Give Eminent Domain a Chance: Law Supports City's Redevelopment

By Timothy J. Dowling

It is a wonder to behold the public relations campaign being conducted by the libertarian Institute for Justice and its supporters regarding *Kelo v. City of New London* (04-108), the eminent domain case scheduled for oral argument today in the U.S. Supreme Court. Lost in the institute's media blitz is the story of an economically distressed community whose leaders are desperately trying to bring new hope to their fellow citizens.

New London is a small city of 25,000 that sits at the mouth of the Thames River on Long Island Sound in Connecticut. The local economy has been struggling for decades. In 1990, the state officially designated New London as a "distressed" community in dire need of economic growth. Six years later, the city suffered another blow when the federal government closed a major Navy research facility that had employed 1,500 people.

Local officials have worked tirelessly to address this economic deterioration. After years of careful planning, they adopted a comprehensive plan for a 90-acre waterfront redevelopment project consisting of commercial, retail and residential space, a public riverwalk, a hotel and conference center, marinas and other public amenities. New London leaders expect the project to generate thousands of permanent jobs, as well as much-needed revenues to hire more teachers, increase pay for police officers, provide assistance to the poor and elderly and fund other vital programs.

New London acquired the vast bulk of the land needed for the site through voluntary transactions, but a few owners held out. The Institute for Justice, counsel for the holdouts, relentlessly casts the case as pitting unfeeling bureaucrats against sympathetic landowners. The trial court summed it up well, writing that while the city might be viewed by some as an abstract entity, "the people behind these abstractions have a dream also … for their city buffeted for decades by hard times and until recently declining prospects."

New London is not alone. Communities across the country have used eminent domain to bring new hope to their residents. For example, Kansas City, Kan., had been burdened for generations by poverty, crime and a stagnant economy until it used eminent domain to assemble land needed for the NASCAR Kansas Speedway.

During the racetrack's first season, $150 million flowed into the metropolitan area, including $70 million in wages for new jobs. The vibrant retail shops that followed the racetrack development are expected to generate employment for about 4,000 people. In the words of one knowledgeable observer, the development is "a glorious success for this once-struggling county."

Resident Joyce Vaught, who once opposed condemnation of her land for the speedway, now hails it as "amazing" and "just a beautiful thing."

Mississippi, which ranks first in poverty and last in per capita income, used eminent domain as it acquired 1,400 acres for a new automobile plant in Canton four years ago. The plant has produced more than 5,000 jobs, and another 29,000 high-wage positions are expected in the surrounding county by 2010. One worker at the auto plant described the transformation: "My job has really changed my life. It keeps me going."

Too often we think of jobs strictly in terms of numbers, but in addition to economic recovery they bring pride and new hope to countless individuals. Eliminating unemployment also reduces the social ills that go with it, including spousal abuse, alcoholism, crime and suicide. These projects overwhelmingly benefit the most in need by putting a paycheck in their hands and enhancing public services for the poor.

Economic development projects such as New London's are not sops to politically connected developers, as the Institute for Justice suggests, but the heart and soul of good government.

There is no question that eminent domain is an awesome power that must be used prudently. There are many built-in checks on its use, including the just compensation requirement, which motivates the taxpaying public to ensure that the power is exercised only as a last resort. In deciding whether to restrict eminent domain further, however, we need to keep the stakes clearly in mind. By belittling our elected representatives, the Institute for Justice and its supporters rack up cheap debaters points at the expense of informed public discussion.

The tremendous public benefits that flow from the use of eminent domain for economic development would be legally irrelevant, of course, if these condemnations were prohibited by the Constitution. They plainly are not. The Just Compensation Clause provides: "nor shall private property be taken for public use, without just compensation."

Constitutional theorists long have observed that the "public use" language is not phrased as prescriptive words of limitation, but instead as descriptive icing on the cake. In other words, the constitutional text could be read as presupposing that every legislative taking is for public use.

The Instititute for Justice argues that the term "public use" should be read narrowly, limiting condemnations to situations where the property will be publicly owned or publicly accessible. On this view, government officials could condemn for roads, public buildings and regulated utilities, but not much else.

Nonsense. The meaning of the word "use" is far more capacious than the Institute for Justice suggests. It embraces not only hands-on enjoyment and consumption, but also benefit or advantage. Every law student learns that a conveyance from "A to B for the use of C" is for the benefit of C. Modern dictionaries, including Black's Law Dictionary, define "use" to include benefit or advantage.

The founders had the same understanding, as evidenced by Webster's 1828 dictionary, which broadly defines "use" to include a benefit or advantage. Public use means, and always has meant, public benefit.

Historical sources support this analysis. The renowned jurist Hugo Grotius, who coined the term "eminent domain," asserted in his 1625 classic De Jure Belli et Pacis that eminent domain may be used "not only in the case of direct need … but also for the sake of the public advantage."

The Commentaries penned by the influential Blackstone in the 1760s discuss takings and taxes in a single breath, suggesting that he viewed the underlying public justifications for each to be identical. Blackstone wrote that private parties could not infringe property rights to advance what he called "the general good of the whole community," but the Legislature could do so upon the payment of just compensation.

From colonial times and throughout the early decades of our republic, land frequently was condemned to benefit the public by promoting private economic interests, including manufacturing mills, ferries, private roads, irrigation ditches and mining easements. Constitutional scholars have concluded that these practices support the view that the eminent domain power is as broad as the police power.

Given the text, structure and history of the Just Compensation Clause, it is no surprise that the Supreme Court has unanimously and repeatedly held that the scope of the eminent domain power is coterminous with the police power.

Just two terms ago in *Brown v. Washington Legal Foundation*, 538 U.S. 216 (2003), the court reaffirmed that the government may condemn property for any valid public purpose. In *National Railroad v. Boston & Maine*, 503 U.S. 407 (1992), the court confirmed that eminent domain may be used for any legitimate purpose even where it "results in the transfer of ownership from one private party to another."

These holdings build on earlier unanimous precedents in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), and *Berman v. Parker*, 348 U.S. 26 (1954), which hold that where a government objective is legitimate, "the right to realize it through the exercise of eminent domain is clear."

Although the Institute for Justice suggests these rulings are limited to their facts, their reasoning is expansive and repeatedly equates the scope of eminent domain with the police power. And not even the Institute for Justice argues that economic development falls outside of the police power.

The institute alternatively argues that for development projects that depend on eminent domain, courts should require local officials to prove that the project's financial success is adequately "certain." For complex undertakings, this unprecedented level of judicial scrutiny often would be impossible.

It also would contravene decades of judicial deference to legislative decision-making by requiring courts to second-guess the Legislature's judgment on complicated economic issues, a task the courts themselves have said they are ill-suited to perform.

All the relevant legal indicia — plain meaning, original meaning, historical sources, traditional practice, unanimous and long-standing precedent, appropriate deference to the Legislature and sound legal policy — weigh in favor of New London. That is good news not just for New Londoners, but for all people who care about the well-being and prosperity of their communities.

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Appellate Court's Decision in 'Lockheed' Was Correct, Mostly

By Raphael Metzger

The recent decision of the 2nd District Court of Appeal in *Lockheed Litigation Cases* has prompted the defense bar to proclaim that trial judges now have the authority to determine the scientific validity of expert medical testimony. Not so.

The *Lockheed* court held that in rendering an expert opinion, an expert must rely on materials that are relevant to the subject of the expert's opinion. The rest of the court's opinion is unfortunate dictum.

In *Lockheed*, a plaintiff's medical expert opined that certain chemicals that are not carcinogens cause cancer. Of course, this is ridiculous. How did the expert reach such an absurd conclusion? The expert reviewed many epidemiologic studies that show that exposure to mixed organic solvents increase the risk of cancer. The results of the studies were not surprising, because organic solvents contain benzene, a known human carcinogen, so chemical mixtures containing benzene would be expected to increase the occurrence of human cancer.

However, based on these studies, the expert opined that certain constituents of mixed organic solvents, such as acetone, isopropyl alcohol and methyl ethyl ketone therefore cause cancer.

In so opining, the expert made a fundamental error in logic. The error is apparent to any high school student who has studied elementary logic: Assume that A (acetone) or B (benzene) or I (isopropyl alcohol) or M (methyl ethyl ketone) cause C (cancer). Does it logically follow that A (acetone) causes C (cancer)? No. Logic dictates that the most one can conclude is that either A, B, I or M causes cancer — not that each one does.

The *Lockheed* court perceived the error in the expert's logic: "The epidemiologic studies that Dr. Teitelbaum relied on all involved exposure to multiple solvents, including solvents not at issue here. The court concluded that the multiple-solvent epidemiological studies showing an association between exposure to multiple solvents and various ailments did not support the conclusion that any one of the solvents at issue here can cause a disease. We conclude the court's conclusion was sound."

The *Lockheed* court reasoned that all of the epidemiologic studies on which the expert relied did not in reason tend to prove that any particular chemical in the toxic soup causes cancer, and were therefore not relevant to the issue of whether acetone or isopropyl alcohol causes cancer. Because the expert relied only on studies that were irrelevant to the issue, his opinion was likewise irrelevant and was properly excluded as being irrelevant. See, California Evidence Code Section 350 ("No evidence is admissible except relevant evidence").

That should have been the end of the court's opinion. But the *Lockheed* court, in dicta, also based its affirmance on Evidence Code Section 801(b), which states that an expert may base an opinion "on matter . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates."

Obviously, an expert cannot reasonably rely solely on irrelevant data in rendering an opinion. Because the only studies that the expert relied upon were irrelevant, the expert's opinion did not satisfy Section 801(b).

However, the *Lockheed* court "construed" Section 801(b) "to mean that the matter relied on must provide a reasonable basis for the particular opinion offered." In so doing, the *Lockheed* court suggested that trial courts may, under Section 801(b), decide not just whether the matter on which an expert relies is relevant, but whether, as a matter of sound science and medicine, it adequately supports the expert's conclusion. In other words, the *Lockheed* court suggested that trial courts may engage in a *Daubert*-type analysis under Evidence Code Section 801(b). In this dictum, the *Lockheed* court erred.

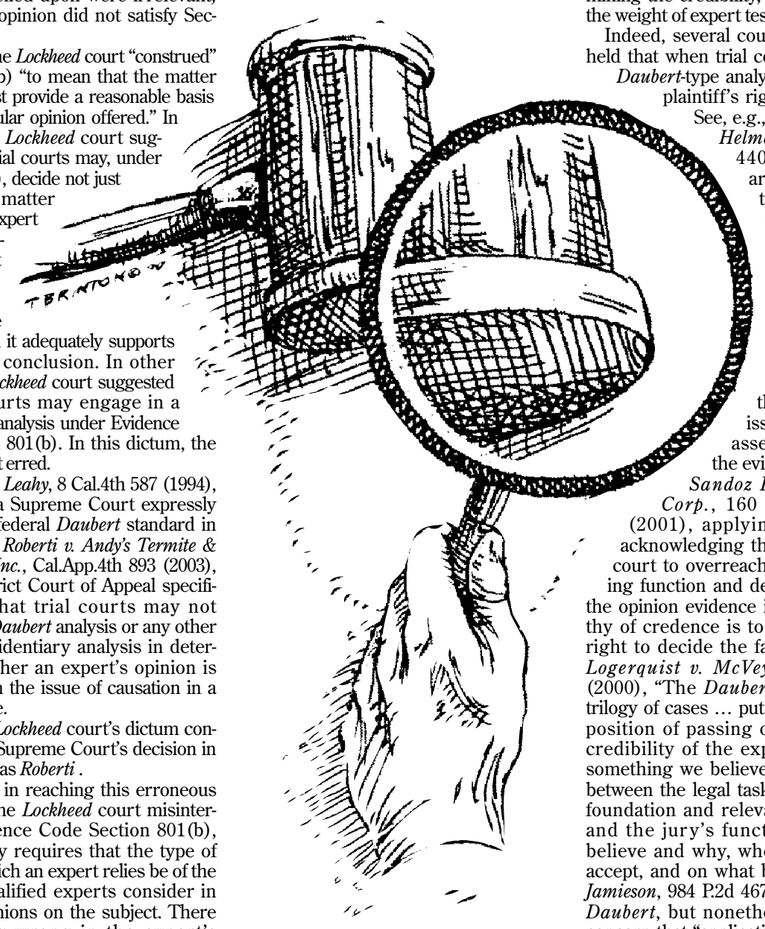
In *People v. Leahy*, 8 Cal.4th 587 (1994), the California Supreme Court expressly rejected the federal *Daubert* standard in California. In *Roberti v. Andy's Termite & Pest Control Inc.*, Cal.App.4th 893 (2003), the 2nd District Court of Appeal specifically held that trial courts may not engage in a *Daubert* analysis or any other threshold evidentiary analysis in determining whether an expert's opinion is admissible on the issue of causation in a toxic tort case.

Thus, the *Lockheed* court's dictum contravenes the Supreme Court's decision in *Leahy* as well as *Roberti* .

Worse yet, in reaching this erroneous conclusion, the *Lockheed* court misinterpreted Evidence Code Section 801(b), which merely requires that the type of matter on which an expert relies be of the type that qualified experts consider in reaching opinions on the subject. There was nothing wrong in the expert's reliance on published, peer-reviewed epidemiologic studies and monographs of the International Agency for Research on Cancer in rendering an opinion on cancer causation. Rather, the expert's error was in relying on studies that were irrelevant to the case.

In drafting Evidence Code Section 801(b), the Legislature carefully chose its words. It said that the matter on which an expert relies must be such as an expert would reasonably rely in forming an opinion "upon the subject to which his testimony relates" not "for the particular opinion offered." By so "construing" Evidence Code Section 801(b), the *Lockheed* court violated the fundamental rule of statutory construction that where the language of a statute is clear, its plain meaning must be given effect. In so doing, the *Lockheed* court, in dictum, created a new rule of evidence that is contrary to the law established by our Supreme Court.

The *Lockheed* court had no power to create a new rule of evidence. See, *California Court Reporters v. Judicial Council*, 39 Cal.App.4th 15 (1995), "The Constitution reserves to the Legislature … the … right to provide rules of procedure." Evidence Code Section 351 states: "Except as otherwise provided by statute, all relevant evidence is admissible." Thus, pursuant to the Evidence Code, an expert's



opinion must be admitted provided that it is relevant and is not otherwise excludable pursuant to a specific statute.

The Evidence Code allows courts to exclude the opinions of scientific and medical experts when their opinions are not relevant (Evidence Code Section 350); when the expert is not qualified (Evidence Code Section 720(a)); when the expert's opinion does not "relate to a subject that is sufficiently beyond common experience" and therefore would not "assist the trier of fact" (Evidence Code Section 801(a)); and when the probative value of the expert's opinion is "substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Evidence Code Section 352 allow courts to exclude expert opinion merely because a trial court does not consider the basis for the expert's opinion to adequately support "the particular opinion offered," as the Lockheed court suggested in dictum. Courts are not qualified to assess the validity of expert scientific and medical opinions and have no authority under California law to make such determinations. In fact, doing so invades the province of jury of evaluating, determining the credibility, the reliability and the weight of expert testimony.

Indeed, several courts have recently held that when trial courts engage in a *Daubert*-type analysis, they violate a plaintiff's right to a jury trial. See, e.g., *Howerton v. Arai Helmet, Ltd.*, 348 N.C. 440 (2004), "[W]e are concerned that trial courts asserting sweeping pretrial 'gatekeeping' authority under *Daubert* may unnecessarily encroach upon the constitutionally mandated function of the jury to decide issues of fact and to assess the weight of the evidence"; *Brasher v. Sandoz Pharmaceuticals Corp.*, 160 F.Supp.2d 1291 (2001), applying *Daubert*, but acknowledging that "[f]or the trial court to overreach in the gatekeeping function and determine whether the opinion evidence is correct or worthy of credence is to usurp the jury's right to decide the facts of the case"; *Logerquist v. McVey*, 196 Ariz. 470 (2000), "The *Daubert/Joiner/Kumho* trilogy of cases … puts the judge in the position of passing on the weight or credibility of the expert's testimony, something we believe crosses the line between the legal task of ruling on the foundation and relevance of evidence and the jury's function of whom to believe and why, whose testimony to accept, and on what basis"; *Bunting v. Jamieson*, 984 P.2d 467 (1999), adopting *Daubert*, but nonetheless expressing concern that "application of the *Daubert* approach to exclude evidence has been criticized as a misappropriation of the jury's responsibilities. . . . '[I]t is imperative that the jury retain its fact-finding function.'"

In conclusion, the *Lockheed* court reached the right conclusion based upon an ordinary relevance determination, but erred in its dictum, which misinterpreted Evidence Code Section 801(b). The lesson to be learned from *Lockheed* is that expert testimony must be relevant — and that bad cases make bad law.

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