

# The *Pointe Gourde* principle and its effect on economic development takings

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# Overview

The problem of economic development takings

Compensation, elimination, and benefit sharing


Norwegian waterfalls and hydropower

Discussion

# Taking property for profit

*Any conception that compulsory acquisition is largely devoted to promoting public, non profit-making activity would be misleading.<sup>1</sup>*

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<sup>1</sup>Law Commission, *Compulsory purchase and compensation: Disregarding* 

# Taking property for profit

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**Figure:** Cartoon commenting on the *Kelo* decision

<sup>1</sup>Law Commission, *Compulsory purchase and compensation: Disregarding* 

Why is it seen as a problem?

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<sup>2</sup>*Kelo v City of New London* 545 US 469, 505 (2010). 

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*The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.<sup>2</sup>*

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What about **compensation**?



# The right to compensation

- ▶ Constitutional principle.
- ▶ Human rights principle.
- ▶ A corrective justice perspective, market value.
- ▶ A distributive justice perspective, contextual assessment.
- ▶ What about benefit sharing?

# The need for elimination

- ▶ To avoid blackmail and 'double-payment'.

- ▶ *Pointe Gourde*, Lord MacDermott:

*It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition.*<sup>3</sup>

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*It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition.*<sup>3</sup>
- ▶ What does this mean exactly?

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- ▶ The *Indian* case, Lord Romer:

*The only difference that the scheme has made is that the acquiring authority, who before the scheme were possible purchasers only, have become purchasers who are under a pressing need to acquire the land; and that is a circumstance that is never allowed to enhance the value.*<sup>4</sup>

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- ▶ However,

*The fact is that the only possible purchaser of a potentiality is usually quite willing to pay for it.*<sup>5</sup>

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<sup>5</sup> *ibid*, 216-217.

► Myers, Lord Denning:

*The valuer must cast aside his knowledge of what has in fact happened in the past eight years due to the scheme. He must ignore the developments which will in all probability take place in the future ten years owing to the scheme. Instead, he must let his imagination take flight to the clouds. He must conjure up a land of make-believe, where there has not been, nor will be, a brave new town, but where there is to be supposed the old order of things continuing.*<sup>6</sup>

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<sup>6</sup>Myers v Milton Keynes DC [1974] WLR 696, 704. 

Lord Nicholls, in *Waters*:

*Unhappily the law in this country on this important subject is fraught with complexity and obscurity. [...] One of the most intractable problems concerns the 'Pointe Gourde principle' or, as it is sometimes known, the 'no scheme rule'. On this appeal your Lordships' House has the daunting task of considering the content and application of this principle.*<sup>7</sup>

Problem resolved, or deferred?

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<sup>7</sup> *Waters and other v Welsh National Assembly* [2004] UKHL 19, 2.

<sup>8</sup> *Star Energy Weald Basin Ltd & Anor v Bocardo SA* [2010] 35 UKSC (UKSC).

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# The importance of benefit sharing

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- ▶ The fairness of benefit sharing.
- ▶ Making predatory takings unprofitable.
- ▶ Indirect recognition of 'weaker' public purposes.
- ▶ The 'uncompensated increment'.

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Can a compensatory approach work in practice?

# A waterfall



# The importance of water

- ▶ 95 % of domestic energy is supplied by hydropower.
- ▶ A riparian system, waterfalls are privately owned.
- ▶ Traditionally important to local communities.
- ▶ By the 1830s, an estimated 20 000 - 30 000 watermills in operation.
- ▶ Political and social ramifications.
- ▶ The emergence of a state monopoly in the early 20th century.

# Benefit sharing, historically

- ▶ Market value, with a 25 % premium.
- ▶ Based on the market practices of the early 20th century.
- ▶ The role of lay appraisers.
- ▶ The push for a simple rule: the *natural horsepower method*.
- ▶ Expropriation gaining ground.

- ▶ From concrete assessment to theoretical assessment.
- ▶ 'Market' prices determined by looking to previous expropriation cases.
- ▶ The lay appraisers are neutralised.
- ▶ Only a symbolic form of benefit sharing?
- ▶ The impossibility of deviating from the established formula.

# The effect of shaking up the regulatory system

- ▶ Liberalization in the early 1990s.
- ▶ Commercialization and (part) privatisation of the energy sector.
- ▶ Local owners gain access to the distribution grid.
- ▶ The real (commercial) value of water is revealed.
- ▶ The case of Måren.





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**What about the compensation formula?**

# New principles for awarding compensation

- ▶ No more natural horsepowers when alternative development is 'foreseeable'.<sup>9</sup>
- ▶ The *Pointe Gourde* principle is used to resist change:

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<sup>9</sup>Rt. 2008 s. 82.

# New principles for awarding compensation

- ▶ No more natural horsepowers when alternative development is 'foreseeable'.<sup>9</sup>
- ▶ The *Pointe Gourde* principle is used to resist change:
  - ▶ On a narrow reading: The expropriation scheme belongs to the developer, not the owner.
  - ▶ On an average reading: The superiority of the resource-use of the expropriation scheme means that alternative development is not foreseeable.
  - ▶ On a broad reading: Other projects would be unprofitable or would not get planning permission.

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# Uncertainty and a struggle for power

- ▶ An extreme level of uncertainty.
- ▶ The importance of expert testimony (and having the resources to acquire it).
- ▶ Diverging opinions in the Supreme Court.
- ▶ *Kløvtveit*, Justice Bull:

*None of the parties should be allowed to take a “monopoly surplus”, either by inflating the price or, as far as the expropriating party is concerned, by arguing that they would have refused to cooperate in a joint development project, to make such a project unsuitable as the basis on which to calculate compensation.*<sup>10</sup>

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<sup>10</sup>Rt. 2011 s. 1683.

► Otra II, Justice Matheson:

*"[....] The Court of Appeal finds it difficult to distinguish this case from other cases when it has been established that alternative development is not foreseeable. It does not seem relevant whether this is the case because the alternative is not commercially viable or because the alternative must yield to a different exploitation of the waterfall". I agree with the Court of Appeal...<sup>11</sup>.*

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<sup>11</sup>Rt. 2013 s. 612

# The broader question

- ▶ How should the hydropower sector be organized?
- ▶ Who should benefit, who should decide?
- ▶ What should be the role of expropriation?
- ▶ Gloppen municipality, more than 250 GWh/year in owner-led projects.
- ▶ The mayor: “Small-scale hydropower is in our blood”.
- ▶ When does benefit sharing become a human rights issue rather than a political issue?

# Discussion

- ▶ The problem of a narrative based on corrective justice.
- ▶ The problem of a contextual narrative.
- ▶ Drawing a distinction between 'commercial' and 'public' values.
- ▶ Tracking the 'pre-existent' commercial value.
- ▶ Impossibility of fairness?
- ▶ The importance of participation.
- ▶ Alternatives to expropriation.