

CONDEMNATION LAW AND PROCEDURES

IN NEW YORK

Editor
Jon Santemma, Esq.

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FOREWORD

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

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

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

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

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

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

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

2 *Id.* at 84.

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

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

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

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

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

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

“the government’s pursuit of a public purpose will often benefit private parties.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Jon N. Santemma

PREFACE

BY: HONORABLE FRANK S. ROSSETTI

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

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

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

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

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

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

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

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

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

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

ABOUT THE EDITOR

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

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

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