Jeff Benedict’s *The Little Pink House*: The Back Story of the Kelo Case, a book review (Forthcoming in 42 CONN. L. REV. (February 2010))

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Jeff Benedict’s *The Little Pink House*:
The Back Story of the Kelo Case
Book Review by George Lefcoe

Little Pink House is a fast paced account by Jeff Benedict of the events surrounding the 2005 U.S. Supreme Court decision in *Kelo v. City of New London*. Along with tracking Benedict’s story line, this review also highlights some of the core legal and policy issues that are an important part of the story for law-trained readers.

At the core of the tale is how Kelo and a handful of her neighbors challenged the New London Development Corporation’s (NLDC) use of eminent domain for the economic redevelopment of the Fort Trumbull neighborhood. A libertarian-inspired public interest law firm named the Institute for Justice (IJ) agreed to represent the beleaguered property owners. IJ challenged the notion that economic development could be regarded as a public use. IJ also unfurled an effective national public relations campaign against what it dubs eminent domain abuse. Benedict gives us front row seats to see how the media drama unfolded.

IJ lost the Kelo case in the Connecticut and US Supreme Courts. A majority of judges in both courts flatly rejected IJ’s contention that takings for economic development weren’t for a public use. Benedict offers enough detail for us to envision the Fort Trumbull area before-and-after the contested public intervention. The industrial remediation effort lead to a broadened job base, and opened stunning waterfront vistas, from the vantage of a new state park, a rehabilitated fort and a seaside promenade.

Though losing in the courts, IJ triumphed in the court of public opinion. In the end Kelo and the other plaintiffs had no choice but to sell and move on. But they didn’t have to leave peaceably. To head off the spectacle of the sheriff forcibly evicting the holdouts in front of a national news audience, the Governor of Connecticut negotiated outsized cash pay outs. This troubled many New London city officials who didn’t believe the hold outs meritied being compensated more lavishly than the overwhelming majority of Fort Trumbull property owners who had settled voluntarily for sums in line with prevailing norms for measuring ‘just compensation’.
Jeff Benedict’s _The Little Pink House:_

The Back Story of the Kelo Case

Book Review by George Lefcoe¹

_The Basic Story Line._ Little Pink House is an engaging account by nonfiction writer Jeff Benedict of the events surrounding the 2005 U.S. Supreme Court decision in _Kelo v. City of New London._ Jeff Benedict sets out to tell “the stirring story behind what drove Kelo—a divorced nurse—to take on a powerful governor, a billion-dollar corporation, and a hard-charging development agency to save her pink cottage is a hidden drama that begs to be exposed.”² Though Jeff Benedict has a law degree, he isn’t a practicing lawyer and touches only lightly on the legal and policy issues of the Kelo case. Instead, he offers a gripping account of the behind-the-scenes maneuvering in the case from start to finish.

This review traces Benedict’s account. He briskly depicts Susette Kelo’s determined resistance to being displaced, and recounts the efforts of New London’s civic leadership to lift one of the city’s most distressed neighborhoods out of the economic doldrums. Benedict’s sympathies reside entirely with Kelo against New London’s political establishment. He lauds the efforts of Kelo’s attorneys to save her home from eminent domain, and endorses the opinion of dissenting Supreme Court Justice O’Connor’s,³ while barely mentioning the majority holding of the U.S. Supreme Court and its bearing on New London’s aspirations.

At the core of the tale is how a libertarian-inspired public interest law firm named the Institute for Justice (IJ) agreed to represent a small band of beleaguered property owners, challenged the New London Development Corporation’s (NLDC) use of eminent domain for the economic redevelopment of the Fort Trumbull neighborhood, and overwhelmed NLDC with a blistering public relations campaign. The IJ’s media message portrays heartless government bureaucrats flouting the constitution’s “public use” requirement by condemning private homes and small businesses for the benefit of greedy private developers and big corporations.⁴

IJ chose Kelo as its lead plaintiff. Instead of listing alphabetically all the parties it represents in a particular lawsuit, as do most litigators, the IJ carefully selects the first party to be named in each of its cases with an eye to the lead plaintiff becoming a spokesperson for the case and the property

¹ _Little Pink House_, p. ix.

² _Little Pink House_, p. ix-x.

rights cause. Kelo proved to be an excellent choice, a strong-willed home owner who became a convincing national advocate for property rights.

Benedict carefully traces how Kelo’s house ended up in condemnation. The saga began with a decision taken by the then governor of Connecticut, John G. Rowland—a Republican, to woo traditionally Democratic voters by offering massive state funding to jump start economic development projects in working class towns suffering high unemployment rates and declining property tax rolls. New London was one of those towns that needed a boost. Contributing to New London’s job losses, the Navy had a big payroll there until Congress shuttered the local naval underwater research center in 1996. After that, “the [Fort Trumbull] neighborhood began to resemble a ghost town.”

As part of its politically wrenching, cost-cutting base closure moves, Congress urged communities across the country to replace lost military jobs by stimulating new economic redevelopment. Governor Rowland and his advisors decided to do that. To spearhead the revitalization program, Governor Rowland resuscitated the long moribund quasi-public, non-profit New London Development Corporation (NLDC). He could have chosen to funnel state funds through the city’s redevelopment agency but preferred to work with an entity not beholden to New London’s Democratic party leaders. As chair of NLDC’s volunteer board, the Governor designated the nationally respected scholar Claire Guadiani. At the time, Guadiani was President of prestigious Connecticut College. NLDC’s mission could be described as converting a 19th century industrial wasteland into a place that would appeal to firms employing “knowledge workers”—scientists and engineers, artists and writers, professionals and managers—an ensemble dubbed the ‘creative classes’

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5 LITTLE PINK HOUSE, p. 200.

6 LITTLE PINK HOUSE, p. 9; By July, 2004, months before the U.S. Supreme Court would agree to hear the Kelo case, federal prosecutors would indict Governor Rowland on corruption charges for which he would be sentenced to serve a year and a day. He resigned as governor just before the indictment and was promptly replaced by then Lieutenant Governor Jodi Rell. LITTLE PINK HOUSE, p. 299-300, 376.


8 LITTLE PINK HOUSE, p. 16

9 Congress authorized the Department of Defense to close and realign bases. 10 U.S.C. § 2687; At the same time, the Department of Defense was authorized to encourage and assist localities impacted by closures to seize the opportunity and replace lost jobs and local tax revenues through vigorous economic redevelopment. See generally Tadlock Cowan and Baird Webel, Military Base Closure: Socioeconomic Impacts, Congressional Research Service, Report for Congress, May 18, 2005, http://www.fas.org/sgp/crs/natsec/RS22147.pdf.

10 In Connecticut, state funds can be funneled to municipalities through one of two statutory vehicles: economic development (Municipal Development Project) Chapter 132 or redevelopment (Redevelopment and Urban Renewal), Chapter 130. Governor Rowland chose the former because once a city forms a non profit economic development corporation, its board is self-perpetuating. Practically, this meant that the governor would be able to designate the board of the New London Development Corporation, and not the New London city council. Had the governor proceeded under chapter 132, the New London city council would have been entitled to designate the agency and name the individuals in charge of the redevelopment effort.
of the 21st century.11

IJ represented only seven of the 70 persons who had held title to Fort Trumbull’s privately owned properties.12 Most of the other owners negotiated an agreed price based on two or more independent certified real estate appraisals.13 IJ’s goal was not to obtain the most money for their clients from the condemnor but to resist the condemnation and enable their clients to reclaim title to their homes and rental properties.

Under Connecticut law, these holdouts might have been summarily evicted once the NLDC started the process by filing with the clerk of the superior court a statement of compensation advising the owners what NLDC believed their properties to be worth, and deposited that sum with the court.14 Shortly thereafter, by operation of law legal title shifts to the condemnor unless the property owner goes to court to halt and unravel the process. That is what IJ lawyers Scott Bullock and Dana Berliner had to do. They managed adroitly to keep their clients in place during the ensuing five years of litigation.

Eventually, the Institute for Justice won a partial trial court victory for some of its clients. Had no one appealed the judgment, Kelo and some of the other plaintiffs could have reclaimed title and stayed put. Instead, IJ appealed and lost, 4-3 in the Connecticut Supreme Court and 5-4 in the U.S. Supreme Court.

Litigating in the Court of Public Opinion. Though the IJ lawyers were rebuffed in the Connecticut and US Supreme Court, they decisively crushed the NLDC in the court of public opinion. Public disapproval of the Kelo ruling ran 80-90%.15 Media relations is very important to IJ. The

11 “The vast majority of the properties were acquired in a friendly way.” Email to author from John Brooks, Executive Director of the NLDC (July 21, 2009, 13:27 PST)(on file with author).

12 Of the six other owners, one had filed bankruptcy and had a limited financial stake in the outcome, three were not residents of Fort Trumbull when NLDC initiated its acquisition effort, title to one property was held by a construction company, and two separate landlords held title to a majority of the properties at stake. Kelo v. City of New London, 268 Conn. 1, 5, Footnote 2 (2004)(listing the names of the plaintiffs, including Pataya Construction Limited Partnership instead of Rich Beyer and Thelma Brelesky instead of Byron Athenian); John Brooks & William Busch, Perception v. Reality: A Commentary on Media Bias and Eminent Domain, p. 20-21, Right of Way Magazine, May/June 2008.

13 “The condemning authority must file a statement of compensation containing (1) a description of the condemned property, (2) the names of all persons having a record interest in the property, and (3) a statement of the amount of compensation which the authority has determined will be paid for the property. The statement must be filed in the superior court clerk's office in the judicial district where the property is located, together with a deposit of the amount stated as compensation. Immediately after filing this statement of compensation, the condemning authority must record it in the town clerk's office of each town in which the property is located. The recorded statement acts as a lis pendens.” 3 Conn. Prac., Civil Practice Forms Form 404.1 (4th ed.2005); Unless the property owner files suit challenging the taking or the proferred compensation, the condemnor has the right to immediate possession. Redevelopment Agency of City of Norwalk v. Norwalk Aluminum Foundry Corp., 155 Conn. 397, 233 A.2d 1 (Conn. 1967) (Condemnor has right to deduct from price paid the value of occupancy from the date the condemnor first had the right to immediate possession, following its service of a notice to quit upon the condemnee.)

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Institute’s business model depends on public awareness of its accomplishments to draw donors to support its mission.

One of the first people the IJ founders hired was a full time public relations expert, John E. Kramer. 16 Kramer knows how IJ works, has spent years nurturing his list of media contacts, and possesses an impressive talent for telling the IJ story in a crisp and convincing way. 17

IJ lawyers routinely and enthusiastically contribute to the public relations effort. So, for instance, immediately upon agreeing to represent Kelo and her neighbors, Bullock and Berliner formulated this game plan:

- Draft the legal complaint
- Develop a background paper on the case, discussing the case history and the plaintiffs’ background.
- Generate a media advisory.
- Produce a news release for distribution on the day the lawsuit would be filed.
- Plan an event in New London to accompany the filing. 18

IJ won the media contest by default. Tom Londregan, New London’s long time city attorney (who had never heard of the Institute for Justice before this case arose) resolved to fight the case only in court, not on the courthouse steps. “I’m not used to competing in the media,” Londregan said later. “I’m just used to going to court and arguing a case. We are such novices in the media-relations business that we never got our story out to the public.” 19

Londregan concedes this was a big mistake. Too late, he learned that a victory in court can prove worthless when offset by a decisive defeat in the court of public opinion. 20 The public outcry led to changes in eminent domain laws across the country. 21 For the litigants, the consequences were

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18 LITTLE PINK HOUSE, p. 205-206.

19 LITTLE PINK HOUSE, p. 271.


up close and personal. After the city finally prevailed in court and established its right to take the IJ plaintiffs’ properties by eminent domain, the mayor and city council were poised to press their victory and take possession of the holdouts’ properties, forcibly if necessary. But the Governor of Connecticut intervened to avoid a media free-for-all eviction show down. In a series of vigorously negotiated settlements, the Governor agreed to pay the holdouts far more money than most other Fort Trumbull property owners had received, on the understanding they would move out peaceably. 22 Earlier, the U.S. Coast Guard walked away from Parcel 4A (the situs of the Kelo house) as the location for a national Coast Guard Museum to escape any political fall out from the nationwide eminent domain protests. 23 The well publicized eminent domain controversy may have stigmatized Parcel 4A for other potential developers as well.24

This experience has turned Londregan around on the topic of litigation public relations. Had he to do it again, he says the first person he would add to his firm’s roster would be “not another appellate lawyer, not a paralegal, not an associate, but a media relations specialist.”25

Finding a qualified specialist in litigation public relations is seldom easy. Good sales people need to understand what they are selling and few PR specialists know much about law or legal proceedings. The revenue tends to ebb-and-flow, and therefore can be difficult to predict for budgeting purposes at a large PR firm. The senior-level nature of the work, with its complexity, doesn't fit well with most PR firms, where the senior executives sell the business and junior people actually do the work.26

How IJ’s Representation Differs From That of Other Eminent Domain Lawyers. In most cities, including New London, attorneys who specialize exclusively in eminent domain stand ready to represent property owners about to be shortchanged by a government’s last best offer. These attorneys work on contingent fees, customarily pocketing between twenty and fifty percent of the difference between the agency’s highest offer and the sum eventually paid–including statutory relocation benefits.27 Of course, eminent domain attorneys working on contingent fees won’t take a

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22 See footnote 99 for a list of the properties involved, the NLDC appraised value in 2000 and the price paid in 2006, adjusted for inflation.


24 Interview of Tom Londregan by author in New London, 06/01/09.

25 Email to author from Jim Haggerty, 07/23/09.

26 Patrick J. Rohan & Melvin A. Reskin, 8A Nichols on Eminent Domain § 15.06[3] (3d ed. 2003) (“[T]he [contingent] fee is determined by a percentage of the total recovery (usually between three percent and ten percent) or a percentage of the difference between the final award and the initial offer to the client (usually between twenty percent and thirty-three and a third percent.”); Boston and Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A., 778 F.2d 890, 892 (Mass.1985) (“According to Sheehan's undisputed testimony before the district court, the customary fee among New Hampshire attorneys for representation of compensation disputes in eminent domain cases is 50% of the amount recovered in excess of the commission's tender deposit.”); Gideon Kanner, Recent Developments in Eminent Domain, SF54 ALI-ABA 1,22 (“It is customary in eminent domain cases that condemnees' lawyers are compensated on a contingent fee basis, often one-third of the overage over and above the condemnor's first offer, though other
case unless, based on their own appraisers’ estimates, they believe the owner’s just claim exceeds the agency’s best offer by a large enough sum to make the case worthwhile for them.

The condemnation bar serves well the many realty and business owners who have no problem with their properties being acquired by eminent domain as long as the price is right. Governments are all cash buyers; their purchases aren’t contingent on mortgage financing.28 Also, sellers whose property is taken in eminent domain, real or threatened, can reinvest the sales proceeds free of federal capital gains tax.29 Home owners, too, sometimes welcome governments as buyers. Some were going to move sooner or later in any event. (Approximately 12% of the population moved between 2006 and 2007;30 US homeowners’ median stay in the same residence is 8.2 years.31)

Though Benedict writes that the Fort Trumbull property owners had difficulty finding counsel to represent them,32 he doesn’t mention the cases of the three Fort Trumbull owners who sued NLDC for more money. Two of them struck out; the court found that the NLDC had proffered adequate compensation. The third challenger won an increased award based on a legitimate element of value the NLDC’s appraisers had overlooked.33

The Institute for Justice agenda isn’t about securing ‘just compensation’ for their clients. IJ lawyers work tirelessly to keep their clients in their homes and small businesses. Unless they drop their cases mid-stream, IJ clients pay no legal fees. For IJ attorney Scott Bullock, the ‘come to Jesus’ moment arrives when the condemnor starts waving more money in front of his clients.34 He demands an ironclad promise they won’t capitulate.

Benedict reports how IJ’s founder and president, Chip Mellor, envisioned the organization’s mission. “The concept behind the Institute for Justice was the notion of entrepreneurial lawyering at no charge to the clients. There were no contingency-fee cases either. All of the institute’s funding

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28 Government entities must deposit with the court the estimated value of property it purports to take through eminent domain. See 3 Nichols Cyclopedia of Federal Procedure Forms § 109.11. “Rule 71.1 requires the plaintiff to deposit with the court any money required by law as a condition to the exercise of the power of eminent domain and provides for distribution of the money so deposited and judgment for any deficiency or overpayment.”


32 Little Pink House, p. 153.

33 Email to author from John Brooks, Executive Director of the NLDC (July 21, 2009, 13:27 PST)(on file with author): “There were three former property owners who sued regarding valuation. Of the three who sued, Foss (commercial warehouse building) and Picinich (non-resident landlord of 2-family house on Howard Street) received no additional compensation. Renshaw owned several vacant lots, a rental house and a small warehouse - all on separate but contiguous tax lots . He was awarded assemblage value for his property. The City/NLDC’s eminent domain compensation had been based on the appraisal of each lot individually.”

34 Little Pink House, p. 169.
came from private donors. To Mellor, litigation was always about much more than winning a single case. In his world, cases had to be platforms for a cause that went beyond any one individual.”

“We don’t negotiate property sales for our clients. That’s just not what we do. We fight to protect people’s property.”

To advance the cause by assisting property owners to resist eminent domain abuse and raise funds from the general public for the effort, IJ formed the “Castle Coalition” in 2005, a “nationwide grassroots property rights activism project.”

In situations where condemnors forfeit the right to use eminent domain due to their disregard of proper procedures, acting beyond their statutory authority or taking property unconstitutionally, the contingency fee lawyer sees these as opportunities for clients to negotiate much higher settlement prices than the customary rules of “just compensation” would normally allow. After all, such clients are freed from having to sell at all. But owners not looking to sell regardless of price, owners who are determined to retain title by overthrowing condemnations predicated on faulty legal underpinnings, must be prepared to shoulder personally the potentially enervating legal costs of suing a public entity. They only save themselves from liability for big legal bills if a public interest firm like IJ comes to their rescue.

Spinning Kelo: Benedict and IJ–Close but Not Identical. Though Benedict embraces the IJ’s David-and-Goliath characterization of the struggle between the Kelo case holdouts and the NLDC, his depiction is necessarily more nuanced than theirs. Benedict’s goal was to write a story that might form the basis of a screen play. Dahlia Lithwick, the New York Times reviewer, put it this way: “The investigative reporter Jeff Benedict has decided to cast Kelo in the style of Julia Roberts as Erin Brockovich.” To be believable, movie characters need to be three dimensional. Their flaws can command the viewer’s attention and empathy. In overcoming their flaws, well-drawn characters give a sense of direction to the story. Actor Christian Bale makes an important point when he explains that an audience doesn’t have to approve of an author’s characters but they have to relate to them.

35 LITTLE PINK HOUSE, p. 199.

36 LITTLE PINK HOUSE, p. 169.


40 Dahlia Lithwick, Driven Out, NEW YORK TIMES, March 12, 2009.


42 Ray Frensham, TEACH YOURSELF SCREEN WRITING, p. 89 (2008). Mr. Frensham quotes Kingsley Amis: “Take one aspect of your own [writer’s] character that you are not particularly proud of and explore that, push the envelope to the limit.”

Dislikable characters can enliven a script as long as they possess at least one redeeming characteristic (remember The Talented Mr. Ripley?).\(^{44}\)

The challenge for public interest lawyers is to shake individuals “away from their ordinary state of passivity and to act collectively.” Public interest advocates need to “single out an existing social condition and redefine as unjust what was previously viewed as unfortunate, yet tolerable.”\(^{45}\) They need to engage in framing—\textit{naming} the problem, \textit{blaming} someone for it and \textit{claiming} a solution for the perceived grievance.\(^ {46}\)

Consistent with the technique of naming, blaming and claiming, when Chip Mellor founded the IJ in 1991, “he developed a simple formula for selecting cases: (1) sympathetic clients; (2) outrageous facts and (3) evil villains.”\(^ {47}\) He avoids nuances or complexities that would distract from the clarity of IJ’s vigorous media message, its dedication to protect property owners from their property being taken to benefit other private owners.

Litigation public relations expert and practicing attorney James Haggerty would endorse Chip Mellor’s approach. Haggerty advises clients to:

- Shed the layers of complexity that often envelop your particular legal issue.
- Refrain from qualifying, differentiating, or otherwise anticipating and refuting opposing arguments.
- Lead with your conclusion, not with your factual argument.\(^ {48}\)

The differences between what it takes to write a good screenplay and how public interest lawyers need to depict events becomes clear when we compare the disparate ways Benedict and IJ characterized the Fort Trumbull area before and after NLDC’s intervention.

\textit{Fort Trumbull Before}. To IJ’s Bullock who had grown up “in the economically devastated Pittsburgh of the seventies and eighties,” the Fort Trumbull neighborhood “didn’t look depressed to him.”\(^ {49}\) An IJ summary asserts: “The richness and vibrancy of this neighborhood reflects the American ideal of community and the dream of homeownership.”\(^ {50}\)

By contrast, Benedict describes the neighborhood’s “tough appearance”: a hodgepodge of industrial properties, warehouses, and old, small houses, the Fort Trumbull neighborhood was cut off

\(^{44}\) Ray Frensham, \textit{Teach Yourself Screen Writing}, p. 91 (2008).


\(^{47}\) Little Pink House, p. 199.

\(^{48}\) James Haggerty, \textit{In the Court of Public Opinion}, p 77-78 (2003).

\(^{49}\) Little Pink House, p. 166.

from the rest of New London, sandwiched between the Amtrak rail lines on the west and the abandoned underwater research facility on the north."\

51 Fort Trumbull was only a block from a smelly sewage treatment plant “which essentially consisted of some oversized cesspools”, 52 in one of New London’s scruffier locales, zoned industrial since 1928. 53

To the NLDC staff, Fort Trumbull had always been on the wrong side of the tracks, contained relatively few homes and businesses, and many unpleasant uses that needed to be cleaned up. NLDC officials adamantly disputed intimations by the opposition that Kelo and her neighbors were going to be displaced to make way for high end condos. “The Municipal Development Plan never contemplated the Kelo block being reused for housing in part because it was just across the street from the sewage treatment plant.”\

54 In 1998 a nationally renowned engineering firm worked on both the Environmental Impact Evaluation and the NLDC’s re-use plan for the area. It found that many properties suffered from deferred maintenance, “less than 12% of residential buildings in the MDP area are considered in average or better condition…30% are in poor condition. As of February 19, 1999, 67 of the 115 dwelling units in the MDP (municipal development plan) area were occupied. Of these, only 15 were owner-occupied, with the remaining 52 renter occupied. [Regarding the availability of replacement properties] a review of published real estate listings in New London showed 19 homes for sale under $70,000, and 23 homes for sale between $70,000 and $90,000.”\

55 *Fort Trumbull After NLDC.* The individual who deserves credit for doing the most to turn around the area was NLDC Board chair Claire Guadiani.

IJ’s Bullock dismisses Claire Gaudiani as “almost a parody of a condescending, collectivist academic.”

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51 Little Pink House, p. 15.

52 LITTLE PINK HOUSE, at p. 32-33.

53 Early zoning laws established a pyramid of uses rooted in 19th century notions of nuisance law. Homes were protected by ‘residential’ zoning. Houses could be built in commercial (e.g., retail) zones, the center of the hypothetical zoning pyramid. The least protected areas were zoned industrial. There, property owners could build virtually anything. Poorly paid workers inhabited houses and trailers located in industrial zones from which they could walk to work if they were fortunate enough to find a job in the area. Early zoning’s reliance on cumulative zoning resulted in industrial zones becoming community ‘garbage pails’ for all the uses that couldn’t qualify for placement in ‘higher’ zones, including residential uses such as trailer parks. Richard Babcock, *THE ZONING GAME* 127 (1965); Later, many localities revised their ordinances by establishing purely industrial zones once they discovered that housing and commercial uses made an area unattractive to operators of prime industrial facilities. “Generally, noncumulative zoning ordinances have replaced cumulative zoning ordinances, reflecting changed beliefs about compatibility.” Oh. Plan. & Zoning L. § 8:39 (2009). New London never did this in the Fort Trumbull area.

54 Email to author from John Brooks, Executive Director of the NLDC (July 21, 2009 13:27 PST)(on file with author).

55 Letter: “Selection of a Rationale for the Preferred Alternative”, pg. 8-9, Appendix A to MDP,2/26/99 (on file with NLDC). Email to author from John Brooks, Executive Director of the NLDC (July 21, 2009 13:27 PST).

Benedict depicts Gaudiani as a worthy screenplay antagonist for Kelo. He describes Gaudiani as ambitious, focused, and intense,\(^5^7\) attractive, and sometimes seductive, with more than a touch of arrogance.\(^5^8\) “One of themes that emerges is the conflict between two remarkably strong women, the glamorous, accomplished, imperious Gaudiani and nurse/homeowner Susette Kelo, a divorced woman from a hardscrabble background who had gone through much to buy her "little pink house" and would not leave it.”\(^5^9\)

Perhaps the most significant difference between Benedict’s account and the IJ’s is that Benedict acknowledges the importance of Pfizer’s decision to build its impressive office and research facility in New London, and the key role of Claire Guadiani in negotiating the deal between Governor Rowland and the pharmaceutical firm. A Hartford Courant reviewer of Benedict’s book summarized Gaudiani’s accomplishment well: “Getting Pfizer to commit to build a $300 million complex on a brownfield next to a junkyard and a sewage treatment plant might have qualified for the Nobel Prize in economic development, were there one.”\(^6^0\) As a result of this single transaction, Pfizer New London would bring 2,000 new jobs to more than offset the 1,500 jobs that had been lost to the naval base closure.\(^6^1\)

As part of its agreement with Pfizer and NLDC, the state agreed to pay for cleaning up the New London Mills property—“piles of rubble atop land contaminated with all sorts of industrial pollutants.”\(^6^2\) This abandoned site is where Pfizer’s sparkling new research and development laboratory would be built.\(^6^3\) Using the NLDC as its conduit, the governor extended additional millions in state funds to cap the cesspools at the sewage treatment plant so as to eliminate the sickening odors, to buy out the owner of the adjoining scrap metal yard, widen the area’s narrow roads, install sidewalks, rejuvenate Fort Trumbull State Park and refurbish Fort Trumbull itself, a structure that had been allowed to sink into great disrepair, becoming a ‘decaying fortress’.\(^6^4\)

\(^{57}\) Little Pink House at p. 35.

\(^{58}\) Little Pink House, 219.


\(^{60}\) Tom Condon, *Kelo Case A Planning Failure*, Hartford Courant, February 1, 2009, http://www.istockanalyst.com/article/viewiStockNews/articleid/2999174. Though Condon admires Guadiani’s achievement in landing Pfizer, he faults “Gaudiani, city officials and their state backers” for trying to “double down on the Pfizer investment by clearing and developing the 90-acre peninsula that adjoins the facility” and not trying to preserve the houses as part of a mixed use project. Instead, they went for a ‘scorched earth’ policy, a “throwback to 1950s-1970s urban renewal projects, almost all failures (including, Benedict might have pointed out, a large project in downtown New London).”


\(^{62}\) Little Pink House, p.23.

\(^{63}\) Little Pink House, p. 56.

\(^{64}\) Little Pink House, p. 14.
IJ realized that none of the condemnations were for Pfizer’s direct use. But in order to conjure up an evil villain, it cast Pfizer as the great behind-the-scenes manipulator instead of as a concerned corporate citizen, eager to secure the best possible environment for its employees. In this situation, improving the urban environment in ways that would benefit Pfizer also produced benefits for New London residents in general.\(^\text{65}\) Besides the indirect benefits of jobs and an increased tax base, John Brooks lists the public benefits:

The plan involved acquisition of significant fallow land including a closed railroad yard and former oil terminal, removal of the obsolete buildings especially on the closed Navy base, remediation of the soil (costing more than $25 million), and installation of significant new public infrastructure to the area ($15 million in new streets, sidewalks and utilities). It also included public amenities, such as the creation of a new state park around the historic Fort Trumbull (state investment of more than $25 million), and a new public access waterfront walkway to enhance the redevelopment area.\(^\text{66}\)

Residents and visitors can now enjoy the stunning waterfront from the newly refurbished Fort Trumbull and Fort Trumbull State Park.

These public benefits are of great legal significance. An economic development project qualifies as a public use even if it benefits private firms or individuals as long as the main beneficiaries are the general public,\(^\text{67}\) and in the Fort Trumbull project the U.S. Supreme Court identified public benefits galore.\(^\text{68}\)

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\(^{65}\) “The trial court’s memorandum of decision, however, reveals that, although a great deal of consideration was given to the various demands and needs created by the new Pfizer facility, this consideration was given for the purpose of making the development plan more beneficial to the city.” Kelo v. City of New London, 268 Conn. 1, 57, 843 A. 2d 500 (2004).


\(^{67}\) “Thus, we conclude that an exercise of the eminent domain power would be an unreasonable violation of the public use clause if the facts and circumstances of the particular case reveal that the taking was primarily intended to benefit a private party, rather than primarily to benefit the public.” See Katz v. Brandon, supra, 156 Conn. 534 (“there is nothing in the record to indicate that any conveyance of land has been made to [a manufacturing corporation] or that any agreement or understanding exists which would provide it with any advantage which is not available to others who may be interested as redevelopers”); Bugryn v. Bristol, supra, 63 Conn. App. 104 (“even if the taking [for an industrial park, an undisputed public use] would later provide a site for [a major local company], a consequence that would be neither undesirable to the defendants nor adverse to the goals that the park plan seeks to achieve, that fact would not support the plaintiffs’ claim [of private taking] in light of the ample evidence in the record concerning the plan as a whole”). Kelo v. City of New London, 268 Conn. 1, 62-64 (Conn. 2004).

\(^{68}\) “The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in Berman, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.” Kelo v. City of New London, 545 U.S. 469, 483-84 (2005).
Exhibit 1 depicts the disputed parcels at the time of US Supreme Court decision. The Pfizer buildings are at the bottom of the picture, six white office structures. In the center right hand portion of the photo is Fort Trumbull and the Fort Trumbull State Park. Notice the new waterfront walk. Just to the left of the Fort Trumbull parking lot is Parcel 4 A( the block containing the Kelo, Von Winkle and Dery properties), wedged between the Fort and the sewage treatment plant. Parcel 3 (Beyer–Pattaya Construction, Cristofaro, and Athenian-Brelevsky) lies above the center of the plant on the other side of the road, the parcel with small buildings barely visible on it.
Exhibit 2 shows the site as it looked in October, 2008. Most of the structures have been removed from parcels 3 and 4A. The stand-alone building in the center of the photo is 1 Chelsea Street, formerly part of the US Naval Undersea Warfare Center. Boston-based redevelopers, Corcoran Jennison, spent $24,000,000 refurbishing this 88,000 square foot property, and have successfully leased it mostly as a research and development center. About 160 persons work there.

Property Taxes from the Fort Trumbull Area Then and Now. In 2000, the combined tax assessed value of property within the Fort Trumbull planning area was $10,000,000. By 2009, the total will be approximately $18,500,000. This doesn’t count the millions in property taxes that Pfizer will pay the city of New London on its $300,000,000 facility.

Property taxes matter a lot in Connecticut, covering about 70% of local government expenditures. Each of Connecticut’s 169 towns and cities levies property taxes to cover its budget.

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Taxed assets include all types of realty and certain items of personal property. Assessed values are supposed to be 70% of fair market value, based on periodic re-appraisals.\footnote{C.G.S.A. 12-62 (b)(1): “...each town shall implement a revaluation not later than the first day of October that follows, by five years, the October first assessment date on which the town’s previous revaluation became effective.”}

To raise enough taxes to cover their projected expenses, cities and towns divide their budget by the total of assessed values on their Grand List to come up with a tax rate in mills. A mil is one thousandth of a dollar. To support budgeted expenditures of $50,000,000 from $2.5 billion in assessed values, a city would have to levy a milage rate of 20. Taxed at a milage rate of 20, a home valued at $500,000 would be subject to a tax of $10,000.

Towns rich in property values levy lower tax rates than poorer locales. For instance, the milage rate in modest Waterbury is 40 while wealthy New Canaan’s is less than 10.\footnote{1000 Friends of Connecticut Blog, The Property Tax (1): The Basics, January 27, 2009. http://1000friends-ct.blogspot.com/2009/01/property-tax-i-basics.html.} “Living in the inner cities, the poorest places in the state, is much more expensive due to the very high taxes.” Understandably, financially strapped cities endeavor to build up their property tax bases as best they can with new construction.\footnote{Bullock made this argument before the U.S. Supreme Court but Wes Horton notes that “Justice Scalia gave Scott a particularly hard time on that: Why do you want us to get involved in deciding whether it is going to work or not?” Interview by Dwight Merriam and Mary Massaron Ross with Wes Horton and Scott Bullock, EMINENT DOMAIN USE & ABUSE: KELO IN CONTEXT § 12: A Discussion with the Advocates (2006).}

The Development in Fort Trumbull’s Future. As IJ reminds us, the contested parcels remain vacant in New London and there are no immediate takers in sight.\footnote{Jerry Ostermiller, director of the U.S. Coast Guard Museum to be built in Fort Trumbull addressed the Friends of Fort Trumbull, June 25, 2009. “The Museum’s objective will be to educate visitors about the extensive contributions the Coast Guard has made to provide security and to save lives.” Mr. Ostermiller is responsible for museum programming, internal infrastructure, and fund raising efforts for the construction of the country’s newest national museum. http://zip06.theday.com/events/eventpost.aspx?PostID=21723. Posted by Friends of Fort Trumbull on May 11, 2009, 12:16 PM.} Those vacant parcels don’t look that bad to anyone who accepts Londregan’s explanation for older cities to be able to use eminent domain for economic development. “Eminent domain gave cities a chance to compete with suburbia” by assembling large tracts of land for redevelopment from many previously subdivided little plots. How else were cities to find the tax base to support affordable housing, tax exempt schools, churches and government offices, social programs, mental health clinics, and the homeless?\footnote{LITTLE PINK HOUSE, p. 50.} At least in this instance, NLDC has assembled and cleared a few well located sites that will be ready for development when the real estate market rebounds.

Planning continues for the location of the U.S. Coast Guard Museum in Fort Trumbull.\footnote{Planning continues for the location of the U.S. Coast Guard Museum in Fort Trumbull. John Brooks reports that plans are also advancing for a hotel catering to regional conventions and tourists. Standing on the site where Kelo’s little pink house once stood, on a bright blue day in June 2009 it}
is easy to imagine that, once the economy recovers and hotel financing revives. Meanwhile, environmentalists will be cheered to know that the grasslands rising on Fort Trumbull’s vacant sites offer a much needed habitat to species of migratory birds and other wildlife that development has driven out of most parts of New London.77

*The Debate About the Proper Place of Local Governments in Land Development.* A topic Benedict never reaches but one which lies just beneath the surface in all the IJ’s endeavors is whether local governments should dictate the parameters of land development within their boundaries. Libertarians tend to believe that local governments should confine their involvement in land development to building roads, schools and other traditional ‘public uses’, reserve their redevelopment powers, if such powers can be exercised at all, to the elimination of the most deeply blighted properties that can’t be improved any other way, and restrict zoning and other land use controls to reconciling potential incompatibilities among adjoining private property owners.78 Libertarians tend to share the late Jane Jacobs’ view that “planning a successful downtown redevelopment, or housing and parks and a successful neighborhood, wasn’t really possible at all—that cities and city neighborhoods had an organic structure of their own that couldn’t be produced at a drafting table.”79

The contrary view starts with the premise that an essential role of effective government is to supply the framework within which urban development takes place, a robust infrastructure—transportation networks, schools, libraries, parks, bridges, and public buildings. Making the most efficient use of public infrastructure investments and implementing broad environmental and land use policies argues against leaving solely to private developers final decisions about the optimal use of land. A city’s development, appearance and destiny should not rest entirely on the vagaries of fluctuating real estate markets, transitory private developers and individual property owners more focused on their short term interests than the city’s long term viability, sustainability and appeal.80 Governments need to rationalize the connections between the location and density of land uses within a community and the placement and quality of infrastructure.81 Lately, public land use policies have favored smart growth—mixed land uses, increased densities, and transit oriented redevelopment.82

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Abraham Bell & Gideon Parchomovsky, *Essay: The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1413 (2006)(“To libertarians, then, Kelo constitutes a judicial endorsement of massive government intervention in the private property market. In their view, this intervention extends well beyond the narrow need to supply public goods, and permits government to second-guess private owners’ autonomy in deciding how to develop their property and when to transfer it.”).


82 Alex Iams and Pearl Kaplan, *ECONOMIC DEVELOPMENT and SMART GROWTH* (2006).
Kelo and Just Compensation for the Little Pink House. Benedict promises to tell us what drove Kelo to take on ‘city hall’. He starts by depicting her acquisition of the Little Pink House. Before she acquired it, she had tried to convince her then husband to sell their ranch style home in rural Preston, Connecticut. She sought to tempt him with a property she happened to spot one day, “a house with a private dock” and “a small patch of beach” in a waterfront community on the Long Island sound.\(^83\) He wouldn’t budge. The Preston house was 15 minutes from where he worked and the beach house an hour away from his work. “‘I’m going to ask you for the last time,’ she said in desperation.” “‘I’m not going to leave Preston,’ he said.”\(^84\)

She finally settled on what became the Little Pink House, 8 East Street, New London, because of its partial waterfront view, and affordability.\(^85\) The house was set on a postage stamp lot little bigger than the house itself.\(^86\) It had two bedrooms upstairs, and a bathroom on each floor.\(^87\)

In the 1980s Avner Gregory, an ardent preservationist, had refurbished the century-old home, and sold it to an investor.\(^88\) Unfortunately, the investor let the house deteriorate, unoccupied. At the time Kelo spotted a broker’s ‘for sale’ sign on the place, the house had lingered on the market for years. The yard was so overgrown with brush and weeds, Kelo had to cut back the overgrowth just to reach the front door.\(^89\)

Kelo was not shy when it came to negotiating the purchase price. The property had been listed at $59,000. Her opening bid was $42,000–$17,000 below list.\(^90\) The owner countered at $59,000. Kelo had been pre-approved for a first-time home buyer’s loan for up to $53,500–and that is the price she agreed to pay–provided the seller reimbursed her for a paint job and closing costs. Her down payment of $2,500, Kelo managed to borrow from a friend.\(^91\)

Kelo cleaned up the overgrown yard, painted the house Odessa Pink (a pinkish salmon color), replaced the curtains and window shades, putted all the nail holes, and stripped and refinished the hardwood floors, painted the molding and stained the stairs.\(^92\)

\(^{81}\) Little Pink House, p. 5.  
\(^{84}\) Little Pink House, p. 5.  
\(^{85}\) Little Pink House, p.5.  
\(^{86}\) Little Pink House, p.14  
\(^{87}\) Little Pink House, p. 12.  
\(^{88}\) Little Pink House, p. 12.  
\(^{89}\) Little Pink House, p. 14.  
\(^{90}\) Little Pink House, p. 14.  
\(^{91}\) Little Pink House, p. 16.  
\(^{92}\) Little Pink House, p. 41.
In 1998 the NLDC offered Kelo $70,000— a $16,000 profit. “Susette balked. ‘Look at this view,’ she said, pointing toward the Thames River. ‘How many people with a $70,000 house have a view like this? If I leave here, where can I go and get the same thing?’”

At times Kelo seems to have been motivated solely by the goal of obtaining sufficient compensation to buy a similar house with a water view. Bethe Dufresne, a writer for The New London Day, claims that she sat at Susette Kelo’s kitchen table only days before IJ agreed to represent the holdouts, while Kelo flipped through real estate ads. Dufresne reports that Kelo seemed willing to consider “a small house in Niantic, with a water view, for a little more than $200,000.” But Susette was distressed because the “NLDC claimed it couldn’t pay enough to replace what she felt she’d be losing.”

“Defining ‘Just Compensation’: Why Courts Tend to Reject Replacement Value As the Norm.” Kelo ran into a familiar brick wall with how courts traditionally have defined “just compensation.” “Current compensation rules exclude whole categories of damages caused by government takings of property.” The Fifth Amendment’s cryptic requirement of ‘just compensation’ prescribes no standard for how to measure value. Courts have equated ‘just compensation’ to the price a willing seller would pay a willing buyer neither under duress to sell or buy, and must often choose between the parties’ rival appraisals. ‘Fair market value’ isn’t the only conceivable standard of ‘just compensation.’ The U.S. Supreme Court identified a competing norm calling for restoration: “the owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.” A ‘restoration measure’ recognizes that there are certain economic costs imposed on condemnees excluded from “fair market value.” In practice, the norm of restoration has generally been subordinated to the market value standard.

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93 Little Pink House, p. 131.


courts are sensitive to issues of horizontal equity—the need to treat all property owners alike. for this reason, ‘just compensation’ isn’t designed to put owners in as good a position as they would have enjoyed had the condemnation not taken place. a standard calling for replacement or restoration almost assuredly would produce differential treatment among owners whose properties were physically comparable, or even identical. one owner may have had the idea of selling anyway and welcomes the government as an all cash buyer. a second owner, a book collector with 4,000 volumes at home, not planning to move anytime soon, might nonetheless be willing if someone paid her library moving costs. a third owner may be so infirm that the move could kill her. she flatly refuses to sell at any price. one price does not really fit all even if a real estate appraiser concluded that each of the three homes had the same value.97

the final settlement with the holdouts. in the end, after the u.s. supreme court decision, the new london mayor and city council wanted to evict the holdouts and pay them on the same basis as other fort trumbull owners. (the mayor received over 4,000 email death threats related to the kelo episode.)98 but the state held the compensation purse strings. benedict reports that then governor rell didn’t agree with the supreme court majority, and worried how it would look, especially to her staunch republican base, to be seen as the one responsible for the sheriff forcibly evicting kelo and the other holdouts.99

bullock skillfully represented the holdouts in a daring “high-stakes game of chicken.”100 he benefitted from the governor’s fear that kelo and the others would defy a court order to vacate, and be seen on national television being dragged from their dwellings by law enforcement officials. but bullock also knew that if he continued haggling to the point of exhausting the governor’s patience, she might just step aside and let new london officials put a harsh end to the caper. under connecticut law, the property had belonged to the state since 2000, and the owners could be held accountable for enormous back taxes, utilities, occupancy fees and any rental income they had collected. in the end, the holdouts were relieved on these obligations and received about twice the year 2000 appraised values.101

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97 these paragraphs are taken from george lefcoe, real estate transactions, finance and development 880, 883 (6th ed., 2009).

98 kathleen edgecomb, nldc officials regret relinquishing power of eminent domain, the new london day, march 5, 2009.

99 little pink house, pp. 363, 366.

100 little pink house, p. 361.

101 below is the list of the nldc appraised values for each of the plaintiffs’ properties. it is followed by a list of these sums adjusted for inflation, and, finally, the sums negotiated in 2006. in addition to the following sums, each plaintiff received between $15,000 and $30,000 in relocation benefits. this information comes directly from nldc files. in 2000, kelo’s property was appraised at $123,000; the dery’s properties were appraised at $506,000; von winkle’s properties were appraised at $768,000; beyer’s properties were appraised at $216,000; the cristofaros’ property was appraised at $150,000; brelesky’s (athenian’s) property was appraised at $88,000; and the gureskys’ property was appraised at $158,000. using an inflation calculator (found at http://www.bls.gov/data/inflation_calculator.htm.), kelo’s appraisal, adjusted for inflation to 2006 was $144,000; the dery’s was $592,390.24; von winkle’s was $899,121.95; beyer’s was $368,780.49; cristofaro’s was $175,609.76; brelesky’s (athenian’s) was $67,902.44; and guresky’s was $184,975.61. in 2006, kelo settled for $392,000; the derys for $950,000; von winkle for $1,800,000; beyer for $500,000; the cristofaros for $460,000; brelesky (athenian) for $174,652 and the gureskys for $320,884. email to author
Half the money went to two landlords in the group—Beyer and Von Winkle. In 1998 Von Winkle would have taken $700,000. In 2006, he settled for $1,800,000. (As far as I have been able to determine, none of the IJ’s media releases mention this, though Benedict does, and clearly.)

Kelo’s Settlement Aftermath. Kelo was the last to settle. Benedict reports the reason for her finally agreeing to exit Fort Trumbull: “And for the first time, she got a sense of what it would feel like if she prevailed and got to stay in the fort—awfully lonely. The thought of staying behind in an abandoned neighborhood without her friends felt terribly depressing.” Of course, the area had been fairly desolate for the past four years, ever since NLDC demolished the structures on the sites it had acquired earlier.

Kelo agreed in June, 2006, to sell for $442,000, not too bad for a place she had purchased in August, 1997 for $53,500, and the NLDC had appraised for condemnation at $123,000 in November, 2000. She only sold the lot. Avner Gregory relocated the house to a vacant parcel with a pre-existing foundation, in a modest neighborhood several miles away, on the other side of the Amtrak rail line from Fort Trumbull. A plaque identifies the house as THE Little Pink House.

For $224,000 Kelo bought a home with a view comparable to the one she had surrendered, located right across the sound from her Little Pink House, near Fort Griswold in Groton. “She knew it was what she wanted: a little house on a little hill overlooking the water.” She put aside the balance of the money for her five sons. One can imagine this as a happy ending to Benedict’s story; the actress playing Kelo casts a knowing smile, content in her new home.

Despite the windfall, Kelo seems not to be living happily ever after. She proclaimed in the opening line of a speech at an event sponsored January 27, 2009, by the libertarian CATO Institute: “My name is Susette Kelo and the government stole my home.” This statement may strike one as odd. Thieves don’t usually dole out to their victims a bundle of cash exceeding the value of the items

from John Brooks, Executive Director of the NLDC (July 21, 2009, 13:27 PST)(on file with author).

102 LITTLE PINK HOUSE at 102.
103 LITTLE PINK HOUSE at 62.
104 LITTLE PINK HOUSE, p. 369.
105 LITTLE PINK HOUSE, p. 363.
106 LITTLE PINK HOUSE, an aerial taken in 2002 appears just before p. 239.
109 LITTLE PINK HOUSE, p. 374.
110 LITTLE PINK HOUSE, p. 376.
111 Youtube. Susette Kelo Tells Her Story at the CATO Institute, http://www.youtube.com/watch?v=iFdn6BGV1lk.
stolen.  Presumably, Kelo meant to draw attention to her continued belief that NLDC had no lawful right to take her home in the first place.

In 2006, Kelo sent a demonic holiday greeting card depicting a snowy image of the Little Pink House to about 30 public officials who had opposed her: “Your houses, your homes, your family, your friends. May they live in misery that never ends. I curse you all. May you rot in hell. To each of you I send this spell.” Apparently, Kelo resisted the temptation to send the card to the five U.S. Supreme Court justices in the majority. Was she serious? Was this meant as a harmless, mischievous prank? Did losing her home cause her to become unhinged? Was she wacky all along? Is she trying to reclaim the media spotlight now, regretful that her 15 minutes of fame is winding down? Kelo told a reporter: “These people can think what they want of me. I will never, ever forget what they did.”

The Decision to Appeal the Trial Court Decision. Kelo had a chance to keep her house following the state trial court’s decision. The trial judge had ruled for the City of New London on all the constitutional issues but found that NLDC’s vague and contradictory plans for Parcel 4A cast doubt on whether these properties were reasonably necessary for the NLDC to acquire. “The city had failed to specify what it planned to do with all the land beneath the 4A plaintiffs’ properties.” The city’s plans for parcel 3 were clear enough. But the NLDC had designated Parcel 4A for different uses


113 http://lawprofessors.typepad.com/property/2006/12/susette_kelos_h.html. The actual text reads:

Here is my house that you did take
From me to you, this spell I make
Your houses, your homes
Your family, your friends
May they live in misery
That never ends.
I curse you all
May you rot in hell
To each of you
I send this spell
For the rest of your lives
I wish you ill
I send this now
By the power of will


116 LITTLE PINK HOUSE, p. 268.
at different points in time—state park support, marina support, parking,\textsuperscript{117} the U.S. Coast Guard Museum—though a Coast Guard Admiral had written a letter to Kelo stating that the Coast Guard had no interest in placing its museum on that particular parcel.\textsuperscript{118}

The trial court based his decision on lack of reasonable necessity, a challengeable result since most courts leave to legislators decisions concerning public necessity for a taking—which properties to acquire, for what purposes, whether the property taken is actually needed for the project and whether the project is likely to succeed.

Still, if no one appealed the decision, Kelo, Von Winkle and Dery could have retained title to their properties. This could have been deeply disappointing to Billy Van Winkle, a real estate entrepreneur who was eager to cash out—at the right price. Appealing the decision would also benefit IJ’s cause by keeping the case in the news. Matthew Dery’s situation was complicated. His parents owned four units, one occupied by Matt’s family, another by his parents, and three rental units—a duplex and a single family rental.\textsuperscript{119} Matt’s mother, Wilhelmina, resided in the very same house in which she had been born, and where she would pass away at age 88 in 2006.\textsuperscript{120} By not appealing he could be assured of his parents’ undisturbed possession for life. But renting might become a challenge once NLDC cleared Parcel 4A of all other structures except those owned by the three holdouts. For Kelo, this would be her last best chance to hang on to the little pink house, and she let it go.

After the trial court judgment had been handed down, the NLDC executive committee, acting on behalf of the board, voted to "refrain from instituting appeal proceedings in the Institute for Justice case and accept the judgment as rendered in the Superior Court, with the caveat that NLDC will defend its position in appeals initiated by other parties and reserve for future consideration the right to file appropriate cross appeals in such event. Further, that NLDC calls on all other parties to also accept the decision without appeal." Current NLDC executive director John Brooks observes that the NLDC Board was prepared to abandon the use of eminent domain and work around the six parcels and nine buildings on Parcel 4A that the plaintiffs’ owned.

\textsuperscript{117} “At one point it says: ‘A portion of parcel 4A will be redeveloped for uses that support the state park such as parking or for uses such as retail that will serve park visitors and members of the community.’ At another point it says: ‘Parcel 4A is intended to accommodate the development of support facilities for a marina, or a marina training facility, to be developed south on parcel 4B and the Fort Trumbull State Park to the east.’” Kelo v. City of New London, 2002 Conn. Super. LEXIS 789, 224.

\textsuperscript{118} LITTLE PINK HOUSE, p. 187.

\textsuperscript{119} Email to author from John Brooks, 08/06/2009.


\textsuperscript{121} The NLDC executive committee acting on behalf of the board, voted to "refrain from instituting appeal proceedings in the Institute for Justice case and accept the judgment as rendered in the Superior Court, with the caveat that NLDC will defend its position in appeals initiated by other parties and reserve for future consideration the right to file appropriate cross appeals in such event. Further, that NLDC calls on all other parties to also accept the decision without appeal." E-mail from John Brooks, Executive Director of the NLDC (June 03, 2009, 08:12 PST)(on file with author).
In the end, the Parcel 4A plaintiffs took their chances and agreed to join the appeal along with the Parcel 3 plaintiffs out of a feeling of solidarity, and greatly influenced by Bullock’s conviction that NLDC would try to find some way to condemn the properties later.\footnote{122}

The plaintiffs’ mistrust of the NLDC was heightened by a statement that its then executive director Dave Goebel made to a local newspaper columnist that if the corporation couldn’t acquire parcel 4A voluntarily, it might use eminent domain in the future.\footnote{123} Bullock feared that even if NLDC didn’t change its mind and decide to appeal, it might come back with “another developer” to condemn the properties on that parcel.\footnote{124} He used this rationale to advise the plaintiffs to reject the NLDC’s proposal.\footnote{125} But the NLDC would have needed city permission to make this switch and to do it by December 31, 2002, unless that deadline was extended by the City.\footnote{126}

Measured from the trial court decision on March 13, 2002,\footnote{127} the NLDC would have had nine months left before its right to use the power of eminent domain expired.\footnote{128} During this time, the NLDC would have had to identify a convincing use for taking Parcel 4-A and yet it had no potential developer in sight for the parcel. However unlikely it was that the NLDC could push through the amendment process in nine months, the text of the enabling statute left one loophole.\footnote{129} The city council could extend the condemnation deadline if it were prepared to incur the bad press this would entail.

\textit{The Doctrine of Necessity.} In appealing the trial court decision Bullock and Berliner knew they were taking a big chance because the trial court had framed the ruling in their favor on Parcel 4A on two highly questionable legal assumptions. One was the burden of proof. Under Connecticut law the property owner has the burden of proving that the taking was in error.\footnote{130} The trial court had

\footnote{122}“Von Winkle and Dery felt there was no reason to believe the NLDC’s statements anyway. Bullock agreed.” \textit{PINK HOUSE} p. 272.

\footnote{123} \textit{PINK HOUSE} p. 272.

\footnote{124} E-mail from John Brooks, Executive Director of the NLDC (June 03, 2009, 08:12 PST)(on file with author).

\footnote{125} E-mail from John Brooks, Executive Director of the NLDC (June 03, 2009, 08:12 PST)(on file with author); \textit{PINK HOUSE} p. 272.

\footnote{126} “The fact of the matter was that eminent domain expired on December 21, 2002. Unless there was a development agreement signed with the Coast Guard Museum Association prior to that date, there would have been no development meeting Judge Corradino’s test. There was no chance of the CGMA being in a position to sign by then, since they needed to raise money to develop much of the information required. No other option was even close, since that was still intended site for USCG Museum. Once IJ appealed, the 4A litigants (“winners”) refused to consider voluntary sale to a third party (for the purpose of assemblage for USCG Museum), and the wheels were in motion leading to U.S. Supreme Court.” E-mail from John Brooks, Executive Director of the NLDC (June 03, 2009, 08:12 PST)(on file with author).


\footnote{128} E-mail from John Brooks, Executive Director of the NLDC (June 03, 2009, 08:12 PST)(on file with author).

\footnote{129} E-mail from John Brooks, Executive Director of the NLDC (June 10, 2009, 15:53 PST)(on file with author).

\footnote{130} \textit{Kelo v. City of New London}, 268 Conn. 1, 117 (Conn. 2004).
clearly reversed that presumption and placed it on the NLDC. Further, courts rarely second guess legislative determinations that a particular property is necessary for a public purpose. Berliner had reminded Bullock of this when he decided to include a count in his complaint based on the fact that the NLDC didn’t need the properties on parcel 4A to fulfill its municipal development plan. He had added this count because “unlike most of the other parcels within the ninety-acre development area, Parcel 4A had not been designated for any specific construction.”\textsuperscript{131} Predictably, the Connecticut Supreme Court reversed the trial court’s decision regarding Parcel 4A, rejecting the trial court’s opinion on both these points.\textsuperscript{132}

In a recent law review article Professor Robert Bird makes a spirited case for courts to grant limited review of whether particular takings are necessary. The necessity doctrine requires condemnors to “justify a proposed taking as necessary for furthering a proposed public use.”\textsuperscript{133} Necessity challengers have the chance to unmask behind-the-scenes hanky-panky when they depose and cross examine witnesses, probing the reasons for their having selected a particular site, and disputing whether the condemnor’s planned use of a given site advances the taker’s legitimate purposes. To limit the situations in which courts would find themselves in the midst of factual disputes over the necessity of a particular parcel for realization of a government’s redevelopment plans, Professor Bird would reserve judicial scrutiny for challengers prepared to show that other options could have met the condemnor’s goals just as well without the use of eminent domain,\textsuperscript{134} or when plans for the use of the property are so vague and indefinite that a reviewing court cannot figure out whether the taking authority has complied with statutory limits on its ability to take. For instance, under some state redevelopment laws a city can only take an owner’s unblighted realty if the property is essential to the realization of the redevelopment plan. But a court can’t be sure the taking is legitimate unless it knows what the city intends to do with the property.\textsuperscript{135} Similarly, a court may not be able to tell if a project serves a public use unless it knows the precise use intended.\textsuperscript{136}

\textit{The Dispute Among New London’s Attorneys Over How Best to Frame Their Case Before The U.S. Supreme Court.} For Londregan, the trial court’s opinion was particularly distressing. He believed that a project met the constitutional standard of “public use” as long as it conferred substantial public benefits. Meticulously, Londregan had established at trial the sizable ‘public goods’ that the NLDC’s plan had conferred. At trial Londregan had carefully proven lot by lot that each of the buildings on Parcel 4A stood in the way of widening the street to the nationally acceptable standard right of way.

\begin{thebibliography}{99}
\bibitem{131} \textit{Little Pink House}, p. 207.
\end{thebibliography}
The ‘right of way’ isn’t just the roadway. It includes curbs, grass “snow shelf,” sidewalks, street lighting, etc. The standard is 137 feet for a street with no parking (curb to curb) and 34’ if marked for parking on one side of the street. Email to author from John Brooks, 8/06/2009.

David E. Johnson, RESIDENTIAL LAND DEVELOPMENT PRACTICES 80 (2008)(“Most municipalities use a 50-ft right-of-way for local residential streets. The right-of-way will change as the number of lots or average daily traffic (ADT) changes for a road segment.”)


138 Interview by author of Edward B. O’Connell, New London, 06/01/09.


140 If the attorneys for NLDC contended that an economic development project qualified as a “public use” when private benefits were incidental to benefits accruing to the general public, this could arouse the justices to interrogate counsel on where to “draw a boundary on how far a city could go to take people’s homes or businesses in the name of economic development.” New London’s appellate counsel Wes Horton dismissed this approach because it would invite questions from the justices that could easily gobble up the few minutes the Supreme Court allows counsel for oral argument. Better to take the controversial tack that in the realm of economic development any public good counted as a public use, including increasing the property tax base, regardless of whether the project also benefitted private individuals and firms. In oral argument, New London’s counsel would concede—to Justice O’Connor’s evident dismay, and Bullock’s great delight—that a city could replace a Motel of 50 feet, and making sure all buildings were sufficiently set back from the corners of their lots to provide a 10 feet line of sight for passing vehicles. Surely roads and sidewalks counted as quintessential public uses. Even the IJ concedes as much in its PR statements concerning eminent domain.

The attorneys who advised New London on condemnation matters, Wes Horton and Ed O’Connell, questioned Londregan’s analysis. Sure, the NLDC’s city-approved plan for Fort Trumbull had substantial public benefits and public uses. But the condemnations of parcel 4A had not been initiated under provisions of the Connecticut statutes dealing with highways, parks or other widely acknowledged public uses. Instead, eminent domain had been initiated under Chapter 132 concerning economic development. Roads were being widened not necessarily or exclusively for park or marina purposes but rather to support future economic development on parcels 3 and 4A. Hence, NLDC needed the courts to vindicate the state statute authorizing condemnation to advance economic development.

Kelo IN CONTEXT § 12: A Discussion with the Advocates (2006).
Wes Horton isn’t sure whether the Court’s opinion in 

*Kelo* would support government taking one owner’s property to transfer to another private owner just for increased property tax revenues. Interview by Dwight Merriam and Mary Massaron Ross with Wes Horton and Scott Bullock, *Eminent Domain Use & Abuse: Kelo in Context* § 12: A Discussion with the Advocates (2006).


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6 with a Ritz Carlton just for the increased property taxes. New London’s counsel lost Justice O’Connor’s vote on that one but carried the day nonetheless.

The U.S. Supreme Court Majority Opinion. Benedict barely mentions the sweeping rationale of the majority opinion. The majority firmly rejected IJ’s attempt to differentiate economic development takings from the Supreme Court’s approval half a century earlier in *Berman v. Parker* of the use of eminent domain to eradicate blight through urban redevelopment. Had the Court ruled otherwise, there would have been no one to blame for the outcome but ex-Governor Rowland who started the events in motion by deciding to proceed under Connecticut’s economic development laws instead of its urban redevelopment statutes. Whether the city of New London could have established the requisite findings under Connecticut’s redevelopment laws, we’ll never know for sure. But the majority opinion declines to endow the distinction with constitutional significance:

Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including--but by no means limited to--new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development.
The Last Word. Who would have imagined that a book about an eminent domain case could be an irresistible read? Benedict is a great story teller who takes us behind the scenes in a series of pitched legal battles. He doesn’t allow his IJ-tilted spin to spoil the fun. *Little Pink Lies* is chock full of delicious anecdotes, heated encounters, even a touching love story.

Whether a screen play can be fashioned from these pages is a question best left to my colleagues in the film school. In Hollywood, the land where all good dreams are supposed to come true, Kelo doesn’t appear to be living happily ever after. Maybe the final image needs to be of the Little Pink House at its new location, 36 Franklin Street, a fitting reminder of a historic controversy.

The Little Pink House (new location)