

A quarterly publication of Wiles, Boyle, Burkholder & Bringardner, Attorneys at Law.



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relationship.



## Eminent Domain – Taking Your Property For Private Development

### Analyzing the United States Supreme Court Decision of *Kelo v. City of New London*

As most of you are aware, on June 23, 2005, the United States Supreme Court issued a decision in *Kelo, et al. v. City of New London, et al.*, holding that the City of New London's proposed disposition of the various owners' property qualified as "public use" within the meaning of the Takings Clause (Fifth Amendment). This decision gained major headlines and left communities and property owners fearing that a municipality could simply "take" an owner's property for private development.

To give you a complete understanding of *Kelo*, it is necessary that you know some of the basic facts. According to Justice Steven's majority opinion, the City of New London was in economic decline for a decade. In 1998, New London's unemployment rate was double that of Connecticut. Additionally, its population was just 24,000, the lowest since 1920. In an effort to combat this depression, New London targeted an area for redevelopment, including commercial office, retail and residential uses.

In order to accomplish this redevelopment, most of the property was purchased. However, the parties in the *Kelo* case could not reach an agreement. In January of 2000, New London authorized the acquisition of the remaining property by eminent domain, which was specifically authorized by Connecticut statute. It should be noted that the owners' property was not determined to be "blighted" or in "poor condition". In fact, their property was "condemned" only because it happened to be located within the development area.

In December of 2000 the property owners sued New London arguing that the taking of their property violated the Fifth Amendment.

Ultimately, the case was appealed to the Connecticut Supreme Court, which held that all of the takings were authorized by Connecticut statute and were valid. The Connecticut Supreme Court ruled, "the statute expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is "public use" and in the "public interest." The property owners appealed to the United States Supreme Court.

Justice Steven's majority opinion essentially upholds the takings as valid by deferring to New London's "carefully considered development plan". The Court noted that New London had carefully formulated an economic development plan that it believes will provide appreciable benefits to the community (i.e. taxes and jobs). The Court ruled that in order to effectuate this plan, the City of New London invoked a Connecticut statute that authorized the use of eminent domain to promote this economic development. Ultimately the Court held, "Because the plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment."

Putting political opinions aside, the *Kelo* case is noteworthy because it gives governmental entities the ability (after "carefully considering a development plan") to take property, that is not blighted or in poor condition, for the purpose of turning a development into tax revenue and jobs.

If you would like further information on eminent domain or the *Kelo* case, please contact Mike Close or Kerry Boyle.

By Mike Close and Kerry Boyle

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## Featured WBBS Attorneys



Thomas E. Boyle

Tom has 33 years experience as a top-notch litigator. His specialties include personal injury and wrongful death, trucking and transportation law, professional and product liability law, and commercial litigation.

Tom earned his undergrad and law degrees from The Ohio State University, graduating cum laude in 1972. He is a member of the American, Ohio State and Columbus Bar Associations and has served on numerous committees at the local and national level.

He served as athletic director at St. Andrew Parish in Upper Arlington for several years and is past president of the Bishop Watterson High School Board. He and his wife, Susie, have four sons, including Kerry, who is also an attorney with the firm.



Mark C. Melko

Mark practices civil litigation with an emphasis on insurance defense and commercial law. His experience in matters involving personal injury, construction, employment and administrative law has earned him Ohio Super Lawyers "Rising Star" award for 2005.

Mark is a member of the American, Ohio State and Columbus Bar Associations. He earned his undergraduate degree from Miami University and graduated magna cum laude in 1998 from Capital University Law School where he was a Law Review member.

Mark and his wife, Tracy, will celebrate their first wedding anniversary on New Year's Eve.

## Giving Voters Choices

This November, Ohio voters will be asked to consider and decide the outcome of five issues on the statewide ballot. Issue 1 has been placed on the ballot by the Ohio House of Representatives while state issues 2, 3, 4 and 5 were petitioned onto the ballot by a coalition of interested parties.

Issue 1 has been dubbed the "Jobs for Ohio" plan because of the impact it could have on Ohio's economy. The plan proposes to spend \$1.35 billion over the next 10 years on repairing and restoring roads, bridges and making other public infrastructure improvements needed at the local level. Maintaining and improving the state's public infrastructure is considered vital in order to retain and attract business opportunities in Ohio.

The Jobs for Ohio plan also proposes a \$500 million

investment in the Third Frontier program, over a seven-year-period. These investments will create advances in technology, new products, new services and a litany of other job producers that will secure the path to economic vitality in Ohio. These advances will help other sectors of the economy, such as manufacturing and agriculture, to expand and grow.

The last part the plan calls for a \$150 million, seven-year investment in capital improvements to revamp existing manufacturing and industrial facilities and sites so that new and expanding businesses will keep their innovative and entrepreneurial ventures here in Ohio.

Issues 2 through 5 are proposed amendments to the Ohio Constitution and were initiated by a group

known as Reform Ohio Now (RON). Issue 2 would allow more voting before Election Day. Issue 3 deals with campaign finance contribution limits. Issue 4 proposes to remove elected officials from the Ohio Apportionment Board. The RON group claims this proposal would eliminate political gerrymandering. And Issue 5 would create a nine-member appointed State Board of Election Supervisors, taking much of the authority from Ohio's secretary of state. There was also talk of a ballot proposal that would restrict government spending to the rate of population growth and inflation. Known as the Tax Expenditure Limitation (TEL) proposal, the proponents have opted to put their issue on next year's ballot.

By Jim Hughes,  
Ohio State Representative

## Workers' Compensation Liens

On April 9, 2003, a new Workers' Compensation statute became effective that will have a profound impact on litigation involving claims arising after that date. Under the new statute, the Bureau's right of subrogation is automatic; i.e., the Bureau is not required to give any notice. Instead, the claimant has an affirmative duty to inform the Bureau (or the self-insured employer) of the third-party claim. Even more profound, the statute states that no settlement or judgment is final unless this notice is given. If no notice is given, the claimant and the third-party tortfeasor are jointly and severally liable to the Bureau for the amount of its lien. Claims will be more difficult to settle because the Bureau will receive the first dollars off the top of any settlement.

From a historical standpoint, in *Holeton v. Crouse Cartage*

*Co.* (2001), 92 Ohio St.3d 115, the Ohio Supreme Court held that Ohio's workers' compensation subrogation statute, R.C. §4123.931, was unconstitutional because it gave a statutory subrogee a right of subrogation with respect to "estimated future values of compensation and medical benefits" could, in the Court's view, result in an unconstitutional taking where "the amount of reimbursement for 'estimated future values of compensation and medical benefits' proves to be substantially greater than the subrogee's eventual compensation outlay." *Id.* at 125. The Court also concluded that R.C. §4123.931(D) violated the Equal Protection, Due Process, and Takings Clauses of the state constitution because, while it provided that a claimant who was successful in a jury trial

could request interrogatories to quantify which part of the jury award was attributable to compensation and medical benefits, a claimant who settled was not afforded the same opportunity. *Id.* at 126.

When R.C. §4123.931 was ruled unconstitutional, the predecessor statute, R.C. §4123.93, became effective again. In *Modzelewski v. Yellow Freight Systems, Inc.* (2004), 102 Ohio St.3d 192, the Ohio Supreme Court found the statute unconstitutional again because it made a distinction between claimants and because it precluded claimants who are parties to actions against third-party tortfeasors from showing that their tort recovery or portions thereof do not duplicate their workers' compensation recovery and, therefore, do not represent a double recovery.

By Bill Benson

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