CONDEMNATION LAW AND PROCEDURES

IN NEW YORK

Editor
Jon Santemma, Esq.

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ISBN: 1-57969-168-4
Product Number: 4043

TABLE OF CONTENTS

Chapter 1	"Public Use"—An Ever-Evolving Concept..... *Ruth A. Keyes, Esq.*	1
Chapter 2	Challenges to Condemnations Under EDPL § 207 ..... *John R. Casolaro, Esq.*	13
Chapter 3	The Acquisition of Property in Non-State Takings .... *Jon N. Santemma, Esq.* *Andrew M. Mahony, Esq.*	29
Chapter 4	The Appropriation of Real Property by the State of New York ..... *Victor J. D'Angelo, AAG*	75
Chapter 5	How and Who Gets the Money? Resolving the Standing and Title Disputes..... *Saul R. Fenchel, Esq.* *Myrna A. Cadet-Osse, Esq.*	117
Chapter 6	Title Objections in Condemnation Takings by the City of New York..... *Theodore K. Okun, Esq.* *Michael J. Wasser, Esq.*	133
Chapter 7	Valuation Concepts in Eminent Domain ..... *Jon N. Santemma, Esq.*	149
Chapter 8	"What's It Worth—Who Wants to Know?"—the Valuation of Real Property in Litigation ..... *Michael Rikon, Esq.*	161
Chapter 9	Highest and Best Use Defined and Applied ..... *Edward Flower, Esq.*	173
Chapter 10	Partial Takings ..... *Kevin G. Roe, Esq.* *Sidney Devorsetz, Esq.*	189
Chapter 11	Law of Trade Fixtures..... *Michael Rikon, Esq.*	205

Chapter 12 Three Dimensions of Viewpoint 221
Hon. John C. Bivona

Chapter 13 The Trial of a Non-Jury Condemnation Case 231
Michael Rikon, Esq.

Chapter 14 The Use of Prior Appraisals in Condemnation and Tax Certiorari Cases 245
Michael Rikon, Esq.

Chapter 15 Letting the Air Out of the Condemnor Proving Damages from the Taking of an Airspace Easement 257
Carl Rosenbloom, Esq.
Sandra F. Gordon, Esq.

Chapter 16 Valuing Contaminated Property in a Condemnation Proceeding 269
Michael Rikon, Esq.

Chapter 17 Environmental Claims 279
Saul R. Fenchel, Esq.
Jason M. Penighetti, Esq.

Chapter 18 The Problem of "Just Compensation" in the Condemnation of "Public Use" Property 289
David M. Wise, Esq.

Chapter 19 Interest on Condemnation Awards in New York..... 305
M. Robert Goldstein, Esq.

Chapter 20 Recovery of Condemnee's Expenses Pursuant to EDPL § 701 313
Edward Flower, Esq.

Chapter 21 Awarding Compensation for "Going Concern Value" in Eminent Domain Proceedings 323
David C. Wilkes, Esq.

Chapter 22 Abandonment of a Project and/or a Taking 335
Mark R. McNamara, Esq.

Appendix A *Kelo v. City of New London*
No. 04-108, slip op. (June 23, 2005)..... 347

DETAILED TABLE OF CONTENTS

Chapter 1 "Public Use"—An Ever-Evolving Concept
Ruth A. Keyes, Esq.

[1.0] I. Introduction 3
[1.1] II. Appropriation Criteria 4
[1.2] III. The Courts' Conception of Public Use 6
[1.3] IV. Conclusion 10

Chapter 2 Challenges to Condemnations Under EDPL § 207
John R. Casolaro, Esq.

[2.0] I. Introduction 15
[2.1] II. Procedural Aspects of an EDPL § 207 Challenge 17
[2.2] III. Constitutional Challenges 20
[2.3] IV. Challenges to Condemnor's Statutory Jurisdiction or Authority 24
[2.4] V. Challenges to SEQRA Findings and to EDPL Procedures 25
[2.5] VI. Conclusion 27

Chapter 3 The Acquisition of Property in Non-State Takings
Jon N. Santemma, Esq.
Andrew M. Mahony, Esq.

[3.0] I. Background 31
[3.1] II. The Eminent Domain Procedure Law 31
[3.2] A. Articles 1 and 2 31
[3.3] B. Articles 3 and 4 35
[3.4] C. Article 5 37
[3.5] D. Articles 6 and 7 42
[3.6] III. Conclusion 43

Appendices
Exhibit "1a": Vesting Map 45
Exhibit "1b": Legal Notice 46
Exhibit "1c": Determinations and Findings 47
Exhibit "1d": Public Notice 51
Exhibit "1e": Notice of Intention to Condemn 53
Exhibit "1f": Notice of Verified Petition 54
Exhibit "1g": Notice of Pendency 56
Exhibit "1h"
Verified Petition 58
Verification 61

Exhibit "1i": Vesting Order 62
Exhibit "1j": Notice of Acquisition of Property 65
Exhibit "2a": Notice of Appearance 67
Exhibit "2b": Notice of Appearance 68
Exhibit "2c": Verifed Claim..... 69
Exhibit "3"
Claim..... 70
Verification 72
Exhibit "4": Trade Fixture Rider to Claim
Exhibit "2c" or "3"..... 73

Chapter 4 The Appropriation of Real Property by the State of New York

Victor J. D'Angelo, AAG

[4.0] I. Introduction..... 77
[4.1] II. The Acquisition of Property..... 77
[4.2] III. Procedures for Litigating a Claim in the Court of Claims 83
[4.3] IV. Conclusion 92

Appendix A 93
Appendix B 99
Appendix C 105
Note of Issue 105
Certificate of Readiness for Trial..... 107
Appendix D 109

Chapter 5 How and Who Gets the Money? Resolving the Standing and Title Disputes

Saul R. Fenchel, Esq.
Myrna A. Cadet-Osse, Esq.

[5.0] I. Introduction..... 119
[5.1] II. Standing to Assert the Claim 120
[5.2] A. Generally..... 120
[5.3] B. Standing of Fee Owner Where Title Is Conveyed After Vesting of Title..... 122
[5.4] C. Claims Where the Condemnation Occurs After Contract, But Before Closing..... 124
[5.5] III. Compelling Payment Where There Are Title Objections or Competing Claims..... 124
[5.6] A. Generally..... 124
[5.7] B. The Lease/Condemnation Clause 125

[5.8] C. The EDPL Provision 126
[5.9] IV. Some Typical Errors in Lease Condemnation Clauses 129

Chapter 6 Title Objections in Condemnation Takings by the City of New York

Theodore K. Okun, Esq.
Michael J. Wasser, Esq.

[6.0] I. Introduction 135
[6.1] II. Ownership of Subject Property 135
[6.2] A. Property Owned by an Individual 135
[6.3] B. For-Profit Corporations 136
[6.4] C. Charitable Corporations 136
[6.5] D. Other Fiduciary Relationships 136
[6.6] III. Clearing Title Objections 137
[6.7] A. Judgments and Liens—Government 137
[6.8] B. Judgments and Liens—Private Parties 138

Exhibit 1: Certificate of Advance Payment on Award for Damages 140
Exhibit 2: Affidavit of Title (Fee) (Corporation) 143
Exhibit 3: Assignment of Condemnation Award 147

Chapter 7 Valuation Concepts in Eminent Domain

Jon N. Santemma, Esq.

[7.0] I. Introduction 151
[7.1] II. Specific Concepts 151
[7.2] III. Finding Value 153
[7.3] IV. Taxation 156
[7.4] V. Assessment and Valuation 157
[7.5] VI. Conclusion 160

Chapter 8 "What's It Worth—Who Wants to Know?"—The Valuation of Real Property in Litigation

Michael Rikon, Esq.

[8.0] I. Introduction 163
[8.1] II. Eminent Domain 163
[8.2] III. How Real Property Is Valued 164
[8.3] IV. Partial Takings 167
[8.4] V. Tax Certiorari 168
[8.5] VI. Valuation of Real Property in Other Contexts 170

[8.6] VII. Qualification of Appraiser 170
[8.7] VIII. Requirement of the Judicial Decision 171

Chapter 9 Highest and Best Use Defined and Applied
Edward Flower, Esq.

[9.0] I. Introduction 175
[9.1] II. Highest and Best Uses at Variance with Existing Zoning and/or Other Regulations 176
[9.2] III. The Highest and Best Use as Affected by the Pendency of a Condemnation 182

Chapter 10 Partial Takings
Kevin G. Roe, Esq.
Sidney Devorsetz, Esq.

[10.0] I. Introduction 191
[10.1] II. Damages 192
[10.2] III. Property Valuation 197
[10.3] IV. Role of Highest and Best Use 198
[10.4] V. Conclusion 203

Chapter 11 The Law of Trade Fixtures
Michael Rikon, Esq.

[11.0] I. Introduction 207
[11.1] II. Classic Definition of a Fixture 208
[11.2] III. Removability Is Not a Test of a Trade Fixture 211
[11.3] IV. Fixture Test 212
[11.4] V. The Sum of the Parts Exceed the Whole 213
[11.5] VI. The Unit Rule Has No Application to Fixture Claims 214
[11.6] VII. Lease Language Will Not Change the Compensability of Trade Fixtures 215
[11.7] VIII. The Language of a Chattel Mortgage or U.C.C. Security Agreement Has Nothing to Do with the Compensability of a Trade Fixture 216
[11.8] IX. A Trade Fixture Claimant Is Entitled to Compensation for All Trade Fixtures Available for Use in the Premises 217
[11.9] X. Increments Are Managed in the Valuation of an Integrated Plant 218

[11.10] XI. A Fixture Claimant Is Entitled to Interest to the Date of Payment 218
[11.11] XII. Conclusion 219

Chapter 12 Three Dimensions of Viewpoint

Hon. John C. Bivona

[12.0] I. Introduction 223
[12.1] II. The Condemnor 223
[12.2] III. The Property Owner 226
[12.3] IV. A View from the Bench 228
[12.4] V. Conclusion 229

Chapter 13 The Trial of a Non-Jury Condemnation Case

Michael Rikon, Esq.

[13.0] I. Introduction 233
[13.1] II. Do Not Waste the Court's Time 234
[13.2] A. Settle Cases that Should Be Settled 234
[13.3] B. Stipulate to Facts 234
[13.4] C. Be Prepared 234
[13.5] D. Prepare Your Cross-Examination 235
[13.6] E. Make Your Point 237
[13.7] F. Know Your Judge 241
[13.8] G. Make a Record 241
[13.9] H. The View 242
[13.10] I. Treat the Court with Respect 243
[13.11] J. Post-Trial Brief 243
[13.12] K. Listen to the Court 243

Chapter 14 The Use of Prior Appraisals in Condemnation and Tax Certiorari Cases

Michael Rikon, Esq.

[14.0] I. The Nature of an Appraisal 247
[14.1] II. An Admission 248
[14.2] III. Judicial Treatment of Appraisals 251
[14.3] IV. The Present Posture of the Courts 252

Chapter 15 Letting the Air Out of the Condemnor Proving Damages from the Taking of an Airspace Easement

Carl Rosenbloom, Esq.
Sandra F. Gordon, Esq.

[15.0] I. Introduction 259
[15.1] II. Airspace Easements Generally 259
[15.2] III. Establishing a Taking of an Airspace Easement 261
[15.3] IV. Compensation for Airspace Easements 262
[15.4] A. *Cunliffe v. County of Monroe* 263
[15.5] B. *Kupster Realty Corp. v. State* 264
[15.6] C. The Albany County Airport Cases 265
[15.7] V. Conclusion 268

Chapter 16 Valuing Contaminated Property in a Condemnation Proceeding

Michael Rikon, Esq.

[16.0] I. Introduction 271
[16.1] II. Remediation Costs 272
[16.2] III. Property Valuation 273
[16.3] IV. Contaminated Properties 274

Chapter 17 Environmental Claims

Saul R. Fenchel, Esq.
Jason M. Penighetti, Esq.

[17.0] I. Introduction 281
[17.1] II. Remediation and Cleanup Costs 282

Chapter 18 The Problem of "Just Compensation" in the Condemnation of "Public Use" Property

David M. Wise, Esq.

[18.0] I. Introduction 291
[18.1] II. Specialty Properties and the RCNLD Approach to Value 291
[18.2] III. RCNLD vs. "Rate Base" 295
[18.3] IV. The "Rights of Ownership" vs. the "Regulatory Compact" Approaches 297
[18.4] V. Condemnation of Economically Viable Systems Historically Subject to Unreasonable Rate Regulation 300

[18.5] VI. Condemnation of Economically Unviable Systems ... 301
[18.6] VII. Condemnation of an Economically Viable Utility System That Has Enjoyed the Benefits of the "Regulatory Compact" ... 303

Chapter 19 Interest on Condemnation Awards in New York
M. Robert Goldstein, Esq.

[19.0] I. Introduction ... 307
[19.1] II. Interest Rates Challenged ... 307
[19.2] III. Parameters Set ... 308
[19.3] IV. Nature of Proof Needed ... 311

Chapter 20 Recovery of Condemnee's Expenses Pursuant to EDPL § 701
Edward Flower, Esq.

[20.0] I. Introduction ... 315
[20.1] II. Issues to Consider ... 316
[20.2] III. Conclusion ... 321

Chapter 21 Awarding Compensation for "Going Concern Value" in Eminent Domain Proceedings
David C. Wilkes, Esq.

[21.0] I. Introduction ... 325
[21.1] II. The Rule of Business Taking ... 326
[21.2] III. Business Valuation Methods ... 328
[21.3] IV. Special Circumstances ... 332
[21.4] V. Exceptions ... 333

Chapter 22 Abandonment of a Project and/or a Taking
Mark R. McNamara, Esq.

[22.0] I. Introduction ... 337
[22.1] II. Post-Taking Project Abandonment ... 337
[22.2] III. Pre-Taking Abandonment ... 339
[22.3] IV. Conclusion ... 345

Appendix A *Kelo v. City of New London* No. 04-108, slip op. (June 23, 2005) ... 347
About the Authors ... 407
Table of Authorities ... 415
Index ... 435

FOREWORD

Eminent Domain Procedure Law (EDPL) is unique. Unlike a plenary action, neither party technically has a burden of proof in a condemnation matter. In *Winooski Hydroelectric Co. v. Five Acres of Land in E. Montpelier and Berlin, Vt.*,[1] the Circuit Court held that since fair market value is found by weighing all of the evidence, "no party has the burden of proof on the issue of the amount of compensation." The court expanded on the idea by saying that:

> [i]t seems difficult to assign an intelligible meaning to the concept of "burden of proof" in the eminent domain context, since the pleadings are not required to allege or deny the amount of compensation claimed, and the ultimate standard of decision is the constitutional rule of "just compensation."[2]

To the same effect, see *Newburgh Urban Renewal Agency v. Williams*,[3] where the court stated that, "the measure of just compensation involves a question of fact to be determined *in rem*," and that "the parties are not adversaries and therefore neither party should have a greater burden of proof than the other."

It is in that spirit that the authors of this book present an analysis of New York's EDPL. Contained within are a series of articles by individual practitioners who have, in their professional experience, represented condemnors and condemnees in proceedings to determine what just compensation may be in any given case. Some topics overlap, thereby presenting the reader with different perspectives.

My particular theory is that—since colonial times—New York state has been at the epicenter of the inter-relationship between real property interests, commercial growth and government involvement.

Consider the way Manhattan is laid out. The broad avenues control the traffic flow from north to south, while the shorter, more numerous intersecting streets connect the East and Harlem Rivers with the Hudson River. Clearly, the land use was to take advantage of the fact that by transiting

1 769 F. 2d 79 (2d Cir. 1985).

2 *Id.* at 84.

3 79 Misc. 2d 991, 361 N.Y.S.2d 842 (Sup. Ct., Orange Co. 1974).

the city, cargo could be moved from one side to the other for trans-shipment up the Hudson River and Erie Canal, through Long Island Sound from New England, up and down to the Chesapeake and south or transatlantically to Europe. Starting with the first colonial civilizations in New York by the Dutch and then the English, civilization required creating a road system to balance public and private interests. New York's current system of parkways, expressways, thruways and highways each generated major issues of land use, just compensation and re-use that, in many instances, set standards for condemnation issues as similar networks evolved across the country.

So it continues today. Whether the taking is for interstate or intrastate highways, hospitals and nursing homes, parks or urban renewal purposes, applying the eminent domain procedures by government from local benefit districts to the state and federal government, courts and constitutions emphasize a proper quantum for the payment of just compensation. When it is established that the taking is for a public use, the sole issue is that of "just compensation."

Publication of this book was held until the United States Supreme Court issued its decision in *Kelo v. City of New London*.[4] The facts in *Kelo* are essentially similar to any "urban renewal" taking where the municipality has determined a blighted area exists that should be assembled into a new site, cleared and reconveyed in accordance with an approved redevelopment plan. Most of the parcels to be acquired are in the blighted area. While petitioner Kelo's area is not blighted, it probably would be used for parking. The redevelopment plan called for marinas, a riverwalk, museum, parking, residences and transfer of the major assembled site to Pfizer Pharmaceutical Co. The issue was drawn as one of public use—essentially whether economic development to increase tax revenues and improve the local economy was a "public use" of a property to be acquired, including the non-blighted Kelo home.

The majority in the 5-4 decision stated that: "[p]romoting economic development is a traditional and long accepted function of government"; that the determinations of the local government are entitled to "broad latitude in determining what public needs justify the use of the takings power"; that it is not for the court to "second guess" the city's need on "what lands it needs to acquire in order to effectuate the project"; even if

4 No. 04-108, slip op., 545 U.S. ___ (June 23, 2005). See Appendix at the end of this book.

"the government's pursuit of a public purpose will often benefit private parties."

The majority and dissents agreed that A's property cannot be taken from A and given to B solely because "B will put the property to a more productive use and thus pay more taxes . . . [which] would certainly raise a suspicion that a private purpose was afoot [and such situations] can be confronted if and when they arise."

The main issues in *Kelo* arise from the inverted statement that A's property can be taken from A and given to B if the government decides such transfer is necessary inside "the confines of an integrated development plan."

The majority adopts a "rational basis" standard—as Justice Anthony Kennedy states in his concurring opinion—that will uphold a taking if it is "rationally related to a conceivable public purpose." He further states that:

> In sum, while there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose, no such circumstances are present in this case.

The dissent stated that the case presents one of incidental "public use," that private property may be forfeited for public use "but not for the benefit of another private person" and would hold "economic development" cases unconstitutional. Continuing in her dissent, Justice Sandra Day O'Connor states that the majority holds that:

> the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure.

In a joining dissenting opinion, Justice Clarence Thomas observed that, "[t]hough citizens are safe from the government in their homes, the homes themselves are not . . ." and points out the disproportionate effect on minorities that arises from many slum clearance projects.

The practical effect on existing New York jurisprudence of the *Kelo* decision should be quite minimal. There is a long line of cases as to public use, economic redevelopment and governmental determination of necessity that is consistent with the majority.

In "less important" or "more casual" takings, however, where the proof may not be as well documented, it is possible that the transfer of A's property from A to B through eminent domain might be so devoid of legitimate public use as to warrant a rejection of the taking as being solely for private use.

Essentially, a New York entity wishing to acquire property for "public use" must approach the EDPL public hearing seriously. It must make a record supporting a rational basis for the taking and one for each issue contemplated by article 2 of the EDPL.

The majority in *Kelo* states at page 19 of Justice John Paul Stevens' opinion:

> many States already impose "public use" requirements that are stricter than the federal baseline. Some . . . are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.

The EDPL does not purport to limit the grounds upon which the power be exercised. Clearly, it applies to any public project in section 101-G (acquisition "for public use, benefit or purpose") and expresses the procedures and evidentiary findings under article 2 that must be made to support a taking.

The *Kelo* case is an example of the issues that arise in this intriguing field of condemnation law. On behalf of the Condemnation and Real Estate Tax Certiorari Committee of the Real Property Section of the New York Bar Association, I thank you for your interest in this book. I also thank our participants for their dedication and selflessness in contributing to this effort, particularly Mike Rikon, who was responsible for obtaining several authors in addition to pursuing his own writings, and Dan McMahon of the New York State Bar Association, who was a great source of guidance throughout the project.

It is our hope that you will refer to this book when confronted with an eminent domain issue—whether from the standpoint of a municipality seeking to consider acquiring real property, or responding to a call from a

client who has just heard of the proposed acquisition of his or her property.

We also hope you find our efforts informative and timely and that the contents of this book will help you identify the issues that confront you and guide you in resolving them in your clients' best interests.

Jon N. Santemma

PREFACE

BY: HONORABLE FRANK S. ROSSETTI

One of the most powerful and necessary aspects of government is the sovereign right to take whatever property it deems necessary for the public good.

If the condemnor properly implements the Eminent Domain Procedure Law (EDPL) in acquiring property for a necessary public use, the emphasis in the proceedings shifts to the issue of just compensation.

The EDPL is just what its title says, a procedural statute intended to provide a fair roadmap for the condemnor to acquire property and a framework under which the claimant is assured a procedure and forum for establishing the proper quantum of just compensation to be received in exchange for the property.

The EDPL is not a substantive statute. It neither gives nor limits either party in its proof of just compensation, nor prescribes approaches to value or valuation principles. Those determinations are left to the courts, fixed under sound constitutional principles and case law precedents, all under evidentiary protection appropriate to expert testimony.

This hallmark power of the state means that truly everyone's ownership of everything is subject to the paramount need of the state to provide for the benefit of the public.

The system that has evolved in New York to process eminent domain cases has enough flexibility to provide for the usual and the unusual. The field has attracted dedicated, creative attorneys and appraisers who are able to place market values on just about any property.

Over the past three or four decades, we have observed takings that involve all sorts and types of real and personal property. Golf courses and antique merry-go-round horses, lakes and public transportation systems, cemeteries and mastodons, public bath houses and private air rights have all been subject of eminent domain proceedings, along with innumerable "ordinary" takings of "usual" properties. All have received awards of just compensation by New York courts.

This book considers substantive issues of just compensation and the procedures necessary for the condemnor to acquire property and for the claimant to seek just compensation.

The field of eminent domain is fascinating in its breadth of scope, the simplicity of its *raison d'etre*, "just compensation" and the complexity of achieving an approximation of compensation that is truly just.

Editor's Note: We note with sorrow the passing of Judge Frank S. Rossetti on May 1, 2005, following four decades of distinguished service on the bench. He was a great judge, a fine lawyer and an outstanding man whose many decisions in property valuation will be cited, with approval, by generations to come.

ABOUT THE EDITOR

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Jon N. Santemma, partner with the Garden City, New York, firm of Jaspan Schlesinger Hoffman LLP, is in charge of the firm's Tax Certiorari and Condemnation Law Practice Group. Formerly a partner at Santemma & Deutsch LLC, he brings years of experience to the firm. He was designated as the law secretary to the administrative judge assigned to the condemnation and tax certiorari part of the Supreme Court, Nassau County, and for five years assisted the court in deciding sophisticated valuation questions involving property in condemnation and real estate proceedings. In 1971, Mr. Santemma started his own practice and became special counsel to attorneys, law firms and private clients throughout New York State.

Mr. Santemma has served as president of the Nassau County Bar Association, a member of The House of Delegates, vice president of the New York State Bar Association and as trustee to the Village of Laurel Hollow, New York. He presently serves as co-chair of the Condemnation and Tax Certiorari Committee of the New York State Bar Association and has served as chair or member of the Condemnation and Tax Certiorari Committees of the Association of the Bar of the City of New York, New York County Bar Lawyers and the American, Nassau and Suffolk County Bar Associations. Mr. Santemma is co-editor and co-author of the 2000 Supplement to the *Review and Reduction of Real Property Assessments in New York* and is editor and co-author of *Condemnation Laws and Procedures in New York* (in progress). He received his A.B. degree from Cornell University in 1960 and an LLB degree from Fordham University School of Law in 1963.

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Mr. Flower has specialized in condemnation and tax certiorari matters, representing both condemnors and condemnees. He has been particularly active in the New York State Court of Claims, representing owners whose properties have been the subject of New York State appropriations. He has written and lectured on the subject and participated in trial demonstrations. Mr. Flower is a member of the American Bar, the New York State Bar and the Suffolk County Bar Associations. He has served as chairman of the committees on real property, condemnation and tax certiorari and environmental law and is a member of the Condemnation and Tax Certiorari Subcommittee of the Real Property Committee of the New York State Bar Association.

M. ROBERT GOLDSTEIN, ESQ.

M. Robert Goldstein is a partner in the firm of Goldstein, Goldstein, Rikon & Gottlieb, P.C. He was admitted to the New York State Bar in 1949. Since then, he has practiced exclusively in the field of condemnation law. Mr. Goldstein has been secretary of the New York County Lawyer's Association since 1981 and is a member of its Board of Directors and Executive Committee. He was a former chair of the Association's Condemnation Law, Library, House and Real Property Law Committees and administrator of its Pension Fund. He chairs its Foundation. Mr. Goldstein also is a member of the New York State Bar Association and its House of Delegates and the Association of the Bar of the City of New York. He is a trustee of the Public Access Law Library in New York County, Special Master in New York County Supreme Court and a mediator in its Commercial Division and for the First Department Disciplinary Committee. Since 1972, first with his brother, Michael Goldstein, and then with Michael Rikon, Mr. Goldstein has written a column on Condemnation and Tax Certiorari for the New York *Law Journal*.

Mr. Goldstein has served as a member of the planning board, chairman of the Board of Zoning Appeals, and trustee and deputy mayor of the village of Great Neck, New York. He also was acting justice and justice of the village court of the village of Great Neck for 11 years. He is a member of the planning board of the village of Kings Point. Mr. Goldstein received his B.A. degree from Pennsylvania State University and his J.D. degree from New York University School of Law.

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Ruth Keyes is a former member of Goldstein, Goldstein, Rikon and Gottlieb, P.C., a practice limited exclusively to condemnation law. Ms. Keyes received her J.D. degree from Tulane University Law School in 1996. She is admitted to practice in New York, Alabama and the United States District Court for the Southern District of Alabama. Ms. Keyes recently relocated to Seattle, Washington, and was scheduled for admission to the Washington State Bar in June 2005. She is a former assistant attorney general for the state of Alabama and a member of the American Bar, New York State Bar, Alabama Bar and the New York County Lawyers Associations.

ANDREW M. MAHONY, ESQ.

Andrew M. Mahony has been a partner in the Tax Certiorari and Condemnation Law Practice Group of Jaspan Schlesinger Hoffman LLP in Garden City, New York, since 2003. His practice concentrates on the areas of commercial condemnation and commercial tax certiorari, representing municipal and private clients; commercial litigation related to real property issues; transactional real estate; and real property exemptions. Prior to joining the firm, Mr. Mahony served of counsel to the Mineola, New York, law firm of Santemma and Deutsch LLC. He is a member of the Nassau County Bar Committee on Condemnation and Tax Certiorari; past president and current director of the Nassau Chapter of the St. John's Law School Alumni Association; a member of the Board of Directors of St. John's University School of Law Alumni Association; and treasurer of the New York Condemnation Conference.

Mr. Mahony co-authored the real property exemption chapter of the 2000 Supplement to the *Review and Reduction of Real Property Assessments in New York*. He earned his undergraduate degree from Saint Anselm College and his J.D. degree from St. John's University School of Law.

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Mark R. McNamara is a partner in the Buffalo office of Hiscock & Barclay, LLP. He received his J.D. degree from the National Law Center at George Washington University and his undergraduate degree from Colgate University. Mr. McNamara is an experienced trial lawyer, whose

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Theodore K. Okun is a graduate of the Brooklyn College of the City University of New York. He received his J.D. degree from Brooklyn Law School in 1960. After more than 36 years of service, he retired from the New York City Law Department in 2002, where he had served as Assistant Corporation Counsel since 1966.

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Jason M. Penighetti is a member of the Garden City, New York, law firm of Siegel Fenchel & Peddy. He received his J.D. degree from Hofstra University School of Law, where he was research editor of the *Hofstra Labor & Employment Law Journal*. In addition to the daily practice of eminent domain and tax certiorari, Mr. Penighetti has written a series of Practitioner's Perspectives for Matthew Bender on various provisions of the Court of Claims Act and Eminent Domain Procedure Law. He has authored articles in both the Suffolk Lawyer and Nassau Lawyer publications. His memberships include the Nassau County (member, Committee on Tax Certiorari and Condemnation), New York State, New Jersey State and the American Bar Associations.

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Michael Rikon is a partner in the New York City law firm of Goldstein, Goldstein & Rikon, P.C. He received a B.S. degree in business administration from the New York Institute of Technology, a J.D. degree from Brooklyn Law School and an LL.M. degree from New York University. Mr. Rikon served as assistant corporation in the City of New York's Condemnation Division (1969-1973); clerked for the Honorable Albert A. Blinder, New York State Court of Claims (1973-1980); and was consultant to the New York State Commission on Eminent Domain (1972-1973).

Mr. Rikon was admitted to the New York State Bar in 1970; the U.S. District Court, Eastern and Southern Districts of New York in 1971; the U.S. Court of Appeals, Second, Fifth and Eleventh Circuits in 1972; and the U.S. Supreme Court in 1973.

He is a member of the American Bar, New York State Bar, Suffolk County Bar, Mt. Vernon Bar and the New York County Lawyer's Associations; the Bar Association of the City of New York; chair, Condemnation Committee, Real Property and Probate Section; member, Committee on Condemnation, Zoning and Land Use Section of Litigation; Fellow-American Bar Foundation; Condemnation Committee; chair, Condemnation Committee; New York State Condemnation Conference; affiliate member of Appraisal Institute; New York State Eminent Domain Designee of Owner's Counsel of America; Condemnation Committee and Special Task Force on Downtown Redevelopment; Who's Who in America; and Who's Who in American Law.

KEVIN G. ROE, ESQ.

Kevin G. Roe is a partner in the Real Property Tax Assessment and Condemnation Group of Devorsetz Stinziano Gilberti Heintz & Smith, P.C. in Syracuse, New York. Mr. Roe's practice focuses on real property valuation litigation in eminent domain and tax assessment proceedings and environmental and land use litigation and permitting. He is a *summa cum laude* graduate of Elmira College, where he was elected to membership in Phi Beta Kappa, and a *summa cum laude* graduate of Syracuse University College of Law, where he was an editor of the *Law Review* and a member of the Order of the Coif. Before joining Devorsetz Stinziano Gilberti Heintz & Smith, Mr. Roe served as principal law clerk to the chief judge of the New York Court of Appeals.

CARL ROSENBLOOM, ESQ.

Carl Rosenbloom, a partner emeritus at Bond, Schoeneck & King PLLC, is an Albany Law School graduate and former assistant attorney general in the New York State Department of Law. While at the Law Department, he was the assistant in charge of the Condemnation Section of the Bureau of Claims and Litigation from 1970 to 1980, and in charge of the Claims Bureau from 1980 to 1982. Mr. Rosenbloom is a member of the New York State Bar, the Albany County Bar and the American Bar Associations.

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Michael J. Wasser is an assistant corporation counsel in the New York City Law Department, Tax & Bankruptcy Litigation Division. His main

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David C. Wilkes is a member of Huff Wilkes, LLP, based in White Plains, New York, where he practices exclusively in the areas of condemnation and property taxation. He is the senior editor of *Real Estate Review* (West Group). Mr. Wilkes received his law degree from Boston University and a master's degree in real estate valuation from New York University's Real Estate Institute, where he was awarded the Norman Weinberg Prize for Excellence. He is the 2003 recipient of the IAAO's Distinguished Research and Development Award for his work on the valuation of REIT-owned properties. Mr. Wilkes also is consultant to the World Bank for the design of a property taxation scheme for the Republic of Serbia.

DAVID M. WISE, ESQ.

David M. Wise is the principal of the Law Offices of David M. Wise, P.A., which has offices in Cranford, New Jersey, and Babylon, New York. He focuses on tax and regulatory issues, particularly on the state and local tax level. Mr. Wise was a formal trial attorney for the Tax Division of the United States Department of Justice. He graduated from the University of Wisconsin Law School, where he received the Order of the Coif. He also received an LL.M. degree in federal tax law from Georgetown University Law Center. Mr. Wise has lectured and written extensively on tax and valuation issues associated with utility properties and deregulation.