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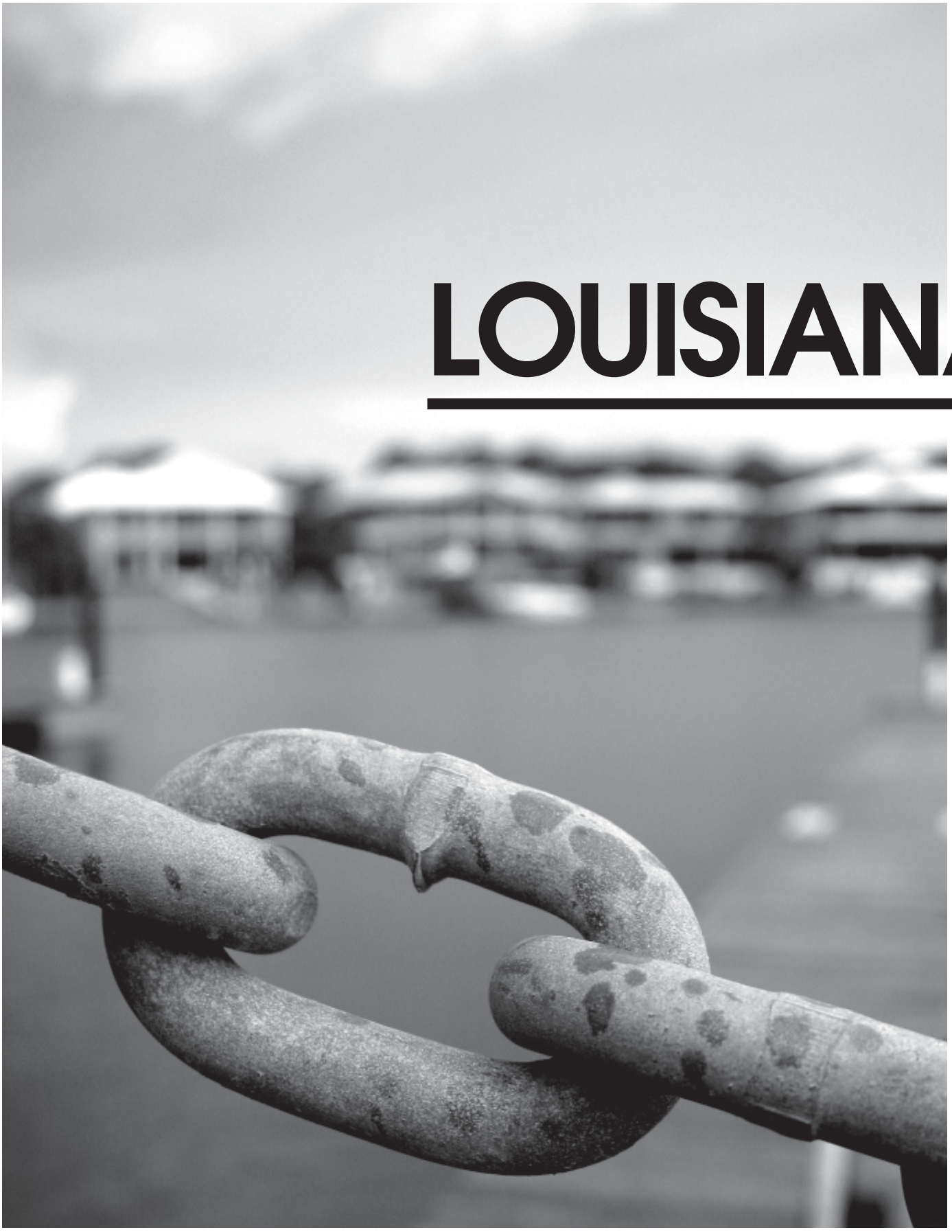

EMINENT DOMAIN

After *Kelo* and Katrina

By Randall A. Smith

The United States and Louisiana Constitutions permit the taking ("condemnation" or "expropriation") of private property without the consent of the owner, provided that the taking is for a public purpose or use and just compensation is paid. In Louisiana, expropriating authorities exercise this power pursuant to specialized procedures intended by the Louisiana Legislature to guarantee due process to landowners. The statutes governing expropriation suits are somewhat complex and lack uniformity among various types of takings, and trial procedures differ greatly from ordinary proceedings.

After Hurricanes Katrina and Rita, many Louisiana landowners have less property that can be taken, but a recent decision by the United States Supreme Court, *Kelo v. City of New London*,[1] may assist Louisiana governmental agencies in taking property to promote economic development and rebuilding in the aftermath of these devastating hurricanes.

The Fifth Amendment to the Constitution, made applicable to the states by the 14th Amendment, provides that "private property [shall not] be taken for public use, without just compensation." Article 1, § 4 of the Louisiana Constitution of 1974 provides similarly that "[p]roperty shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit." The terms "public use" and "public purposes" are defined in neither the United States nor Louisiana Constitutions; although these terms have always been interpreted rather broadly, the recent decision by the United States Supreme Court in *Kelo v. City of New London*[2] appears to have broadened them still further.

The dispute in *Kelo* arose when the City of New London expropriated property for a comprehensive waterfront development following Pfizer's announcement that it was building a facility near New London's Fort Trumbull neighborhood. The development plan was prepared by New London's City Council's consultant, New London Development Corp. (NLDC), and encompassed 90 acres, including 115 privately owned properties and 32 acres already utilized by the government.[3] The development plan included a waterfront conference hotel, restaurants, shopping, marinas, a riverwalk, a museum, office and retail space and parking.[4]

Most of the private property necessary to implement the plan was acquired by voluntary sale. However, owners of 15 of the 115 necessary parcels refused to sell their property, and the New London City Council authorized the exercise of eminent domain over these 15 parcels.[5] The properties were neither blighted nor in bad condition.[6] The home of one of the petitioners had been in her family for more than 100 years.[7]

After the property owners' efforts to invalidate the takings failed on the state level, the United States Supreme Court granted certiorari to consider whether economic development was a valid public purpose supporting the exercise of

eminent domain. In an opinion authored by Justice Stevens and joined by Justices Kennedy, Souter, Ginsburg and Breyer, the court acknowledged that purely private takings, as well as takings under the mere pretext of a public purpose, are forbidden.[8] In this case, however, the court found that there was "no evidence of an illegitimate purpose" and that the taking was in furtherance of a carefully considered development plan.[9] The court declined to adopt a test requiring a detailed examination of a particular use, finding that a literal "use by the public" test would be too "impractical" and "difficult to administer."[10] Instead, the court adhered to a broad definition of "public purpose" and a "longstanding policy of deference to legislative judgments in this field,"[11] citing its prior decisions in *Berman v. Parker*[12] and *Hawaii Housing Authority v. Midkiff*.[13]

In *Berman*, the court upheld the exercise of eminent domain to redevelop a blighted area of Washington, D.C., even though the expropriation included property not itself blighted and a portion of the property was to be transferred to private parties. In *Hawaii Housing*, the court found that the elimination of an oligarchy — by expropriating and transferring property from private individuals to other private parties — was a legitimate public purpose, contrary to the 9th Circuit's conclusion that the taking was "a naked attempt on the part of the state of Hawaii to take the property of A and transfer it to B solely for B's private use and benefit."[14]

In accordance with its history of deference to governmental findings of public purpose, the court deferred to the city's finding that the Fort Trumbull area was sufficiently distressed to warrant a redevelopment program. Considering the development plan as a whole, the court found that it "unquestionably" served a public purpose.[15] Moreover, the court found no basis for distinguishing economic development from other public purposes it had recognized previously, such as agriculture, mining, alleviating blight, breaking up a land oligarchy, or eliminating barriers to entry in the free market.[16] The court responded to the concerns expressed by the dissenters, reassuring that nothing in its opinion eliminated the requirement of payment of just compensation. Moreover, it emphasized that states are free to restrict the takings power further if they see fit:

> 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.[17]

Justice Kennedy concurred, but advocated adoption of a rational basis test for examining public purpose.[18] He distinguished this case from one that might require a more stringent standard on grounds that: (1) the taking occurred in the context of a comprehensive development plan; (2) the economic benefits of the project were ample; (3) the identity of most private beneficiaries of the plan were unknown at the time of its formulation; and (4) the city complied with elaborate procedural safeguards and requirements.[19]

Justice O'Connor authored a lengthy dissent, which was joined by Justices Rehnquist, Scalia and Thomas. The dissent asserted that, as a consequence of the court's opinion:

> [A]ll private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded — *i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public — in the process . . . . The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.[20]

The dissenters predicted that "the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms."[21] Justice Thomas, dissenting separately, expressed similar concerns and suggested that the court reconsider prior decisions to the extent they have strayed from the Constitution's original meaning of "public use."[22]

Although the dissent in *Kelo* was aggressive, its import was lessened in fall 2005 by the death of Chief Justice Rehnquist in September 2005 and the impending retirement of Justice O'Connor. Although neither the newly confirmed Justice John Roberts nor any

other Supreme Court nominee has publicly announced a position regarding *Kelo*, it is unlikely that the court will retreat from its position regarding the government's expropriation powers in the near future.

Louisiana courts have not had an opportunity to consider the impact of *Kelo*. The public purpose for expropriations is not often challenged for three reasons. First, Louisiana courts rarely sustain challenges to the public purpose for an expropriation.[23] Second, the Louisiana Legislature has limited the time within which a landowner may challenge the public purpose of a taking to 10 days from the date of formal notice of the taking.[24] Finally, the term "public purpose" has always been interpreted broadly in Louisiana. Indeed, economic development was recognized by Louisiana appellate courts as a public purpose years prior to the *Kelo* decision. In *Town of Vidalia v. Unopened Succession of Ruffin*,[25] the 3rd Circuit held that:

> any allocation to a use resulting in advantages to the public at large will suffice to constitute a public purpose. Moreover, a use of the property by a private individual or corporation, when such use is *merely incidental* to the public use of the property by the state or its political subdivisions, does not destroy an otherwise valid public purpose.[26]

Subsequently, in *City of Shreveport v. Chanse Gas Corp.*,[27] the 2nd Circuit confirmed that economic development is a public purpose under Louisiana law. In *City of Shreveport*, the city expropriated property for the purpose of building a convention center and hotel. The trial court rejected the landowners' challenge to the public purpose for the taking. On appeal, the landowners argued that the economic development anticipated to be generated by the convention center and hotel was an insufficient public purpose, that the project would be a financial drain on the city, and that the city would have to donate the property to a private developer in order to have the project built. Relying on *Town of Vidalia* and the cases later cited in *Kelo* (*Berman* and *Hawaii Housing*), the court held that economic development was a sufficient public purpose and adopted a preponderance of the evidence test that the government must meet to demonstrate public need.[28] The court held that, once the government meets that burden, a landowner must show abuse of discretion by the expropriating authority in selecting the project site, which requires showing that the government acted "in bad faith, without adequate determining principles, or without reason."[29] The court found that the government met its burden by showing a rational relationship to a public purpose.[30]

Following the United States Supreme Court's suggestion that the states are free

to limit expropriation powers, the legislatures in 28 states have discussed or proposed legislation to limit the taking of private property for economic development purposes and/or for transfer to other private parties.[31] As of Dec. 16, 2005, Alabama, Delaware, Ohio and Texas had passed legislation designed to curb *Kelo*'s impact.[32] Also, in the 109th Congress, First Session, the House of Representatives passed H.R. 4128, which would withhold federal economic development funds from states that expropriate property for economic development purposes.[33]

Louisiana has passed no laws specifically designed to curb the impact of *Kelo*. On the contrary, in Louisiana, Hurricanes Katrina and Rita have provided a strong incentive to the Legislature to utilize *Kelo* to redevelop New Orleans and the surrounding areas. Nevertheless, the Legislature issued a Concurrent Resolution memorializing Congress to take innovative steps to provide housing for hurricane victims, but specifically stating that "any comprehensive development plan must clearly indicate that no powers of eminent domain shall be granted." Without mentioning expropriation or *Kelo,* the Legislature has introduced other legislation that may support future expropriations: HB 2 in the 2005 First Extraordinary Session (returned to the calendar in November 2005) proposes a statute recognizing that the rebuilding of utilities destroyed by the hurricane is "a valid public purpose."[34]

As Louisiana recovers from Hurricanes Rita and Katrina, the Legislature may be inclined to utilize economic development to support expropriation of private property to rebuild damaged areas. Various governmental agencies are already drafting and unveiling broad redevelopment plans encompassing economic redevelopment and rebuilding of necessary infrastructure. In view of the urgency of the situation and need for housing and public infrastructure, it is likely that the number of expropriation proceedings will increase in the next several years. In view of *Kelo* and its broad definition of public purpose, it may be difficult to challenge the public purpose for these takings. However, these landowners will still be entitled to just compensation and their day in court, and they will need assistance in wading through the expropriation laws to ensure that appropriate compensation is paid.

FOOTNOTES

1. Kelo v. City of New London, ____ U.S. ____, 125 S.Ct. 2655, 162 L. Ed. 2d 439 (2005).
2. *Id.*
3. *Id.* at 2659.
4. *Id.*
5. *Id.* at 2660. After initiating the condemnation proceeding, NLDC announced its intention to lease some parcels to private parties and disclosed its negotiations for a 99-year lease for $1 per year. *Id.* at 2660, n. 4.
6. *Id.*
7. *Id.* at 2671 (O'Connor, J., dissenting).
8. *Id.* at 2661, *citing* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 104 S.Ct. 2321, 2331, 81 L. Ed. 2d 186 (1984), and Missouri Pac. R. Co. v. Nebraska, 164 U.S. 403, 17 S.Ct. 130, 41 L. Ed. 489 (1896).
9. *Id.*
10. *Id.* at 2662.
11. *Id.* at 2663.
12. 348 U.S. 26, 75 S.Ct. 98, 99 L. Ed. 27 (1954).
13. 467 U.S. 229, 104 S.Ct. 2321, 2331, 81 L. Ed. 2d 186 (1984).
14. *Id.* at 235. The government owned 49 percent of the land, and another 47 percent was owned by only 72 private persons.
15. Kelo, 125 S.Ct. at 2665.
16. *Id.*
17. *Id.* at 2668.
18. *Id.* at 2669 (Kennedy, J., concurring).
19. *Id.* at 2670 (Kennedy, J., concurring).
20. *Id.* at 2671, 2676 (O'Connor, J., dissenting).
21. *Id.* at 2677 (O'Connor, J., dissenting).
22. *Id.* at 2678 (Thomas, J., dissenting).
23. *See, e.g.*, DOTD v. Estate of Griffin, 95-1464 (La. App. 1 Cir. 2/23/96), 669 So.2d 566.
24. *See, e.g.*, La. R.S. 19:147; 19:276; 19:296; 19:316; 38:357 (West 2005) (giving landowners 10 days from date of service of notice of expropriation to challenge public purpose of "quick taking" expropriations by various governmental authorities).
25. 95-580 (La. App. 3 Cir. 10/4/95), 663 So.2d 315.
26. *Id.* at 319.
27. 34,959 (La. App. 2 Cir. 8/22/01), 794 So.2d 962, *writ denied*, 01-2657 (La. 1/4/02), 805 So.2d 209.
28. *Id.* at 972.
29. *Id.* (citations omitted).
30. *Id.*
31. Tresa Baldas, "States Ride Post-*'Kelo'* Wave of Legislation," Nat'l L.J. (8/2/05), p. 1. The 28 states included Louisiana, which ultimately did not pass legislation expressly limiting *Kelo*.
32. National Conference of State Legislatures, *Post Kelo v. New London State Eminent Domain Legislation* (12/16/05) (updated regularly at *http://www.ncsl.org/programs/natres/post-keloleg.htm*).
33. The bill was received in the Senate on Nov. 4, 2005 and referred to the Committee on the Judiciary.
34. HCR No. 42, First Extraordinary Session of 2005.

Do You Have a Post-Hurricane Professionalism Story?

Members of the LSBA's Professionalism & Quality of Life Committee are aware that there have been remarkable acts of kindness and selflessness shown to Bar colleagues following the two hurricanes, including assistance with their practices and with basic needs ... in other words, true "professionalism." The committee is now soliciting "professionalism" stories from members, with the idea of publishing them online, in print publications, or both. Send your story or comments to: Publications Coordinator Darlene M. LaBranche, 601 St. Charles Ave., New Orleans, LA 70130-3404; fax (504)566-0930; or e-mail dlabranche@lsba.org.

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