Kelo Confined—Colorado Safeguards Against Condemnation for Public–Private Transportation Projects

by Michael R. McCormick

Colorado's public agencies are contemplating private investment in transportation infrastructure. This article discusses the Kelo *decision and how Colorado law may safeguard landowners against condemning private property for a combination of public transportation purposes and private profits.*

The 2005 U.S. Supreme Court decision *Kelo v. City of New London*[1] ignited a nationwide debate over whether governments can use the power of eminent domain to take property from one private party to transfer it to another private party for the purpose of economic redevelopment. In narrowly interpreting the constraints of the Fifth Amendment to the U.S. Constitution, the Court opened the door for municipalities and other governmental agencies across the country to take private property on a more expansive basis than many had thought possible. The full implications of *Kelo* have yet to be determined. The decision did, however, leave state and local governments free to place additional limits on the exercise of the power of eminent domain, as is the case in Colorado because of various statutory and constitutional safeguards that both predate and postdate the *Kelo* decision.

The limits of these Colorado safeguards likely will face direct judicial challenge. Colorado public agencies are facing significant financial shortfalls in funding transportation infrastructure.[2] In searching for solutions, Colorado's public agencies are considering partnerships with private investors by inviting them to invest in public transportation infrastructure or related supporting development, in return for enjoying profits from user fees and other benefits.[3] Examples could include condemning private land for toll roads financed by private investors, or for private housing or retail development as part of a larger public transportation project.

It is only a matter of time before Colorado courts will be forced to evaluate the limits of the power of condemnation under Colorado law in these instances. The purpose of this article is to examine the *Kelo* decision and relevant Colorado law in the context of a public–private partnership seeking to condemn private property as a part of a larger transportation and redevelopment project.

Public–Private Partnerships and Transit-Oriented Development

A likely scenario in which the government's authority to take private property in Colorado will be tested is in connection with a transportation project that also involves commercial redevelopment pursuant to a public–private partnership. A "public–private partnership" means a contractual relationship between a public agency and a private partner, in which the private partner provides a public benefit, such as building transportation infrastructure improvements, in return for receiving a business opportunity or other benefit from the public agency.[4]

Indeed, though not yet a certainty, both the Colorado Department of Transportation (CDOT) and the Regional Transportation District (RTD) are considering partnerships with private investors for some of their better-known projects.[5] For example, it is conceivable that RTD could partner with a private developer for the creation of a "transit-oriented development,"[6] such as the CityCenter Englewood project on RTD's Southwest Corridor Light Rail line.[7] Such a project might, like CityCenter Englewood, include residential units, commercial space (such as retail, restaurants, and offices), public parks, trails, and cultural facilities, as well as transit facilities.[8] RTD itself notes that it is exploring public–private partnerships for stations along its West Corridor Light Rail line,[9] which already is the focus of controversy related to RTD's plans to condemn nearby property.[10]

Article Editor

Joseph E. Lubinski, Denver, of Ballard Spahr Andrews & Ingersoll—(303) 299-7359, lubinskij@ballardspahr.com

About the Author

This month's article was written by Michael R. McCormick, who practices real estate and eminent domain litigation at Montgomery Little Soran & Murray, P.C. He recently entered private practice after spending three and one-half years as an Assistant Attorney General in the Colorado Attorney General's Office, where he represented the Colorado Department of Transportation—(303) 779-2721, mmcormick@montgomerylittle.com.

Real Estate Law articles are sponsored by the CBA Real Estate Law Section.

Although there are clear public benefits for such transit-oriented development, private investors will benefit, as well. For example, RTD currently is considering condemning a landowner's residential and commercial property along its FasTracks West Corridor line, for use as parking to support transit use and a neighboring commercial office building.[11] What will happen if a landowner resists a condemnation by a public agency for such "transit-oriented development" when private investors will receive direct benefits or profits as a result? How would the Colorado Constitution's "public use" requirement come into play? Colorado Courts soon may be faced with such a public–private partnership attempting to use eminent domain to take a landowner's private property for a combination of transportation purposes, private profit, and economic redevelopment.

The *Kelo* Decision

The 2005 *Kelo* decision ignited a nationwide discussion over the use of eminent domain. As discussed below, the *Kelo* decision also had repercussions on Colorado's own public use safeguards for the use of eminent domain for transportation projects.

Facts and Background

In January 1998, the state of Connecticut authorized a $5.35 million bond issue to support the planning activities of the New London Development Corporation (NLDC), a private nonprofit entity established years earlier to assist the city of New London with redevelopment of the Fort Trumbull area.[12] In February 1998, the pharmaceutical company Pfizer Inc. announced that it would build a $300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation.[13] After obtaining state-level approval, the NLDC finalized an integrated development plan focused on ninety acres of the Fort Trumbull area. The development plan encompassed seven parcels:

- parcel one for a waterfront hotel and conference center
- parcel two for eighty new residences as part of a new urban neighborhood
- parcel three for research and development office space
- parcel four to support either a park or a marina
- parcels five, six, and seven for additional office and retail space, parking, and water-dependent commercial uses.[14]

In December 2002, the landowner petitioners, including Susette Kelo, brought an action in the Superior Court of New London, claiming that the taking of their properties would violate the Fifth Amendment's "public use" restriction.[15] The petitioners owned fifteen properties in Fort Trumble, four located in parcel three, and eleven located in parcel four. Some of their homes were being taken for "park support," which eventually might include parking.[16] Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918, and had lived there her entire life. Her husband Charles also lived in the house since they married some sixty years earlier.[17]

The Supreme Court Opinion

The U.S. Supreme Court held that the city of New London could condemn the petitioners' private homes for the purpose of

transferring them to the NLDC for economic redevelopment, even though there was no showing by the city or the NLDC that the property taken was harmful to the community or blighted. The Court's majority rejected any literal requirement in the Fifth Amendment that the condemned property be put into use for the general public, and instead embraced the interpretation of "public use" as "public purpose."[18] The Court refused to adopt a bright-line rule that economic development alone does not qualify as a public use.[19] The Court interpreted the concept of "public purpose" broadly, reflecting its longstanding policy of deference to legislative judgments in the field.[20]

The homeowners argued that their property was being transferred from one private party to another for purposes of economic development and increasing tax revenues, in violation of the public use clause of the Fifth Amendment. In rejecting this argument, the Court noted the comprehensive character of the ninety-acre integrated development plan, the thorough deliberation that preceded the plan's adoption, and the limited scope of the Court's review of the lower courts' affirmation of the city's exercise of its eminent domain powers.[21]

Although the Court acknowledged that the sovereign cannot take the property of one private party for the sole purpose of transferring it to another party, it found that a one-to-one transfer of property, executed outside the confines of an integrated development plan, was not presented in the case.[22] The Court reasoned that the public end may be as well or better served through an agency of private enterprise than through a department of government—or so Congress might conclude.[23] The Court could not say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.

Consistent with its 1954 decision in *Berman v. Parker*,[24] the Court refused to consider public purpose on a piecemeal basis by an individual owner, but instead examined the public purpose behind the entire redevelopment plan.[25] In the *Berman* decision, the Court upheld a redevelopment plan targeting a blighted area of Washington, D.C.[26] The owner of a department store located in the area challenged the condemnation, arguing that his store was not blighted. The *Berman* Court refused to evaluate this claim in isolation, deferring instead to legislative and agency judgment that the area must be planned as a whole for the plan to be successful. The Court explained that "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building."[27] The public use underlying the taking was affirmed.

Finally, the *Kelo* majority noted that states were free to provide further protection beyond the federal Fifth Amendment.[28] This includes individual state constitutional requirements, as well as state eminent domain statutes restricting public use.

The federal rule affirmed by *Kelo* and the breadth of the government's power of eminent domain affirmed therein has been summarized as follows: "as long as a public use (redefined as a public purpose) is conceivable and possible, even if it never comes to pass, the federal courts will accept it."[29] Justice O'Connor's dissent criticized Justice Kennedy's summation of the federal test by saying, "it is difficult to envision anyone but the 'stupid staffer' failing it."[30] As stated by a noted authority, "The federal bar is presently set so low as to be little more than a speed bump."[31]

The *Kelo* decision received considerable public reaction, including here in Colorado, putting the phrase "eminent domain" back into the public's awareness. Numerous states, including Colorado, passed eminent domain legislation in response to the decision.[32] Colorado's House Bill 1411 states that "public use" shall not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue.

Colorado Safeguards for Landowners

As discussed in the *Kelo* decision, Colorado has constitutional safeguards that go beyond the Fifth Amendment's protections. These are discussed below.

Colorado's Constitutional Public Use Requirement

Article II, § 15 of the Colorado Constitution states: "Private property shall not be taken or damaged, for public or private use,

without just compensation." Article II, § 14 allows takings for private use only for a limited number of specifically defined uses: "private ways of necessity, reservoirs, drains, flumes and ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes." Any other proposed taking must be for a public use. Section 15 states that "the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."

The Colorado Supreme Court has reiterated the requirement given in Article II, § 15 of the Colorado Constitution that the question of whether a use is public is a judicial question for the courts, without any regard to a legislative assertion that the use is public.[33] Nonetheless, although the General Assembly's judgment is not conclusive on the courts, it is entitled to careful consideration and great weight as the judgment of a coordinate branch of the government of the necessities of the state for the development of its resources and the needs of the people.[34]

The Colorado Supreme Court has not drawn a precise line between public and private use.[35] Instead, the definition of "public use" must have enough elasticity to be capable of meeting new conditions and improvements and the ever-increasing needs of society.[36] In determining whether a use is public, a court examines the physical conditions of the country, the needs of a community, the character of the benefit that a projected improvement may confer on a locality, and the necessities for such improvement in the development of the resources of the state.[37]

Incidental benefits to private parties. The question then arises: What if a private party receives incidental benefits from a project? The mere fact that private interests may be involved in some aspect of the condemnation or receive incidental benefits does not defeat a public purpose. Rather, in reviewing a condemning authority's finding that a proposed taking is for a public use, the court's role is to determine whether the essential purpose of the condemnation is to obtain a public benefit.[38] Where the proposed use is unquestionably public, incidental private use will not adversely affect the legality of the taking.[39]

Cost of improvements. Taking the matter a step further, it does not matter if the private entity pays for the entire cost of the improvements. Even if persons who benefit from the improvement agree to pay for it entirely, the taking of necessary property is valid, as long as the use of the property is a public use.[40]

Public or private ownership. Another factor that will be considered is whether the property to be condemned will remain in public ownership or be transferred to a private party. However, the transfer of the property to a private party is not dispositive, at least in an urban renewal context.[41]

Colorado Statutes Governing Public Use

Colorado also has significant statutory protections that extend beyond *Kelo*. These are discussed below.

House Bill 1411. In response to the controversy stirred by *Kelo*, on June 6, 2006, Colorado's Governor Owens signed House Bill 1411, amending CRS § 38-1-101(1)(b)(I), which now states that "public use" shall not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue. Private property otherwise may be taken solely for the purpose of furthering a public use.[42] In addition, the burden of proof is on the condemning entity to demonstrate, by a preponderance of the evidence, that the taking of private property is for a public use.[43] If the condemnation action involves a taking for the eradication of blight, the burden of proof is on the condemning entity to demonstrate by clear and convincing evidence that the taking of the property is necessary for the eradication of blight.[44]

Private toll road statutes. In 2006, the Colorado General Assembly was embroiled in a controversy over the proposed Front Range Toll Road project, a 210-mile toll highway planned by private investors since 1985 to bypass Interstate 25 from Pueblo to Fort Collins.[45] The purpose of the road would be to give commercial traffic an alternative route around Colorado's front range urban highways.[46] The project would combine highway, railroad, light rail, and utilities, and would be constructed on rural property east of the heavily populated front range area. In response to public outcry regarding the project, the Colorado Legislature passed several amendments to Colorado's toll road statutes prohibiting private toll road companies from condemning property.[47]

CDOT public–private initiatives. However, a private toll road company still can enter into a "public–private initiative" with CDOT, provided that the project meets several statutory requirements: the toll highway must be open to the public; the project must be approved through the transportation commission's statewide planning process; the project must condemn no more property than that allowed by the various local planning organizations; and the project must comply with CDOT's administrative rules.[48]

Importantly, if CDOT condemns the property with public funds, CDOT cannot transfer the property to the private entity.[49] The private entity can own the right-of-way only if the project is entirely funded by private monies and CDOT determines that such ownership is in the public interest.[50] Additionally, if a private investor approaches CDOT with an unsolicited proposal that requires CDOT to spend more than $50,000, CDOT must open the proposal to competitive bidding.[51]

An interesting issue is whether private toll road investors will be forced by the courts to pursue such statutory public–private initiatives with CDOT as statutory toll road companies, or whether they will be allowed to form their own quasi-public special district entities with separate statutory condemnation authority.[52] It is unclear whether such an entity would be required by the courts to follow the new toll road laws, or whether the Colorado Constitution's public use requirement would be implicated.

RTD statutes and public use. RTD likewise has the power to condemn property for public use.[53] RTD has the power to establish, maintain, and operate a mass transportation system across or along any public street, bridge, viaduct, or other public right-of-way, or across any vacant public lands, without first obtaining a franchise from the public body having jurisdiction.[54] RTD also has the authority to negotiate and enter into agreements with any person or public entity for the provision of retail and commercial goods and services to the public at transfer facilities.[55]

However, any use of an RTD transfer facility for the provision of retail or commercial goods or services shall not be implemented if the use would reduce transit services, would reduce the availability of adequate parking for the public, or would result in a competitive disadvantage to a private business reasonably near a transfer facility engaging in the sale of similar goods or services.[56] Additionally, the provision of retail and commercial goods and services at transfer facilities must be designed to offer convenience to transit customers and not be conducted in a manner that encourages automobile traffic from nontransit users.[57]

Necessity

An issue closely related to public use is whether the property sought by the government is necessary for the project. A determination of necessity by the government is not reviewable by the judiciary, absent a showing of fraud or bad faith by the condemning authority.[58] This limitation on the scope of a court's review precludes review of the necessity of an acquisition of a specific parcel of property absent bad faith.[59] Does this also mean that a court cannot scrutinize whether an individual parcel is being taken for a public use in the absence of bad faith or fraud?

The U.S. Supreme Court has made it clear that, in an urban renewal context, it will not second-guess the legislature's decision regarding an urban renewal project as a whole rather than lot-by-lot.[60] Likewise, the Colorado Supreme Court has refused to examine whether individual structures were in a state of disrepair calling for condemnation as nuisances.[61] As will be discussed below, the Colorado Court of Appeals has followed this principle outside the urban renewal or blight context in the *Geudner* and *Eat Out* decisions.

Statutory Authority

An issue in the taking analysis that is closely related to public use is statutory authority. Statutory authority to take property is a separate requirement for a valid taking,[62] and a party may not condemn private property without demonstrating that the taking has been statutorily authorized either expressly or implicitly.[63]

The Colorado Supreme Court recently examined the issue of statutory authority in *Colorado Department of Transportation v. Stapleton*.[64] CDOT and Pitkin County sought to condemn Stapleton's property for a 750-car parking garage, which would reduce air pollution and traffic congestion in the city of Aspen.[65] CDOT claimed the proposed parking and transit facility would satisfy federal clean air requirements such as to secure federal funding for the project.[66] Pitkin County contended that the facility would serve as an intercept lot for visitors of Aspen, and would provide parking for and access to a large public trail system owned by the county.[67]

CDOT was statutorily authorized to condemn property for "state highway purposes."[68] However, the statutory definition of "state highway" does not include a parking transit facility.[69] Nonetheless, the Colorado Supreme Court held that the proposed use bore a "sufficiently direct functional relationship" to the improvement of the adjoining State Highway 82 so as to give CDOT the implied authority to condemn the parcels.[70]

The *Stapleton* Court did not address the question of public use under the Colorado Constitution. Justice Kourlis noted in her dissent that there was a very real possibility that, after Stapleton's property was condemned for highway purposes, it would be leased back to the Buttermilk Ski Area, a private corporation, to accommodate and supplement its own inadequate parking facilities.[71]

Colorado Case Law on Public Use

Three Colorado Supreme Court and Court of Appeals decisions address the issue of private investors partnering with public agencies to condemn private property for public works projects. Note, however, that these decisions were issued before the passage of the amendment to CRS § 38-1-101(1), which now states that "Private property may . . . be taken *solely* for the purpose of furthering a public use" (emphasis added). It remains to be seen what effect this amendment will have on the precedential weight these rulings will be given in the future.

The Shaklee *Decision (Colorado Supreme Court)*

In *Public Service Company v. Shaklee*, Public Service Company (PsCo) sought to condemn the Shaklees' property to provide electrical service to the Adolph Coors Company (Coors) for its mining activities in Weld County. PsCo determined that an electrical transmission line would have to be built from PsCo's substation to the Coors mine site, a distance of about 12.5 miles.[72] Coors had an agreement with PsCo to pay for most of the $1.3 million cost of the line, while PsCo retained title and the right to provide service to future customers from the extension line.[73]

The Shaklees argued that the taking was not for a public use. The Colorado Supreme Court began by stating that the owners have the burden of proving that the taking is not for a public use.[74]

After citing the rules concerning the elastic definitions of public use and the factors to be considered, the Court turned to whether the use of right-of-way for purposes of constructing transmission towers to carry electricity that would serve a single customer (Coors) was a public use.[75]

The Court held that, for such electrical power uses, as long as every member of the public had an equal right with all others on equal terms to the use of the power produced, it did not matter whether every person actually benefited thereby.[76] The Court found that the public had the right to use the power transmitted by the lines on equal terms with Coors.[77] Although PsCo had indicated to members of the community that the transmission line was the "Coors Line" and was unavailable for use by others, as a regulated monopoly, PsCo had to provide service to the public without discrimination.[78]

The Shaklees also argued that Coors paid for most of the construction cost and that it would be prohibitively expensive for another potential power user to pay for the necessary modifications to make use of the high-voltage line.[79] The Court rejected this argument, ruling that even if persons who benefit from the improvement agree to pay for it entirely, the taking is valid as long as the use of the property is a public use.[80]

The Geudner *Decision (Colorado Court of Appeals)*

In *Denver West Metropolitan District v. Geudner*, the Denver West Metropolitan District (District) attempted to condemn Geudner's property to relocate a gulch across the property.[81] All of the officers of the District were members of the Stevinson family.[82]

A Stevinson-controlled corporation entered into a contract to sell property that required relocating a gulch from the sale property onto Geudner's property. The engineering firm hired by the Stevinson corporation submitted a proposal concluding that the most hydrologically sound alignment was to channel the gulch along its existing alignment on the sale property.[83] The Stevinson corporation rejected the proposal and directed the engineering firm to relocate the gulch off the sale property and onto Geudner's property.[84] When Geudner refused to sell, the District subsequently brought condemnation proceedings against him.

The trial court found rechanneling the gulch onto Geudner's property would enhance flood control and thus render some public benefit.[85] Nonetheless, the trial court concluded that the condemnation action was brought in bad faith and found there was no public necessity for the relocation and that the primary purpose for the relocation was to facilitate the sale of the Stevinson corporation's property.[86]

The Court of Appeals distinguished judicial review of an agency's finding of necessity, which requires bad faith to invalidate it, from public purpose, which does not. Although the existence of a public purpose is always subject to judicial review, the necessity of an acquisition of a specific parcel of property may be reviewed by a court only on a showing of bad faith.[87] The issues of necessity and public purpose are closely related and, to some extent, interconnected.[88] In reviewing a condemning authority's finding that a proposed taking is for a public use, the court's role is to determine whether the essential purpose of the condemnation is to obtain a public benefit.[89]

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.[90] Thus, the Court of Appeals affirmed the "bad faith" finding of the trial court, using a public purpose rationale.[91]

The Eat Out *Decision (Colorado Court of Appeals)*

In *City and County of Denver v. Eat Out, Inc.*, the city of Denver decided to expand the Denver Art Museum by constructing additional museum space and a related parking garage on private property Eat Out was renting.[92] A portion of the parking was to benefit a private developer that constructed a condominium building on a portion of the property.[93]

The Court of Appeals began by noting that the mere fact that private interests may be involved in some aspect of the condemnation does not defeat a public purpose or necessity.[94] Rather, in reviewing a condemning authority's finding that a proposed taking is for a public use, the court's role is to determine whether the essential purpose of the condemnation is to obtain a public benefit.[95]

The court found that the essential purposes of Denver's project were to build a parking garage, support buildings, and headquarters space for the Denver Art Museum, as well as to allow land for its library expansion.[96] Although the private developer of a condominium building constructed on a portion of the property was benefited from Denver's project, the condemnation of the property was for a valid public purpose that was not incidental.[97]

Interestingly, Eat Out argued that the acquisition of the property was not necessary, because Denver needed only a small parking garage for the art museum expansion and library parking, but

planned a large parking garage for the sole benefit of occupants of a private high-rise condominium building to be constructed on the property.[98] However, the existence of a public purpose is always subject to judicial review, but the necessity of an acquisition of a specific parcel may be reviewed by a court only on a showing of bad faith.[99] Finding no bad faith, the court would not separately address the issue of necessity.[100]

The *Eat Out* decision does not explicitly state whether the proposed public and private uses were co-mingled or whether they could be separated. Apparently the court was not presented with a scenario in which Eat Out could distinguish a separate parcel as being solely for the private use of the condominiums.

Implications and Analysis

It is not difficult to imagine a scenario in which CDOT or RTD enter into a partnership with a private developer to construct a public transportation project in which some of the property condemned is to be owned or leased by the developer for a private business use, such as for retail or office space. Additionally, some of the property might be used for transit support, such as for granting a long-term lease to a fast food restaurant that serves a neighboring transit station in return for the developer financing some of the transportation improvements. The issue of whether the courts would allow condemning a private citizen's home for such a use is unresolved.

The Colorado courts have yet to interpret the newly amended CRS § 38-1-101(1)(b)(I), which states that "public use" shall not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue. Private property may otherwise be taken solely for the purpose of furthering a public use. This could mean that an incidental private purpose of economic development cannot be combined with a primary public purpose, such as transportation.

Conversely, the meaning of "for the purpose of furthering a public use" might differ from the meaning of "for the purpose of public use." Perhaps by including the word "furthering," the legislature meant that an incidental private interest could still "further" a public use without changing the character of the use. On the other hand, this reading would derogate the legislature's use of the word "solely."

Recall that Article II, § 15 of the Colorado Constitution states that the question of whether a use is public is a judicial question for the courts without any regard to a legislative assertion that the use is public. This raises the issue of whether the legislature can tell the courts what constitutes a "public use" under the constitution—and specifically whether property may be used solely for public use—or whether the Colorado Supreme Court is bound only by its own precedent interpreting the public use requirement.

Additionally, there is tension regarding whether the government must show public use for every parcel it seeks to condemn. Although CRS § 38-1-101(1)(b)(I), *Eat Out*, and *Geudner* mandate judicial review of the existence of a public purpose, the necessity of the acquisition of a specific parcel may be reviewed by a court only on a showing of bad faith.[101] As shown in the *Eat Out* decision, if

the government is able to co-mingle public and private use, such that they cannot be easily distinguished, the government will have a much easier time justifying the incidental private use.

Conclusion

Colorado case law currently supports the concept of a public entity partnering with a private entity and exercising the power of eminent domain that provides a benefit to a private investor as part of a large-scale transportation project, as long as the overall project has a predominantly public purpose aside from economic development or enhancement of tax revenue. If the condemning agency can show that the project has an overall public purpose, and that the proposed private use of a parcel is inseparably co-mingled with the public purpose, it is likely that such a condemnation will be upheld as valid.

However, the Colorado Supreme Court has yet to determine the meaning of CRS § 38-1-101(1)(b)(I) as amended. The Colorado Supreme Court may interpret this statutory amendment to prohibit an incidental private purpose of economic redevelopment. The Court also could interpret the statute to require judicial scrutiny of public use for each and every parcel sought to be condemned. In the alternative, the Court could completely reject the legislature's attempt to define public use as an invasion of its constitutionally mandated independent scrutiny. Although the outcome of the next Colorado Supreme Court case dealing with the public use requirement is uncertain, what is certain is that the issues and implications of public–private partnerships raised by the *Kelo* decision will continue to be controversial for many years to come.

Notes

1. *Kelo v. City of New London*, 545 U.S. 469 (2005).

2. *See, e.g.*, Proctor, "The Roadblock: Paying for Transportation," 59 *Denver Business J.* A32 (Aug. 24, 2007) (Governor's Blue Ribbon Panel on Transportation seeking additional $300 million to $1 billion per year to maintain and improve highway system); Leib, "RTD Grilled on Rising Cost," *The Denver Post* (May 20, 2007) (RTD facing $1.5 billon shortfall in paying for FasTracks transit expansion); Leib, "RTD abandons plan to buy railyard," *The Denver Post* (Jan. 10, 2008).

3. *See, e.g.*, Leib, "RTD Grilled on Rising Cost," *supra* note 2 (public–private partnerships considered by RTD); "Private Partnership with RTD benefits taxpayers," (Opinion) *The Denver Post* (July 29, 2007); Hurley, "Colorado Springs Toll Road Gains Momentum," *Colorado Springs Business J.* (April 7, 2006), available at findarticles.com/p/articles/mi_qn4190/is_20060407/ai_n16188074 (proposed public–private partnership with CDOT on Springs Toll Road, privately financed thirty-three mile eastern loop tollway east of Colorado Springs).

4. *See, e.g.*, www.fhwa.dot.gov/ppp/defined.htm#1 (Federal Highway Administration definition of "public–private partnership"); www.rtd-fastracks.com/media/uploads/main/FTfocusPPPweb_2.pdf (FasTracks brochure on public–private partnerships); CRS § 43-1-1201(3) (definition of "public–private initiative" with CDOT).

5. *See, e.g.*, RTD FasTracks website, www.rtd-fastracks.com/main_92 ("Public–Private Partnerships, or PPPs as they are often called, is one concept that RTD is pursuing in the implementation of FasTracks"); Leib, "RTD Grilled on Rising Cost," *supra* note 2 (public–private partnerships considered by RTD); "Private Partnership with RTD benefits taxpayers," *supra* note 3; Hurley, *supra* note 3.

6. "Transit Oriented Development Status Report 2006" (Feb. 2007), available at www.rtd-fastracks.com/media/uploads/main/TODStatusReport2006.pdf. *See also* Flynn, "RTD Raises Hackles," *Rocky Mountain News* (Dec. 3, 2007).

7. "Transit Oriented Development Status Report," *supra* note 6 at 4-2.

8. *Id.* This is not to say that RTD would attempt to use its condemnation powers for all of these purposes.

9. *Id.* at 6-1 to 6-5. *See also* Flynn, *supra* note 6.

10. Leib, "Lakewood Landowner Vows Fight Against RTD," *The Denver Post* (Dec. 5, 2007); Flynn, "RTD Condemnation Splits Board," *Rocky Mountain News* (Jan. 23, 2008); Schrader, "RTD May Face Lawsuit Over Land-Taking For New West Line," *The Denver Post* (Feb. 1, 2008); Ensslin, "Rally Protests Use of Eminent Domain," *Rocky Mountain News* (Feb. 18, 2008).

11. Flynn, *supra* note 6; Leib, *supra* note 10; Flynn, *supra* note 10.

12. *Kelo, supra* note 1 at 473.

13. *Id.*

14. *Id.* at 474.

15. *Id.* at 475.

16. *Id.* at 495.

17. *Id.* at 475.

18. *Id.* at 479.

19. *Id.* at 485.

20. *Id.* at 481.

21. *Id.* at 484.

22. *Id.* at 487.

23. *Id.* at 475.

24. *Berman v. Parker*, 348 U.S. 26, 34-35 (1954).

25. *Id.*

26. *Kelo, supra* note 1 at 481; *Berman, supra* note 24.

27. *Id.*

28. *Kelo, supra* note 1 at 489.

29. 2A Sackman, *Nichols on Eminent Domain* § 7.09[1] (rev. 3d. ed. 2006).

30. *Kelo, supra* note 1 at 502.

31. Sackman, *supra* note 29 at § 7.09[2].

32. *See* "National Conference of State Legislatures: State Legislative Reponse to *Kelo*," available at www.ncsl.org/programs/natres/annualmtgupdate06.htm.

33. *Pub. Service Co. v. Shaklee*, 784 P.2d 314, 317 (Colo. 1989); *Buck v. Dist. Court*, 608 P.2d 350, 351 (Colo. 1980); *Potashnik v. Pub. Service Co.*, 247 P.2d 137 (Colo. 1952).

34. *Tanner v. Treasury Tunnel, Mining & Reduction Co.*, 83 P. 464, 465 (Colo. 1906).

35. *Shaklee, supra* note 33 at 317; *Larson v. Chase Pipe Line Co.*, 514 P.2d 1316, 1317-18 (Colo. 1973); *Tanner, supra* note 34 at 464.

36. *Id.*

37. *Id.*

38. *Tanner, supra* note 34 at 464; *City and County of Denver v. Eat Out, Inc.*, 75 P.3d 1141, 1144 (Colo.App. 2003); *Denver West Metro. Dist. v. Geudner*, 786 P.2d 434, 436 (Colo.App. 1989).

39. *Shaklee, supra* note 33 at 318, *citing* Sackman, *supra* note 29 at § 7.55[3].

40. *Id.*

41. *Rabinoff v. District Court*, 360 P.2d 114, 119 (Colo. 1961).

42. CRS § 38-1-101(1)(b)(I).

43. CRS § 38-1-101(2)(b).

44. *Id.* This article does not directly address eminent domain issues related to urban renewal. For more information about condemnation in an urban renewal context, as well as a broader treatment of eminent domain issues, *see* Wilson, "Eminent Domain Law in Colorado—Part I: The Right to Take Private Property," 35 *The Colorado Lawyer* 65 (Sept. 2006).

45. *See* Front Range Toll Road website, www.cololegislativeinfo.com/TRInfo.html.

46. *See* Front Range Toll Road Media Information Release, available at www.cololegislativeinfo.com/TRMediaInfo.html.

47. CRS §§ 7-45-104 and 38-2-101.

48. *Id. See also* CRS § 43-1-1503 (CDOT transfer facilities, provision of retail and commercial goods and services).

49. CRS § 43-1-1204(3)(b).

50. *Id.*
51. CRS § 43-1-1204(6).
52. *See, e.g.*, CRS § 32-1-1004 (powers of metropolitan districts).
53. CRS §§ 32-9-119 and -161.
54. CRS § 32-9-119(1)(k).
55. CRS § 32-9-119.8.
56. *Id.* On January 31, 2008, H.B. 08-1278 was introduced in the Colorado House of Representatives. It would amend CRS §§ 32-9-119 and -161 to prohibit RTD from condemning property to support public transit purposes, such as for parking near transit stations, and would prohibit condemnation for mixed public–private commercial development. It also would make explicitly clear that the provisions of CRS § 38-1-101 governing public use apply to RTD.
57. CRS § 32-9-119.8.
58. *City of Thornton v. The Farmers Reservoir and Irrigation Co.*, 575 P.2d 382 (Colo. 1978); *Colorado State Bd. of Land Comm'rs v. Dist. Court*, 430 P.2d 617 (Colo. 1967); *Dallasta v. Dep't of Highways*, 387 P.2d 25 (Colo. 1963); *Mack v. Highway Comm'n*, 381 P.2d 987 (Colo. 1963); *Denver v. Bd. of Comm'rs*, 156 P.2d 101 (Colo. 1945); *Lavelle v. Town of Julesburg*, 112 P. 774 (Colo. 1911).
59. *Geudner, supra* note 38 at 436.
60. *Berman, supra* note 24 at 34-35.
61. *Rabinoff, supra* note 41 at 121.
62. *Potashnik, supra* note 33 at 139-40.
63. *Dep't of Transp. v. Stapleton*, 97 P.3d 938, 941 (Colo. 2004).
64. *Id.*
65. *Id.* at 939.
66. *Id.*
67. *Id.*
68. CRS § 43-1-208.
69. CRS § 43-1-203.
70. *Stapleton, supra* note 63 at 938.
71. *Id.* at 948.
72. *Shaklee, supra* note 33 at 315.
73. *Id.* at 315-16.
74. *Id.* at 317-18. This principle has been statutorily overriden by the General Assembly by H.B. 1411, amending CRS § 38-1-101(1)(b)(I), which now places on the condemning entity the burden of proof, by a preponderance of the evidence, that the taking of private property is for a public use. CRS § 38-1-101(2)(b).
75. *Shaklee, supra* note 33 at 318.
76. *Id.* at 318, *citing* Sackman, *supra* note 29 at § 7.55[3].
77. *Id.* at 318.
78. *Id.* at 319.
79. *Id.*
80. *Id.*, *citing* Sackman, *supra* note 29 at § 7.08(5).
81. *Geudner, supra* note 38 at 435.
82. *Id.*
83. *Id.*
84. *Id.* at 435-36.
85. *Id.* at 436.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Eat Out, Inc., supra* note 38 at 1142.
93. *Id.*
94. *Id.* at 1144.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*; *Geudner, supra* note 38 at 436; *Thornton Dev. Auth. v. Upah*, 640 F.Supp. 1071 (D.Colo. 1986).
100. *Eat Out, Inc., supra* note 38 at 1144.
101. *Id.* ■