

Eminent Domain Revisited

by Devala A. Janardan, Associate Counsel

This month's column is a bit unusual– it doesn't deal directly with federal law, but, rather, addresses two state court decisions on eminent domain, a claim usually dealt with in federal court. The two New York cases, quite at odds with each other, put the Supreme Court's infamous decision in *Kelo v. City of New London*[1] back in the spotlight.

The first case is *Goldstein v. New York State Urban Development Corp.*,[2] dealing with a large-scale project called Atlantic Yards, consisting of a 675,000-square-foot arena and sixteen high-rise towers containing up to 6,430 dwelling units. In late 2006, respondent Empire State Development Corporation (ESDC), New York State's economic development agency, issued a determination that the State should use its eminent domain power to take certain privately-owned properties on the proposed site. Under State law, eminent domain can only be utilized after finding that the area in question is blighted.[3] The controversy revolves around a three-block area, which until recently was never previously designated as blighted. The petitioners brought a challenge in federal court, including under the Fifth Amendment of the Federal Constitution, but this was dismissed by the district court[4] and affirmed by the Second Circuit Court of Appeals.[5] The state law claims were dismissed without prejudice.

The New York Constitution provides that "[p]rivate property shall not be taken for public use without just compensation."[6] The petitioners' first contention under the State Constitution was similar to the argument in *Kelo* – that the agency determination authorizing the condemnation of their properties was not for the purpose of putting the properties to a "public use" but, rather, for a private economic gain. New York's highest court disagreed, stating that the legislature has the power to "provide in such manner, by such means and upon such terms and conditions as it may prescribe…for the clearance, replanning, reconstruction and rehabilitation of [blighted] areas,"[7] and this includes the power of eminent domain.[8]

The main controversy in the case was whether or not the areas at issue could be appropriately labeled as "blighted." The court admitted that the city blocks in question would not be historically viewed as blighted; however, "as the complexities of urban conditions became better understood, it has become clear that the areas eligible for renewal are not limited to 'slums' as that term was formerly applied, and that …economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose.[9]" Unfortunately for the petitioners, the court refused to involve itself with determining whether the city blocks in question were, in fact, blighted. In the court's own words, "[w]hether a matter should be the subject of a public undertaking – whether its pursuit will serve a public purpose or use – is ordinarily the provide of the Legislature, not the Judiciary."[10]

Less than two weeks after the New York Court of Appeals expressed its intention that New York courts should not get involved in blight determinations, a lower court did just that.[11] In 2001, Columbia University began purchasing property in the area that would be used to develop a 17-acre new campus in the Mahattanville area of West Harlem. In 2004, Columbia met with the ESDC and the New York City Economic Development Corporation (EDC) regarding the condemnation of the remaining land, and entered into an agreement whereby the University would pay the ESDC for costs incurred by ESDC relating to the project area. An environmental and planning firm (AKRF) was brought in by the University to attend the meetings. Ultimately, AKRF was retained by ESDC to evaluate conditions at the site. In 2007, AKRF issued a study finding that "48 of the 67 lots in the study area…have one or more substandard conditions, including poor or critical physical lot conditions," and concluded that the project area was "substantially unsafe, unsanitary, substandard, and deteriorated." Ultimately, ESDC used these findings and authorized the acquisition of the property pursuant to New York law.

The New York Supreme Court, First Department, concluded that "ESDC's determination that the project has a public use, benefit or purpose is wholly unsupported by the record and precedent."[12] The court looked at *Kelo*, and while it agreed that the "*Kelo* plurality reaffirmed the broad deference accorded to the legislature in determining what constitutes a valid public use,"[13] it noted that Justice Kennedy in *Kelo* detailed why the City of New London's action in *Kelo* was permissible:

- The city's awareness of its depressed economic condition, by virtue of a recent closing of a major employer and the state's designation of the city as a distressed municipality;
- The formulation of a comprehensive development plan meant to address a serious citywide depression;
- The substantial commitment of public funds to the project before most of the private beneficiaries were known;
- The city's review of a variety of development plans;

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and provide—what—20 comments from across the country richly laced with legal theories and actual experience so the city attorney can walk into the meeting looking, if not brilliant, then at least surprisingly well-informed." And, as Karen Emerson of Florida added, "When folks are reminded that the details are important and that the long-term legal impact should be considered, it sometimes is just not what they want to hear. But if you can look to your colleagues on the LIST to bolster your position or provide some great guidance, then it's like someone has your back."

Surely, the telephone conversation with a nearby colleague offered opportunity for collegial conversation plus the much-appreciated guidance. In the 21st century, however, municipal attorneys have much broader access to colleagues for both socializing and legalizing.

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- The city's choice of a private developer from a group of applicants rather than picking out a particular transferee beforehand;
- The identities of most of the private beneficiaries being unknown at the time the city formulated its plan; and
- The city's compliance with elaborate procedural requirements that facilitated the review of the record and inquiry into the city's purposes.[14]

In this case, Columbia's and the ESDC's actions could not be more different when compared to the redevelopment of New London. The court noted that Manhattanville was not labeled as being in a "depressed economic condition when EDC and ESDC embarked on their Columbia-prepared-and-financed quest."[15] The study summaries which found the area to be blighted were characterized by the court as "preposterous" and that "[e]ven a cursory examination of the study reveals the idiocy of considering things like unpainted block walls or loose awning supports. [V]irtually every neighborhood in the five boroughs will yield similar instances of disrepair that can be captured in close-up technicolor."[16] The court also noted that the only alternative plan considered was a plan presented by West Harlem Community Board 9, which was rejected by ESDC because it "[did] not meet Columbia's needs as Columbia had defined them."[17]

With the U.S. Supreme Court recently hearing[18] its first takings case since *Kelo*, and federal and state courts still coming to varying versions on interpreting *Kelo*, municipal attorneys should keep a close watch on cases such as the ones described above—IMLA will bring you the latest on these cases and other eminent domain cases.

Notes

1. 545 U.S. 469 (2005).
2. Goldstein v. New York State Urban Development Corp., No. 178, 2009 WL 4030939 (N.Y. Nov. 24, 2009).
3. N.Y. Uncons. Law § 6253(6)(c) (McKinney 2009).
4. Goldstein v. Pataki, 488 F. Supp 2d 254 (E.D.N.Y. 2007).
5. Goldstein v. Pataki, 516 F. 3d 50 (2nd Cir. 2008), *cert denied*, 128 S.Ct. 2964 (2008).
6. N.Y. Const. art. I, § 7(a).
7. N.Y. Const.. art. XVIII, § 1.
8. N.Y. Const. art. XVIII, § 2.
9. Cannata v. City of New York, 11 N.Y.2d 210 (N.Y. 1962).
10. *Goldstein*, No. 178, slip op. at 16.
11. Kaur v. New York State Urban Develop. Corp., No. 778, 2009 WL 4348472 (N.Y.A.D. Dec. 03, 2009).
12. *Id.* at 5.
13. *Id.* at 7.
14. *Id.* at 8-9.
15. *Id.* at 9.
16. *Id.* at 12.
17. *Id.* at 9.
18. Stop the Beach Renourishment, Inc. v. Florida Dept. of En'l Protection, 998 So.2d 1102 (Fla. 2008), *cert. granted*, 129 S. Ct. 2792 (U.S. June 15, 2009) (No. 08-1151). ML

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