No. S.C. 18132

IN THE
SUPREME COURT
OF CONNECTICUT

NEW ENGLAND ESTATES, LLC,	)
	)
v.	)
	)
TOWN OF BRANFORD, *et al.*	)
	)

BRIEF OF *AMICI CURIAE*
NATIONAL ASSOCIATION OF HOME BUILDERS and
HOME BUILDERS ASSOCIATION OF CONNECTICUT

WILLIAM H. ETHIER
HOME BUILDERS ASSOCIATION
OF CONNECTICUT
1245 FARMINGTON AVENUE, 2ND FL.
WEST HARTFORD, CONNECTICUT 06107
TELEPHONE: (860) 521-1905
FACSIMILE: (860) 521-3107
JURIS NO. 407347

KRISTY M. ROGAN
DLA PIPER LLP (US)
1251 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10020-110
TELEPHONE: (212) 335-4686
FACSIMILE: (212) 884-8587
JURIS NO. 426343

OF COUNSEL

MARY LYNN HUETT
NATIONAL ASSOCIATION OF
HOME BUILDERS
1201 15TH STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE: (202) 266-8485
FACSIMILE: (202) 266-8161

OF COUNSEL

THOMAS F. GESELBRACHT
DLA PIPER LLP (US)
203 NO. LASALLE STREET
SUITE 1900
CHICAGO, ILLINOIS 60601
TELEPHONE: (312) 368-4094
FACSIMILE: (312) 630-7348

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INTEREST OF *AMICI CURIAE*

The National Association of Home Builders ("NAHB") is a trade association representing more than 235,000 members nationwide involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Known as "the voice of the housing industry," NAHB is affiliated with more than 800 state and local home builders associations around the country. The Home Builders Association of Connecticut ("HBACT") is the state affiliate of NAHB, representing 1,500 members statewide organized into five local associations within Connecticut. NAHB's builder members will construct about 80 percent of the more than 1.08 million new housing units projected for 2008.

Because NAHB and HBACT members include both property owners and development interests, NAHB and HBACT regularly grapple with the complexities of competing demands for the use of land and opportunities for condemnation related to those uses. However, even with seemingly incompatible interests, at their most fundamental levels the associations' goals are to protect private property rights from abuses by local government and to preserve opportunities for housing. NAHB's experience nation-wide, and HBACT's experience in Connecticut, includes the best of these governmental policies – carefully-wrought and comprehensive municipal development and redevelopment efforts that include the opportunity for new housing, business and commercial uses along with the need to preserve open space for common enjoyment – as well as the worst – *ad hoc* and sometimes politically influenced abuses of authority to serve the interests of a few at the expense of the common weal, or to

serve the interests of the majority at the expense of the rights of an individual property owner. With that backdrop, NAHB and HBACT are concerned by any judicial decision that would open the door for the abuse of the eminent domain power by state or local governments.

NAHB and HBACT offer their national and statewide perspectives to the Connecticut Supreme Court in this case and provide this brief in support of the judgment below with the understanding that there must be a proper balance between the preservation of open space and the protection of private property rights. NAHB and HBACT believe that the Superior Court and the jury struck the correct balance here, carefully protecting the use of eminent domain against an unreasonable and pretextual abuse of power, and awarding consequential damages to indemnify the defendants when the Town of Branford did so.

INTRODUCTION

The Superior Court here sent to trial a case in which the jury confirmed that the Town of Branford's use of eminent domain violated the Public Use Clause of the 5th Amendment to the United States Constitution because each of the three reasons offered by the Town for the taking was either pretextual and invalid, factually and legally baseless, or an abuse of power. NAHB and HBACT submit this *amicus curiae* brief to confirm that bad faith, pretextual, baseless or abusive takings of this kind remain a continuing threat to property owners – a threat from which they look to the courts for relief.

Despite the broad deference given to legislative determinations of the need for and purpose of the use of eminent domain, the most recent decisions – including *Kelo v. City of New London*, 545 U.S. 469 (2005) – reserve to the courts the power to address constitutional violations of the requirement that eminent domain only be wielded for a proper public use. In its rulings below and its instructions to the jury, the Superior Court filled that role, and its rulings should be affirmed to preserve this important judicial function.

ARGUMENT

I. THE IMPORTANT PUBLIC USE RESTRICTION ON TAKINGS IS AT STAKE, AND THE 5TH AMENDMENT BULWARK AGAINST BASELESS, PRETEXTUAL OR ABUSE OF POWER TAKINGS SHOULD BE UPHELD.

The problem of baseless, pretextual or bad faith takings is a nationwide concern that requires the courts to strictly enforce the public use restriction on the exercise of eminent domain. The field of eminent domain has been dominated over the last three years by the unprecedented public reaction and concern over the proper exercise of that sovereign power generated by *Kelo v. City of New London*, 545 U.S. 469 (2005). *Kelo* confirmed that, when eminent domain is used in a reasonable manner, after careful and comprehensive consideration, to address existing, well-understood issues of public concern, courts will defer to the legislative decision to use it. But *Kelo* expressly left it to the courts to guard against demonstrably improper takings.

As this Court is aware from *Kelo*, decades of economic decline had led a state agency to designate the City of New London as a "distressed municipality." 545 U.S. at 473. After a series of neighborhood meetings, the New London Development Corporation drew up an integrated development plan covering 90 acres of the Fort Trumbull area of New London, and the plan received both state agency and city council approval. *Id.* The United States Supreme Court noted that the economic development plan was "carefully formulated" and of a "comprehensive character" (545 U.S. at 483-484). The Court upheld the taking – part of "[o]rderly implementation of a comprehensive redevelopment plan" (545 U.S. 488) – as properly within the constraints of the Public Use Clause. A comprehensive, carefully formulated plan to coordinate a variety of land uses "with the hope that they will form a whole greater than the sum of its

parts" was held to be an essential element of proper exercise of eminent domain. 545 U.S. at 470.

The Court's opinion in *Kelo* made it clear that the public use doctrine forbids takings "under the mere pretext of a public purpose." 545 U.S. at 477. The *Kelo* majority confirmed that a deferential standard of review is generally used in reviewing the decision to exercise the power of eminent domain. "For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." 545 U.S. at 483. But Justice Kennedy, who provided the decisive vote for the *Kelo* majority, wrote a separate concurring opinion emphasizing that, notwithstanding the generally-applicable deferential standard, he recognized the problem of pretextual or abusive takings, and was prepared to endorse an even more active role for the courts in enforcing the Public Use Clause against such takings. 545 U.S. at 490-93.

Kelo was decided against a backdrop of cases that illustrate the need for judicial vigilance against abuse of the eminent domain power. For decades, the public use restriction on the power of eminent domain has required a clear and comprehensive statement of the actual reason for a taking. See, *e.g., City of Cincinnati v. Vester,* 281 U.S. 439, 447 (1930) ("To the end that the taking shall be shown to be within its authority, the municipality is called upon to specify definitely the purpose of the appropriation"). This pre-requisite to a proper public use insures that the tool of eminent domain is not used to displace persons from their homes or businesses on a whim, to satisfy powerful private interests, or as a pretext to mask more nefarious purposes.

"There is, of course, a role for the courts to play in reviewing a legislature's judgment of what constitutes a public use." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984). *Kelo* acknowledged that courts have properly viewed aberrational takings "with a skeptical eye." 545 U.S. 487 at n. 17, contrasting *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123 (C.D.Calif. 2001) with *Vester*, *supra.* *Lancaster* explained the proper approach to enforcing the public use restriction:

> No judicial deference is required, for instance, where the ostensible public use is demonstrably pretextual. . . . "If officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a 'public use,' and if those officials could later justify their decisions in court merely by positing 'a conceivable public purpose' to which the taking is rationally related, the 'public use' provision of the Takings Clause would lose all power to restrain government takings."

237 F.Supp.2d at 1129. This expression is consistent with the view of the leading commentator:

> [I]t is obvious that, if property is taken in ostensible behalf of a public improvement for which it can never by any possibility serve, it is being taken for a use that is not public, and the owner's constitutional rights call for protection by the courts. . . . [I]t may safely be said that the courts of the various states would feel obligated to interfere to prevent an abuse of discretion delegated to the legislature by an attempted appropriation of land in utter disregard of the possible necessity of its use, or when the alleged purpose was a cloak to some sinister scheme. In other words, the court would interpose in a case in which it did not merely disagree with the judgment of the legislature, but felt that the body acted with total lack of judgment or in bad faith.

1A NICHOLS ON EMINENT DOMAIN, § 4.11[2], p. 4-200 (Matthew Bender 2005)

The *Kelo* majority viewed such abuses of the power of eminent domain philosophically, citing Justice Iredell's concurring opinion in *Calder v. Bull*, 3 Dall. 386,

400 (1798): "the power may be abused, for, such is the nature of all power . . . We must be content to limit power where we can . . .."[1] But, in this regard, *Kelo* took pains to point out the important continuing role of the States in enforcing the federal constitutional public use restriction. 545 U.S. at 489.

A series of State court eminent domain decisions in the last two decades has had to strike down takings that were seen to be abusive or pretextual. In *Southwestern Illinois Dev. Auth. v. National City Environmental, LLC,* 199 Ill.2d 225, 768 N.E.2d 1 (2002), for example, a redevelopment authority advertised that its eminent domain power was available on a "turn-key" basis for a standard fee plus a sliding scale percentage of the acquisition price. After perfunctory consideration, the authority condemned land from a scrap dealer to give to its racetrack neighbor for additional parking. The Illinois Supreme Court struck down the taking, stating:

> Clearly, the foundation for this taking is rooted not in the economic and planning process with which SWIDA has been charged. Rather, this action was undertaken solely in response to [the racetrack]'s expansion goals and its failure to accomplish those goals through purchasing [the scrap dealer]'s land at an acceptable negotiated price. It appears SWIDA's true intentions were to act as a default broker of land for [the racetrack]'s proposed parking plan.

199 Ill.2d at 240-41; see also, *e.g., Bailey v. City of Mesa*, 206 Ariz. 224, 230, 76 P.3d 898, 904 (Ariz. Ct. App. 2003) (court must weigh anticipated public benefits against the private character of the end use to determine whether the taking is for a use that is "really public"); *City of Rapid City v. Finn*, 668 N.W.2d 324, 327 (S.D. 2003) (street condemnation case dismissed as an abuse of discretion and in bad faith where City

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[1] Coincidentally, *Calder* was also a case arising from Connecticut.

failed to undertake its usual traffic, engineering and drainage studies before filing, but instead condemned land to satisfy the demand of a party needed to gain contiguity to annex a desirable parcel); *Port Authority of the City of St. Paul v. Groppoli*, 295 Minn. 1, 8-9, 202 N.W.2d 371, 375 (1972) (condemnation dismissed where taking was unreasonable and an abuse of discretion).

In *Casino Reinvestment Dev. Auth. v. Banin,* 320 N.J. Super. 342, 345, 727 A.2d 102, 104 (Law Div. 1998), a condemnation was dismissed pursuant to the rule that, where a condemnation is commenced for an apparently valid public purpose, but the real purpose is otherwise, the condemnation may be set aside. The court found it particularly significant that the public agency had not put together an assemblage of land to attract a developer. Instead, the developer proposed an additional acquisition to the agency to complement the developer's existing project already underway. *Id.* at 355-356, 109-110. With nothing identifying a clear future use of the property to be taken, and without any other adequate assurances of future use, the court ordered the condemnation dismissed. *Id.* at 111, 359.

In *Earth Management, Inc. v. Heard County*, 248 Ga. 442, 283 S.E.2d 455 (1981), property was condemned ostensibly for a park, but actually to block a proposed landfill. The Georgia Supreme Court reversed the decision of the trial court which allowed the taking, noted that no law clothes a governmental authority with the right to use eminent domain to restrict a legitimate activity. The court concluded, "Such action is beyond the power conferred upon the county by law and amounts to bad faith." *Id.* at 447, 461.

Even Connecticut has seen bad faith takings. In *AvalonBay Communities, Inc. v. Town of Orange*, 256 Conn. 557, 565, 775 A.2d 284, 292 (2001), the trial court found that the town had proceeded in bad faith to condemn property for an industrial park, because the project plan was a pretext in an effort to thwart affordable housing.[2] The property owner's standing to challenge the trial court's injunction against the project plan and the condemnation was upheld, because the statutory scheme for a redevelopment plan, "coupled with findings of bad faith, satisfy classic aggrievement principles." *Id.* at 578, 300. The Connecticut Supreme Court affirmed the finding, based on the record, that the industrial park was merely a pretext. *Id.* at 579-81, 300-01. By the time the case got to the Connecticut Supreme Court, the town had abandoned the condemnation, so the Supreme Court did not rule on the actual validity of the taking. But it did note that any attempt to revive the condemnation would be rendered legally futile by the injunction against the project plan. *Id.* at 587-88, 305.

AvalonBay is an indicator that in Connecticut, like in other states across the country, the threat of pretextual takings in bad faith that abuse the power of eminent domain is a continuing concern. The Public Use Clause of the 5th Amendment guards against such threats, but it must be continuously enforced. It is up to the courts to do so, and in making its rulings below the Superior Court acted in its proper constitutional role consistent with a long line of precedent. To maintain the Public Use Clause's clear

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[2] The pretextual use of eminent domain to block affordable or fair housing is neither new nor rare. See, *e.g.*, *Deerfield Park Dist. v. Progress Dev. Corp.*, 22 Ill.2d 132, 174 N.E.2d 850 (1961) (case remanded for a hearing on property owner's allegations in motion to dismiss that taking for a park was really to block the sale of homes in a white suburb to blacks).

and reasonable restriction on the power of eminent domain, the Connecticut Supreme Court should affirm the judgment of the Superior Court.

CONCLUSION

Ad hoc governmental action to preserve the status quo, as here, is the antithesis of a good faith exercise of the power of eminent domain. The facts as presented to and found by the jury demonstrate that the taking by the Town was pretextual, abusive and baseless. The Town's abuse of power properly gave rise to a claim to recover damages. The *amici* respectfully urge the Connecticut Supreme Court to affirm the judgment of the Superior Court.

NATIONAL ASSOCIATION OF HOME BUILDERS and HOME BUILDERS ASSOCIATION OF CONNECTICUT

Dated: September 8, 2008

By:_____
One of its attorneys

William H. Ethier
Home Builders Association of Connecticut
1245 Farmington Avenue, 2nd Floor
West Hartford, Connecticut 06107
Telephone: (860) 521-1905
Facsimile: (860) 521-3107
Juris No. 407347

Kristy M. Rogan
DLA Piper LLP (US)
1251 Avenue of the Americas
New York, New York 10020-1104
Telephone: (212) 335-4686
Facsimile: (212) 884-8587
Juris No. 426343

OF COUNSEL

Mary Lynn Huett
National Association of Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
Telephone: (202) 266-8485
Facsimile: (202) 266-8161

OF COUNSEL

Thomas F. Geselbracht
DLA Piper LLP (US)
203 No. LaSalle Street
Chicago, Illinois 60601
Telephone: (312) 368-4094
Facsimile: (312) 630-7348

Certification as to Rules of Appellate Procedure § 67-2

This certifies that the foregoing *Amicus Curiae* Brief of the National Association of Home Builders and Home Builders Association of Connecticut complies with all provisions of Rules of Appellate Procedure § 67-2.

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Kristy M. Rogan

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing Brief and accompanying Appendix were mailed, first class and postage prepaid, this 8th day of September, 2008, to:

The Hon. William T. Cremins
Judge of the Superior Court
J. D. of Waterbury
Complex Litigation Docket
400 Grand Street
Waterbury, CT 06702
PHONE: (203) 236-8200
FAX: (203) 236-8205

Wesley W. Horton, Esq.
Kimberly A. Knox, Esq.
Kenneth J. Bartschi, Esq.
Horton, Shields & Knox PC
90 Gillett Street
Hartford, CT 06105-2629
PHONE: (860) 522-8338
FAX: (860) 728-0401

William H. Clendenen, Jr., Esq.
Kevin C. Shea, Esq.
Clendenen & Shea, LLC
400 Orange Street
New Haven, CT 06511
PHONE: (203) 787-1183
FAX: (203) 787-2847

David A. Reif, Esq.
Matthew A. Weiner, Esq.
McCarter & English LLP
185 Asylum Street
Hartford, CT 06103
PHONE: (860) 275-6700
FAX: (860) 724-3397

Steven R. Humphrey, Esq.
Brian R. Smith, Esq.
Linda L. Morkan, Esq.
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103-3597
PHONE: (860) 275-8200
FAX: (860) 275-8229

Jonathan M. Freiman, Esq.
Wiggin & Dana LLP
265 Church Street
New Haven, CT 06508
PHONE: (203) 498-4400
FAX: (203) 782-2889

Timothy S. Hollister, Esq.
Sheila A. Huddleston
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103-1919
PHONE: (860) 251-5000
FAX: (860) 251-5318

_____
Kristy M. Rogan
Juris No. 426343