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Challenges to the use of eminent domain have a much better chance of success now than they have in the past. Although owners certainly do not win all challenges, both state high courts and appellate courts increasingly engage in close judicial scrutiny and rule in favor of owners. These materials are meant to be an outline of the kinds of claims one might bring to challenge a taking and a sampling of cases about such claims. We first address precondemnation challenges and political pressures. Then we turn to two general legal issues that can determine judicial approaches to almost any question—treatment of abuse of discretion and heightened scrutiny. We then present a number of different defenses to condemnation actions, including lack of public use, challenges to blight designations, pretextual takings, lack of reasonable assurances of future public use, lack of necessity, violation of procedural due process, and improper delegation of power. Courts currently seem to be paying particular attention to claims of pretextual takings, so we have given special attention to this defense.

I

Challenges to the right-to-take can be made both in the actual condemnation action and outside of it. Condemnations are generally driven by an agency decision, a political decision, through the urging of private interests, or a mixture of all of these. If there is a desire to fight the project, one primary means of addressing this is through the political process either through lobbying, public relations or other political pressures. Such efforts have been used successfully in the past. Though the purpose of this outline is to discuss legal means to challenge the right-to-take and public use, the use of the political process cannot be discounted and never should be ignored. Early political resistance can be more effective than legal challenges in many cases.

When faced with the prospect of challenging a proposed project, many initial questions need to be answered. For instance, urban renewal projects are rarely driven by a desire to actually renew. There is usually a developer or agency who wants to do something with the property. The “urban renewal” aspect generally is an afterthought. Further, the consideration of whether the area is blighted is even more distant. Therefore, it is important to determine who the backers are of the project.

Additionally, a large component of any projects is how it is funded. Many public projects would not happen but for the existence of a pot of money to complete the project. A primary area of inquiry is whether federal funding is involved.

If federal funding is involved, or if a federal approval or permit is necessary, a project will likely trigger the application of the National Environmental Policy Act (“NEPA”), 42 U.S.C. §4332 (2)(C) and §106 of the National Historic Preservation Act

(“NHPA”), 16 U.S.C. §470f. Under NEPA, any action related to implementing a proposed project that would limit the consideration of alternatives is forbidden (40 C.F.R. §1506.1). A strong argument exists that the acquisition of real property is among the project implementation activities prohibited prior to NEPA completion (23 C.F.R. §771.113(A)). Additionally, §106 of the National Historic Preservation Act requires federal agencies to take into account the effect on historic properties of any undertaking that uses federal money or secures federal approval (16 U.S.C. §470f).

If faced with such a situation, it is important to force the federal agency to initiate the Section 106 process early on in the planning stages—not only because the NHPA requires that the Section 106 Review Process be completed prior to the issuance of any license, but because early consultation allows for a broad range of alternatives to be considered (36 C.F.R. §800.1(c)). You should also participate in the process by requesting that your client be a “consulting party.” This will allow your client to communicate his or her concerns about the impact of a project and will also give your client standing to challenge the outcome of the Section 106 process in federal court if the result is unsatisfactory. The Section 106 Review Process “seeks to accommodate historic preservation concerns with the needs of federal undertakings through consultation among agency officials and other parties with an interest in the effects of the undertakings on historic property, commencing at the early stages of project planning.” (*Id.* §800.1 (a)) (emphasis added). “The goal of consultation is to identify historic properties potentially effected by the undertaking (assess its effect and seek ways to avoid, minimize or mitigate any adverse effects on historic properties).” *Id.* This means that the federal government must complete Section 106 prior to dispersing any federal funds.

Additionally, if there are federal transportation funds involved, §4f of the Department of Transportation Act requires that funding may only be permitted for a project if there is “no feasible or prudent alternative” to the use of historic properties and the project includes all possible planning to minimize harm to the historic site (49 U.S.C. §303; 23 U.S.C. §138). Among the alternatives that should be considered is the possibility of not doing the project at all. Each of these laws should be complied with prior to the use of federal transportation funds as part of the project. Indeed, if the project is implemented without federal, environmental and historic preservation reviews and property is acquired, it would amount to an unlawful, anticipatory acquisition in violation of 16 U.S.C. §47 OH-2(k) and 36 C.F.R. §800.9(c).

If your property creates environmental concerns or is a property of potential historic interest (notably it does not need to be listed on the National Register of Historic Places for these statutory provisions to be triggered), the process needs to be followed and any violation of that process would be subject to challenge. All of these considerations will be subject to the facts of the specific case. Further, the case law and individual departmental regulations applying these provisions in various circuits can be mixed. However, many projects have been altered or halted because of compliance issues with these statutes and must be considered if you are representing a client seeking to challenge a project.

Other pre-suit activity can involve the application of federal and state regulations and must be considered depending on the nature of the project. Without going into the list of many of the conditions precedent existing in the various eminent domain statutes across the nation, these conditions must be studied and any attorney representing a property owner seeking to challenge an eminent domain taking must consider these seriously and govern their actions accordingly.

I ■

Challenging the right-to-take generally is more successful in state rather than federal actions. Federal courts are now very reticent to hear eminent domain challenges and not usually as willing as state courts to engage in the facts of the condemnation case.

A ■

1 ■

Every eminent domain challenge somehow involves the issues of judicial deference and abuse of discretion. State courts vary greatly in how much they defer to legislative or administrative determinations and thus how closely they look at the justifications and evidence proffered by the condemnor. The level of deference can affect every issue in the case, from statutory interpretation to constitutional meaning to application of law to facts. For example, many courts characterize the standard of judicial review as an examination of whether there has been an “abuse of discretion” by the legislative or administrative body. Yet “abuse of discretion” can mean very different things to different courts. This conflict is illustrated by the Ohio Supreme Court’s analysis as compared to the State of New York in the recently decided Atlantic Yards case. In the Ohio case *AAAA Enterprises v. Riverplace Community Urban Redevelopment Corporation*, 50 Ohio St.3d 153, 553 N.E.2d 597, the court said:

“If we were to accept the City’s contention that it is City Council’s determination that an area is a blighted area (with the necessary consequence being that its taking of property within the area through the exercise of the power of eminent domain would be for a public use, and would therefore satisfy constitutional requirements) can only be judicially overturned upon a finding that the City’s decision constituted internal ‘perversity of will, passion, prejudice, partially, or moral delinquency’ -- essentially a bad faith standard --~~v. [REDACTED]~~ We must not abdicate the historic role of the court in the protection of constitutional rights though the exercise of the power of judicial review.”

Id. at 160 (emphasis added). A decision to approve an urban renewal plan is governed by an abuse of discretion standard. The Court in *AAAA* stated that standard as follows:

“Abuse of discretion has been defined as an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, 19 O.B.R. 123, 126, 482 N.E.2d 1248, 1252. It is to be expected that most instances of abuse of discretion will result in decisions that are unconscionable or arbitrary. ■

Id. at 161 (emphasis added).

The New York court in *Atlantic Yards*:

It may be that the bar has now been set too low -- that what will now pass as "blight," as that expression has come to be understood and used by political appointees to public corporations relying upon studies paid for by developers, should not be permitted to constitute a predicate for the invasion of property rights and the razing of homes and businesses. But any such limitation upon the sovereign power of eminent domain as it has come to be defined in the urban renewal context is a matter for the Legislature, not the courts. Properly involved in redrawing the range of the sovereign prerogative would not be a simple return to the days when private property rights were viewed as virtually inviolable, even when they stood in the way of meeting compelling public needs, but a reweighing of public as against private interests and a reassessment of the need for and public utility of what may now be out-moded approaches to the revivification of the urban landscape. These are not tasks courts are suited to perform. They are appropriately situated in the policy-making branches of government.

Goldstein v. New York State Urban Development Corp., 2009 N.Y. LEXIS 4090, *21-22 (Nov. 24, 2009).¹

Obviously, any consideration of a challenge should consider the view of the relevant state court regarding the amount of deference it must give an agency's decision. Most states now refuse to apply extreme levels of deference. New York, unfortunately, is one exception. But New York was the first state in recent years to make a significant public use decision against the owners. Kansas is also highly deferential. But among nearly all the other states, greater judicial scrutiny prevails.

2. ■

Heightened scrutiny is not a separate claim, but an additional legal argument that you may want to make along with any other public use-type claim you are advancing. Like many aspects of public use analysis, heightened scrutiny is a doctrine somewhat in

¹ Throughout this summary, we disclose any involvement by one of the authors in the cases discussed. The Institute for Justice filed an amicus brief in this case.

flux. Justice Kennedy's concurrence in *Kelo* suggests that even under federal law, heightened scrutiny might be applied by courts when sufficient facts suggest suspicious circumstances surrounding the condemnation. 545 U.S. at 491.² Several states also explicitly apply heightened scrutiny, including Delaware, Ohio, and probably Michigan and Mississippi. See *Wilmington Parking Authority v. Land with Improvements*, 521 A.2d 227 (De. 1986); *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 459-60 (1981) (*Poletown* has been overruled by *County of Wayne v. Hathcock*, 684 N.W.2d 765 (2004), but it is not clear that it overruled the heightened scrutiny); *Mississippi Power & Light Co. v. Conerly*, 460 So.2d 107 (Miss. 1984) (implicitly applying heightened scrutiny). Most states have not ruled one way or the other on whether they will apply heightened scrutiny, so in states that have not opined on this topic, it may be worth making the argument.

B ■

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Almost all states hold that eminent domain statutes must be strictly construed against the government and liberally construed in favor of property owners. See, e.g., *Platte River Power Auth. v. Nelson*, 775 P.2d 82, 83-84 (Colo. App. 1989) (attempted condemnation lacked specific description of property to be condemned and was thus invalid). Thus, there must be explicit statutory authorization for a condemnation, and the condemning agency must comply in full with the statutory requirements for condemnation. Decisions in other courts reinforce the need for strict statutory compliance. See, e.g., *Matter of Hargett v. Town of Ticonderoga*, 826 N.Y.S.2d 819 (App. Div. 2006), *lv. denied*, 8 N.Y.3d 810 (2007) (highway condemnor did not have statutory power to condemn to improve tourism); *Aposporos v. Urban Redev. Commission*, 790 A.2d 1167, 1176-77 (Conn. 2002) (statute did not permit expansion of urban renewal plan boundaries);³ *Graber v. City of Upland*, 2002 Cal. App. Lexis 4296 (June 18, 2002) (city failed to follow redevelopment statute); *Hillsborough Township v. Robertson*, 614 A.2d 1374 (N.J. Law Div. 1992) (town was required to pass ordinance, not resolution).

Each state has numerous statutory prerequisites, most of them requiring pre-suit negotiation prior to filing the lawsuit and a failure of that negotiation to occur. See, e.g., *Metro v. Capozzello* 796 N.E.2d 583 (Ohio App. 2003). *Usher and Gardner Inc. v. Mayfield Independent Bd. of Education*, 461 S.W.2d 560 (Ky. 1970) Notably, many recent eminent domain reforms specifically outline the steps that must be followed in the negotiation process prior to filing the lawsuit. Some cases have held that a determination to take the property must be made prior to negotiations. See, e.g., *Erie County v. Lancaster Development Company*, 250 N.Y.S. 108 (N.Y. App. 1931); *Core v. Norfolk*, 37 S.E. 845 (Va. 1901). There is often a good-faith component to the negotiations, and a failure to negotiate under good-faith, if it can be proven, can be justification for the

² The Institute for Justice represented the homeowners in this case.

³ The Institute for Justice filed an amicus brief in this case.

dismissal of the suit. While failure to negotiate is a legitimate defense, there often is nothing to prevent the governmental agency from filing the lawsuit again, though under certain state statutes, there may be an entitlement to attorney's fees and other ramifications. *See Metro v. Cappozolo, supra*. Further, some state statutes allow for a correction of failure to negotiate in good faith. Again, this will be subject to each state's specific requirement.

Further, your state's constitution may have helpful provisions with procedural requirements for eminent domain. For example, a number of state constitutions have prohibitions against lending of credit to private entities, *see, e.g., State ex rel. Bruestle v. Rich* (1953), 110 N.E.2d 778, 790 (Ohio 1953) or prohibitions against allowing to non-elected boards to decide to use eminent domain, *see, e.g., Bernard v. Russell County Air Board*, 718 S.W.2d 123 (Ky. 1986). Other such prohibitions may exist in other states and must be considered.

2 ■

Public use under state constitutions and state statutes continues to be a rapidly developing area of law. The use of eminent domain for economic development is now illegal in approximately 40 states, either by statute, constitutional amendment, or court decision. Even the use of eminent domain for blight or redevelopment has been limited in at least half of the states. Below is a sampling of some of the more recent cases that may prove useful.

Cases holding that economic development is not a public use include Board of County Commissioners of *Muskogee County v. Lowery*, 136 P.3d 639 (Okla. 2006)⁴ (“To permit the inclusion of economic development alone in the category of ‘public use’ or ‘public purpose’ would blur the line between ‘public’ and ‘private’ so as to render our constitutional limitations on the power of eminent domain a nullity. If property ownership in Oklahoma is to remain what the framers of our Constitution intended it to be, this we must not do.”); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1142 (Ohio 2006)⁵ (“We hold that an economic or financial benefit alone is insufficient to satisfy the public-use requirement of [the Ohio Constitution].”); *Wayne County v. Hathcock*, 684 N.W.2d 765, 786 (Mich. 2004)⁶ (“To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain.”); *Southwestern Illinois Development Authority v. National City Environmental*, 768 N.E.2d 1, 9-11 (Ill. 2002)⁷ (although condemnation “would allow [the private developer] to grow and prosper and contribute to positive economic growth in the region...revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power”); *City of*

⁴ The Institute for Justice filed an amicus brief in this case.

⁵ The Institute for Justice represented the owners in this case. Manley Burke represented the City of Norwood in this case.

⁶ The Institute for Justice filed an amicus brief in this case.

⁷ The Institute for Justice filed an amicus brief in this case.

Little Rock v. Raines, 411 S.W.2d 486, 495 (Ark. 1967); *Owensboro v. McCormick*, 581 S.W.2d 3, 8 (Ky. 1979) (“No ‘public use’ is involved where the land of A is condemned merely to enable B to build a factory”); *Karesh v. City of Charleston*, 247 S.E.2d 342, 345 (S.C. 1978) (“We cannot constitutionally condone the eviction of the present property owners by virtue of the power of eminent domain in favor of other shopkeepers”).

3

One particularly active area of litigation is challenges to blight designations. The case law across the country is mixed on this. However, there have been a number of recent decisions, New York notwithstanding, upholding challenges to blight designations.

Many courts now are skeptical of the use of blight designations to take property for private development and will find that area characteristics like “underutilization” do not satisfy either the statute, the state constitution, or both. *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007)⁸ is a perfect example of this trend. In this case, the New Jersey Supreme Court implicitly rejected condemnations for economic development alone. The court interpreted its state constitution to invalidate an attempt by the Borough of Paulsboro to “blight” a vacant piece of property, holding that the fact that a piece of land is “not fully productive” cannot be used as a basis for including the property in a redevelopment area. In its opinion, the Court warned of the danger of open-ended blight designations used by the Borough in this case and by many other municipalities throughout New Jersey: “Under [the Borough’s] approach, any property that is operated in a less than optimal manner is arguably ‘blighted.’ If such an all-encompassing definition of ‘blight’ were adopted, most property in the State would be eligible for redevelopment.”

The *Gallenthin* court also appears to be increasing the burden on municipalities. In discussing the level of proof needed by governments in redevelopment cases, the Court declared: “[A] municipality must establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met. Because a redevelopment designation carries serious implications for property owners, the net opinion of an expert is simply too slender a reed on which to rest that determination.”

The Ohio Supreme Court also explicitly rejected “deteriorating” as a possible standard for blight. *Norwood v. Horney*, 853 N.E.2d 1115, 1144-46 (2006); see also *In re Condemnation by the Redevelopment Authority of Lawrence County*, 962 A.2d 1257, 1263-64 (Commw. Ct. Pa. 2008) (finding blight designation must be based on actual condition of property, not comparison of property to what it might be if redevelopment project occurred): see also *City of Cincinnati v. Clif Cor* 2007 Ohio Ct. App. 1st Dist. Jan 26, 2007⁹ (application of term “deterioration” and other “blighting factors” failed to distinguish area from any other urban area and ordinance therefore was unconstitutional).

⁸ The Institute for Justice filed an amicus brief in this case.

⁹ Manley Burke represented the property owners in this case.

Other courts have similarly engaged in close examination of facts to determine if the evidence supported real blight. See, e.g., *Beach-Courchesne v. City of Diamond Bar*, 80 Cal. App. 4th 388, 398 (Ct. App. 2000) (“there is no evidence that any of the affected parcels contains a building in which it is unsafe or unhealthy for persons to live or work.”); *Graber v. City of Upland*, 2002 Cal. App. Lexis 4296, *31-35 (Jun. 18, 2002) (factors such as peeling paint and sagging screens insufficient for blight declaration). Even Missouri has begun enforcing its requirement (previously honored only in the breach) of “substantial evidence” to support a blight finding. See *Centene Plaza Redev. Corp. v. Mint Props.*, 225 S.W.3d 431 (Mo. 2007). See *Prestonia Area Neighborhood Assn.* Ky. 797 S.W. 2d 708 (1990) (decision to condemn must be based upon substantial evidence).

Blight challenges can take many different forms. One Ohio court described in detail the role of blight designations and their relationship to public use:

“The critical question, it seems to us, is... the fundamental inquiry... of the plan of urban renewal under which the City proposes to exercise its power of eminent domain over the property in question. As we have seen, the inquiry into the propriety of the underlying plan for urban renewal, insofar as it relates to the problem at hand, must begin with legitimacy of a determination by the city of blight in the area sought to be redeveloped to the correction or amelioration of which the renewal plans are addressed. Similarly, we think it follows that the adoption of a plan of urban renewal not addressed to the problem of correcting such predetermined blight would also fail. The one seems necessarily to follow the other; blight is the diagnosis and urban renewal the cure, the latter following inevitably from the former, and both are required to justify, constitutionally, the surgical technique of eminent domain. It is not dispositive merely to assert that the City has declared the area which the property in question is located to be a blighted area, and does not determine all legal issues to prove that this step has been properly taken, if it is clearly shown that the City’s plan to use the property once acquired are irrelevant to any reasonable design for eliminating the blight.

Eighth & Walnut Corp. v. Public Library of Cincinnati, 385 N.E.2d 1324, 1330 (Ohio App. 1977) (emphasis added).

Particular challenges to blight studies and blight designations are very fact intensive and detailed. Most blight studies are conducted by private blight consultants, and it is vital to obtain the data they looked at and examine it closely. Such studies are often error-ridden, but this may not be apparent until the processes and conclusions are actually checked.

Other factors that have been used and worked in some circumstances, include the notion of governmental or developer created blight, the age (or continued validity) of the

blight study, the argument that the blight has already been cured, gerrymandering of the supposedly blighted district, and whether the plan addresses the blight indentified.

4



a.

One of the most successful arguments in recent years has been that a taking is pretextual—that the purpose claimed by the government is not the real purpose of the taking. The majority in *Kelo* suggested that some kind of pretext defense might remain under federal law, *Kelo v. City of New London*, 545 U.S. 469, 478 (2005), although of course the *Kelo* court itself did not apply that. The Kennedy concurrence also suggested that pretext might have importance in future litigation. 545 U.S. at 491-92. The high courts of Hawaii, Pennsylvania, and Rhode Island all relied on pretext analysis to reject proposed takings in the past several years. Earlier cases also applied pretext analysis. If you have a pretext claim, this is definitely a viable option.

Pretext claims come in many varieties. They can involve comparison of the stated purpose of the condemnation on the condemnation papers with other documents, like the resolution approving the taking or the plan documents for the project. Sometimes there can be a claim of bad faith, but this is not necessary. Or a taking can be pretextual if the consequences and effects of the taking do not match the purpose. And, as the recent decisions show, even takings for nominally public purposes like roads can be pretextual.

In *County of Hawaii v. C&J Coupe Family Ltd. Partnership*, 198 P.3d 615 (Haw. 2008),¹⁰ the Supreme Court of Hawaii held that a trial court erred when it failed to consider whether a condemnation to construct a public road was pretextual. The court held that even though a road was a classic public use, it was still subject to the same public use analysis as any other taking. In this case, there was some evidence that the private developer had contracted with the condemning authority for the power to designate the path of the road and areas subject to condemnation, and the developer then exercised that power for the benefit of a housing subdivision built by the developer. The trial court had not considered this evidence but had simply accepted the city findings that the purpose was public. The Hawaii Supreme Court remanded for actual consideration of the facts and judgment on pretext.

Middletown Township v. Lands of Stone, 939 A.2d 331 (Penn. 2007) rejected the use of eminent domain, finding that the claim that the property was being taken for open space was pretextual. It is a particularly interesting decision because it claims to rely in part on *Kelo*, while in fact applying significantly more scrutiny than *Kelo* did. The Stone family owned a farm and had proposed to convert it into a residential subdivision. Shortly after the first hearing about approving the subdivision, the township decided to condemn the property to prevent development. It claimed the purpose of the condemnation was for recreational use. Although the Pennsylvania Supreme Court rejected the owners' claim that the taking was not authorized by statute, it agreed that the

¹⁰ Robert Thomas represents the owners in this case.

taking was pretextual and thus not properly for a public purpose. In part relying on *Kelo*'s comments about the importance of a carefully considered development plan, the court found that the acquisition of the farm was not part of the township's recreational plan. The court found that the plan only supported agricultural preservation and open space for the Stone farm, not recreational use; other properties were designated for recreational use. The Pennsylvania Supreme Court also concluded that because the township had no specific plan, it could not establish a public purpose. In sum, the Pennsylvania Supreme Court held that even in public ownership takings, courts will now give close scrutiny to the government's planning process and may not allow condemnations that deviate from it in any way. There was no challenge under the Pennsylvania Constitution.

Rhode Island Economic Development Corporation v. The Parking Company, 892 A.2d 87 (R.I. 2006)¹¹ also focused on the *Kelo* concurrence by Justice Kennedy to find that the condemnation was not for a public purpose. In essence, the Rhode Island EDC leased property to The Parking Company to operate a parking lot. The agreement between the parties had a penalty clause whereby the EDC would have to pay millions of dollars if it terminated the agreement early. Instead of paying the termination penalty, the EDC condemned a temporary easement on the property, covering the whole leased area and lasting only as long as the lease. The value of the "temporary easement" was substantially less than the penalty for breaking its lease, to which the EDC had previously agreed. In other words, the agency condemned in order to escape from a lease it didn't like and reap higher profits without having to pay its contracted-for penalty. The Rhode Island Supreme Court saw through this subterfuge and denied the taking.

Some other potentially useful pretext cases include: *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp.2d 1123, 1129-31 (C.D. Cal. 2001) (city claimed to be condemning to prevent future blight but actually to appease major retail taxpayer in city); *Wilmington Parking Authority v. Land with Improvements*, 521 A.2d 227 (Del. 1986) (parking authority nominally condemned land for parking, while in reality trying to prevent development, a purpose not given to the Authority by statute); *City of Lansing v. Edward Rose Realty*, 442 Mich. 626, 502 N.W.2d 638 (Mich. 1993) (primary benefit of condemnation would accrue to cable company); *City of Center Line v. Chmelko*, 164 Mich. App. 251, 416 N.W.2d 401 (Mich. App. 1987) (dealership's plan showed that property would be used for inventory storage, rather than as a site creating jobs); *Redevelopment Authority v. Owners*, 1 Pa.Cmwlth. 378, 274 A.2d 244 (1971) (land taken on pretext of removing blight but actually to provide property to another party characterized as bad faith).

Cases finding proof of pretext in failure of documents to match ostensible purpose of taking include: In the Matter of *49 WB v. Haverstraw*, 839 N.Y.S.2d 127 (App. Div. 2007) (village sought to condemn for affordable housing, but plan documents showed project would result in less, rather than more, affordable housing); *CRDA v. Banin*, 727 A.2d 102, 111 (N.J. Law Div. 1998)¹² (agreement did not guarantee that property would

¹¹ The Institute for Justice filed a friend of the court brief in this case.

¹² The Institute for Justice represented Vera Coking, one of the property owners, in this case.

be used for a park and parking lot, the stated purposes of the taking); *Mayor and Aldermen of City of Vicksburg v. C.N. Thomas*, 645 So. 2d 940 (Miss. 1994) (agreement did not guarantee that property would be used as a casino); *City and County of San Francisco v. Ross*, 279 P.2d 529 (1955) (In Bank) (agreement did not guarantee that property would be used for a parking structure).

Earlier cases that found pretextual takings even when the takings were for nominally public uses include *Essex Fells v. Kessler Inst.*, 289 N.J. Super. 329, 673 A.2d 856 (Law Div. 1995); *Denver West Metropolitan Dist. v. Geudner*, 786 P.2d 434 (Colo. App. 1989) (bad faith found where real purpose of condemnation was to enable sale of government property, not flood control); *City of Miami v. Wolfe*, 150 So.2d 489 (Fla. 1963) (condemnation had pretext of extending roadway, but really for acquisition of valuable riparian rights); *Earth Management Inc. v. Heard County*, 248 Ga. 442, 283 S.E.2d 455 (Ga. 1981) (condemnation nominally for a park but really to prevent construction of waste disposal site); *Pheasant Ridge Assoc. v. Burlington Town*, 399 Mass. 771, 1506 N.E.2d 1152 (1987) (pretext of condemnation was park and moderate income housing, while real purpose was exclusion of lower income housing); *In Re Real Prop. In Village of Hewlett Bay Park*, 48 Misc.2d 833, 265 N.Y.S.2d 1006 (N.Y. Sup. Ct. 1966) (real purpose of condemnation was to prevent construction of parking facility). See also *Randolph v. Wilmington Housing Authority*, 139 A.2d 476 (Del. 1958) (analyzing primary and secondary benefits, criticizing one condemnation not for an authorized purpose).

Kelo

As noted above, several cases appear not to reject the rationale of the *Kelo* majority, but claim to apply it. These decisions stand apart from those that reject *Kelo* under a state constitutional provision (such as *Hathcock* and *Horney*), and from those decisions which focus on Justice Kennedy's concurring opinion. Here, we describe cases that find pretextual takings even under *Kelo* and under federal law.

It is critical to first note *Kelo*'s narrow holding, that condemnations supported solely by claims of "economic development" were not *always* violative of the U.S. Constitution's Public Use Clause. The question presented by the *Kelo* petition asked the Court to adopt a prophylactic *per se* rule that all economic development takings were invalid. The Court rejected adoption of the "bright-line" rule urged by the petitioners. *Kelo v. City of New London*, 545 U.S. 469, 483 (2005). The *Kelo* majority pointedly did *not* hold that all economic development takings – or all takings, for that matter – were immune from judicial scrutiny; the standard of review is "rational basis, but there remains a role for the courts to play in reviewing takings and a condemnor's claim that a taking is "for public use."

The majority noted that "the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. See *Midkiff*, 467 U.S. at 245 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of

government and would thus be void”). Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. . . The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case.” *Kelo*, 545 U.S. at 477-78 (emphasis added) (citation and footnote omitted).

Adding in Justice Kennedy’s critical fifth vote and concurring opinion yields a roadmap:

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.

Kelo, 545 U.S. at 491 (Kennedy, J., concurring). Justice Kennedy added: “A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government’s actions were reasonable and intended to serve a public purpose.” *Id.* (Kennedy, J., concurring). These days, you ignore Justice Kennedy at your peril. *See* Adam Cohen, Anthony Kennedy Is Ready for His Close Up, N.Y. Times (Apr. 3, 2006) <<http://www.nytimes.com/2006/04/03/opinion/03mon4.html>> (“these days, the law is pretty much what Justice Kennedy says it is . . . [t]hat means that until [the Court’s] membership changes again, he is likely often, although certainly not always, to have the final word . . .”); Bill Mears, Justice Kennedy works on his swing, CNN.com (Sep. 29, 2006); <<http://www.cnn.com/2006/LAW/09/25/scotus.kennedy/index.html>> (“Kennedy, a moderate-conservative, is in the eyes of many legal scholars the court’s new power broker. . . ‘The basic principle is, it’s Justice Kennedy’s world and you just live in it,’ said Thomas Goldstein, a private attorney who practices regularly before the Supreme Court, speaking tongue-in-cheek.”).

In *Franco v. Nat’l Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007), the court based its holding expressly on the *Kelo* majority:

Kelo “recognized that there may be situations where a court should not take at face value what the legislature has said. The government will rarely acknowledge that it is acting for a forbidden reason, so a property owner must in some circumstances be allowed to allege and to demonstrate that the stated public purpose for the condemnation is pretextual. It may be difficult to make this showing, and the Supreme Court’s decision may raise many more questions than it answers, but a pretext defense is not necessarily foreclosed by *Kelo*.

Franco, 930 A.2d at 169. “The opinion “appl[ie]d the decision of the *Kelo* majority, written by Justice Stevens.” and did not rely upon Justice Kennedy’s concurrence. *Franco*, 930 A.2d at 169 n.8.

Similarly, in *County of Hawaii v. C&J Coupe Family Ltd. P’ship*, 198 P.3d 615 (Haw. 2008), the court expressly based its decision to review the record of a taking on the *Kelo* majority. “As discussed *infra*, the *Kelo* majority opinion, consistent with our prior decisions [*Hawaii Hous. Auth. v. Ajimine*, 39 Haw. 543 (1952)], allows courts to look behind an eminent domain plaintiff’s asserted public purpose under certain circumstances.” *Coupe*, 198 P.3d at 638. The case involved a taking of private, undeveloped land by the County, purportedly as part of a road. Ownership of the property would initially be in another private owner, who might eventually convey it to the County.

See also Goldstein v. Pataki, 516 F.3d 50 (2d Cir. 2008), *cert. denied*, 128 S. Ct. 2964 (2008) (Pretext claim rejected under *Kelo* because it was “founded only on mere suspicion.”). The *Goldstein* court applied the heightened pleading standard under *Twombly* to dismiss the complaint, but left open “the possibility that a fact pattern may one day arise in which the circumstances of the approval process so greatly undermine the basic legitimacy of the outcome reached that a closer objective scrutiny of the justification being offered is required.” *Id.* at 63.

c. ~~REDACTED~~

Once in possession of a legal theory, one thing stands out in cases where a property owner successfully challenges a taking for pretext: development of a factual record. There will rarely be direct evidence of the condemnor’s actual reasons, so circumstantial evidence can be the focus. Examine the circumstances which preceded the taking, as well as the procedures employed to determine whether the taking was “such an unusual exercise of government power [which] would certainly raise a suspicion that a private purpose was afoot.” *Kelo*, 545 U.S. at 487 (footnote omitted). *See also Earth Management, Inc. v. Heard County*, 293 S.E.2d 455, 460-61 (Ga. 1981), the court “review[ed] some of the events leading up to the condemning of the subject property,” and invalidated a taking as lacking a public purpose. In *Earth Management*, the County claimed the taking was for a public park, but no other land was ever considered for the public park and no on-site surveying, planning or inspection was done prior to its condemnation. Further, there had been no attempt to negotiate a purchase of the property prior to the filing of the condemnation proceeding. The court determined the “inescapable conclusion” was that the real reason for the taking was not to acquire a park, but for the “obvious purpose” of preventing the property owner from constructing a hazardous waste disposal facility. *See also Vill. of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (“Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.”). Of course, the court need not wear blinders and ignore common sense when evaluating the factual context and circumstances. *See, e.g., McConnell v. FEC*, 540 U.S. 93, 152-53 (2003) (“This crabbed view of corruption, and particularly of the appearance of corruption, ignores precedent,

common sense, and the realities of political fundraising exposed by the record in this litigation . . .”).

The standard for reviewing such evidence is an objective one, not subjective, so an inquiry into elected officials’ state of mind may not be necessary. *See Coupe*, 198 P.3d at 646 (Did “other conditions” exist “such that private character predominated. Those issues may be factors relevant to the pretext issue.”); *see also Middletown Township v. Lands of Stone*, 939 A.2d 331, 337 (Pa. 2007) (objective standard; taking ostensibly for farmland invalidated because it was a pretext to hide the “true purpose” of the taking for recreational purposes); *In re Condemnation by the Redevelopment Authority of Lawrence County*, 962 A.2d 1257 (Pa. Commw. Ct. 2008) (a “blight” determination supporting a taking must be determined by reference to objective criteria and the reasonable person standard, and a court may not simply accept the government’s claim that a property is blighted); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (“[W]e may determine the city council’s object from both direct and circumstantial evidence,” which includes “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.”); *Vill. of Arlington Heights*, 429 U.S. at 266 (judicial inquiry into whether racially discriminatory purpose was a motivating factor in decision to deny rezoning looks to “circumstantial and direct evidence of intent as may be available”). Although many of the cases which establish these standards are not public use challenges and involved equal protection or the free exercise of religion, for example, the inquiry should not be different when property is involved, since private property is also a fundamental constitutional right that must be respected. *See Dolan v. City of Tigard*, 512 U.S. 374, 393 (1992) (“We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.”).

The sequence of events and history of the project may help to build your pretext case. *See, e.g., Pheasant Ridge Assoc. Ltd. P’ship v. Town of Burlington*, 506 N.E.2d 1152, 1156-57 (Mass. 1987) (“In determining the state of mind of a person or group of persons [in public use challenge], we consider not only what they have said but we also draw inferences concerning their intentions from what they have done and what they have not done.” The court affirmed summary judgment for property owner because “[t]he record requires the inference that the town, acting through its town meeting, was concerned only with blocking plaintiffs’ development.”); *Vill. of Arlington Heights*, 429 U.S. at 267 (when determining whether a municipality was motivated by racial animus to deny rezoning to racially integrated development, “[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.”) (citations omitted). In *Arlington Heights*, the Court also held the “specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker’s purposes.” *Id.* at 267. A court should look for a “clear pattern, unexplainable on grounds other than [improper grounds].” *Id.* at 266.

Is this a “spot taking?” Counsel should look for a preexisting, comprehensive plan. A “one-to-one transfer of property, executed outside the confines of an integrated development plan . . . would certainly raise a suspicion that a private purpose was afoot.” *Kelo*, 545 U.S. at 478 n.6 (citing *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001)). In *Kelo*, the Court took great pains to point out the condemnation of individual parcels were part of an “integrated” and “carefully considered” development plan. *Kelo*, 545 U.S. at 474. The Court focused on the New London Development Corporation’s development plan, not on the individual takings which were part of that plan:

Given the *comprehensive character* of the plan, the *thorough deliberation* that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather *in light of the entire plan*. Because *that plan* unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

Id. at 483-84. *See also id.* at 487 (“Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case.”). The *Kelo* majority cited *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the case which upheld zoning enacted within the framework of a comprehensive plan against a due process challenge. When zoning is accomplished outside of such a plan, no deference is due.

Similarly, a taking accomplished outside a comprehensive plan is inherently suspect. In *Middleton Twp. v. Lands of Stone*, 939 A.2d 311 (Pa. 2007), the Pennsylvania Supreme Court invalidated an attempted taking of property for farmland because it was a pretext to hide the “true purpose” of the taking for recreational purposes. The property owner proffered evidence that the true purpose of the taking was to prevent development (in other words, to preserve open space), not for recreational purposes as claimed. The Supreme Court held that the record did not reflect the “true purpose” the township condemned the property was for recreational use. *Id.* at 337. Relying on the maxim that the power of eminent domain must be strictly construed against the condemnor, the court held that courts must look for the government’s real reasons and need not defer to government’s “mere lip service,” or its retroactive justifications. *Id.* at 338. The court rejected the township’s attempt to use a preexisting recreation and open space plan that included the Stone property to show that the taking was for recreational purposes. Because the plan did not show any proposed recreational use related specifically to the property, the court rejected the attempt to use *Kelo*’s “carefully considered plan” as a panacea to actually thinking about what property is being taken. The court set forth the standard for when a taking asserted to be in accordance with a comprehensive eminent domain plan will be upheld:

[P]recedent demonstrates that condemnations have been consistently upheld when the taking is *orchestrated according to a carefully developed plan which effectuates the stated purpose. Anything less would make an empty shell of our public use requirements.* It cannot be sufficient to merely wave the proper statutory language like a scepter under the nose of the property owner and demand that he forfeit his land for the sake of the public. *Rather, there must be some substantial and rational proof by way of a intelligent plan* that demonstrates informed judgment to prove that an authorized public purpose is the true goal of the taking.

Id. at 339 (emphasis added).

Look for “capture” and rent-seeking behavior. A key issue is whether the condemnor saw a need and filled it in its neutral capacity, and then recruited the best candidate to fill that need, or whether it was the other way around. Did the government recruit the developer, or did the developer recruit the government? *See generally* Daniel S. Hafetz, *Ferretting Out Favoritism: Bringing Pretext Claims After Kelo*, 77 Fordham L. Rev. 3095 (2009).

Counsel should also ask whether the condemnor is adhering to its usual condemnation procedures. When “[t]he manner in which the [government] dealt with the attempted acquisition of the subject parcel was not in accord with its usual practice,” the inference of improper purpose arises. *Pheasant Ridge Assoc. Ltd. P’ship v. Town of Burlington*, 506 N.E.2d 1152, 1157 (Mass. 1987). Who is paying compensation, for the land agents, appraisers, for the costs of court, and attorneys? Also highly relevant are “[d]epartures from the normal procedural sequences [which] also might afford evidence that improper purposes are playing a role.” *Vill. of Arlington Heights*, 429 U.S. at 267. Was condemnation the last resort, or the first? *Beach-Courchesne v. Diamond Bar*, 95 Cal. Rptr. 2d 265, 279 (Cal. Ct. App. 2000) (eminent domain is a power of last resort for the good of the public; it “is not simply a vehicle for cash-strapped municipalities to finance community improvements.”).

Other items to consider. Do not rely on litigation discovery to make the record. State or federal Freedom of Information or Uniform Information Practices statutes may be very helpful in obtaining information. Especially if you have a skeptical judge or are in federal court, a court may dismiss a complaint that does not sufficiently plead facts to convince a judge that the claims of pretext or private benefit are plausible. Additionally, some states limit the ability to conduct adequate discovery within the condemnation litigation. Freedom of information requests also are extremely useful in jurisdictions where the owner needs to make an administrative record before litigation begins. Such states include California, New York, and New Jersey.

Where blight or other claims may be in play, counsel should consider commissioning a counter-study.

The message of any successful pretext case is the importance of facts. Now that (most) courts are giving the facts genuine scrutiny, owners have a unique opportunity to prove that the taking is pretextual.

5 ■

This claim also overlaps to some extent with both pretextual takings and lack of public purpose claims. However, it can be distinct. This defense is particularly appropriate when it appears that the condemnation will give a private party broad discretion on how to use the property in the future. Usually, the most significant piece of evidence for this claim is the development agreement with the private developer.

Cases rejecting takings where there is no reasonable assurance of future public use include: *Cincinnati v. Vester*, 281 U.S. 439, 447-48 (1930) (holding that “private property could not be taken for some independent and undisclosed public use); *County of San Francisco v. Ross*, 279 P.2d 529, 532 (Cal. 1955) (In Bank) (holding that agreement lacked controls over the use of the property and “[s]uch controls are designed to assure that use of the property condemned will be in the public interest.”); *Mayor of the City of Vicksburg v. Thomas*, 645 So.2d 940, 943 (Miss. 1994) (holding that property may only be condemned for transfer to “private parties subject to conditions to insure that the proposed public use will continue to be served”); *Krauter v. Lower Big Blue Nat. Res. Dist.*, 259 N.W.2d 472, 475-76 (Neb. 1977) (holding that “a condemning agency must have a present plan and a present public purpose for the use of the property before it is authorized to commence a condemnation action . . . The possibility that the condemning agency at some future time may adopt a plan to use the property for a public purpose is not sufficient.”); *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 111 (N.J. Super. Ct. 1998) (holding that when a “public agency acquires . . . property for the purposes of conveying it to a private developer,” there must be advance “assurances that the public interest will be protected”); *State ex rel. Sun Oil v. Euclid* 130 N.E.2d 336 (1955) (land may not be appropriated for a contemplated but undetermined future use.)

The main way to establish that no assurance of future public use is to demonstrate that there is no contractual or other guarantee that the property will be used for the designated public purpose once title is transferred. See *CRDA v. Banin*, 320 N.J. Super. 342, 727 A.2d 102 (Law Div. 1998) (agreement did not guarantee that property would be used for a park and parking lot); *Mayor and Aldermen of City of Vicksburg v. C.N. Thomas*, 645 So. 2d 940 (Miss. 1994) (agreement did not guarantee that property would be used as a casino); *City and County of San Francisco v. Ross*, 44 Cal.2d 52, 279 P.2d 529 (1955) (In Bank) (agreement did not guarantee that property would be used for a

parking structure). *Northern Kentucky Port Authority v. Cornett* Ky., 625 S.W.2d 104 (1981) (condemning authority must show it has acted in good faith, with reasonable assurance that the project will come to pass.) Additionally, in one case it was determined that inability to fund the project was evidence of no reasonable assurance. *County of Campbell v. BIF Inc.*, Ky. Ct. of Appeals (2005) No. 2003-CA-002318-MR.¹³

While not precisely a “no future public use” case, a recent decision by a California Court of Appeal should be noted. In *City of Stockton v. Marina Towers L.L.C.*, 88 Cal. Rptr. 3d 909 (Cal. Ct. App. 2009), the court labeled the supposedly deliberative process which preceded the taking as “condemn first, decide what to do with the property later,” and invalidated the taking on public use grounds. *Id.* The court held the city’s resolution of necessity which identified the purpose of the taking only as “the acquisition of additional land in conjunction with potential development” was so “nondescript [and] amorphous,” and “so vague, uncertain and sweeping in scope that it failed to specify the ‘public use’ for which [the city] sought acquisition of the property.” *Id.* at 913. The court did not accept the city’s litigation claim that the taking was part of a master redevelopment plan, but instead looked to the city’s actual conduct. The court analyzed the remaining language in the resolutions and determined that the city had not gone beyond vague, generic descriptions of what it intended to do, and that the resolutions were essentially self-justifying because they equated the project with the condemnations.

6 ■

If your state (or city) has an unusual process that deprives the owner of notice or an opportunity to be heard, you may have a procedural due process claim. A few cases finding procedural due process violations include: *Sapero v. Mayor and City Council of Baltimore*, 920 A.2d 1061 (Md. 2007) (rejecting use of quick-take; owners challenging eminent domain should generally be entitled to discovery and a full opportunity to present their opposition; only in quick-takes where there is an immediate threat to public safety is the government justified in depriving the owner of the benefits of ordinary litigation); *Brody v. Village of Port Chester*, 434 F.3d 121 (2d Cir. 2005)¹⁴ (where sole opportunity to challenge redevelopment designation occurs before condemnation action, government must provide mailed notice to individual owners telling them about the government action and the window of opportunity to challenge); *Harrison Redevelopment Agency v. DeRose*, 942 A.2d 59, 85-92 (N.J. App. Div. 2008) (interpreting New Jersey statute to permit challenges to blight designation after time do so had apparently expired, because a contrary interpretation would violate due process); *In re Rapp*, 621 N.W.2d 781 (Minn. App. 2001) (condemnation statute that did not provide any opportunity to challenge the validity of a taking prior to the loss of the land deprived owners of due process of law under both the U.S. and Minnesota constitutions).

7 ■

¹³ Manley Burke represented the property owners in this case.

¹⁴ The Institute for Justice represented the owner in this case.

A claim of lack of necessity for a taking is somewhat similar to a claim of no assurance of future public use. There are really two types of necessity claims. First, a taking can be unnecessary because there is no plan to use it for many years. Second, a taking can be unnecessary because the government is trying to take much more property than needed for the use it wants to accomplish. In general, the first type of claim has been more successful than the second, but of course this varies by state. In addition, a number of the state statutes passed post-Kelo have some kind of necessity language, and that may change the way courts treat the claim in your particular state. See also *Mayor and City Council of Baltimore v. Valsamaki*, 916 A.2d 324 (Md. 2007) (proof of immediate necessity required for quick-take). *Dayton v. Keys*, 252 N.E.2d 655 (Ohio Ct. Comm. Pleas 1969) (taking was unnecessary because blight had been removed.)

8

The power of eminent domain may of course be delegated to various government bodies. In doing so, the delegating body must follow proper procedures. But even if it does so, there may still be a potential challenge to the delegation of the condemnation power to a private party.

Although we believe this should be a strong basis for challenging condemnations, it has only succeeded in one published decision that we are aware of. In *Condemnation of 110 Washington St.*, 767 A.2d 1154 (Pa. Commw. Ct.), *review denied*, 2001 Pa. Lexis 1544 (Pa. July 19, 2001), a Pennsylvania appellate court affirmed that the Montgomery County Redevelopment Authority had unconstitutionally delegated its power to a private party. The court found that the agency had tried to delegate away its decision whether or not to take individual properties by giving a private party veto power over any condemnation within a redevelopment project area. It dismissed the condemnation.

In an unreported decision, a trial court's Conclusions of Law in *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 198 P.3d 615 (Haw. 2008), the court invalidated an attempted taking on the basis that the county illegally delegated its nondelegable eminent domain power to a private party via a Development Agreement. The court cited *110 Washington Street*, among other decisions, concluding "[i]f the government attempts to delegate its power of eminent domain to a private party in an agreement whereby the developer controls what property is taken and pays for all expenses, and the private party is able to demand the government institute eminent domain proceedings against other private property owners, then the attempted delegation is illegal and void." The trial court's written order is available here: <http://tinyurl.com/32pr9v>. The County did not appeal from the adverse ruling.

