelo* has affected eminent domain in Connecticut, it is helpful first to summarize how eminent domain works and how it can be challenged.

A. *Connecticut's Basic Process for Taking Land, As Amended in 2007*

Eminent domain is one of the general powers of a Connecticut municipality.³⁵ The procedural instruction to municipalities for condemnation is found in Connecticut General Statutes §§ 48-6 and 48-12, *which direct towns to follow the procedures stated in the redevelopment agency statutes, which start at Connecticut General Statutes § 8-127.*³⁶ So prior to 2007, to understand the procedure, one had to read the redevelopment statutes by substituting “municipality” for “redevelopment agency.” This was, and remains, confusing because a municipality *per se* is a different entity than a redevelopment agency, and general municipal powers procedures do not always align with redevelopment agency powers and procedures.

Section 48-6 provides that when a municipality takes land, the process of vesting title must be completed within six months of the legislative body’s approval of the use of eminent domain.³⁷ The expiration of this six-month period can be a tricky problem for municipal officials, because if they dawdle or the property owner files for an injunction, the authorization process may need to begin again, but this time often with much greater public awareness, publicity, and challenges by affected owners.

Section 8-129(a)(2) requires two appraisers to value the property to be taken and requires each appraiser to send to the property owner a copy of the appraisal report, before the municipality formally initiates the condemnation.³⁸ The purpose of this requirement is to give the property owner notice of the imminent taking and an opportunity to identify errors in the appraisal before a town files its Notice of Condemnation and Statement of Compensation.³⁹

Section 8-129(a)(3) then provides that the municipality formally initiates eminent domain by filing with the Superior Court a statement of compensation, along with a deposit of the property’s asserted market

³⁵ See CONN. GEN. STAT. § 7-148(c)(3)(A) (2015) (explaining that “any municipality” has the power to take private property for “any public use or purpose”).

³⁶ *Id.* §§ 48-6, 48-12, 8-127.

³⁷ *Id.* § 48-6.

³⁸ *Id.* § 8-129(a)(2).

³⁹ S. Proc. Vol. 50, pt. 13, at 4314–15 (Conn. 2007); H.R. Proc. Vol. 50, pt. 21, at 6954 (Conn. 2007).

value.⁴⁰ Section 8-129(b) then requires newspaper publication of notice of the condemnation and certified mailing of a copy of the court filing when the property owner is a non-resident.⁴¹ No less than thirty-five days or more than ninety days after the condemnation notice, the condemning authority prepares a return of service, which includes documenting compliance with the notice requirements, receiving from the court clerk a certificate of taking, and recording that certificate on the land records, which vests title in the municipality.⁴²

These are the basic, required steps under current law for a municipality's use of eminent domain.

With the current law outlined above, it is helpful to review what was amended in 2007, and why. It is critical to understand that in 2007, when the General Assembly enacted a variety of changes to eminent domain, it did not have choice to undo this mess and start over. The 2007 amendments were *additions, not revisions*. The following procedures were amended or added in 2007 by Connecticut Public Acts 07-141:

1. The requirement that each appraiser transmit a copy of the appraisal report to the property owner before the taking is formally initiated was a major change, because the Freedom of Information Act, General Statutes §§ 1-210(b)(7)-(8), allowed the government to keep all appraisals confidential “until . . . all proceedings or transactions have been terminated.”⁴³

2. Connecticut Public Acts 07-141 lengthened from twelve to thirty-five days the minimum time that a municipality must wait between its court filings and obtaining a certificate of taking, to prevent what was known as a “quick take,” which was arguably a due process violation.⁴⁴

3. Connecticut Public Acts 07-141, § 4, removed from General Statutes § 7-148(c)(3)(A)—the list of municipal powers—the authority to use eminent domain for the encouragement of private commercial development.⁴⁵

4. Connecticut Public Acts 07-141, § 2, added to General Statutes § 8-127a an express prohibition on the use of eminent domain

⁴⁰ CONN. GEN. STAT. § 8-129(a)(3).

⁴¹ *Id.* § 8-129(b)(2).

⁴² *Id.* § 8-129(c).

⁴³ Compare *id.* §§ 1-210(b)(7)-(8) (containing part of the Connecticut Freedom of Information Act), with 2007 Conn. Pub. Acts 07-141, § 8 (Reg. Sess.) (codified at CONN. GEN. STAT. § 8-129(a)(2)) (containing the updated eminent domain requirement).

⁴⁴ 2007 Conn. Pub. Acts 07-141, § 1(c) (Reg. Sess.); see also *Brody v. Village of Port Chester*, 434 F.3d 121, 123–24 (2d Cir. 2005) (reviewing the due process aspects of property owner notice of eminent domain).

⁴⁵ 2007 Conn. Pub. Acts 07-141, § 4 (Reg. Sess.) (codified at CONN. GEN. STAT. § 7-148(c)(3)(A) (2015)).

when the “primary purpose” of the taking is increasing local tax revenue.⁴⁶

5. Connecticut Public Acts 07-141, § 2, as codified in General Statutes § 8-127a (redevelopment)⁴⁷ and § 1, codified in General Statutes § 8-193 (municipal development),⁴⁸ added provisions that if a taking is for municipal redevelopment or economic development, additional procedures and substantive limitations must be followed. In other words, in Connecticut Public Acts 07-141, the legislature prohibited all takings where the primary purpose is additional revenue, and specified that takings for economic development or redevelopment purposes may be carried out by a municipality only by following additional procedures and providing additional due process and procedural protections beyond those applicable to municipal takings.⁴⁹ Such takings, among other requirements, must be approved by a two-thirds vote of the town’s legislative body, and just compensation deposited with the Superior Court must equal 125% of fair market value, not just 100%.⁵⁰

General Statutes § 8-127a(a)(4), added by Connecticut Public Acts 07-141, § 2, expressly provides for the condemnee to seek an injunction against a taking by a redevelopment agency,⁵¹ and General Statutes § 8-193(b)(4) provides the same remedy to challenge eminent domain in aid of an economic development project.⁵²

Connecticut Public Acts 07-141 therefore requires a court to determine: whether the primary purpose of a taking is increasing local tax revenue; whether a taking constitutes redevelopment or economic development, by identifying if a municipality is evading the new procedures by improperly labeling its use of eminent domain as a mere municipal action; and whether the 125% requirement is applicable.⁵³

⁴⁶ 2007 Conn. Pub. Acts 07-141, § 2 (Reg. Sess.) (codified at CONN. GEN. STAT. § 8-127a(a)(1) (2015)).

⁴⁷ 2007 Conn. Pub. Acts 07-141, § 2 (Reg. Sess.) (codified at CONN. GEN. STAT. § 8-127a (2015)). As defined in CONN. GEN. STAT. § 8-125(1), “redevelopment” means “improvement by the rehabilitation or demolition of structures, by the construction of new structures, improvements or facilities, by the location or relocation of streets, parks and utilities, by replanning or by two or more of these methods.”

⁴⁸ 2007 Conn. Pub. Acts 07-141, § 1 (Reg. Sess.) (codified at CONN. GEN. STAT. § 8-193 (2015)). CONN. GEN. STAT. § 8-187(4) defines a municipal “development project” as “[a] project conducted by a municipality for the assembly, improvement and disposition of land or buildings or both to be used principally for industrial or business purposes”

⁴⁹ 2007 Conn. Pub. Acts 07-141, §§ 1, 2 (Reg. Sess.) (codified at CONN. GEN. STAT. §§ 8-193, 8-127a (2015)).

⁵⁰ 2007 Conn. Pub. Acts 07-141, §§ 3, 8 (Reg. Sess.) (codified at CONN. GEN. STAT. §§ 32-224, 8-129 (2015)).

⁵¹ 2007 Conn. Pub. Acts 07-141, § 2 (Reg. Sess.) (codified at CONN. GEN. STAT. § 8-127a(a)(4) (2015)).

⁵² CONN. GEN. STAT. § 8-193(b)(4).

⁵³ 2007 Conn. Pub. Acts 07-141, §§ 1, 2, 8 (Reg. Sess.) (codified at CONN. GEN. STAT. §§ 8-193, 8-127a, 8-129 (2015)).

The legislative history of Connecticut Public Acts 07-141 reinforces and clarifies the textual amendments.⁵⁴ Presenting the bill initially, Senator McDonald explained that it made “extraordinarily significant changes in the area of economic development eminent domain legislation,” including banning takings for “the primary purpose of increasing local tax revenue,” making elected officials “directly responsible” for use of eminent domain, and adding substantial new requirements for notice of property owners.⁵⁵ He described the detailed findings a municipality’s legislative body would be required to make to justify a taking based on economic development.⁵⁶ He further noted that the legislation “would allow a property owner to bring an injunction action against the municipality if it was acting in excess of its statutory authority.”⁵⁷

Addressing the burden of proof in challenges to eminent domain, Senator McDonald later rose to oppose (successfully) an amendment by Senator Fasano that would have expressly placed the burden on the condemnor municipality to prove procedural and substantive compliance with all eminent domain laws before taking title.⁵⁸ Senator McDonald said:

[U]nder existing law that property owner would have a right to provide [that a taking was illegal] just by a preponderance of the evidence. It’s not a heavy, heavy burden. You would just have to show, by the documents, that something wasn’t right. That the I wasn’t dotted, that the T wasn’t crossed, that somebody didn’t get notice⁵⁹

In the House debate, Representative Lawlor, Judiciary Committee co-chair, explained the bill’s main provisions.⁶⁰ Representative Feltman noted that one significant change was to delete takings for economic development purposes from General Statutes § 7-148, the municipal powers statute, to make it clear that takings for such purposes could only occur in compliance with the new procedures in § 8-127a (redevelopment) or § 8-193 (municipal economic development).⁶¹ Describing the new procedures for economic development takings, Rep. Feltman stated that the bill “makes clear that the burden on anyone trying to redevelop for economic development purposes of any public body must be a very, very

⁵⁴ In general, the legislative history of Conn. Pub. Acts 07-141 appears at S. Proc. Vol. 50, pts. 13–14, at 4304–4424 (Conn. 2007), and H.R. Proc. Vol. 50, pts. 21–22, at 6838–7007 (Conn. 2007).

⁵⁵ S. Proc. Vol. 50, pt. 13, at 4308–10 (Conn. 2007).

⁵⁶ *Id.* at 4309–14.

⁵⁷ *Id.* at 4313.

⁵⁸ S. Proc. Vol. 50, pt. 14, at 4382 (Conn. 2007).

⁵⁹ *Id.* at 4383.

⁶⁰ H.R. Proc. Vol. 50, pt. 21, at 6840–43 (Conn. 2007).

⁶¹ *Id.* at 6864–67.

high burden”⁶²

Again, the 2007 provisions were procedural steps *added* to the basic statutory framework of eminent domain, lengthening and clarifying the process but also adding complexity, confusion, and traps for the unwary.

B. *Challenging a Taking*

There are six potential ways to litigate against city hall when it condemns land: (1) procedural error in the taking process;⁶³ (2) the condemning entity does not have the power of eminent domain;⁶⁴ (3) the taking is not for public use/purposes;⁶⁵ (4) the government is taking more land than is necessary for the claimed public use;⁶⁶ (5) the taking is in “bad faith;”⁶⁷ or (6) if the legality of the taking is conceded, the money paid does not constitute “just compensation.”⁶⁸

In Connecticut, these defenses are further shaped by what I call the “Connecticut caveats.” First, as noted, our state constitution has its own eminent domain provision, so a separate state constitutional analysis—whether Connecticut will provide more protection for property owners than the federal Takings Clause—*should always be considered*.⁶⁹ Second, as a general principle, takings procedures are strictly construed *against* the condemning authority.⁷⁰ Third, Connecticut allows environmental remediation costs to be “deducted” from just compensation,⁷¹ which I think

⁶² *Id.* at 6919.

⁶³ *See, e.g.,* *Town of Montville v. Antonino*, 825 A.2d 230, 234 (Conn. App. Ct. 2003) (indicating procedural errors can be a basis for challenging the legitimacy of a taking).

⁶⁴ *See, e.g.,* *Greater Hartford Bridge Auth. v. Russo*, 188 A.2d 874, 876 (Conn. Super. Ct. 1963) (indicating the state has the authority to condemn land for a public use provided it complies with all constitutional and statutory provisions).

⁶⁵ *See, e.g., id.* (noting the state’s authority to condemn land for a public use).

⁶⁶ *See, e.g.,* *Mar. Ventures, LLC v. City of Norwalk*, 855 A.2d 1011, 1017 (Conn. App. Ct. 2004), *aff’d*, 894 A.2d 946 (Conn. 2006) (noting that the legislature has delegated to each redevelopment agency the power to determine what property is necessary for a taking but this decision can be open to judicial review).

⁶⁷ *See, e.g.,* *New England Estates, LLC v. Town of Branford*, 988 A.2d 229, 252 (Conn. 2010) (acknowledging a government actor’s bad faith exercise of the power of eminent domain is a takings clause violation).

⁶⁸ Challenging the amount of compensation is deemed a waiver of challenges to the government’s right to use eminent domain, as the two remedies are mutually exclusive. *Cf.* *Conn. Light & Power Co. v. Pub. Utilities Control Auth.*, 405 A.2d 638, 644 (Conn. 1978) (claiming the filing of a rate-increase order by a public utility based upon an order given constitutes a waiver of an appeal from the order).

⁶⁹ *See* CONN. CONST. art. I, § 11.

⁷⁰ *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 790 A.2d 1178, 1185 (Conn. 2002); *State v. McCook*, 147 A. 126, 129 (Conn. 1929).

⁷¹ *Ne. CT. Econ. All., Inc. v. ATC P’ship*, 776 A.2d 1068, 1080 (Conn. 2001). In my opinion, *ATC Partnership* is wrongly decided and an invitation to abuse because fair market value should be the highest and best use of the property, estimating the method and cost of environmental remediation are often educated guesswork at best, and environmental contamination may or may not be an impediment

is an invitation to mischief. Fourth, it is important to keep in mind what could be called the “red flags” of eminent domain, the warning signs of potential abuse: (1) the condemning entity is not a governmental agency;⁷² (2) a private party will pay or has paid some or all of the money used for just compensation;⁷³ (3) the primary beneficiary of eminent domain is or will be a private entity whose finances are not public information;⁷⁴ (4) condemnation for “economic development” purposes rests on a study procured by and paid by the condemning entity;⁷⁵ (5) the condemnation is for a use that will be privately operated;⁷⁶ (6) the condemnation potentially

to economic reuse because sometimes pollution is inert and best left in place. *ATC* is now codified in CONN. GEN. STAT. § 8-132(b).

⁷² See Timothy S. Hollister, *Connecticut Eminent Domain Law in the Post-Kelo World*, 16 CONN. LAW. 14, 15 (2005) (listing several eminent domain practices that have been struck down or questioned by courts, including the delegation of eminent domain power to a non-governmental agency).

⁷³ See *Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 3–4, 11 (Ill. 2002) (exercising eminent domain authority for use by a private party, with an agreement that a private party will reimburse the costs of acquisition, was deemed to be beyond constitutional authority for a taking).

⁷⁴ See *id.* (taking a property under governmental authority for purely private purposes). In this case, the main proponent of the taking was a privately owned, for-profit business, not subject to freedom of information laws. See *id.* at 7–8. Economic development corporations can be a gray area as to FOI disclosure obligations.

⁷⁵ See *AvalonBay Cmty., Inc. v. Town of Orange*, 775 A.2d 284, 290–91, 302 (Conn. 2001) (concluding that the town economic development commission's hiring of a private firm to draft a project plan for a high-tech industrial park, and subsequently using this plan to effectuate a taking, constituted an act of bad faith).

⁷⁶ *S.W. Ill. Dev. Auth.*, 768 N.E.2d at 7. National City Environmental operated a metal recycling business. *Id.* at 4. The Development Authority, a regional economic development agency known as SWIDA, entered into a contract with Gateway International Motorsports Corp., the owner and operator of an auto-racing speedway adjacent to National City, to use SWIDA's “quick take” eminent domain power to provide additional parking, and thus additional revenue, for the race track. *Id.* at 3–4. In the contract, Gateway agreed to reimburse SWIDA the cost of the eminent domain process, including the fair market value of the land taken. *Id.* at 4. National City brought an action under the federal Fifth Amendment and the Illinois Constitution to enjoin the taking. *Id.* at 5. Affirming an injunction against the taking as improper use of eminent domain, the Illinois Supreme Court said:

Entities such as SWIDA must always be mindful of expediency, cost efficiency, and profitability while accepting the legislature's charge to promote development within their defined parameters. However, these goals must not be allowed to overshadow the constitutional principles that lie at the heart of the power with which SWIDA and similar entities have been entrusted. As Justice Kuehn stated in dissent in the appellate court, “If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of a private capitalist's ability to develop land cannot justify a surrender of ownership to eminent domain.”

While the activities here were undertaken in the guise of carrying out its legislated mission, SWIDA's true intentions were not clothed in an independent, legitimate governmental decision to further a planned public use. SWIDA did not conduct or commission a thorough study of the parking situation at Gateway. Nor did it formulate any economic plan requiring additional parking at the racetrack. SWIDA advertised that, for a fee, it would condemn land at the request of “private developers” for the “private use” of developers It appears SWIDA's true

violates a federal or state civil rights law—Fair Housing Act,⁷⁷ Americans with Disabilities Act,⁷⁸ relocation statutes, etc.; and (7) stretching the definition of “blight” to non-use/failure to maintain.⁷⁹

C. *Kelo’s Impacts in Connecticut*

With this background, we can distill *Kelo* as having had four impacts in Connecticut. First, due to extensive procedural amendments adopted in 2007, government compliance is much more complicated, filled with traps for the unwary, and subject to challenges by property owners.⁸⁰ Second, with *Kelo* having blessed “economic development” as a public use under the federal Takings Clause,⁸¹ a separate state constitutional analysis is essential in every defense of a property owner. Third, in general, all across the country, eminent domain has become a political third rail, to be used only as a last resort or for politically acceptable, as opposed to municipally needed, projects—though this may change as the memory of *Kelo* fades. Finally, the current state of the law seems to be that governments, proposing to use eminent domain, are now tasked with careful planning and documentation of benefits; while property owners are required, in order to stop takings, to root out speculation, favoritism, or corruption—hardly a fair fight when civil rights are at stake.

intentions were to act as a default broker of land for Gateway’s proposed parking plan.

....

As a result of the acquisition of NCE’s property, Gateway could realize an estimated increase of \$13 to \$14 million in projected revenue per year. While we do not deny that this expansion in revenue could potentially trickle down and bring corresponding revenue increases to the region, revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power of the government

Id. at 10–11 (citation omitted).

Thus, as part of its bases for enjoining the taking, the court cited the fact that a private business was contributing money to the condemning authority and no study of necessity had been done. *Id.* at 10.

⁷⁷ Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619 (2012)).

⁷⁸ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).

⁷⁹ *See, e.g.,* *Berman v. Parker*, 348 U.S. 26, 35–36 (1954) (“Once the question of public purpose has been decided, the amount and character of the land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.”); *Somin, supra* note 5, at 1201 (describing a potentially limitless definition of blight).

⁸⁰ *See* CONN. GEN. STAT. § 48-12 (2015) (listing additional statutory sections for condemning land).

⁸¹ *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005).

IV. THE IMPORTANCE OF A SEPARATE STATE LAW ANALYSIS, AND “NECESSITY”

In its 2004 opinion, the Connecticut Supreme Court twice bemoaned the fact that the Institute for Justice, lead counsel for Mrs. Kelo and her neighbors, had not presented an analysis of whether the Connecticut constitution provided greater civil rights protection for property owners against the use of eminent domain to promote private economic development than the Taking Clause of the federal Fifth Amendment,⁸² and greater equal protection rights.⁸³ As noted earlier, in 2011, I wrote an op-ed piece for the *Connecticut Law Tribune* in which I pointed out the Supreme Court’s admonishment of the plaintiffs, and wondered whether a separate state constitutional analysis might have saved Mrs. Kelo’s house.⁸⁴ In its own decision, the U.S. Supreme Court emphasized that state courts were empowered to interpret their own constitutions to provide greater protection of property owners from eminent domain than *Kelo*’s federal Fifth Amendment interpretation.⁸⁵

The necessity requirement is a powerful tool, and thus warrants review here. In the exercise of eminent domain, a municipality may only take private property that is actually necessary to effectuate the stated public purpose (which is one reason that the condemning entity needs to state carefully what that public purpose is).⁸⁶ A condemning authority cannot take property that exceeds what, in good faith and within reasonable limits, is necessary to carry out the stated public purposes. The prohibition on excessive takings is of long standing in Connecticut, tracing its origins to *Boston & N.Y. Air Line R.R. Co. v. Coffin*,⁸⁷ wherein the Connecticut Supreme Court noted that the taking entity “had no right to take surplus lands in order to make their right of way through such lands cost less than it could have been otherwise obtained for.”⁸⁸

⁸² *Kelo v. City of New London*, 843 A.2d 500, 521 n.29 (Conn. 2004) (citations omitted).

⁸³ *See id.* at 563 n.92 (“In their brief, the plaintiffs do not ‘provide an independent analysis asserting the existence of a greater protection under the state constitutional provision than its federal counterpart . . . [and] we will not on our own initiative address that question’” (quoting *Donahue v. Southington*, 792 A.2d 76, 83 n.7 (Conn. 2002))).

⁸⁴ Hollister, *supra* note 7.

⁸⁵ *Kelo*, 545 U.S. at 489. Indeed, as Horton and Levesque note, at least two states, Ohio and Oklahoma, have accepted the *Kelo* invitation and held that their state constitutions do not allow use of eminent domain for private economic development purposes. Horton & Levesque, *supra* note 5, at 1420–21.

⁸⁶ *See Kelo*, 843 A.2d at 557–59; *Pequonnock Yacht Club v. City of Bridgeport*, 790 A.2d 1178, 1184 (Conn. 2002); *Toffolon v. Frankel*, No. CV910712357, 1997 WL 399574, at *19 (Conn. Super. Ct. July 1, 1997) (“A taking not justified by necessity is, by definition, unreasonable”).

⁸⁷ 50 Conn. 150 (1882).

⁸⁸ *Id.* at 155. Necessity to support a taking is a criterion created by Connecticut court decisions; it is not a requirement of the federal Fifth Amendment. *See Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 231–32 (2003) (discussing the Fifth Amendment criteria).

In *In re New Haven Water Co.*,⁸⁹ the court articulated why eminent domain may not be used to take more land than is necessary for a public purpose: “The property taken must be restricted to that which will reasonably serve the public use; more than that would, in effect, be a taking for private use and illegal because an abuse of power.”⁹⁰

In *Connecticut Light & Power Co. v. Huschke*,⁹¹ the trial court, relying on these principles, denied an application to initiate eminent domain proceedings seeking to take a 150-foot-wide utility easement where it was clear that only an eighty-foot strip was necessary for the stated purpose.⁹² Similarly, in *Toffolon v. Frankel*,⁹³ Judge Sheldon enjoined the Commissioner of Transportation from taking the plaintiff’s land where that land was not part of the original taking plan, and it was apparent at the time of the taking that the subject property was not necessary and would never be used for the DOT’s stated purpose of completing an interchange modernization project.⁹⁴ Judge Sheldon concluded that the proposed “taking was plainly in abuse of the Commissioner’s statutory powers.”⁹⁵

In *Bugryn v. City of Bristol*,⁹⁶ the Appellate Court reiterated that it is improper to “condemn any more property than is necessary to satisfy the legislative mandate.”⁹⁷ Although the court recognized that the judiciary is not as well suited as the elected branches to make such determinations, it indicated that, where the extent of a taking is challenged, “courts should be cautious about disturbing the decision of the local authority” only to the extent that “it appears that an honest judgment has been reasonably and fairly exercised after a full hearing.”⁹⁸

Thus, the *Kelo* decisions, both in the Connecticut Supreme Court and the U.S. Supreme Court, all but mandate that any party contesting the use

⁸⁹ 85 A. 636 (1912).

⁹⁰ *Id.* at 640; *see also* *Ne. Gas Transmission Co. v. Collins*, 87 A.2d 139, 146 (Conn. 1952) (stating that “[t]he property which it is privileged to take is restricted to that which will reasonably serve the public use; more than that would, in effect, be a taking for a private use and, hence, illegal as an abuse of power”); *Rubenstein v. Town of West Hartford*, No. 348100, 1990 WL 279624, at *4 (Conn. Super. Ct. Aug. 24, 1990) (“The power of eminent domain by a condemning authority is to be used sparingly, limited in scope to its governmental purpose and provid[ing] for just compensation. The purpose and function of real estate condemnation, because it impinges upon the ownership of private property, must necessarily by constitutional limitation be restricted to the minimum of taking required in each instance.”).

⁹¹ 409 A.2d 153 (Conn. 1979).

⁹² *Id.* at 156–57.

⁹³ No. CV910712357, 1997 WL 399574 (Conn. Super. Ct. July 1, 1997).

⁹⁴ *Id.* at *19.

⁹⁵ *Id.*

⁹⁶ 774 A.2d 1042 (Conn. App. Ct. 2001).

⁹⁷ *Id.* at 1050.

⁹⁸ *Id.* at 1051 (citation omitted); *see also* *Kelo v. City of New London*, 843 A.2d 500, 561 (Conn. 2004) (“The condemnor’s right to acquire land for future expansion . . . is tempered by the need for a suitable investigation to inform its assessment of future needs . . . [T]he acquisition of land may not be for real estate speculation and future sale, but rather, must be, in the intelligent, informed judgment of the condemnor, in furtherance of an authorized public use.” (citation omitted)).

of eminent domain provide a separate constitutional analysis and attempt to establish a greater state law protection of property owners, with the necessity of the taking to the stated public purpose being the most well-developed but by no means the only protection with a higher state law profile.

V. *KELO* AMENDMENT IN ACTION: *EMERY V. CITY OF MIDDLETOWN*

In *Emery v. City of Middletown*,⁹⁹ Keith and Marilyn Emery owned a two-family residence on a one-third acre lot which, prior to 2012, had a fenced rear yard, two-tenths of an acre, located at 12 Clinton Avenue in Middletown, Connecticut.¹⁰⁰ The rear of the Emerys' property abutted a parking lot of a new community health center that was constructed during 2010–11 and opened in June 2012. As the CHC construction got underway in late 2010, its CEO engaged in several communications with the Mayor and Town Planner about “grabbing . . . property” to provide parking for CHC before “someone else . . . could come in and secure a log [sic] lease.”¹⁰¹ The Town Planner then began physical and financial planning for a public parking lot encompassing fifty-nine spaces laid out on several parcels, including 12 Clinton Avenue Rear.¹⁰² The Town Planner and Finance Director justified the taking by the property's intended revenue production:

REVENUE

59 parking spaces @ \$60 per space

\$42,480.00 per year supports \$475,000 acquisition

CHC indicates [the health center] will rent 40 spaces at market rate.¹⁰³

Twenty-seven to twenty-nine of the fifty-nine spaces would be located on 12 Clinton Avenue Rear, which at \$60 per space, the Planner agreed, would generate nearly \$20,000 annually for the City.¹⁰⁴ The City offered

⁹⁹ No. MMXCV126008058S, 2013 WL 1943823 (Conn. Super. Ct. Apr. 17, 2013); *see also* Robert H. Thomas, *Recent Developments in Eminent Domain*, 47 URB. LAW. 501, 523 (2015) (describing recent eminent domain cases and concluding, “[m]ore and more [state] courts appear to be delving deeper into a condemning agency’s power to take, and looking into issues with a more stringent eye In the interim, the . . . state supreme courts interpreting takings provisions in their respective constitutions—are where the interesting action is taking place”).

¹⁰⁰ *Emery*, 2013 WL 1943823, at *1.

¹⁰¹ Post-Trial Brief of Plaintiffs Keith and Marilyn Emery, with Appendix, at 11, *Emery*, 2013 WL 1943823 (No. MMX CV 126008058S).

¹⁰² *Id.* at 12.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 13.

the Emerys \$50,000 for 12 Clinton Avenue Rear.¹⁰⁵ The Emerys told the Planner that they would not sell. The City moved to acquire the unused back portion of 12 Clinton Avenue for \$60,000, with CHC contributing \$50,000.¹⁰⁶ The City did not obtain a parking utilization study. The City obtained its second appraisal dated November 22, 2011, which characterized the highest and best use of 12 Clinton Avenue as a “future parking amenity” for redevelopment, but then valued it on a comparable sales basis, using vacant/undeveloped parcels and did not employ the income approach to value based on leasing monthly parking spaces.¹⁰⁷ Neither the City nor the appraisers provided a copy of either the July 2011 or November 2011 appraisal to the Emerys in December 2011 or January–February 2012. The City filed with the court a Notice of Condemnation and a Statement of Compensation, dated January 3, 2012, stating its intent to use eminent domain to take the 0.203-acre parcel at 12 Clinton Avenue Rear, listing the intended public use as parking.¹⁰⁸ The City deposited \$60,000 with the court as the asserted market value of the property.¹⁰⁹ The Planner confirmed that this amount was intended to be 100% of market value, not 125% as would be required if the taking was for economic development/redevelopment purposes.¹¹⁰ The Emerys then served an Application for a Temporary and Permanent Injunction dated July 25, 2012, to prevent City officials from completing the eminent domain process and vesting title.¹¹¹

A procedural error occurred as the appraisals had not been transmitted to the Emerys. The taking was for local revenue and economic development, which requires 125% for just compensation. There was no parking study, so no demonstration of need. The appraisals, not using the income method, were bad faith condemnation. Also, there was untimely notice.

The court issued an injunction since the City failed to provide the appraisals and to publish timely notice.¹¹²

VI. CONCLUSION

I commend Attorneys Horton and Levesque for their U.S. Supreme Court victory, their energetic participation in the national and state-by-state

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 16.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 17.

¹¹² *Emery v. City of Middletown*, No. MMXCV126008058S, 2013 WL 1943823, at *3 (Conn. Super. Ct. Apr. 17, 2013).

response to *Kelo*, and their insightful response to the commentary that *Kelo* has generated. Yet, as a “dirt lawyer,” I would urge my colleagues at the bar and government officials to regard eminent domain as a necessary evil, a last resort to which government should turn only in the most compelling circumstances, and only after thorough and unbiased studies, and only with the potential for abuse and trampling of civil and property rights firmly in mind, and those rights robustly protected.