



## Pondering public use

Consider possible business development opportunities generated by Court's ruling

by Pamela V. Rothenberg

Without eminent domain, the Rockville Town Center redevelopment project—a mixed-use public, commercial, residential, retail, cultural, restaurant and entertainment space under construction in Rockville, Md.—would still be just an idea, not a construction site.

After previous unsuccessful attempts to redevelop downtown Rockville and residents repeatedly requesting a revitalized town center, the city developed a new town center master plan involving—from the public sector—the city, Montgomery County, the State of Maryland and the federal government, as well as—from the private sector—a nationally known retail developer and a residential developer.

Prior to beginning the project, the city condemned and relocated several businesses operating on the proposed town center's site. Since the project incorporates true public uses, including four municipal parking facilities, a public square and a new regional library—fulfilling the requirements of Maryland's relatively liberal eminent domain statute—the condemnation actions succeeded, despite challenges similar to those presented in *Kelo v. City of New London, Conn.*, decided by the U.S. Supreme Court earlier this year.

In *Kelo*, the Court held New London's proposal to condemn pri-

vately owned real estate for economic development purposes qualified as public use within the Takings Clause of the Fifth Amendment. The amendment prohibits government from taking private property unless its taken for public use in exchange for just compensation.

The broader interpretation of public use presents a host of slippery-slope issues.

The principal legal issue most often facing courts in condemnation cases is whether the government's proposed use of the condemned property constitutes a "public use" under relevant state or federal eminent domain statutes.

Highways, schools, parks or public municipalities are the most recognizable and narrowly construed examples of public use. However, public use can be more liberally interpreted to equate with "public purpose," permitting government to impose eminent domain on a community for both public and private interests—including those of private developers.

The broader interpretation of public use presents a host of slippery-slope

issues. For example, a public/private partnership's redevelopment project designed to revitalize a community's economic health—like in the *Kelo* case—might constitute a permitted public use by producing increased taxes, adding jobs and improving housing, despite not being an entirely public project.

It seems relatively clear the relaxed public purpose precedent *Kelo* generated—regardless of whether you agree with the decision—will afford municipalities greater flexibility to partner with private developers for redevelopment projects.

The Rockville Town Center, now in its first phase of construction, demonstrates how a municipality can utilize its power of eminent domain and team up with private developers to respond to citizen demands for community revitalization—transforming the heart of a city into a focal point for civic, social and business activity.

Developers should be on the lookout for other opportunities, similar to the Rockville Town Center, that may result from the Supreme Court's decision. □

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