

May 21, 2008

Dear Senator McDonald and Representative Lawlor:

In answer to your question concerning whether the legislature can shift the burden of proof and raise the level or standard of evidence with respect to acquisitions by eminent domain pursuant to Chapters 130, 132 and 588l, I feel quite confident the answer is yes. The issues I have raised concern factual determinations by trial judges. I am not asking the legislature to usurp the court's authority to determine constitutional issues. I think a good starting point to understand the concept better is *Kelo et al v. City of New London*, 545 U.S. 469. Justice Stevens delivering the opinion of the court stated:

“We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose “public use” requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. As the submissions of the parties and their amici make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate.”

In the opinion delivered by Justice Norcott of Connecticut's Supreme Court, he stated:

*“Our analysis of the foregoing cases reveals that this state's well established approach to judicial review of legislative public use determinations, first articulated more than 125 years ago in *Olmsted v. Camp*, supra, 33 Conn. 546-51, is in harmony with the approach of the federal courts. Both federal and state courts place an overwhelming emphasis on the legislative purpose and motive behind the taking, and give substantial deference to the legislative determination of purpose.”*
Kelo et al v. City of New London, 268 Conn. 1, 40.

DISCUSSION: BURDEN OF PROOF
LEVEL OF PROOF - CLEAR AND CONVINCING EVIDENCE

Burden of Proof

The burden of proof is imposed by the court and the legislature as an expression of what is believed to be society's regard for the individual interests at stake. In *State v Rizzo* 266

Conn.171, at 211, a death penalty case, the court restated the basis for establishing a burden of proof:

“In general, the assignment of a particular burden of persuasion to a particular category of cases reflects ‘a fundamental value determination of our society....’ In re Winship, 397 U.S. 358, 372, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). Thus, we have stated that ‘[t]he functions of a burden of proof are twofold: (1) it allocates the risk of error between the litigants; and (2) it indicates the relative importance of the ultimate decision.... Both of these functions ‘reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations.’ Id., at 370, 90 S.Ct. 1068] Miller v. Commissioner of Correction, 242 Conn. 745, 793, 700 A.2d 1108 (1997). We also have identified a third, intimately related function, namely, that of giving the fact finder guidance regarding the ‘sense of the solemnity of the task’ ”; State v. Daniels, supra, 207 Conn. at 384, 542 A.2d 306; and “regarding the degree of certitude that it must have in order to reach a certain decision. State v. Cobb, 251 Conn. 285, 465, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S.Ct. 106, 148 L.Ed.2d 64 (2000).”

The essential question is what value does our society place upon private ownership of real property? My own view is that Connecticut citizens place a very high value on their right to own and possess private property and the general statutes should reflect the public’s strongly held views. The preambles to CGS Chapters 130, 132 and 588l and the statutes that follow do not reflect placement of high value and great importance with respect to ownership of private property. Public Act 07-141 provides for additional, procedural steps and votes during the planning and implementation phases of a project but is silent with respect to society’s fundamental value determination concerning private property rights and its assessment of comparative social costs of erroneous factual determinations in eminent domain proceedings.

As was suggested by Justice Stevens modifications to eminent domain statutes can be made that “carefully limit the grounds upon which takings may be exercised.” This does not mean a prohibition against economic development or any other public use the legislature has provided for. **Rather, it means a clear legislative pronouncement that notwithstanding the language of Sec.8-126 et seq., Sec.8-186 et seq. and Sec.32-221 et seq. the legislature places high value and great importance on the ownership of private property. I would respectfully request the legislature consider adding to the aforementioned statutes:**

That before adopting a plan the public agency must take into consideration the potential for negative and adverse social and economic effects upon the people who reside and the businesses located in the targeted neighborhoods, an eminent domain impact statement.

That the public agency's planning for implementation of a public use in which privately owned properties may be acquired by eminent domain requires strong evidence of the need to use such governmental power and that the use will primarily benefit the public through better living conditions or economic growth, or both.

That the public agency has determined the taking of private property is reasonably necessary to implement the plan and that the economic development portions of the plans have a reasonable chance of success. That alternatives to eminent domain have been considered and found not to be feasible.

That the public agency must be able to justify its actions in planning and implementing a plan of development in accordance with above stated criteria by clear and convincing evidence.

These or similar statements would provide clear and new guidance to the court that the legislature expects the public agency to bear the burden of proof and that the level of proof should be high reflecting a desire to protect very important interests of society in a civil case.

Importance of Connecticut's Constitution

The state and federal constitutions provide that a person shall not be deprived of property without due process of law nor shall private property be taken except for public use upon the payment of just compensation. Due process means the giving of notice, a right to trial (not before a jury of one's peers in Connecticut) and payment of just compensation. This is the minimum standard that the U.S. Supreme Court and Connecticut's Supreme Court have used when defining due process in an eminent domain matter. The taking of someone's home or business property is very important to almost everyone in our society and the imposition of the risk of error on the property owner is a heavy burden, when a court is deciding whether an approved development plan, in fact, will result in a public benefit or whether the taking of a person's property is reasonably necessary. I believe the burden is misplaced and should be shifted to the party taking the property. The property owner should be relieved of carrying the burden of the risk of error and provided greater protection under our Connecticut constitution.

Our Supreme Court has stated previously and restated in *Rizzo*:

“Moreover, we have held that in the area of fundamental civil liberties- which includes all protections of the declaration of rights contained in article first of the Connecticut constitution - we sit as a court of last resort. In such constitutional adjudication, our first referent is Connecticut law and the full panoply of rights Connecticut citizens have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but they are to be followed by Connecticut courts only when they provide no less individual protection

than is guaranteed by Connecticut law.... Recognizing that our state constitution is an instrument of progress ... is intended to stand for a great length of time and should not be interpreted too narrowly or too literally ... we have concluded in several cases that the state constitution provides broader protection of individual rights than does the federal constitution.... State v. Miller, 227 Conn. 363, 379-80, 630 A.2d 1315 (1993).” (Internal quotation marks omitted.) State v. Ross, supra, 230 Conn. at 247-48, 646 A.2d 1318. (Internal quotation marks omitted.) State v. Ross, 230 Conn. at 247-48, 646 A.2d 1318.”

What then could be the reason for our Supreme Court not following this line of reasoning in eminent domain proceedings when deprivation of property is protected under our Connecticut Constitution, Sections 8 and 11 of Article First of the Declaration of Rights? In my view there are two reasons. First, the statutes (CGS, Chapters 130, 132 and 588I) nowhere indicate a legislative intent to place a high degree of importance on protecting private property interests sufficient to warrant the risk of error being carried by the government; and second, the statutes so broadly define the scope of municipal authority as to leave a clear impression that the power to take property through eminent domain should not be restrained.

When the majority in *Kelo* took up the issue whether the trial court determined correctly that the taking primarily benefited the public and not private individuals, it stated that such determination “is a question of fact” to be reviewed “pursuant to the clearly erroneous standard of review.” p.61. The court under this standard sustains the findings of fact by a trial judge unless “there is no evidence in the record to support it ... or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Bugryn v. Bristol*, 63 Conn.App.98, 103; *Kelo*, p.61.

Any reasonable amount of evidence justifying a taking will be enough to sustain the decision of a trial judge upholding the taking. The trial judge is making his/her decision based on minimum standards of due process using a “broad purposive approach” to the underlying legislation, which is to say, requiring the property owner to bear most of the risks of error by the public agency in taking his/her property for the approved project.

Should it be that way when the public agency has greater knowledge concerning the plans, the disposition of properties, the necessity for taking any property within the area, foreseeable needs of the development and the chance of the plan succeeding? The public agency has chosen the developer, entered into agreements with the developer, knows what the status of the developer’s progress is in obtaining funding, tenants and other end users of the properties. How then can it be said that the risk of error resides logically or even naturally with the property owner? An erroneous factual determination is far more likely to be made by the public agency in the process of determining the feasibility of its plan than by the property owner whose participation in developing and implementing the plan and deciding which properties will be taken is minimal.

There has always been heavy judicial reliance upon the legislature with respect to the grant of authority to municipalities to engage in acquisition of properties by eminent domain. With respect to any municipal taking, including for the purpose of economic development, the court looks first to the statutory language and the reasons for passage of the statutes. The court has determined in instances of redevelopment and economic development that the legislature means to broadly state the nature of the problems and provide wide latitude with respect to municipal actions and remedies. Therefore, the court has taken a deferential approach to legislative pronouncements of public use when interpreting Connecticut and federal constitutional provisions.

In *Kelo* the trial judge found that the taking of properties comprising Parcel 4A was unconstitutional. However, the Supreme Court reversed his decision on the basis of the broad, general language of the statutes and the perceived legislative intent of favoring development over an individual's right of ownership.

The statutes (Chapters 130, 132 and 588l) do not directly address the issue of burden of proof and so the court interprets the language of the statutes based on what the court believes the legislature intended. The majority opinion in *Kelo* states over and over again that it is because of the legislature's broad purposive statements with respect to municipal development that the court takes such a broad purposive approach to reviewing the facts of the case.

The U.S. Supreme Court held in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, a 1984 case, that ***"the court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use unless the use be palpably without reasonable foundation."*** Later in the *Midkiff* case the court states, ***"Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use."*** The Connecticut Supreme Court majority relied on *Midkiff* and other earlier federal and state court decisions in deciding *Kelo*.

CLEAR AND CONVINCING EVIDENCE

The basic rule is ***"the greater the social cost of an erroneous outcome in a particular type of litigation, the higher the standard of proof the law applies to that litigation."*** *Miller v. Commissioner of Correction*, 242 Conn. at 793. ***"The more confidence our society requires in the correctness of the factual determinations for a particular type of litigation, the higher the standard of proof the law applies to that litigation."*** *Id.*

There are three standards or levels of proof: beyond a reasonable doubt, clear and convincing evidence and a mere preponderance of the evidence. To protect particularly important individual interests in a civil case the standard of clear and convincing evidence is used. ***"Thus, in cases governed by this burden, because society regards the individual interests involved to be very important, and because society imposes most of the risk of error on the party so burdened, we also require a very high degree of***

subjective certitude for the burden to be satisfied: the fact finder must be persuaded to a high degree of probability.” Rizzo, supra.

No one can reasonably argue or conclude that ownership of private property anywhere in the United States is not valued highly by the public. A home to most is a large purchase and for a majority the biggest purchase of one’s life.

The ability to own a home or other property free and clear of mortgages and other debts provides personal as well as financial security to an individual and his/her family. Home ownership is the basis on which many credit decisions are made. It provides status in a community to be able to say, “I own my own home or I own the property in which my business is located.”

The social cost of having one’s home or business location taken by government is so much more than simply having to move. It is far more severe a turn of events in one’s life than a mere inconvenience. For many it can end their home ownership or business ownership. For others who have obtained a position of financial security, it can mean having to incur and undertake payment of new and/or larger debt obligations to enjoy a comparable living standard. For yet others it can force them to separate from family and friends who have lived and worked close to each other for years.

The burden and level of proof is determined as our Supreme Court has said by a “fundamental value determination.” Values of our society are determined by legislative pronouncements and judicial decisions. In eminent domain matters the court has relied heavily on the legislature and declared as recently as 2005 in *Kelo* that such reliance will continue to be the basis on which it will decide such cases.

Connecticut’s legislature needs to affirm the fundamental values of the citizens of Connecticut and place a much higher value and greater importance on ownership of private property. I strongly encourage the Judiciary Committee to take up these matters this summer and fall and be ready to enact substantive changes to Chapters 130, 132 and 588l consistent with the recommendations set forth in this letter in the 2009 session.

Respectfully submitted,

Robert S. Poliner, Ombudsman

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