Recent Developments in Public Use and Pretext in Eminent Domain

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The Supreme Court's controversial 5-4 decision in *Kelo v. City of New London*[1] renewed both public and judicial interest in the contours of the public use requirement of the Fifth Amendment and its counterparts in state constitutions. Courts began to take a harder look at how the government's claim that property is being condemned for a public use or purpose can be challenged by a landowner, and what degree of deference is owed by the courts to the government's assertion. This article summarizes recent developments in public use and pretext litigation.

I. *Kelo* Sets the Stage

In *Kelo*, the United States Supreme Court rejected a bright line rule that every taking supported only by claims of "economic development" violates the Public Use Clause. The landowner of a non-blighted home challenged the taking by arguing that a prediction of "economic revitalization" alone was an insufficient public use or purpose.[2] While upholding New London's redevelopment plans, pursuant to which private property was condemned and ownership eventually transferred to another private owner, the *Kelo* majority noted that two classes of takings would fall short. First, the Court affirmed the touchstone principle that "the sovereign may not take the property of *A* for the sole purpose of

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1. 545 U.S. 469 (2005).

2. Local planners "hoped" that a pharmaceutical company's plans to relocate to the area would serve "as a catalyst to the area's rejuvenation." *Id*. at 473. The city projected: "In addition to creating jobs, generating tax revenue, and helping to 'build momentum for the revitalization of downtown New London,' the plan was also designed to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the park." *Id*. at 474-75 (citation omitted).

transferring it to another private party *B*, even though *A* is paid just compensation,"[3] and that a "purely private taking"—one for the purpose of "conferring a private benefit on a particular private party"—would not meet public use standards.[4] Second, the Court held that takings in which the stated public use or purpose was a "pretext to hide private benefit" would not survive scrutiny, either.[5] The majority also took great pains to point out that the condemnation of individual parcels were part of an "integrated" and "carefully considered" development plan, and viewed eminent domain through the same lens as the police power to regulate property, particularly the judicial deference owed to comprehensive zoning decisions in due process analysis.[6]

While the *Kelo* majority did not rule out finding in some future case that a taking supported only by claims of economic development would fail because of private influences and benefits, it refused to establish a prophylactic rule exhibiting any distrust of government actions that might encroach on the fundamental right of property.[7] Justice Kennedy, the majority's fifth vote, wrote separately to argue for "meaningful rational-basis review":

> 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.[8]

3. *Id*. at 477 (emphasis in original).

4. *Id*. (citing Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984)).

5. *Kelo*, 545 U.S. at 478 ("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.").

6. *Id*. at 474; *see also id*. at 484 ("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 487 ("Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case."); *cf*. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (no due process violation in comprehensive zoning).

7. The right to own and make reasonable use of property is not supposed to be a second-class federal constitutional right. *See* Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one."). The *Kelo* majority, however, (as the Court has been doing with regulatory takings claims since Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)), punted responsibility for protecting a federal constitutional right to state courts and legislatures.

8. *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring) (citing Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446-47 (1985); Dep't of Agric. v. Moreno, 413 U.S. 528, 533-36 (1973)).

Justice Kennedy also noted that some takings may be subject to more stringent judicial review because they lack systemic indicators that the results produced are truly public.[9]

Neither the majority opinion nor Justice Kennedy's concurrence, however, provided much guidance to lower courts on how to apply these amorphous standards, or how courts should measure the public versus private nature of a taking, leaving those issues for another day.[10] The majority emphasized that its conclusions were driven, in large part, by "federalism" and that property owners could look to state courts and state legislatures for protection for their federal constitutional rights. It should come as no surprise, therefore, that much of the subsequent judicial developments in the public use arena detailed in this article are the product of state court litigation.

II. Hawaii: "Classic" Taking for a Road Not Immune From Judicial Review for Pretext

In *County of Hawaii v. C&J Coupe Family Ltd. Partnership*,[11] the Hawaii Supreme Court held that even if the government establishes that a taking is for a public purpose—in that case, a road that may eventually be public—when "there is evidence that the asserted purpose is pretextual, courts should consider a landowner's defense of pretext."[12]

The developer of a luxury gated golf course community needed to rezone agricultural land, and as a condition of rezoning, agreed to acquire and build a bypass road to be built at its own expense on its property and its neighbors' properties. The road would also provide

9. *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) ("My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.") (citing E. Enterprises, Inc. v. Apfel, 524 U.S. 498, 549-50 (1998) (Kennedy, J., concurring in part and dissenting in part) (heightened scrutiny for retroactive legislation under the Due Process Clause)).

10. *Kelo*, 545 U.S. at 487 (citing 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001); Cincinnati v. Vester, 281 U.S. 439 (1930)). Justice Kennedy also did not elaborate, noting only that "[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." *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

11. 198 P.3d 615 (Haw. 2008).

12. *Id*. at 620.

access to the development. Several years later, with the road still not constructed, the developer entered into a development agreement with the County of Hawaii in which the county agreed that if the developer's efforts to negotiate to acquire neighboring private property for the road failed, the county would be obligated at the developer's "sole discretion" to use its power of eminent domain to take the land, that the developer had the "sole discretion" to determine what property the county must take, and that the developer had the "sole and absolute discretion" to determine when possession of property was needed.[13] The developer would initially own the property, but upon completion of the road, was required to dedicate it to the county. The development agreement further provided that a condemnation lawsuit must be initiated by the county within thirty days after receipt of notice from the developer, that the "tender of a requirement of condemnation letter" by the developer constituted a "formal initiation of condemnation action," and that the developer would reimburse the county for the costs of the condemnation.[14]

After the developer failed to negotiate purchase of one parcel, it directed the county to bring a condemnation lawsuit, which it did. The resolution of taking stated:

> Whereas, the [D]evelopment [A]greement provides that if one of the owners across whose property the [Bypass] is planned to traverse fails to mutually agree with Oceanside with respect to the purchase price or "the terms of the purchase," the condemnation powers of [the county] shall be used to acquire that particular segment with [the developer] reimbursing [the county] for any costs to acquire.[15]

The property owner claimed, among other arguments, that the county improperly delegated its power of eminent domain to the developer.[16] After several years of litigation which saw the trial court *sua sponte* vacate the order of immediate possession and summary judgment it had earlier granted to the county on the issue of public use, an unsuccessful attempt by the developer to disqualify the trial judge, and de-

13. *Id*. at 622.
14. *Id*. at 621-22.
15. *Id*. at 622.
16. *See, e.g.*, In re Condemnation of 110 Washington Street, 767 A.2d 1154, 1160 (Pa. Commw. Ct. 2001) (holding that if 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, the attempted delegation is illegal and void).

velopments in the law that suggested a closer inquiry was necessary,[17] the county adopted a second resolution of taking to condemn nearly the same property it was already attempting to take. The county did not explain why a second attempt was necessary,[18] but unlike the first, the second resolution omitted all references to the development agreement and the developer. After *Kelo* was accepted for review by the United States Supreme Court in September 2004, the county instituted a second condemnation action based on the second resolution. At the conclusion of a consolidated trial of the two condemnations, the court concluded the first condemnation was not for public use because the county had delegated its power of eminent domain in the development agreement, and the taking for the road was therefore not for a public purpose.[19] However, the trial court held that the second condemnation was for public use because the two resolutions were passed by separate county councils comprised of different members over four years apart. The trial court did not consider the property owner's evidence that the second condemnation was a pretext to hiding the private benefit to the developer.

The Hawaii Supreme Court held that even though the road would be for public use, the trial court had an obligation under both the United States Constitution and the Hawaii Constitution to consider evidence of pretext, and could not limit the inquiry to the face of the resolution of taking. Hawaii has adopted the rational basis test for public use, and the county argued that courts are only obligated to determine whether the legislature "might reasonably have considered the use public, not whether the use is public."[20] The court, however, noted the presumption in favor of public use is not "unfettered," and "under appropriate circumstances, courts may consider whether a purported public purpose is pretextual."[21] Interestingly, the *Coupe* court relied on both a decision by

17. *See* 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001); Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002). *See also* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004), *overruling* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

18. The Hawaii Supreme Court only noted that the county adopted the second resolution of taking "[f]or unstated reasons." *Coupe*, 198 P.3d at 623.

19. *Id*.

20. *See* Hawaii Hous. Auth. v. Lyman, 704 P.2d 888, 896 (Haw. 1985) ("[w]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, a compensated taking is not proscribed by the public use clause") (citation omitted).

21. *Coupe*, 198 P.3d at 638.

the Supreme Court of Hawaii[22] and the *Kelo* majority.[23] The court held "[u]nder our precedents and *Kelo*, it appears that the stated public purpose in this case on its face comports with the public use requirements of both the Hawaii and United States constitutions,"[24] but "the single fact that a project is a road does not per se make it a *public* road."[25] The court concluded, "[h]owever, both *Ajimine* and *Kelo* make it apparent that, although the government's stated public purpose is subject to prima facie acceptance, it need not be taken at face value where there is evidence that the stated purpose might be pretextual."[26] Because the trial court did not look beyond the face of the county's second resolution, the court remanded the case for a determination of whether the taking was "clearly and palpably" of a private character, and for a "clear showing that the use was of a predominantly private character," factors which the court held were relevant to the pretext issue.[27] The *Coupe* majority rejected the dissent's assertion that "classic" public uses were not subject to pretext inquiry, and that *Kelo* limited pretext questions to economic development cases.[28]

III. California: No Details, No Public Use

In *City of Stockton v. Marina Towers L.L.C.*,[29] a California Court of Appeal exposed as fantasy the *Kelo* majority's conclusion that decisions to take property for redevelopment are due deference because they are the result of an objective process and comprehensive and carefully considered planning.[30] In a case the court labeled "condemn first, decide

22. Hawaii Hous. Auth. v. Ajimine, 39 Haw. 543 (1952).

23. *Coupe*, 198 P.3d at 638 ("the *Kelo* majority opinion, consistent with our prior decisions, allows courts to look behind an eminent domain plaintiff's asserted public purpose under certain circumstances."). The *Coupe* court based its decision on Justice Stevens' majority opinion, and did not adopt Justice Kennedy's concurring opinion. *Id*. at 642 ("[T]he majority opinion in *Kelo*, as well as our own cases, provide ample authority to require the court to reach the issue of pretext. . . . Therefore, we decline to adopt Justice Kennedy's concurring opinion."). The court noted that the District of Columbia Court of Appeals reached the same conclusion in *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 169 n.8 (D.C. 2007).

24. *Coupe*, 198 P.3d at 643.

25. *Id*. (quoting City of Novi v. Robert Adell Children's Funded Trust, 701 N.W.2d 144, 150-51 (Mich. 2005)).

26. *Coupe*, 198 P.3d at 644.

27. *Id*. at 647.

28. *Id*. ("Under the dissent's formulation, it is difficult to imagine what question would be left for the court to decide when the stated purpose of the taking is a public road.").

29. 88 Cal. Rptr. 3d 909 (Cal. Ct. App. 2009).

30. *Id*. at 913.

what to do with the property later,"[31] it invalidated a taking on public use grounds, holding 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"[32] 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."[33] 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 property owner possessed two parcels. One was unimproved, and a vacant office building was on the other. More than a decade before the owner's purchase, the city adopted the "Central Stockton Final Plan/ Revitalization Plan":

> The plan presents itself as a visionary planning document for future development of the city center, with maps, charts and descriptions of possible development of the downtown area. In 1991, the subject property was added to the West End Redevelopment Project Area of downtown Stockton, and an environmental impact report (EIR) was certified for this purpose.[34]

The city studied projects including development of the Stockton Event Center, a complex which was projected to include an arena, hotel, baseball stadium, and apartments, and the city settled on the two parcels as the "catalyst site" for the project. The city notified the owner that it was considering acquisition for the Event Center, but the property owner objected. The owner was willing "to work with [the city] on developing the property" and disagreed that condemnation was necessary, and at the hearing on the resolution of necessity, no one tied the taking of the property to any specific project.[35] The city, however, went ahead and passed resolutions of necessity, which provided:

> (1) the "Proposed Project" consists of acquisition of additional land on the North Shore of the Stockton Deep Water Channel; (2) City already owns approximately 20 acres on the North Shore and "has been preparing this site for development"; (3) the North Shore is a "catalyst site" consistent with redevelopment of a portion of the West End (Central Stockton) Redevelopment Project Area; (4) assembling the North Shore parcels, including this property, into a single parcel will eliminate irregularly shaped and undersized lots, permitting development of a larger and economically feasible use; and (5) the "Proposed Project" will complement other revitalization efforts and City will be a direct beneficiary of such efforts.[36]

31. *Id.*
32. *Id.* at 921.
33. *Id.* at 913.
34. *Marina Towers L.L.C.*, 88 Cal. Rptr. 3d at 914.
35. *Id.*
36. *Id.* at 915.

Based on the resolutions, the city instituted eminent domain proceedings and obtained possession of the properties. The city then adopted a new resolution which designated one parcel for use as a parking lot and the other for a ballpark. The project was built before the superior court held a trial on the property owner's objections to the condemnations, so it should not be a big surprise that after the property owner's opening statement, the court dismissed the public use objections and ruled in favor of the city.

The court of appeals reversed. California law requires a resolution of necessity to contain certain elements, one of which is that it set forth a description of the project with clarity.[37] The court held that without details, "[i]t is both a physical and legal impossibility" for legislators to determine whether the public interest requires the project, whether it is planned consistently with the "greatest public good and least private injury," or whether the property to be taken is necessary for the project.[38] The court focused on the due process rights of the property owner:

> A governing body of a public entity may not adopt a resolution of necessity until it has given the owner proper notice and an opportunity to be heard on all matters that are the subject of the resolution of necessity. . . . If the governing body does not have before it a definable project for which the property is sought to be taken, any discussion of the pros and cons of the condemnation would be an empty gesture and the necessity findings rendered at the conclusion of the hearing would be devoid of real meaning.[39]

The court concluded that the city's description of its purposes was "woefully lacking in its identification of the project."[40] 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. In other words the court held that *we are taking this property because we need this property for something* is not good enough. "A hopelessly obscure description of the project in a resolution of necessity cannot be justified simply because the governing body has incanted every statutorily authorized purpose."[41] The court held the critical time for defining the

37. *See* CAL. CIV. PROC. CODE §§ 1240.020-40.030 (West 2007). "No public entity may condemn property unless it has first adopted a resolution of necessity that meets all statutory requirements." § 1240.040.
38. *Marina Towers L.L.C.*, 88 Cal. Rptr. 3d at 920.
39. *Id*.
40. *Id*. at 921.
41. *Id*. at 923-24.

project was when the resolution was passed, so even though the city eventually made use of the property, it conceded in its briefs that at the time the condemnation case was instituted, it did not have any specific purpose in mind.[42] The court rejected the trial court's determination that city's construction of the project after the passage of the resolutions of necessity somehow validated the defects in the project description.[43] Interestingly, the city disclaimed that it was taking the property as a redevelopment project, which, under California law, would likely have provided it a safe harbor by rendering even the vague statements of necessity nearly bulletproof.[44] Finally, what of the fact that even though the taking was struck down, the property had already been taken and the project built? The court considered the taking *fait accompli*, and did not unwind it. It did, however, order the payment of the property owner's attorneys' fees and costs.

IV. Pennsylvania: Less Economically Intensive Use Does Not Equal Blight

In the case *In re Condemnation by the Redevelopment Authority of Lawrence County*,[45] the Pennsylvania Commonwealth Court held that "blight" must be determined by reference to objective criteria and the reasonable person standard, and a court may not accept the government's claim that a property is blighted simply because it is being underused in comparison to the government's proposed use.[46]

The county redevelopment authority determined that six homes built in 2002 were blighted merely because the properties would be better used as an industrial park. According to the authority, the properties were "shovel ready" and primed for industrial development, but they

42. *Id*.
43. *Marina Towers L.L.C.*, 88 Cal. Rptr. 3d at 916.
44. *Id*. at 915-16. The court distinguished the situation where a resolution of taking declares that property is being condemned to eliminate blight and for redevelopment. *See* Anaheim Redevelopment Agency v. Dusek, 239 Cal. Rptr. 319, 319 (Cal. Ct. App. 1987) (holding that general language was specific enough because the public use was established at the time the redevelopment plan was adopted). The *Marina Towers* court held that the city could not take advantage of this "safe harbor" because it did not rely upon redevelopment law to take the properties. *Marina Towers L.L.C.*, 88 Cal. Rptr. 3d at 916.
45. 962 A.2d 1257 (Pa. Commw. Ct. 2008).
46. *Id*. at 1264 ("Our conclusion, that the criteria qualifying an area as blighted must be ascertained by viewing the condition of the targeted area itself under a reasonable person standard rather than considering solely the anticipated benefit from the intended future use.").

were not decayed, and were not unsafe, unsanitary, or overcrowded.[47] The blight designation was based only on the property's use as a residence, which was "economically and socially undesirable" only because "the use of the properties as residences was determined to be an "impediment to industrial development."[48] The trial court determined the authority's claim of blight was "capricious and not in good faith" but allowed the taking because the property owner failed to prove the authority acted in bad faith when it determined the residence was blighted.[49]

The court reversed, expressly rejecting *Kelo*, noting in that case the court held state legislatures were free to provide more protection for property owners, and that the Pennsylvania legislature had done so in the Urban Redevelopment Law[50] which prohibits the taking of unblighted property for economic development.[51]

> The term "economically undesirable land uses," as used in Section 2 of the URL, does not mean property that is merely put to a use other than the most economically profitable. Such an understanding of the term fails to focus the inquiry on the actual condition of the properties labeled as "blighted" and instead improperly focuses the inquiry on a comparison of the present use with the proposed redevelopment use. The terms in Section 2, such as "unsafe, unsanitary, overcrowded," are not relative descriptors that mean less safe, less sanitary or more crowded; rather, the terms describe actual conditions of deterioration. In order for an area comprising several properties to qualify as unsafe, unsanitary or overcrowded, the area must contain at least some properties in a condition that a reasonable person would conclude met the ordinarily understood meaning of these terms. We construe "economically undesirable" in the same manner, as describing an actual, objectively negative use of the property rather than merely a use relatively less profitable than another.[52]

An objective rule makes sense; otherwise, the government would be able to take any property at any time simply by moving the goalposts. More intense use of land is nearly always possible, and if that were the rule, a property owner could never object to a blight declaration or a taking.

47. *Id*. at 1262 ("The Redevelopment Area consists of six properties, none of which are in a condition that any reasonable person could consider blighted in the ordinarily understood sense of severely deteriorated, slum or nuisance conditions. Condemnor concedes as much.").
48. *Id*.
49. *Id*. at 1260.
50. 35 PA. STAT. ANN. §§ 1701-1719.2 (2003).
51. *Lawrence County*, 962 A.2d at 1263.
52. *Id*. at 1263. *See also id*. at 1265 ("The record leaves no room for any conclusion that the properties in the Area specifically inflict any affirmative harm on the community due to the physical condition or the use of those properties. The desire to put the properties to industrial use does not render their present use undesirable within the meaning of [the statute].").

V. New York: If No Comprehensive Plan Exists, The Court May Look For One

In *Aspen Creek Estates, Ltd. v. Town of Brookhaven*,[53] the New York courts approved a taking of private property to preserve it as farmland and to prevent development. Aspen Creek purchased the farmland to develop residences, outbidding the township which also wanted to purchase the development rights from the prior owner. When negotiations began between Aspen Creek and the township to purchase the property for over three times Aspen Creek's purchase price, the township instituted condemnation proceedings.[54]

The appellate division's majority held the goal of preserving farmland generally qualifies as a public use or purpose, and there was no evidence of pretext in the record demonstrating that the presumption of public use should be questioned, even though the property owner asserted the land would eventually be leased or sold to another private owner.[55] The property owner also asserted that because the taking was not part of a carefully considered plan, it did not deserve judicial deference.[56] The appellate division was not bothered by the utter lack of a formal (or even informal) plan, *Kelo*'s "carefully considered" language notwithstanding. The court implied one:

> In any event, while it does not appear from the record that the precise boundaries of the Manorville Farmland Protection Area have been formally defined by the Town, it is clear from the comments made by various speakers at the hearing that the desirability of preserving farmland in Manorville has indeed been recognized by civic associations and public officials. A plan prepared by the Manorville Taxpayers Association in 1993 set preservation of the remaining farms in the hamlet as a goal. . . .[57]

Is a "plan" by civic groups gleaned from comments at a public hearing the kind of comprehensive consideration the majority had in mind in *Kelo*? The fact that a condemnation takes place within the context of a comprehensive plan is, in theory, designed to give the courts confidence in the result, but if an action takes place without a plan, courts should be more willing to give it a hard look, as in cases of spot zoning, for example.

The court of appeals affirmed,[58] summarily holding that "the public benefits of the taking in this case were not incidental or pretextual

53. 848 N.Y.S.2d 214 (N.Y. App. Div. 2007), *aff'd*, 2009 WL 382534 (N.Y. 2009).
54. *Id*. at 216-17.
55. *Id*. at 219-20.
56. *See Kelo*, 545 U.S. at 474.
57. *Aspen Creek*, 848 N.Y.S.2d at 221.
58. Aspen Creek Estates, Ltd. v. Town of Brookhaven, 2009 WL 382534 (N.Y. 2009).

in comparison with benefits to particular, favored private entities,"[59] because:

> Petitioner's property was taken pursuant to a legislatively declared public policy in favor of farmland preservation and as part of the Town of Brookhaven's master plans endorsing farmland preservation. In furtherance of these plans, Town voters passed three bond acts providing $130 million to acquire development rights or fee interests in undeveloped land in the Town; among the areas specifically designated for preservation was the 500-acre tract of farmland in which petitioner's parcel is located.[60]

VI. Pennsylvania: Post-Hoc Plan Does Not Support Taking

Aspen Creek is at odds with the ruling by the Pennsylvania Supreme Court in *Middletown Township v. Lands of Stone*.[61] In that case, the 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 court upheld the power of local government to take property "for any legitimate purpose," notwithstanding statutory language that did not extend authority to the town to take property for "open space."[62] However, the court struck down the attempted taking because the evidence showed that the real purpose of the taking was something other than the township's stated reason.[63]

The township filed a declaration of taking to condemn farmland the Stone family wanted to subdivide and presumably develop.[64] The township wanted to take the property for recreational purposes and open space.[65] The property owner objected, arguing the township was specifically prohibited by state statute from taking land to preserve open space and prevent development. Pennsylvania's Lands Act prohibits local government units from utilizing eminent domain to take land to preserve open space, but the Township Code allows local government to take property 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 township argued that it did not matter what evidence the property owner produced because the "sole ques-

59. *Id*. at *1.
60. *Id*.
61. 939 A.2d 331 (Pa. 2007).
62. *Id*. at 337.
63. *Id*.
64. *Id*. at 333.
65. *Id*.

tion is whether the Township could lawfully condemn for recreational purposes."[66] The township also asserted that it was not relevant that the Lands Act prohibited local government from condemning land to preserve open space since it took the property under the authority of the Township Code, not the Lands Act. The trial court overruled the property owner's objections.

The Pennsylvania Supreme Court held the township had the authority to condemn the property under the Township Code, despite the prohibitions on takings for open space in the Lands Act. Local governments can condemn for any legitimate purpose.[67] The court held the prohibition means only that a local government may not rely upon the Lands Act when it takes property, and thus does not prohibit the government from relying upon some other authority, namely the Township Code, which allows takings for "recreational" use.[68] However, the court held that the record did not reflect the "true purpose" the township claimed as the reason for condemnation, that the property was for recreational use.[69] 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.[70] "[I]n order to uphold the invocation of the power of eminent domain, this [c]ourt must find that the recreational purpose was real and fundamental, not post-hoc or pre-textual."[71] 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

66. *Middletown Twp.*, 939 A.2d at 336.
67. *Id*. at 337.
68. *Id*.
69. *Id*.
70. *Id*. at 338 ("This means that the government is not free to give mere lip service to its authorized purpose or to act precipitously and offer retroactive justification.").
71. *Middletown Twp.*, 939 A.2d at 338.

> requirements. It cannot be sufficient to merely wave the proper statutory language like a scepter under the nose of a 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 an intelligent plan that demonstrates informed judgment to prove that an authorized public purpose is the true goal of the taking.[72]

VII. Second Circuit: Pleading Pretext

In *Goldstein v. Pataki*,[73] a case involving the Atlantic Yards redevelopment project in Brooklyn,[74] the United States Court of Appeals for the Second Circuit affirmed the dismissal of a complaint alleging that the project's proffered public benefits were a pretext to hide a developer's private advantage. The district court dismissed the case for failure to state a claim because the fifteen property owners whose homes and businesses were to be taken because the property owners admitted the project would serve several public uses, including blight abatement, the basketball arena, and new affordable housing.[75] The federal district court recognized that *Kelo* allows a pretextual challenge, but determined that even if every allegation in the complaint was true, no jury could conclude the asserted public benefits were pretextual.[76]

The Second Circuit affirmed, rejecting the allegations that the developer was the impetus for the project and that the public uses were post-hoc justifications, because they did not rise above speculation.[77] The court also held that when the plaintiffs admitted that the project may have some public benefit, they conceded the public use issue:

> [T]he instant complaint calls the "alleged 'public benefits' . . . either wildly exaggerated or simply false. At best, [they] are incidental; at worst, they are nonexistent." Read carefully, however, the specific allegations in the complaint foreclose any blanket suggestion that the Project can be expected to result in no benefits to the public. Instead, their collective import is that the costs involved, measured in terms of either government spending or the impact the Project will have on the character of the neighborhood and its current residents, will dwarf whatever benefits result. In other words, the appellants have effectively conceded what *Rosenthal* found to have been a complete defense to a public-use challenge: that viewed objectively, the Project bears

72. *Id*. at 339.

73. 516 F.3d 50 (2d Cir.), *cert. denied*, 128 S. Ct. 2964 (2008).

74. *Goldstein*, 516 F.3d at 53 (the project includes a new home for the National Basketball Association's New Jersey Nets, at least sixteen apartment buildings, and several office towers).

75. *See* Goldstein v. Pataki, 488 F. Supp. 2d 254, 287 (E.D.N.Y. 2007).

76. *Id*. at 288.

77. *Goldstein*, 516 F.3d at 56 (citing Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007)). The property owners conceded that *Twombly* applied to their complaint, even though *Twombly* involved a complaint under the Sherman Act and the Court has not determined whether its heightened pleading requirement applies in other areas. *Id*.

> at least a rational relationship to several well-established categories of public uses, among them the redress of blight, the creation of affordable housing, the creation of a public open space, and various mass-transit improvements.[78]

In other words, once a property owner admits that a taking may have some public benefit, the court "need not go further" and the inquiry ends.[79] Pretextual allegations must only be examined by the court if it pleads facts that the court believes rise above "mere suspicion."[80] The court stated that allowing a pretextual claim to go forward would invite "a full judicial inquiry into the subjective motivation of every official who supported the Project, an exercise as fraught with conceptual and practical difficulties as with state-sovereignty and separation-of-power concerns."[81]

VIII. Conclusion

The decisions of the lower courts view the United States Supreme Court's opinion through vastly different lenses, and no consensus has emerged about how to apply the Court's rules about pretext or comprehensive taking plans.

78. *Goldstein*, 516 F.3d at 58-59 (citing Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp., 771 F.2d 44, 45 (2d Cir. 1985) (per curiam); Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1092 (2d Cir. 1995)).

79. *Goldstein*, 516 F.3d at 59-60.

80. *Id*. at 62.

81. *Id*. at 63.