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Public Uses and Non-Uses: Sinister Schemes, Improper Motives, and Bad Faith in Eminent Domain Law

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Abstract

In this manuscript, I address the largely unexplored issue of whether a sovereign may use its power of eminent domain not to pursue an affirmative public use, but rather to prevent an undesired private use (such as a landfill, rehabilitation facility, or other NIMBY-triggering use) from going forward. I argue that although sovereigns tend to dissemble in these “non-use” cases based upon an underlying assumption by condemnors and courts alike that non-use takings are not constitutionally permitted, their analysis is in fact, incorrect. It is not the non-use condemnations themselves that are problematic, but the subterfuge that condemnors typically use in pursuing such takings. The resulting lack of transparency in governmental action subverts the political process and weakens private property rights protection.

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Imagine that you are a retired farmer, with several hundred acres of agricultural land, and that neither you nor your family has any continued interest in farming it. You have been approached by a national real estate development firm that wishes to build a large “New Urbanism” mixed-use community on your property, consisting of thousands of homes intermixed with retail and office uses. Although the project would require a rezoning, the proposed uses are not inconsistent with your municipality’s master plan and the development firm anticipates that the project would be approved by the local planning commission, subject only to typical land use controls.

Your neighbors are horrified at the proposal and quickly organize to oppose the project. Soon thereafter, your municipal government announces that it intends to condemn your property for use in part as a public park, but primarily for an open space/wildlife preserve. The municipal officials propose a special tax to pay for the condemnation, which the residents approve in a special election.

You find the condemnation highly suspect, as the municipality has never before expressed a desire or need for a public park or open space in this location or of this size. Although the municipality has offered you “just compensation” for your property, you and the development firm you were negotiating with wish to challenge the condemnation of the property in court as not meeting the “public use” requirement of the state and federal constitutions. Your argument is that the municipality is not really pursuing a public use—a park and provision of open space—through condemnation of your property, but rather is condemning to prevent a private, lawful use that it opposes from going forward. Will your legal challenge succeed?

Various permutations of this scenario have played out in recent years in published court cases. We can only speculate as to how often the situation has occurred but has not resulted in a court challenge and subsequent published opinion. Moreover, the number of times that this condemnation strategy has been proposed and seriously considered but not pursued because of budgetary or other concerns is undoubtedly much higher still.¹ The scenario raises a fascinating, though largely unexplored, question regarding the scope of the public use requirement of the Takings Clause: may a sovereign use its power of eminent domain not to pursue an affirmative

¹ Anecdotal evidence derived from my own experience of serving on a local planning commission for fifteen years suggests that it is a strategy often urged by disaffected neighbors, who may well not comprehend either the fiscal or legal issues posed by such a tactic, but who view it as an efficient and quick solution to often hostile and emotion-laden conflicts between neighboring land uses.

public use, but rather to prevent an undesired private use from going forward? In short, may a sovereign exercise its eminent domain power to pursue a “non-use”?

The Fifth Amendment to the United States constitution provides that “[n]or shall private property be taken for public use, without just compensation.”² Most recent legal scholarship on the scope of the public use requirement has tended to focus on the thorny question of whether the sovereign can condemn private property for redevelopment by another private party³—a question that the U.S. Supreme Court addressed recently in *Kelo v. City of New London*.⁴

I address the flip side of the eminent domain coin. In the “non-use” context, the condemning authority condemns to prevent an undesirable use (or, at least, one undesired by the condemnor or its most-vocal constituents), be it a landfill,⁵ low-income housing,⁶ a rehabilitation facility,⁷ or any other NIMBY-triggering use.⁸ Rather than attempting to prevent the undesired use through a non-compensable exercise of its police power (an attempt which

² U.S. Const. amend. V. The United States Supreme Court extended this amendment to the states under the due process clause of the fourteenth amendment in 1896. *See Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897). In addition, the state constitutions of virtually every state contain similar clauses. *See* 2A JULIUS A. SACKMAN, NICHOLS ON EMINENT DOMAIN § 7.01[2] & n.10 (3d ed. 2005) (listing state statutory and constitutional provisions) [hereinafter NICHOLS].

As noted by the U.S. Supreme Court in *Kelo v. City of New London*, 545 U.S. 469 (2005), state takings clauses may be significantly more restrictive than the federal clause: “[M]any [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.” *Id.* at 489 (footnotes omitted).

³ *See, e.g.*, Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J. L. & PUB. POL’Y 491 (2006); Ashley J. Fuhrmeister, *In the Name of Economic Development: Revising “Public Use” as a Limitation on the Eminent Domain Power in the Wake of Kelo v. City of New London*, 54 DRAKE L. REV. 171 (2005); Brent Nicholson & Sue Ann Mota, *From Public Use to Public Purpose: The Supreme Court Stretches the Takings Clause in Kelo v. City of New London*, 41 GONZ. L. REV. 81 (2005/06); *Symposium: The Death of Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock*, 2004 MICH. ST. L. REV. 859.

⁴ 545 U.S. 469 (2005) (discussed *infra* notes 30-35 and accompanying text).

⁵ *See Earth Mgt., Inc. v. Heard County*, 283 S.E.2d 455 (Ga. 1981) (discussed *infra* notes 74-81 and accompanying text).

⁶ *See Pheasant Ridge Assoc. v. Town of Burlington*, 506 N.E.2d 1152 (Mass. 1987) (discussed *infra* notes 64-71 and accompanying text); *Town of Chelmsford v. DiBiase*, 345 N.E.2d 373 (Mass. 1976) (discussed *infra* note 70).

⁷ *See Borough of Essex Fells v. Kessler Institute for Rehabilitation*, 673 A.2d 856 (N.J. 1995) (discussed *supra* notes 89-97 and accompanying text).

⁸ “NIMBY,” of course, is the acronym for “not in my backyard,” signaling the propensity of landowners to resist having uses they perceive as noxious or intrusive located near their property.

might prove illegal, resulting in a regulatory taking),⁹ the sovereign elects instead to condemn the property and pay the constitutionally-mandated “just compensation” for the property taken.¹⁰ But is such an action constitutional? Does it satisfy the public use requirement of the Fifth Amendment?

Although “public use” itself is a difficult concept for courts to wrest with, the “non-use” cases seem to pose even tougher analytical hurdles for the courts. As a result, the line of published cases on this topic are either limited in their analysis, or simply wrongly decided.

I believe that the major cause of the analytical muddle surrounding this area is the fact that condemnors and courts alike misunderstand the scope and extent of the condemnors’ power to condemn. Both condemnors and courts seem to assume that condemnations for non-uses are not constitutionally permitted, so the condemnors attempt to conceal their motivations in order to proceed with the condemnation they desire. Instead of forthrightly declaring their intentions—“we don’t want a large-scale mixed-use development at this location in our community, so we are condemning the property to prevent the use”—they make a flimsy excuse for their actions—“we have always needed a park and open space, right here where this development is proposed, we just hadn’t realized it until now.” Their dissembling is often obvious to property owners, citizens, and the courts alike, and leads to suspicion that something not only dishonest, but quite likely illegal, is really going on.

Sometimes, of course, the municipality is right in thinking that the condemnation it desires is illegal. The municipality may, for example, lack statutory authority to condemn for other than very specific purposes,¹¹ or its actions may be unconstitutional, *e.g.*, as a violation of

⁹ See *infra* notes 13-16 and accompanying text (discussing the police power).

¹⁰ See Part I *infra* (discussing the eminent domain power).

¹¹ If the purpose of the taking is outside the constraints of the enabling legislation authorizing the exercise of the eminent domain power by the municipality, the condemnation is *ultra vires* and will be struck down. In *Wilmington Parking Auth. v. Land with Improvements*, 521 A.2d 227 (Del. 1987), for example, the Delaware

equal protection. In such an instance, the municipality does indeed lack the power to do directly what it is indirectly attempting through its eminent domain power, and the courts are correct to call the municipality on its illegitimate action.

However, in many instances, the municipality's authority is not constrained in this manner. It is those instances that interest me here. We need to step back and ask why do municipalities feel a need to dissemble in these non-use cases, rather than being forthright about their intentions and motivations? Why do they think that condemning for non-uses is not permitted, and are they correct in their belief?

I argue that, particularly in light of the recent decision in *Kelo* in which the Supreme Court essentially stated that public uses equal public purposes, which equal practically anything the legislature defines as such,¹² municipalities actually do have the constitutional power to engage in condemnations for non-uses. Prevention of an undesired use is, in effect, a form of public use, and the sovereign should be able to use eminent domain as yet one more tool in its regulatory toolbox, provided that: (1) it is willing to pay the just compensation price-tag; and (2) it is prepared to show that the condemnation is motivated by an actual public use (which would include prevention of a private use deemed detrimental to the public as a whole), as opposed to an intent to benefit private parties (such as protection of one or a few vocal neighbors).

The real problem is not that municipalities engage in condemnations for non-uses, but that they employ subterfuge to do so. It is the lack of transparency in governmental action, not the action itself, that renders the taking suspect and perhaps even void. If a municipality were

Supreme Court found that a parking authority lacked the power to condemn certain land pursuant to its statutory authority to exercise eminent domain because the primary purpose of the condemnation was to retain a business within the city limits, not to provide public parking, and such a purpose was outside the parking authority's delegated powers. *See also infra* note 18 (discussing *City of Tempe v. Fleming*, 815 P.2d 1 (Ariz. App. 1991)).

¹² *See infra* note 35 and accompanying text.

simply honest about what it was doing—“we are condemning to prevent this large development from being built”—the rights of all concerned would be better protected. The property owner would obtain just compensation for its property. (It may still resent the condemnation and prefer the ownership of the land to the monetary compensation, but that can be true of any condemnation, not just those involving non-uses.) More importantly, the public would be fully informed as to the nature of the municipality’s action and, to the extent that the public opposed the municipality’s condemnation, the political process could address those decisions contrary to public will through referenda, recalls, or other ballot-box measures. The Constitution is not the only protector of private property rights. The political process also has a critical role to play; unfortunately, the current jurisprudence on non-use takings encourages a subversion of that process.

I. DISTINGUISHING THE EMINENT DOMAIN POWER FROM THE POLICE POWER

The answer to whether a “non-use” can be a “public use” for purposes of the Takings Clause turns in part upon the potent distinction between the eminent domain power and the police power. The former permits the taking of private property for public use upon payment of just compensation; the latter permits the regulation, even value-impairing regulation, of private property without the payment of such compensation.

Professor Freund provided the classic definition of the distinction between these two sovereign powers over a century ago:

Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be

detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful¹³

Thus, a sovereign's police power enables it to enact regulations to promote the public health, safety, and welfare, or to prevent a public harm.¹⁴ Legitimate uses of the police power require no payment of compensation by the condemning authority; it is only when the exercise of the police power goes "too far," resulting in a regulatory taking, that compensation is required.¹⁵

One might think that an exercise of the eminent domain power is, at least in some ways, less burdensome and costly to the affected landowner than the exercise of the police power—after all, with the former the property owner receives monetary compensation equivalent to the property value it has lost, but with the latter it does not. That would suggest then that a municipality should always be able to choose to exercise the eminent domain power instead of the police power.

The property owner may well disagree with this trade-off, however. First, the exercises of the two powers have very different effects. An eminent domain action strips the property owner of its ownership interests, while a police power action merely constrains the property owner's ability to use the property for certain purposes or in certain manners; the underlying property interest, and all of the rights attendant upon that property ownership, are left with the property owner.

¹³ ERNST FREUND, *THE POLICE POWER AND CONSTITUTIONAL RIGHTS* § 511, at 546-47 (1904).

¹⁴ See *Bacon v. Walker*, 204 U.S. 311, 318 (1907) (The police power "is not confined . . . to the suppression of what is offensive, disorderly, or unsanitary. It extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people.").

¹⁵ The Supreme Court held in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) that "[t]he general rule at least is, that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking." Since then, of course, the courts have struggled to decide how far is "too far." See generally Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91 (1995) (discussing the Court's tests for regulatory takings).

Second, and more important, the exercises of the two powers have very different predicates. An exercise of the police power must be justified either by reference to the harmful nature of the proposed use at issue or by the promotion of the public welfare to be achieved.¹⁶ The eminent domain power, on the other hand, must be supported by a public use (though just how real this constraint is under modern jurisprudence is a matter of some debate, as discussed in the next Section¹⁷). If the public use requirement of the eminent domain clause can be satisfied by the mere desire of the municipality to avoid a use that it does not desire but which is otherwise legitimate, then the property owner may correctly view his rights to be at greater risk. The police power requirement that the municipality justify its restrictions, define their extent, and otherwise leave the property owner in possession of, and free to use, his property may be preferable to the cold comfort of knowing that the owner will be fully compensated for the property he has lost under the eminent domain power.

If the mixed-use development proposed in the hypothetical above were to actually pose harm to the public, the municipality would not have to resort to eminent domain, and the concomitant requirement of just compensation, in order to regulate and prevent the harm—it could do so directly through its police power, and without payment of compensation, by passing land use regulations governing the use. The difficulty lies, of course, in characterizing a particular use as either a prevention of public harm or promotion of public welfare such that compensation is not required for the regulation. With regard to the hypothetical, for example, the municipality could clearly exercise its police power to regulate the location of the development and its infrastructure so as to prevent conflicts with neighboring uses or threats to resources such as public water supplies or to regulate the placement of roads, type of signage

¹⁶ See generally Lynda J. Oswald, *The Role of the “Harm/Benefit” and “Average Reciprocity of Advantage” Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449, 1459-64 (1997) (discussing bases for exercise of the police power).

¹⁷ See *infra* Part II.

and lighting, and other aspects of the development that might create a public or private nuisance. It is conceivable that the municipality could even ban the land use altogether (if, for example, the public need for these uses was already being met in nearby communities or if the municipality lacked adequate water or sewer infrastructure to support such an activity). Outright bans on such uses are likely to be viewed with a close and skeptical judicial eye, however, and such exercises of the police power may not survive a legal challenge. The police power therefore might well support the imposition of restrictions upon the proposed use but perhaps not its ban altogether.

It is in this context that the question posed by the “non-use” cases arises—when the use proposed by the property owner is perfectly legal and is likely insulated from police power regulation banning such use, can a municipality turn to eminent domain as an alternative? Is the payment of just compensation the only key needed to open the eminent domain door? Or does the public use requirement impose real constraints on the use of eminent domain as a regulatory tool to prevent non-desired uses?¹⁸ In short, can a “non-use” be a “public use”?

¹⁸ Although the public use requirement focuses on constitutional bars to exercise of the eminent domain power, statutory bars may exist as well. The municipality may lack authority to condemn, depending upon the underlying enabling legislation. In such an instance, the municipality’s only option is to exercise its police power (assuming of course that the situation lends itself to a legitimate exercise of the police power). In *City of Tempe v. Fleming*, 815 P.2d 1 (Ariz. App. 1991), for example, the city convicted a property owner of maintaining a public nuisance because his property contained extensive trash. The city then sought to obtain title to the property through eminent domain so that it could abate the nuisance. The court noted that the state statute authorized a municipality to exercise the eminent domain power for only limited purposes, and that none of these purposes included abatement of a nuisance, but that the state did allow the city to abate a nuisance by use of its police power. The city had argued that it should be able to avoid the “harsh result” of using its police power to abate the nuisance by taking the property through eminent domain and offering just compensation. The court rejected the argument, stating that “[t]he regulation and abatement of a nuisance is one of the ordinary functions of the police power,” *id.* at 5, but that the exercise of the police power did not include the eminent domain power. Moreover, “[e]minent domain proceedings are not a substitute for judicial foreclosure of a lien created pursuant to” state statute. *Id.* See also *supra* note 10 (discussing *Wilmington Parking Auth. v. Land with Improvements*, 521 A.2d 227 (Del. 1987)).

II. THE “PUBLIC USE” REQUIREMENT OF THE TAKINGS CLAUSE

The power of eminent domain is considered to be an inherent and essential attribute of sovereignty. In the words of the Supreme Court, “[t]he taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the state.”¹⁹ Thus, the Court has noted, the Takings Clause “is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.”²⁰ The “otherwise proper interference” language is critical here. The eminent domain power is not without limits. If the government action fails to satisfy the “public use” requirement, or is so arbitrary as to be a violation of due process, the taking is invalid and “[n]o amount of compensation can authorize such action.”²¹

Historically, “public use” has been an amorphous concept, resistant to precise definition.²² The state courts, in particular, have diverged on how they treat the term. In the narrow (and more literal) view of the concept, “public use” is considered to be synonymous with “employment,” meaning that the condemned property must be employed only for projects where the public can use the property acquired—a definition that constrains the state’s exercise of the condemnation power.²³

In the broader view, “public use” is treated as coterminous with “public advantage” or “public purpose,” which allows the acquisition of private property to further the public good or general welfare, or to secure a public benefit.²⁴ Under this view, “public use” is broadly defined

¹⁹ *State of Georgia v. City of Chattahoochee*, 264 U.S. 472, 480 (1924).

²⁰ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987).

²¹ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005).

²² See Joseph J. Lazzarotti, *Public Use or Public Abuse?*, 68 *UMKC L. REV.* 49, 59-61 (1999) (discussing the various interpretations and applications of the public use standard).

²³ See NICHOLS, *supra* note 2, § 7.02[2] (discussing the narrow view of public use).

²⁴ See *id.*, § 7.01[2].

as “conducive to community prosperity,”²⁵ which would include “[a]ny eminent domain action which tends to enlarge resources, increase industrial energies, or promote the productive power of any considerable number of inhabitants of a state or community”²⁶

At the same time, the public use to which the private property taken is put need not be “active”; rather, “negative” uses are permitted in the sense that “the prevention of an evil may constitute a public use.”²⁷ Normally, the courts discuss the “negative” public uses that prevent evil as being those combating slum, blight, or economic loss;²⁸ I could find no reported case characterizing prevention of a legal but undesired land use as a “negative” public use that combats evil.

The U.S. Supreme Court historically has adopted the broad view of the public use power.²⁹ Its recent decision in *Kelo v. City of New London*³⁰ reaffirmed this stance, although hardly unreservedly, as it was a divisive 5-4 decision. The majority, in an opinion authored by Justice Stevens, stated that “this ‘Court long ago rejected any literal requirement that condemned property be put into use for the general public.’”³¹ Instead, the *Kelo* majority turned to what it deemed the “broader and more natural interpretation of public use as ‘public purpose.’”³² The Court also emphasized the “‘great respect’” that the federal courts should pay

²⁵ *Id.*, § 7.02[4] (citations omitted).

²⁶ *Id.*, § 7.02[3].

²⁷ *Id.* (citations omitted). *See also* 26 Am. Jur. 2d *Eminent Domain* § 50 (“the prevention of evil or incompatible uses may constitute a public use”); *Crommet v. City of Portland*, 107 A.2d 841, 850 (Me. 1954) (noting that “[t]he prevention of evil may constitute a [public] use”).

²⁸ NICHOLS, *supra* note 2, § 7.02[3] (citations omitted).

²⁹ *See Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906) (pointing out the “inadequacy of use by the general public as a universal test” for public use); *Fallbrook Irrigation Distr. v. Bradley*, 164 U.S. 112, 161-62 (1896) (finding that “public use” means furthering a “public interest”).

³⁰ 545 U.S. 469 (2005).

³¹ *Id.* at 479 (citing *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 244 (1984)).

³² *Id.*

The *Kelo* majority had a long line of precedent to look to, in which the Court had repeatedly held that the judicial role in the public use inquiry was extremely limited. *See, e.g.*, *Berman v. Parker*, 348 U.S. 26, 32 (1954) (“The role of the judiciary in determining whether the [eminent domain] power is being exercised for a public purpose is an extremely narrow one.”). The *Kelo* Court in particular turned to *Berman*, where it had found that “[t]he concept of the public welfare is broad and inclusive” enough to allow the use of eminent domain to achieve

the state courts and legislatures in identifying local public needs,³³ stating that: ““When the legislature’s purpose is legitimate and its means are not irrational, our cases make it clear that empirical debates over the wisdom of takings—no less than the debates over the wisdom of other kinds of socioeconomic legislation--are not to be carried out in the federal courts.””³⁴

In the end, *Kelo* provides little direct guidance for the resolution of the “non-use” situation. At issue in *Kelo* was whether the condemnation of non-blighted private property to foster economic redevelopment was a public use. The debate amongst the Justices was the extent to which the direct benefit derived from such a taking must flow through to the public as opposed to private interests.³⁵

However, the Court’s reaffirmation of its earlier adoptions of the broad view of public use is illuminating, even if it does not completely resolve the issue of takings for non-use. Of

any legislatively permissible end, *id.* at 33 (quoted in *Kelo*, 545 U.S. at 482) and its 1984 decision in *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984), where the Court stated that the eminent domain power is “coterminous with the scope of a sovereign’s police powers,” 467 U.S. at 232-33, and that a taking must be upheld if it is “rationally related to a conceivable public purpose.” *Id.* at 241.

³³ 545 U.S. at 486 (citing *Hairston v. Danville & Western R. Co.*, 208 U.S. 598, 606-07 (1908)).

³⁴ *Id.* at 488 (quoting *Midkiff*, 467 U.S. at 242).

As explained in *Nichols on Eminent Domain*, the leading treatise in the eminent domain law area:

When the legislature has authorized the exercise of eminent domain in a particular case, it has necessarily adjudicated that the land to be taken is needed for the public use, and no other or further adjudication is necessary. When the legislature has made its decision and has authorized the taking of land by eminent domain, the owner has no constitutional right to have this decision reviewed in judicial proceedings or to be heard by a court on the question whether the public improvement for which it is taken is required by public necessity and convenience, or whether it is necessary or expedient that his land be taken for such improvement, unless the public use alleged for the taking is a mere pretense.

1A-4 NICHOLS, *supra* note 2, §4.11.

³⁵ While Justice Stevens, writing for the majority, found that any public purpose espoused by the legislature was a sufficient public use, 545 U.S. at 483 (stating that for over a century, the Court’s “public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power”), Justice Thomas, in his dissent, argued that a public use existed only when the public had the legal right to use the property after the taking—in effect, adopting the narrow definition of “public use.” *See id.* at 521 (“[T]he government may take property only if it actually uses or gives the public a legal right to use the property.”). In her concurrence, Justice O’Connor took a middle ground, arguing for a rule that that would permit a taking of property for the benefit of a private party only when the taking would “directly achieve[] a public benefit.” *Id.* at 500. Justice O’Connor was joined by Chief Justice Rehnquist, and Justices Scalia and Thomas.

particular relevance is the syllogism that the *Kelo* Court invoked. In effect, the *Kelo* majority stated:

$$\begin{array}{c} \text{Public Use} \\ = \\ \text{Public Purpose} \\ = \\ \text{Pretty Much Anything the Legislature Rationally Defines as Such} \end{array}$$

The interesting and critical debate over whether the Court is correct in the deferential stance that it has taken to local legislative determinations of public use, particularly in the context of economic redevelopment projects, is left to another day and another forum. Rather, taking *Kelo* at face value—as the Supreme Court’s most current word on the extent of judicial deference to legislative determinations of takings and as binding law on the scope of constitutional limitations on the eminent domain power—it becomes clear non-use takings are not constitutionally prohibited on their face. *Kelo*’s hands-off approach to public use leaves the door clearly open for takings to prevent undesired uses, as well as takings to achieve affirmative goals, provided that the legislature in good faith determines that preventing an undesired use would serve the public purpose and provide a public use.

That is not to say, however that the legislature has a blank check with respect to takings, including non-use takings. One important lesson of *Kelo* and the firestorm of public outrage

that it sparked³⁶ is that constitutional protection is by no means the *only* protection that private property owners have against unbridled and or overreaching legislative takings. The political process has a large and important role to play in determining whether takings go forward. We see that in the aftermath of *Kelo* as well, where the public outcry was immediate and vocal, and the response of the state legislatures in introducing (and even enacting) legislation that would limit the impact of *Kelo* in state condemnation actions was swift and severe.³⁷

The significance of *Kelo* for non-use takings lies in its two-fold message that: (1) legislative determinations of public use and need are entitled to substantial judicial deference; and (2) the political process, as well as the judiciary and the Constitution, has an important role to play in reining in takings that are inappropriate or unwarranted. However, for the proper balance of power between the judiciary and the political process to emerge in the takings arena, the takings process itself must be open and transparent—and it is here that the non-use takings cases fall short.

The current jurisprudence on non-use takings discourages candid discussions of motivations and purposes by condemnors, and encourages instead evasive and disingenuous actions that, even if they do not run afoul of constitutional limitations as set forth by *Kelo*, clearly subvert the political process and dilute the power of the public in setting condemnation policy. To a large extent, this problem has been generated by the complex, confusing, and often imprecise terms that courts use to evaluate condemnors' actions in takings cases. As discussed in the next Part, vague notions of motive, purpose, and bad faith have led condemnors to dissemble, rather than to be direct and honest about their actions.

³⁶ See Judy Coleman, *The Power of a Few, the Anger of the Many*, WASH. POST, p. B02, (Oct. 9, 2005), available online at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/07/AR2005100702335.html>

³⁷ Thirteen states have considered restrictive legislation in response to *Kelo*. Four states have enacted such legislation, and one state (Michigan) has passed a constitutional amendment on this issue. See <http://www.ncsl.org/programs/natres/post-keloleg.htm> (last visited Feb. 21, 2007).

III. “MOTIVE,” “PURPOSE,” AND THE ROLE OF “BAD FAITH” IN NON-USE CASES

It is difficult to characterize the public use limitations of eminent domain actions because the rules are packed with complex and often conflicting notions. Even prior to *Kelo*, substantial judicial deference to the sovereign was the norm in condemnation actions.³⁸ The courts historically have applied a presumption of legitimacy to legislative declarations of public use, which can only be overcome where, as one treatise summarized it, “the use is clearly, plainly, and manifestly of a private character, or the declaration by the legislature is manifestly arbitrary or unreasonable, involves an impossibility, or is palpably without reasonable foundation, or was induced by fraud, collusion, or bad faith.”³⁹ In short, “when the alleged purpose [is] a cloak to some sinister scheme,”⁴⁰ the courts can intervene to redress bad faith actions by the legislature.⁴¹ Short of these types of clearly untenable actions, however, it would appear that almost anything goes, in terms of legislative determinations of public uses. Moreover, while articulating these general prohibitions regarding legislative overreaching in the public use arena is relatively easy, applying them in specific cases is much more difficult.

In general, in evaluating the legitimacy of a condemnation action, the courts use a confusing, and often overlapping, array of terms. The courts talk of analyzing the condemnor’s actions in terms of “purpose” versus “motive” (the former being a legitimate focus of judicial inquiry, the latter not), in terms of “true” versus “stated” purpose, and in terms of “bad faith.” None of these terms is well-defined within the eminent domain field, however, and they are

³⁸ See, e.g., *Midkiff*, 467 U.S. at 244 (“legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power”).

³⁹ 29A C.J.S. Eminent Domain § 29.

⁴⁰ *Id.*

⁴¹ And yet, while the courts frequently aver their power to set aside eminent domain actions of the legislature grounded in bad faith, they have actually done so in only a few cases. *Id.* “Bad faith” is discussed further below. See *infra* Part III.B.

often used interchangeably. The net result is that it is difficult to ascertain the true rules that apply to judicial evaluations of legislative decisions to condemn property, particularly in the non-use context.

A. “Motive” versus “Purpose”

In defining the scope of appropriate judicial scrutiny of condemnation actions, the courts rely heavily on the hazy distinction between “motive” and “purpose”⁴²—while legislative *motives* are considered outside the realm of appropriate judicial inquiry, legislative *purpose* (which is viewed as a more concrete, verifiable concept) is considered fair game for judicial scrutiny.⁴³ Judicial reluctance to inquire into the motives underlying legislative actions (of any type, not just condemnations) is driven by the difficulty of assessing such motives. As the U.S. Supreme Court explained in an 1885 case involving allegations that San Francisco regulations controlling the operation of public laundries were improperly motivated by a discriminatory animus against Chinese persons:

⁴² The Missouri Supreme Court recently described the difference between motive and purpose as follows:
While purpose and motive are sometimes used synonymously, . . . they are distinguishable in that motive refers to “that which prompts the choice or moves the will thereby inciting or inducing action,” and purpose refers to “that which one sets before himself as the end, aim, effect, or result to be kept in view or object to be attained.” The purpose of a condemnation action is subject to judicial scrutiny because it is the basis on which the authority to condemn rests.

City of Wentzville v. Dodson, 133 S.W.3d 543, 548 (Mo. Ct. App. 2004) (citations omitted).

⁴³ See, e.g., *id.* (“Generally, however, the purpose of a condemnation action is open to judicial investigation, although we cannot question the motive of such an action.”); *In re Hewlett Bay Park*, 265 N.Y.S.2d 1006, *rev’d*, 276 N.Y.S.2d 312 (1966) (“when dealing with a legislative determination to condemn, it becomes especially important to scrutinize the purpose, for a proper purpose is the very essence of the right to condemn”).

The purpose/motive distinction is blurred by the tendency of at least some courts to analyze “purpose” in terms of motivation. See, e.g., *Wilmington Parking Auth. v. Ranken*, 105 A.2d 614, 626 (Del. Supr. Ct. 1954) (“the reviewing court must be satisfied that the underlying purpose—the motivating desire—of the public authority is the benefit to the general public”). According to the Delaware Supreme Court: “This test instructs the trier of fact to examine the motivations of the parking authority and the objective benefits that accrue to the general public versus private interests.” *Wilmington Parking Auth. v. Land with Improvements*, 521 A.2d 227, 235 (Del. 1987) (affirming trial court’s finding that the primary motivation behind the condemnation was to benefit the city by retaining a business, not to provide public parking, and that the proposed condemnation was therefore beyond the parking authority’s statutory condemnation power).

[T]he rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible [sic] from their operation, considered with reference to the condition [sic] of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.⁴⁴

Thus, courts generally view inquiries into the motives behind eminent domain actions as off-limits, absent “a clear abuse” of the taking power.⁴⁵ In *Deerfield Park Distr. v. Progress Dev. Corp.*,⁴⁶ for example, the property owner had argued that the Park District Board had condemned its property for use as a park to prevent it from building integrated housing on the site. The Illinois Supreme Court’s application of the motive/purpose distinction translated into a holding that while it was inappropriate for the court to inquire into the motives of the individual

⁴⁴ *Soon Hing v. Crowley*, 113 U.S. 703, 710-11 (1885).

⁴⁵ *City of Chicago v. R. Zwick Co.*, 188 N.E.2d 489, 491 (Ill. 1963) (“[T]he purpose for which the power of eminent domain is exercised may be questioned, but in the absence of a clear abuse of the power, the motives that prompt the taking are not the subject of judicial investigation.”).

See also Indianapolis Water Co. v. Lux, 64 N.E.2d 790, 791 (Ind. 1946) (trial court cannot consider the motive of the condemning authority in bringing the condemnation action); *In re Armory Site in Kansas City*, 282 S.W.2d 464, 468 (Mo. 1955) (“As a general rule the purpose of the condemnation, as distinguished from the motive, is a legitimate subject of judicial investigation.”); *In re Matter of City of New York (Ely Avenue)*, 111 N.E. 266, 271 (N.Y. 1916) (“This court has recently held that the courts will not impute to the legislature or the discretionary action of municipal bodies clothed with legislative powers other than public motives for their acts; that the presumption that legislative action has been devised and adopted on adequate information and under the influence of correct motives will be applied to the discretionary action of municipal bodies and will preclude all collateral attack and this rule has long been established by decisions of this court.”).

“Motive” is subject to judicial scrutiny, however, when it merges with “bad faith,” a topic taken up below. *See infra* Part III.B.

⁴⁶ 174 N.E.2d 850 (Ill. 1961).

Board members,⁴⁷ the property owner was entitled to show “that the land sought to be taken, is sought not for a necessary public purpose, but rather for the sole purpose of preventing [the property owner] from conducting a lawful business.”⁴⁸

In practice, however, the distinction between motive and purpose often blurs because of the difficulty of categorizing legislative actions. If the Park District Board in *Deerfield Park* actually constructs a park at the site, does that mean that the taking was legitimate, even if primarily (so long as not solely?) motivated by an impermissible goal of preventing integrated housing? At least one court would answer that question “yes.” In *State ex rel. City of Creve Coeur v. Weinstein*,⁴⁹ the African-American property owners alleged that the city had condemned their residential property for a public park and playground to prevent them from building a home on the property. The court refused to examine the motives behind the city’s actions, stating that if the land was used for the stated purpose, there was “no doubt” that the taking was for a public use. While the court did note that the property owners could show as a defense to the eminent domain action that the land would not be put to the stated use of a public park and playground, so long as the park was built the court was unwilling to consider whether the taker was animated by racially-discriminatory motives.⁵⁰

At bottom, the distinction between “motive” and “purpose” is an artificial one, and the courts’ response to this issue is a pragmatic one—if the condemnor puts the land to the

⁴⁷ *Id.* at 855 (the purpose for which the power of eminent domain is exercised is a legitimate subject of judicial inquiry, but “the motives that may have actuated those in authority are not the subject of judicial investigation”).

⁴⁸ *Id.*

⁴⁹ 329 S.W.2d 399 (Mo. App. 1959).

⁵⁰ *Id.* at 410. Although *Creve Coeur* is an older case, it apparently remains good law. See *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 835 (Mo. 1991) (citing *Creve Coeur* for the proposition that “[c]ourts absolutely may not look behind the legislature’s enactment of a statute to second guess the process by which the legislature arrived at its conclusion”).

See also *State of Washington v. Hutch*, 631 P.2d 1014, 1019 (Wash. App. 1981) (“Although motivated in part by improper considerations, if examination of the facts and circumstances of the proposed condemnation demonstrates a genuine need and if in fact the condemnor intends to use the property for its avowed purpose, the condemnor’s action cannot be arbitrary and capricious.”).

articulated public use, the judicial inquiry ceases. The practical effect of the courts' ineffectual response is to encourage strategic and deceitful behavior by the condemnor. If the only restriction is that the condemnor articulate a proper use for the taking (even if the use is a subterfuge), and then follow through on that articulated use, the judicial inquiry quickly devolves into a variant of Justice Scalia's "stupid staffer" argument in *Lucas v. South Carolina Coastal Commission*⁵¹—even a condemnor with clearly improper motives can, with a little effort and forethought, articulate a facially valid purpose for the taking and one which is relatively easy and relatively inexpensive to effectuate, such as construction of a park or provision of open space.

Some courts have recognized the inherent opportunity for legislative gaming here, and have tried to address the issue by examining whether the purpose articulated by the condemnor is a real one, or is just a sham. This leads the court into convoluted issues of "true" versus "stated" purpose and raises the ill-defined role of "bad faith" in takings analysis.

B. "Stated" versus "True" Purpose and the Role of Bad Faith

Courts sometimes will inquire, at least to a limited extent, into whether the *stated* purpose of the taking is the *true* purpose—an inquiry that often spills over into evaluations of "bad faith" on the part of the condemnor. And, in fact, issues of motive can also be introduced through the back-door of bad faith, further muddying already clouded waters. In Pennsylvania, for example, the courts have stated that "[b]ad faith is generally the opposite of good faith and . . . implies a tainted motive of interest,"⁵² and that "[b]ad faith becomes palpable when such

⁵¹ 505 U.S. 1003, 1025-26 n.12 (1992) ("In Justice Blackmun's view, even with respect to regulation that deprives an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff.").

⁵² *Redev. Auth. of City of Erie v. Owners*, 274 A.2d 244, 247 (Pa. Commonw. Ct. 1971).

motive is obvious or readily perceived.”⁵³ Thus, although the courts in theory eschew the notion that they can inquire into the motives underlying a taking, they in practice, by acknowledging a role for evaluating the condemnor’s actions for subterfuge or bad faith, open the door to at least limited inquiries about motive.⁵⁴

The real difficulty lies in defining legislative actions that constitute bad faith. Some cases are relatively easy—such as where the sovereign articulates a valid public purpose for the taking, but the real purpose is palpably and demonstrably otherwise.⁵⁵ In *City of Miami v. Wolfe*,⁵⁶ for example, the City of Miami sought to condemn the appellee’s property, allegedly for the purpose of extending an existing roadway. The property owner challenged the condemnation action on the grounds that the city’s true purpose was not to acquire the lands for a public street, but rather to acquire the title to contiguous bay bottom land. The bay bottom land in question was owned by the state in trust and, under state statute, could be sold only to the upland riparian owner. The court found that the record “conclusively indicate[d]” that the city had attempted to condemn the appellee’s land so as to acquire the riparian right to purchase contiguous bay bottom land under the state statute, and not to construct a road extension.⁵⁷ The court thus concluded that the condemnation action “was brought in bad faith, amounted to a gross abuse of discretion, and should have been dismissed.”⁵⁸

⁵³ *Id.* Thus, where a Redevelopment Authority sought to condemn private property from one owner “for the sole purpose of obtaining the property in question for the benefit” of another private individual, palpable bad faith was present. *Id.* at 250. See also *City of Atlanta v. First Nat’l Bank of Atlanta*, 271 S.E.2d 821, 822 (Ga. 1980) (“[B]ad faith has been more sharply defined as conscious wrongdoing, motivated by improper intent, ill will, or dishonest intent.”).

⁵⁴ *City of Evansville v. Reising*, 547 N.E.2d 1106, 1111 (Ind. Ct. App. 1989) (“[A] trial court could properly decide whether a public body is using subterfuge and bad faith in seizing a citizen’s property, whether the public body has no real intention of applying the property to the public purpose and use alleged and to decide whether a public body is acting outside its power and scope of authority in an arbitrary and capricious manner.”).

⁵⁵ See *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 103 (N.J. Super. 1998) (“Where . . . a condemnation is commenced for an apparently valid public purpose, but the real purpose is otherwise, the condemnation may be set aside.”).

⁵⁶ 150 So.2d 489 (Fl. 1963).

⁵⁷ *Id.* at 490.

⁵⁸ *Id.* This case was not a non-use case.

Not all cases present such forthright facts, however, and many courts, even in the context of allegations of bad faith, will fall back on the rubric that so long as the articulated public purpose is pursued, the taking is valid. For example, in *In re Hewlett Bay Park*,⁵⁹ the city had proposed to condemn a parcel for construction of a city garage and storage facility after the property owner had repeatedly petitioned over a several-year period to have the parcel rezoned for construction of a parking lot (a use opposed by many neighboring property owners).⁶⁰ The trial court found that the facts surrounding the condemnation suggested that the stated purpose was suspect⁶¹ and concluded “that the real purpose of this condemnation proceeding in larger part is not to use this property for something affirmative, so much as it is to prevent its use for something else which the village authorities regard as undesirable. Such is a perversion of the condemnation process.”⁶² On appeal, however, the Appellate Division reversed, stating that because there was no proof that the city would *not* use the property for the stated public purpose, “there was no proof of ‘bad faith’ on the part of the condemnor, either as to whether the proposed use is a public one or as to whether there would be adherence to such use after the taking of the property.”⁶³

Part of the analytical difficulty in these cases lies in the fact that “bad faith” is a many-nuanced term in the context of eminent domain actions in general, and in non-use cases in

⁵⁹ 265 N.Y.S.2d 1006, *rev'd*, 276 N.Y.S.2d 312 (1966).

⁶⁰ The parcel was adjacent to the property owner’s shopping center. The property owner wanted the parcel rezoned from single-family residential to commercial uses, so that it could construct a parking lot. The need for the parking lot was occasioned by the county widening the road in front of the shopping center, causing a loss of parking.

⁶¹ *See id.* at 1010. The trial court stated: “The precipitate way in which the village moved to condemn this property, without any specific plan for its development, on the eve of the hearing of an application by the owner to use it for parking purposes, coupled with its size of more than four times the present site, would seem to belie the bona fides of the petitioner’s position.” Moreover, the court noted, it seemed “highly improbable” that the village residents, who were adamantly opposed to the use of the parcel for parking purposes, would really be content with its use as a “storage dump” if that were actually the use to which the village intended to put it.

⁶² *Id.*

⁶³ 276 N.Y.S.2d 312, 312 (1966).

particular. In defining the term in *Pheasant Ridge Assoc. LP v. Town of Burlington*,⁶⁴ for example, the Massachusetts Supreme Court noted that bad faith “includes the use of the power of eminent domain solely for a reason that is not proper, although the stated public purpose or purposes for the taking are plainly valid ones”⁶⁵—in short, the court drew a distinction between true public purpose and stated (sham) public purpose. Nonetheless, proving bad faith is difficult,⁶⁶ and the *Pheasant Ridge Assoc.* court stated it would not impute improper motives to municipal officers and voters if “valid reasons that would have supported the . . . action” were present.⁶⁷

However, the *Pheasant Ridge Assoc.* court explicitly rejected the notion that so long as the articulated public use was pursued, the taking was legitimate regardless of the underlying legislative motive. The property owner in *Pheasant Ridge Assoc.* had filed an application for a comprehensive permit to develop low- and moderate-income apartments. Acting pursuant to a unanimous vote of a town meeting, the town adopted an order to take the land for purposes of parks, recreation, and moderate-income housing.

The Massachusetts Supreme Court found that it would have been improper for the town to take the land solely to block the construction of low- or moderate-income housing.⁶⁸ The court concluded that the “only valid justification” for the taking would be that the town truly

⁶⁴ 506 N.E.2d 1152 (Mass. 1987).

⁶⁵ *Id.* at 1156. The South Dakota Supreme Court has taken a similar stance: “A municipality acts in bad faith when it condemns land for a private scheme or for an improper reason, though the superficially stated purpose purports to be valid.” *City of Freeman v. Salis*, 630 N.W.2d 699, 703 (S.D. 2001) (citing *Pheasant Ridge Assoc.*, 506 N.E.2d at 1156). *See also* *Denver West Metropolitan Distr. v. Geudner*, 786 P.2d 434, 436 (Colo. Ct. App. 1989) (“If the primary purpose underlying a condemnation decision is to advance private interests, the existence of an incidental public benefit does not prevent a court from finding “bad faith” and invalidating a condemning authority’s determination that a particular acquisition is necessary.”).

⁶⁶ 506 N.E.2d at 1156 (“It is not easy to prove that particular municipal action was taken in bad faith.”).

⁶⁷ *Id.*

⁶⁸ Nor could the town have taken the property in order to prevent the negative impact of the proposed development on water, sewer, or traffic, as the town was not barring other residential developments (presumably higher-income housing) on these grounds. 506 N.E.2d at 1156-57. While infrastructure impacts might have warranted denial of the comprehensive permit, it would not justify a taking, which the court deemed “an indirect and unfairly selective attack on the problem.” *Id.* at 1157.

intended the land be used for the purpose articulated as the basis for the taking.⁶⁹ Yet the record showed that in recent studies of the town's parks and recreation needs, the town had never identified this site or this general area for acquisition, nor had the town ever considered providing housing in this area prior to the property owner's proposal. In fact, the court found, the record as a whole made it clear that the town "was concerned only with blocking the [property owner's] development."⁷⁰ Because the attempted condemnation was intended to prevent an undesired use, not to pursue an affirmative public use, it "was unlawful because [it] was done in bad faith."⁷¹

The Georgia Supreme Court, which has probably confronted the non-use issue more directly than any other state court, has adopted a slightly different definition of bad faith. According to the Georgia Supreme Court, "bad faith is neither negligence nor poor judgment, but involves conscious wrongdoing and a dishonest intent"⁷²—*i.e.*, actions that are tantamount to "fraud."⁷³ The Court has also stated that: "This Court has found bad faith in the determination of public purpose only where the stated purpose was a subterfuge."⁷⁴ Yet, it is hard to

⁶⁹ *Id.*

⁷⁰ *Id.*

By contrast, in *Town of Chelmsford v. DiBiase*, 345 N.E.2d 373 (Mass. 1976), the Massachusetts Supreme Court found that no bad faith had occurred because the taking decision actually predated the unwanted proposed use by the private property owner. The town of Chelmsford had been considering the acquisition of a 48-acre parcel for more than 10 years; in part, their interest was generated by the fact that the parcel abutted 100 acres of town forest. Two town meetings were held to vote on taking the property for conservation purposes, but the first meeting was adjourned for want of a quorum, and the town counsel ruled that the vote taken at the second meeting was invalid. The property owner then submitted an application for a comprehensive permit to build low- and moderate-income housing; three weeks later, a town meeting was held at which the taking was approved. The judge ruled, in the absence of pleadings to the contrary, that the taking was in good faith and for a public benefit and the appellate court affirmed.

The bottom line is that these determinations are largely fact-specific, and timing of the taking greatly influences the outcome.

⁷¹ 506 N.E.2d at 1158.

⁷² *Earth Management v. Heard County*, 283 S.E.2d 455, 460 (Ga. 1981).

⁷³ *See City of Atlanta v. First Nat'l Bank of Atlanta*, 271 S.E.2d 821, 822 (Ga. 1980) ("The term 'bad faith' has been used side by side with the word 'fraud' in describing those exercises of official discretion to condemn lands with which the courts will interfere.").

⁷⁴ *City of Marietta v. Edwards*, 519 S.E.2d 217, 219 (Ga. 1999).

characterize the general rule regarding non-use cases in Georgia because of the specialized nature of the cases presented there.

The Georgia Supreme Court decided one of the earliest cases to take on directly the issue of whether a sovereign can take property for non-use purposes--*Earth Management, Inc. v. Heard County*.⁷⁵ The proposed private use at issue there was one that often raises the hackles of municipalities and neighboring property owners alike: a hazardous waste facility. Earth Management, Inc. had done studies and conducted investigations for several months with regard to the acquisition of necessary permits to locate a hazardous waste facility on a parcel of property on which it held an option. Before Earth Management exercised its option, the county instituted condemnation proceedings to take the property for use as a public park. Earth Management alleged at trial that the county had condemned the property in bad faith and for the “sole purpose” of preventing the construction of the hazardous waste facility.

As the Georgia Supreme Court put it, the case addressed “the point of impact between two vital competing public interests”⁷⁶--the right of a property owner to prevent the taking of its property except for a public purpose (and with the payment of just compensation), and the right of the state to appropriate private property for public purpose in the interest of its people. The court acknowledged that a public park was a public purpose and that the court was not in a position to second-guess the county as to the size and scope of a park needed for its people. The court found, however, that the inquiry did not end there: “The remaining question . . . is whether the action of the county commissioner in condemning this parcel of land was taken for the purpose of building a public park or whether this was a mere subterfuge utilized in order to veil the real purpose of preventing the construction of a hazardous waste disposal facility.”⁷⁷

⁷⁵ 283 S.E.2d 455 (Ga. 1981).

⁷⁶ *Id.* at 459.

⁷⁷ *Id.* at 459-60.

Here, while no evidence indicated that the condemned land would *not* be put to use as a public park, the evidence also indicated that the “real reason for its being taken was to thwart” the use of the property as a landfill⁷⁸—a result the court found untenable: “There is no law, statutory, constitutional or otherwise, which clothes a governing authority with the right to utilize the power of eminent domain in order to restrict a legitimate activity in which the state has an interest.”⁷⁹ Although a public park is a legitimate public use,⁸⁰ the court found that this land was condemned “for the obvious purpose” of preventing the location of the hazardous waste facility and “[s]uch action is beyond the power conferred upon the county by law and amounts to bad faith.”⁸¹

The court’s language is interesting in two respects. First, the court identified the landfill as a “legitimate activity *in which the state has an interest*”⁸²—suggesting, perhaps, that were the undesired use not serving a general public need, the outcome might have been different. Did the social necessity (and traditional public service overtones) of the landfill use somehow give this case greater urgency than if the undesired use had been a use more traditionally pursued by the private, rather than the public, sector (such as a rehabilitation facility)? Second, the court seemed concerned that the county was engaging in a subterfuge. Would the court have viewed the condemnation as more legitimate had the county been more direct about its legislative objectives?

⁷⁸ *Id.* at 460. The court noted that no other land was considered for a public park, no on-site surveying, planning, or inspection was conducted before the condemnation, and that neither the chair of the county recreation commission nor any member of the recreation commission other than proposing member had visited the site. The county commissioner and the county attorney had publicly stated that they would do anything within their power to block the proposed hazardous waste disposal facility, and the county commissioner had in fact previously passed three ordinances and a zoning referendum attempting to prohibit the facility. In addition, the county did not attempt to negotiate a purchase of the property prior to the condemnation.

⁷⁹ *Id.*

⁸⁰ *Id.* at 461.

⁸¹ *Id.*

⁸² *Id.* at 460 (emphasis added).

The non-use issue was presented to the Georgia Supreme Court again just five years later, in *Carroll County v. City of Bremen*,⁸³ and again the court described the dispute in terms of competing public interests. The City of Bremen had been negotiating with the property owner for “some time” to buy the land for a waste-water facility.⁸⁴ After a new county commissioner took office who opposed the location of the facility in Carroll County, the County filed a condemnation action to take the land for use as a training area for county police and fire employees.

The trial court found that the “true reason” for the condemnation was to prevent construction of the public-sewage treatment plant.⁸⁵ The Georgia Supreme Court agreed, finding that the county was acting in bad faith.⁸⁶ The court stated: “As in *Earth Management*, the use put forth by the county is a public purpose, but there is evidence to suggest that the actual purpose was to stop another use, also public, but one which the county officers oppose.”⁸⁷ Although the “general rule” is that “a court will not substitute its judgment for that of a condemning authority in determining the need for a taking or the type of interest to be taken,” and although the court acknowledged its “reluctance . . . to find bad faith in determining the public purpose and thereby overturn the condemnor’s authority to condemn,”⁸⁸ the supreme court found that it was “improper” for the county to use its eminent domain power to block the sewage plant when other, legitimate efforts to block the plant failed.⁸⁹

What is interesting—and perhaps unique—about *Earth Management* and *Carroll County* is that they both involved undesired uses with strong public services overtones. In *Carroll*

⁸³ 347 S.E.2d 598 (Ga. 1986).

⁸⁴ *Id.* at 599.

⁸⁵ *Id.*

⁸⁶ *Id.* (“This use of the condemnation process by a county is not within its power and amounts to acting in bad faith.”).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 600. The court stated: “The condemning authority of a court may not be used simply to block legitimate public activity.” *Id.* at 599.

County, the sewage treatment plant actually was to be constructed and run by the City of Bremen. While the hazardous waste facility in *Earth Management* was to be constructed and run by a private entity, the land use is of the type that is typically both heavily regulated and essential to modern society—not unlike a traditional sanitary landfill writ large. It may be that these cases can be explained more in terms of a paramount state public interest trumping a weaker local public interest, than in terms of outright judicial rejection of non-use takings.

We can only speculate on that point, however, because when we look at subsequent non-use cases where the public nature of the undesired use was weaker, we find the courts have not explicitly drawn such a distinction. In *Borough of Essex Fells v. Kessler Institute for Rehabilitation*,⁹⁰ for example, the Borough brought a condemnation action to acquire a 12.5 acre parcel, purportedly for public park purposes. The owner, the Kessler Institute for Rehabilitation, challenged the condemnation on the grounds that the Borough's stated public use was a mere pretext to exclude Kessler and its rehabilitation facility from the community.

The facts showed that, prior to Kessler's purchase of the parcel, the Borough had been actively soliciting residential developers to acquire the parcel for construction of single-family residences. After Kessler contracted to purchase the property, it applied for a conditional use permit for its rehabilitation facility. Once community resistance to the Kessler plan became clear, the Borough hired a planner and a land use attorney to evaluate the suitability of the site for the proposed use. Both concluded that the proposed use was consistent with the community's master plan and zoning ordinances. After a citizens' organization was formed to oppose the use, the Borough conducted a survey, which revealed that a majority of the residents were willing to pay extra taxes to purchase the property for park uses. The Borough passed a resolution stating that it was in the public interest to acquire the parcel for public use as park

⁹⁰ 673 A.2d 856 (N.J. 1995).

land and recreational use. The Borough started a condemnation action and Kessler filed suit, challenging the condemnation.

The New Jersey Supreme Court stated that because it is the legislature's prerogative to determine what is a public use,⁹¹ a presumption of validity and "great deference" attaches to a municipality's exercise of its eminent domain power.⁹² The court added that "[c]ourts generally will not inquire into a public body's motive concerning the necessity of taking"⁹³ However, the *Essex Fells* court went on to note, the condemnation will not be enforced "where there has been a showing of 'improper motives, bad faith, or some other consideration amounting to a manifest abuse of the power of eminent domain.'"⁹⁴

The court clarified that even if the articulated public purpose falls within the realm of valid public uses, if the "true reason" for the taking is *ultra vires*, the court may strike down the condemnation. In short, the court concluded, "public bodies may condemn for an authorized purpose but may not condemn to disguise an ulterior motive."⁹⁵ Although the *Essex Fells* court could find no relevant New Jersey cases involving bad faith challenges to condemnations, it stated that cases from other jurisdictions "make it clear where a condemnation is commenced for an apparently valid, stated purpose but the real purpose is to prevent a proposed development which is considered undesirable, the condemnation may be set aside."⁹⁶

⁹¹ *Id.* at 860.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* The court stated: "Bad faith generally implies the doing of an act for a dishonest purpose. The term also 'contemplates a state of mind affirmatively operating with a furtive design or some motive of interest of ill will.'" *Id.* at 861.

⁹⁵ *Id.* See also *City of Rapid City v. Finn*, 668 N.W.2d 324, 327 (S.D. 2003) ("a municipality acts in bad faith when it condemns land for a private scheme or for an improper reason, though the superficially stated purpose purports to be valid").

⁹⁶ 673 A.2d at 861 (citing *Earth Mgt., Inc. v. Heard County*, 283 S.E.2d 455 (Ga. 1981); *Carroll County v. City of Bremen*, 347 S.E.2d 598 (Ga. 1986); *Pheasant Ridge Assoc. v. Burlington Town*, 506 N.E.2d 1152 (Mass. 1987); *Redevelopment Auth. v. Owners or Parties in Int.*, 274 A.2d 244, 247 (Pa. 1971); *City of Miami v. Wolfe*, 150 So.2d 489 (Fla. 1963); *In re Hewlett Bay Park*, 265 N.Y.S.2d 1006 (N.Y. S. Ct. 1966)).

Certainly, the evidence here indicated that the Borough was not condemning to satisfy “the public need” for a park, but rather to address community opposition to Kessler’s proposed use.⁹⁷ The Borough never considered purchasing the land until the public opposition occurred, and evidence suggested Borough officials were more interested in controlling who acquired the property than in obtaining open space for its residents. Ultimately, the court found that the condemnation action was brought in bad faith to block a rehabilitation facility that the residents opposed, and so was invalid.⁹⁸

The *Essex Falls* decision is interesting on several accounts. First, there was no subterfuge involved—the Borough council was very open about the proposed taking and its opposition to the property owner’s proposed use of the parcel. While using the land as a park might have been a secondary purpose for the taking (the first clearly being preventing the facility opposed by its residents), there was no evidence that the property would *not* be put to use as a public park. *Essex Falls* is, in this respect, analogous to *Creve Coeur*⁹⁹ and *Hewlett Bay Park*,¹⁰⁰ where the courts found the taking to be valid, yet the *Essex Falls* court reached a very different result.

Second, the court stated that this was a bad faith taking, and yet it never explained *why* the Borough’s actions were tainted. Certainly, the taxpayers and voters, and even the property owner, were not being misled in any way as to what was going on—the Borough surveyed the residents and found that they were prepared to pay additional taxes to acquire the property for recreational purposes to avoid Kessler’s proposed use.

⁹⁷ 673 A.2d at 861.

⁹⁸ *Id.* at 863 (“The power of eminent domain cannot be justified when used in response to public opinion against a proposed land use.”).

⁹⁹ 329 S.W.2d 399 (Mo. App. 1959) (discussed *supra* notes 49-50 and accompanying text).

¹⁰⁰ 276 N.Y.S.2d 312 (1966) (discussed *supra* notes 59-63 and accompanying text).

It may be that the real source of the court's discomfort is that the Borough was using its eminent domain power to accomplish indirectly what it could not do directly through the police power. The Borough's own planning and legal consultants had determined the proposed private use was consistent with the master plan and zoning ordinances—and had indicated that a conditional use permit should issue. Under the police power, the Borough could not completely ban the use from its borders, although it could regulate the location and operation of the use.

The New Jersey Supreme Court looked at this issue again in 2006, in *Mount Laurel Township v. MiPro Homes, LLC*, with a very different outcome.¹⁰¹ The Township had condemned a 16.3 acre parcel owned by a developer, MiPro Homes, which was zoned for residential uses. The trial court had found that while the Township had articulated a facially valid purpose for the taking—provision of open space—its real purpose in condemning the land was to prevent development of another residential subdivision in what was already a heavily-developed township.¹⁰² The trial court had concluded that while the township could prevent residential development and preserve open space by engaged in a voluntary purchase from the property owners, it was prohibited from using the power of eminent domain to acquire the property.¹⁰³

The Court of Appeals reversed, stating that even if the Township's "primary goal" was to impede or slow residential development, "this does not provide a foundation for finding that the municipality's use of eminent domain for this purpose constitutes fraud, bad faith, or manifest abuse."¹⁰⁴ The appellate court specifically distinguished *MiPro Homes* from *Kessler*

¹⁰¹ 910 A.2d 617 (N.J. 2006).

¹⁰² The trial court stated that "the public purpose articulated for the taking of Mipro's property for passive open space was not based on a true public need but solely in response to the community's sentiment expressed at the polls, coupled with clear indications from township officials that the property be acquired to stop residential development." *Quoted in* 878 A.2d 38, 44 (N.J. App. Ct. 2005), *aff'd*, 910 A.2d 617 (N.J. 2006).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 49.

Institute, stating that in *Kessler Institute*, the property owner’s proposed use of its property implicated a “significant public interest[]” (a rehabilitation institute) and that the municipality had abused its power in trying to prevent that use. The court of appeals indicated that “a development of single-family homes that will be affordable only to upper-income families” did not “serve a comparable public interest.”¹⁰⁵

The New Jersey Supreme Court affirmed the decision in a very short opinion, finding that “the citizens of New Jersey have expressed a strong and sustained public interest in the acquisition and preservation of open space,”¹⁰⁶ and that the township’s motivation in condemning the property was “not inconsistent with the motive driving the public interest in open space acquisition generally.”¹⁰⁷ Justice Rivera-Soto, writing in dissent, argued that the majority had erred in allowing the court of appeals’ judgment regarding the social worth (or lack thereof) of MiPro’s development plans to sway the outcome. In his view, “a judge’s individualized and idiosyncratic view of what is or is not socially redeeming has no place in determining whether the sovereign’s exercise of the power of eminent domain is proper.”¹⁰⁸

When we step back and look at the non-use cases decided to date, it is hard to find consistent patterns or rules among them. The courts have essentially stated that in evaluating these cases, they will not look to the condemnor’s motives, only its purpose. However, the courts will look to see if the stated purpose is the true purpose, and further, they will look to motive to the extent that it shows bad faith on the part of the condemnor. At this point, of course, the analysis becomes circular—bad faith can be evidenced by tainted motive, and yet the courts claim they do not examine motives in takings cases.

¹⁰⁵ *Id.*

¹⁰⁶ 910 A.2d at 618.

¹⁰⁷ *Id.* at 618.

¹⁰⁸ *Id.* at 610 (Rivera-Soto, J., dissenting).

It is small wonder, then, that the existing case law is in disarray, and that it is so difficult to draw clear and easily-applied rules from the existing jurisprudence on the appropriateness of condemning to prevent undesired uses. Rather than attempting to bring order to what is clearly chaos in the case law, it is more productive to step back and consider what the rule should be. Why can the municipality not decide that the public is best served by a condemnation designed to prevent an undesired use—by a non-use taking—provided the municipality is willing to pay the bill for its decision in the form of just compensation for the property taken?¹⁰⁹ Might private property rights and the public weal be better served by permitting an open and honest taking, accompanied by just compensation and full disclosure in the public arena, to prevent an undesired use? This is the topic I address in the concluding Part.

IV. RETHINKING NON-USE TAKINGS

When we step back to consider what the rules regarding non-use takings *should* be, as opposed to what they *are*, some basic contours quickly emerge. A municipality's efforts to

¹⁰⁹ I do not pretend that my approach would resolve all problems associated with non-use takings, nor do I profess complete comfort with the result that I have reached. My own strong belief in the sanctity of private property rights caused me initially to resist and reject this outcome, yet I was ineluctably drawn to the conclusion that non-use takings can indeed be public uses. In part, this result may be an unintended consequence of the broad, hands-off approach to legislative determinations occasioned by the Supreme Court's recent decision in *Kelo*. More fundamentally, however, I think that there are occasions the public good would be better served if a property were condemned to prevent a proposed private use that would be contrary to the wishes or best interests of the public as a whole—provided always, of course, that the condemnation is accompanied by just compensation.

There are, of course, problems with this approach. Few issues in the takings law area are clear-cut, and trade-offs are inherent. Society does need landfills, sewage-treatment plants, rehabilitation facilities, and other uses that neighbors may find undesirable, and those uses must be located somewhere—and they will be. At a practical level, at some point, the proponent of the undesired use will find either a community that welcomes the tax dollars, jobs, or other economic benefits associated with the use, or a community who opposes the use but is too poor to buy the use out. The second outcome, of course, is the troublesome one from an economic justice viewpoint, because it may well lead to wealthier communities displacing undesired uses onto poorer communities. However, at the most fundamental level, state and federal constitutional provisions protect against improper and illegal discrimination, such as exclusion of racial minorities. Moreover, there is a limit as to how often any given municipality could condemn for non-use purposes. Fiscal realities being what they are, at some point even the wealthiest community will run out of funds to buy out every noxious use to which it objects; rather, municipalities will be forced to prioritize their decision-making in this area. Finally, economic markets, which influence siting and allocation of property uses in all other manners, likely resolve many of the conflicts in the non-use context as well before they ever arise.

condemn for a non-use should be stopped if: (1) the municipality runs afoul of statutory or state constitutional limits (*e.g.*, the municipality is empowered to condemn only for certain limited purposes, such as roads or schools, and the condemnation does not fall within the specified boundaries); (2) the municipality runs into a federal constitutional limit, such as equal protection (*e.g.*, the municipality is condemning the property to prevent the construction of racially-integrated housing); or (3) the municipality hides its true intent, thereby acting in bad faith, and subverting the political process and denying accountability to voters.

The first two categories do not cause much concern, as the rules there are straightforward and easy enough to apply, and the results uncontroversial—the municipality has exceeded its statutory or constitutional authority, and its actions must be set aside by the courts. It is the third category—the one that raises convoluted issues of “motives” versus “purpose,” “true” versus “stated” purposes, and “bad faith”—that causes the disjointed and often inconsistent outcomes that permeate the current case law on non-use takings. Issues of bad faith, motive, and purpose are already areas of eminent domain law fraught with inconsistent and incomplete analysis and murky relationships. It is small wonder, then, that infusing these issues into non-use cases simply serves to further confuse the analysis rather than illuminate it.

The analysis in non-use cases would be greatly simplified and clarified if these amorphous and ephemeral concepts were simply swept away. Discussions of bad faith, motive, and purpose not only beg the question, but they induce and encourage manipulative and deceptive behavior by municipalities. The non-use cases suggest an underlying assumption by condemnors and courts alike that it is *not* permissible to take property for a non-use. As a result, municipalities tend to hide their true intent by articulating sham reasons for their condemnation—“we suddenly realize we need a park and we need it right here, where this landfill, low-income housing, [*fill in the undesired use of your choosing*], is proposed!” When

courts then look at the underlying facts and see what is really going on, they may call the municipalities on their less-than-forthright behavior, by labeling the behavior as bad faith and setting it aside. Or, worse, the courts may hide behind the flimsy cloak of “motive” versus “purpose” and refuse to address a situation that to outsiders goes beyond smelling fishy to stinking to high heaven. When the courts engage in this kind of selective vision, they do little to promote public confidence in the fairness of the constitutional constraints upon the eminent domain power or public respect for the power and integrity of the judiciary.

Condemning authorities feel compelled to hide their true motivations because they, and the courts, feel that taking for non-use purposes is inherently wrong. But why? What is wrong with taking for a non-use, so long as the goal is to benefit the public generally by preventing the undesired use, and not simply to confer private benefit upon a few vocal neighbors? Suppose we were simply to require the actors to be direct about what they were achieving. Go back to our opening hypothetical, where the municipality has condemned land, ostensibly for park purposes, in order to prevent a large-scale development from going forward. What if the municipality had been honest and had just stated: “We don’t want this development. We think that it will have deleterious effects on our community, because of environmental impacts, noise and traffic issues, and stigmatizing effects on neighboring property values. *But*, we also recognize that such a development provides substantial societal benefits, and that the benefits in this instance are not outweighed by the potential harms. Thus, we recognize we cannot ban the use under the police power—that would be a de facto taking. So, fine, we will instead make it an actual taking and provide you, the property owner, with the just compensation the Constitution demands.” In return, the public will receive the property for use as a park, open space, or whatever other public use we deem appropriate.” This direct approach gets rid of the clutter of

bad faith, the confusion between motive versus purpose, and all of the judicial second-guessing that drawing such distinctions necessitates.

The real concern here is not that condemnors may engage in non-use takings, but rather that when sovereigns do not openly and honestly discuss the motives behind their actions, they subvert the political process—they prevent open public discussion and dissension about the legislative acts, and they obliterate the opportunity for the public to voice its pleasure or displeasure about the sovereign's actions, either in open public debate or through the ballot box. Where the stated purpose for the taking is a subterfuge or a sham, there is a breakdown in the political process because there is no way for the public to evaluate the actions of the municipality or to react. Where the municipality is honest in stating its purpose, however, public debate and opportunity for response are fostered.

Moreover, that public debate can itself offer substantial protection for private property rights, as the firestorm of negative reaction to *Kelo* and the resulting legislative efforts to overturn its effects on a state-by-state level indicates.¹¹⁰ Fundamentally, a legal rule that would permit municipalities to openly condemn to prevent an undesired use from going forward is considerably less worrisome than a legal rule, such as we currently have, that encourages municipalities to dissemble or even be outright dishonest in pursuing their legislative goals. In this instance, honesty is not only the best policy, but it is critical to ensuring proper protection of private property rights and preservation of constitutional integrity.

¹¹⁰ See *supra* notes 36-37 and accompanying text.