



# The *Greater* Public Good

## An Ombudsman for Property Rights Speaks Out About Kelo

BY ROBERT S. POLINER

When our founding fathers met in Philadelphia to draft the U.S. Constitution, they created a document that would provide for a stronger national government than existed under the Articles of Confederation. The proposed constitution granted broad powers to the legislative branch.

It wasn't until the document was sent to the thirteen states for ratification that the authors, principal among them Alexander Hamilton and James Madison, realized that the states would not ratify without assurance that individual rights and liberties would be protected from an overbearing and intrusive government as existed under English rule. Thus the first ten amendments (Bill of Rights) were written and ratified and became the law of the United States.

The Fifth Amendment prohibits government from depriving a person of life, liberty or property without due process of law and further provides "nor shall private property be taken for public use, without just compensation."

In an article which appeared in the September/October 2008 issue of Right of Way Magazine, under the title "The Non-Truth About Kelo," the author sought to make the point that "a taking is constitutional when it is for the greater public good." He does not address what the phrase "the greater public good" means. Rather he leaves the reader to conclude that governmental actions that do not violate constitutional principles are, in fact, for the public good. Even in the world of highway and bridge construction

it can not be said that every road and bridge, though they be dedicated to public use, are necessarily for the greater good of the public. There can be hundreds (if not thousands) of people affected, many adversely, by forced moves or diminution of value to properties. Please remember that only those real property owners who have suffered a taking receive compensation. The rest of a neighborhood or city, homeowners and businesses alike, have to live with the consequences of public officials' and employees' actions and decisions, good and bad.

Court is usually the place citizens go to seek relief from legislative and administrative governmental actions that they believe abridge their constitutional rights. In most areas, even some not enumerated in the first ten amendments, courts require a higher standard of proof before enforcing laws, regulations and administrative actions that deprive individuals of life, liberty or property.

One of the central issues that Connecticut's Supreme Court discussed in the Kelo case was who is responsible for proving that the municipal development plan is for public use. The majority held that private property owners, even owners of non-blighted properties, would have to prove by a very high level of proof that the approved plan was not for public use and their properties were not needed. The court refused to grant private property owners the same recognition they have granted many individuals and groups under Connecticut's Declaration of Rights or under the U.S. Constitution.

**“...private property rights were not given the same protection by the courts as they give to other rights under the Fifth Amendment ...”**

The heavy burden of proof required made it extremely difficult for the owners to overcome the city's presentation of its evidence. Even so, the trial judge granted permanent injunctive relief and dismissed the city's eminent domain actions against four residential properties. On appeal to Connecticut's Supreme Court, the Court reaffirmed its own prior rulings which are consistent with minimum federal standards of protection of rights of private property owners and determined that, if the use could be considered public, then how the city went about carrying out its plan, including which properties would be taken by eminent domain, was not for a trial judge to decide. It is this interpretation of Connecticut law, one of almost complete deference to the legislature and municipal officials and administrators, which the U.S. Supreme Court upheld in its very controversial 5-4 decision.

What's wrong with both decisions and the premise of the article is that private property rights were not given the same protection by the courts as they give to other rights under the Fifth Amendment and other amendments of the U.S. and Connecticut Constitutions. The courts did not grant to the owners a status that would allow for what is called heightened or strict scrutiny or place on government, and not the owners, the burden of proving that the approved plan was for public use and the takings of homes and business properties were necessary to carry out the plan.

One of the three dissenting Connecticut justices wrote, "Judicial deference to legislative declarations of public use does not require complete abdication of judicial responsibility." He added, "I therefore submit that, just as the taking of non-blighted property in a blighted area is subject to additional scrutiny to determine whether the taking is 'essential' to the redevelopment plan; so too should a heightened standard of judicial review be required to ensure that the constitutional rights of private property owners are protected adequately when property is taken for economic development. Justice demands no less."

One would hope that public officials and employees make all of their decisions for the best interests of the people and that all of their actions meet constitutional requirements. But as we have seen, even when these two preconditions are met, there is still great controversy as to what constitutes "the greater public good."

What Kelo reminds us is that our government was created on the principle that those who govern and administer the laws must have the consent and the trust of the governed. The actions of the city and the decisions of the highest courts violated the public's sense of what is right and fair, and therefore, was not considered "for the greater public good" by a large majority of the citizenry. In an attempt to rectify the situation and restore a small measure of trust in governmental authority, the State of Connecticut paid considerably greater compensation than what had been offered originally to Susette Kelo and the other plaintiff property owners.

Since 2005, more than forty states have altered their laws and some their constitutions to strengthen the rights of property owners and restrict the use of eminent domain, particularly in the area of economic development. The creation of the office I hold as the State of Connecticut's Ombudsman for Property Rights is a direct result of the Kelo decision as are many significant changes to Connecticut's eminent domain statutes involving municipal development, all providing greater due process rights and just compensation. I hope the era of judging the constitutionality of takings by minimum standards in Connecticut and elsewhere is over and the lessons of Kelo have been learned by all. ✪