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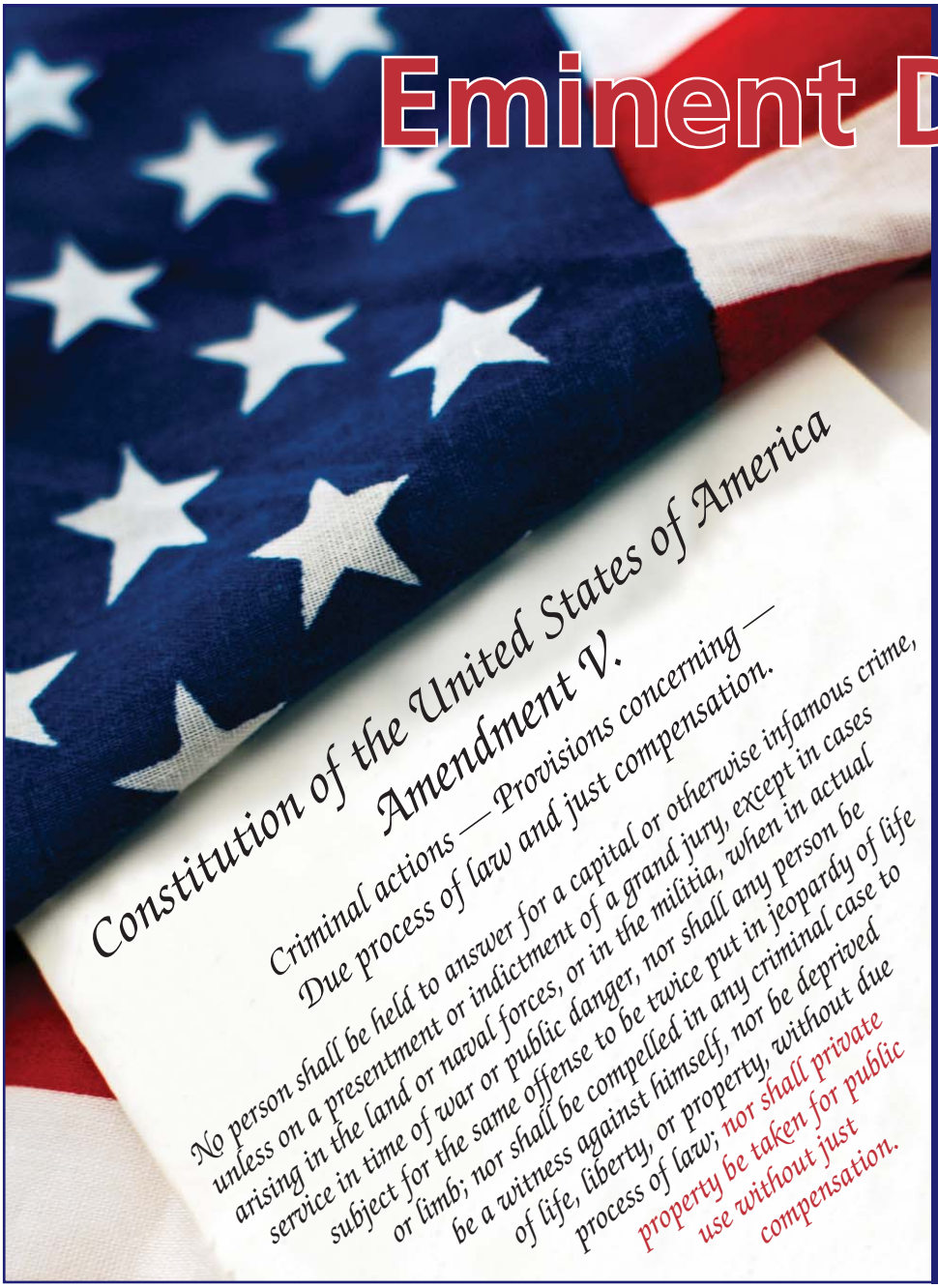

Eminent Domain

- Myths of *Kelo v. New London, Connecticut*
- Current Problems and Suggested Solutions
- Legislative Proposals to Rectify Public's Concern
- Highest and Best Use
- Just Compensation
- Condemnation of Public Utility Properties
- Compensation for Loss of Business Value
- Methods for Judicial Challenges Under the EDPL
- Local Governments' Exercise of Eminent Domain Powers

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2008 Annual Meeting Program and Reception

Tuesday, January 29, 2008

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Message from the Chair

By Patricia E. Salkin

As I am finishing my first year as Chair of the Committee on Attorneys in Public Service, it has become even more apparent that government lawyers are not only intelligent, hard-working and committed public servants, but as a group, government lawyers are thoughtful, supportive and dedicated volunteers for our State Bar Association. This fact is no surprise to our new State Bar President, Kate Grant Madigan, who early on recognized the untapped resources in the government law arena. President Madigan, known to Committee Members affectionately as our "fairy godmother," was instrumental in the creation of the Committee on Attorneys in Public Service as a vehicle to demonstrate the Association's desire to more actively involve government lawyers in all aspects of the Association. The Association has benefited by the diversity of experiences from public sector lawyers and government lawyers have felt more welcomed in terms of membership and participation in Association activities, and we have all benefited from the professional exchange of information that has helped to enhance publications and programs. The Committee looks forward to working more closely with President Madigan in the coming year.

Inside this issue of the *Government, Law and Policy Journal*, readers will find a photo montage from the January 2007 Annual Meeting. The Committee's events once again topped anything we had done before. Attendance at our CLE program—which featured a morning session on recent cases of interest decided by the U.S. Supreme Court, and an afternoon session focused on eminent domain—was high and evaluations were outstanding. In fact, people are still offering positive feedback about the program months later. Special thanks to Committee members Donna Case and Mary Berry who coordinated the program content, speakers and materials.

The 2007 Excellence in Public Service Awards were presented to three distinguished public servants who collectively set the standard for excellence. Chief Judge Judith Kaye; Murray Jaros, currently with the Association of Towns of the State of New York; and Joan Kehoe, Counsel at the NYS Department of Agriculture and Markets, are not only role models in the legal profession, but they have mentored and inspired countless others who try to emulate their high standards of professionalism, service and capability. Thank you to Anthony Cartusciello and Robert Freeman, co-chairs of the Awards Committee, for selecting these distinguished lawyers for well-deserved recognition and for allowing us to show in one small way our appreciation for their work.

Our Administrative Law Judge subcommittee has been particularly active this year under the leadership of Catherine Bennett and James McClymonds. In addition to a series of statewide CLE programs organized by Past-Chair James Horan, this year the subcommittee has invested considerable time in developing a proposed code of conduct for ALJs. The full Committee is looking forward to reviewing and discussing their work and to sharing a proposal with the leadership of the Association in the near future.

Under the leadership of David Markus, Donna Snyder and Lori Mithen-DeMasi, our subcommittee on legislation is planning a September 2007 invitational summit at the State Bar on the government attorney-client privilege. This is an issue that remains of particular interest to government lawyers, and one where more guidance in the form of legislation and/or commentary in the rules of professional conduct may be appropriate. The summit will explore these options and examine whether any recommendations for future action may be advisable.

Also in the fall of 2007, under the guidance of Linda Valenti, Carl Copps, Steve Richman and Stephen Casscles, the Committee will be launching a new web-based portal for government lawyers where we hope NYSBA members will find one-stop shopping for Internet links and information to better assist lawyers looking for helpful sources about government law.

My job this year has been made infinitely easy by an additional team of subcommittee coordinators who have kept the Committee working between regularly scheduled meetings. Special thanks to Spencer Fisher, Peter Loomis and Donna Snyder for outstanding leadership and commitment to the Committee and to the Association. And, I would be remiss without continuing to thank publicly the Association staff for their continued assistance and guidance: Pat Wood and Maria Kroth in Membership, and Wendy Pike and Lyn Curtis in Publications. Last, but certainly not least, thank you to Rose Mary Bailly, editor-in-chief of our flagship *Government, Law and Policy Journal*.

Editor's Foreword

By Rose Mary Bailly

In the wake of the decision of the United States Supreme Court in *Kelo v. City of New London, Connecticut* upholding the use of eminent domain for economic development, strong opposition erupted and critics of the decision suggested it was "open season on eminent domain."[1] While such a backlash may not be surprising to those who thought the court had strayed from precedent, the articles in this issue devoted to the subject of eminent domain make clear that *Kelo* did not represent new law. Despite the fact that the Court was merely following the current trend of cases, the *Kelo* decision and the reaction that ensued offers an opportunity to assess the state of eminent domain law in New York and whether changes to the law are warranted. In fact, A. Vincent Buzard, past President of the New York State Bar Association, appointed a special Task Force on Eminent Domain to study the issue and to make recommendations to the Association leadership regarding an appropriate response to the issue resulting from the *Kelo* backlash.

Once again a wonderful collaboration produced this fascinating issue. First and foremost, I want to thank Jon N. Santemma, Esq., and David Wilkes, Esq., CRE, FRICS, our special guest editors, for taking the lead in assembling this issue. Jon N. Santemma is of counsel to the Tax Certiorari and Condemnation Law Practice Group of the firm of Jaspan, Schelsinger and Hoffman with over 35 years of experience in tax certiorari and condemnation law. David Wilkes, from the firm of Huff Wilkes, is an international real estate advisor, concentrating in property taxation and local government finance, complex property valuation, eminent domain, and emerging market tax and mortgage finance, including Islamic law-compliant mortgages. The depth of their expertise on the subject of eminent domain was extremely helpful to this effort. Our authors one and all add to our appreciation of the complexity of the law of eminent domain and present readers with very different and diverse views and analyses of eminent domain law in New York and across the country, views with which not everyone will agree.

Our first series articles looks at the fallout from *Kelo.* David Schultz takes us through the *Kelo* decision and the criticism surrounding the distinction between a valid public use and a private taking and where economic development straddles the dividing line in *Comprehensive Plans, Corporate Thuggery, and the Problem of Private Takings.* The author notes approvingly that the existence of a comprehensive plan as backdrop to the exercise of eminent domain may validate a public use. He contends that the more difficult problem is dealing with a corporate developer that asserts power for its own interests and the inequities that allow that to happen. He indicates that the latter problem will not necessarily be fixed by changes in the law of eminent domain.

In *The Mighty Myths of* Kelo, Professor John R. Nolon challenges the hyperbole that has surrounded much of the discussion of the Supreme Court's decision in *Kelo.* He traces the law as stated in *Kelo* back to much earlier cases and concepts. He contends that the numerous legislative efforts to curtail the use of eminent domain in response to *Kelo* are of dubious benefit to the public because they would undermine the ability of government to address serious problems in difficult areas. He points to the fate of New Orleans in the wake of Hurricane Katrina as an obvious example where eminent domain could be used to improve the life of the city and its citizens and concludes by commenting that we need to know more about the use of eminent domain and its consequences before we dismantle our current laws.

Charlene Indelicato and Linda Trentacoste examine attempts by governments at every level to respond to the public outcry engendered by *Kelo*. In their article, *Throwing Out the Baby with the Bathwater: A Review of Various Federal, State and Local Legislative Proposals Purporting to Rectify the Public's Concerns Revealed in* Kelo v. City of New London, Connecticut *Decision*, the authors are critical of these legislative efforts and the potential for unintended consequences that could result in the rush to calm public concerns. They suggest that a more fruitful approach is an Eminent Domain Task Force that would take a comprehensive approach to reviewing the use of eminent domain at various levels of government and what problems need to be addressed.

Jon N. Santemma discusses some improvements that would be appropriate for New York's current procedures in *Eminent Domain in New York: Current Problems and Suggested Solutions*. Among the topics he considers are the two methodologies for takings—one for the state and another one for non-state entities; who should be receiving notice of the condemnation, such as tenants; whether the findings mandated of the condemnor are sufficient or too extensive; the appropriate standard of proof and the standard of review; jurisdiction for review of takings that occurred without hearings in accordance with permissible exceptions to the hearing requirement; the equitable treatment of deposits for condemnors and condemnees; and abandonment of a project.

The next series of articles examines the issue of "just compensation." Edward Flower looks at the criteria determining the "highest and best use" of a property, the standard by which a property must be valued in the exercise of eminent domain in his article, *Highest and Best Use*. He explores various ways condemnees have sought to increase the value of the property, including challenges to the property's zoning, the use of collateral attacks on land use regulations, and the exclusion of the consequences of "condemnation blight" from the value. In his second article, *Reimbursement for the Cost of Obtaining Just Compensation,* he examines how a court exercises its discretion to award additional monies to a condemnee under section 701 of the Eminent Domain Procedure Law to compensate the condemnee for the expenses associated with demonstrating the inadequacy of the condemnor's initial offer for the property. David M. Wise explores valuation of specialty properties, namely public utility property; other privately owned properties dedicated to the public service, such as water, sewer, transportation, gas and electric utility type property; and hospitals and clinics serving the general public in *The Condemnation of Public Utility and Other Specialty Properties Already Dedicated to the Public Use*. In their article, *The Condemnation Clause of the Lease—Frequently Overlooked,* Saul R. Fenchel and Jason M. Penighetti bring our attention to the fact that practitioners who have ignored or overlooked a condemnation clause in a lease do so at their peril if the underlying property is subsequently condemned. The article considers both the general rule that the terms of the condemnation clause govern the division of any award made as a result of a taking of the leased property and the problems that may arise when the condemnation clause is ambiguous.

Assessing compensation for a partial taking can be particularly difficult. Kevin G. Roe and Sidney Devorsetz examine this type of assessment in their article, *Partial Takings*, noting that while the concept of compensation based on market value was developed in an era when the country was largely agricultural, its application to partial takings, particularly in today's environment of "fast-food restaurants, drive-thru branch banks and big-box retail centers" often results in property owners being deprived of "just" compensation for the harm suffered to the remaining property. Saul Fenchel and Jennifer Hower take a specific look at recovery of damages for partial takings in retail and commercial enterprises in *Can Your Client Recover Severance Damage for the Loss of Frontage Area?* The authors note that the loss of parking areas or display areas along the highway can be significant for businesses seeking to attract customers with the availability of ample parking or attractive displays, and discuss cases in which business owners have successfully recovered substantial damages.

As David C. Wilkes explains in *Compensating for the Loss of Business Value as a Result of Condemnation*, New York generally does not allow for an award of damages for the loss of a business when the land on which a business operates has been condemned. While some states have taken a more liberal approach to this issue, New York and many other states retain this rule. The difficulty associated with establishing a value for the business involves separating the value of the business from the "fair market value" of the real estate. He examines several different types of business, offers a review of different appraisal methodologies used to allocate value between real estate and the business on it, and suggests circumstances in which a court might be persuaded to award damages for the value of the business.

In the next article, *Abandonment of a Project and/or a Taking*, Mark McNamara explores the consequences when the project for which property has been taken by eminent domain is abandoned or the taking itself is determined to be illegal, and suggests three areas for legislative review. The first focuses on the requirement that when a project is abandoned, the condemnor must offer the property back to the condemnee at a price described by the EDPL as the "fair market value of the property at the time of the offer." The second area focuses on the issue of calculating when the procedure to acquire the property has been abandoned or a determination has been made that the condemnation is illegal. Finally, the third area focuses on the ambiguity of what "other damages" a condemnee might recover under section 702 of the EDPL when there is a finding of abandonment.

The next article is an examination of a municipality's exercise of eminent domain, *Eminent Domain in the City of New York: A Discussion of the Public Hearing and Notice Requirements and Methods for Judicial Challenges Under the Eminent Domain Procedure Law*. Natasha Demosthene and Geeta Kohli take us through the city's procedures, with particular focus on the city's use of its Uniform Land Use Review Procedure as an exemption from the state's Eminent Domain Procedure Law.

The next series of articles takes a look at court decisions after *Kelo*. In *Is It Jurisdiction or Economic Development?*, M. Robert Goldstein looks at the decision in *Hargett v. Town of Ticonderoga*, in which the Appellate Division held that it was beyond the jurisdiction of the superintendent of highways to condemn property in order to create access between an existing road and state land for the stated purpose of "recreational use." Mr. Goldstein suggests that the decision is far afield of well-established law in New York regarding the use of eminent domain for economic development and well might be "the first step in the courts reigning in the power to condemn." In Didden v. Village of Port Chester: *For Now, Broad Judicial Deference to Local Governments' Exercise of Eminent Domain Powers Remains the Rule*, Edward J. Phillips examines a recent decision of the Court of Appeals of the Second Circuit that followed on the heels of *Kelo,* noting that

while its outcome favoring the local village of Port Chester is disappointing to those concerned about the broad interpretation of eminent domain, government officials should nevertheless tread carefully in the field of eminent domain because there may come a situation where the government and the developer's actions become untenable.

Finally, Nadia E. Nedzel and Dr. Walter Block suggest a rather radical approach to the debates over takings for economic development and calculating just compensation—a repeal of the takings clause and the treatment of government as a private party forced to justify its actions. In their essay, *The Demise of Eminent Domain*, the authors challenge the traditional views of eminent domain to direct our focus on where the law has led us and what eminent domain should mean.

Our Board of Editors was again instrumental in making very helpful suggestions and providing support. The admirable skills of Albany Law School student editorial staff, Executive Editor Michael Pendell and his law school colleagues, Luke Davignon, Margaret Lavery, Joshua Luce, Mark Myers, Olivia Nix, William Robertson, and Mark Simoni assisted all of us through the editorial process. The New York State Bar Association staff, Pat Wood, Lyn Curtis, and Wendy Pike, deserve special thanks for their inexhaustible patience and good humor.

Finally, any flaws, mistakes, oversights or shortcomings in these pages are my responsibility. Your comments and suggestions are always welcome at rbail@albanylaw.edu or at Government Law Center, 80 New Scotland Avenue, Albany, New York 12208.

Endnote

1. David Barron, *Eminent domain is dead! (Long live eminent domain!)*, The Boston Globe (April 16, 2006) (citing Larry Morandi of the National Conference of State Legislators), available at http://www.boston.com/news/globe/ideas/articles/2006/04/16/eminent_domain_is_dead_long_live_eminent_domain/.

Comprehensive Plans, Corporate Thuggery, and the Problem of Private Takings

By David Schultz

By upholding the use of eminent domain to take private property from one owner and give it to another in order to promote economic development, the Supreme Court's decision in *Kelo v. City of New London* [1] angered many.[2] Some felt that this decision meant the "public use" stipulation in eminent domain no longer had any meaning and that the Court was now prepared to endorse any taking for any reason, so long as compensation was paid. Yet this was not the first decision that property rights advocates saw as rendering the public use limitation moot. Similar laments were heard following *Hawaii Housing Authority v. Midkiff* [3] and *Poletown Neighborhood Council v. City of Detroit*.[4]

But much in the same way that Claude Rains (a.k.a. Captain Renault in *Casablanca*) exclaimed that he was "shocked" to find gambling at Rick's Cafe, those closely following eminent domain law should not be surprised by the Court ruling that the government could take a private home or property for economic development reasons and transfer it to another. The real shock, if any, was in the reaction to the *Kelo* decision and the fact that it illuminated two questions surrounding condemnation law. First, is there any way left to distinguish public from private uses? Second, how can we prevent eminent domain from being used on behalf of corporate interests to advance their private interests? *Kelo* answered the first question yet failed to address the latter.

Understanding the *Kelo* Opinion

In *Kelo*, the United States Supreme Court affirmed a decision of the Connecticut Supreme Court, which held that the taking of unblighted private property for economic development purposes constituted a valid public use under both the state and federal constitutions.[5]

At issue in *Kelo* was an attempt by the City of New London, a municipal corporation, and the New London Development Corporation to use a state law (Chapter 132 of the Connecticut General Statutes) to take non-blighted land to build and support the city's downtown economic revitalization.[6] In its plan, New London divided the development into seven parcels, with some of these parcels including public waterways or museums. One parcel, known as Lot 3, was to be a 90,000-square-foot research and development office space and parking facility for the Pfizer Pharmaceutical Company. Several plaintiffs located within Lot 3 challenged the taking of their property, claiming that the condemnation of unblighted land for economic development purposes violated both the state and federal constitutions. More specifically, they argued that the taking of private property under Chapter 132 and handing it over to another private party did not constitute a valid public use, or at least that the public benefit was incidental to the private benefits generated.

The Connecticut Supreme Court rejected the plaintiffs' claims, and the United States Supreme Court granted *certiorari* to review the federal question of whether the taking of private property for economic development purposes, when it involves the transferring of the land from one private owner to another, constitutes a valid public use under the Fifth and Fourteenth Amendments of the United States Constitution.

Writing for a divided Court, Justice Stevens ruled that the taking did not violate the public use requirement of the Fifth Amendment.[7] In arriving at this conclusion, Stevens first noted how the case pitted two propositions against one another:

> [T]he sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example.[8]

But Stevens stated that neither of these rules resolved the case.[9] Drawing upon *Midkiff*, he first reaffirmed the proposition that a taking for a purely private benefit would be unconstitutional. But this case did not constitute a private taking since the decision to acquire the property was part of a "'carefully considered' development plan" for which neither the real nor the hidden motive was to confer a private benefit.[10]

Second, the Court rejected arguments that the taking failed the public use requirement because the property would eventually be used and transferred to a private party, rather than be used by the public.[11] Here, Stevens stated that the "Court long ago rejected any literal requirement that condemned property be put into use for the general public"[12] and that this narrow reading had been rejected in favor of a broader public purpose reading of the public use doctrine.[13] Therefore, the case turned on whether the tak-

ing served a valid public purpose and Stevens wrote that the Court should adhere to the long-established judicial tradition of deferring to legislative determinations on this matter.[14] In short, given the broad and flexible meaning attached to the public use stipulation and past judicial deference to legislative determinations of what constitutes a public purpose, Stevens declined to establish a bright-line rule,[15] and concluded that the taking of private property for economic development purposes was a valid public use.[16]

Overall, *Kelo* did not make new law in terms of taking private property for economic development purposes. As Stevens pointed out, the city could not take private property to primarily benefit a private party.[17] He also noted that the narrower conception of public use had long since been abandoned,[18] and governments have long had the power to take for a variety of public welfare purposes, including economic development.[19] *Kelo* simply reaffirmed a trend that already existed in the law.

Comprehensive Plans and the Problem of Private Takings

Perhaps the main criticism in *Kelo* surrounded the problem of distinguishing a private taking from a valid public use. Takings for economic development purposes were once considered per se invalid. The Stevens majority rejected this assertion as unworkable. However, the search for a dividing line to distinguish valid public uses from private takings has a long history, with the Court repeatedly rejecting previous tests as unworkable.[20] *Kelo*'s comprehensive plan test is another effort in making this distinction.

In *Kelo*, Stevens rejected arguments for the Court to carve out an economic development exception to the broad public use doctrine.[21] He dismissed such a rule as unworkable, stating that it would be impossible to distinguish economic development from other valid public purposes.[22] He turned away assertions that the taking for economic development purposes blurred the distinction between a public and a private taking.[23]

> It is further argued that without a bright-line rule nothing would stop a city from transferring citizen *A*'s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case.[24]

Stevens here offers an example of what the Court might consider to be evidence of a taking for private use, in other words, a taking not backed up by a comprehensive plan. Absent such a plan, it might appear that the taking was primarily intended to convey a private benefit. The presence of such a plan, especially one replete with legislative findings, would provide evidence that the taking was part of a broader public purpose, and therefore not primarily aimed at conveying a private benefit.

But one area where new law was created in this case was perhaps in the appeal to a comprehensive plan as a means of distinguishing public versus private takings. In *Kelo*, Justice Stevens reiterates that an existing comprehensive plan is critical to upholding a taking. For example, in comparing the taking here to that in *Midkiff*, Stevens states, "Therefore, as was true of the statute challenged in *Midkiff* . . . the City's development plan was not adopted 'to benefit a particular class of identifiable individuals.'"[25] Furthermore, "In *Berman v. Parker* . . . this Court upheld a redevelopment plan targeting a blighted area of Washington, D.C., in which most of the housing for the area's 5,000 inhabitants was beyond repair."[26] Finally, Stevens concludes:

> 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. 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*.[27]

The presence and use of comprehensive plans as a requisite for distinguishing private from public takings has some cogency. Prior to *Kelo*, several state courts had drawn upon their absence or presence in adjudicating public use decisions.[28] For example, in *City of Las Vegas Downtown Redevelopment Agency v. Pappas*,[29] the Nevada Supreme Court upheld the taking of non-blighted commercial property to provide parking facilities for a downtown redevelopment project under both the federal and Nevada constitutions. Critical to upholding the taking was the presence of a comprehensive plan for the area, which included the condemned property in question.

Similarly, the Minnesota Supreme Court upheld the taking of real property from one business and giving the

land to another private business in *Housing and Redevelopment Authority in and for the City of Richfield*.[30] Here, the condemnation involved the acquisition of residential property, an automobile dealership, and the eventual transfer of the property to a retail business for the construction of their new corporate headquarters. Critical to finding this a valid public use was the court noting how the acquisitions fit into a comprehensive plan for the area.

Conversely, the Illinois Supreme Court ruled that transferring private property from one business in order to allow another to expand was not a valid public use in *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*[31] In this case, the court invalidated the taking of a private business by a regional development authority at the urging of a business operating a racetrack, after the latter's attempt to purchase the property or address its parking needs had failed. The Court here noted that there was no comprehensive plan supporting the taking,[32] leading them to conclude that the condemnor was simply the "default broker of land for the eventual owner."[33]

Prior to *Kelo*, then, state courts were increasingly looking into comprehensive plans to validate the public nature of takings.[34] The *Kelo* decision should strengthen such a trend. Having in place a valid comprehensive plan is a necessary showing that the taking is part of a larger documented and thought-out design for a community, demonstrating where and how specific parcels fit in. If there is a single reform measure that legislatures should look to post-*Kelo* in revising their eminent domain statutes to guard against private takings and to protect homeowners, it would be elevating the status of comprehensive plans in terms of justifying takings and showing how specific property fits into a broader schema for development. These plans, formulated with public input and hearings, would go a long way towards assuring that the eventual decision making processes for eminent domain are fair and that potential condemnees have sufficient notice to protect their rights.

Corporate Thuggery and Eminent Domain

The development and implementation of a comprehensive plan prior to property acquisitions is a necessary but not a sufficient condition to preventing private takings and in protecting ownership rights. What *Kelo* also highlighted was a second problem in many of the famous cases involving alleged abuses of eminent domain—the use of eminent domain by a condemnor to serve powerful corporate interests.

In *Kelo*, the criticism was that private property was being taken simply to serve the corporate interests or plans of Pfizer Pharmaceutical Company. The City of New London, Connecticut, in an economically desperate situation, needed to accommodate Pfizer in the creation of this economic development project, or else it would lose this company, as well as its jobs and tax revenue, to another community. Similarly, back in early 1980s when the City of Detroit was economically reeling from the job losses and hemorrhaging in the automobile industry, it capitulated to the demands of General Motors to use its eminent domain authority to provide land for a new assembly plant, or face the prospect of the auto giant going elsewhere to expand. As a result, the Michigan Supreme Court upheld the City of Detroit's use of its eminent domain authority to level a city neighborhood, relocate 1,362 households, and acquire over 150 private businesses in order to accommodate the desire of General Motors Corporation to build a new assembly plant on 465 acres of land in *Poletown Neighborhood Council v. City of Detroit*.[35] On top of this acquisition, the City of Detroit also provided over $200 million in tax breaks and other subsidies to GM to support the project, only to find the promise in creating 6,000 new jobs to be illusory.[36]

Kelo, *Poletown*, and even the *Southwestern Illinois Development Authority* highlight the unsolved problem of eminent domain—how to prevent corporate thuggery. What checks prevent powerful corporate interests from blackmailing politicians into using the takings power to further corporate interests? While enactment of a valid comprehensive plan may eliminate many private takings, *Kelo* does nothing to prevent future GMs, Pfizers, and other developers from forcing changes on them in order to accommodate their economic expansion needs.

Governmental entities and the political decision making process are like an island embedded within a larger economic sea that leaves in the hands of private economic players the power to make business investment decisions. Developers can use this tool—invest or withhold investment and flee from a jurisdiction—if they do not secure the benefits they desire from a community. Such a threat has been successful in corporations extracting tax credits and breaks for business relocation decisions, even though the empirical evidence suggests such incentives are minor factors affecting how facilities are sited. Similarly, sports teams use the threat of relocation along with fan-base loyalty to wrestle new publicly financed stadiums from cities and other local governments.

There is a well-trod path of eminent domain being exercised on behalf of powerful interests to secure their needs, with the occasions of *Midkiff* takings (the breaking up of land monopolies to benefit tenants) being the exception to the rule.[37] Perhaps what infuriated Kelo and others in Connecticut was not simply that their property was being taken, but rather that the developers, a corporate giant, and the city were overwhelming the residents. For Kelo, as well as others across the country who see developers and city officials working together to push them out of their homes, the problem is that democracy has broken down and they see neither a means by which to be heard nor a respect for their voices in the political process.[38]

What needs to be addressed post-*Kelo* is not simply the eminent domain process, but the substantive power inequities in the political arena making it possible for corporate and wealthy interests to wield the condemnation power to their advantage. Perhaps better judicial review of the eminent domain process, such as in the *Southwestern Illinois Development Authority* case, might eliminate some of the inequities when no valid public use is revealed. However, the real solutions may lie elsewhere. Such might include campaign finance reforms limiting corporate and individual contributions and lobbyist influence, tax policies discouraging concentrated wealth, and renewed antitrust regulation that addresses political power flowing from economic monopolies. Regardless of the solution, remedying the private takings problem post-*Kelo* will not be fixed with new laws demanding enhanced judicial scrutiny of public use decisions, by banning takings for economic development reasons, or by increasing the burden for the government in condemning property. The needed reforms touch deeper issues such as how democratic societies allocate power and reach decisions. Cases in the future that are analogous to *Kelo* will not be avoided unless one looks behind the law to see what practical changes are required to assure that democracy does not submit to corporate thuggery.

Conclusion

Kelo v. City of New London was shocking not because of its novel holding, but for what it revealed about influential parties in condemnation proceedings and how public use decisions are made. While legislatures seeking reforms in a post-*Kelo* atmosphere should strengthen the role that comprehensive plans serve as evidence of valid public uses, they should also be attentive to reforms that address the inequities in power that many condemnees feel when facing a taking. It is this aspect of the taking in *Kelo*—the real or apparent teaming-up by corporate interests and the government—that might be the root of the anger and dismay following the decision.

Endnotes

1. 125 S. Ct. 2655 (2005).
2. *See, e.g.*, Timothy Egan, *Ruling Sets Off Tug of War Over Private Property*, N.Y. TIMES, July 30, 2005, at A1 (noting the efforts in Congress and the states after the *Kelo* opinion to condemn it or limit it with legislation); and Michael Corkery and Ryan Chittum, *Eminent-Domain Uproar Imperils Projects*, WALL ST. J., August 3, 2005, at B1 (discussing how the *Kelo* opinion is causing a backlash against many projects involving the use of eminent domain).
3. 467 U.S. 229 (1984).
4. 304 N.W.2d 455 (Mich. 1981).
5. 843 A.2d 500 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005).
6. *See Kelo*, 125 S. Ct. at 2660 (noting that "[t]here is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area").
7. *Id.* at 2665–66. *See also id.* at 2659 (Kennedy, J., concurring) (noting that the purpose of the economic redevelopment plan was to revitalize the waterfront, bring new businesses to the area, generate tax revenue, and increase employment).
8. *Id.* at 2661 (majority opinion).
9. *Id.*
10. *Id.*
11. *Id.* at 2661–62.
12. *Id.* at 2662 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984)).
13. *Id.*
14. *Id.* at 2663, 2664.
15. *Id.* at 2663–64.
16. *Id.* at 2665.
17. *Id.* at 2661.
18. *Id.* at 2662.
19. *Id.* at 2662–63.
20. *See* David Schultz, *What's Yours Can be Mine: Are There Any Private Takings After* Kelo v. City of New London*?*, 24 UCLA J. ENVTL. L. & POL'Y 195 (2006).
21. *Kelo*, 125 S. Ct. at 2668.
22. *Id.* at 2665.
23. *Id.* at 2666.
24. *Id.* at 2666–67.
25. *Id.* at 2661–62 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984)) (citation omitted).
26. *Id.* at 2663 (citing *Berman v. Parker*, 348 U.S. 26 (1954)) (citation omitted).
27. *Id.* at 2657.
28. David Schultz, *What's Yours Can be Mine: Are There Any Private Takings After* Kelo v. City of New London*?*, 24 UCLA J. ENVTL. L. & POL'Y 195, 224 (2006).
29. 76 P.3d 1, 17 (Nev. 2003).
30. 641 N.W.2d 885 (Minn. 2002).
31. 768 N.E.2d 1 (Ill. 2002).
32. *Id.* at 10.
33. *Id.* at 9.
34. David Schultz, *What's Yours Can be Mine: Are There Any Private Takings After* Kelo v. City of New London*?*, 24 UCLA J. ENVTL. L. & POL'Y 195, 233 (2006).
35. 304 N.W.2d 455 (Mich. 1981).
36. DAVID A. SCHULTZ, PROPERTY, POWER, AND AMERICAN DEMOCRACY, 115 (1992).
37. Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U. L. REV. 1, 24-5 (2005).
38. *Id.* at 43–45 (arguing that the reinforcement of representation systems might be the solution to address the inequities in the power relations when corporate interests team up with local governments).

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The Mighty Myths of *Kelo*

By John R. Nolon

The press releases of property rights activists and the media's rapid embrace of their views have perpetuated several myths about the U.S. Supreme Court's decision in *Kelo v. New London*.[1] In the immediate aftermath of this myth making, the legislatures of several states have adopted restrictions on the use of eminent domain with uncharacteristic speed. Wisely, the New York State Legislature has been more cautious in its reaction.

As it turns out, many of the eminent domain laws in other states have nothing to do with New London's program of area-wide redevelopment or the legal holding of the *Kelo* case. In fact some will have the unintended consequence of crippling state and municipal efforts to direct the redevelopment of inner-city neighborhoods, coastal areas subject to inundation due to climate change, and cities trying to rebuild after devastating natural disasters.

Myth #1: New London's Objective Was Economic Development

New London is a formally designated "distressed city." In Connecticut, a state in which there is a great disparity between haves and have-nots, New London houses mostly the latter. Its 5.5 square miles were carved out of the affluent town of Waterford, which has a property tax rate 40 percent lower than New London's. The city serves, as most older cities do, to house transit facilities, hospitals, colleges, polluting industries, and low- and moderate-income workers: all resources critical to its region's well-being. New London's poverty and unemployment rates are well above the state's average. Because the city lost a naval base and most of its industrial jobs, its tax base declined and it has flirted with municipal bankruptcy.

New London, after much public discussion and debate, adopted an area-wide redevelopment plan for one of the few relatively low-density parcels left, next to the shuttered naval facility and a state-funded public park. The plan envisioned a small mixed-use, tourist-oriented urban village, with public parking, a renovated marina and river walk open to the public, and some restaurants and shopping. These activities would generate 1,000 new jobs, bring tax revenues to the fiscally strapped city, and enable it to provide better services to its low- and moderate-income residents and workers and continued service to the region beyond.

It would be startling news to generations of urban policy makers that this New London program was designed to achieve "economic development." Area-wide redevelopment programs are a response to a tight knot of despair in distressed cities like New London. These cities were called places "from which men turn" by the unanimous U.S. Supreme Court in *Berman v. Parker*,[2] which upheld an area-wide urban renewal plan in the District of Columbia over 50 years ago. Countless local, state, and federal programs have struggled to restore inner-city regional centers; to obtain the proper balance of housing, industrial, and commercial facilities; and to increase their attractiveness to persons of all incomes to make them desirable places to live, work, shop, and enjoy life and its urban amenities.

Myth #2: *Berman v. Parker* Made New Law

The *Kelo* Court based its decision on the *Berman* case which upheld the constitutionality of condemning the non-blighted property owned by the plaintiff in the interest of area-wide redevelopment of an inner-city neighborhood. It also sanctioned the lease or sale of condemned land to private redevelopment companies whose projects conform to the area-wide plan. According to the myth, that Court confused the narrow concept of public use (for which property may be condemned) with the broader definition of public purpose (which justifies other government functions, such as land use regulations).

The *Berman* Court—all nine Justices—thought that condemnation could be employed to accomplish any objective for which sovereign power can be exercised when it permitted condemnation of private land for a "public use."[3] The myth claims that "public use" is limited to a narrower range of objectives: takings for public works projects, public utility projects, or projects that the public at large will actually be able to use, such as a park. There is no evidence of any discussion of this distinction among the Constitution's framers; in fact, the Court had assumed the opposite for over 50 years before the *Berman* decision was handed down.

In 1893, Congress authorized the War Department to condemn private property in and around the Gettysburg battlefield. The Gettysburg Electric Railway Company challenged this act, arguing that the preservation of the lines of battle by preventing the completion of its rail line was not a public use as that term is used in the Fifth Amendment. In *U.S. v. Gettysburg Electric Railway Co.*, the

Court addressed this question: whether "the use to which the petitioner desires to put the land . . . is of that kind of public use for which the government of the United States is authorized to condemn land."[4]

The Court held that the government "has authority to do so whenever it is necessary or appropriate to use the land in the execution of any of the powers granted to it by the constitution. . . . [W]hen the legislature has declared the *use or purpose* to be a public one, its judgment will be respected by the courts. . . ."[5] As if anticipating future questions, the Court added, "The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred."[6]

Myth # 3: Condemned Land Cannot Be Transferred to a Private Entity

What about the *Berman* court's authorization of the transfer of title to condemned land to the private sector for redevelopment—surely that was a newly minted concept? To the contrary. That complaint was settled by the Court in a 1906 opinion: *Strickley v. Highland Boy Gold Mining Co.*[7] In *Strickley*, an easement over the plaintiff's property was condemned and handed over to his neighbor, a private mining company. The complaint was that this was done solely for private benefit and was not, therefore, a public use under the Fifth and Fourteenth Amendments. The condemnation was done under a Utah statute which asserted that the public welfare of the state demanded that mining operations in the mountains have access to rail lines in its valleys.

Justice Holmes wrote the opinion of the Court which addressed the sole question of whether the Utah statute is consistent with the constitutional prescriptions regarding the condemnation of property for a public use. His response follows: "In the opinion of the state legislature and the Supreme Court of Utah, the *public welfare of that State* demands that aerial lines between the mines on its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong."[8]

For a more modern endorsement of taking private property and transferring it to other private parties where the larger public interest is clearly promoted, see *Ruckelshaus v. Monsanto*.[9] There the Court upheld a provision of the Federal Insecticide, Fungicide, and Rodenticide Act which "took" the data submitted by private companies to support their applications for a permit to market chemicals. It allowed the EPA to use their private data to evaluate subsequent applications, so long as the later applicants paid just compensation for the data. The public benefit is in the speedier entrance into the market of valuable chemical products.

Myth # 4: Every American Home and Shop Is Vulnerable to a Taking

The petitioners in *Kelo* were represented by an advocacy litigation group that raised public awareness of the fact that some public takings are abusive. It cited evidence of condemnations of homes and shops of innocent owners whose property was taken primarily to benefit a Walmart, a Ritz Hotel, or even Donald Trump. The specter of corrupt, or misguided, local officials condemning title to property of private owners primarily to benefit developers was on the mind of the Court in the *Kelo* decision. The majority made it clear that "[s]uch a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case."[10]

The background of the New London case illustrates the extent of the government's presence in typical area-wide development planning. The state designated New London an economically distressed city. Its area-wide plan was supported by a $5 million state grant. The state also provided a $10 million grant to establish Fort Trumbull park. The state authorized the city to establish the New London Development Corporation, a quasi-public body, which was then created by the city council to prepare the plan and implement it as the city's agent. Such public development corporations are created and governed by the state Municipal Development Statute which authorizes the condemnation of land that cannot be acquired voluntarily and without which the project cannot succeed. Each qualifying project is designated by the state statute as "public use." Under that statute, a detailed public process must be followed including public input, public hearings, and full transparency. The resulting plan in New London was approved by the city council and by the State of Connecticut. The New London Development Corporation eventually selected one developer out of a group of applicants to which the land is to be leased, not sold, remaining in public ownership. Finally, the city agreed to install some of the needed infrastructure as a contribution to the area-wide project's success.

Justice Kennedy, in a concurring opinion in *Kelo*, discussed how courts handle one-to-one transfers. He demonstrated that, using the rational basis test that all police power actions must meet, courts can invalidate such condemnations by finding that the public benefits achieved by such a transfer are only incidental to the benefits that will be conferred on the private parties. The dissenters in *Kelo* disparaged Kennedy's confidence in the rational basis test as sufficient to ferret out privately motivated takings by applying the "stupid staffer" test: suggesting that only the most inept administrations could fail to paper over a private deal and make it appear public in nature.

The dissent was apparently unaware of numerous cases called to the Court's attention in *amici* briefs submitted in *Kelo*. In *99 Cents Only Store v. Lancaster Redevelopment Agency*, for example, a federal district court in California invalidated the condemnation of a store to accommodate the interest of an adjacent Costco's expansion plans; it found that the redevelopment agency's only purpose "was to satisfy the private expansion demands of Costco."[11] In *Bailey v. Meyers*, the state court held that the taking of a brake shop for the construction of a hardware store to advance economic development lacked the requisite public purpose.[12] Donald Trump's attempt to get the Casino Reinvestment Development Authority in New Jersey to condemn the parcels of a few landowners who had refused to sell to expand his hotel and casino was thwarted by the state court; it found that the Authority had given Trump a blank check regarding future development on the site.[13]

Under state law, in fact, courts have invalidated condemnations in Arizona, California, Georgia, Illinois, Indiana, Michigan, Missouri, New Jersey, and Virginia. In all these cases, there was no sustaining public presence of the type involved in all area-wide redevelopment projects. In cases involving no more than a one-to-one transfer of title between businesses, as a *de facto* matter, the court can use the rational basis test to look closely at whether the private benefit achieved is dominant and the public benefit incidental. This enables state courts to invalidate such condemnations, saving the homes of average Americans and the businesses of moms and pops, dulling the edge of the hard-cutting rhetoric of those alarmed by the majority's decision in *Kelo*.

Myth # 5: Private Gain was the Motive for the Condemnation in *Kelo*

Reactions to *Kelo* pointed out that developers often drive public decisions to condemn private land. They somehow convince public officials who stand for reelection frequently to exercise public authority primarily for the developers' private gain. In New London, there was no developer on the scene during the entire twenty-month decision-making process. The New London Redevelopment Authority, a publicly created, not-for-profit corporation, was authorized to purchase and condemn land for the area-wide development project. Following acquisition, it was authorized to advertise for private redevelopers, select one, and lease the acquired land to that developer.

Area-wide development projects, under state laws that govern them, are subject to onerous, transparent, and lengthy processes that provide all the details of the project and invite public participation and extensive debate. In New London, the public was asked what it thought about the redevelopment project as the project was debated, shaped, and decided over a period of nearly two years. In New York, under the State Environmental Quality Review Act, redevelopment projects generate foot-high environmental impact statements that include a hard look at their impact on community character and neighborhood change, and contain lengthy chapters on the economic and environmental consequences of the project.

Public hearings, Uniform Land Use Review Process proceedings in New York City, reviews of impact statements, open meeting laws, conflict-of-interest rules, and a host of other legal protections ensure that the public knows who is involved, how they were chosen, what the proposed benefits are, and who will suffer. By the time such projects are approved, this public process has mediated the claims of those whose properties are to be taken and the public benefits of urban revitalization: jobs, housing, increased taxes, better services, and a more livable community.

Myth # 6: State Legislation Limiting Eminent Domain Is Clearly Beneficial to the Public

The many state legislative reforms that followed *Kelo*'s discontents can be divided into two categories. The first includes those that in effect needed procedural and substantive reforms: longer notice to affected landowners, more public involvement, more transparency, better area-wide planning, or clearer articulation of the public benefits to be achieved. The second curtails the use of eminent domain in one of several ways: they limit it to public works, public access, or public utility projects; allow it in blighted areas, but define blight narrowly; prohibit it for economic development; prohibit the transfer of condemned land to private redevelopers; or some combination of these.

There are serious doubts about whether the consequences of this second category of reforms are beneficial. If Connecticut statutes, for example, limited condemnation to public works projects or limited it to use in narrowly defined blighted areas, New London would have had great difficulty carrying out an area-wide development project in aid of its revitalization.

Several projects in New York City would have been frustrated if such laws had been adopted in New York. In an *amici curiae* brief filed in *Kelo*, the Empire State Development Corporation noted its success in transforming neighborhoods surrounding the New York Stock Exchange, Seven World Trade Center, and in the 42nd Street Redevelopment Area; it attributed its success, in part, to using its authority to condemn private properties and convey them to private development companies. The Corporation's brief notes that "despite private benefits, the predominant economic and social benefits have accrued to the public."[14]

In *Rosenthal & Rosenthal v. The New York State Urban Development Corp.*, the Second Circuit affirmed a District Court decision upholding the taking of the petitioners' unblighted buildings which were needed for the 42nd Street Redevelopment Project.[15] The District Court found that the proposed taking was rationally related to a conceivable public purpose. The Second Circuit noted that "the power of eminent domain is a fundamental and necessary attribute of sovereignty, superior to all private property rights."[16] It rested its decision on the U.S. Supreme Court's decision the previous year in *Hawaii Housing Authority v. Midkiff*, concluding that "courts long have recognized that the compensated taking of private property for urban renewal or community redevelopment is not proscribed by the Constitution."[17] The U. S. Supreme Court denied *certiorari* in *Rosenthal* in 1986.[18]

Various industrial companies, including several oil refineries, challenged the City of Syracuse Industrial Development Agency for condemning their properties to further a waterfront redevelopment master plan for an 800-acre area on the south shore of Onondaga Lake known as "oil city." *Sun Company v. City of Syracuse IDA*.[19] The area was located next to several low-income neighborhoods in Syracuse where a disproportionately large percentage of welfare recipients, jobless, and poverty-level households resided. This is a classic environmental justice context, but condemnation could be denied under reform bills that define such projects as "economic development" or that require the city or IDA to develop the project itself, by prohibiting transfer of title or possession to a private redevelopment company. The New York court in *Sun Company* found that the purpose of the taking was to accomplish a proper use. The petitioners' motion for leave to appeal was denied by the Court of Appeals in 1997.[20]

Property rights advocates oppose condemnation because it victimizes limited-income homeowners. Consider New Orleans, still trying to find the formula for redevelopment long after Katrina. In the absence of an area-wide plan and effective means of implementing it, many lower-income homeowners do not have the financial wherewithal to repair or rebuild their homes. Many of them work for $10 to 15 an hour. With this income, they can afford a home costing around $70,000. In the lower Ninth Ward, lower-income homeowners have existing debt, face extremely high costs of repair, and must meet FEMA flood plain elevation requirements which alone can cost $30,000. The sum of these costs, in many cases, greatly exceeds what they can afford even considering available governmental subsidies, where they can be obtained. As a result, many property owners have sold their properties at 30 percent of pre-hurricane values.

Area-wide development in New Orleans can't work without the use of the power of eminent domain. Some owners cannot be found. Some parcels have no record owners. Some are slivers of land and not marketable, others are in foreclosure, some are tied up in estates that will never be resolved, others have multiple owners who cannot agree on what to do, and some are owned by individuals who are incapacitated. Although the situation is more dramatic, this confusion of titles is typical of conditions in many inner-city neighborhoods, which are full of small parcels with owners who are not rational actors or cannot be found.

What if a major hotel and entertainment center developer were ready to build a mixed-use project and, at the insistence of the city, to provide an equity position and affordable residences to the lot owners in the area? Would this be an economic development project? Would it be prohibited because some lots will be transferred to a private entity?

If this second category of statutory "reforms" had been adopted by Congress, would the Gettysburg battlefield still have been saved from a railroad's extension at a critical moment? With such reforms, would the state of Utah have been able to extract needed minerals to further the public welfare at a key moment in the state's overall development?

Conclusion

Before corrective legislation is enacted in New York there is more that we need to know about the use of condemnation in redevelopment. How much actual hardship is caused to those whose homes and properties are condemned? Anecdotal evidence shows that most affected owners settle, agree on prices, and relocate. Some are unable to find suitable new quarters and suffer economically as a result. A few actually benefit from being transplanted. What corrective measures are needed to prevent documented hardships? Do we know whether redevelopment projects would be feasible without the availability of condemnation? Again, there is evidence that many property owners would fail to negotiate for a fair settlement with redevelopment agencies if they didn't realize that the agency could take their property if negotiations fail.

If the absence of the power of condemnation would mean that most redevelopment projects would not be feasible, what are the resultant costs to the public? Have redevelopment projects helped distressed cities to the benefit of the public? Here the evidence is mixed: New London's earlier downtown renewal efforts years ago were less than impressive, while recent revitalization projects in many regions today seem to be succeeding.

The unique American approach to land development and urban revitalization is to empower local governments. Seldom are they required to do particular things, like protect wetlands, limit development to certain areas, or provide a certain amount of affordable housing. If cit-

ies want to engage in area-wide redevelopment projects with qualified and eligible private redevelopment companies, the approach has been to let them do so. The state legislature will give them that power, but it will not mandate that they use it.

In reaction to *Kelo*, a few states have passed laws that constrain the power of city legislatures from being the architects of their own revitalization. The speed with which these limitations have been enacted in some states has been breathtaking. New London, New York, New Orleans, and Syracuse, along with other older industrial municipalities, need help. So do coastal cities fearing inundation and other cities as they recover from natural disasters. They get their legal authority to act from the state. They need technical assistance, financial relief, innovative ways to attract private development, tax credits and abatements, help in modernizing needed infrastructure and providing affordable housing, and best practices for working with private firms to provide jobs and housing while protecting community character and environmental resources for future generations.

It is important to be clear about what is at stake here. The *Kelo* decision has been criticized as an assault on middle-class home and business owners in the pursuit of purely private-sector economic interests. This is a serious charge and one that must be addressed where condemnations achieve only incidental public benefits. To say that *Kelo* is about the pursuit of private interests, however, ignores what the case is about more fundamentally. It addresses the critical importance of the revitalization of cities from which more affluent populations have fled. This demographic shift fuels sprawl, diminishes open space in exurban areas, and drains critical regional centers of their financial strength.

In our legislature, any surplus energy and resources should not be siphoned off in an effort to strip challenged cities and older suburbs of their powers. Instead, they should be devoted to the broader urban and development agenda. Without strong regions with stable centers, New York cannot compete in the global economy. State governments should protect private property owners from the abusive use of eminent domain, promote needed area-wide redevelopment, and encourage localities to use all the power they are given to become innovators as they struggle to regain their role as powerful centers of their economic regions.

Endnotes

1. 545 U.S. 469 (2005).
2. 348 U.S. 26, 33 (1954).
3. *Id.* at 33–34.
4. 160 U.S. 668, 679 (1896).
5. *Id.* at 680 (emphasis added).
6. *Id.* at 683.
7. 200 U.S. 527 (1906).
8. *Id.* at 531 (emphasis added).
9. 467 U.S. 986 (1984).
10. *Kelo,* at 484.
11. 237 F. Supp. 2d 1123 (C.D. Cal. 2001).
12. 76 P.3d 898 (Ariz. 2003).
13. *Casino Reinvestment Dev. Auth. v. Banin,* 727 A.2d 102 (N.J. Sup. Ct. 1998).
14. Brief of *Amici Curiae* Empire State Development Corp., at 20, *Kelo v. New London,* 545 U.S. 469 (2005) (No. 04-108).
15. 771 F.2d 44 (2d Cir. 1985).
16. *Id.* at 45.
17. 467 U.S. 229 (1984).
18. 475 U.S. 1018 (1986).
19. 625 N.Y.S.2d 371 (App. Div. 1995).
20. 89 N.Y.2d 811 (1997).

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Throwing Out the Baby with the Bathwater: A Review of Various Federal, State and Local Legislative Proposals Purporting to Rectify the Public's Concerns Revealed in *Kelo v. City of New London, Connecticut* Decision

By Charlene M. Indelicato and Linda M. Trentacoste

Charlene M. Indelicato

After the United States Supreme Court rendered its decision in *Kelo v. City of New London, Connecticut*,[1] the facts of the case as commonly reported by the media to the general public raised a fury of public outcry demanding immediate legislative reform. Only the most heartless and greedy of businessmen and politicians would not be moved to action at the thought of hardworking homeowners (including one individual whose family had resided in the particular house for over 100 years)—having their primary residences located in an area that was not blighted—forcibly taken away from them in order to make way for a major redevelopment of the waterfront. Indeed, in the dissent, Justice Sandra Day O'Conner noted that while economic development takings jeopardize the security of all private property owners, it will be those with the fewest resources who will be the greatest victims of such taking.[2]

Despite the extensive media coverage regarding the *Kelo* decision, little, if anything, was reported to reveal that the legal concepts as memorialized in the *Kelo* decision had been the supreme law of the land since its inception. More specifically, the results of the *Kelo* decision exposed the intrinsic authority of government, and local governments in particular, to utilize their sovereign authority over an individual and his or her property as a last resort to address persistent problems or the unfulfilled necessities of a failing community.

Notwithstanding this inherent governmental tenet, the result of the public outcry for immediate legislative action was an enormous number of legislative proposals since 2005 that are being considered by the federal, state and local governments, all which purport to be a panacea to address the injustices perceived from *Kelo.* A close review of just a few of these proposals reveals the haste and lack of depth of research of the problems to address the concerns perceived by *Kelo.* In addition, it is also clear that if adopted in their current form, there would have been major unintended consequences and irreparable harm upon our government as a whole.

Linda M. Trentacoste

Congressional Interest

Among the various congressional legislative proposals considered in 2006 was a United States Senate bill—S. 3873, also known as "the Private Property Rights Protection Act of 2006." The congressional intent of this proposal was "to encourage, support and promote the private ownership of property and to ensure that the constitutional and other legal rights of private property owners are protected by the Federal Government."[3] In order to achieve this objective, this proposal completely prohibits the federal government from exercising its power of eminent domain for economic development.[4] Then, in an effort to dissuade states and/or their political subdivisions from exercising their own condemnation powers over property for economic development, this proposal threatens to render such states or political subdivisions ineligible for any federal economic development funds for a period of 2 fiscal years.[5] This loss of federal funding is to occur whenever the power of eminent domain has been utilized over property to be used for economic development, or over property that is "subsequently used" for economic development.[6] It also creates a separate private right of action for any owner of private property who suffers injury as a result of a violation of the law and enables such an owner to commence an action up to seven years following the conclusion of the condemnation proceedings and the subsequent use of such condemned property for economic development.[7] Finally, the use of eminent domain is completely prohibited by this proposal for *any* purpose against *any* property owned by not-for-profit or religious organizations, and any violation would again result in the ineligibility of any federal economic development funds for a period of 2 fiscal years.[8]

While this federal proposal attempts to address the perceived *Kelo* problems of infringing upon the rights of the individual, it actually nullifies the solution that was originally created to solve problems affecting entire communities. In other words, while the threat of the loss of federal funds may serve to deter the states and their

political subdivisions from exercising their power of eminent domain over private property for economic development, such action may have a devastating impact on economic development projects that are absolutely critical to address and improve upon the situation in blighted areas. Indeed, the reasonable use of the power of eminent domain in conjunction with economic development has played an incredibly important role in urban renewal and other areas where devastated communities were deeply entrenched in either a static or downward spiraling destructive situation. Notably, the concept of urban renewal was originally created, among other things, to help the needs of the many persons who constitute a community as opposed to the needs of a few individuals. Now, proposed federal legislation, like United States Senate Bill S. 3873, which is intended to protect the individual property owners in the wake of the *Kelo* decision, threatens federal funds for urban renewal and other laudable projects that were intended to benefit entire communities as a whole.

Eminent domain has always been a sovereign power of government and primarily utilized by local authorities that were integrally familiar with the needs of a community. Yet, Senate Bill S. 3873 threatens to prohibit states and their political subdivisions from using their power of eminent domain for economic development. Such a law necessarily undermines the sovereign authority of these state and local governments and their final effort to adequately address purely local concerns as well as their ability to protect the needs of their residents, both individually and as a community.

Furthermore, the creation of a blanket exception in the bill would completely eliminate the power of states or their political subdivisions from exercising their power of eminent domain over the property of a religious or other not-for-profit organization and would provide a classic opportunity for abuse by individuals who desire to thwart an economic development project. Finally, it is unclear why this proposal specifically shields religious and not-for-profit organizations from being subject to the power of eminent domain and there is no explicit rationale to justify the creation of a protected class for just these two organizations. Accordingly, it is apparent that the bill, which was intended to address the public outcry to protect individual homeowners, requires additional consideration to adequately address the unintended consequences that such legislation would have upon society.

The New York State Legislature

Congress was not the only legislature that was enticed to respond hastily to pacify the uproars of the people in the wake of the *Kelo* decision. The New York State Legislature considered a variety of distinct legislative proposals relating to the use of eminent domain. One proposal attempted to limit the power of eminent domain for economic development to only "blighted areas" and defined the phrase "blighted area" as "an area in which one or both of the following conditions exists: (i) predominance of buildings and structures which are deteriorated or unfit or unsafe for use or occupancy; or (ii) a predominance of economically unproductive lands, buildings or structures, the redevelopment of which is needed to prevent further deterioration which would jeopardize the economic well-being of the people."[9] This proposal recognized the importance of the use of eminent domain with respect to urban renewal that escaped the federal government's consideration. However, by limiting the sovereign power to condemn property to only blighted areas, it ignores the wide variety of situations for which that power is utilized. For example, condemnation has been utilized to acquire some form of title or easement to property located underground as may be necessary for the creation of sewers or utilities. It is possible that the use of condemnation may be necessary for an economic development project that is not necessarily for a blighted area. Despite the fact that this proposed legislation was intended to protect against the concerns perceived by the *Kelo* decision, this proposal, if adopted, could also adversely prevent beneficial situations from occurring even where there are no *Kelo* problems to be addressed.

In 2006, the New York State Legislature also considered an eminent domain proposal that would have required the preparation of a comprehensive economic development plan for every economic development project.[10] An additional review process was being created to hold local governments accountable by requiring them to approve or disapprove the use of eminent domain by any public authority or local development corporation or industrial development agency. While these additional requirements provide a further obstacle in the exercise of the power of eminent domain, it is unclear how they are intended to prevent a situation like *Kelo* from reoccurring. Other than to effectively stop all eminent domain projects by mandating compliance with a seemingly endless approval process, this proposal attempts to address the *Kelo* situation in another provision in a unique way. In cases where a condemnee's home or dwelling is to be acquired, this legislative proposal requires that such person be compensated a minimum of 150 percent of the fair market value of the real property, in addition to any other compensation requirements.[11] The problem with this particular "solution" is that it has the potential to be abused. Why would anyone agree to the sale of the property at fair market value, when the person could demand 150 percent of the fair market value? Furthermore, in the situation of a person who really did not want to sell his or her residence at all, the mere thought of increasing the compensation may ease the pain, but does it really address the concern that the power of eminent domain is being abused? Apparently, the New York State Legislature struggled to address the concepts of how to compensate and what to compensate. Nevertheless, the additional compensation may help ease the pain from the harsh reality of the situa-

tion that the needs of the many outweigh the needs of the one.

In addition to the numerous proposals that were considered by the New York State Legislature, there was one legislative proposal that was adopted which restricts the right of certain gas and gas-electric corporations to exercise eminent domain within the state. Specifically, Section 11 of the New York State Transportation Corporations Law was amended to revoke, effective immediately, the eminent domain right of any gas or electric company which: (1) project commences and ends in the state of New York; (2) through its employees, agents, representatives, or assigns has represented in testimony that the construction of such power transmission lines will increase electric rates in any part of the state; and (3) applied for and did not receive an early designation as a national interest electric transmission corridor under an act of Congress commonly known as the Energy Policy Act of 2005.[12] The declared rationale behind this legislation was to protect communities across New York State by prohibiting transmission companies from utilizing eminent domain if a proposed project does not meet designated criteria. However, one could argue that the scope of protection that this legislative enactment provides is rather limited. Notably, this particular piece of legislation is directed at one specific eminent domain project involving the New York Regional Interconnection ("NYRI"), a project of a private corporation to build an approximately 200-mile-long high-voltage electricity transmission line from Utica in central New York to New York City and Long Island. In order for the project to be built, it has been reported that the company would need to acquire land in 37 towns and villages statewide, and while the company has stated that the project would lower electricity prices in downstate New York, it further noted that it would increase prices upstate. Despite the fact that this legislative proposal was adopted during the *Kelo* public fury and under the guise of addressing the "ills of eminent domain," it would appear that the usefulness or the ability to protect against the abuses of eminent domain is extremely limited.

Municipal Initiatives

Joining with their federal and state counterparts, some local governments are also taking up the cause relating to the public outcry against *Kelo,* despite the limitations established by state preemption. In Westchester County, proposed legislation is currently being considered which would require the county to create additional environmental reports and the impact of economic development whenever it is considering the use of its own power of eminent domain. In addition, the proposal would create an ombudsman, who will provide general information regarding the condemnation process to private citizens.

In both Greene and Delaware Counties, the respective legislative branches have adopted resolutions to voluntarily forgo the use of its power of eminent domain.[13] Specifically, both local jurisdictions have determined to refrain from taking private real property to benefit another private entity for the purpose of generating higher tax revenue and shall support only property exchanged through voluntary methods in the marketplace.[14]

Conclusion

In the end, there currently does not appear to be any adequate legislative answer or remedy which could immediately address the perceived dangers of eminent domain. There will always be a situation where some individual will be unhappy or even disgruntled at the possibility of losing his or her primary residence regardless of whether condemnation is utilized for economic development or any other purpose. Nevertheless, the judicious and limited use of eminent domain in conjunction with the reasonable application of urban renewal projects can be a most effective tool to revitalize stagnant communities. Notably, those condemnation projects which have been most successful (judging by the economic boost to the municipality and lack of litigation to interfere with the project) were guided by utilizing the democratic process to the fullest. Accordingly, the best way for government and other agencies to protect the public against potential abuse of the power of condemnation is through the democratic process. Early public notification and active participation by the public should be encouraged and, if the public's concerns are properly considered and met, to the extent possible, then the number of individuals who believe themselves to be "victims" will be greatly minimized.

In order to address these issues legislatively, it would be highly beneficial if federal, state and local governments would redirect their current *ad hoc* legislative efforts and concentrate on creating an eminent domain task force which would conduct a comprehensive review of the use of eminent domain on both a local and national level. The information gathered by such a task force would highlight where and what problems need to be addressed legislatively. The composition of this task force should include legal experts and professionals who are integrally involved in the various aspects of the eminent domain process and real estate development, as well as members of the general public representing the interests of the people at large so as to provide various practical solutions to address enumerated concerns (such as notification, public input and compensation) and to determine which areas need to be completely overhauled. As opposed to the more general and random concerns raised by the public outcry against the *Kelo* decision, information and recommendations provided by a well-formed Eminent Domain Task Force representing all of the diverse and competing interests will be a incredibly useful and beneficial tool for the various legislatures to hone in on a solution for, and improving upon, the current eminent domain process.

Endnotes

1. 545 U.S. 469 (2005).
2. 545 U.S. at 505 ("Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. 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.").
3. *See* Private Property Rights Protection Act of 2006, S. 3873, 109th Cong. § 10 (2d Sess. 2006).
4. *See id.* at § 3.
5. See *id.* at § 2.
6. *See id.*
7. *See id.* at § 4.
8. *See id.* at § 13.
9. *See* 2005–2006 Regular Session of the New York State Senate, S5936.
10. *See* 2005–2006 Regular Session of the New York State Assembly, A9043-A.
11. *See* 2005–2006 Regular Session of the New York State Assembly, A9043-A, § 7.
12. N.Y. TRANSP. CORP. LAW § 11(7) (McKinney 2005).
13. Greene County Legislature Resolution No. 376-05; Delaware County Board of Supervisors Resolution No. 299.
14. *Id.*

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Eminent Domain in New York: Current Problems and Suggested Solutions

By Jon N. Santemma

The power to acquire property for public purposes is an essential right of government, without which, government simply cannot exist.

The recent decision in *Kelo v. New London*[1] has brought substantial attention to that power and there have been many suggestions as to how the law ought to be changed. The holding in *Kelo*, however, is not new law.

Years prior to *Kelo*, the leading decision in New York on the concept of economic redevelopment takings was the case of *Yonkers Community Development Agency v. Morris*.[2] In that instance, the Otis Elevator Company was doing business in the city and advised the city that unless it was permitted to expand its facility, it would leave the area.[3]

As a result, the city decided to acquire additional property adjacent to Otis' holding to permit Otis to build the expanded plant. Some of the businesses subject to the taking were not doing well. However, others were functioning quite well and individual shop owners, store owners and business owners did not wish the taking to occur.

The Court of Appeals held that the economic redevelopment as established by the plan to redevelop and expand the Otis Elevator Company constituted a public use, and as such, was a proper underpinning for the exercise of the area to be acquired by eminent domain.[4]

Actually, after the property was acquired and the plant built, Otis itself was acquired by a multinational corporation in 1975 and operates as a wholly owned subsidiary. In 1996, Otis formed a joint venture with a foreign corporation and today the site is devoted to the manufacture and sale of subway cars.

Everybody generally articulates the position that the private property of A may not be taken from A and given to B through the power of eminent domain. Unfortunately, that appears to be happening in New York State by virtue of the power of community redevelopment agencies to select redevelopers.

In the recent case of *Haberman v. City of Long Beach*, Mr. Haberman, a developer, purchased a 2.5-acre parcel of vacant oceanfront land in 1993.[5] In August of 1995 the city established a development moratorium area called the "superblock," of which this parcel was a part. Mr. Haberman brought suit because the city denied two different proposals for redevelopment.[6] The city then proceeded to acquire the property, including Mr. Haberman's, claiming that the city would choose the use and the developer, notwithstanding Mr. Haberman's offers to redevelop his property in accordance with whatever plan the city wished to place on the superblock. The Court wrote:

> The petitioner contends that condemnation of his property where he is ready, willing, and able to develop the property in a manner that is fully consistent with the City's urban renewal plan serves no valid public purpose, and for this reason, the determination to condemn must be annulled. We disagree.
>
> A municipality's taking of substandard land for urban renewal serves a valid public purpose. "Judicial review of a condemnation determination is limited to whether the proceeding was constitutional, whether the proposed acquisition is within the condemnor's statutory jurisdiction, whether the determination and findings were made in accordance with the procedures set forth in EDPL Article 2, and whether a public use, benefit, or purpose will be served". In this instance, the respondents made that showing.[7]

New York has and enjoys some of the best examples of successful urban renewal programs in the country. Community development agencies and urban renewal agencies have literally turned around downtown areas and made them successful business centers, showplaces of particular entrepreneurial development that were impossible prior to the takings. For example, take the City of Ithaca. Forty years ago, the downtown area was nothing to write home about, but recent visits demonstrate a vibrant, artsy community with two college campuses which provide an outstanding framework for a community that has become quite lively.

On the other hand, I have seen instances in which, there is no doubt in my mind, the urban renewal or community redevelopment process has been used to take the property from A and give it to B and the difficulties in try-

ing to resolve those takings or those concepts in the court system is very, very difficult. The concept has always been that the determination of the necessity of a taking is something left to the legislature, but that the courts could then determine whether or not the taking was for a public use. I think that the courts have generally tended to blur the two distinctions and have applied, long in advance of *Kelo*, a rational basis test, which is similar to the standard of review under an Article 78 proceeding. The court looks to determine whether there is any substantial evidence in the record to support the conclusion. We must have a solution which places a greater emphasis upon the details of a proposed acquisition so that each property owner is advised and can discuss exactly why his or her property is to be acquired. Furthermore, the solution should provide a greater right of a condemnee to participate in the redevelopment.

With respect to the day-to-day operation of New York's Eminent Domain Procedure Law (EDPL), there are a number of things that require attention.

As a result of prior practices, the EDPL evolved into two general methodologies of acquiring property. The state, with its appropriation through map filing, required a claimant to institute a separate proceeding in the Court of Claims, while claimants proceeding against non-state condemnors dealt with simply appearing in an existing piece of litigation in Supreme Court that was brought by the condemnor before the property was acquired.

Although the state agreed to a number of reforms in its processes that led to the holding of hearings and payment of 100 percent advance payments and offers, payment of fees and costs and other major accomplishments or concessions, the state held to its method of acquisition by map filing.

As a result of various negotiations in the EDPL Commission and in the legislature, an agreement was reached that the state would continue its processes, but other entities, in non-state takings, would require a court order to assure that the constitutional rights of the condemnee were protected, that the procedures had been followed and that the hearings had, in fact, been held in accordance with the Eminent Domain Procedure Law.

Obviously, the first item to be considered is whether the duality of taking methodologies in state and non-state takings should be continued, since it appears from a reading of EDPL § 101, that a single procedure was intended. If so, are there additional accommodations that can be made to further unify and simplify the Eminent Domain Procedure Law?[8]

The following are items which should be considered for further study in connection with a revision of the Eminent Domain Procedure Law. The New York State Bar Association's Task Force on Eminent Domain has received a report from the author and Carl Rosenbloom, Esq. suggesting the following problems in the EDPL that should be addressed by the New York Legislature.

Article 1

Section 103

Many of the requirements for notice provide that notices should be sent to the "assessment record billing owner." "Assessment record billing owner" is defined as "the owner, last known owner, or reputed owner, at such person's tax billing address. . . ."[9]

That provides an obvious problem for individuals who have mortgages in which the lending institution receives the notices from the assessment department, as well as for tenants who pay all of the assessments and taxes on the property which they lease.

Consideration should be made as to whether any notice directed to an assessment record billing owner ought to also be addressed to the last owner of record. Presumably, condemnors order title reports before they acquire the property and additional notices to the last owner of record should not be a problem.

Article 2

Section 202

Originally, the state gave no notice whatsoever for the appropriation of property; some of the administrative code jurisdictions would publish notice in obscure places such as, in New York City, the City Record.

The EDPL provides for publication even if there is but one owner, no mortgages and liens or any other indication in the title report that there is any person having any interest whatsoever.[10]

The local municipalities should be canvassed to find out whether the notice requirements as currently constituted are, in fact, burdensome, since the personal notice to the property owner is the most effective means of providing notice.

Section 204

Section 204 deals with the mandated findings of the condemnor before the taking.[11] Analysis should be made as to whether the three required findings are sufficient or too extensive for the municipalities throughout the state. The main concept at issue now is the determination of "public use." The current finding in New York State, that "the public use, benefit or purpose to be served by the proposed public project," permits the acquisition of property for actual use by the public and for economic benefit of communities, such as urban renewal.[12]

There has been substantial post-*Kelo* discussion and speculation in the public as to whether the public use requirement should be expanded, modified, changed or constricted. Section 204 is where any modification should be logically placed if acquisitions for economic development were to receive a different standard of proof. Amendments in this regard may also have to be made to EDPL § 103(A) and § 103(G).

Further policy discussion concerning the public use of "economic" redevelopment takings should focus on means of establishing how each of the parcels to be sacrificed for the common good is important to the project as well as the rights of the owner to be involved in the redevelopment.

The standard of proof itself should be considered because, currently, Section 204 essentially requires only substantial evidence in the record before the condemnor to support the taking of any property.[13] It is a standard which any condemnor can meet with a modicum of preparation and there should be an analysis as to whether that standard should be modified in any fashion.

Whether or not the modification of the standard of review would provide too much intrusion into the governmental process and stymie necessary public projects, the current review, limited to the Appellate Division, would be appropriate in any circumstances where the matter relates to the review of the record.

However, it has been suggested that there should also be an opportunity for a condemnee to alternatively appear in Supreme Court in opposition to the application to condemn the property which would then refer the entire matter to the Appellate Division for summary disposition. That practice makes access to the courts more affordable to the small property owner seeking to exercise constitutional rights.

The thirty-day "statute of limitations" for appealing a determination of a condemnor to acquire can be burdensome and recently the Federal courts have suggested that the notice requirements in connection with those hearings are not constitutionally applied in all takings.[14]

Judicial review in Section 207(C) limits the Appellate Division review to the findings made after the hearing by the condemnor, including specifically the "public use, benefit or purpose" involved, and adds the requirement that the Appellate Division determine if the proceedings were held in conformity with the Federal and state constitutions, the condemnor's statutory jurisdiction, and the appropriate provisions of the EDPL and the Environmental Conservation Law.[15] Neither Section 207 nor any other EDPL provision addresses the question of jurisdiction in instances where a condemnor invokes one or more of the exemptions in Section 206 and does not hold a hearing.[16] A condemnee, thus, has no opportunity to contest the propriety of an exemption that has been invoked and seemingly no forum in the absence of a public hearing.

Article 3

Section 303

Under Article 3, "Offer and Negotiations," the condemnor is required to appraise that which it acquires and, under Section 303, to make an offer.[17] Section 303 provides that, "wherever practicable," the offer must itemize "the total direct, the total severance or consequential damages and benefits as each may apply to the property."[18]

Often, a single acquisition will affect various interests including those of the landlord and the tenant. While most tenants have waived any interest in any condemnation award in the terms of their lease, they are entitled to an award for their business fixtures.

Most condemnors do not include an offer on fixtures nor generally do they obtain an appraisal on fixtures until a fixture claim has been filed.

Fixture claims can be very, very substantial and the question is whether tenants should also receive formal notices of the takings, advice as to what their rights are concerning their trade fixtures and also an advance payment offer as to what the value of those trade fixtures may be.

With respect to clouds on title, both state and non-state takings provide for the deposit of the amount of the offer with the court. However, non-state takings require an application to the court, and a court order and a deposit, once made, appears to stay in court indefinitely unless and until some owner proves his entitlement to the award.

In state takings, the EDPL is much more detailed as to the rights of the controller to deposit the money, not with the court, but in a special bank account, transfer it into an Eminent Domain account or, after three years, to withdraw the sum deposited and redeposit it in the account from which it was withdrawn.[19] Analysis should be made as to whether condemnors and condemnees, in both state and non-state takings, are being treated equally and fairly under the implementation of the Article 3 deposits.

Section 305

Section 305 deals with use and occupancy and indicates that a person "holding, using or occupying property acquired . . . shall be liable to the condemnor for the fair and reasonable value of such holding, use or occupancy. . . ."[20]

However, non-condemnation cases equate use and occupancy to rent. Rental value of a property on a term basis—even month to month—is payment for a substan-

tial right of possession, not for the transitory existence of a condemnee in possession who does not and cannot ever have any interest in the real property whatsoever.

It has been suggested that use and occupancy should be defined as a minimal requirement reflecting no more than the transitory right to be present temporarily on a piece of property belonging to a governmental entity which needs possession of the property for a public use.

Article 4

Section 402

Section 402 is where the dichotomy between state and non-state is the greatest. Although for the sake of uniformity all condemnors in the state now acquire by filing acquisition maps, non-state municipalities must first apply to Supreme Court for an order of condemnation which grants the municipality permission to file the map.[21]

That entire procedure should be revisited because there is an unnecessary step in non-state takings to file a map when it is actually the vesting order that grants the municipality the right to acquire the property that is set forth on the vesting map filed with the petition. Essentially, a non-state acquisition must go through the separate step—an important step—of having the court review the proceedings and declaring that the condemnor is ready to acquire the property.

The state has a relatively straightforward proceeding whereby it sends out notices and advises the owner and the world that it has acquired the property by filing in the county clerk's office.

Notices under the non-state takings are much more involved and analysis should be made as to whether they are required to be so involved.

However, discussion ought to be had as to whether the state should be required to obtain a court order approving its treatment of the condemnee prior to taking and the quality of the taking just as a non-state condemnor must establish at the present time.

Section 405

Under Section 405, "Possession," it was contemplated that the state could acquire property possession by going to Landlord/Tenant Court (since there is no court action pending), and that court would provide for a reasonable amount of time for the condemnee to vacate after payment of the advance payment.

A "writ of assistance" to the Supreme Court that handled the vesting order is the appropriate methodology in non-state takings. However, some courts have read the language of Section 405 as mandating that the court give immediate possession as long as the advance payment has been tendered. It should be clarified that the court should condition possession on a reasonable time to permit the condemnee to relocate in an orderly fashion—a balancing test which is used by some courts would appear to be fair and reasonable.

Section 406

Section 406 involves the situation where the project is abandoned.[22] The question is, where it is abandoned and offered back to the original owner—what should be the measure of value at the time of the reconveyance—the original offer plus interest or current value?

Article 5

Under Article 5, there is a serious problem concerning non-state takings.

The state has a statute of limitations of three years after the filing of the map for the filing of claims—three years after personal service of the notice of acquisition. It is a true statute of limitations because the claimant has three years to institute a legal proceeding against the state in the Court of Claims.[23]

In non-state takings, there can be no true statute of limitations because there is always a pending Supreme Court action. All that is necessary is for a claimant to appear in that action and assert his or her claim. The original intent of the EDPL Commission was that the Supreme Court would establish a deadline by which it could reasonably expect claims would be filed and, on that day, could consult with the condemnor as to who had appeared and how much additional time and notices were appropriate to get everyone into the fold. Unfortunately, the Appellate Division has treated the unilaterally *ex-parte* date selected by the court as a deadline as a statute of limitations. It is difficult to see how a constitutional right of just compensation can be extinguished by an *ex-parte* order.

This problem must be remedied.

Article 6

While the concept of small claims is appropriate under Article 6, I have never seen a small claims action in the metropolitan area and I do not know of any in the state, although I am sure there are some. The entire issue should be revisited and a determination made that the procedures be adjusted—perhaps the $25,000 should be a higher figure.

Article 7

The courts have been very responsive in fixing additional allowances in awards to condemnees— recogniz-

ing that they are involuntary litigants who have lost their property because the public good requires their property to be devoted to a different use. When the condemnor has made an offer that is substantially less than the final award, the courts have been very responsive in awarding attorneys' fees and appraisal fees to the claimants, provided that the services produced the increased award. While analysis should be made as to whether all appraisal fees and all costs should be paid by the condemning authority, the current provision appears to be working not only where cases are tried to conclusion, but in encouraging settlements. The current provision also allows a municipality that has made an error in its estimate of just compensation to resolve a case before it is subjected to additional costs.

Finally, New York remains a "taking state" in which it only pays for that which it actually takes—real property—and does not pay for that which it damages—the businesses conducted on the property—even though they may be damaged to the point of extinction.

Historically, a few special situations have received business loss compensation; notably the water supply cases in connection with upstate reservoirs needed to provide New York City water. There, businesses were compensated by awards predicated upon the claimants' income tax returns for the years preceding the taking.

It has been strongly suggested that there should be some recognition of the business interruption damage or the loss of business income that is generated by some takings.

Compensation is now made regularly to business owners who have lost trade fixtures as a result of the takings. There are statutes that provide for relocation expenses and moving expenses for certain administrative payments to condemnees.

The quantum of just compensation should not depend upon what municipality acquired the property. Currently, there are a number of administrative payments made to claimants depending upon the type of condemnor (Federal, state or local) and where the funds originate, as funding statutes often have administrative payment features. The EDPL should contain in Article 7 a complete list of damages, moving expenses, relocation business damages that are in fact compensable in particular takings. Those items should be part of the original communications to potential condemnees with the notices of acquisition that are sent to the condemnees following the acquisition of their property.

The amount of just compensation should not depend upon who condemns the property.

Endnotes

1. 545 U.S. 469 (2005).
2. 335 N.E.2d 327, 37 N.Y.2d 478 (1975), *cert. dismissed,* 423 U.S. 1010 (1975).
3. *Id.*
4. *Id.*
5. 307 A.D.2d 313, 762 N.Y.S.2d 425 (N.Y. App. Div. 2d Dep't 2003).
6. *Haberman,* 298 A.D.2d 497, 748 N.Y.S.2d 397 (N.Y. App. Div. 2d Dep't 2002).
7. *See Haberman,* 307 A.D.2d at 313 (internal citations omitted).
8. N.Y. Em. Dom. Proc. Law § 101 (Consol. 2006).
9. N.Y. Em. Dom. Proc. Law § 103(B-1) (Consol. 2006).
10. N.Y. Em. Dom. Proc. Law § 202(A-B) (Consol. 2006).
11. N.Y. Em. Dom. Proc. Law § 204 (Consol. 2006).
12. N.Y. Em. Dom. Proc. Law § 204(B)(1) (Consol. 2006).
13. *See* N.Y. Em. Dom. Proc. Law § 204 (Consol. 2006).
14. N.Y. Em. Dom. Proc. Law § 207 (Consol. 2006).
15. N.Y. Em. Dom. Proc. Law § 207(C) (Consol. 2006).
16. *See* N.Y. Em. Dom. Proc. Law § 207(C) (Consol. 2006).
17. N.Y. Em. Dom. Proc. Law § 303 (Consol. 2006).
18. N.Y. Em. Dom. Proc. Law § 303 (Consol. 2006).
19. N.Y. Em. Dom. Proc. Law § 204(E) (Consol. 2006).
20. N.Y. Em. Dom. Proc. Law § 305(A) (Consol. 2006).
21. N.Y. Em. Dom. Proc. Law § 402 (Consol. 2006).
22. N.Y. Em. Dom. Proc. Law § 406 (Consol. 2006).
23. N.Y. Em. Dom. Proc. Law § 503(A) (Consol. 2006).

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Highest and Best Use

By Edward Flower

An accepted property must be valued for eminent domain purposes based upon its "highest and best use." The quote highest and best use represents the most valuable use to which a property can be and likely is to be put. In a partial taking, that same concept of highest and best use must be applied to the subject property, both before and after the taking, although they need not be the same. That is, a highest and best use may be offered as a result of the taking.

Appraisers generally apply four criteria to the determination of a highest and best use as follows:

1. That which is physically possible.
2. That which is nearly permissible. (Question a matter of zoning and interpretation of a zoning code.)
3. That which is financially feasible.
4. That which results from those uses which are financially feasible and productive.

My own experience has been that evidence may be offered with respect to the first two of the above, but generally in a trial of a condemnation or appropriation matter, the determination of the last two criteria represents a subjective determination made by the appraiser subject, of course, as should be all subjective determination by the observation and discussion of objective support.

A frequent cause of disparity of values found by appraisers results from the adoption of different kinds of uses. A concern most frequently results from a varying view of the zoning ordinance applicable to a subject property.

A disparity between values found by appraisers based upon differing assumptions of highest and best use most often involves consideration of whether or not there existed, on the title vesting date, a reasonable probability that the subject property, absent the condemnation or pendency thereof, could have obtained a change of zoning classifications, a zoning variance, special use permit or any one of a number of other government actions or reliefs from regulations that would have been necessary for the presumed highest and best use to have had an influence upon the value of the subject property. These considerations of government regulations also have substantially influenced the issue of economic feasibility for a projected highest and best use. That is, the cost of obtaining relief from government regulation or the cost of conforming to governmentally imposed requirements must be considered.

Ordinarily, a court will start with a presumption that the highest and best uses it may consider in determining value are limited to those permitted by zoning and/or other regulations in effect at the time of taking. Thus, the condemnee has the burden of proof in asserting a highest and best use other than the one to which the property is being put or that use which is allowable under the zoning and/or other regulations in effect on the vesting date. The condemnee must establish that there existed, on the title vesting date, a reasonable probability that the asserted highest and best use could or would have been made of the subject property in the reasonably near future and the use was economically feasible.

The probability of change of zone issue is most frequently encountered in cases where it is anticipated that the municipality would involuntarily rezone without prompting from the courts. To establish the probability of a change of zone on such a voluntary basis, a claimant must prove a condition or trend that rendered such zoning inevitable. Whether in fact the property owner (or perhaps occasionally the condemnor) has established such probability is a question of fact for the trial court. A finding by the court that there existed a probability of change of zone that is not entitled to the property owner devalued the land as if the change of zone had occurred. It requires instead an increment to reflect that probability which a purchaser would pay an enhanced purchase price, or in the alternative, a discount from the value of the property rezoned for the fact that it has not yet been accomplished.

There are instances, however, in which the property owner cannot establish the probability of a zoning change as a result of a municipality's *voluntary action*. In some instances, the problem is further compounded by the fact that the condemning authority is itself the authority responsible for the zoning change and/or other permit or regulatory requirements imposed upon the subject property. *In re Town of Islip (Mascioli),*[1] the Court of Appeals determined that a condemnee, notwithstanding the inability to establish that the municipality (which in that case also was the condemnor) would voluntarily rezone the subject property, could and did proceed to establish that a court action to remove the zoning restriction (in that instance action for declaratory judgment) possessed a reasonable probability of success and that "to a knowledgeable buyer, the probable invalidity of zoning restrictions, which would otherwise prohibit valuable uses, should enhance the market value of the property to some extent."[2] Thus, if it was demonstrated there was a reasonable probability that a challenge to the zoning regulations

could succeed in court, it would be appropriate to grant the claimants some increment above the residential value. The burden of proof imposed upon the owner in such instance is much the same as the burden of proof imposed in a zoning case.[3]

Where the court has determined that a probability of change of zone existed, it must nevertheless not value the subject property as rezoned. That value must be discounted to reflect that the zoning had not yet been accomplished and that there are costs and delays associated with the process of achieving it.[4] The amount of the increment allowed must be supported by evidence before the court and itself becomes the subject of appraisal testimony and findings of fact by the trial court.[5] It has been held, however, that where experts disagree as to the highest and best use, and the court selects the highest and best use found by the expert for one side, the value found by that expert must be given full weight absent a stated reason by the court for its modification.[6]

Excellent illustrations of the application of the doctrine of collateral attack upon land use regulations within a condemnation proceeding and the manner of determination of the "increment" to be allowed in the event a property owner is successful is found in the decisions of the Appellate Division, Second Department in *Chase Manhattan Bank v. State*,[7] *Berwick v. State*[8] and *Berwick v. State*[9] (a second decision by the Appellate Division after a Court of Claims' determination following remittal for determination in light of the Appellate Division's earlier decision). In the *Chase Manhattan Bank* case, the Appellate Division extended the doctrine enunciated in *In re Town of Islip (Mascioli)* to hold that in a proceeding to determine value of classified wetlands appropriated by the state for environmental purposes, the owners could, and did, establish that a constitutional challenge to the Tidal Wetlands Act, as applied to the subject property, would have yielded a reasonable probability of success absent the condemnation. The court further opined that such showing did not require valuation as if the Act's application had been declared confiscatory prior to taking, but rather that the property must be valued as restricted (for recreational use) with an increment for the reasonable probability of a successful judicial challenge to the Act's application as confiscatory, notwithstanding the fact that the state was both condemnor and regulatory authority.[10]

The court pointed out that the reasonable probability incremental increase rule had its genesis in an earlier rule against collateral attack of land use restrictions in condemnation proceedings.[11] The court acknowledged that several courts have concluded that where the condemnor and regulator are one and the same, collateral attack prohibition is no longer valid and permits valuation of the subject property as if unrestricted or unzoned by the offending statute or regulation.[12]

The claimant was required to establish by "dollar and cents" evidence that, under no permissible use, could the parcel as a whole be capable of producing a reasonable return.[13] The court ruled, however, that the owner in the condemnation proceeding was not required to first undergo permit application, denial and review procedures under the Tidal Wetlands Act as it would in order to actually commence an Article 78 proceeding.[14] Thus, the property owner was able to use very limited value attributed to the property by the state's own appraiser, who valued the property as limited by the Environmental Conservation Law in the absence of permits as a recreational property, to establish the disparity in value (some 86 percent in that case) in order to prevail on the issue of probability of success if an Article 78 proceeding to compel issuance of a permit had been commenced in the absence of a condemnation.

In the first *Berwick* decision, the court reviewed not only the issue of the collateral attack upon the Tidal Wetlands Act restrictions imposed on the subject property and the probability of success in such an attack, but also whether the owners had demonstrated that absent the restrictions of the Tidal Wetlands Act the property could be economically developed for residential subdivision purposes in order to be entitled to an incremental award over and above the property's market value as restricted by the Tidal Wetlands Act. The court reversed the finding of the Court of Claims—to the effect that notwithstanding the question of the restrictions of the Tidal Wetlands Act, the subject property could not be economically developed—and found that, in fact, it could be economically developed and remitted to the Court of Claims for a new hearing. The issue at the new hearing was to be limited solely to the amount to be awarded to claimants on the basis of the increment above the recreational value that a knowledgeable buyer would pay in light of the reasonable probability of a successful court challenge.[15]

The matter reached the Appellate Division a second time after determination by the Court of Claims upon the remittal described above. The Appellate Division reduced the award of the Court of Claims upon a review of that court's findings having to do with the amount of discount or increment. The trial court had allowed an increment of approximately 75 percent of the difference in value between the subject property as restricted by the tidal wetlands regulation and the value which the court found the property would have absent the restriction. The Appellate Division imposed an additional downward adjustment for "developability" as applied to the unrestricted residential value before using it as a basis for the increment to the recreational value. The court approved the methodology of determination of the recreational value of the subject property (that is, as restricted by the tidal wetlands regulations) and the determination of the unrestricted residential value (that is, unrestricted by tidal wetlands

regulations) but were still restricted by the realities of the marketplace and the characteristics of the property having to do with its economic developability as a basis for increment in value. The court finally concluded, "We find that the increment over the recreational value which a knowledgeable buyer would pay is 75 percent" of that difference.[16]

It is also well established that while a subject property must be valued as of the date of the *de jure* appropriation it must, nevertheless, be valued absent consideration of the deleterious effect on the value of that property that has resulted from the threat or pendency of the condemnation proceeding or from the various activities conducted in advance thereof.[17]

The city should not be permitted upon completion of its condemnation plans to benefit from such loss it caused to defendant, by evaluating the property as of the trial date on the basis of its damaged, diminished value. In these circumstances it is proper that the property be evaluated on the basis of its value except for such affirmative value-depressing acts by the city.[18]

The courts have uniformly held that such "condemnation blight" must be extracted from the valuation process in that to do otherwise would improperly penalize the property owner by allowing the very same taking from which his claim arises to adversely impact upon his property's value.

Often these scenarios occur where a municipality (whether or not it is the potential condemnor) has or has not made a zoning-related decision on the basis that there was an impending taking. In each such case, the courts of this state (as well as U.S. District Courts in other states acting under the Fifth Amendment of the Federal Constitution) have held that such municipal zoning actions must be removed from the court's analysis when computing a property's value in connection with the *de jure* condemnation which ultimately results. For example, in *In re City of New York (Inwood Hill Park),*[19] the defendant condemned a large parcel of land overlooking the Hudson River. At trial, the property owner claimed the land ought to be valued as being capable of supporting apartment houses due to the natural advantages of its location and the extensive transportation facilities available to it. The city, on the other hand, claimed the property was available only for a less valuable residential use in that while the development plans for apartment houses, which the owner had previously submitted to the city, were physically possible, the city had withheld its approval of them and there was no likelihood that the city would ever have approved such plans in view of its contemplated taking of the property for park purposes.

In reversing the trial court, the Appellate Division (which was then affirmed by the Court of Appeals) held that the city's contention regarding the potential use of the subject premises was untenable. In ruling that the trial court was required to value the subject property as though it was not going to be the subject of a taking, the court stated as follows:

> The city could not lawfully thus deprive the owners of the lands taken of their right to receive their true market value. Carried to its logical conclusion, to sustain this contention of the respondent would enable it to prevent any development whatsoever of lands which it might desire to acquire at some time in the future, for the purpose of preventing enhancement of the value of said lands. Such a contention is unconscionable and does violence to established principles of law and equity. . . . Each owner, so long as he is holding the property, is entitled to be considered in the same position as if his land were not to be sought in condemnation.[20]

> This rule applies regardless of whether the potential condemnor is also the municipality that made the zoning decision and regardless of whether the zoning action is in the form of a specific enactment or merely a refusal by the municipality to act on an owner's development related application.[21]

Not surprisingly, the U.S. District Courts, which have considered this issue, have found that this common sense principle of valuation applies where a condemnation claimant seeks to recover damages under the federal constitution. The courts have ruled that pursuant to the Just Compensation Clause of the Fifth Amendment, municipal zoning actions which are implemented in anticipation of an impending government taking, and which depress the value of the property within the scope of the project, must be excluded from the court's valuation analysis at the condemnation trial.

For example, the trial court judge in *Certain Lands in Truro* stated:

> I further rule that any fluctuation in property value which has resulted from the three acre [municipal] zoning provision is a fluctuation which is attributable to the federal project itself and therefore that the three acre provision should not be considered in determining the fair market value of the land in question. I further rule that ¾ acre zoning provision which was in effect in those portions of Truro outside the [area slated for condemnation] at the time of the takings should be

applied in determining the fair market value of the thirty-six tracts.[22]

A dramatic demonstration of this point was found in the case of *Schad v. State*.[23] In that case, on October 5, 1993, the State of New York appropriated a 2.022-acre portion of a 14.835 acre parcel at the northwest corner of Sunrise Highway and Lincoln Avenue in Sayville. Prior to 1988, the subject property had been split zoned; the front portion abutting Sunrise Highway was zoned for commercial use and the rear portion residentially zoned. In 1988 the Town of Islip, in anticipation of the state's long-published plans for appropriation along this stretch of Sunrise Highway, which included a partial taking of the subject property and reconstruction of Sunrise Highway as a limited access highway, rezoned the entire subject to an AA zoning classification.

In 1999, the claimant attempted to mitigate the effect of the planned taking by seeking to improve the use of what would be the remainder of his property (without access to Sunrise Highway or the service road). The claimant successfully obtained a rezoning of the subject property to a more intensive residential zoning, Residence CA (apartments).

The claimant's position on trial in the Court of Claims, however, was that absent the pendency of the state's appropriation (since approximately 1981), the town would not have rezoned the front portion of the subject property for residential purposes and the owner would not have rezoned the entirety of his property to a more intensive residential purpose. Instead, the entire property would have been rezoned for commercial purposes, and that this represented a highest and best use. The property must thus be valued as commercial prior to the appropriation and for limited residential purposes only after the appropriation.

The trial court so found and the Appellate Division affirmed upon the opinion of the trial court.

While the courts have not found that in order to recover severance or other consequential damages as a result of a partial taking, it is necessary that there be a change in the highest and best use of a partially taken subject property and that the same highest and best use may be made less valuable as a consequence of a taking and an owner is thus entitled to compensation for that loss. The courts have held, in New York at least, that if the change brought about by that partial taking is merely a security of access to and from a subject property from a public road, that element of damage—however real it may be—is not convincible. Their reasoning has been that an owner without title or easement in a road has no vested right, either in the continuance of a highway or its traffic flow, in front of his property. If the condemnor following a partial condemnation leaves him with suitable ingress and egress to the remainder of the property itself, it may without impunity create a new route and eliminate the old.[24] If a property's highest and best use was contingent on highway contiguity and traffic flow, the owner must turn to the next highest and best use regardless of whether the diversion was a consequence of a partial taking. The issue is one of whether the change in highest and best use was a result of highway relocation and diversion of traffic flow, thus non-compensable, or a change in the character of the access to the property itself.[25]

In the case of *Priestly v. State of N.Y.*,[26] the Court of Appeals distinguished between non-compensable damages stemming entirely from circuity of access or highway diversion and compensable damages relating to access to the subject property itself and rendering it unsuitable or less desirable for the highest and best use which it possessed on title vesting date. It held that non-compensability was the rule only if as a question of fact the access involved "is shown to be merely circuitous."[27] If, on the other hand, "the access involved is more than merely circuitous so that it can be characterized as 'unsuitable' compensability follows."[28]

In the *La Briola* case,[29] some seven years later, the Court of Appeals was able to distinguish the facts from those of *Priestly* in that the loss of commercial utility to the subject stemmed not from a loss of ingress and egress to the subject, but solely from a diminution of traffic flow and loss of highway flowage.[30] The courts have subsequently followed the rule that damages resulting from mere circuitry of access are non-compensable, finding damages only if access to the remaining property is proven unsuitable.[31]

This is an area which I believe resulted in a great injustice to numerous property owners especially those who have paid substantial sums for commercial properties on a busy highway only to witness at some future date a widening of that highway to which they contribute property by condemnation or appropriation. This leaves the property on a service road reachable only by a circuitous route and substantially diminishes the value of the property whether still vacant or improved. Given the fact that the case law has now been "written in stone," legislative intervention is required so that the loss as a result of security of access to a subject property becomes an element of compensation mandated by the legislature.

Endnotes

1. 49 N.Y.S.2d 354, 361, 426 N.Y.D.2d 220 (1980).
2. *Id.* at 362.
3. *Id.*
4. *City of Rochester v. Dray,* 60 A.D.2d 766, 767, 400 N.Y.S.2d 635 (4th Dep't 1977); *Yochmowitz v. State,* 25 A.D.2d 930, 270 N.Y.S.2d 333 (3d Dep't 1966); *Maston v. State,* 11 A.D.2d 370, 372, 206 N.Y.S.2d 672 (3d Dep't 1960), *aff'd,* 9 N.Y.2d 796, 215 N.Y.S.2d 508 (1961).
5. *S. Path Realty Corp. v. State,* 35 A.D.2d 896, 896, 315 N.Y.S.2d 789 (3d Dep't 1970).

6. *In re City of New York,* 94 A.D.2d 724, 724, 462 N.Y.S.2d 260 (2d Dep't 1983), *aff'd,* 61 N.Y.2d 843, 473 N.Y.S.2d 963 (1984); *Vic's Auto Serv., Inc. v. State,* 91 A.D.2d 1115, 1115, 458 N.Y.S.2d 339 (3d Dep't 1983).
7. 103 A.D.2d 211, 479 N.Y.S.2d 983 (2d Dep't 1984).
8. 107 A.D.2d 79, 486 N.Y.S.2d 260 (2d Dep't 1985).
9. 159 A.D.2d 544, 552 N.Y.S.2d 409 (2d Dep't 1990); *see Rogers v. State,* 66 N.Y.2d 604, 498 N.Y.S.2d 1024 (1985).
10. *Chase Manhattan Bank,* 103 A.D.2d at 214; *see generally* N.Y. ENVTL. CONSERV. LAW §§ 3-0305, 25-0101-250103, 25-0402(1), 25-0404 (protecting tidal wetlands, which were at issue in *Chase Manhattan Bank*); N.Y. C.P.L.R. 7801–7803 (setting forth procedures for Tidal Wetlands Act proceedings).
11. *Chase Manhattan Bank,* 103 A.D.2d at 217 (the court cited out-of-state decisions); *State ex rel, State Highway Comm'n v. Graeler,* 527 S.W.2d 421 (Mo. Ct. App. 1975); *Linge v. Iowa State Highway Comm'n,* 260 Iowa 1226, 150 N.W.2d 642 Iowa (1967); *Robinson v. Commonwealth*, 335 Mass. 630, 141 N.E.2d 727 (Mass. 1957); as well as one New York State decision: *In re County of Westchester*, 237 A.D. 833, 260 N.Y.S. 875 (2d Dep't 1932); and an additional out-of-state decision: *Overpeck Land Corp. v. Vill. Of Ridgefield Park,* 104 N.J.L. 402, 140 A. 300 (N.J. 1928).
12. *Bus Ventures, Inc. v. Iowa City,* 234 N.W.2d 376, 380–381, 1975 Iowa Supp. LEXIS 1023 (Iowa 1975), and cases cited therein; *People ex rel, Dep't of Pub. Works v. S. Pac. Transp. Co.,* 33 Cal. App. 3d 960, 965-66, 109 Cal. Rptr. 525 (Cal. Ct. App. 1973). Those cases allowing valuation of the appropriated property as if already rezoned or unzoned have dealt with zoning restrictions enacted or retained to depress property values in order to minimize the cost of acquisition in anticipated condemnation proceedings. *See Bd. of Comm'rs of State Insts. v. Tallahassee Bank & Trust Co.,* 108 So. 2d 74, 1958 Fla. App. LEXIS 2393 (Fla. Dist. Ct. App. 1958); *see also* 4 Nichols, EMINENT DOMAIN § 12.322[1] (rev. 3d ed.).
13. *Chase Manhattan Bank*, 103 A.D.2d at 215.
14. See ECL §§ 3-0305, 25-0101-250103, 25-0402(1), 25-0404 (protecting tidal wetlands, which were at issue in *Chase Manhattan Bank*; CPLR 7801–7803 (setting forth procedures for Tidal Wetlands Act proceedings).
15. *Berwick v. State,* 107 A.D.2d 79, 86, 486 N.Y.S.2d 260 (2d Dep't 1985), *appeal after remand*, 159 A.D.2d 544, N.Y.S.2d 409 (2d Dep't 1990).
16. *Estate of Berwick v. State,* 159 A.D.2d 544, 548, 552 N.Y.S.2d 409 (2d Dep't), *appeal denied*, 76 N.Y.2d 884, 561 N.Y.S.2d 544 (1990); *see In re Suffolk County,* 109 A.D.2d 155, 491 N.Y.S.2d 371 (2d Dep't 1985) (adjusting the valuation of the subject property for diminished developability as a result of the existence of wetlands on the subject property); *Hewitt v. State,* 18 A.D.2d 1128, 239 N.Y.S.2d 522 (4th Dep't 1963) (adjusting the valuation of the subject property according to its "potential" use, not its raw acreage nor its actual use), *aff'd*, 18 A.D.2d 1138, 239 N.Y.S.2d 864 (4th Dep't 1963).
17. *Buffalo v. J.W. Clement Co.,* 28 N.Y.2d 241, 257–58, 321 N.Y.S.2d 345, (1971); *City of Rochester v. Livadas,* 98 A.D.2d 976, 470 N.Y.S.2d 259 (4th Dep't 1983).
18. *City of Buffalo v. George Irish Paper Co.,* 31 A.D.2d 470, 476, 299 N.Y.S.2d 8 (4th Dep't 1969); *see Matlow Corp. v. State,* 36 A.D.2d 461, 321 N.Y.D.2d 734 (4th Dep't 1971) ("[C]ompensation shall be based on the value of the property as it would have been at the time of the de jure taking but for the debilitating effect of the project itself.").
19. 230 A.D. 41, 243 N.Y.S. 63 (1st Dep't 1930), *aff'd*, 256 N.Y. 556 (1931).
20. *Id*. at 46–47 (emphasis added).
21. *See In re City of New York*, 94 A.D.2d 724, 724, 462 N.Y.S.2d 260 (2d Dep't 1983), *aff'd*, 61 N.Y.S.2d 843, 473 N.Y.S.2d 963 (1984) (zoning action brought about because of impending condemnation and which impaired property value must be extracted from valuation analysis at condemnation trial); *see also United States v. Certain Lands in Truro,* 476 F. Supp. 1031, 1036 (D. Mass. 1979) (refusing to allow the government to take advantage of depreciated value that resulted from its own acts or omissions).
22. *Certain Lands in Truro,* 476 F. Supp. at 1036.
23. Claim No. 87732 (filed Oct. 31, 1997) (Silverman, J.), *aff'd* upon opinion below, 259 A.D.2d 691, 685 N.Y.S.2d 627 (2d Dep't 1999).
24. *La Briola v. State,* 36 N.Y.2d, 328, 368 N.Y.S.2d 147, 328 N.E.2d 781 (1975) (It was not appropriation of frontage but non-compensable highway relocation diverting traffic which eliminated retail business as the highest and best use of the subject. The access remaining was suitable for the next best industrial highest and best use.).
25. *See La Briola v. State, supra* note 24.
26. *Priestly v. State,* 23 N.Y.2d 152, 155, 295 N.Y.S.2d 659, 662 (1968).
27. *Id.* at 152, 295 N.Y.S.2d at 662, 242 N.E.2d at 829, citing *Laken Realty Corp. v. State*, 29 A.D.2d 1027, 289 N.Y.S.2d 570 (3d Dep't 1968); *Red Apple Rest, Inc. v. State,* 27 A.D.2d 417, 280 N.Y.S.2d 229 (3d Dep't 1967).
28. *Id.* at 152, 295 N.Y.S.2d at 663, 242 N.E.2d at 829.
29. *La Briola v. State*, 36 N.Y.2d 328, 368 N.Y.S.2d 147, 328 N.E.2d 781 (1975).
30. *Id.* (citing *Bopp v. Stat*e, 19 N.Y.2d 368, 280 N.Y.S.2d 135, 227 N.E.2d 37 (1976).
31. *County of Erie v. Abbot-Ridge Roads, etc.* 116 A.D.2d 971, 498 N.Y.S.2d 597 (4th Dep't 1986); *Beh v. State,* 56 N.Y.2d 576, 450 N.Y.S.2d 182, 453 N.E.2d 399 (1982) (adopting the dissenting opinion in the Appellate Division at 81 A.D.2d 744, 438 N.Y.S.2d 415; expansion of state highway resulted in interruption of access to owner's land on one side of highway, evidence sufficient to establish that highest and best use of land had been diminished due to decrease in developmental potential and owner entitled to consequential damages).

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Reimbursement for the Cost of Obtaining Just Compensation

By Edward Flower

The general purpose of New York's Eminent Domain Procedure Law (hereinafter "EDPL") is "to assure that just compensation shall be paid to those persons whose property rights are acquired by the exercise of eminent domain."[1] While various sections thereof establish the procedure by which property shall be acquired by exercising the power of eminent domain—all of which have been provided with a view towards the Federal and state constitutional mandate that property not be acquired by eminent domain without just compensation—it is EDPL section 701, both by the current terms and as it has been interpreted and administered by the courts, that takes a final giant step to assure that just compensation is, in fact, the outcome. That section, as amended in 1987 established the following criteria:

A. Whether the award may be deemed to be "substantially in excess of the amount of the condemnor's proof";

B. Whether it is deemed necessary by the court to make such additional award to achieve just and adequate compensation; and

C. The amount which the trial court may "in its discretion" award to condemnee as reimbursement for actual and necessary costs, disbursements and expenses, including attorney's fees, appraisal and engineering costs.

The first issue to consider is whether the award is substantially in excess of condemnor's proof.

Prior to the 1987 amendment, the section defined an award considered sufficiently in excess of condemnor's proof to qualify for an additional award under EDPL section 701 to be "in excess of 200 percent of the amount of condemnor's proof." The amount allowed for expert services was limited to $10,000. Both provisions were repealed in 1987 and, with the substitution of the phrase "substantially in excess" for the specific sum in excess of 200 percent, it would be up to the court to determine what would be considered substantially in excess.

Malin v. State[2] held that the claimant need only show "more than a modest increase in value." In the *Malin* case, that increase was a 79-percent increase in value over and above the state's *initial offer*. There is, however, a substantial body of case law useful in resolving that issue. In *Town of Riverhead v. Lobozzo*,[3] an award of $47,640 over and above the initial offer—a 30-percent increase—was considered sufficient to sustain an EDPL section 701 award. In *Karas v. State*,[4] an award of $75,718 over an initial offer—representing a 41.5-percent increase—was considered sufficient. In *Scuderi v. State*[5] an award of $20,100—or a 41.4-percent increase—was considered sufficient. In *In re New York City Transit Authority (Gun Hill Bus Depot)*,[6] an award of 35-percent above the initial offer was deemed sufficient.

This author strongly suspects that a court might reasonably reject a high percentage increase where the dollar sum is small (e.g., 100 percent increase over a $5,000 initial offer). On the other hand, an amount that is a small percentage but of a large offer (e.g., an additional $200,000 over a $2,000,000 offer), might be considered sufficient as a "substantial" sum. Presently, no case law supports that position.

The next issue presented is for the court to determine, "in its discretion," whether such an additional award is necessary "for the condemnee to achieve just and adequate compensation."[7] It is difficult to understand how such an additional award cannot be necessary to achieve "just compensation" once the threshold of whether or not the award is "substantially in excess" has been overcome. It is obvious that but for the services provided by a claimant's attorney and expert witnesses, the court's award would not materialize. Since the court's initial award and interest thereon deals only with compensation for the full or partial taking, were it not for the additional allowance provided by EDPL section 701, a claimant would, in effect, obtain only a partial recovery inasmuch as claimant would realize the sum to which it has been adjudged entitled less the amount necessarily incurred for legal fees and expert witnesses.[8] *Hakes v. State*[9] holds that while a section 701 award is not considered an automatic part of the constitutionally mandated just compensation, its issuance or absence, nevertheless, will have an undeniable and profound impact on the result achieved by claimants. Only by obtaining the reimbursement provided in section 701 will the claimant truly be made whole.

The condemnor should not complain about the amount of such reimbursement given the claimant's need to hire an attorney and experts, which was brought about by the condemnor's own failure to make a sufficient initial offer.[10] Only through such reimbursement will the stated purpose of EDPL section 701 be effectuated by preventing claimants from having "to bear the cost of litigation expenses for proving inadequacy of a condemnor's offer."[11] In *General Crushstone Co. v. State*,[12] the Court of Appeals held that section 701 was "necessary to guaran-

tee fair treatment of condemnees as unwilling litigants who find their property subject to a condemnor's power of eminent domain."

In considering what the courts have viewed as reasonable and adequate for purposes of reimbursement of a condemnee, it is important to remember that EDPL section 701 neither authorizes the court nor burdens it with determining counsel or expert witness fees. That is left to contractual agreements between the litigant and those experts and counsel whom the litigant chooses to employ. Unlike laws in other states, EDPL section 701 is not a fee-shifting statute. The initial burden always remains on litigants to pay counsel and expert witnesses according to the contractual arrangements between the parties.

This notwithstanding, it does grant broad discretion to the trial court to determine how much of those fees the successful claimant should be able to recapture from the condemnor to be assured of just compensation. In doing so, the trial court may undoubtedly consider the reasonableness of the fee agreement (at least for purposes of reimbursement to claimant but not necessarily to modify same as between claimant and counsel). The trial court may consider the application for reimbursement in light of the circumstances at the time the fee agreement was entered into, counsel's background and qualifications, the nature of the case and, perhaps most important, what counsel achieved on behalf of the client. The same may be considered in reviewing the question of claimant reimbursement for expert witness fees.

The trial court is in the best position to determine whether just compensation requires full reimbursement to the successful claimant. This is in accord with the general proposition that the decision of the trial court is to be given great deference on appeal.[13] This also is consistent with the rule that a condemnation award made by a trial court should not be disturbed unless supported by any fair interpretation of the evidence in the record before it.[14] The rule applies to an award made under EDPL section 701, perhaps with even greater force since the statute specifically states the award by the trial court is "in its discretion." Accordingly, an EDPL section 701 award may not be reversed on appeal unless it constitutes "an abuse of the trial court's discretion."[15] In other words, "an award of counsel fees pursuant to EDPL Section 701 should be upheld absent an abuse of discretion."[16]

This notwithstanding, the *failure to make an award* of an additional allowance pursuant to EDPL section 701 where the trial court's condemnation award has been substantially in excess of condemnor's initial offer *has been held to constitute an abuse of discretion*.[17] In the *City of Yonkers* and *County of Oswego* cases, the Appellate Division, Third Department, exercised its discretion and directed awards of additional allowances under EDPL section 701 where the trial courts had improperly chosen not to do so. The First Department also has held that a trial court's determination of counsel fees in an EDPL section 701 award in an arbitrary amount which ignores the retainer agreement between counsel and the condemnee constitutes an abuse of discretion.[18] The Appellate Courts even have modified an award of counsel fees where the trial court purported to base its award on the retainer agreement between counsel and condemnee but simply calculated it incorrectly.[19] The Fourth Department also modified an EDPL section 701 award where it is held that not all of the reimbursement expenses directed by the trial court were reasonable or necessarily incurred.[20]

The standard one-third contingency fee arrangement frequently used in condemnation cases was sanctioned by New York courts as the appropriate legal fee for which claimant is entitled to be reimbursed under EDPL section 701.[21] Although the Appellate Division, Second Department, opinions in *Dunn Holding Co. v. State* and *Schad v. State* do not discuss whether the attorney's fees, based on a contingent fee arrangement of one-third of all sums recovered over the initial offer, are appropriate, such cases, nevertheless, clearly stand for this proposition, because the Court of Claims from which the appeal was taken so held and its findings were affirmed on appeal. In the *Schad* case, the state appealed a reimbursement for counsel fees in excess of $2.5 million (based on an award inclusive of interest in excess of the state's initial offer by approximately $7.5 million). The state urged on appeal that the court also must pay attention to the amount of time put in by the attorney, etc., rather than relying solely on the contingency fee agreement. The Appellate Division affirmed without its own opinion and upon the opinion of the trial court. In *Forgeon v. State*,[22] it was held that claimant should be reimbursed under EDPL section 701 for contingent attorneys' fees based on *all funds* received by claimant, including interest on the award that also was subject to the attorney fee contingency.

Consistent with the discretion afforded the trial court on this issue, no New York Appellate Court has reversed or reduced an additional allowance made under EDPL section 701 as an abuse of discretion of the trial court solely by virtue of it being an amount considered excessive by the Appellate Court. This is not to say that a trial court, in its discretion, may award reimbursement in an amount less than that sought by the claimant, notwithstanding, the attorneys' fee agreement. In *City of Yonkers v. Celwyn Co.*,[23] the Appellate Division held that it was an error for the lower court to refuse to make any award under EDPL section 701. The Appellate Division exercised its own discretion and made the EDPL section 701 award for only one-half the sum requested for reimbursement as attorneys' fees, which was found to be reasonable under the circumstances. In that case, the Appellate Division was exercising its own discretion where the trial court had failed to do so or, in doing so, had abused that discre-

tion. In *Hakes v. State*,[24] which was an affirmance of a lower court's refusal to make an award under EDPL section 701, the trial court found that the attorney's fees for which claimant sought to be reimbursed were for services rendered in advancing a claim *completely rejected* by the trial court. The decision was entirely consistent with the policy of not disturbing the trial court's exercise of discretion unless that discretion clearly was abused.

There are a number of cases in which the trial court awarded reimbursement of attorneys' fees that would amount to less than what was called for in the retainer agreement. Unfortunately, none have been the subject of review by an Appellate Court.[25] All of those cases are examples of a trial court exercising its own discretion.

Endnotes

1. EDPL § 101.
2. 183 A.D.2d 899, 584 N.Y.S.2d 596 (2d Dep't 1992).
3. 207 A.D.2d 789, 616 N.Y.S.2d 973 (2d Dep't 1994).
4. 169 A.D.2d 816, 565 N.Y.S.2d 185 (2d Dep't 1991).
5. 184 A.D.2d 1073, 585 N.Y.S.2d 271 (4th Dep't 1992).
6. 142 Misc. 2d 629, 538 N.Y.S.2d 161 (Sup. Ct., Bronx Co. 1989).
7. EDPL § 701; *Hakes v. State*, 81 N.Y.2d 392, 599 N.Y.S.2d 498 (1993).
8. *See In re City of New York* (*Town of Hempstead*), 125 A.D. 219, 220–21, 109 N.Y.S. 652 (2d Dep't 1908), *aff'd*, 192 N.Y. 569 (1908) (holding that awarding a condemnation claimant who has had his property taken from him involuntarily less than all of his expenses incurred in obtaining just compensation offends the spirit of the Fifth Amendment to the Constitution).
9. 81 N.Y.2d at 398.
10. *See Nat'l Field Gas Supply Corp. v. Cunningham Natural Gas Corp.,* 191 A.D.2d 1003, 595 N.Y.S.2d 275 (4th Dep't 1993) (awarding a reimbursement of $38,000 pursuant to EDPL Section 701 notwithstanding that the main award exceeded condemnor's initial offer by just $28,565).
11. *In re New York Transit Auth.,* 160 A.D.2d 705, 553 N.Y.S.2d 785 (2d Dep't 1990).
12. 93 N.Y.2d 23, 686 N.Y.S.2d 754 (1999).
13. *Town of Islip v. Sikora,* 220 A.D.2d 434, 632 N.Y.S.2d 160 (2d Dep't 1995).
14. *Rochester Urban Renewal Agency v. Lee*, 83 A.D.2d 770, 443 N.Y.S.2d 479 (4th Dep't 1981).
15. *Walsh v. State,* 180 A.D.2d 290, 585 N.Y.S.2d 574 (3d Dep't 1992).
16. *Hoffman v. Town of Malta*, 1890 A.D.2d 968, 592 N.Y.S.2d 503 (3d Dep't 1993).
17. *City of Yonkers v. Celwyn Co.,* 221 A.D.2d 437, 633 N.Y.S.2d 578 (2d Dep't 1995); *see also County of Oswego v. Maroney,* 186 A.D.2d 1031, 588 N.Y.S.2d 478 (4th Dep't 1992).
18. *In re New York Convention Ctr. Dev. Corp.,* 234 A.D.2d 167, 651 N.Y.S.2d 479 (1st Dep't 1996).
19. *DeMarco v. State,* 211 A.D.2d 610, 622 N.Y.S.2d 58 (2d Dep't 1995).
20. *Nat'l Fuel Gas Supply Corp. v. Cunningham Nat'l Gas Corp.,* 191 A.D.2d 1003, 595 N.Y.S.2d 275 (4th Dep't 1993).
21. *See Dunn Holding Co. v. State,* 169 A.D.2d 809, 565 N.Y.S.2d 178 (2d Dep't 1991); *Schad v. State*, 259 A.D.2d 691, 685 N.Y.S.2d 627 (2d Dep't 1999); *Long Island Pine Barrens Water Corp. v. State*, 144 Misc. 2d 665, 544 N.Y.S.2d 939 (Ct. Cl. 1989).
22. Memorandum Opinion, Claim #89785 (N.Y. Ct. Cl. 1995).
23. 221 A.D.2d 437, 633 N.Y.S.2d 578 (2d Dep't 1995).
24. 81 N.Y.2d 392, 599 N.Y.S.2d 498 (1993).
25. *Meyers v. State,* 166 Misc. 2d 586, 634 N.Y.S.2d 642 (Ct. Cl. 1995); *In re New York City Transit Auth. (Northern Blvd.),* 150 Misc. 2d 917, 572 N.Y.S.2d 613 (Sup. Ct., Queens Co. 1991): *Universal Empire Indus v. State,* N.Y.L.J., Oct. 30, 1991, p. 23, col. 1 (Ct. Cl.); *In re New York City Transit Auth. (Gun Hill Bus Depot),* 142 Misc. 2d 629, 538 N.Y.S.2d 161 (Sup. Ct., Bronx Co. 1989); *Frisbo Enter. Ltd. v. State,* 145 Misc. 2d 397, 546 N.Y.S.2d 789 (Ct. Cl. 1989).

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The Condemnation of Public Utility and Other Specialty Properties Already Dedicated to the Public Use

By David M. Wise

This article addresses the condemnation issues in New York State of a particular class of specialty properties: public utility and other privately owned properties already dedicated to the public service, such as water, sewer, transportation, gas and electric utility-type property, but also including hospitals and clinics serving the general public.[1] We will refer to these as "public use" properties. Typically these properties (a) involve the delivery of public necessities, (b) have enjoyed certain government granted special franchises or privileges, such as protection from competition and the right of eminent domain, (c) have been subject to rate regulation and other forms of intensive governmental supervision, and (d) are often inherently monopolistic. The valuation issues associated with these properties are particularly thorny, and there are few hard and fast principles that apply across the board. This article shall, nevertheless, attempt to describe the conceptual framework within which the courts and regulatory agencies have attempted to resolve these issues.

Specialty Properties and the RCNLD Approach to Value

Typically, public use properties are specialty properties. Specialty properties have been defined for both tax certiorari and condemnation purposes as follows:

(a)The improvement must be *unique* and must be specially built for the specific purpose for which it is designed;

(b) [t]here must be a *special use* for which the improvement is designed and the improvement must be so specially used;

(c) [t]here must be *no market* for the type of property * * * and no sales of property for such use; and

(d) [t]he improvement must be an appropriate improvement at the time of its taking and its use must be *economically feasible and reasonably expected to be replaced*.[2]

Specialty properties must be valued by the reproduction or replacement cost new less depreciation methodologies (RCNLD).[3] Reproduction cost uses as its point of departure the costs of reproducing an exact replica of the facility in question, while replacement cost uses the cost of replacing a state-of-the-art facility that performs the same function. Although it arguably results in superfluous effort, reproduction cost new is generally considered the appropriate RCNLD starting point.

Reproduction cost new may be obtained by either a "sticks or bricks" method which relies on engineering studies of the construction costs of the facilities in question, or by a trended original cost approach, where original costs based on year of installation are *trended up* to present costs using cost indices such as the Handy-Whitman Utility Cost Index.[4] Adjustments are then made for all forms of depreciation, including curable and incurable physical deterioration, functional obsolescence and economic obsolescence.[5] Functional obsolescence is a "loss of utility and failure to function due to inadequacies of design and deficiencies of the property."[6] Economic obsolescence is a loss of value as a result of external conditions such as a declining location or neighborhood, or competitive pressures.[7] One measure of functional obsolescence is the difference between reproduction cost new and the cost new of the replacement facility that would most appropriately perform the economic function of the existing facility. Excess operating costs associated with the existing facility over the replacement facility are an additional measure of functional obsolescence.

Incurable physical deterioration can be measured in two ways, one based on accounting principles, and the other on engineering principles. Accounting model depreciation is based on average service life of classes of property, and usually proceeds on a straight-line basis with some curvilinear adjustment made for the phenomenon of "dispersion," i.e., the phenomenon that all members of an asset class are not actually removed from service at the expiration of the *average service* life of the asset class, and that those surviving beyond the average life of the class obviously retain utility and value. The inadequacy of simple straight-line depreciation becomes particularly apparent when dealing with facilities that can survive indefinitely if properly maintained, such as dams or reservoirs.[8] Engineering depreciation is based on an "observed condition" analysis, ostensibly founded on objective criteria.[9] Although observed condition depreciation makes more sense from the perspective of actual use value, it is very subjective and New York courts have been more inclined to the use the accounting approach.[10]

It is generally recognized that the RCNLD methodologies yield the highest values of the three approaches to value.[11]

Hence, almost invariably, use of RCNLD will favor the government in tax certiorari proceedings, but favor the private party in the condemnation proceedings.

In *Saratoga Harness Racing v. Williams*,[12] a tax certiorari decision, the Court of Appeals made clear that, in the tax certiorari context at least, the specialty designation was to be applied very sparingly. The question of specialty treatment turned on whether there was a recognized market for the sale of harness racing tracks. The Court, noting that there had been a total of "33 sales of horse racetracks in the United States and one in Canada between 1984 and 1992," and that the RCNLD formula "is the one most likely to result in overvaluation," endorsed the trial court's "realistic assessment" and rejected the "Appellate Division's conclusory 'specialty' slotting of this property," and sustained the comparable lease income method.[13] Clearly, if a harness racing track cannot qualify as a specialty, the compass of specialty properties would seem to be very narrowly circumscribed, at least in the tax certiorari context.

Although the courts have not explicitly distinguished between the definition of specialty properties for condemnation purposes and for property tax purposes, the specialty designation seems to be more liberally applied in the condemnation context. For example, in the leading condemnation specialty decision, the Court of Appeals concluded that a commercial nursery was a specialty because, even though there had been several sales of nurseries in Suffolk County, there had not been any in Eastern Suffolk County.[14] In the tax certiorari context, however, the *Saratoga Harness Racing* court, by contrast, scoured the entire continent for the existence of market sales.

This more liberal approach to specialties in the condemnation context makes sense. For property taxes, market value is the upper cap of value,[15] and RCNLD may be used as a surrogate for market value only where market value is not reasonably ascertainable through the market sales or capitalization of earnings methods.[16] By contrast, as discussed more fully below, under the "just compensation" measure of damages for condemnation, market value should not be the measure of damages if it would result in an unjustly low level of compensation.[17] This disconnection between market value and just compensation has been very pronounced in the context of public takeovers of public use property.

Public use property has two characteristics absent from other specialties. First, owners of these systems have typically enjoyed a host of unique privileges, including the power of eminent domain, and the rights to construct in the public rights-of-way and to protected monopoly franchises, but have, at the same time, been subject to economic rate regulation and other unique restrictions and obligations.[18] Secondly, these systems often have a value to the public that transcends the value of the sum of individual customer transactions. Money-losing systems with virtually no conceivable investment value to private operators can still be extremely valuable to the public: hence the need for, and willingness to provide, public subsidies. A corollary to this is that the developers and owners of these systems may have been making necessary, but uncompensated, contributions to the public good.

These factors significantly complicate valuation, and the determination of "just compensation."

RCNLD vs. "Rate Base"

Axiomatically, the historic earnings of an enterprise are one indication of the enterprise's value. For public utilities, however, government regulators rather than market forces have largely dictated the level of those earnings. The thorniest "just compensation" problem for public utility property is, then, the impact of rate regulation on the calculation of just compensation.

The rate regulation of public use entities has long been recognized as a form of taking for the public good governed by the same "just compensation" requirements of the Fifth and Fourteenth Amendments that govern condemnation awards.[19] Thus, rate regulation has always had to allow owners a reasonable opportunity to recover both their current expenses together with a "fair return" on capital. The proper identity of the "base" upon which this fair return was to accrue, or of "rate base," was long a thorny issue.

Since the Supreme Court's landmark 1944 *Hope Natural Gas*[20] decision, however, most regulators have used a rate base founded on Original Cost Less Depreciation (OCLD) (i.e., net book value). OCLD ratemaking has made ownership of public utilities a relatively low-return but risk-free proposition. Monopoly utility investors have generally not been entitled to enjoy the benefits of the capital appreciation of their assets but have, at the same time, been insulated from losses due to untimely asset depreciation caused, for example, by changing technology or customer disaffection.[21]

Clearly the OCLD of utility assets bears only the most incidental relation to the true *use value* of these assets, which is best evidenced by their RCNLD. In inflationary times (which, of course, are the norm) the RCNLD of utility assets will typically exceed their OCLD. In other contexts, however, changes in technology, customer preferences, or politics will cause an RCNLD value—which fully recognizes functional and economic obsolescence—to be less than the OCLD, for example, the intra and intercity passenger railroad systems, intra-city bus lines, and nuclear power plants.

The *spread* between RCNLD and OCLD, whether negative or positive, and the question of who is entitled to (or should bear the cost of) this spread is the pivotal issue when privately owned utility property is condemned or otherwise removed from the regime of monopoly rate regulation. On one hand, the earning capacity, and, hence,

true economic value of the assets *in the hands of the investors at the time of the takeover* is, of course, equal to the OCLD earnings or rate-base. On the other hand, the true economic value of the system *to the public served by these systems* is best reflected by the RCNLD.

The "Rights of Ownership" vs. the "Regulatory Compact" Approaches

Historically, there have been two approaches to the question of who is entitled to (or responsible for) the spread between RCNLD value and OCLD value on the disposition of utility systems, whether through condemnation or otherwise. What might be termed the "rights of ownership" approach holds "that utility assets, though dedicated to the public service, remain exclusively the property of the utility's investors, and that growth in value is an inseparable and inviolate incident of that property."[22] An alternative approach which might be labeled the "regulatory compact"[23] approach holds, however, that OCLD ratemaking has essentially transferred the risks and benefits of capital losses and gain typically associated with ownership from owners to the public. According to the regulatory compact approach, when government action removes assets from the protected environment of rate regulation, the public should bear the costs of theretofore unrecognized capital depreciation (or stranded costs), but enjoy the benefit of capital appreciation, particularly where the losses and gains result from circumstances outside the reasonable control of the owners.[24]

Under the rights-of-ownership approach, even if the prior ratemaking regime virtually insulated the utility owners from risk, the proper compensation upon condemnation should be RCNLD, regardless of whether this is more or less than OCLD. Under the regulatory compact approach, if the rate-base has been OCLD, then the owner should recover OCLD upon condemnation, regardless, once again, of whether this is higher or lower than the system's RCNLD. In the recent restructuring of the electric industry, both utility companies and regulators embraced the regulatory compact approach in concluding that ratepayers, not owners, should bear "stranded costs," i.e., the losses associated with uneconomic power plants being removed from rate regulation, and subjected to price competition.[25]

The major New York utility condemnation cases reflect the tension between the rights-of-ownership and regulatory compact approaches to the OCLD vs. RCNLD models of compensation.

Condemnation of Economically Viable Systems Historically Subject to Unreasonable Rate Regulation

The leading Court of Appeals decision involving the takeover of a rate-regulated utility, *City of New York v. Fifth Avenue Coach Lines*,[26] reflects a balancing of the rights-of-ownership and regulatory compact approaches. The decision concerned the New York City takeover of two privately owned, yet publicly franchised, intra-City New York City bus lines. The decision begins with the comment that the takeover was necessary because "it is beyond the resources of private enterprise to provide mass transportation at modest rates, dictated by political exigencies and confiscatory as far as the equity in the business is concerned."[27] In sum, the city regulators had systematically violated the *regulatory compact* by failing to provide the owners of the bus lines with a reasonable rate of return.

Although the bus lines had been only marginally profitable in recent years, the court concluded that this resulted, not "because of the economic law of diminishing returns or inefficient management," but because the city had "suppressed the earning power of these transit lines by denying them, for political reasons, the right to charge an increased and reasonable fares," and that, but for this unreasonable rate regulation, the bus lines "would have had large gains in gross revenues and greater gain in net profits as going concerns at the time of the condemnation."[28] The decision went on to sustain an RCNLD valuation of the bus lines' tangible assets, and ordered a similar valuation of the bus lines' intangible "going concern" assets, including trained workforce, operating schedules, coach routes, and operating systems. A decision on a subsequent appeal held that the value of these intangibles was compensable even absent proof that they had any earning capacity so long as the intangibles were, in fact, necessary to the system's successful operation.[29]

Fifth Avenue has sometimes been cited as standing for the simple rule that the just compensation for the condemnation of public utility property in New York is the RCNLD of both tangible and intangible property. This, however, is not the case. First, unlike most utilities, the bus companies did not enjoy true monopoly franchises, and were, indeed, required to compete for customers with city-owned bus companies. Moreover, the court's heavy emphasis on the unreasonableness of the fare restrictions preceding the takeover suggests that, had the government given the bus companies monopoly franchises and a rate structure that had reasonably assured them a fair return on OCLD, the result would have been different. In sum, the decision in *Fifth Avenue* makes clear that its RCNLD outcome results from the fact that investors had borne the risk of loss prior to the takeover, and hence, were entitled to the gain on the appreciated value of the assets.

Condemnation of Economically Unviable Systems

While the bus companies in *Fifth Avenue* were unable to earn a reasonable return because of confiscatory rate regulation, in *In re the Port Authority Trans-Hudson Corporation*,[30] which involved a commuter railroad system under the Hudson River from New Jersey to New York,

investors were unable to earn a reasonable return because of competition from other means of transportation. In sum, the system had virtually no earning capacity on a stand-alone basis due, not to rate regulation or other governmental constraints, but to market forces. The system was nevertheless an "essential public facility" because it provided necessary transportation to over 100,000 commuters.

The Court of Appeals rejected an Appellate Department ruling that just compensation equaled the system's scrap value, stating, that it "involves a practical contradiction of terms to say that property useful and actually used in a public service is not to be estimated as having the value of property in use, but is to be reckoned with on the basis of its 'junk value.'"[31]

Fairness, however, did not permit payment of the full RCNLD value of the system. Hence, although the reproduction cost of the tunnels was $400 million, the Court of Appeals, noting the system's lack of economic viability, would only sustain an award of $30 million based roughly on the tunnel's OCLD. The Court, however, overturned a $20 million OCLD award for non-tunnel facilities because there was inadequate support on the record for the amount of depreciation. Thus, the apparent rule seems to be that for *economically unviable utility systems* essential to the public good, OCLD is the best measure of just compensation.[32]

Condemnation of an Economically Viable Utility System That Has Enjoyed the Benefits of the "Regulatory Compact"

Curiously, there is no Court of Appeals decision specifying the valuation methodology for the condemnation of a utility system that (a) is economically viable, and (b) has enjoyed the protections of the regulatory compact. The legislature, however, has repeatedly passed laws trying to impose OCLD as the appropriate methodology for particular utility condemnations, making clear its belief that any compensation in excess of OCLD would result in a windfall.[33]

In *In re Saratoga Water Services, Inc.*,[34] the Court of Appeals addressed the constitutionality of legislation providing for the takeover of a water system. The statute provided that "compensation of the real property condemned shall be determined solely by the income capitalization method of valuation based on the actual net income as allowed by the public service commission," a *de facto* OCLD methodology.[35] If the condemnation award ultimately given was based on some other methodology, the statute provided that the takeover authority could "withdraw the condemnation proceeding without prejudice."[36]

The Court of Appeals construed the statutory language prescribing valuation methodology as advisory rather than mandatory, and then held that "the solution chosen by the legislature, while unusual, is constitutionally tolerable given the unique valuation problems inherent in public utilities takings."[37] A prior decision involving similar legislation held that, in the face of this sort of legislation, a court must, at the least, show that it has given "due regard" to legislative dictates to consider OCLD.[38]

Conclusions and Recommendations

Ultimately, the question of the appropriate balancing between OCLD and RCNLD in the condemnation of a utility or other public use system that has effectively been insulated from the risks of the marketplace remains unresolved. It would seem, though, that just compensation would entail a balancing of RCNLD and OCLD that is most fair to condemnee and condemnor in light, not only of the value of the system at the time of the takeover, *but of the history of rate regulation that preceded the takeover*. Clearly, a strong legislative preference for an OCLD versus an RCNLD award, or vice versa, can and should be one factor on the scales, and the legislature should not hesitate to intercede when circumstances make it appropriate.

Endnotes

1. This article will not address the unique problems associated with the municipalization of portions of integrated systems. On this issue, see, e.g., *In re Niagara Mohawk Power Corp. (Village of Lakewood)*, Case 99-E-0681, 205 Pub. Util. Rep. (PUR) 4th 140 (Sept. 11, 2000). *See also* MASSENA/NIAGARA MOHAWK: A CASE STUDY OF ISSUES IN MUNICIPAL ACQUISITION, Edison Electric Institute (Washington, D.C. 1985). This article also will not address the issue of government-mandated relocations of public utility property in the public rights-of-way. *See generally Consol. Edison Corp. v. Lindsey,* 24 N.Y.2d 309, 248 N.E.2d 150, 300 N.Y.S.2d 321 (1969). Finally, this article will not address the takeover of public use property where the intent is not to continue the pre-existing use, but merely to acquire the underlying land. *See, e.g., Banner Milling Co. v. N.Y.*, 240 N.Y. 533; 148 N.E. 668 (1925).
2. *Brooklyn Union Gas v. State Bd. of Equalization and Assessment*, 65 N.Y.2d 472, 486; 492 N.Y.S.2d 598; 482 N.E.2d 77 (1985) (quoting *In re County of Suffolk* (C.J. Van Bourgondien, Inc.), 47 N.Y.2d 507, 512).
3. *Id.*
4. *Niagara Mohawk Power Corp. v. City of Cohoes Bd. of Assessors*, 280 A.D.2d 724; 720 N.Y.S.2d 241 (3d Dep't 2001); *Niagara Mohawk v. Bethlehem Assessor,* 225 A.D.2d 841; 639 N.Y.S.2d 492 (3d Dep't 1996).
5. *Long Island Lighting Co. v. Assessor for Town of Brookhaven,* 202 A.D.2d 32, 42; 616 N.Y.S.2d 375 (2d Dep't 1994).
6. *Id.* at 42.
7. *Id.* at 43.
8. *City of Troy v. Assessor of the Town of Pittstown,* 227 A.D.2d 736; 642 N.Y.S.2d 717 (3d Dep't, 1996) (water reservoir); *Niagara Mohawk v. Town of Moreau,* Index No. 94-1616, Supreme Court, County of Saratoga (Jul. 18, 1999) (hydro-electric dams.).
9. *See* MASSENA/NIAGARA MOHAWK: A CASE STUDY OF ISSUES IN MUNICIPAL ACQUISITION, Edison Electric Institute (Washington D.C. 1985).

10. *See, e.g., Niagara Mohawk v. City of Cohoes,* 280 A.D.2d 724, 720 N.Y.S.2d 241 (3d Dep't 2001).

11. *Great Atl. & Pac. Tea Co. v. Kiernan,* 42 N.Y.2d 236; 366 N.E.d 808; 397 N.Y.S.2d 718 (1977).

12. 91 N.Y.2d 639, 659 N.Y.S.2d 938; 697 N.E.2d 164 (1998).

13. *Id.*, 91 N.Y.2d 646.

14. *In re County of Suffolk* (C.J. Van Bourgondian, Inc.), 47 N.Y.2d 507; 392 N.E.2d 1236; 419 N.Y.S.2d 52 (1979).

15. N.Y. Const. Art. XVI, § 2.

16. RCNLD may always be used to establish the upper cap on value. *See Great Atl. & Pac. Tea Co. v. Kiernan*, note 11, *supra*.

17. *Port Authority Trans-Hudson Corp. v. Hudson Rapid Tubes Corp.,* 20 N.Y.2d 457, 231 N.E.2d 734, 285 N.Y.S.2d 24 (1967).

18. Unlike other private businesses, public utilities are typically obligated to (a) provide all customers within their franchise areas with reliable and adequate service; (b) to provide this service based on publicly filed tariffs on a non-discriminatory basis and without undue preferences as among classes of customers; and (c) to submit to strict governmental oversight of business operations.

19. *Smyth v. Ames,* 169 U.S. 466, 422 L. Ed. 819, S. Ct. 418 (1898).

20. *Fed. Power Comm'n v. Hope Natural Gas,* 320 U.S. 5912, 88 L. Ed. 333, 64 S. Ct. 281 (1944).

21. Regulators keen on encouraging efficiency and innovation have, however, been attempting to introduce forces of competition to the various utility industries with various levels of success.

22. *Democratic Cent. Comm. of D.C. v. Wash. Metro. Area Transit Comm'n,* 485 F.2d 786, 802 (C.A.D.C. 1973), *cert. denied*, 415 U.S. 935, 39 L. Ed.2d 493, 94 S. Ct. 1451 (1974).

23. The phrase "regulatory compact" has, in fact, emerged in the context of the recent restructuring of the electric industry, and the problem of dealing with "stranded costs" associated with power plants worth far less under competitive circumstances than OCLD. The argument in favor of the regulatory compact in the stranded cost context was well-articulated in the 1996 Report of the Council of Economics Advisors (Washington, D.C. 1996):

> In unregulated markets the possibility of stranded costs typically does not raise an issue for public policy—it is simply one of the risks of doing business. However, there is an important difference between regulated and unregulated markets. Unregulated firms bear the risk of stranded costs but are entitled to high profits if things go unexpectedly well. In contrast, utilities have been limited to regulated rates, intended to yield no more than a fair return on their investments. If competition were unexpectedly allowed, utilities would be exposed to low returns without having had the chance to reap the full expected returns in good times, thus denying them the return promised to induce the initial investment. A strong case therefore can be made for allowing utilities to recover stranded costs where these costs arise from after-the-fact mistakes or changes in regulatory philosophy toward competition, as long as the investments were initially authorized by regulators. Good policy tries to mitigate such losses for investments made. (P. 187).

24. *See* DCC, note 22, *supra*, 485 F.2d at 806, 811.

25. In the stranded costs debate, RCNLD was less than OCLD primarily because advances in combined cycle gas turbine technology and lower than anticipated fossil fuel prices had rendered nuclear power plants functionally obsolete.

26. 18 N.Y.2d 212, 219 N.E.2d 410, 273 N.Y.S.2d 52 (1966).

27. *Id.* at 218.

28. *Id.* at 221.

29. *City of New York v. Fifth Ave. Coach Lines* 22 N.Y.2d 613, 241 N.E.2d 717, 294 N.Y.S.2d 502 (1968).

30. 20 N.Y.2d 457; 231 N.E.2d 734; 285 N.Y.S.2d 24 (1967).

31. *Id.* 20 N.Y.2d at 470 (quoting *Denver v. Denver Union Water Co.*, 246 U.S. 178, 191 (1918)).

32. The decision does, however, suggest an entitlement to compensation for necessary going concern assets based on their RCNLD.

33. *See, e.g.,* so-called "LIPA Law," at N.Y. PUB. AUTH. LAW § 1020-h (McKinney Supp. 2006).

34. 83 N.Y. 2d 205, 630 N.E.2d 648, 608 N.Y.S.2d 952 (1994).

35. Where the PSC rate base equals OCLD, then any valuation based on net earnings will generate an OCLD value.

36. N.Y. PUB. AUTH. LAW § 1199-eee(5) (McKinney Supp. 2006).

37. *See In re Saratoga Water Services,* note 34, *supra.*

38. *Onondaga County Water Auth. v. N.Y. Water Service Corp.,* 285 A.D. 655, 139 N.Y.S.2d 755 (4th Dep't 1955).

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The Condemnation Clause of the Lease—Frequently Overlooked

By Saul R. Fenchel and Jason M. Penighetti

Saul R. Fenchel

A. The Problem

The condemnation clause is perhaps the most overlooked clause in the lease agreement. Most practitioners give it little attention, reasoning that it is unlikely that a condemnation will occur or, even if it does, that it will be many years away and will have little significance.

This approach, however, has adverse consequences when the property is affected by a condemnation. The likelihood of a condemnation taking place is greater than generally believed—especially in rapidly developing areas such as Long Island. The most common type of condemnation is not a total taking, but a partial taking usually associated with a road widening or intersection improvement. Many of Long Island's roads were originally mapped out decades ago (if not centuries ago—e.g., Routes 25A and 27A)[1] and are in need of major expansion. The properties located along these thoroughfares have already experienced, or are almost certain to experience, partial takings to accommodate road improvements and expansions.

In a condemnation, there are generally two types of damages: direct and indirect. The direct damage is simply the value of that property (land and/or improvement) physically and actually taken. The indirect damage—also called severance or consequential damages—is the diminishment in value to both the land and improvements on the remainder property. In a partial taking, most of the damage is indirect; however, this damage can be quite substantial and is frequently in excess of the direct damages.[2]

B. The General Rule

What happens when there is a taking and a tenant is adversely affected? Who collects the award and under what standard? In New York, the rule is a simple and rigid one—the explicit terms of the condemnation clause govern the allocation. Concepts of equity and fairness play little, if any, role.[3] The constitutional right to just compensation may be waived and the courts of this state have consistently and repeatedly held that a tenant, in its lease, may waive all or part of its condemnation rights and that such a waiver or limitation is valid and enforceable.

In *Cooney Bros. v. State of N.Y.*, the claimant leased two adjacent parcels of land, installed heavy equipment and engaged in the production of sand and gravel.[4] The state appropriated 26 acres from one of the parcels. As a result, the claimant's operation could not be continued. Claimant, pursuant to its lease, moved its operation and its equipment to another location at a cost of $451,000. The Appellate Division, in ruling on the issue of claimant's damages to its leasehold interests, looked to the lease condemnation clause and held:

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> The first and most easily disposed of issue as we see it is claimant's assertion to damages to its leasehold interests. It is clear that where the agreement between the lessor and lessee provides for the reservation to the landlord of any condemnation award and terminates the lease in the event of condemnation, the lessee has no claim for injury to his leasehold interest (citation omitted), and while the condemnation clauses in the instant leases provide only that the lessor is to receive the award, without also expressly terminating the lessee's rights and obligations thereunder, the only reasonable interpretation to be placed on the agreement is that such rights and obligations were impliedly terminated (citation omitted). Thus we find that the trial court correctly denied claimant any leasehold damages.[5]

Likewise, in *Traendly v. State*, a landlord and tenant brought actions against the state to recover damages due to the state's partial appropriation and temporary easements for highway purposes.[6] The Court of Claims entered judgment in favor of tenant for $112,209 and landlord for $15,080. The landlord, tenant and the state appealed. On appeal, the landlord claimed that the apportionment of damages was erroneous because the Court disregarded the condemnation clause in the lease between landlord and tenant. The Appellate Court agreed and held:

> We find the court erred in failing to accord proper treatment of the condemnation clauses in the lease. The decision herein neglected to apportion the award in condemnation in the manner agreed upon by the landlord and tenant in the lease of the sub-

> ject property. A landlord (fee owner) and tenant may determine by agreement how a condemnation award shall be divided. The court hearing the condemnation proceeding must divide the award according to the terms of the agreement. . . . The agreement may exclude a tenant from all the award or from some lesser part (citations omitted).[7]

The Appellate Court modified the award and, pursuant to the condemnation clause, granted minimal damages to the tenant for its fixtures and the temporary easement and awarded the remaining amount to the landlord.

In *Castelano v. State*, the Court of Appeals stated:

> It is a fundamental principle that the Court of Claims has jurisdiction, and indeed an obligation, to make an award in compliance with the terms of an agreement between a landlord and a tenant and that in so doing it may exclude one of the parties from part or all of an award to which it might otherwise be entitled (citations omitted).[8]

Numerous cases are in agreement.[9] The Court will not rewrite a lease simply because one of the parties is dissatisfied with its terms or would prefer that the terms indicate otherwise. A lease is a contractual agreement and it is not the Court's role to amend or reform the contract to meet the wishes of one of the parties. In *Grace v. Nappa*, the Court of Appeals held: "Parties are free to tailor their contract to meet their particular needs and to include or exclude those provisions which they choose. Absent some indicia of fraud or other circumstances warranting equitable intervention it is the duty of the court to enforce rather than reform the bargain struck. . . ."[10] (emphasis added).

C. What Happens When the Clause Is Unclear?

The condemnation clause is often ambiguous. Many of these clauses, especially in land leases or leases involving major anchor stores, were written years ago without a full understanding of the condemnation process, the realities of a condemnation, and, most notably, a full understanding of the distinction between direct and indirect damages. The clauses often contain reference to damages which are not recoverable under New York Law (e.g., going concern value or business value)[11] and will attempt to allocate the award in a way which is inconsistent with the actual procedures followed by the courts for a condemnation proceeding. These clauses fail to take into account the methods by which damages are determined in condemnation and fail to properly address the situation, most notably for partial takings.

Questions of interpretation, however, are governed by standard contract principles.[12] Problems are exacerbated by the fact that many of these lease provisions were executed decades ago and any testimony from the drafter as to intent or surrounding documentation is either impossible to obtain or is long since lost. Since these clauses can be unrealistic, it is extremely difficult for a court to reach a result.

Complicating this problem is the fact that the drafters of these clauses did not fully appreciate that few, if any, takings are total takings. The vast majority of takings are partial and, of these, most will not trigger termination of the lease on the grounds that the remainder is rendered unusable. Most partial takings leave the remainder impaired but still usable so that the tenant will elect to continue with the lease. Therefore, the primary attention of the drafters should not be on a total taking, but on a partial taking and especially a partial taking which leaves the lease in place.

A classic example of a condemnation clause which "does not work" but which is often seen, especially in older leases, is the requirement of "restoration" coupled with the requirement that the monies paid (usually to tenants) must first be applied towards restoration of the property to correct the damage. This sounds good, but in practice is impossible. Most partial takings involve road widening. What is the typical consequence or severance damage that flows from a road widening? Usually, it is loss of parking, the creation of non-conformity in building or parking setbacks or an impairment in access. Substantial damages in the form of severance damage to the remainder property are possible. Yet, once this money is obtained, how is it possible to "restore" lost parking or, for that matter, correct a non-conformity of setback, or an access impairment it caused by the road realignment? It cannot be accomplished. A typical example of this type of condemnation clause is as follows:

> In the event of the acquisition of a portion of the demised premises which for the purpose of this paragraph shall be construed to mean a taking or acquisition less than that set forth in paragraph (a) hereof all award shall be payable and distributed as follows:
>
> (1) The damage value of any buildings and improvements erected on the premises by the Tenant after the deduction of any amounts which may be due on the mortgage shall be paid to the Tenant provided, however, that the amounts so paid to the Tenant be applied to the cost of repairing, replacing or restoring damage which the Tenant shall proceed to effectuate with all reasonable speed and dispatch. Such payment to the Tenant, however, shall not be required to be made unless and until such reconstruction shall have been completed and the statutory period for the filing of mechanics liens shall have expired. . . .
>
> (2) The damage value of the land taken and the damage value to the residue and reversionary interest of the Landlords shall be paid to the Landlord. In the event such ac-

> quisition shall be determined to be partial, or if not partial, in the event the Tenant may elect that the lease shall not cease and terminate, then there shall be no interruption in the term of rent reserved under this lease, but the said lease shall continue in full force and effect the same as if no partial acquisition had occurred, except that the rental herein reserved shall abate in proportion to the area taken under such acquisition. In the event that in the said condemnation proceedings the damage values as above set forth are not separately determined between land and buildings, then the respective values of the land and buildings shall be determined by arbitration in the same manner as provided in paragraph 35 hereof unless the parties may amicably make such apportionment.

This type of clause is seriously deficient. It fails to distinguish between direct and indirect damages. More often than not, the award for the severance (indirect) damage is far in excess of the award for the direct damage. The severance damage is essentially an intangible damage flowing to the remainder property. Yet, the type of condemnation clause outlined above addresses direct damages, but offers no guidance on severance damages. Does severance damage flow to the land or buildings (i.e., improvements)—or to both—and, in any event, in what proportion is it possible to restore this? What about fixtures?

It is no stretch of the imagination to recognize that the loss of parking spaces, setback or front display can result in hundreds of thousands, if not millions, of dollars worth of damage and that this is a significant concern to the property owners, tenants and operators of these properties who have now inherited these clauses.

From an examination of many of these antiquated condemnation clauses, it appears that the drafters' concept of dealing with this problem, as well as other problems in the lease, is to refer to an arbitration procedure. Nothing could be more inefficient and ineffective than this solution. While arbitration can expeditiously and efficiently handle many types of disputes, referring the calculation of damages to arbitration in an already ongoing condemnation case serves no purpose, is duplicative, and only adds to the expense of the litigation.

The condemnation law specifically provides for sufficient remedy to resolve disputes between conflicting claimants.[13] No purpose is served by taking a condemnation case out of the condemnation court familiar with the case and experienced in dealing with valuation, and referring it to a panel of arbitrators. The EDPL remedies provide one simple unified forum in which all these disputes can be addressed and resolved.[14]

It is our experience that almost all of these disputes are resolved between the claimants without a court decision. This is not surprising since the parties in a dispute of this nature are, by definition, commercially sophisticated parties who realize the strengths and weaknesses of an ambiguity in a lease and the difficulties (if not inordinate delay) involved in litigating it to a conclusion.

The best remedy for the drafter is to assure that the condemnation clause is well drafted and fully addresses all of these possible issues. This is in the interest of both the landlord and tenant.

D. What Should the Practitioner Do?

There are a number of rules which should be followed in drafting a condemnation clause. The primary goal must be to draft a condemnation clause where landlord and tenant are compelled to unify their common interest of maximizing the award. There should be no incentive for either party to attack the other's valuation claim. Nothing is better calculated to serve the interests of the condemnor, add immeasurably to litigation costs, and to delay resolution of a case, than for the condemnees to be fighting among themselves before or during the trial as to the measure of damages to each real estate element and the allocation of damages. As a basic outline, we suggest the following approach to the drafting of these clauses:

> (a) Take into account the reality of the condemnation procedure. Every condemnation is preceded by an advance payment which represents 100 percent of the condemnor's appraisal of the damages. This offer can be rejected and, at the same time, the property owner can collect this amount, reserving their rights to file a claim.[15] The notice or tender of the advance payment may not be made to both the landlord and the tenant. Often the condemnor may only notify one of the parties. It is, therefore, essential that the lease contain a provision that upon any party receiving notice of the condemnation or tender of advance payment that the other party is to be notified as well and provided with the documentation.
>
> (b) The lease should provide that each side will cooperate in obtaining the advance payment and ultimately the final award. This is significant not only for the sake of obtaining the money, but also to assure that there is no loss of interest. The condemnation law provides that in the event an advance payment (or even a final award) is not processed expeditiously by the condemnee, that interest will suspend.[16] Considering that the interest on a state award is 9% per annum[17]

and on a local taking 6% per annum[18] both of which rates are higher than the currently prevailing market rates, the loss of interest is something which should be avoided. A dispute may be unavoidable, but that should not serve as an impediment. The primary objective of each party should be to obtain the award so as to avoid suspension of interest. If there is a dispute, this can be temporarily resolved between the parties and the monies placed in escrow, pending a later resolution by either the court or an agreement between the parties.

(c) Ideally, the lease should require that the claim be a combined claim representing all interests. A distinction should be made between the "right to file a claim" and the "right to recover." This can be accomplished by limiting the right to file the claim to one party. This type of provision is often seen in leases for multi-tenanted premises where only the landlord has the right to file the claim.

(d) Recognize the difference in the damages. The clause should have a realistic and specific allocation for the right to recover a specific damage. The traditional separation of interest between landlord and tenant is that the landlord makes a claim for damage to the real estate and the tenant for the "fixtures." However, this is not specific enough. What constitutes the real estate and fixtures can, and does, often overlap. Leaving the definition in this amorphous state is sure to lead to conflict. Rather, in the clause itself, the landlord and tenant should reach a discernible definition of what each side may recover. For example, the language in the clause may limit the tenant's right to recover to only "movable" fixtures or light fixtures for which compensation can be claimed by tenant.

No allocation fits all situations. A situation where the landlord is a land lessor and the tenant is constructing the building, or a situation where the land lessor is constructing the improvements and the cost to construct (and profit) is wrapped inside the lease, are drastically different. For example, in a long-term land lease where the tenant constructs the building at its expense, the lease can be viewed as a conveyance of the fee interest. These leases are for very long duration—25 years, 50 years and even longer with options to renew. It would be inappropriate to limit the tenant's right to make a claim or to recovery solely to fixtures. The tenant plainly has a real interest in the bricks and mortar of the building and the long-term operation of the property. A framework for a solution is to allow the landlord to make the claim for direct damages to the land and perhaps for a share of the severance damages to the remainder land. Damages to building and improvements should be shared by landlord and tenant, including the severance damage to the building rental tied to reversion value or the exercise of the option to purchase or renew the lease.

The ideal condemnation clause most likely to avoid conflict would be a simple percentage allocation between the landlord and tenant for all the damages and an agreement to work together on one claim. This is a "bottom line" approach in which it does not matter how you define the damages or the property. It would make no difference in this type of clause whether the damages were direct or severance.

E. Schematic Balancing of Interests

A reasonable condemnation clause should properly reflect a balancing of the respective interests. The following is a proposed schematic approach to the drafting of condemnation clauses applying a balancing-of-interests approach. In the analysis, "L" means the interest should belong to the landlord; "T' means the primary interest lies with the tenant. The "-+" designation indicates a sharing or an inclination toward either L or T; and the "=" designation indicates an equality. These tables should be viewed from the time frame of the first year of the term so that as the term progresses, the interest may move "-+ " to the other party. This analysis of these interests is not rigid and depends upon the exercise of an option to purchase or an option to renew.

(A) Pure Land Lease (Lessor Leases Land/Tenant Builds/ Pays for all Improvements) / Reversion to Landlord

	Direct	**Indirect**
Land		L T-L5
Improvement	T L	T-4 L
Fixtures Generally	T	T
Non-Movables	T- L	T- L
Movables	T	T
Reversion Value	T- L	T— L
Option to Purchase	T4- L	T- L6
Option to Renew/Extend	T- L	T L7
Relocation	T	T

(B) Modified Land Lease (Lessor Leases Land/Lessor Builds or Pays for all or Some Improvements)

	Direct	**Indirect**
Land	L	L T5
Improvements	L -T	L T5
Fixtures Generally	T	T
Non-Movables	T-L	T- L
Movables	T	T
Reversion Value	L	L
Option to Purchase	T -L	T -L6
Option to Renew/Extend	T- L	T- L7
Relocation		

(C) Commercial Triple Net by Landlord who Constructs Building and Net Leases to One Tenant or Dominant Tenant/Reversion sc L

	Direct	Indirect
Land	L	L
Improvements	L	L Fixtures
Generally		
Non-Movables	T- L	T —> L
Movables	T	T
Reversion	T- L	T-L
Option to Purchase	T - L	T - L
Option to Renew	T - L	T - L
Relocation	T	T

(D) Commercial/Standard/Multi-tenanted Lease

	Direct	Indirect
Land	L	L
Improvements	L	L
Fixtures (Movables Only)	T	T
Reversion	L	L
Option to Purchase	N/A	N/A
Option to Renew	N/A	N/A
Relocation	T	T

These tables are suggestions for the drafter to consider when crafting condemnation clauses. The facts of each case are unique and the economic realities of the situation will drive how the respective interests are divided among the landlord and tenants. The most important points to remember are that the clauses should be given serious consideration and that there are components of interests which must be separately addressed. In an area that is rapidly developing, no lease agreement is complete without a well-thought-out condemnation clause.

Endnotes

1. One need only look at a Hagstrom Map to see how many "Main Streets" (for example, Routes 25A or 27A) exist on Long Island—the original routes of which date back to as early as the 17th and 18th centuries. The routes themselves are remarkably convoluted and reflect Long Island's rural history. The New York State DOT has properly targeted these routes as well as other major arteries for improvement.
2. *See, e.g., Pollak v. State*, 41 N.Y.2d 909, 394 N.Y.S.2d 617 (1977); *Overseas Am. Bay Shore Assoc. L.P. v. State*, Claim No. 101771 (Ct. Cl., June 21, 2004); *JWD v. State*, Claim No. 102213 (Ct. Cl., Sept. 15, 2003); 1303 *Lee v. State*, Claim No. 96782 (Ct. C1., December 20, 2000); *Ornstein Leyton Realty Inc. & LLC v. County of Suffolk*, Index No. 03-0312 (Sup. Ct., Suffolk County 2004); *In re the Application of the Town of Hempstead [Razzano]*, Index No. 16307-88 (Sup. Ct., Nassau County 1997).
3. Many states generally follow the same strict rule. *See, e.g., Twp. of Bloomfield v. Rosanna's Figure Salon, Inc.*, 253 N.J. Super. 551, 602 A.D. 751 (1992); *Redev. Agency of City of San Diego v. Attisha*, 128 Cal. App. 4th 357, 27 Cal. Rptr. 3d. 126 (2005). However, in other states, the courts tend to look with disfavor on waiver of interest applying a strict construction to avoid forfeiture. *See, e.g., Amoco Oil Co. v. Dept. of Tranp.*, 157 Pa. Cmmw. 222, 629 A.2d 259 (1993); *Winn-Dixie Stores, Inc. v. Dept. of Tranp.*, 839 So.2d 727 (Fla. App. 2003); *Trump Enter., Inc. v. Pub. Supermarkets, Inc.*, 682 So.2d 168 (Fla. App. 1996). Accordingly, in an eminent domain or condemnation proceeding where the property taken is encumbered by a leasehold interest, the first issue to be determined from all pertinent proffered facts is the value of the fee interest and the value of the leasehold interest. After such a determination, either by the jury verdict or by a stipulated final judgment, the parties next proceed to an apportionment hearing at which the court determines their respective rights in the amount awarded. *Dania v. Record Bar, Inc.*, 512 So.2d 206 (Fla. 1 Dist. Ct. App. 1987). "In apportioning condemnation proceeds the court should divide the sum equitably between the parties to reflect the respective values of the encumbered leasehold's interest." *Id.* at 208; *see generally Parks Bldg., Inc. v. Palm Beach City*, 144 So.2d 830 (Fla. 2d DCA 1962).
4. *Cooney Bros. v. State of N.Y.*, 27 A.D.2d 93, 276 N.Y.S.2d 337 (3d Dep't 1966), *modified on other grounds*, 24 N.Y.2d 387, 300 N.Y.S.2d 830 (1969).
5. *Id*.
6. *Traendly v. State*, 51 A.D.2d 489, 382 N.Y.S.2d 365 (3d Dep't 1976).
7. *Id*.
8. *Castellano v. State*, 43 N.Y.2d 909, 403 N.Y.S.2d 724, 726 (1978).
9. *See, e.g., Marrero v. State*, 12 N.Y.2d 285, 239 N.Y.S.2d 105 (1963); *In re City of New York (Allen St.)*, 256 N.Y. 236, 176 N.E. 377 (1931); *In re Mayor, etc. of New York*, 168 N.Y. 254 (1901); *Robin Oper. Com. v. State*, 47 A.D.2d 772, 366 N.Y.S. 2d 55 (3d Dep't 1975).
10. *Grace v. Nappa*, 46 N.Y.2d 560, 565, 415 N.Y.S.2d 793, 796 (1979); *see also Ward v. Union Trust Co.*, 224 N.Y. 73 (1918); *Burnside Bargain Store. Inc. v. Carmel*, 156 A.D.2d 248, 548 N.Y.S.2d 510 (1st Dep't 1989).
11. Except in the rarest of circumstances, business, going concern and goodwill value is not recoverable under New York Law. *Banner Milling Co. v. State*, 240 N.Y. 533 (1925); *People v. Isaac G. Johnson & Co.*, 219 A.D. 285, 219 N.Y.S. 741 (1st Dep't 1927). The rule is different in other states where these elements of value are recoverable. *See, e.g.*, Fla. Stat. Ann. Sec. 73.071; Cal. Civ. Proc. Code Sec. 1263.510.
12. *See Matthews v. State*, Claim No. 101225 (Ct. Cl., June 3, 2004); *Metz v. Metz*, 175 A.D.2d 938, 572 N.Y.S.2d 813 (3d Dep't 1991); *Goode v. Drew Bldg. Supply, Inc.*, 266 A.D.2d 925, 697 N.Y.S.2d 417 (4th Dep't 1999).
13. N.Y. Em. Dom. Proc. Law §§ 304, 505.
14. *See In re New York Convention Center Dev. Corp.*, 88 A.D.2d 574, 451 N.Y.S.2d 91 (lst Dep't 1982).
15. *See* N.Y. Em. Dom. Proc. Law § 303.
16. N.Y. Em. Dom. Proc. Law § 514.
17. N.Y. State Fin. Law § 16.
18. N.Y. Gen. Mun. Law § 3-a.

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Partial Takings

By Kevin G. Roe and Sidney Devorsetz

Kevin G. Roe

A partial taking occurs when the condemnor takes less than all of the property owner's right, title and interest in and to the entire parcels.

This article addresses the existing state of the law regarding the measure of constitutionally required "just compensation" that must be paid to the condemnee and, in particular, those issues that are unique to partial takings. Historically, just compensation has been based on a "market value" concept—that is, the market value of the property taken and, in the case of partial takings, any diminution in the market value of the remaining property. It is questionable, however, whether damages based on market value fully compensate a condemnee for the losses suffered. As noted by a member of the New York State Commission on Eminent Domain in 1973:

> [O]ur legal concepts of compensation in eminent domain were formulated when our country was largely rural, agricultural and undeveloped. Problems of incidental damage were rare or insignificant in character. The formulation of the market value concept [of compensation] did not anticipate the urbanization of the country and the complexities which would arise when the power of eminent domain came to be utilized in taking commercial and industrial properties.[1]

The market value concept, with its focus on real property value, does not, for example, account for loss of goodwill that a business may suffer when it is forced to move from a location that it has occupied for decades. Nor does it account for the costs of relocation. In the partial taking context, legal precedent established before the days of fast-food restaurants, drive-thru branch banks and big-box retail centers holds that no compensation is due for damages to the remaining property resulting from a taking that deprives the property of direct access to a commercial thoroughfare and leaves it with access that is "circuitous."

The law of just compensation thus often denies to condemnees damages equivalent to their losses. The current debate about the proper use of eminent domain powers—prompted by the United States Supreme Court's decision in *Kelo v City of New London*[2]—would be incomplete without re-examining the law governing compensation.

Sidney Devorsetz

Every eminent domain case presents unique valuation and damage issues, involving special attributes of the property affected—i.e., whether the market for comparable properties is local, regional, national or even international, the nature of the public project and countless other factors. These complexities are inherent in any eminent domain proceeding. Partial takings, which constitute the majority of takings, add additional considerations.

Where an entire parcel is taken, the established measure of compensation is straightforward—it is the property's "market value at the time of the appropriation, that is, the price a willing buyer would have paid a willing seller for the property."[3] Most takings, however, involve the direct appropriation or condemnation of only a portion of the property. Strip takings for highway widening or for power lines are typical examples. Such partial takings raise additional complications because they involve not only the value of the property appropriated but also potential damage to the value of the property remaining.

It has long been recognized in New York that, in addition to the value of the land and improvements taken ("direct" damages), damages to the value of the remainder ("indirect" damages) are also compensable.[4] The latter are often referred to generically as "consequential damages" and described as "the diminution in the value of the remainder resulting from the taking of a part and from the condemnor's use of the property taken."[5] More precisely, indirect damages fall into two categories. The damages to the remainder that result from the taking itself are "severance damages," while those that result from the use to which the condemnor puts the appropriated property are "consequential." The distinction currently has less significance than it did historically and the terms are now often used interchangeably. Early cases allowed compensation only for such damages as were caused by the severance of the part taken, but it is now settled that compensation is also allowed for damages resulting from the condemnor's use of that property.[6]

At a minimum, the separation of the appropriated property from the remainder reduces the acreage available for the existing use or potential development. It can also result in the loss or impairment of access, loss of parking, a change in shape, or the division of the remainder into

two parcels separated by the property taken. Standing alone or in combination, these consequences of the appropriation can diminish the market value of the property by an amount greater than the value of the property taken. These additional damages are severance damages.

For example, the effect of dividing the property into two smaller tracts may render both remaining parcels unsuitable for the highest and best use of the property as it existed before the taking.[7] In such a case, the claimant is entitled to be compensated not only for the value of the property taken, based upon the per-acre value before the taking, but also for the fact that the per-acre value of the remaining property has been reduced because it is no longer marketable for that use.[8]

Similarly, severance damages have been recognized where the taking impaired the value of the remainder because of its resulting irregular shape,[9] where the remainder was less suitable for commercial purposes because delivery trucks could no longer maneuver,[10] and where the loss of pasture and tillable land adversely affected the utility of farm structures and remaining farm land.[11] These are but a few examples.

As noted, consequential damages are those that result from the condemnor's proposed use of the property acquired.[12] For example, the courts have awarded compensation for damages to the remainder resulting from increased noise and loss of privacy, seclusion and view caused by the construction of a highway on the appropriated property.[13] Thus, "[l]oss of enhancement due to the location and esthetic qualities of a claimant's property is readily cognizable as consequential damage."[14] Similarly, it is appropriate to compensate a property owner for the diminution in value of the remaining property caused by the operation of a railroad on the property taken "with its smoke, noise, dust and cinders, and the embankment obstructions to the view."[15] Although these cases support a claim for compensation based upon the impairment of the property owner's view *from* the property, damages based upon impairment of the view *of* the property—i.e., loss of visibility—have generally been found to be non-compensable.[16]

It is important to note that "the burden is upon the claimant to prove consequential damages and to furnish a basis from which a reasonable estimate of those damages can be made."[17] Furthermore, such damages must relate to the value of the property, not to the value of the business conducted on the property. Thus, consequential damages cannot be awarded for loss of goodwill and business profits.[18] Nor can consequential damages arise from the condemnor's use of its own property—that is, property owned by the condemnor prior to the taking. Accordingly, where improvements in the state's pre-existing right-of-way were the cause of problems in maneuvering around the claimant's gas pump island, consequential damages were not available, the court noting, "the culprit here is not the State of New York but claimant's predecessor in title who, at some time in the past, constructed the pump island and the building on the subject property too close to the highway boundary."[19] On the other hand, where an appropriation results in greater exposure to existing uses, compensation is appropriate. Thus, it has been held that the loss of a buffer zone is compensable where the taking resulted in "the elimination of potential use of the appropriated area for shrubbery and landscaping and the increased exposure to traffic noise and odors by reason of the reduced setback from Main Street, a heavy traffic city thoroughfare."[20]

The measure of damages where there is a partial taking of land is commonly stated as the difference between the fair market value of the whole before the taking and the fair market value of the remainder after the taking.[21] This formula accounts for severance and consequential damages, since the fair market value of the remainder after the taking would reflect such damages.

The difference between the before and after values is then apportioned between direct damages and indirect damages, and indirect damages may be allocated between severance and consequential damages.

The property is to be valued as of the date of the appropriation and the valuation is based upon the highest and best use of the property, regardless of whether the condemnee is so using the property at the time.[22] The valuation method should be the same for determining the value before the taking and the value after the taking, at least where the highest and best use has not changed as a result of the appropriation.[23] Where the property is not being put to its highest and best use at the time of the appropriation, a valuation that accounts for its potential development can be accomplished in one of two ways. The value can be established by reference to sales of comparable properties similarly situated, i.e., those with similar highest and best uses but not so developed.[24] Or an increment reflecting the value for potential development can be added to the raw acreage value. The increment should take into account a discount for the costs that would be incurred in developing the property for its highest and best use.[25] If the property has unrealized development potential, it is neither appropriate to treat it as mere raw acreage nor, on the other hand, to treat it as having attained its highest and best use.[26]

Ordinarily, the highest and best use of the property must be one which is permitted by the zoning regulations at the time of the taking.[27] Nevertheless, upon proof that there is a reasonable probability of rezoning to allow a more valuable use, it is permissible to add an increment to the value to reflect this potential.[28] Conversely, if the probability is that rezoning will result in the loss of a valuable use, the value of the property as currently zoned should be subject to a discount to reflect this potential.[29] In either case, the theory is that a knowledgeable buyer,

knowing of either potential, would make similar adjustments in valuing the property.[30]

The concept that damages are assessed as of the date of the taking means that the condemnor may not attempt to reduce its liability for damages by a subsequent limitation on its original appropriation.[31] Thus, where the State took an easement that effectively cut off the claimant's access to his property, the claimant was entitled to damages for the loss of access notwithstanding the state's later tender of a quitclaim deed and stipulation that would have allowed claimant to cross the easement.[32] Accordingly, damages are assessed prospectively, on the basis of what the condemnor has actually taken, whether or not it intends to use all of the property acquired.[33] Similarly, it is not relevant when the condemnor plans to use the property taken, but rather what the condemnor acquires the right to do.[34] Furthermore, damages should be assessed based upon all that the condemnor has the right to do under the interest taken, even though its immediate and ascertainable plans may be for something less intrusive.[35]

While the condemnor cannot avoid payment of damages for loss of access by a post-taking offer of rights,[36] a condemning authority has inherent authority, as an incident to its authority to appropriate land for a public purpose, to appropriate property of others to provide substitute access for the claimant.[37] If the access is provided or offered at the time of the taking (and not as a post-taking afterthought), it is effective to mitigate the damages to the claimant's property.[38] The claimant cannot reject the proffered access and then claim damages for lack of access.[39]

The owner of property abutting a public highway has a compensable right of access thereto,[40] but the right is not absolute. When a new highway is constructed that no longer affords the property owner direct access, the owner is not entitled to damages because remaining access is less than ideal.[41] The distinction is between access that is merely "circuitous," and therefore insufficient as a basis for consequential damages, and access that is "unsuitable," in which case the loss is compensable.[42] The early formulation of the test was that access is unsuitable if it is "inadequate to the access needs inherent in the highest and best use of the property involved."[43] Thus, consequential damages were available if appropriation of highway frontage or construction of the improvement "so impairs access to the remaining property that it can no longer sustain its previous highest and best use."[44] More recent cases, however, evince a somewhat more liberal approach to consequential damages in these circumstances. Thus, consequential damages have been sustained where the impairment of access has not resulted in a change in the highest and best use of the property, but has merely reduced the potential development of the property.[45]

To be distinguished are cases involving the relocation of a highway and the diversion of traffic elsewhere. A property owner has no vested interest in the continuance of a highway or its traffic.[46] While the diversion of traffic may impair a property's commercial value, it is *damnum absque injuria*—the property owner's contiguity to a heavily traveled highway is said to be fortuitous and its benefits can be freely retracted by the state.[47] The state's obligation to the property owner is fulfilled by providing reasonably adequate access to and from the new highway.[48]

As in other areas of the law, it is well established that a claimant in an eminent domain proceeding has a duty to mitigate damages.[49] Where the claimant does so, the cost-to-cure (for example, the cost to extend a driveway and reconfigure a warehouse to restore the pre-taking utility of the structure) is recoverable in place of consequential or severance damages.[50] Thus, the award of consequential damages may be limited to the cost-to-cure, provided that the cost does not exceed the diminution in value of the remainder.[51]

It is equally well established that the claimant's obligation to mitigate damages does not extend to remedies beyond the boundary lines of the subject property.[52] The theory underlying this rule is that "a condemnee's right to compensation [should not] be made to depend upon whether adjacent land could easily be purchased."[53]

Generally, where it is claimed that the appropriation of the whole or a part of one parcel has resulted in damages to another parcel, such damages are recoverable only if there is (1) contiguity, (2) unity of use and (3) unity of title or ownership.[54] While the requirement of unity of use seems to be applied strictly in the cases,[55] the remaining criteria are applied with some flexibility. For example, where the state appropriated a sand and gravel pit, consequential (severance) damages were properly awarded for the diminution in value to claimants' nearby, but not contiguous, property containing processing facilities and a ready-mix concrete plant used in conjunction with the sand and gravel pit.[56] And, with respect to unity of title or ownership, the courts have sometimes overlooked technical legal title to find unity of ownership based upon close family or corporate relationships.[57]

As noted at the beginning of this article, compensation is generally based on the market value concept, which often ignores real and quantifiable losses. The current debate about eminent domain issues provides an opportunity to address this inequity.

Recent judicial decisions—most notably *Kelo v. City of New London*—have focused the attention of the public, legislative bodies and the judiciary on the "public use" aspect of eminent domain—in particular, whether the public benefits generated by private economic development

justify the use of eminent domain powers to facilitate that development. The *Kelo* decision has generated much debate and prompted numerous legislative proposals in New York and other states that would narrowly define the kinds of public purposes for which private property can be appropriated. Because *Kelo* merely re-affirmed the longstanding principle that promoting economic development constitutes a valid public purpose, the intensity of the debate prompted by the decision is somewhat surprising. That does not mean, however, that debate is unwarranted or unwelcome.

We would suggest only that the superficial appeal of the argument that one person's property should not be taken for the benefit of another must be balanced against the historical reality that many successful urban renewal and downtown revitalization projects could not have been accomplished without just such a use of eminent domain powers.

Furthermore, any debate about the use of eminent domain powers should not lose sight of the fact that the fundamental constitutional protection against abuse of the power of eminent domain is the requirement of just compensation. If reform is to be proposed, issues regarding compensation should be addressed. For example, consideration should be given to compensating business owners for loss of locational goodwill and impairment of access. Similarly, any reform efforts should address whether the market value of acquired property is still the proper and limiting measure of just compensation. The exercise of eminent domain powers often causes financial hardship beyond the loss of the value of the property. Condemnees may have to pay for temporary housing or storage, may have to obtain financing at higher interest rates, and will incur moving costs and fees for brokers and attorneys. While there are regulatory requirements for relocation assistance payment for some projects, these dictates are neither uniform nor universal. A market value standard of just compensation ignores these real expenses to the owner. Such a standard may require the condemnor to pay for what it has acquired, but it does not always result in achieving full compensation for what the condemnee has lost.

Endnotes

1. Sackman, *Condemnation Blight—A Problem in Compensability and Value*, reprinted in 1972 Report of the State Commission on Eminent Domain (March 1, 1973), pp. 101–130, at 116.
2. 545 U.S. 469.
3. *In re Town of Islip (Mascioli)*, 49 N.Y.2d 354, 360 (1980).
4. *S. Buffalo Ry. Co. v. Kirkover*, 176 N.Y. 301 (1903).
5. *In re County of Nassau (Knightsbridge Co.)*, 144 A.D.2d 364, 364 (2d Dep't 1988).
6. *S. Buffalo Ry. Co. v. Kirkover*, 176 N.Y. 301, 303–304 (1903); *Dennison v. State of New York*, 22 N.Y.2d 409, 412 (1968).
7. *Wilmot v. State of New York*, 32 N.Y.2d 164 (1973).
8. *Id.*
9. *Niagara Mohawk Power Corp. v. Olin*, 138 A.D.2d 940 (4th Dep't 1988).
10. *In re Saratoga County Sewer Dist. #1 v. Gordon*, 101 A.D.2d 966 (3d Dep't 1984).
11. *Zittel v. State of New York*, 65 A.D.2d 926 (4th Dep't 1978).
12. *Williams v. State of New York*, 90 A.D.2d 882, 883 (3d Dep't 1982).
13. *Dennison v. State of New York*, 22 N.Y.2d 409, 413 (1968).
14. *Monser v. State of New York*, 96 A.D.2d 702, 703 (3d Dep't 1983); *Williams v. State of New York*, 90 A.D.2d 882, 883–884 (3d Dep't 1982).
15. *S. Buffalo Ry. Co. v. Kirkover*, 176 N.Y. 301, 307 (1903).
16. *Acme Theatres, Inc. v. State of New York*, 26 N.Y.2d 385, 390 (1970); *224 Troup Realty, Inc. v. State of New York*, 88 A.D.2d 773 (4th Dep't 1982). In both *Acme Theatres* and *224 Troup Realty*, it was stated as a rule of law that loss of visibility is non-compensable. In accordance with this principle (and citing both *Acme Theatres* and *224 Troup Realty*), the Fourth Department vacated an award of consequential damages based upon loss of visibility in *Forest City Enterprises, Inc. v. State of New York*, 91 A.D.2d 839 (1982), stating unequivocally, "Loss of visibility is not compensable." The Court of Appeals affirmed, 59 N.Y.2d 884 (1983), but in doing so left some doubt as to whether there is such a rule of law. Instead of simply affirming the Appellate Division's rejection of such damages as a matter of law, the Court of Appeals held that "the implicit determination of the Appellate Division that no compensable damages occurred for this reason more nearly comports with the weight of the evidence." *Id.* at 886. The Court of Appeals is notoriously exacting about the distinction between its broad powers to review matters of law and its narrow factual review powers. *See generally*, Karger, The Powers of the New York Court of Appeals (3d ed.), § 77, pp. 469–473. Its relatively rare invocation of factual review powers in the *Forest City* case suggests that the rejection of consequential damages for loss of visibility was based on a deficiency in the evidence rather than a strict rule of law.
17. *Mil-Pine Plaza, Inc. v. State of New York*, 72 A.D.2d 460, 464 (4th Dep't 1980).
18. *City of Dunkirk v. Conti*, 186 A.D.2d 1012, 1012 (4th Dep't 1992).
19. *S.E. Leasing, Inc. v. State of New York*, 145 A.D.2d 891, 892 (3d Dep't 1988).
20. *Monser v. State of New York*, 96 A.D.2d 702, 703 (3d Dep't 1983).
21. *McDonald v. State of New York*, 42 N.Y.2d 900, 900–901 (1977); *Centereach Car Care Ctr., Ltd. v. State of New York*, 271 A.D.2d 391, 391 (2d Dep't 2000); *Erie County Indus. Devt. Agency v. Fry*, 254 A.D.2d 721, 722 (4th Dep't 1998); *Star Plaza, Inc. v. State of New York*, 79 A.D.2d 746, 747 (3d Dep't 1980).
22. *Breitenstein v. State of New York*, 245 A.D.2d 837, 839 (3d Dep't 1997); *see In re Town of Islip (Mascioli)*, 49 N.Y.2d 354, 360 (1980).
23. *Diocese of Buffalo v. State of New York*, 24 N.Y.2d 320, 326 (1969).
24. *Breitenstein v. State of New York*, 245 A.D.2d 837, 839 (3d Dep't 1997).
25. *Id.*
26. *Id.*
27. *In re Town of Islip (Mascioli)*, 49 N.Y.2d 354, 360 (1980).
28. *Id.* at 361.
29. *Id.*
30. *Id.*
31. *Wolfe v. State of New York*, 22 N.Y.2d 292, 297 (1968).
32. *Id.*
33. *Id.* at 295. It has been held, however, that damages for the taking of a temporary easement may be assessed retrospectively where the easement has expired at the time the condemnation award is made. *Vill. of Highland Falls v. State of New York*, 44 N.Y.2d 505, 508

(1978). In such a case, it is possible to compute the actual damages suffered by the owner during the duration of the easement instead of engaging in speculation as to what might have been contemplated at the time of the taking. *Id.*

34. *Donaloio v. State of New York*, 99 A.D.2d 335, 338 (3d Dep't 1984), *aff'd*, 64 N.Y.2d 811 (1985).

35. *Spinner v. State of New York*, 4 A.D.2d 987, 988 (3d Dep't 1957).

36. *Wolfe v. State of New York*, 22 N.Y.2d 292, 297 (1968); *Pollak v. State of New York*, 41 N.Y.2d 909, 910 (1977); *In re Schenectady County (Pahl)*, 194 A.D.2d 1004, 1006 (3d Dep't 1993).

37. *Carillion Realty Corp. v. State of New York*, 158 Misc. 2d 810, 814 (Ct. of Claims 1993), *aff'd*, 212 A.D.2d 660 (2d Dep't 1995).

38. *Id.* at 812–813.

39. *Id.* at 813. In *B&B Food Corp. v. State of New York*, 96 A.D.2d 893 (2d Dep't 1983), however, the court held that the claimant could recover consequential damages despite its refusal to accept a deed to a parcel contiguous to the subject parcel that would have mitigated claimant's damages. The court first held, in accordance with *Wolfe v. State of New York*, 22 N.Y.2d 292 (1968), that the offer was ineffective because it was made after the appropriation. But the court also stated that it was ineffective because the claimant cannot be required to go outside the tract in controversy to mitigate damages. In light of the court's initial holding, which was sufficient by itself to reject the state's position, the latter statement can be considered *dictum*. It does appear to be contrary to *Carillion Realty*, which is based upon the state's authority to mitigate damages by providing the claimant with property outside the tract in controversy, as opposed to the claimant's obligation (discussed below) to mitigate damages on its own initiative. The *B&B Food* court was correct that the claimant cannot be required to acquire someone else's property to mitigate its damages. But that does not answer the question whether a claimant can be required to accept property that the state has acquired for claimant's benefit to avoid causing unnecessary damages.

40. *Raj v. State of New York*, 124 A.D.2d 426, 427 (3d Dep't 1986).

41. *Bopp v. State of New York*, 19 N.Y.2d 368, 372 (1967).

42. *Priestly v. State of New York*, 23 N.Y.2d 152, 155 (1968).

43. *Id.* at 156.

44. *La Briola v. State of New York*, 36 N.Y.2d 328, 332 (1975).

45. *In re County of Rockland (Kohl Industrial Park Co.)*, 147 A.D.2d 478, 480 (2d Dep't 1989); *Split Rock P'ship v. State of New York*, 275 A.D.2d 450, 451 (2d Dep't 2000); *Beh v. State of New York*, 81 A.D.2d 744, 746 (4th Dep't 1981) (dissenting opinion of Hancock, Jr. and Moule, JJ.), *rev'd. for reasons stated in dissent at App. Div.*, 56 N.Y.2d 576 (1982).

46. *La Briola v. State of New York*, 36 N.Y.2d 328, 331 (1975).

47. *Id.; Bopp v. State of New York*, 19 N.Y.2d 368, 372–373 (1967).

48. *Bopp v. State of New York*, 19 N.Y.2d 368, 373 (1967).

49. *Mayes Co. v. State of New York*, 18 N.Y.2d 549, 554 (1966); *Wilmot v. State of New York*, 32 N.Y.2d 164, 168 (1973).

50. *Groeschel v. State of New York*, 74 A.D.2d 658 (3d Dep't 1980).

51. *Fodera Enter. v. State of New York*, 275 A.D.2d 85, 87 (2d Dep't 2000).

52. *In re County of Suffolk (Yaphank 96 Assocs.)*, 63 A.D.2d 980, 980–981 (2d Dep't 1978); *In re County of Suffolk (Arved, Inc.)*, 63 A.D.2d 673, 674 (2d Dep't 1978); *St. Patrick's Church v. State of New York*, 30 A.D.2d 473, 475 (3d Dep't 1968).

53. *St. Patrick's Church v. State of New York*, 30 A.D.2d 473, 475 (3d Dep't 1968).

54. *Erly Realty Devt., Inc. v. State of New York*, 43 A.D.2d 301, 303–304 (3d Dep't 1974); *Guptill Holding Corp. v. State of New York*, 20 A.D.2d 832, 833 (3d Dep't 1964); 4A Nichols, *Eminent Domain* (3d ed.), §§ 14.25, 14.26 (1), (2).

55. *See, e.g.*, *Ephraim Holding Corp. v. State of New York*, 30 A.D.2d 623 (3d Dep't 1968); *Jacoby v. State of New York*, 26 A.D.2d 724 (3d Dep't 1966); *City of Buffalo v. Goldman*, 63 A.D.2d 828 (4th Dep't 1978).

56. *Strong v. State of New York*, 38 A.D.2d 241, 243 (3d Dep't. 1972).

57. *Luther v. State of New York*, 60 A.D.2d 928, 930 (3d Dep't 1978); *Di Bacco v. State of New York*, 46 A.D.2d 461, 462 (3d Dep't 1975); *Guptill Holding Corp. v. State of New York*, 23 A.D.2d 434, 437 (3d Dep't 1965). It should be noted that unity of ownership also becomes an issue when the condemnor contends that the claimant could mitigate damages by obtaining access through an abutting property owned by a related entity. *See In re County of Suffolk (Yaphank 96 Assocs.)*, 63 A.D.2d 980 (2d Dep't 1978).

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Can Your Client Recover Severance Damage for the Loss of Frontage Area?

By Saul R. Fenchel and Jennifer Hower

Saul R. Fenchel

Most takings are partial takings. On Long Island, the most common taking involves a road widening resulting in a loss of frontage area which, in turn, results in the loss of display or front parking area.

The frontage area represents the most economically important area of the property. This is especially so on Long Island and even more so in Suffolk County where the typical retail or commercial property consists of parcels with much of the parking and often product display in the front area. From the viewpoint of the tenants, the front does the selling, offering to the passing traffic the availability of the product and convenient parking.

The key is to recognize that the area in front of the property, which is used as a display or front parking, has a value unique to the overall utility of the property. Where, by result of the taking, that area is impaired, it gives rise to a compensable severance damage.

In *Enmac Realty Corp. v. State,* the appellate court described the taking and the lower court's approach:

> The area of appropriation involves a 43-foot strip along the entire frontage on Broadway, plus a small triangular piece extending along Farm Lane. The taking eliminated the parking display area in front of the building and also resulted in making the property a nonconforming use under the existing zoning by reducing the front setback. The [lower] court found the property's highest and best use before the taking was an auto showroom and sales room and after the taking, a less desirable commercial use because of the loss of the front display space. . . .
>
> The State took the entire frontage on Broadway up to a depth of about 44 feet in fee and also acquired a permanent easement immediately behind the fee taking, v[a]rying to a further depth of five to ten feet. . ."[1]

Jennifer Hower

The Court of Claims granted substantial severance damage. On appeal, the Appellate Division recognized that finding severance damage was appropriate. The Court, however, reversed on the grounds that the claimant had used an improper averaging method to arrive at the damages and that the state, having failed to recognize any severance damage whatsoever, deprived the trial court of evidence to support any range in value.[2] The Appellate Division remanded the matter for the purpose of quantifying the damage.[3]

Likewise, in *Ross v. State,* the property had a number of possible commercial uses (grocery, bar).[4] The Court found the distinction between "front parking" and "display" is not significant. Both play an important role in the utility and value of property. Front space enhances and broadens the potential and intensity of the use. This was recognized by the Court in *Long Island Pine Barrens Water Corp. v. State,* which involved a convenience store and delicatessen which, prior to the taking, had ample front parking spaces to accommodate its customers.[5] After the taking its front parking spaces were reduced by a third. The Court in *Long Island Pine Barrens* emphatically rejected the state's position that there was no severance damage:

> Despite the loss of parking, defendant's appraiser concluded that there would be no effect on the subject's use or value. This is an outrageous contention given the use of the subject as a convenience store in a suburban area. Common sense and logic dictates that the overwhelming majority of patrons must arrive by automobile and require parking. A loss of 33 percent of the available parking cannot be considered inconsequential. The situation is further compounded by the lack of any on-street parking along the frontages of the subject. On-street parking may be available across the street and/or down the block, but to use that parking is inconvenient. Inconvenience is a major drawback to a convenience store.[6]

Much the same result was reached in *Casamassima v. State*, which involved an ice cream stand, which, prior to the taking, enjoyed ample front parking.[7] After the taking, the front area was severely reduced. The Court in *Casamassima,* observed:

> In order for a soft ice cream stand such as that maintained and operated by the claimants to be successful, it must attract motorists by offering to them not only merchandise they will buy but also a place to park their vehicles easily while they make their purchases and consume the product as the majority do before traveling further. It is more likely that the approaching motorist will stop if he sees parking space is available for him. Claimants' loss of this readily viewed front parking space, therefore, is a consequential damage to the remainder, even if the Court were to accept the State's engineering expert's feasibility study of the number of cars which the plot could accommodate. The study concluded that the number of cars to be accommodated before and after the taking as being almost the same. A road view of the plot after the appropriation does not appear to offer the same likelihood of quick and ready accommodation for cars as before the taking.[8]

In *JWD Realty v. State*, the state had taken a substantial amount of the frontage area of a successful Volkswagen dealership.[9] The Court, reviewing the precedent, reasoned:

> The differences lie in how each expert views the impact of the taking on the viability of the use. Certainly, unlike the automobile dealership in the most relevant case cited, (Citation omitted) the Claimant here did not lose all frontal display area, nonetheless, after carefully considering the two perspectives, the Court cannot help but agree that there is severance damage to the remainder attributable to the loss of half the original frontal display area . . .
>
> In this case, "spontaneous" type of access that might be required of a lot to be developed as a fast food chain, for example, is not an integral part of the highest and best use. But the visibility of new products and used automobiles, as well as a variety of brands, is a part of the use. Indeed, some brands of automobiles require that their dealers have specific display areas available in order to sell their brand. Thus while the taking did not change the highest and best use from one use to another, it did diminish the value of the use. A better analogy may be found in *Ross v State of New York,* 89 AD2d 709 (3d Dept 1982), where the frontal display area of a retail establishment was impacted by a taking, and the loss was made an item of severance damages. The Appellate Division approved of the finding.[10]

The taking of the frontage area of a parcel of commercial property may not appear, at first blush, to amount to much in the way of damages. However, the wary practitioner should be alert to the potential for significant severance damage to the remaining parcel. The courts have recognized the economic importance of that area of property and the practitioner should too, or run the risk of his or her client losing out on an appreciable award.

Endnotes

1. *Enmac Realty Corp. v. State,* 38 A.D.2d 650, 327 N.Y.S.2d 213 (3d Dep't 1971).
2. *Id.*
3. *Id.*
4. *Ross v. State,* 89 A.D.2d 709, 453 N.Y.S.2d 834 (3d Dep't 1982).
5. *Long Island Pine Barrens Water Corp. v. State of New York,* 144 Misc. 2d 665, 544 N.Y.S.2d 939 (N.Y. Ct. Cl. 1989).
6. *Id.*
7. *Casamassima v. State,* 53 Misc. 2d 680, 279 N.Y.S.2d E 18 (N.Y. Ct. Cl. 1967).
8. *Id.*
9. *JWD Realty v. State of New York,* Claim No. 102213 (Ct. Cl. Sep. 15, 2003).
10. *Id.*

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Compensating for the Loss of Business Value as a Result of Condemnation

By David C. Wilkes

Justice Frankfurter analogized compensation for intangibles such as going concern under the Fifth Amendment with a covenant between purchaser and seller restricting one's right to compete with the other in the *Kimball Laundry Co.* case.[1] Courts have stringently awarded compensation for going concern in takings cases based on the following four theories: (1) damage to a business was not considered compensable by virtue of the fact that neither business nor goodwill were taken, (2) damages to business or goodwill were considered *damnum absque injuria* (loss not giving rise to legal action for damages), (3) the constitutional scope of just compensation does not contemplate the uncertainties and vicissitudes in businesses, and (4) goodwill and intangible losses cannot be inferred from the Constitution's eminent domain clause.[2] The Uniform Eminent Domain Code embraces a flexible definition of goodwill; it must be broad enough to support activities that fail to qualify as a business according to the Internal Revenue Service.[3] Another perspective is that going concern valuation depends as much on the quality of the operation in question as the location itself, thus going concern value is likely to persist despite relocation.[4] States have approached the problem of takings compensation for going concern quite differently.

Florida has developed an approach where, in limited circumstances satisfying three conditions, a business may be awarded compensation for going concern value in condemnation proceedings: (1) the business must be more than five years old (though not necessarily with its present owner), (2) the taking must be for right-of-way purposes by condemnors who are named in the statute, and (3) the business taken must have been located on the land or its adjoining lands for five years.[5] Florida's legislature has adopted the view that business damages *necessarily* stem from lost profits, which are linked to a reduced profit-making capacity resulting from a taking.[6]

Texas courts do not consider goodwill and going concern to be among the *in rem* and ordinary rights attributable to real property, which are more traditionally the subject of condemnation proceedings.[7] Relevant Texas statutes speak in broad, conservative terms on valuing going concern: "If an entire tract or parcel of real property is condemned, the damage to the property owner is the local market value of the property at the time of the special commissioners' hearing."[8] It is well established that Texas courts shy away from awarding compensation for losses of both goodwill and going concern.[9] One Texas court has justified its reasoning as twofold: (1) profitability depends more on invested capital, business conditions, and entrepreneurial skill rather than the location of the business, and (2) only the real estate, not the business, is being taken.[10] Generally speaking, these courts do not consider goodwill and going concern as within the purview of condemnation statutes despite their real property characteristics affecting other legal issues.[11]

Connecticut courts have undertaken an inclusive approach to valuing going concern. One court has defined the concept as "an established and operating business with an indefinite future life."[12] In another case involving a nursing home, the value of intangibles that constituted going concern exceeded that of the real property itself.[13] The total business enterprise value contemplated intangibles including, but not limited to, goodwill, business management skills, reputation, and a trained workforce.[14] Kentucky courts share a similar view where evidence of profits will contribute to market value in some circumstances, unless the profits result from entrepreneurial skill and character rather than the land.[15] Adding another wrinkle, Georgia courts have inserted a uniqueness condition to the broad rules of goodwill compensation.[16] This requires that a business seeking to recover going concern or goodwill beyond that of fair market value must prove that unique or peculiar characteristics exist between the condemnee's business and the property.[17] In order to arrive at a fair, reasonable estimation, these issues are presented to juries in Georgia courts for resolution.[18]

Many states are taking a more liberal approach and departing from valuations directly linked to real property. Colorado gives precedence to equitable factors in awarding takings compensation over stricter, technical concepts in real property law.[19] Colorado also acknowledges a distinction between income derived from the land itself and income that is merely incidental to land ownership.[20] Alternatively, Missouri courts will generally consider evidence of profits derived from a business on land to be overly speculative and inadmissible as a basis of evidence for determining the fair market value of property.[21] Although this does not speak directly to going concern it reflects the attitude of Missouri courts which have, like Colorado, bifurcated the valuation process into categories that remain separate and distinct from each other.[22]

At the extremes are speculation and intangible rights, which few states are willing to accept as compensable

losses. More generally, many states agree that appraising going concern necessitates a bifurcated analysis at least in part. The nexus between intangible and tangible assets includes reasonableness and equity. New York has begun to weigh the issue of jury trials and the fairest means in arriving at equitable takings compensation by means of proposed bills and legislation in light of the Supreme Court's decision in *Kelo v. New London*.[23] Nevertheless, this state continues to provide no compensation for the loss of going concern value except in extremely limited circumstances. The balance of this article will examine in detail the law and rationales for this approach, particularly as applied in New York State.

The most difficult and often controversial assignments real estate appraisers encounter in their daily practice are those that involve a going business concern, for which the physical real estate assets are integral parts of the proprietor's ongoing business and not easily separated. Going concern appraisals most commonly arise in the valuation of hotels and motels, senior living properties such as nursing homes and assisted living facilities, restaurants, golf courses, gas stations, bowling alleys, retail stores, shopping centers, and industrial enterprises, among others.

It is well established that the ultimate and basic test for establishing the amount of a condemnation award is always market value.[24] But, with several limited exceptions that will be examined later in this article, "market value" in condemnation proceedings relates principally to the real property value alone, and an award will generally not be available for the lost value of the owner's entire business. The difficulty in determining appropriate compensation for a going concern property lies in separating the market value that is attributable to the real estate from that which is attributable to the business.

In comparison to ordinary, more passive real estate ventures in which market value may be derived directly from the actual rental income and the expenses associated with a property, or from the sales of comparable rental properties, the income and expenses of going concern properties commingle items that are related to the real estate with items that are related to the operation of the business, and sales prices of comparable business operations often combine both real estate and business value together in a single sum without distinction between the two components.

To illustrate the dilemma this can present in the context of determining a condemnation award, in a nursing home, for example, income is never neatly separated between that which is attributable to the residents' rental of their rooms and that which is attributable to the medical services the facility provides. The income generated by a restaurant, likewise, will make no distinction between the portion that patrons pay for the food they are served and the portion that relates to the theoretical "rent" customers pay for the temporary use of dining space. Hotels are typically purchased for the entire value of the going operation, including goodwill, contracts with suppliers, and possibly franchise rights, without regard to the underlying value of the bricks and mortar alone.

In the course of ordinary operations, there is little need for most such businesses to make distinctions between real estate value and the more "intangible" items that add value to the enterprise. At best, a business enterprise may make some form of allocation of value to the real estate for accounting purposes, but such treatment is often based more on generally accepted rules of accounting than on the information a competent appraiser would deem relevant.

The general rule concerning a business taking is that damages for the loss of goodwill or loss of the going concern value of a business are not compensable unless the condemnor intends to substantially continue the operation of the business it is taking.[25] In other words, although determining the value of the business portion of the condemnation may be subject to more speculation and conjecture than the real estate portion, it is not so much the intangible character of the going concern value that negates a duty of just compensation, but rather it is whether the business itself was intended to be taken in the first place or was simply incidental to the taking of the land.[26]

Of course, to any business owner, the effective taking or substantial disruption of the business in connection with the condemnation of the land, even if arguably "unintentional," can hardly be considered incidental. Yet, the rationale traditionally promulgated has been that where the location of the property is not crucial to the conduct of the business, nothing has actually been taken because under competent management the business can be relocated and continued.[27] "The owner of the business may remove to another place, establish his business and carry his goodwill with him."[28] Where the condemnor's principal aim is an appropriation of the land, irrespective of the current business enterprise, there is no compensable "taking" of the business in a legal sense.

Therefore, in attempting to determine the fair market value of a motel and restaurant complex for purposes of condemnation, it was proper for the court to reject an appraiser's income approach to value where the appraiser capitalized the gross profits of the business rather than the fair rental value of the real property.[29] To do so would be to effectively value the going concern as a whole, including, for example, personal property such as furniture, fixtures, and equipment and intangible personal property, or business enterprise value, rather than just the realty. It is the actual or market-level real estate income that can be capitalized, and not, as one court wrote, "entrepreneurial skills or lack of such skills."[30]

One appellate panel reversed a trial court's finding that the owner of a golf course was entitled to compensation where the state appropriated approximately four acres of land in connection with building the New York State Thruway.[31] In that case, the lower court found that the land taken utilized a portion of the seventh fairway, resulting in the placement of the seventh tee more than 225 feet closer to the planned roadway than it was prior to the appropriation. "The nearness of said seventh tee to the Thruway and the inexperience of a large percentage of the golfers using said course . . . created a hazard to those using the Thruway, from being struck by flying golf balls."[32] The trial court concluded, therefore, that the resulting likelihood of accidents would deplete golf course revenues and awarded consequential damages to the claimant-owner. On appeal, the Appellate Division's Fourth Department rejected this analysis, finding that the lower court had effectively calculated its award on the basis of the golf course as a going concern, and held that while profits from the enterprise might be used to show the best available use of the property, such profits could not be used to value the real estate itself.[33] Notwithstanding the validity of the final decision, the lower court's sympathy for errant hackers is noted.

In condemnation proceedings, the income from a business concern might be relevant only to the question of whether the existing use is suitable for the land condemned, or whether such business income reveals that a higher and better use might be made of the property. As one court found, the operational results of the beach club properties at issue provided little insight into the value of the underlying land and actually appeared to impede the highest and best use of the land rather than enhance that value.[34] This conclusion was further bolstered by the record before the court, which revealed that no other beach club had been built in that area in the preceding 10 years, and that single-family residential development was the prevailing local use. If one were to merely capitalize the operating results of the business enterprise, the resulting value would be a small fraction of the value of the land as vacant, and a taking award would be confiscatory in comparison to the highest and best use for residential purposes, according to the court.[35]

Once it has been determined that the property at issue is of such a nature that an allocation may be required to be made among the various components of, for example, real estate, furniture, fixtures and equipment, business enterprise, and other intangible elements of value, the appraisers must turn their attention to defining such components and then placing the appropriate values upon them.

In addition to the constraints placed upon an appraiser in performing an eminent domain assignment, the reporting requirements of the Uniform Standards of Professional Appraisal Practice (USPAP) require that value be allocated between the real estate and other elements of a going concern. Specifically, USPAP Standard Rule 1-4(g) provides that "[a]n appraiser must analyze the effect on value of any personal property, trade fixtures or intangible items that are not real property but are included in the appraisal."[36]

The various assets of an enterprise other than the realty and furniture, fixtures and equipment that have no real physical component and that may add to the going concern value of a business are considered "intangible assets." In a large company, intangible value might be found in the form of having a trained workforce, an operating plant, necessary patents, copyrights and trademarks, contracts with suppliers, goodwill, and even a recognizable name. The two most common broad categories of intangible assets that appraisers commonly concern themselves with are "business enterprise value" and "goodwill."

Business enterprise value may exist in a property when the income and expenses of the property are commingled with those of the occupying business, or the property has become "branded" by association of the property with that business, as might be the case in a hotel property for example. Business enterprise value has been defined as "a value enhancement that results from items of intangible personal property such as marketing and management skill, an assembled work force, working capital, trade names, franchises, patents, trademarks, non-realty related contracts/leases, and some operating agreements."[37]

The term "business enterprise value" is perhaps familiar to many appraisers and attorneys. However, a later edition of the well-regarded appraisal resource quoted above has coined a new term for the concept, which it refers to as "capitalized economic profit," or "CEP," which is defined as "[t]he present worth of an entrepreneur's economic (pure) profit expectation from being engaged in the activity of acquiring an asset or collection of assets at a known price and then selling or being able to sell the same asset or collection of assets at a future uncertain price."[38]

Goodwill value is occasionally treated as simply a component of business enterprise value and is sometimes kept distinct. "Goodwill consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill, or quality, and any other circumstances resulting in probable retention of old, or the acquisition of new, patronage."[39] Goodwill is, by its nature, highly personal to the particular business property being condemned, and, on the scale of intangible items, perhaps the most easily forfeited when an enterprise is disrupted.[40]

Appraisal experts have devised widely varying methodologies for distilling real estate value from the other components that are present in the value of a going concern. Indeed, significantly different appraisal methodologies may be more or less appropriate depending on

specific property types, particular property locations, and even current market activity. In fact, the subject of appropriately valuing going concern properties is a highly controversial one among many appraisers. Although this article is not intended as a guide to appraisal techniques, it may be helpful to consider a fairly typical approach that might be taken in estimating business enterprise value and determining whether the business contributes to the going concern. The main issue to be concerned with in many cases is the amount of net operating income necessary to support the investment in real estate. If, after making that determination, it is found that residual income exists, a determination must be made as to how much is required to support other personal and intangible components of the going concern.

Another methodology that has found some common acceptance in the appraisal community relies on a variation of the sales comparison approach to value. A general market ratio is identified between business value and real estate value in the regional market for the particular property type. Using this approach, a comparison is made between, for example, senior living facilities and similar-looking, "pure" real estate operations such as apartment complexes. The higher operating expense ratio that would typically be associated with running the senior living facility as compared to the apartment complex would then be attributed to the healthcare services provided—the "business"—and not to additional real estate-related services.[41] A ratio can then be derived from market transactions in senior care facilities and then applied to the subject property to determine that portion of the net income that is attributable to running the real estate.

Neither of the foregoing approaches to separating real estate value from business value is necessarily the best or only approach, nor is either necessarily recommended or suitable for any given particular property at issue. Rather, these are intended merely to illustrate fairly common methodologies that have been used by appraisers in the past to solve difficult valuation allocation problems.

In the process of attempting to distill the real estate value from business enterprise and other intangible value, a further word of caution is in order. Although the property type at issue may by its nature suggest that some form of going concern or business enterprise value is present, such as with nursing homes, hotels, motels, and similar operations, this does not hold true in every case. Upon close examination, specific property operations may indicate that the actual net operating income is sufficient to support the real estate component and nothing more.

Occasionally, the business climate for the particular enterprise at issue is moving in a direction opposite to or at a markedly different pace than the real estate market at that time. Because a condemnation award will be based upon highest and best use and is not limited to current use, situations may often arise in which going concern value shrinks or expands without regard to the value of the bricks and mortar. For example, the local market for nursing homes may be saturated and at a low ebb while the subject property's readily convertible use as an apartment building may be in great demand, rendering the real estate value the same or higher than the going concern value.

State or local legislation may apply in particular circumstances to broaden the scope of compensation for a taking that results in damages to the tangible non-realty components of a going concern. Where property is acquired pursuant to the EDPL for purposes of a state educational institution, for example, payment may be authorized for actual reasonable and necessary moving expenses, and for actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, so long as such losses do not exceed the reasonable amount of expenses that would have been required to relocate the business.[42] Actual reasonable expenses may also be available in such circumstances for the search for a replacement business or farm.[43] A variety of similar business relocation statutes exist that may apply in given situations depending on the identity of the condemnor; counsel should not therefore summarily presume that damages will only extend to the value of the real estate alone in every case.[44]

In addition to the legislative authority for reimbursement of moving and other direct losses incurred by a business in specific circumstances, practitioners should also become familiar with any local code provisions applicable to the particular condemning authority that may similarly broaden the scope of an award. Certain business owners, for example, in specified counties whose going concern is directly or indirectly decreased in value as a result of New York City's acquisition of land for additional water supply have a right to damages for such decrease in business value.[45] Recovery was allowed under the New York City Administrative Code provision where claimants owned *no* real estate subject to the taking but were, rather, permissive users of water in connection with their businesses and suffered indirect losses when that water usage was impacted by the city's actions.[46] In another claim pursued under the New York City Code, the owner of a retail feed enterprise was awarded compensation for lost profits and customers following the city's appropriation of nearby lands for water supply purposes.[47]

A recognized exception to the general rule that compensation is not available for a business concern occurs when the condemnor seeks to take over the business itself. As noted earlier, the rationale traditionally promulgated has been that where the location of the property is not crucial to the conduct of the business, nothing has ac-

tually been taken because under competent management the business can be relocated and continued.[48] Where the condemnor does intend to continue operating the business, as one frequently quoted federal decision observed, "the condemning authority in effect takes the business since, in a monopoly situation, the former owner cannot establish a rival operation capable of receiving any of the former business' transferable intangible value."[49]

In a federal case upholding an award for the business value of the going concern, claimants contended that the government did indeed intend to "create a monopoly situation" and take "any transferable and tangible value of the former business" when it took over the operation of claimants' lakeshore canoe-launching enterprise to make it a part of the National Park Service's operations.[50] Government documents indicated that the condemnor sought to condemn the claimant's property with the intention of substantially carrying on the existing operations. It was further evident that the area along the lake that was the subject of the condemnation was the only one suitable for canoe launching, thus precluding any competition with the government's proposed operation and depriving the commercial owners of their livelihood. The court concluded that while the government did not intend to continue the operation of the existing business per se, it clearly intended to continue to provide a service of the same nature as the current business and would financially benefit from its existence, and an award including the value of the business as a whole, including any goodwill and going concern value, was appropriate.[51]

This holding followed the frequently cited decision of the United States Supreme Court in *Kimball Laundry Co. v. United States*,[52] which involved the temporary taking and operation of a laundry plant for use by Army personnel during World War II. The laundry-claimant argued that just compensation under such circumstances should include both the rental value of the real estate as well as the diminution in the value of its business when the government effectively destroyed the company's trade routes. The Court agreed, noting that during the period of temporary occupancy the government had effectively preempted the laundry's trade routes, and the intangible character of such value alone would not preclude compensation for the loss.[53]

This line of cases provides persuasive authority to suggest, as well, that in a given situation courts might appropriately grant damages for going concern value where the taking has the inevitable effect of completely depriving the owner of the going concern value of the business, even if the business is not actually continued by the government, such as where the business is inextricably tied to the location or some other particular characteristic that cannot be reasonably resumed elsewhere without suffering substantial damages.[54]

Endnotes

1. *See Kimball Laundry Co. v. United States*, 338 U.S. 1, 10–11 (1949).
2. *See* 4 Nichols, *Law of Eminent Domain* § 13.18[2] (3d ed. rev. 1977).
3. *Id. at* § 13.18[4].
4. 26 Am. Jur. 2d *Eminent Domain* § 368 (2006), citing *In re Larned-Bates Rehabilitation Project*, 202 N.W.2d 816 (1972).
5. *See* 4 Nichols, *Law of Eminent Domain* § 13.18[3] (3d ed. rev. 1977).
6. *See* Fla. Stat. §§ 337.27(3) (2003), 127.01(1)(b) (2006), 166.401(2) (2000); *see also Dep't of Transp. v. Fortune Fed. Sav. & Loan Ass'n*, 532 So.2d 1267 (Fla. 1988).
7. *Id.*
8. TEX. PROP. CODE ANN. § 21.042(B) (Vernon 2000).
9. *See Herndon v. Hous. Auth. of City of Dallas*, 261 S.W.2d 221, 222–23 (Tex. App. 1953).
10. *Id.* at 223.
11. *Id.*
12. *Pilots Point Marina, Inc. v. Town of Westbrook*, 2005 Conn. Super. LEXIS 2651, at *13 (Oct. 6, 2005).
13. *See Avon Realty, LLC v. Town of Avon*, 2006 Conn. Super. LEXIS 913, at *19 (Mar. 24, 2006).
14. *Id.* at *18.
15. *See Commonwealth v. R.J. Corman R.R. Co./Memphis Line*, 116 S.W.3d 488, 496 (Ky. 2003).
16. *See* Charles M. Cork III, *Special Contribution: A Critical Review of the Law of Business Loss Claims in Georgia Eminent Domain Jurisprudence*, 51 Mercer L. Rev. 11 (1999).
17. *Id.*
18. *Id.*
19. *See Bd. of County Comm'rs v. Delaney*, 592 P.2d 1338, 1340 (Colo. Ct. App. 1978).
20. 4 Nichols, *Law of Eminent Domain* § 13.3[2] (3d ed. rev. 1977), citing *DURA v. Berglund-Cherne Co.*, 193 Colo. 562 (1977); *see also Denver v. Quick*, 108 Colo. 111 (1941) (finding evidence relating to care, feeding, and sale of cattle relevant to income as admissible in valuing business as it was derived *from the use of the property itself*).
21. *See* 4 Nichols, *Law of Eminent Domain* § 13.18[7] (3d ed. rev. 1977).
22. *Id.*
23. 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).
24. *New York v. 57 Columbia, Inc.*, 40 N.Y.2d 1057 (1976).
25. *Banner Milling Co. v. State of New York*, 240 N.Y. 533 (1925); *United States v. 0.88 Acres of Land*, 670 F. Supp. 210 (W.D. Mich. 1987).
26. 26 Am. Jur. 2d *Eminent Domain* § 335 (2006).
27. *Banner Milling Co. v. State of New York*, 240 N.Y. 533 (1925).
28. *Id.* at 540.
29. *Niagara Falls Urban Renewal Agency v. Gorge Terminal Realty Co.*, 92 A.D.2d 719 (4th Dep't 1983).
30. *In re County of Nassau (Lido Boulevard)*, 43 A.D.2d 45, 50 (2d Dep't 1973), *aff'd sub nom. Colony Beach Club, Inc. v. County of Nassau*, 39 N.Y.2d 958 (1976).
31. *Humbert v. State of New York*, 278 A.D. 1041 (4th Dep't 1951).
32. *Id.*
33. *Id. See also*, *Burdick v. State of New York*, 276 A.D. 1052 (4th Dep't 1950), *aff'd*, 302 N.Y. 670 (1951); *In re City of Rochester [Smith St. Bridge]*, 234 A.D. 583 (4th Dep't 1932); *Banner Milling Co. v. State of New York*, 240 N.Y. 533 (1925).

34. *In re County of Nassau (Lido Boulevard)*, 43 A.D.2d 45, 50–51 (2d Dep't 1973).

35. *Id.* In this regard, it is also interesting to note the juxtaposition of these rules when the underlying land, in and of itself, contains inherent business value. In *Belott v. State of New York*, 26 A.D.2d 749 (3d Dep't 1966), the land subject to taking contained valuable mining rights. While the court disagreed with the claimant's methodology for calculating damages, it did find that the proper measure of damages in that case was the present business value of the profits to be realized from ownership of such mineral rights.

36. USPAP (Appraisal Foundation), Standard Rule 1-4(g).

37. The Appraisal Institute, *The Appraisal of Real Estate* 578 (11th ed. 1996).

38. The Appraisal Institute, *The Appraisal of Real Estate* 641 (12th ed. 2001).

39. UNIF. EMINENT DOMAIN CODE § 1016.

40. *See Kimball Laundry Co. v. United States*, 338 U.S. 1 (1948) ("The value compensable under the Fifth Amendment . . . is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent.").

41. Richard T. Crotty, Anthony J. Mullen, & William C. Weaver, *Identifying Business Values in Assessment of Senior Living and Long-Term Care Properties*, Assessment Journal, March/April 2001, at 33; *see also* Anthony J. Mullen, *A Note on Underwriting and Investing in Senior Living and Long-Term Care Properties: Separating the Business from the Real Estate*, 5 Journal of Real Estate Portfolio Management 299–302 (1999).

42. N.Y. EDUC. LAW § 307(10) (McKinney 2000).

43. *Id.*

44. *See, e.g.*, N.Y. AGRIC. & MKTS. LAW § 27(12) (McKinney 2004); N.Y. CANAL LAW § 40(12) (McKinney 1996); N.Y. CORRECT. LAW § 21(12) (McKinney 2003); N.Y. ENVTL. CONSERV. LAW §§ 3-0305(16), 3-0306(12) (McKinney 2005); N.Y. EXEC. LAW § 213(12) (McKinney 2001); N.Y. HIGH. LAW §§ 29(11), 30(13), 347(14) (McKinney 2000); N.Y. MIL. LAW § 177(12) (McKinney 1990 & Supp. 2006); and N.Y. PUB. HEALTH LAW § 401(12) (McKinney 2001).

45. NYC ADMINISTRATIVE CODE § 5-423 (Condemnation Procedures: Damage to value of real property; businesses, and employees thereof).

46. *In re Huie (Klass)*, 11 A.D.2d 837 (3d Dep't 1960).

47. *In re Huie (Crawford Bros., Inc.)*, 26 A.D.2d 746 (3d Dep't 1966).

48. *Banner Milling Co. v. State of New York,* 240 N.Y. 533 (1925).

49. *United States v. 0.88 Acres of Land*, 670 F. Supp. 210 (W.D. Mich. 1982); *see also Mitchell v. United States*, 267 U.S. 341 (1925) (consequential damages for losses to business precluded because government's destruction of the business was unintentional).

50. *United States v. 0.88 Acres of Land*, 670 F. Supp. 210 (W.D. Mich. 1982).

51. *Id.* at 213.

52. 338 U.S. 1 (1948).

53. *Id.* at 10–12.

54. *See* 26 Am. Jur. 2d *Eminent Domain* § 335 (2006); *see also Kimball Laundry Co. v. United States*, 338 U.S. 1, 13 (1948) ("If such a deprivation has occurred, the going-concern value of the business is at the Government's disposal whether or not it chooses to avail itself of it.").

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Abandonment of a Project and/or a Taking

By Mark R. McNamara

Abandonment in the context of the New York Eminent Domain Procedure Law [1] ("EDPL") refers to the consequences which flow from two separate, but sometimes related, events. These are the condemnor's post-taking abandonment of the project for which the acquisition was done and the abandonment or determined illegality of the taking itself. In either situation, the assumption is that the condemnee has been injured and is entitled to very specific redress in the form of reimbursement of expenses and damages pursuant to EDPL § 702(B). In addition, the statute provides for a right of first refusal to the condemnee where her property has been acquired and the project subsequently abandoned.

Post-Taking Project Abandonment

The duty owed by a condemnor to a condemnee whose property has been acquired for a public project which is abandoned and where the property has not been materially improved is clearly set forth in EDPL § 406(A):

> If, after an acquisition in fee pursuant to the provisions of this chapter, the condemnor shall abandon the project for which the property was acquired, and the property has not been materially improved, the condemnor shall not dispose of the property or any portion thereof for private use within ten years of acquisition without first offering the former fee owner of record at the time of acquisition the right of first refusal to purchase the property at the amount of the fair market value of such property at the time of such offer. . . .

In determining whether a project has been "abandoned" for purposes of triggering the EDPL § 406(A) right of first refusal, it should be noted that a change in the public purpose does not constitute abandonment. So long as there is still a public purpose to which the property is being devoted, there has been no abandonment for purposes of EDPL § 406.[2] The requirement that the right of first refusal to the former fee owner be in the amount of the fair market value of the property at the time of such offer is to assure that the condemnee will not be unjustly enriched nor the condemnor penalized.[3]

Proposed Statutory Revisions

In most instances, it is cold comfort to a condemnee whose property has been forcibly taken through the exercise of the power of eminent domain to be offered the

property back years after the acquisition. Most condemnees would trade the money damages paid as just compensation for simply being left alone. That is, the disruption of one's life or business as a result of the forcible acquisition of real property is not remedied by the offer of the property's return, at a price, years after the taking. The fact that the buyback price, with the passage of time, is just as likely to be in excess of that which the condemnee was paid when the property was taken only adds insult to injury. One could reasonably argue that, contrary to the sentiment expressed by the 1974 Commission, the condemnor should be penalized for acquiring property for a public purpose which never came to fruition. That punishment could take various forms which would properly be the matter of study in connection with the overall review and revision of the EDPL.

Pre-Taking Abandonment

EDPL § 702(B) provides:

> In the event that the procedure to acquire such property is abandoned by the condemnor, or a court of competent jurisdiction determines that the condemnor was not legally authorized to acquire the property, or a portion of such property, the condemnor shall be obligated to reimburse the condemnee, an amount, separately computed and stated, for actual and necessary costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees, and other damages actually incurred by such condemnee because of the acquisition procedure.

EDPL § 401(B) effectively sets a statute of limitations of three years during which the condemnor must commence proceedings pursuant to EDPL Article 4 to acquire the property.[4]

The three-year period is measured from the later of the publication of the EDPL § 204 Determination and Findings, the date of the order or completion of proceedings which provide the basis for an exemption under EDPL § 206 or entry of "the final order or judgment on

judicial review" of an EDPL § 207 proceeding challenging the Determination and Findings.[5] EDPL § 401(C) provides a period of up to ten years to complete the condemnations if the project is being done in stages, but the first stage of these acquisitions must commence within the same three-year period as described above. The failure to commence the EDPL Article 4 proceeding within that three-year period is deemed an abandonment.

Where the condemnor was exempt from holding an EDPL § 204 hearing by EDPL § 206(C) because, pursuant to other law, it conducted the appropriate public hearing, the three-year limitations period ran from the date its urban renewal plan was initially adopted and approved and authorized the condemnor to acquire property, rather than from subsequent amendments.[6]

The time calculation which determines the fact of the condemnor's abandonment is a threshold issue. That is, the calculation of the date at which the three-year period expires requires a determination of the commencement date of that three-year period. The measurement of the three-year limitations period is generally straightforward since EDPL § 401(A) is clear as to its commencement date.

There is no mystery to this calculation where, subsequent to the publication of the synopsis of the EDPL § 204 Determination and Findings, there is no EDPL Article 2 challenge. Similarly, where there is an Article 2 challenge and the Appellate Division confirms the Determination and Findings but no further appeals are sought, the three-year calculation is simple. By way of example, the entry of the order effecting the Appellate Division's decision to confirm the condemnor's EDPL Article 2 Determination and Findings commenced the three-year limitations period in *City of Buffalo Urban Renewal Agency v. Moreton*.[7] The controversy with respect to this calculation arises where a condemnee appeals the Appellate Division's order confirming the Determination and Findings either by filing a notice of appeal claiming the constitutional issue or bringing a motion for leave to appeal to the Court of Appeals. The controversy with respect to this calculation is centered on the date at which the three-year period begins which is as much about when the condemnor can commence an Article 4 proceeding as it is about the triggering date for the commencement of the three-year period. Absent an EDPL Article 2 challenge of the Determination and Findings, a condemnor can commence an Article 4 proceeding as soon as it publishes its synopsis of its Determination and Findings. This right is self-evident since the condemnor cannot know whether there will be a challenge to its Determination and Findings until the 30-day period in which such challenge must be brought pursuant to EDPL § 207 has passed.[8]

There is at least one decision in which a court focused on the earliest date one could commence an EDPL Article 4 proceeding where there is a pending challenge to the Determination and Findings. The court held the condemnor may not commence such a proceeding until the Appellate Division has confirmed the Determination and Findings pursuant to EDPL § 207.[9] Where there has been an appeal of the Appellate Division's EDPL § 207 order confirming the Determination and Findings, the controversy as to the calculation of the three-year period arises out of the assertion that it must be measured from the Appellate Division's EDPL § 207 order because, absent a determination on the merits by the Court of Appeals, this constitutes the EDPL § 401(A)(3) "final order or judgment on judicial review." If the determination is not on the merits, the argument goes, it does not constitute a "final" order under the EDPL.

The contrary, and better, position is that "the final order or judgment on judicial review" is the one that ends judicial review, i.e., the denial of a motion for leave to appeal to the Court of Appeals or the order dismissing an appeal to the Court of Appeals. The pragmatic argument in favor of this position is that the condemnor's time to commence acquisition proceedings would not begin to run until its right to acquire the property had been fully and finally adjudicated. Otherwise, the condemnor might acquire the property only to have the Court of Appeals or United States Supreme Court later rule the acquisition was not authorized. Where the public purposes for the taking flow out of a major project which is dependent on the acquisition of the property, certainty as to the final legitimacy of the acquisition is normally a prerequisite to the development and construction of that public project. The risk of having to unwind a project because the taking is subsequently determined to be invalid will, in most instances, preclude going forward with the project until that risk is eliminated. If one accepts the counter proposition that the three-year period begins to run from the date of the order of the Court of original jurisdiction (the Appellate Division) regardless of any appeals of that order, the time to commence an Article 4 acquisition proceeding could expire before the right to take has been finally adjudicated. By way of example, in the well-known case *Kelo v. City of New London*,[10] the Supreme Court's decision on the condemnor's right to take was issued more than three years after the decision of the state court of original instance where, as in New York, there was one level of state appellate review by the state's highest court. This would be nonsensical.

This issue of the calculation of the abandonment period where judicial review has ended with the dismissal of the appeal or denial of a motion for leave to appeal was squarely before the Court in *In re J.C. Penney*.[11] There, the Appellate Division, Fourth Department held:

> Here, the Court properly determined that the three-year time period set forth in EDPL 401(A)(3) commenced on Febru-

ary 25, 2003, the date on which the Court of Appeals denied the motion for leave to appeal from our orders of November 15, 2002 confirming the 2002 Determination and Findings of SIDA to acquire certain property interests and dismiss the appeal of respondent J.C. Penney Corporation, Inc.

EDPL § 702(B) provides a comprehensive description of items for which the condemnee should be reimbursed in the event of an abandonment or judicial determination that the condemnor is not authorized to acquire the property. These are the "actual and necessary costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees, and other damages actually incurred by such condemnee because of the acquisition procedure."

In determining the expenses for which a condemnee will be reimbursed, EDPL § 702(B) is, for the most part, very clear. This is fortunate since there is very little case law which has been decided under this section. Essentially, a condemnee will be reimbursed those costs, disbursements and expenses which are actual, necessary and reasonable and include, but are not limited to, attorney, appraisal and engineering fees. Less clear is the provision for "other damages actually incurred" by the condemnee due to the acquisition procedure.[12] Any reexamination and redrafting of the EDPL should include a clarification of the reimbursement of the expenses available to condemnees under Article 7.

Endnotes

1. N.Y. Em. Dom. Proc. Law (McKinney 2003).
2. *Vitucci v. New York City Sch. Constr. Auth.*, 289 A.D.2d 479, 735 N.Y.S.2d 560 (2d Dep't 2001); *City of Syracuse Indust. Dev. Agency v. J.C. Penney*, 2006 N.Y. Slip Op. 7003 (N.Y. App. Div., Sept. 29, 2006).
3. 1974 Report of the State Commission on Eminent Domain ("1974 Commission"), Comment § 406, p. 40.
4. *Binghamton Urban Renewal Agency v. Manculich*, 67 N.Y.2d 434, 438, 503 N.Y.S.2d 548, 549–50 (1986); *250 W. 41st St. Realty Corp. v. New York State Urban Dev. Corp.*, 277 A.D.2d 47, 715 N.Y.S.2d 407 (1st Dep't 2000).
5. N.Y. Em. Dom. Proc. Law § 401(A).
6. *Manculich*, 67 N.Y.2d 434 (1986).
7. 127 Misc. 2d 292, 486 N.Y.S.2d 141 (Sup. Ct., Erie County 1985).
8. N.Y. Em. Dom. Proc. Law § 401(A).
9. *In re New York State Urban Dev. Corp.*, 193 Misc. 2d 290, 749 N.Y.S.2d 122 (Sup. Ct., N.Y. Co. 2002). *See also* dicta in *Dowling College v. Flacke*, 78 A.D.2d 551, 432 N.Y.S.2d 23 (2d Dep't 1980).
10. 545 U.S. 469, 125 S. Ct. 2655 (2005).
11. 2006 Slip Op. 7033; *see also In re New York State Urban Dev. Corp.*, 165 A.D.2d 733, 735, 563 N.Y.S.2d 788 (1st Dep't 1990).
12. *See Buffalo Airport Ctr. Assoc. v. Niagara Frontier Transp. Auth.*, Index No. 1995-1706 (Sup. Ct., Erie Co. Dec. 13, 1995), *aff'd*, 233 A.D.2d 869, 649 N.Y.S.2d 858 (4th Dep't 1996), *appeal denied*, 89 N.Y.2d 962, 655 N.Y.S.2d 882 (1997).

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Eminent Domain in the City of New York: A Discussion of the Public Hearing and Notice Requirements and Methods for Judicial Challenges Under the Eminent Domain Procedure Law

By Natasha Demosthene and Geeta Kohli

Natasha Demosthene

Eminent domain is the power of a governmental entity to acquire and condemn private property for public use subject to payment of just compensation to the owner of the property acquired. Condemnation procedures throughout the State of New York are governed by the Eminent Domain Procedure Law (hereinafter "EDPL").[1] The City of New York must also comply with the statutory requirements set forth in Title 5, Chapter 3 of the New York City Administrative Code, and §§ 197-c and 197-d of the New York City Charter (hereinafter "N.Y.C. Charter").[2]

Eminent domain has been a useful tool for the City of New York. The city's residents have seen the revitalization of communities infested with crime, physical blight, and social problems. Additionally, through the use of eminent domain, the City has provided more parks and schools, solutions to chronic street flooding, relief of traffic congestion, and many other changes visible all over the city.[3] The New York City Law Department's Tax and Bankruptcy Litigation Division facilitates the city's acquisition of property for public use by eminent domain.

This article will provide a brief background of the condemnation procedures utilized by the City of New York and other municipalities and instrumentalities of the state and will discuss the process to acquire property by eminent domain by the City of New York. Specifically, this article compares the public hearing and notice requirements and method for judicial challenges to proposed public projects laid out in the EDPL versus the public hearing and notice requirements and methods for raising challenges when the city's Uniform Land Use Review Procedure (hereinafter "ULURP"), set forth in §§ 197-c and 197-d of the N.Y.C. Charter, is used as an exemption to the public hearing requirement as set forth in EDPL § 206. Finally, this article provides an analysis of the effects of an EDPL § 206 exemption on interested parties and provides thought for resolution.

Geeta Kohli

On July 1, 1978, Assembly Bill Number 5108 was enacted to establish a new EDPL.[4] The purpose of the bill was to create "a uniform and equitable procedure which assures that the public will be adequately informed through hearings of proposed public projects requiring the acquisition of land; that environmental and community impact will be weighed before the acquisition can go forward; and that every effort will be made to negotiate with owners for the acquisition of their property."[5] The EDPL sets forth requisite procedures for the acquisitions of property throughout the State of New York.

Informing Owners and Interested Parties of Proposed Public Projects: The Public Hearing Requirement Under the Eminent Domain Procedure Law

As a prerequisite to petitioning the court for an order of condemnation, the City of New York, as well as other municipalities and instrumentalities of the state—such as the Empire State Development Corporation and the Metropolitan Transit Authority[6]—are required to hold a public hearing prior to acquisition to inform the public of its proposed public project and to review the public purpose served by the project pursuant to EDPL § 201.[7] The potential impact on the environment and residents of the locality of the project must also be assessed.[8] Additionally, the condemning agency must give proper notice to the public of the purpose, time and location of its hearings at least ten days but not more than thirty days prior to the hearing.[9] Notice must be published in consecutive issues of a newspaper of that locality and served on the owners of the properties to be acquired pursuant to requirements of the EDPL.[10] Generally, a public hearing is held for most acquisitions by eminent domain. However, EDPL § 206 provides an exemption to the hearing requirement.[11]

Application of the EDPL § 206 Exemption from the Public Hearing Requirement

Pursuant to EDPL § 206(A), in certain instances, a condemning authority may be exempt from conducting an EDPL § 201 hearing if pursuant to other state, federal, or local law or regulation it considers and submits factors similar to the public hearing requirement outlined in EDPL § 204(B) to a state, federal or local governmental agency, board or commission before proceeding with the acquisition and obtains a license, a permit, a certificate of public convenience or necessity or other similar approval from such agency, board, or commission.[12]

The City of New York often utilizes the exemption under EDPL § 206 since there are several public hearings that are held pursuant to the ULURP. ULURP is an additional prerequisite that the city must complete prior to acquiring a property by eminent domain. The Court of Appeals has held that the City of New York's use of ULURP hearings as an exemption to the EDPL § 201 hearing fits squarely within the exemption set forth in EDPL § 206.[13] ULURP was enacted on July 1, 1976, by the N.Y.C. Charter to establish a standard procedure for applications affecting land use of the city to be publicly reviewed.[14] N.Y.C. Charter §§ 197-c and 197-d state that "applications by any person or agency for changes, approvals, contracts, consents, permits or authorization thereof, respecting the use, development or improvement of real property subject to city regulation shall be reviewed pursuant to a uniform review procedure"[15] including acquisition by the city of real property by purchase, condemnation, exchange or lease.[16] It should be noted however, that pursuant to EDPL § 401 if the public hearing was held more than three years prior to the date of commencement of the action to acquire the property by eminent domain, then the condemnor must follow the public hearing requirements set forth in EDPL § 202.[17]

Throughout the city ULURP process, there are many layers of review, opportunities for public comment and public hearings. The establishment of ULURP reflects the city's goals of increasing community participation in the decision making process for city development.[18] Pursuant to N.Y.C. Charter § 197, after an applicant files its ULURP application with DCP, DCP reviews the application for completeness.[19] If DCP determines that an environmental review is necessary, then an Environmental Impact Statement must be issued before an application can be certified.[20] Once DCP certifies the application, copies are sent to the affected Borough President, Community Board and City Council.[21] After receiving DCP's certification, the application must be reviewed by the Community Board within sixty (60) days of receipt. [22] The Community Board holds a public hearing and provides a written recommendation to the City Planning Commission, the applicant, and the Borough President.[23] If a Community Board fails to act within its time limit or waives its right to act, the application proceeds to the next level of review.[24]

Endnotes

1. N.Y. Em. Dom. Proc. Law (McKinney 2007).
2. N.Y.C. Admin. Code, Title 5, Chapter 3; N.Y.C. Charter § 197. Also, NY General Municipal Law, Article 15 governs urban renewal projects in the City of New York. The City may condemn a designated area for an urban renewal project if it deems redevelopment and rehabilitation necessary, for example, to eliminate slums and blight. N.Y. Gen. Mun. L § 501 (2007).
3. Friedlander, Jeffrey D., *Eminent Domain in the City: From Metrotech to 42nd Street*, New York Law Journal, March 28, 2005; *see also Matter of Sanitation Garage Brooklyn Districts 3 and 3A*, 5 Misc.3d 1014A (Sup. Ct., Kings Co. 2004), *appeal dismissed*, 32 A.D.3d 1031, 1034 (2d Dep't 2006).
4. New York Legislative Service, Inc., Governor's Bill Jacket, 1997, Chapter 839: Eminent Domain Procedure, *Memorandum filed with Assembly Bill Number 5108*, dated Aug. 11, 1997.
5. *Id*.
6. N.Y. Em. Dom. Proc. Law § 402(B) (McKinney 2007); *see also In re Metro. Transp. Auth.*, 2007 NY Slip Op. 50541U (Sup. Ct., NY Co. 2007); *In re N.Y. State Urban Dev. Corp.*, 193 Misc. 2d 290 (Sup. Ct., NY Co. 2002). It is important to note that the EDPL lays out separate hearing requirements for the State of New York versus its municipalities and instrumentalities of the state. Pursuant to the "quick take" procedures outlined in EDPL § 402(A), the State of New York may acquire property for a public purpose immediately by filing a map and description of the property to be acquired with the county clerk or register's office. N.Y. Em. Dom. Proc. Law § 402(A)(1) (2007). Notice is provided to condemnees by first class mail of the acquisition. N.Y. Em. Dom. Proc. Law § 402(A)(2) (McKinney 2007). A public hearing is not required.
7. N.Y. Em. Dom. Proc. Law § 201. The purpose of the hearing is to inform the public and to review the public use to be served by a proposed public project and the impact on the environment, unless exempt from that requirement for one or more of the reasons enumerated in EDPL § 206. *See Rockland County Sewer Dist. No.1 v. J. & J Dodge*, 213 A.D.2d 409 (2d Dep't 1995).
8. N.Y. Em. Dom. Proc. Law § 201 (McKinney 2007).
9. N.Y. Em. Dom. Proc. Law § 202 (McKinney 2007).
10. N.Y. Em. Dom. Proc. Law § 202 (McKinney 2007).
11. N.Y. Em. Dom. Proc. Law § 206 (McKinney 2007).
12. N.Y. Em. Dom. Proc. Law § 206(A) (McKinney 2007).
13. *City of New York v. Grand Lafayette Properties LLC*, 6 N.Y.3d 540 (Ct. of App. April 4, 2006).
14. New York City Department of City Planning, *The Uniform Land Use Review Procedure (ULURP)* (last visited March 19, 2007), *available at* http://www.nyc.gov/html/dcp/html/luproc/ulpro.shtml.
15. N.Y.C. Charter § 197-c(a).
16. N.Y.C. Charter § 197-c(a)(11).
17. N.Y. Em. Dom. Proc. Law § 401(A)(2) (McKinney 2007). If the condemnor follows the public hearing requirements outlined in the EDPL, it may commence its proceeding no later than three years after the publication of its determination and findings pursuant to EDPL § 204. *See* N.Y. Em. Dom. Proc. Law § 401(A)(1) (McKinney 2007).
18. New York City Department of City Planning, *The Uniform Land Use Review Procedure (ULURP)* (last visited March 19, 2007), *available at* http://www.nyc.gov/html/dcp/html/luproc/ulpro.shtml.

19. N.Y.C. Charter § 197-c(c).
20. N.Y.C. Charter § 197-c(b).
21. N.Y.C. Charter § 197-c(b).
22. N.Y.C. Charter § 197-c(e). Pursuant to N.Y.C. Charter § 197(i), the City Planning Commission must establish rules for community boards, borough presidents, borough boards, and the commission in exercise of their duties and responsibilities during the ULURP application review period.
23. *Id*.
24. N.Y.C. Charter § 197-c(e)(f).

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Is It Jurisdiction or Economic Development?

By M. Robert Goldstein

Last year, The Appellate Division, Third Department, in *Hargett v. Town of Ticonderoga*,[1] handed down a decision which was so far afield from decisions historically decided on the subject that it caused us to comment in a recent CLE lecture that there must be facts in the case not apparent from those recited in the decision. If not, we confess we are hard put to reconcile the decision with the facts and previous cases.

The facts, as set down in the decision, were that the Town Superintendent of Highways, after rejecting the petitioner's request to dedicate a portion of her property for town highway purposes, applied to the Town Board for permission to acquire that property as a highway by eminent domain.[2] The stated purpose was to "establish access from an existing town road to a pre-existing public right of way for vehicles, hikers, horseback riders, bicyclists and snowmobiles" and "establish access from (an) existing town road to state-owned land for vehicles, hikers, horseback riders, bicyclists and snowmobiles."[3] The Town Board approved the proposed acquisition as an aid to a "tourist-based economy."[4] Highway Law, Section 173 provides "[w]henever the town superintendent of highways . . . shall determine that public necessity requires the laying out of a new or additional highway . . . he may apply to the town board of his town for permission to institute a proceeding to acquire so much land as may be necessary to lay out such new or additional highway. . . ."[5]

Upon these facts the Appellate Division found in a proceeding pursuant to E.D.P.L., Section 207[6] that the Superintendent exceeded his authority and set aside the Determinations and Findings, thus denying the right to condemn.[7] The court found that pursuant to Highway Law, Section 140,[8] the Superintendent's power "relates to the c*reation,* care or maintenance of the town's roads, bridges, sidewalks or other related appurtenances."[9] But it also found no statutory authority for the Superintendent to determine that a highway for recreational users would enhance the economy of the town and annulled the determination to condemn.[10]

So what attracted our attention to this seemingly nonremarkable case involving statutory construction? The fact that it is really quite remarkable. The first thing that struck us is the apparent contradiction between the statutory language quoted by the court and its interpretation of same. Does it not appear strained to say the legislative grant to the Superintendent of the unconditioned right to determine that public necessity requires the laying out of a new or additional highway and to create a highway carries within it an implied limitation that it cannot be used for what is—in effect, an economic development—"a highway for recreational users [that] would enhance the economy of the town"?[11] At first glance it appeared to us that the court was straining to reach its conclusion.

We put that together with the history of court decisions in New York relating to challenges to the right to condemn. Without researching to get an actual count, we believe that you can count on one hand the number of times the courts have denied a governmental body the right to condemn in the past fifty years. To the contrary, courts will not second-guess the political decision to condemn. Between the two, we came to the conclusion that either there were facts or facets to the case we did not recognize or perhaps the court has been reading the public's reaction to the Supreme Court's decision in *Kelo v. City of New London,*[12] and that approximately twenty-two bills were put into the hopper at the last session of the legislature seeking in one way or another to restrict the right to condemn, where the power of eminent domain was being used to promote economic development, whether by private parties or government. Of course, it may be that we have an overactive imagination.

A short review of New York's historic position on eminent domain is in order at this point. The power of eminent domain is one of the three inherent powers of government, the other two being the police power and the power of taxation. The United States Constitution, Fifth Amendment, did not create the power; it restricted it to the extent it carried with its use the obligation to pay "just compensation."[13] Contrary to court decisions, the Constitution did not restrict its use to a "public use," such restriction, if it existed at all, was inherent and existed prior to the Constitution based on generally accepted principles of law.[14]

New York State, as does the Federal government, has that inherent power and it is similarly limited as in the Fifth Amendment to the United States Constitution by Article 1, Section 7 of its Constitution.[15] The power is exercised legislatively either directly or by delegation of power through legislation.[16] Thus the power to condemn by the Superintendent in the *Hargett* case was by delegation of the power as found in the Highway Law.

While the decision was bottomed in statutory construction, what it really was attacking was the use to which the Superintendent was planning to put the property, i.e., economic development. The decision, as it must, concedes the Superintendent has the power to condemn.

If the decision directly attacked the proposed use—that economic development was not a proper public purpose (use)—it would fly in the face of many contrary decisions over the years in New York State. While most criticisms of the *Kelo* decision point to the fact that what was permitted was taking the property from A and turning it over to B in the name of economic development, others point to the lack of a proper public use, even if government itself did the economic development.

All we need do is go to cases such as *Bush Terminal Co. v. City of New York*,[17] *Northeast Parent & Child Society v. City of Schenectady IDA*,[18] *Cannata v. City of New York*,[19] *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*,[20] and *In re Fisher*,[21] for examples of condemnations for economic development.

One of the things that persuaded us that this was not just a case of statutory construction, that more had to be involved, was that the statute required Town Board approval, which was granted.[22] This condemnation was as much an act of the town as it was of its highway Superintendent. Surely no one could contend that the Town Board did not have the power to condemn for a new road, whether to promote tourism or for any other reason. But inherent in this decision is that the town itself could not condemn for that purpose, since the condemnation was, after all, an act of the town. Town Law, Section 64(2) grants the town power to condemn.[23] Examination of the power of towns in Section 64 of the Town Law reveals that nowhere is it specifically provided that towns may provide for economic development, but then again, case law tells us that inherent in the power to condemn is to implement the public health, safety and welfare[24] and that includes the right to provide for economic development, which is why the twenty-two bills were introduced at the last session of the legislature to restrict that use. Even were that not so, General Municipal Law, Section 852, although referring to industrial development agencies, states "[i]t is hereby declared to be the policy of this state to promote the economic welfare, recreation opportunities and prosperity of its inhabitants and to actively promote attract, encourage and develop recreation, economically sound commerce and industry. . . ."[25] General Municipal Law, Section 2 provides that the General Municipal Law shall apply to towns.[26]

It appears to us the ramifications of this decision go way beyond the Town of Ticonderoga and its attempt to bolster its economy by building a highway to promote tourism. We suspect very few statutes explicitly provide for "economic development." Carried to its logical conclusion, we may be seeing the first step in the courts reining in the power to condemn.

Lastly, we cannot get away from the holdings in so many of the past cases.

> Given the breadth with which public use is defined in the condemnation context and the very restricted scope of our review of respondent's findings in support of condemnation we might perceive no ground upon which we might reject respondent's finding that the condemnation of 45 Wall Street as part of respondent's New York Stock Exchange Project will result in substantial public benefit.[27]
>
> However, the situation here actually displayed is one of those as to which the legislature has authorized the city officials, including elected officials, to make a determination and so the making thereof is simply an act of government, that is, an exercise of governmental power, legislative in fundamental character, which, whether wise or unwise, cannot be overruled by the courts. If the courts below should decide in favor of plaintiff, there would be effected a transfer of power from the appropriate public officials to the courts. The question is simply not a justiciable one.[28]

Although written in another context, the following is germane to this case:

> Over many years and in a multitude of cases, the courts have vainly attempted to define comprehensively the concept of a public use and to formulate a universal test. They have found here, as elsewhere, that to formulate anything ultimate, even though it were possible, would, in an inevitably changing world, be unwise if not futile. Lacking a controlling precedent, we deal with the question as it presents itself on the facts at the present point of time. The law of each age is ultimately what that age thinks should be the law.[29]

Endnotes

1. 826 N.Y.S.2d 819 (2006).
2. *Id.* at 820.
3. *Id*.
4. *Id*.
5. N.Y. High. Law § 173 (McKinney 2001).
6. N.Y. Em. Dom. Proc. Law § 207 (McKinney 2003).

7. *Hargett*, 826 N.Y.S. at 821.
8. N.Y. HIGH. LAW § 140 (McKinney 2001).
9. *Hargett*, 826 N.Y.S. at 821 (emphasis added).
10. *Id*. at 821.
11. *Id*.
12. 545 U.S. 469 (2005).
13. U.S. CONST. amend. V, cl. 5.
14. *See Calder v. Bull*, 3 U.S. 386 (1798); John A. Humbach, *Constitutional Limits on the Power to Take Private Property: Public Purpose and Public Use*, 66 OR. L REV. 547, 548 (1987).
15. NY CONST. art. I, § 7.
16. *Culgar v. Power Auth. of N.Y.*, 163 N.Y.S.2d 902 (N.Y. Sup. Ct. 1957), *aff'd*, 164 N.Y.S.2d 686 (N.Y. App. Div. 1957), *aff'd*, 3 N.Y.2d 1006 (1957); *County of Orange v. Metro. Transp. Auth.*, 337 N.Y.S.2d 178, 188–189 (N.Y. Sup. Ct. 1971), *aff'd*, 332 N.Y.S.2d 420 (N.Y. App. Div. 1972).
17. 282 N.Y. 317 (1940).
18. 494 N.Y.S.2d 503 (N.Y. App. Div. 1985).
19. 11 N.Y.2d 210 (1962).
20. 12 N.Y.2d 379 (1963).
21. 730 N.Y.S.2d 516 (2001).
22. *Hargett*, 826 N.Y.S.2d at 820.
23. N.Y. TOWN LAW § 64(2) (McKinney 2004 & Supp. 2007).
24. *Berman v. Parker*, 348 U.S. 26 (1954); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).
25. N.Y. GEN. MUN. LAW § 852 (McKinney 2001 & Supp. 2007).
26. N.Y. GEN. MUN. LAW § 2 (McKinney 2007).
27. *In re Fisher*, 730 N.Y.S.2d at 516-17.
28. *Kaskel v. Impelliterri*, 306 N.Y. 73, 80 (1953).
29. *In re N.Y. City Hous. Auth. v. Muller*, 270 N.Y. 333, 340 (1936) quoting *People ex rel. v. Durham R. Corp. v. La Fetra*, 230 N.Y. 429, 450 (1921).

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Didden v. Village of Port Chester: For Now, Broad Judicial Deference to Local Governments' Exercise of Eminent Domain Powers Remains the Rule

By Edward J. Phillips

I. Introduction

Last year, lawyers and informed citizens listened to politicians and commentators from across the political spectrum roundly criticize the Supreme Court's decision in *Kelo v. City of New London*.[1] By a narrow 5-4 vote, the Supreme Court held in *Kelo* that the government may condemn property for the sole purpose of facilitating commercial development that is expected to increase tax revenues and enhance the local economy.[2] In perhaps the most unpopular Supreme Court decision in recent history, even the author of the majority opinion, Justice John Paul Stevens, was heard to opine that in his personal view, that the condemnation activities challenged in *Kelo* were "unwise" because "the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials."[3]

The firestorm of public controversy ignited by *Kelo* provoked legislative responses on state[4] and local levels.[5] However, the Supreme Court does not appear inclined to revisit its eminent domain jurisprudence anytime soon. On January 16, 2007, the Supreme Court denied a petition for a writ of certiorari filed by the plaintiffs in *Didden v. Village of Port Chester*, a case alleging egregious eminent domain abuse on the part of a local village government and its designated developer for an urban redevelopment area.[6] Thus, the Supreme Court let stand a Second Circuit decision[7] affirming the Rule 12(b)(6) dismissal of a complaint alleging that the designated developer, with the knowledge and tacit approval of local government officials, attempted to coerce the plaintiffs into paying money in exchange for averting the condemnation of their properties.

This article will discuss the *Didden* litigation and the current legal landscape in the area of eminent domain. *Didden* should be interpreted as a clear sign that, particularly in the wake of *Kelo*, federal courts will continue to afford extremely broad deference to the decisions of local government officials who are engaged in eminent domain activities. Nevertheless, the outcomes reached in these cases should not lull public officials into complacency. *Kelo* was a 5-4 decision in which four justices called for the application of heightened scrutiny in economic taking cases. Four justices rejected such an approach, and the swing vote, Justice Kennedy, wrote a concurring opinion, which deferred the question for another day. The Connecticut Supreme Court, from which *Kelo* emanated, was similarly split.

While not reaching the Supreme Court, *Didden* rekindled the controversy started by *Kelo* and shed light on condemnation activities in the Village of Port Chester that were imprudent at best. In the future, local governments should carefully weigh the interests of property owners and exercise their eminent domain powers in a measured, responsible and transparent manner to ensure that the next landmark eminent domain case is not of their own making.

II. Legal Landscape

The government may not take a person's property without paying for it, and it may take property only for a "public use."[8] The term "public use" is not defined in the Fifth Amendment. Very early eminent domain cases typically involved takings for quintessential "public uses," e.g., municipal buildings and railroads,[9] but before long courts began approving takings for other types of governmental activities. Courts thus construed the "public use" requirement in the Fifth Amendment as meaning that a public purpose or benefit would be achieved through the acquisition of property through eminent domain. Because such determinations are legislative in nature, the standard that emerged simply asked whether the taking was "rationally related to a conceivable public purpose."[10]

Justice O'Connor coined that deferential standard of review in her 1984 opinion in *Hawaii Housing Authority v. Midkiff*. In that case, landowners challenged state legislation which used eminent domain to redistribute land from lessors to lessees. The law's objective was the redistrbution of land ownership where a great majority of private property was held by a relative handful of wealthy individuals.[11] The landowners claimed this legislative purpose failed to satisfy the "public use" requirement of the Fifth Amendment. The Ninth Circuit agreed and labeled the legislation a "naked transfer" of property from one private party to another. The Supreme Court, however, declined to "substitute its judgment for a legislature's judgment as to what constitutes a public use."[12] Citing a 1954 decision, *Berman v. Parker*, Justice O'Connor emphasized, for a unanimous Court, that the scope of judicial

review in such matters was extremely narrow, such that a legislature's judgment as to what constitutes a public use should not be disturbed "unless the use be palpably without reasonable foundation" or "shown to involve an impossibility."[13]

Berman v. Parker,[14] a short, unanimous opinion by Justice Douglas, permitted a public agency to condemn properties within one of the most badly blighted urban areas[15] in the country and to convey that property to a private entity for redevelopment. The plaintiffs, who owned and operated a department store within the condemnation zone, argued that taking their property would violate the Fifth Amendment because the property was to be redeveloped by a private entity for private use. The Supreme Court disagreed and authorized the use of eminent domain for the purpose of blight eradication, notwithstanding that the plaintiffs' unblighted property would be transferred from one private party to another. The Court declined to second-guess the condemning authority's redevelopment plan for eliminating blight within the project area, reiterating that "[t]he role of the judiciary in determining whether [eminent domain] power is being exercised for a public purpose is an extremely narrow one."[16]

Midkiff and *Berman* were the principal cases that the parties and the Supreme Court were obliged to confront in *Kelo*. A brief summary of the salient facts in *Kelo* follows. The City of New London had been designated as a "distressed municipality"—a local naval base had closed and the city's unemployment was twice the state average.[17] Pfizer Pharmaceutical Company proposed building a $300 million research and development facility in the City. The redevelopment agency decided to condemn properties to facilitate the project. There was no allegation of blight. Following a 7-day bench trial, the trial court issued a permanent restraining order prohibiting certain particular condemnations.[18] The Connecticut Supreme Court ruled, 4-3, that all the takings were valid.[19] The dissenting judges disagreed and would have imposed a heightened standard of judicial review due to the nature of the takings.[20]

As we all know, the Supreme Court affirmed by a 5-4 majority. In a separate concurrence, Justice Kennedy sounded a cautionary note, instructing that even under rational basis review, a court should set aside a taking where the evidence clearly demonstrates the taking is intended to favor a particular private party, with only incidental public benefits. Thus, Justice Kennedy explained as follows:

> A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose.
>
> . . .
>
> There may be private transfers in which the risk of undetected impermissible favoritism to private parties is so acute that a presumption of invalidity is warranted under the Public Use Clause. This demanding level of scrutiny, however, is not required simply because the purpose of the taking is economic development.[21]
>
> . . .
>
> 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.[22]

Finding no evidence of "impermissible favoritism" or abuse in *Kelo*, Justice Kennedy chose to vote in favor of affirmance.

In dissent, Justice O'Connor wrote that possible public benefits, such as increased tax revenues and the creation of jobs, did not convert the proposed condemnation into a public use.[23] She distinguished *Berman* and *Midkiff* on the grounds those cases addressed more manifest harms, i.e., urban blight and land oligopolies, and she warned it was an "abdication" of the Court's responsibility to defer to state legislatures in cases involving purely economic takings.[24] Rather, she indicated that it was the Court's responsibility to determine on a case-by-case basis whether the proposed taking was for a "public use."

In a separate dissent, Justice Thomas predicted that the beneficiaries of the Court's decision would be large corporations, developers and lenders who would utilize the decision to persuade municipalities to acquire lands for redevelopment.[25] Justice Thomas warned that the victims of the *Kelo* decision would be low-income and minority residents of municipalities who would be displaced from their homes and businesses at an ever-increasing pace.

III. *Didden v. Village of Port Chester*

A. Background[26]

In 1982, the Village of Port Chester enacted a plan for urban renewal known as the Marina Redevelopment Urban Renewal Plan. In 1991, the village modified the plan and created the "MUR District," which was overlaid on

pre-existing zoning districts within the boundaries of the Marina Redevelopment Project. The village also selected a "designated developer" to implement the redevelopment plan.[27]

By 1997, little or no progress had been made towards implementing the redevelopment plan and the village selected a new designated developer. In 1999, the village modified and expanded its redevelopment plan and made a finding of "public purpose," pursuant to the EDPL,[28] for the future use of eminent domain within the MUR District. The modified plan encompassed approximately twenty-seven (27) acres of development, including construction of over 500,000 square feet of retail space.

The Didden Plaintiffs owned or controlled an assemblage of contiguous properties situated within the MUR District and just outside it.[29] Representatives of CVS Pharmacy approached them concerning the possibility of constructing a CVS Pharmacy on their properties. To facilitate a deal with CVS, the Didden Plaintiffs purchased additional contiguous property located outside of the MUR District.

In 2003, the Didden Plaintiffs filed an application for site plan approval to redevelop their properties as a CVS Pharmacy. Neither the urban renewal designation of those properties within the MUR District, nor the Code of the Village of Port Chester, prohibited the CVS project from proceeding. In November 2003, the Village of Port Chester Planning Commission issued a negative declaration under the New York State Environmental Quality Review Act ("SEQRA") for the project and granted it preliminary site plan approval. Final site plan approval followed in February 2004. The Didden Plaintiffs signed with CVS for an initial term of twenty-five (25) years and potential options that could extend the lease to more than forty-eight (48) years.

As the CVS project was approaching fruition in November 2003, the village directed the Didden Plaintiffs to meet with its designated developer. During this meeting, the designated developer demanded that the Didden Plaintiffs pay him the sum of $800,000, or else he would cause the village to condemn their properties within the MUR District, thereby killing their project. The designated developer alternatively demanded a 50 percent partnership interest in the CVS project as compensation for allowing the Didden plaintiffs to avert the condemnation.[30]

The Didden Plaintiffs refused to accept either of these demands. The very next day, the village filed a condemnation petition to acquire their properties so they could be transferred by lease to the designated developer.[31]

Thereafter, the Didden Plaintiffs appeared before the Village Board and called upon its members to withdraw or postpone the condemnation, citing the designated developer's demands and the advanced stage of their own redevelopment plans. The Didden Plaintiffs also petitioned the Village Board to have their properties removed from the MUR District. From time to time, the Village Board had previously altered the boundaries of the MUR District at the designated developer's request. Nevertheless, these efforts were rebuffed by the Village Board, which reportedly believed it was powerless to stop the taking because it had a contractual obligation to the designated developer to condemn the property and convey to the developer a leasehold interest.[32]

Notably, the designated developer planned to redevelop the condemned properties as a Walgreens pharmacy—essentially the identical use proposed by the Didden Plaintiffs.

B. The Village Prevails in the District Court and Second Circuit

In January 2004, the Didden Plaintiffs commenced an action in the United States District Court seeking to enjoin the condemnation. The Didden Plaintiffs argued that the designated developer's $800,000 demand, together with their willingness and ability to proceed with the CVS Pharmacy project (the project had received approvals from the Village's Planning Commission), established that the condemnation of their property was intended to achieve a purely private purpose. The Didden Plaintiffs contended that the designated developer's plan to build a Walgreens Pharmacy would achieve no public benefit that their CVS Pharmacy project would not likewise have provided. Indeed, comparing the two projects, the Didden Plaintiffs claimed that the CVS Pharmacy would have been larger, offered more services and parking, had a drive-through window, redeveloped four (4) additional properties just outside the MUR District and generated more property tax revenues.

The Didden Plaintiffs also argued that the designated developer had no legal right to demand an $800,000 payment from them. They reasoned that it would have been unlawful for any village official to make such a demand,[33] and therefore it should have been unlawful for the designated developer to do so with the village's knowledge and tacit support. The Didden Plaintiffs further argued that the designated developer had no right to control the village's exercise of its eminent domain powers, regardless of the terms of its development contract with the village. Case law holds that the government may not delegate its eminent domain powers to a private person or entity.[34]

Another theory advanced by the Didden Plaintiffs posited that the $800,000 demand constituted an unlawful development exaction. Development exactions involve situations where a property owner is required to relinquish something of value (e.g., land, cash or access

rights) in exchange for municipal approval to use and/or develop that property. The Supreme Court has ruled that development exactions are lawful, and do not offend due process or other constitutional property rights (such as those embodied in the Fifth Amendment), if an "essential nexus" exists between the required exaction and the impact it purportedly addresses, and the exaction sought is "roughly proportional" to that impact.[35] Absent such a nexus and rough proportionality, the exaction cannot be upheld as a legitimate exercise of the municipality's police power.

In response, the designated developer and the village argued that the Didden Plaintiffs' claims challenging the condemnation of their properties and the redevelopment contact were time-barred because they were commenced more than three (3) years[36] after the contract was executed and their properties were selected for condemnation under the EDPL. They also contended that the condemnation was rationally related a clear public purpose (elimination of blight); that the designated developer and Didden Plaintiffs had a long history of prior negotiations and the $800,000 demand was made in that context; and that CVS' interest in the village's redevelopment project was attributable to the involvement and efforts of the designated developer.

The Didden Plaintiffs countered by arguing that their claims did not accrue until November 2003, at the earliest, when the designated developer made his demands and began to direct the village's exercise of its eminent domain powers. They also pointed out that in a "phased" urban redevelopment project, such as the village's Marina Redevelopment Project, a finding of "public purpose" remains effective for a period of ten (10) years.[37] Thus, if the statute of limitations for Section 1983 actions always began to run upon the issuance of such findings and expired exactly three (3) years later, a developer would be immune from liability between years 3 through 10 for all constitutional violations. The Didden Plaintiffs also asserted that the designated developer had never engaged them in any serious or legitimate "negotiations."

The District Court denied the Didden Plaintiff's motion for a preliminary injunction[38] and, shortly thereafter in a separate decision, dismissed the action pursuant to Fed. R. Civ. P. 12(b)(6).[39] The District Court did not have the benefit of Supreme Court's *Kelo* decision. Nevertheless, the District Court held that because the designated developer had contracted with the village and could, pursuant to the contract, cause the village to condemn the property, the developer's threats to do what it was contractually authorized to do were not actionable.[40] The District Court further held that since the developer's threats were not actionable, the Didden Plaintiffs could only challenge the redevelopment plan itself, and any such claims were time-barred.[41] The court held that no exaction had occurred because the condemnation had lawfully extinguished their ownership rights in the properties (other than their right to receive just compensation for the taking).[42]

The Didden Plaintiffs appealed to the United States Court of Appeals for the Second Circuit. In an unpublished summary order, the Second Circuit affirmed on the grounds that the Didden Plaintiffs' claims were time-barred.[43] The Second Circuit further held that "even if Appellants' claims were not time-barred, to the extent that they assert that the Takings Clause prevents the State from condemning their property for a private use within a redevelopment district, regardless of whether they have been provided with just compensation, the recent Supreme Court decision in [*Kelo*] obliges us to conclude that they have articulated no basis upon which relief can be granted."[44]

C. The Supreme Court's Denial of Certiorari

With the assistance of the Institute for Justice,[45] a not-for-profit public interest law firm specializing in the area of property rights,[46] the Didden Plaintiffs began a concerted effort to have their case heard by the United States Supreme Court. Their petition for certiorari attracted national media coverage and was joined by a group of eminent law school professors and a renowned public interest group who both submitted *amicus curiae* briefs.[47]

The Didden Plaintiffs and *amicus curiae* argued that the Second Circuit had misinterpreted *Kelo* and that a Rule 12(b)(6) dismissal was premature. They contended that under the lower courts' decisions, redevelopment areas would become "constitution-free" zones because property owners would be unable to raise *any* claim that their property was being taken for a purely private purpose or that other unlawful practices were occurring. Additional arguments were raised concerning the use of eminent domain as leverage to obtain a development exaction. Nevertheless, the Supreme Court declined to grant certiorari.[48]

IV. Conclusion

The Supreme Court does not provide a reason for denying certiorari in a particular case, so those who participated or followed the *Didden* certiorari petitions were left to speculate as to why the Court declined to hear the case. Because the Second Circuit rendered its decision by unpublished "summary order,"[49] it is unclear whether *Didden* will materially affect the law with respect to private takings or development exactions. Without doubt, however, *Didden* raises important questions about the proper use of eminent domain, particularly where a private entity is enlisted to undertake significant redevelopment activities within a municipality. Given the breadth of the public backlash over *Kelo,* eminent domain is likely to remain a hot button issue for the foreseeable future.

Endnotes

1. *Kelo v. City of New London*, 545 U.S. 469 (2005).

2. In her dissent, Justice O'Connor, with whom the late Chief Justice Rehnquist, Justice Scalia and Justice Thomas joined, stated in relevant part:

> Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner so long as it might be upgraded — *i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public — in the process . . . .
>
> . . . .
>
> [W]ho among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz Carlton, any home with a shopping mall, or any farm with a factory.

Kelo, 545 U.S. at 494, 503 (O'Connor, J., dissenting).

3. Linda Greenhouse, *Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005, at A1. Speaking before the Clark County Bar Association in Las Vegas, Nevada, Justice Stevens reportedly stated: "I would have opposed [the result in *Kelo*] if I were a legislator." *Id*. He also stated the decision is "entirely divorced from my judgment as concerning the wisdom of the program" to take homes for private development. *Id*.

4. In response to *Kelo,* thirty (30) states enacted some type of legislation aimed at limiting the use of eminent domain or strengthening public notice criteria and other procedural requirements. *See* National Conference of State Legislatures, Eminent Domain Main Page, http://www.ncsl.org/programs/natres/EMINDOMAIN.htm (last visited Apr. 1, 2007). At least four (4) states—Alabama, Delaware, Ohio and Texas—passed laws to curb the use of eminent domain for economic purposes. In New York, the Eminent Domain Procedure Law (EDPL) was amended to require that better notice be provided to property owners concerning the possible condemnation of their property. *See* N.Y. EM. DOM. PROC. LAW §§ 202(C), 204(C) (McKinney 2007) (*amended by* L. 2004, c. 450, § 2 eff. Jan. 12, 2005). The statute now requires that notice of a "public use" hearing, and any findings made therein, be provided to property owners by personal service or certified mail; notice by publication was sufficient prior to the amendment.

   Some state courts have reexamined their eminent domain jurisprudence with respect to economic takings. The most notable example is the Michigan Supreme Court's decision in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), in which it unanimously overturned its holding in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), and held that economic development was not a legitimate public use under the Michigan Constitution. *See also City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006) (heightened scrutiny should be applied when reviewing statutes that regulate the use of eminent domain powers, and an ordinance that permitted appropriation of property within a "deteriorating area" was unconstitutional).

   New York State courts, however, have upheld economic takings. *See, e.g.*, *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 330 (N.Y. 1975) (observing that "economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose"); *Cannata v. City of New York*, 182 N.E.2d 395 (N.Y. 1962) (approving the taking of predominantly vacant, substandard real estate for redevelopment by private entities); *In re Horoshko*, 90 A.D.2d 850 (N.Y. App. Div. 1982) (elimination of substandard lots in Town of East Hampton served valid public purpose); *Ne. Parent & Child Soc'y v. City of Schenectady Indus. Dev. Agency*, 114 A.D.2d 741 (N.Y. App. Div. 1985) (approving condemnation to increase tax base and diversify local economy).

5. For example, earlier this year the Town of Yorktown adopted a local law that prohibits the use of eminent domain to acquire land for economic development. *See* Town of Yorktown L.L. No. 1-2007. The law provides, in relevant part, that "the public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health, shall not constitute a public use" sufficient to justify the town's use of eminent domain. Town of Yorktown Town Code § 38-1(B).

6. *Didden v. Village of Port Chester, New York*, 127 S. Ct. 1127 (2007).

7. *Didden v. Village of Port Chester*, 173 Fed.Appx. 931 (2d Cir. 2006), *aff'd*, 322 F. Supp. 2d 385 (S.D.N.Y. 2004).

8. The Takings Clause of the Fifth Amendment provides: "Nor shall private property be taken for public use without just compensation." U.S. CONST., amend. V.

9. *See, e.g.*, *Hairston v. Danville & W. Ry*, 208 U.S. 598 (1908).

10. *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).

11. Specifically, due to the manner in which Hawaii was first settled, 49% of the land was owned by the state and federal governments, while another 47% was owned by only 72 private landowners. *See Midkiff*, 467 U.S. at 232.

12. *Id*. at 241.

13. *Id*. at 240–41 (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896), and *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925)).

14. *Berman v. Parker*, 348 U.S. 26 (1954).

15. For instance, within the area for redevelopment in Washington, D.C., the available data indicated that 64% of the dwellings were "beyond repair," 58% of the dwellings had outside toilets and 29% lacked electricity. *See Berman*, 348 U.S. at 30.

16. *Id*. at 32.

17. *Kelo*, 545 U.S. at 473.

18. *See Kelo v. City of New London*, No. 557299, 2002 WL 500238 (Conn. Super. Ct. 2002).

19. *See Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004).

20. *Id*. at 575.

21. *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

22. *Id*. at 493.

23. *Id*. at 494 (O'Connor, J., dissenting).

24. *Id*. at 504.

25. *Id*. at 521 (Thomas, J., dissenting).

26. The District Court provided an abbreviated factual recitation its Decision and Order granting the defendants' Rule 12(b)(6) motion. *See Didden v. Village of Port Chester*, 322 F. Supp. 2d 385 (S.D.N.Y. 2004). The court's Decision and Order denying a preliminary injunction contains a more complete factual summary. *See Didden v. Village of Port Chester*, 304 F. Supp. 2d 548 (S.D.N.Y. 2004).

27. *Didden*, 304 F. Supp. 2d at 551.

28. *See* N.Y. EM. DOM. PROC. LAW § 204 (McKinney 2007).

29. *Didden*, 304 F. Supp. 2d at 553.

30. *Id*. at 556.

31. *Id*.

32. John M. Crane, Letter to the Editor, PORT CHESTER WESTMORE NEWS (Feb. 18, 2005).

33. *See, e.g.*, 18 U.S.C. § 1951 (2000); N.Y. PENAL LAW § 155.05(e)(viii) (McKinney 2007).

34. *See Contributors to Pennsylvania Hosp. v. City of Philadelphia*, 245 U.S. 20 (1917). The Supreme Court stated, in relevant part, as follows:

> There can be now, in view of the many decisions of this court on the subject, no room for challenging the general proposition that the states cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental authority in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties . . . . The right of government to exercise its power of eminent domain upon just compensation for a public purpose comes within this general doctrine.

Id. at 23–24.

35. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).
36. The statute of limitations applicable to actions brought under 42 U.S.C. § 1983 is three (3) years from the accrual of the plaintiff's cause of action. *See Ormiston v. Nelson*, 117 F.3d 69, 71 (2d Cir. 1997); *Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir. 1980).
37. *See* N.Y. EM. DOM. PROC. LAW § 401(c) (McKinney 2007).
38. *See Didden v. Village of Port Chester*, 304 F. Supp. 2d 548 (S.D.N.Y. 2004).
39. *See Didden v. Village of Port Chester*, 322 F. Supp. 2d 385 (S.D.N.Y. 2004).
40. *Id*. at 390.
41. *Id*. at 388–89.
42. The Village acquired title to the properties in April 2004.
43. *See supra* note 7.
44. *Id*. at 933.
45. The Institute for Justice maintains a website at http://www.ij.org/.
46. The Institute for Justice also represented the plaintiffs in the *Kelo* litigation.
47. *See* Brief of Law Professors D. Benjamin Barros, Eric R. Claeys, Viet D. Dinh, Steven J. Eagle, James W. Ely, Jr., Richard A. Epstein, Adam Mossoff, and Ilya Somin as *Amici Curiae* in Support of Petitioners, 2006 WL 3806379 (Dec. 8, 2006), and Brief *Amicus Curiae* of Pacific Legal Foundation in Support of Petitioners, 2006 WL 3667543 (Dec. 11, 2006).
48. *See id*.
49. *See* 2d Cir. R. § 0.23(b). 2d Cir. R. § 0.23(a) provides the following explanation as to how the court decides when to issue a summary order rather than a published opinion:

> The demands of contemporary case loads require the court to be conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by an opinion (i.e., a ruling having precedential effect), the ruling may be by summary order instead of by opinion.

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The Demise of Eminent Domain

By Nadia E. Nedzel and Dr. Walter Block

Nadia E. Nedzel

I. Introduction

The primary concept of a limited government whose powers are both checked and balanced underlies the United States Constitution. A case in point is the Fifth Amendment, which limits the exercise of eminent domain in two ways: a taking must be for a "public use" and "just compensation" must be paid to the owner.[1] However, the long line of Supreme Court cases culminating in *Kelo v. City of New London*[2] has successfully obliterated both of those limitations. Citizens whose private property is taken by the government are not justly compensated nor are those takings limited by "public use."

After this introduction, we critically discuss takings for the purpose of economic development. Section III is given over to difficulties with just compensation. The burden of section IV is to analyze, from an economic perspective, urban planning and the real estate hold out. In section V, we address a radical objection to our thesis: how can land be assembled for roads and highways without utilizing eminent domain? The purpose of section VI is to challenge the usual presumption that land subject to eminent domain be limited to public use: we ask, given that the government has already seized private property, whether it is a foregone conclusion that public use should be preferred to private use.

II. Economic Takings

Kelo is consistent with Supreme Court precedent; its only distinction is that the Court now fully and overtly accepts "economic development" as an appropriate "public use."[3] In retrospect, the decision that was most destructive to any rational definition of the term was undoubtedly *Berman v. Parker*.[4] In *Berman*, the Court defined public use as anything a legislature wants it to be. "[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[5] Furthermore, the term represents values "spiritual as well as physical, aesthetic as well as monetary."[6] *Berman* and *Kelo* both approved takings for purposes of economic development, and therein lies the problem.

The *Kelo* majority claims that promoting economic development is a traditional, long-accepted function of government.[7] Perhaps that is true, but taking from one private party to give to another violates the fundamental social compact and is "against all reason and justice."[8] Furthermore, the practical problem with using eminent domain to foster economic development is that it often fails. The redevelopment project at issue in *Berman* ultimately failed, as have several others, including the Poletown GM project in Michigan, and Cincinnati's downtown. Poletown's busy commercial strip was replaced with vacant and burned-out buildings when GM did not expand as planned and, instead of a Nordstrom store, downtown Cincinnati now has a municipal parking lot. Where an economic development taking does not result in further depression, it is likely that the area at issue would have improved without resorting to eminent domain.

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A second practical problem with the Supreme Court's interpretation of "public use" is that it gives too much power to local, state, and national legislatures. As a result, legislatures have both the power and the incentive to use eminent domain irresponsibly and unjustifiably at the expense of working-class neighborhoods. Such was the case with Sunset Manor subdivision in Missouri, where a city council, attempting to increase its tax base with a new shopping mall, apparently manipulated studies so that it could declare the subdivision as blighted.

A third and very serious problem with economic takings—indeed any takings—is that they undermine private property rights, the bedrock of a well-functioning economy. If property rights are jeopardized, homeowners and small businesses lose incentive to invest in property. Economic incentives, based upon individual property rights, are essential for economic growth as shown by the work of economist Hernando de Soto[9] and demonstrated by the fall of the Soviet Union.

III. [Un]Just Compensation and Serbonian Bogs

Just as the Supreme Court has destroyed any rational meaning of the term "public use," so has it wrecked the meaning of "just compensation." The compensation granted under current Supreme Court authority is unjust, even though the underlying theory seems plausible. The Court defines "just compensation" as requiring that the owner of condemned property be put in as good a financial position as if his property had not been taken, meaning that the owner should be paid the "fair market value," which is defined as "the price a willing buyer would pay a willing seller in the open market."[10]

The "fair market value" method as used by courts is a fiction that makes sense only to attorneys who enjoy cavorting in Serbonian bogs, from which extrication is

impossible.[11] It certainly does not make sense under either economics or traditional common law. To begin with, there is no willing seller in this equation, and the only willing buyer is the government. Market value, as ascertained by realtors, refers to the price an interested buyer would pay and assumes that the seller will accept a reasonable price given local market conditions.[12] In contrast, the judicial definition of "fair market value" is circular because it uses one unknown variable (fair market value) to define a second unknown variable (willing seller).

Regardless of semantics, the "fair market value" scheme is legally insufficient because it excludes all consequential damages, thus it is unable to fairly compensate owners for losses that would otherwise be included in tort damages. Thus, business owners lose business profits and goodwill, removal costs, relocation costs, litigation costs, and demoralization costs.[13] Homeowners lose any value that could be attributed to emotional or historical attachment to the property.[14] This exclusion of consequential damages from the plaintiff's losses in eminent domain cases is unjust: the clause was not designed to protect the thing owned; rather, it was designed to protect the owner of the thing.[15]

IV. The Radical (but Effective) Solution: Repeal the "Takings" Clause

While excluding economic takings might temporarily rejuvenate "public use," it does not remedy the interpretation of "just compensation." Courts and takings-minded legislatures could still torture language to find that a proposed economic development project has a "public use." The best solution is to return to common law by repealing the takings clause and forcing governments to justify their actions as if they were any other private party.

Governments would be forced to develop plans that would avoid taking property from one private person and giving it to another. Where they insisted on doing so, they would be forced to give compensation according to traditional tort law on conversion and would be forced to give just compensation. "The measure of damages recoverable in an action for the wrongful taking of property is ordinarily the market value of the thing converted, fixed as of the time and place of the conversion, and with interest from that date to the time of trial."[16] Normal compensatory damages would be available for loss of goodwill and other "subjective" damages. Punitive damages might also be available for a particularly recalcitrant governmental entity whose taking the jury found particularly offensive—subject, possibly to the reasonable, proportionate limitation the Supreme Court recently placed on punitive damage awards.[17]

V. Urban Planning and Real Estate Hold Out

One of the most interesting of all architectural developments is the pie-with-a-missing-slice shaped building phenomenon. We have all seen these. Typically, there will be a gigantic high rise edifice, but not shaped at its base as we might expect, as an unbroken square, rectangle, or circle, or some such other regular geometrical figure. Instead, there will be a missing piece, on which is often perched an older home. The architect might bemoan the lack of artistic or intellectual integrity of such a development, but those who favor markets and private property will see a certain beauty in them; an economic aesthetic, as it were.

What is the source of such constructions? In most cases, a private developer was able to buy up all the lots on an entire city block except for one tiny parcel. When all purchase offers failed to convince the "hold out"[18] to sell, the entrepreneur decided to go ahead with construction, but was limited to an irregular plot of land and hence, the structurally misshapen building. Such an event cannot be witnessed in any communist or dictatorship-run country. The central planners would simply not tolerate such uncooperativeness on the part of the hold out. Instead, it is a badge of honor for a capitalist nation, predicated upon the sanctity of private property rights.

Morally, it is easy to see that the misshapen edifice is preferable to the unblemished geometrically correct one. The former is predicated on voluntariness; no one is coerced into doing something against his will. The latter, in sharp contrast, is the result of violence or the threat of violence.[19] This is ethically problematic, in that it cannot in principle be distinguished from armed robbery.[20]

Even on the more mundane economic level there is something to be said on behalf of misshapen constructions that may emanate from hold out or opportunistic behavior. First, there is simply no way to distinguish such commercial interaction from any other normal business interaction. There are no objective criteria where it could be said that one man is an obstreperous hold out, while another refuses to sell to the developer for other reasons. All that is known in assuming the role of the disinterested economist is that A offers to purchase something from B, and the latter declines.

Second, assume *arguendo*, that there is indeed a discernable difference in the motivation underlying these supposedly two different behaviors (hold out and ordinary refusal to sell). Still, albeit paradoxically, it makes more economic sense to rely on a private property rights regime, which sometimes but not always eventuates in misshapen structures, than on a regime that allows some to ride roughshod over others with the goal of avoiding such architecture. Why? There are two and only two economic systems possible; all others are merely theme and variation on one of these two. They are, first, *laissez faire* capitalism, where each owner decides for himself how his property is to be used, and second, central planning, where the authority makes such determinations. But if we have learned anything whatsoever from the fall of the U.S.S.R. and the crumbling of the Berlin Wall, it is that central economic direction is a snare and a delusion. This applies to the Soviet style of plan-

ning as well as urban planning on which the basis of *Kelo* uncomfortably perches.

VI. Assembling Roads Without Eminent Domain

The opponent of eminent domain must squarely face the issue that without this type of legal recourse, there would be no roads or highways, or, at the very least, far less than the optimal mileage in this regard; this seems like a bigger challenge. Buildings can be constructed without expropriation. The result is likely to be only an aesthetically challenged edifice. But with thoroughfares, the result would appear to be nothing at all, in the face of the hold out.

How, then, would road assembly work in the absence of eminent domain? There are several means of accomplishing such. First, just as there is more than one way to skin a cat, there is more than one path that can be taken between any two points: for example, between Baton Rouge, Louisiana and British Columbia, Canada, to mention places where the present authors sometimes reside. One possibility is a direct route, taking in effect the hypotenuse, something that does not exist at present, not at least in the form of major highways. A second alternative is to go west from Baton Rouge on Interstate 10, and then north on Interstate 5 when we reach California. A third option is to start out in a northerly direction, along what is now Interstate 55, and then turn west tracing out roughly along the space now occupied by Interstate 90. Both these second plans call for going along the sides of a right triangle, the apex of which would be where Los Angeles and Chicago, respectively, are located.

There is almost an infinite number of other paths lying between the second and third tracings of the two right triangles,[21] with the hypotenuse or direct route being only one of these. The point is that the firm that wishes to build a road between Louisiana and British Columbia need not, at least initially, *purchase* any land at all. Rather, they can at a mere fraction of the cost, buy *options* to assemble land. For example, there are 100 feasible routes between the start and end points of our prospective road. Agents can be sent out in secret to purchase these options along all of them. As soon as, or, rather, when and if a hold out appears, who demands appreciably more for his parcel than would be justified by what farms or forest lands normally command in the given neighborhood, all efforts along that particular route may cease. That alone ought to suffice.

After all, while there are no private highways that have ever been put together, there are other long thin things that have: railroads. P.J. Hill built them without any eminent domain powers, whatsoever. But suppose that each and every one of these 100 routes runs into a hold out. Or, take the case where a single individual owns a long thin strip of land stretching from Chicago to Los Angeles, thus blocking our putative road at all points. The answer to this challenge[22] is to tunnel under, or build a bridge over, this man's land holdings.[23] It might be a bit more expensive but, if it is far less than what the "blockader" is demanding, a reasonable presumption, it will be the most feasible option to take.

The obvious objection to this "modest proposal" is the *ad coelum* doctrine. According to this perspective, it would be illicit for our road company to tunnel under, or bridge over the holdout's land, since he owns whatever lies below him, all the way down, in a decreasing, cone shaped mass extending to the core of the earth, and, in an increasing cone shaped area as we move in an upward direction, all the way to the heavens.

But the *ad coelum* doctrine is itself open to a host of criticisms.[24] One is a pragmatic concern: it would make air flight impossible, as *every* land owner over which an airplane appears could charge the latter whatever price he wished. This would not constitute a mere single hold out which might or might not be potentially overcome. This doctrine would be the death knell of air carriers, period.

Another objection is more philosophical: why should someone who owns a square mile of the surface of the planet be entitled to control land hundreds or even thousands of miles below his acreage? He never homesteaded[25] as much as a square inch of any of it. To be sure, the tunnel built below him may not be so close to his holdings that it causes cave-ins of his buildings. Similarly, why should he be justified in determining what takes place 30,000 feet above his property? And, just how far above him do his supposed property rights extend? Certainly, airplanes should not be allowed to "buzz" him by flying only feet above his head. But can he literally own the air space all the way to Mars? To the next solar system? The courts have quite rightly refused to accommodate so outlandish a doctrine.

VII. Is Private Better Than Public Use?

One final but very, very radical point. Given that for better or worse, and we have argued the latter in this article, there are to be takings: should they be limited to the purpose of promoting public uses,[26] as most critics argue, or should they be for the private use of other people? In other words, given that courts condemn the land of private party A, should only the government be able to use this property, or, can the state properly give or sell A's property to private party B? At first blush, this is preposterous. After all, given that we do not want to forcibly take A's property away from him, limiting the use to which it may be put to "public" uses at least decreases the incidence of such occurrences. However, *given* that such an unjustified act has already taken place, and has no implications for future such practices (a heroic assumption), are there any cogent reasons for wishing to allow B to enjoy the fruits of A's labors? Absolutely. It all depends upon the stance one takes toward the government. If one sees it as an unmitigated robber gang,[27] then there is at least a case for preferring that A's property ends up in B's hands,[28] for the latter is at least relatively innocent.

VIII. Conclusion

It is time to end this legal, economic and philosophical discussion of eminent domain. Legally, this initiative is incompatible with constitutional emphasis on takings for public use and the requirement of just compensation. Economically, the notion that takings actually promote economic welfare is dubious. Philosophically, with respect to the *ad coelum* doctrine, ask whether, in this era of Big Government, given a taking has already occurred, if it will really further the public wealth to add more property to the public sector, or would it not be better to simply focus on providing compensation that is truly just?

Endnotes

1. U.S. CONST. amend. V. (". . . , nor shall private property be taken for public use, without just compensation.").
2. *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005).
3. *See id.*
4. *Berman v. Parker,* 348 U.S. 26 (1954).
5. *Id.* at 32.
6. *Id.* at 33.
7. *Kelo,* 125 S. Ct. at 2665.
8. *Kelo*, 125 S. Ct. at 2671 (O'Connor, J. dissenting).
9. *See* HERNANDO DE SOTO, THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM (Basic Books 2000).
10. *See United States v. 564.54 Acres of Land,* 441 U.S. 506, 510, 516–517 (1979); *United States v. Miller,* 317 U.S. 369, 373 (1943); *Olson v. United States,* 292 U.S. 246, 255 (1934) (all holding that just compensation requires the owner be put in substantially the same pecuniary position as if his property had not been taken).
11. Parker B. Potter Jr., *Surveying the Serbonian Bog: A Brief History of a Judicial Metaphor*, 28 TUL. MAR. L. J. 519, 521–522 (2004) (tracing the origin of the term to Milton's *Paradise Lost*).
12. BLACK'S LAW DICTIONARY 1587 (8th ed. 2004).
13. *Id.*; *see also* Michael DeBow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579 (1995).
14. *See DeBow* at 587–588.
15. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN, 52–53 (1985).
16. *Morris v. Pearl St. Auction Co.*, 22 N.E.2d 740, 741 (Ohio Ct. App. 1939).
17. *BMW of N. Am. v. Gore,* 517 U.S. 569 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (discussing the due process clause and damage awards).
18. Walter Block, *Herbie the Holdout*, Frasier Forum, 28–30 (Oct. 1989).
19. If there is any doubt about this, let someone attempt to "hold out" against a governmental condemnatory order and see what happens to him.
20. But is not a duly processed taking compatible with, and even based on, the Constitution? Well, yes, at least as interpreted by the Supreme Court. However, as Spooner has shown, this is not a binding document, since no one signed it, and it would be improper to interpret voting, or taxpaying, as implicit consent to the Constitution. *See* Lysander Spooner, *No Treason No. I* (1867) (Larkspur, Colorado: Rampart College 1966), *available at* http://www.lysanderspooner.org/notreason.htm; Lysander Sponner, *No Treason, No. VI, The Constitution of No Authority* (1870), *available at* http://www.lysanderspooner.org/bib_new.htm; Lysander Spooner, *A Letter To Congressman Thomas F. Bayard: Challenging His Right—and That of All the Other So-Called Senators and Representatives In Congress—To Exercise Any Legislative Power Whatever Over The People of the United States* (Boston, May 22, 1882), *available at* http://www.lysanderspooner.org/bib_new.htm.
21. This is only approximately true, given that the contours of the Rocky Mountains sharply reduce the pathways that can be taken. Some would say that the possible paths would be radically decreased due to this consideration, but they have not reckoned with the tunneling option, to be discussed below.
22. Gordon Tullock, *Comment on 'Roads, Bridges, Sunlight and Private Property,' by Walter Block and Matthew Block*, 7 J. des Economistes et des Etudes Humaines, Dec. 1996, at 589–592; *Block vs. Epstein*, op. cit.
23. Walter Block & Matthew Block, *Roads, Bridges, Sunlight and Private Property Rights*, 7 J. Des Economistes Et Des Etudes Humaines, June-Sept. 1996, at 351–362; *available at* http://141.164.133.3/faculty/Block/Blockarticles/roads1_vol7.htm.
24. Walter Block, *Roads, Bridges, Sunlight and Private Property: Reply to Gordon Tullock*, 8 J. des Economistes et des Etudes Humaines, June-Sept. 1998, at 315-326; *available at* http://141.164.133.3/faculty/Block/Blockarticles/roads2_vol8.htm.
25. HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY (Kluwer 1993) ; John Locke, *An Essay Concerning the True Origin, Extent and End of Civil Government*, *in* SOCIAL CONTRACT 17–18 (E. Barker, ed., Oxford Univ. Press 1947); ELLEN FRANKEL PAUL, ED., PROPERTY RIGHTS AND EMINENT DOMAIN 71–158 (Transaction 1987) Check out this book. I cited the page numbers of the chapter that deals with what he is talking about, but I couldn't find anything specific. Call number JC 606.P388 1987; Michael S. Rozeff, *Original Appropriation and Its Critics (* September 1, 2005), http://www.lewrockwell.com/rozeff/rozeff18.html; MURRAY N. ROTHBARD, *FOR A NEW LIBERTY* (Macmillan 1973); *available at* http://www.mises.org/rothbard/foranewlb.pdf.
26. Such as national defense, roads, lighthouses, courts, etc. For the argument that there is no such thing as a public good, e.g., that the doctrine of public goods is entirely fallacious, *see* Walter Block, *Public Goods and Externalities: The Case of Roads*, 7 J. OF LIBERTARIAN STUDIES: AN INTERDISCIPLINARY REV.1-34 (Spring 1983), *available at* http://www.mises.org/journals/jls/7_1/7_1_1.pdf; Walter Block, *National Defense and the Theory of Externalities, Public Goods and Clubs, in* THE MYTH OF NATIONAL DEFENSE: ESSAYS ON THE THEORY AND HISTORY OF SECURITY PRODUCTION 301–334 (Hans-Hermann Hoppe, ed., Auburn: Mises Inst. 2003); ANTHONY DE JASAY, SOCIAL CONTRACT, FREE RIDE: A STUDY OF THE PUBLIC GOODS PROBLEM (Oxford Univ. Press 1989); Hans-Hermann Hoppe, *Fallacies of the Public Goods Theory and the Production of Security*, 9 J. LIBERTARIAN STUDIES 27–46 (Winter 1989), *available at* http://www.mises.org/journals/jls/9_1/9_1_2.pdf; Jeffery Hummel, *National Goods vs. Public Goods: Defense, Disarmament and Free Riders*, 4 THE REV. OF AUSTRIAN ECONOMICS, 88-122 (1990), *available at* http://www.mises.org/journals/rae/pdf/rae4_1_4.pdf.
27. *Spooner, supra* note 20; MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY 161-188, (N.Y. Univ. Press 2002) (1982).
28. We make another heroic assumption here that B is an innocent party, and not part and parcel of an illegitimate governmental undertaking.

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CAPS Annual Meeting Program co-chair Donna Case and past NYSBA president A. Thomas Levin

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Committee on Attorneys in Public Service

2007 Annual Meeting Program and Awards Reception

The Committee on Attorneys in Public Service held its 2007 Annual Meeting on January 23rd. The Committee presented two educational programs: "United State Supreme Court Term in Review: Introducing the Roberts Court" and "Eminent Domain: Is this land your land?"

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- **Joan Kehoe,** NYS Department of Agriculture and Markets
- **Murray Jarros,** NYS Association of Towns
- **The Honorable Judith Kaye,** Chief Judge, NYS Court of Appeals

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The New York State Bar Association Committee on Attorneys in Public Services (CAPS) invites all interested NYSBA members to consider joining one or more of its subcommittees. The following are brief descriptions of the work of CAPS subcommittees. If you are interested in joining any subcommittee, or would like more information, contact the committee chairs listed below or send an e-mail to CAPS@nysba.org . You may also call the NYSBA Membership Services Department at 518-487-5578.

Administrative Law Judge Subcommittee

This subcommittee focuses on the issues of concern and provision of services to the administrative law judges and hearing officers ("ALJs") that conduct administrative hearings in federal, state, and local agencies in New York State. The subcommittee is the only one of its kind in the New York State Bar Association.

This year, the subcommittee is working on two major projects. First, the subcommittee has developed and is presenting a Continuing Legal Education program on administrative adjudicatory procedures in New York. The CLE program is geared towards the general practitioner and covers administrative adjudication before various state and local agencies. Second, the subcommittee is considering the adoption of a Code of Conduct for state ALJs.

Although the subcommittee is devoted to the interests of ALJs, its membership is not limited—anyone interested in the issues concerning the implementation of administrative justice in New York State is welcome to join.

Hon. Catherine M. Bennett, ALJ cbennett@nysdta.org
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Annual Meeting Subcommittee

The Annual Meeting Subcommittee develops and implements continuing legal education programs for presentation at the NYSBA Annual Meeting. The subcommittee strives to provide programs with broad appeal to attorneys in all areas of government service on timely issues. Recent programs include an annual United States Supreme Court Review, protecting civil liberties during the fight against terrorism, ethics in government and government reform.

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Awards Subcommittee

The subcommittee on awards facilitates CAPS' recognition of outstanding efforts by public service attorneys. The subcommittee's primary function is to coordinate the annual presentation of CAPS' Award for Excellence in Public Service. Each year, subcommittee members solicit nominations for the award, review all nominations received, and identify the most worthy nominees. The subcommittee presents a list of finalists to the full CAPS committee, from which the award recipients are chosen. The Award for Excellence is presented each January at the State Bar Association's Annual Meeting.

This year, the subcommittee is also working to expand CAPS' recognition of public service attorneys. The subcommittee is developing a process that will enable CAPS to highlight achievements by public service attorneys who would not likely be considered for the annual award for excellence.

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Education Subcommittee

The Education Subcommittee coordinates continuing legal education programs, other than the programs for the NYSBA Annual Meeting. In the fall of 2006, the Subcommittee worked on a program on "Administrative Hearings Before New York State Agencies." This program took place at four locations throughout the state and presented information on the administrative hearing process at five state agencies that conduct high-profile or high-volume hearings: the Workers' Compensation Board, the Division of Tax Appeals and the Departments of Health, Environmental Conservation and Motor Vehicles. We welcome the involvement of other NYSBA members interested in coordinating other educational programs.

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Publications Subcommittee

This subcommittee will identify topics and plan to produce books of interest regarding the practice of law before government agencies to inform government and private sector lawyers concerning the policies, processes and precedent set.

Currently, an update of the 2002 *Ethics in Government* Book and *Legal Careers in New York State Government* are underway. Future projects may include books on technology law for government lawyers; procurement in New York; and special projects on particular offices, such as the Office of Counsel to the Governor.

Barbara F. Smith bfsmith@courts.state.ny.us

Legislative Policy Subcommittee

The Legislative Policy Subcommittee serves as a forum for the development of policy affecting the practice of public law and the interests of public service attorneys in all branches and levels of government. This Subcommittee supports the policy program of the New York State Bar Association and develops its own policy positions, including legislation and legislative memoranda as warranted.

This year, the Legislative Policy Subcommittee is working to advance reform of the collateral source rule (CPLR 4545); clarify the public sector attorney-client privilege (CPLR 4503); support equal benefits for same-sex partners of public sector employees, and make public service more economically feasible by enhancing loan forgiveness opportunities. We welcome participation, including referrals of draft legislation and policy issues, from all public sector constituencies in New York State.

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Special Programs Subcommittee

The Special Programs Subcommittee creates, coordinates and participates in unique initiatives of interest to government lawyers. This new Subcommittee strives to provide programs of interest to those in public service. We are looking for ideas and welcome members who would like participate in a wide range of special initiatives and events.

Donna Ciaccio Giliberto donna@nycom.org

Web Subcommittee

Our general goal for the year is to expand the content of the CAPS website, i.e., by providing links to various sites of interest to government lawyers and to make the website more interactive by posting articles and FAQs, while soliciting responses to the articles, other questions to be answered by CAPS members, etc. We welcome the involvement of other NYSBA members interested in developing online resources for government attorneys.

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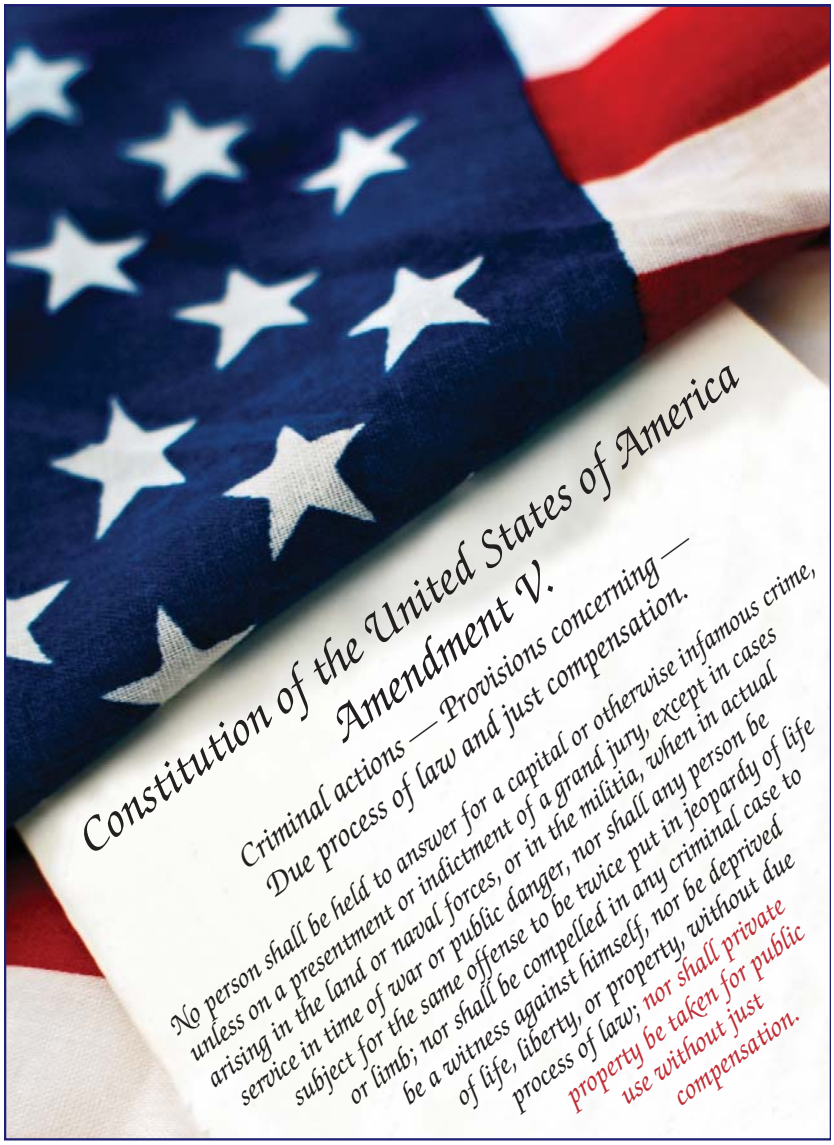

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