# MOVING THE CAT INTO THE HAT: THE PURSUIT OF FAIRNESS IN CONDEMNATION, OR, WHATEVER HAPPENED TO CREATING A "PARTNERSHIP OF PLANNING?"

*Michael Rikon*[*]



[*] Partner, Goldstein, Rikon & Rikon, P.C and formerly a consultant to the New York State Commission on Eminent Domain. L.L.M., New York University; J.D., Brooklyn Law School; .B.S., New York Institute of Technology. The author's career as a condemnation lawyer has spanned over forty years and he has represented clients in several important eminent domain decisions in New York. It should be noted that due to his depth and experience in eminent domain litigation, the author has been involved in several of the cases mentioned in this article.

## INTRODUCTION

The New York State Commission on Eminent Domain[1] was created by Chapter 621 of the Laws of 1970 "for recodification and modernization of the law, procedures and practices of eminent domain."[2] The Commission issued its first report in 1971 and noted that there were approximately 3,372 local government units with the power of eminent domain.[3] This figure did not include "[s]tate departments and agencies, public authorities, utilities, and even private bodies," whose addition would swell the number of condemnors to several thousands more.[4] The Commission further noted that there were "well over 50 various procedures utilized in New York State" at that time.[5] The Commission eventually drafted a proposed Uniform Eminent Domain Procedure Act (EDPA), which was adopted as the Eminent Domain Procedure Law in 1977.[6] In this article, we will concentrate only on those provisions dealing with the determination of the need and location of a public project prior to acquisition—and, the ability to challenge the same. [7]

## I. THE PUBLIC HEARING

It is notable that in its 1973 report, the Commission strongly "recommended that during the planning phase of a public project, a procedure (public hearings) should be established to afford citizens the opportunity of participation in the planning

[1] Eminent Domain is the right of the sovereign to take your property. It is an inherent power of government that is necessary for the fulfillment of sovereign functions. Indeed, one will find nothing in the Constitution creating the power, only limitation on its exercise. The limitation is found within the Fifth Amendment to the United States Constitution: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V, § 5. These limitations are made applicable to the States by the Fourteenth Amendment. The Fifth Amendment was adopted on December 15, 1781. U.S. CONST. amend. V, § 5. The Fifth Amendment did not apply to the states prior to 1897 when it was decided that it applied via the Fourteenth Amendment's Due Process Clause. Chicago, B. & Q. R.R. Co. v. Chicago, 166 U.S. 226, 238–39 (1897).

[2] 1970 N.Y. Laws 2272.

[3] N.Y. STATE COMM'N ON EMINENT DOMAIN, 1971 REPORT OF THE STATE COMM'N ON EMINENT DOMAIN 12 (1971).

[4] *Id.*

[5] N.Y. STATE COMM'N ON EMINENT DOMAIN, 1973 REPORT OF THE STATE COMM'N ON EMINENT DOMAIN 8 (1973) [hereinafter 1973 REPORT].

[6] 1977 N.Y. Laws 1337.

[7] N.Y. EM. DOM. PROC. LAW §201–208 (McKinney 2003 & Supp. 2010).

decision."[8] The "condemnor's decision concerning the necessity and location of a proposed public project should reflect both consideration of the project's detrimental and beneficial effects on a locality and should also include a specific statement of the basis of the condemnor's decision."[9] This first draft of New York's Eminent Domain Procedure Law (EDPL) also contained the recommendation "that the condemnor's decision should be reviewable by an impartial administrative agency which would have the power to approve, conditionally approve, or disapprove the condemnor's decision."[10] This remarkable provision was quickly removed from subsequent drafts of the proposed law and never adopted. Indeed, the Commission eliminated the entire subject of the necessity of the taking from the scope of judicial review and stated that "[u]nder present case law, the question of necessity of the taking of a parcel, is a legislative question and is not subject to judicial review."[11]

The Commission, however, remained steadfast that there must be a "partnership of planning."[12] This partnership would be the result of increased public participation in the early planning stages of a project requiring use of the power of eminent domain.[13] Among the salutary effects were to bring to the attention of the planners any unconsidered problems affecting the community and environment. It was the Commission's intent to provide a meaningful public hearing and to avoid hearings that just pay lip-service to the public.[14] But, alas, it was not to be. The failure of the salutary objective of avoiding lip-service to the public at eminent domain hearings is best shown by the procedure used by the New York State Urban Development Corporation (UDC).[15] When it conducts a public hearing pursuant to Section 201 of the

[8] 1973 REPORT, *supra* note 5, at 10.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 34. But there is still a statement in Section 101 of the EDPL which notes that the purpose of the EDPL is to establish opportunity for public participation in the planning of public projects necessitating the exercise of eminent domain and to give consideration of the need to acquire property for public uses as well as the legitimate interests of private property owners, local communities, etc. *See* N.Y. EM. DOM. PROC. LAW §101.

[12] 1973 REPORT, *supra* note 5, at 12.

[13] Historically, there was no requirement of notice that a parcel would be selected for acquisition. *See, e.g.*, *In re* Vill. of Middletown, 82 N.Y. 196, 201 (1880); Zember v. State of New York, 160 N.Y.S.2d 510, 514 (N.Y. Ct. Cl. 1957).

[14] 1973 REPORT, s*upra* note 5, at 13–14 (citing Brooks Atkinson, *Citizens Without Standing*, N.Y. TIMES, Aug. 3, 1973, at 31).

[15] Also referred to as the Empire State Development Corporation.

EDPL, it does not bother to have a director or officer present; rather it retains an attorney to conduct the hearing. In one of the cases arising from the 42nd Street Development Project, one judge found that this was a denial of the property owner's right to a full, fair hearing, but he was quickly reversed.[16] In another recent case, the Appellate Division, Second Department dismissed a property owner's complaint that it was limited in speaking time.[17] From personal experience, most public hearings limit speakers to three or four minutes. Furthermore, in most hearings there is typically no response from those running the hearing to anything said or any questions posed. Consequently, the eminent domain public hearing rarely, if ever, changes the proposed condemnation.[18] There is no "partnership of planning" and the hearing is little more than a dog and pony show that covers the matters set forth in Section 203 of the EDPL.[19] In other words, it is a hearing that basically just pays lip-service to the public. Recent decisions by the New York State Courts on challenges to "Determinations and Findings," adopted pursuant to Section 204 of the EDPL, seem to bend over backwards in the perceived required deference to what are called "legislative determinations." In doing so, there has been an abdication of judicial function. Courts must consider the due process and procedural fairness in the acquisition of private land in the name of redevelopment. As Second Circuit Judge Wesley stated, "to say

[16] Orbach v. N.Y. State Urban Dev. Corp., 442 N.Y.S.2d 900, 904 (Sup. Ct. 1981), *rev'd sub nom.* Mets Parking Inc. v. N.Y. State Urban Dev. Corp., 451 N.Y.S.2d 379, 379 (App. Div. 1982), *aff'd*, 449 N.E.2d 706, 707 (N.Y. 1983). The Appellate Division, First Department ruled that the public hearing held by the New York State Urban Development Corporation satisfied the legal requirements for such a hearing under Section 16 of the Urban Development Corporation Act. *See* 1968 N.Y. Laws 824, § 16(1) (codified as amended at N.Y. UNCONSOL. LAW § 6266(2)(c) (McKinney 2000)).

[17] Aspen Creek Estates, Ltd. v. Town of Brookhaven, 848 N.Y.S.2d 214, 218 (App. Div. 2007).

[18] Small towns or communities have discontinued proposed condemnations when there was extensive public outrage expressed at the hearing. Even the New York State Urban Development Corporation backed away from a proposed taking after the press ridiculed a project which proposed condemning 99 Orchard Street in the Lower East Side of Manhattan, which was a modernized tenement, to turn over to the Lower East Side Tenement Museum. *See* Denny Lee, *A Tenement Owner Gets a Reprieve As a Museum Peers Over His Shoulder*, N.Y. TIMES, Aug. 11, 2002, at 4.

[19] At the public hearing, the condemnor shall outline the purpose, proposed location, or alternative locations of the the public project and any other information it considers pertinent. N.Y. EM. DOM. PROC. LAW §203 (McKinney 2003).

that no right to notice or a hearing attaches to the public use requirement would be to render meaningless the court's role as an arbiter of a constitutional limitation on the sovereign's power to seize private property."[20] Furthermore, by virtue of recent decisions by the New York State Court of Appeals, which will later be discussed in detail, it appears to be completely possible to condemn a property in New York for any reason.

How did New York become so oblivious to property rights? In 2009, the Institute for Justice published a report that stated, New York is one of "the worst state[s] in the nation when it comes to eminent domain abuse" for private gain.[21] Not that the country as a whole enjoys an enviable reputation for property rights.[22]

## II. DON'T BLAME IT ON KELO V. CITY OF NEW LONDON

Many mistakenly blame New York's lack of respect for property rights on the U.S. Supreme Court's notorious decision, *Kelo v. City of New London*, where the Court eviscerated the U.S. Constitution's public use clause by holding that a property owner's land can be taken for economic development.[23] Under this interpretation, the U.S. Constitution no longer places any meaningful check on the state's powers, a result that was certainly not intended by its framers.[24] As Justice O'Connor noted in her dissenting opinion in *Kelo*, the text of the Fifth Amendment "'impos[es] two distinct conditions on the exercise of eminent domain: '[t]he taking must be for a 'public use' and 'just compensation' must be paid to the owner.'"[25]

It is the public use requirement which imposes a more basic limitation, circumscribing the very scope of the eminent domain power. As Justice O'Connor further explained, "[g]overnment

[20] Brody v. Vill. Of Port Chester, 434 F.3d 121, 129 (2d Cir. 2005), *remanded to* No. Civ.7481, 2007 U.S. Dist. LEXIS 15746, at * 28 (S.D.N.Y. Mar. 7, 2007).

[21] DANA BERLINER, INST. FOR JUSTICE, BUILDING EMPIRES, DESTROYING HOMES: EMINENT DOMAIN ABUSE IN NEW YORK 1 (2009) [hereinafter BUILDING EMPIRES], *available at* http://www.ij.org/images/pdf_folder/other_pubs/buildingempires.pdf.

[22] According to a study by the *Wall Street Journal* and the Heritage Foundation, the United States ranks eighth after Canada and before Denmark in the 2010 Index of Economic Freedom. The Heritage Foundation, *The Link Between Economic Opportunity & Prosperity: The 2010 Index of Economic Freedom*, HERITAGE.ORG, www.heritage.org/ index/ (last visited Nov. 28, 2010).

[23] 545 U.S. 469, 489–90 (2005).

[24] *See id.* at 506 (Thomas, J., dissenting).

[25] *Id.* at 496 (quoting Brown v. Legal Found. of Wash., 538 U.S. 216, 231–32 (2003)).

may compel an individual to forfeit her property for the *public's* use, but not for the benefit of another private person."[26] *Kelo* created a great public outcry when people learned that their homes could be condemned to give to a private developer to build anything,[27] including, for example, a Costco warehouse store—something that actually occurred in Port Chester, New York, which was a condemnation proceeding that was fraught with abuse.[28]

One of the statements made by Justice Stevens in the *Kelo* decision was that the states are free to adopt their own limitations to prevent condemnation of private property to turn over to another private party.[29] And, as of this date, some forty-three states have done just that, preventing private-to-private takings, but not New York.[30]

In 1975, the New York State Court of Appeals decided *Yonkers Community Development Agency v. Morris*, which allowed the

[26] *Id.* at 497 (citing Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 336 (2002)).

[27] The majority decision in *Kelo v. City of New London* written by Justice Stevens was, as this author believes, wrong—wrong in its holding and wrong on its facts. At the outset, the Supreme Court noted that it "would no doubt be forbidden from taking [privately owned] land for the purpose of conferring a private benefit on a particular private party." *Id.* at 477 (citing Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 245 (1984)). The *Kelo* Court then stated, "[t]he takings before us, however, would be executed pursuant to a 'carefully considered' development plan." *Id.* at 478. This statement, which became the predicate for sustaining an eminent domain proceeding that outraged most of America, was absolutely and totally wrong. Not only was there never a finding of blight in the Fort Trumbull area of New London, but there never was an agreement with any developer, sponsor, or agency to do anything with the land. There was no development plan, let alone a development plan which was "carefully considered." Five years after the Supreme Court's decision and the demolition of the property owners' homes, the land lies vacant and barren. Jeff Benedict, "*Little Pink House" All Too Easy to Condemn*, HARTFORD COURANT, Jan. 25, 2009, *available at* http://www.jeffbenedict.com/cms/images/ documents/ littlepinkhousecourantjeffbenedict.pdf. According to the published reports, the City of New London has had no success in finding a developer to build a hotel, the proposed use, or for that matter, any use at all. *Id.* As one reporter noted: "A few weeks ago I visited the neighborhood, ground zero in the famous battle between the city and homeowners. Here's what I saw: a sea of brown dirt littered with old rusty nails, broken bricks and slivers of glass—the only signs that people once lived there. Every home has vanished. Nothing has been built in their place. The neighborhood is a ghost town, a scarlet letter on the city's forehead." *Id.* Further, Pfizer, the sponsor of the project, left completely. *Id.*

[28] *See* Didden v. Vill. of Port Chester, 173 F. App'x 931, 932–33 (2d Cir. 2006) (decision not selected for publication in the Federal Reporter).

[29] *Kelo*, 545 U.S. at 489.

[30] BUILDING EMPIRES, *supra* note 21, at 23.

condemnation of private property placed in an urban renewal plan for the removal of "substandard" conditions.[31] In fact, the properties were not substandard but were taken for the expansion of Otis Elevator Company, a leading industrial employer in the City of Yonkers. The court applied the liberal rather than literal definition of a "blighted" area and permitted the taking.[32] Judge Fuchsberg noted in the decision:

> [I]t is clear that in such situations, courts are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases. The findings of the agency are not self-executing. A determination of public purpose must be made by the courts themselves and they must have a basis on which to do so.[33]

The UDC had been created in 1968 by Governor Nelson Rockefeller in response to the riots that erupted in cities across the country in the mid-1960s.[34] The legislation provided that UDC, as it was originally known, would possess extraordinary powers including eminent domain and could pre-empt zoning laws and even building regulations.[35] It could do all this without obtaining the approval of any city, county, or state agency.[36] While the UDC required a finding of blight to condemn,[37] this would not necessarily stand in the way as specific legislation could be passed to authorize a project anyway—as was the case with the ill-proposed expansion of the New York Stock Exchange.[38] In *Matter of Fisher*, the Appellate Division, First Department, dismissed a petition brought under Section 207 of the EDPL challenging the proposed condemnation of 45 Wall Street in Manhattan, a luxury building, for the construction of a

---

[31] 335 N.E.2d 327, 334 (N.Y. 1975).

[32] If one thinks that this was outrageous, consider that even after receiving such municipal largess, Otis closed down its plant in Yonkers in 1982. Yonkers then sued Otis in the United States District Court for the Southern District of New York only to have its suit for breach of contract, unjust enrichment and fraud dismissed with the imposition of sanctions since there was no colorable factual basis for filing a fraud claim. It seems that Yonkers failed to obtain any written specific commitment by Otis to continue production as its Yonkers facility. *See* City of Yonkers v. Otis Elevator Co., 844 F.2d 42, 43–44 (2d Cir. 1988).

[33] *Yonkers Cmnty. Dev. Agency*, 335 N.E.2d at 333 (citation omitted).

[34] ALEXANDER GARVIN, THE AMERICAN CITY: WHAT WORKS, WHAT DOESN'T 299 (1996).

[35] *Id.*

[36] *Id.*

[37] N.Y. UNCONSOL. LAW § 6260 (c)(1) (McKinney 2000).

[38] *In re* Fisher, 730 N.Y.S.2d 516, 516–17 (App. Div. 2001).

proposed new New York Stock Exchange.[39] The court stated:

> 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 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.[40]

## III. IN NEW YORK, A CONDEMNOR CAN CONDEMN A KASHA KNISH

The New York State Urban Development Corporation, with its extraordinary powers pre-exempting zoning and building code requirements, has been aggressively utilized to condemn privately owned property to transfer to private developers.[41] The concept has not gone over well with those standing in the way. It is an aphorism in criminal law that a good prosecutor could get a grand jury to "indict a ham sandwich."[42] With regards to condemnations in New York, it can fairly be said that in New York, a condemnor can condemn a Kasha Knish.

New York politicians are so used to the power of condemnation that a current proposal to build a mosque near ground zero in Downtown Manhattan was met with the promise by a candidate for governor that, if he was elected, he would condemn it.[43] New York City Mayor, Michael Bloomberg, chided those opposed to religious freedom and property rights who would use the power of eminent domain to prevent the mosque from rising.[44] At the same time, the Mayor is hardly concerned about the City's casual

---

[39] *Id.* at 516.

[40] *Id.* at 517 (citation omitted); *see also*, Charles V. Bagli, *45 Wall St. is Renting Again Where Tower Deal Failed*, N.Y. TIMES, Feb. 8, 2003, at B3. This self-imposed restrictive review criterion proved very expensive for taxpayers of New York. The project which was poorly conceived never happened and was abandoned. At the end of the day, there was an estimated loss of $109 million dollars. *Id.*

[41] *See* Floyd v. N.Y. State Urban Dev. Corp., 300 N.E.2d 704, 706 (N.Y. 1973).

[42] TOM WOLFE, THE BONFIRE OF THE VANITIES 629 (1987).

[43] Robert J. McCarthy, *Collins Endorses Paladino, Cites Business Background Backs Fellow Republican In His Run For Governor*, BUFFALO NEWS, July 23, 2010, at D1 (quoting candidate Carl Paladino: "As governor I will use the power of eminent domain to stop this mosque and make the site a war memorial instead of a monument to those who attacked our country."). Oddly enough condemnation is not prohibited under the Religious Land Use and Institutionalized Persons Act of 2000. *See* 42 U.S.C. § 2000cc; s*ee also* St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 640 (7th Cir. 2007).

[44] Michael Howard Saul, *Mayor Jabs at Paladino—Ground Zero Mosque Issue Heating Up*, WALL ST. J., July 23, 2010, at A19.

use of eminent domain on a grand scale.[45] Further, condemnation by local government to rid itself of a problem is not an unknown allegation in New York; a challenge by a petitioner *against* the government on that basis, however, is hardly ever successful.[46] Condemnation is not limited to real estate. Actually, the EDPL allows the condemnation of any property, not just real estate.[47] It has been used to condemn a historic carousel.[48] And, even leasehold interests created by a shopping mall lease which precluded a mall owner from allowing any further anchor tenants could be specifically condemned.[49]

## IV. PROCEDURE TO CHALLENGE

Ninety days after the conclusion of a public hearing, which is jurisdictional, a condemnor is to make a Determination and Findings concerning the proposed public project.[50] There is a requirement to publish a synopsis of the determination in at least two successive issues of a newspaper.[51] The challenge of a Determination and Findings must be made by filing a petition pursuant to Section 207 of the EDPL within thirty days of the condemnor's publication of its synopsis of the Determination and Findings.[52] This is an extremely limited time period and in and of itself works as a denial of procedural due process. As originally drafted, the time period was to have been four months and the challenge was to follow "the procedure prescribed by Article 78 of the Civil Practice Law and Rules."[53] Indeed, not only was the time period drastically reduced, but as adopted, Section 207 of the

[45] *See* Fernando Santos, *E-mails Show State Officials' Skepticism About Willets Point Project*, N.Y. TIMES, Aug. 13, 2010, at A17.

[46] *See* Rafferty v. Town of Colonie, 752 N.Y.S.2d 725, 728 (App. Div. 2002) (holding the argument that the proposed taking was to eliminate adult entertainment business was unpersuasive); Broadway Schenectady Entm't. Inc. v. Cnty. of Schenectady, 732 N.Y.S.2d 703, 704–05 (App. Div. 2001); Faith Temple Church v. Town of Brighton, 794 N.Y.S.2d 249, 251 (App. Div. 2005).

[47] N.Y. EM. DOM. PROC. LAW § 708 (McKinney 2003 & Supp. 2010).

[48] Vivian S. Toy, *Around In Circles*, N.Y. TIMES, May 1, 2005, at 14LI 1.

[49] Kaufmann's Carousel, Inc. v. City of Syracuse Indus. Dev. Agency, 750 N.Y.S.2d 212, 219 (App. Div. 2002).

[50] N.Y. EM. DOM. PROC. LAW § 204(A). Many condemnors hold the hearing open for an additional period of time for submissions of further comments or materials.

[51] *Id.* § 204(A).

[52] *Id.* § 207(A).

[53] N.Y. STATE COMM'N ON EMINENT DOMAIN, 1972 REPORT OF THE STATE COMM'N ON EMINENT DOMAIN 11 (1973).

EDPL mandated that the petition was to be an original proceeding filed in the Appellate Division embracing the county where the property was located. Further, only a "condemnee" as defined by Section 103(c) of the EDPL could file a petition.[54] The EDPL provides that the scope of review is limited to four issues:

> 1. Was the proceeding in conformity with Federal and State constitutions;
> 2. Whether the proposed acquisition is within the condemnor's statutory jurisdiction or authority;
> 3. Whether the condemnor's determination and findings were made in accordance with procedures set forth in this article [Article 2] and with Article 8 of the Environmental Conservation Law (SEQRA); and
> 4. Whether a public use, benefit, or purpose will be served by the proposed acquisition.[55]

Although Section 207(C) of the EDPL only provides four areas of review, it is clear that there are at least two additional grounds for granting a petition to set aside a Determination and Findings—an "excess taking" can be challenged as well as a "pretext taking."[56]

A petitioner will find it extremely difficult to prevail and have a petition granted to reject the condemnor's Determination and Findings. Every decision in a challenge will note that the scope of the court's review is extremely limited.[57] A Section 207 proceeding is a summary review procedure,[58] "[it] is not a *de novo* review . . . either with respect to the public purpose issue, where review of the agency determination is circumscribed, or as to other issues, where courts review compliance with statutory . . . evidence in the record that was before the agency at the time of its decision."[59] If an adequate basis for a determination is shown

[54] *See* East Thirteenth St. Cmty. Ass'n. v. N.Y. State Urban Dev. Corp., 641 N.E.2d 1368, 1371 (N.Y. 1994); *see also* McCarthy v. Town of Smithtown, 797 N.Y.S.2d 555, 555 (App. Div. 2005) (a non-condemnee is entitled only to a properly conducted hearing held on proper notice).

[55] N.Y. EM. DOM. PROC. LAW § 207(C).

[56] *Id.*

[57] Engels v. Vill. of Potsdam, 727 N.Y.S.2d 202, 203 (App. Div. 2001).

[58] Vill. Auto Body Works v. Vill. of Westbury, 454 N.Y.S.2d 741, 743 (App. Div. 1982).

[59] Jackson v. N.Y. State Urban Dev. Corp., 494 N.E.2d 429, 437 (N.Y. 1986) (citation omitted).

and the objector cannot show that the determination was without foundation, the agency's determination will be confirmed.[60]

## V. WAS THE PROCEEDING IN CONFORMITY WITH FEDERAL AND STATE CONSTITUTIONS?

Arguing that the project will benefit a private party and that the proposed condemnation will thereby violate the constitutional restraints against the condemning private party to give another private party will fall on deaf ears as long as it could be said the public purpose is dominant.[61]

As noted earlier, virtually any purpose will be acceptable including the condemnation of a historic waterfront for a shopping mall[62] to condemning non-blighted buildings for a basketball arena,[63] or for that matter, taking private land being developed as a CVS drugstore to a private developer who, after demanding $800,000 as an alternative to condemnation, then had it condemned for a Walgreen's drug store.[64] In one of the many legal challenges to the 42nd Street Development project, a property owner alleged that the boundaries of the project were corruptly drawn to benefit a hotel because the owner was well-connected politically, but the court held that it has a narrow role and it was only concerned that the taking is rationally related to some legitimate public policy.[65]

## VI. PUBLIC USE DOESN'T REALLY MEAN PUBLIC USE

*Kelo* relied, to a large extent, on *Berman v. Parker* which allowed the condemnation of a department store in good repair so as to allow a blight removal project.[66] New York's constitution should preclude the exercise of the power of eminent domain for private development. The language of the limitation in New

[60] Long Island R.R. Co. v. Long Island Light Co., 479 N.Y.S.2d 355, 363 (App. Div. 1984), *aff'd*, 479 N.E.2d 226 (N.Y. 1985).

[61] *See* Waldo's, Inc. v. Vill. of Johnson City, 543 N.E.2d 74, 75–76 (N.Y. 1989); *see also* Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 331 (N.Y. 1975).

[62] *See* Brody v. Vill. of Port Chester, 434 F.3d 121, 124 (2d Cir. 2005).

[63] *See* Goldstein v. N.Y. State Urban Dev. Corp., 921 N.E.2d 164, 166 (N.Y. 2009).

[64] *See* Didden v. Vill. of Port Chester, 173 Fed.App'x 931, 932–33 (2d Cir. 2006).

[65] Rosenthal & Rosenthal, Inc. v. N.Y. State Urban Dev. Corp., 605 F.Supp. 612, 616–18 (S.D.N.Y. 1985), *aff'd*, 771 F.2d 44 (2d Cir. 1985).

[66] Berman v. Parker, 348 U.S. 26 (1954).

York's Constitution is a model of simplicity: "Private property shall not be taken for public use without just compensation."[67] Interestingly, when interpreting the language of the U.S. Constitution, there is a presumption "that every word in the document has independent meaning, 'that no word was unnecessarily used, or needlessly added.'" [68] But over the years, by judicial decision, "public use" became corrupted to also mean "public purpose" or "public benefit."[69] As was noted by the New York State Court of Appeals in *New York City Housing Authority v. Muller*, in a "slum clearance" of a blighted area: "[u]se of a proposed structure, facility, or service by everybody and anybody is one of the abandoned universal tests of a public use."[70] The court further stated:

> 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 [was] 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.'[71]

In *Muller*, the court opined that the clearance of slums was within the police power of the state and that elimination of certain conditions was a public purpose.[72] Notably, the court used the term "public purpose" rather than "public use."[73] The adulteration of the constitutional limitation that "private property [shall not] be taken for public use, without just compensation" reached its zenith in *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*, where the Court of Appeals approved the condemnation of some thirteen city blocks for the commercial venture known as the World Trade Center as a "facility of commerce" and therefore, a public purpose.[74] Judge Van Voorhis's dissenting opinion contained a more accurate and

---

[67] N.Y. CONST. art. I, § 7(a).

[68] Kelo v. City of New London, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting) (quoting Wright v. United States, 302 U.S. 583, 588 (1938)).

[69] *See id.* at 479–80.

[70] 1 N.E.2d 153, 155 (N.Y. 1936) (citations omitted).

[71] *Id.* (quoting Durham Realty Corp. v. La Fetra, 130 N.E. 601, 608 (N.Y. 1921)).

[72] *Id.* at 154–55.

[73] *Id.* at 155.

[74] 190 N.E.2d 402, 405–06 (N.Y. 1963).

prophetic constitutional warning:

> Disregard of the constitutional protection of private property and stigmatization of the small or not so small entrepreneur as standing in the way of progress has everywhere characterized the advance of collectivism. To hold a purpose to be public merely for the reason that it is invoked by a public body to serve its ideas of the public good, it seems to me, can be done only on the assumption that we have passed the point of no return, that the trade, commerce and manufacture of our principal cities can be conducted by private enterprise only on a diminishing scale and that private capital should progressively be displaced by public capital which should increasingly take over. The economic and geographical advantages of the City of New York have withstood a great deal of attrition and can probably withstand more, but there is a limit beyond which socialization cannot be carried without destruction of the constitutional bases of private ownership and enterprise. It seems to me to be the part of courts to enforce the constitutional rights of property which are involved here.[75]

As Justice O'Connor noted in *Kelo,* it is "[t]he public use requirement, [which] imposes a more basic limitation, circumscribing the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the public's use, but not for the benefit of another private person."[76]

*Kelo* created a great public outcry when people learned that their homes could be condemned to give to a private developer. But even if this is the case, it seems that the judiciary in New York has made the possibility of a challenge virtually impossible. In the majority decision by Chief Judge Lippman of the New York State Court of Appeals, in *Goldstein v. New York State Urban Development Corp.*, a challenge to the Atlantic Yards project in Brooklyn which includes a stadium for the New Jersey Nets basketball team, the court stated:

> It may be that the bar has not been set too low—that what will now pass as "blight," as that expression has come to be understood and used by political appointees to public corporations relying upon studies paid for by developers, should not be permitted to constitute a predicate for the invasion of property rights and the razing of homes and businesses. But any such limitation upon the sovereign power of eminent domain as it has come to be defined in

[75] *Id.* at 411 (Van Voorhis, J., dissenting).

[76] Kelo v. City of New London, 545 U.S. 469, 497 (2005) (O'Connor, J., dissenting) (emphasis omitted).

> the urban renewal context is a matter for the Legislature, not the courts. Properly involved in redrawing the range of the sovereign prerogative would not be a simple return to the days when private property rights were viewed as virtually inviolable, even when they stood in the way of meeting compelling public needs, but a reweighing of public as against private interests and a reassessment of the need for and public utility of what may now be outmoded approaches to the revivification of the urban landscape. These are not tasks courts are suited to perform. They are appropriately situated in the policy-making branches of government.[77]

But as Judge Smith pointed out in his dissenting opinion in *Goldstein*, this determination "is much too deferential to the self-serving determination" of blight.[78] The dissent goes on to state:

> Our later decision in *Yonkers Community Development* is relied on heavily by ESDC here as permitting great leeway to the State in condemning blighted areas. But *Yonkers* contains language looking in both directions. It does seem to adopt a rather loose interpretation of "substandard" conditions that would justify a taking, but it also says that "courts are required to be more than rubber stamps in the determination of the existence of substandard conditions" and that "in order to utilize the public purpose attached to clearance of substandard land, such clearance must be the primary purpose of the taking, not some other public purpose, however laudable it might be." In *Yonkers*, we found that the agency had not provided factual support for its claim that the land to be taken was substandard, but held that the landowners had failed to raise this issue properly by their pleadings.[79]

Legislative deference should certainly not mean that the judiciary's hands are tied. In *Brody v Village of Port Chester*, the United States Court of Appeals for the Second Circuit held:

> At the outset, we must note that, despite the broad deference given to the government's decision to exercise its power of eminent domain, at bottom, 'the question [what is a public use] remains a judicial one . . . which [the courts] must decide in performing [their] duty of enforcing the provisions of the Federal Constitution.' The Supreme Court has long recognized this crucial, albeit limited, role that the courts play in enforcing the public use limitation. Thus, while the legislative decision to condemn is not reviewable, the purpose of the condemnation is. The role of the judiciary,

---

[77] Goldstein v. N. Y. State Urban Dev. Corp., 921 N.E.2d 164, 172–73 (N.Y. 2009).

[78] *Id.* at 546 (Smith, J., dissenting).

[79] *Id.* at 549 (citations omitted).

> however narrow, in setting the outer boundaries of public use is an important constitutional limitation. To say that no right to notice or a hearing attaches to the public use requirement would be to render meaningless the court's role as an arbiter of a constitutional limitation on the sovereign's power to seize private property.[80]

Recently, New Jersey backed away from the deference to legislative determinations in blight designations in *Gallenthin Realty Development, Inc. v Borough of Paulsboro*.[81] The New Jersey Supreme Court held in *Gallenthin* that "the Judiciary is the final arbiter" of the determination and is not divested of responsibility.[82] In *Gallenthin*, the Borough of Paulsboro sought to designate a largely undeveloped parcel of land as "in need of redevelopment," which would make the land subject to condemnation.[83] The Borough of Paulsboro sought to convince the court that any property that was not fully developed or could be put to a better use, should be considered blighted and eligible for condemnation at the government's power to discretion.[84] The court, making clear that the scope of government's power to declare and condemn "blight" was a judicial question, explicitly rejected a definition of "blight" that would extend to property that was merely "not fully productive."[85] Instead, the court held that blight, at its heart, required evidence of the property's "deterioration or stagnation that has a decadent effect on surrounding property."[86]

*Gallenthin* was recently followed by *Cottage Emporium, Inc. v Broadway Arts Center, LLC,*[87] in which the New Jersey Appellate Division reviewed blight determinations made by the City of Long Branch, NJ and invalidated them for failure to meet the *Gallenthin* blight standard. The court stated:

> We conclude that the City's designation of the study area properties as in need of redevelopment does not satisfy the heightened standard made applicable to such determinations by the Supreme Court's decision in *Gallenthin Realty Development, Inc v. Borough of Paulsboro*. Therefore, because the record does

[80] Brody v. Vill. of Port Chester, 434 F.3d 121, 128–29 (2d Cir. 2005) (citations omitted).

[81] *See* 924 A.2d 447, 460 (N.J. 2007).

[82] *Id.* at 456.

[83] *Id.* at 449.

[84] *See id.* at 460.

[85] *Id.* at 449.

[86] *Id.* at 460.

[87] No. A-0048-07T2, 2010 N.J. Super. LEXIS 835, at *3–4 (2010) (citation omitted).

> not contain substantial evidence to support the City's findings under any of the subsections upon which it relied, we reverse the judgment appointing condemnation commissioners and vacate the declarations of taking.[88]

Other state courts have reviewed and changed their holdings, which allowed takings for private benefit concluding that "[t]he power of eminent domain is to be exercised with restraint, not abandon."[89]

In *Poletown Neighborhood Council v City of Detroit*,[90] the Michigan Supreme Court allowed the condemnation of some 465 acres, 1,176 buildings including 144 businesses, three schools, a 278-bed hospital, sixteen churches, and one cemetery so that General Motors could build a Cadillac factory.[91] The project cost Detroit over $200 million.[92] General Motors paid $8 million and also received a twelve year 50% tax abatement.[93] There was very little evidence of "blight," but the argument was that "the economic benefit to General Motors would, eventually, trickle down to the public."[94] Perhaps, "blight" is in the eyes of the beholder."[95] Furthermore, "who is to say what is 'blight?'"[96] Additionally, "if a government earmarks a portion of a block for condemnation for many years, does it not itself create 'blight?'"[97] The Michigan Supreme Court, however, acknowledged that its decision in *Poletown* was wrong. On July 30, 2004, the Michigan Supreme Court reversed its earlier *Poletown* decision in *County of Wayne v. Hathcock*, holding that *Poletown* was wrongly decided and did so retroactively.[98] While the Michigan Supreme Court stated that the case did not "require that this Court cobble together a single, comprehensive definition of 'public use',"[99] the court described the exercise of the power of eminent domain as

[88] *Id.* at *3–4 (citation omitted).

[89] Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 11 (Ill. 2002) (dealing with an expansion for a race track.)

[90] 304 N.W.2d 455, 455 (Mich. 1981).

[91] Michael Rikon, *Bulldozers at Your Doorstep—The Aftermath of Kelo v. City of New London*, ABA.NET, http://www.abanet.org/rppt/meetings_cle/2005/spring/rp/PrivateBenefitsCondemnations/RIKON_hand.pdf (last visited Jan. 6, 2010).

[92] *Poletown*, 304 N.W.2d at 469–70.

[93] *Id.*

[94] Rikon, *supra* note 91; *See Poletown,* 304 N.W.2d at 459.

[95] Rikon, *supra* note 91.

[96] *Id.*

[97] *Id.*

[98] 684 N.W.2d 765, 787 (Mich. 2004).

[99] *Id.* at 781.

being limited to an actual public use such as roads, schools, and parks.[100]

The Supreme Court of Ohio struck down the taking by a municipality of an individual's property and the transfer of the property to a private entity for redevelopment in *City of Norwood v. Horney*.[101] The Ohio Supreme Court held that the lower courts were mistaken when they felt constrained by its interpretation of prior cases, stating that judicial review is limited in reviewing a designation of a neighborhood as a "deteriorating area."[102] The court held that "[i]nherent in many decisions affirming pronouncements that economic development alone is sufficient to satisfy the public-use clause is an artificial judicial deference to the state's determination that there was sufficient public use."[103] The court further held that, "[g]iven the individual's fundamental property rights in Ohio, the courts' role in reviewing eminent-domain appropriations, though limited, is important in all cases."[104] Furthermore, the court noted:

> [J]udicial review is even more imperative in cases in which the taking involves an ensuing transfer of the property to a private entity, where a novel theory of public use is asserted, and in cases in which there is a showing of discrimination, bad faith, impermissible financial gain, or other improper purpose.[105]

The court held that an economic or financial benefit alone is insufficient to satisfy its public use requirement.[106]

New York's most recent decision on the subject was *Kaur v. New York State Urban Development Corp.*, where the Court of Appeals reversed a decision of the Appellate Division, First Department, which granted a petition prescribed under Section 207 of the EDPL.[107] The court held that a condemnation for Columbia University, a private school, was supported by a sufficient public use, benefit, or purpose.[108] It also held, citing *Goldstein*, that the "findings of blight and determination[s] that the condemnation of [the] petitioners' property qualified as a 'land use improvement project' were rationally based and entitled

---

[100] *See id.* at 794.
[101] 853 N.E.2d 1115, 1124, 1146 (Ohio 2006).
[102] *Id.* at 1136.
[103] *Id.*
[104] *Id.* at 1140.
[105] *Id.*
[106] *Id.* at 1142.
[107] 933 N.E.2d 721, 736–37 (N.Y. 2010).
[108] *Id.* at 734–35.

to deference."[109]

What is interesting about *Kaur* is that the Court of Appeals seemingly excused the improper conduct of the condemnor's counsel in avoiding compliance with Freedom of Information Law (FOIL) requests. Indeed, the FOIL violation was so outrageous to the First Department that it formed the basis for the concurring decision by Justice Richter because it was violative of both the EDPL and procedural due process under state and federal constitutions.[110] Seemingly, the New York State Court of Appeals ignored its own earlier decision dealing with the improper use of statutory stays when taking meritless appeals to prevent disclosure compliance.[111] The next time a petition pursuant to Section 207 of the EDPL presented itself to the First Department, Justice Catterson, who wrote the majority decision when *Kaur* was heard before that court,[112] authored a concurring memorandum in which he noted that in the case "the record amply demonstrates that the neighborhood in question was not blighted, that whatever blight exists is due to the actions of the City and/or is located far outside the project area, and that justification of under-utilization is nothing but a canard to aid the transfer of private property to a developer."[113] He went on to state that "[u]nfortunately for the rights of citizens affected by the proposed condemnation, the recent rulings of the Court of Appeals in *Matter of Goldstein v. New York State Urban Dev. Corp.* and *Matter of Kaur v. New York State Urban Dev. Corp.* have made plain that there is no longer any judicial oversight of eminent domain proceedings."[114]

## VII. WHETHER THE PROPOSED ACQUISITION IS WITHIN THE CONDEMNOR'S STATUTORY JURISDICTION OR AUTHORITY

The second issue open for review in a Section 207 petition in

[109] *Id.* at 724 (citing Goldstein v. N.Y. State Dev. Corp., 921 N.E.2d 164 (N.Y. 2009)).

[110] *See* Kaur v. N.Y. State Urban Dev. Corp., 892 N.Y.S.2d 8, 28–29 (App. Div. 2009) (Richter, J., concurring), *rev'd*, 933 N.E.2d 721 (N.Y. 2010), *cert. denied*, 2010 WL 3712673, at *1 (U.S. Dec. 13, 2010) (No. 10-402).

[111] *See* W. Harlem Bus. Group v. Empire State Dev. Corp., 921 N.E.2d 592, 594–95 (N.Y. 2009).

[112] *Kaur*, 892 N.Y.S.2d at 8.

[113] Uptown Holdings, LLC v. City of N. Y., 908 N.Y.S.2d 657, 660–61 (App. Div. 2010).

[114] *Id.*

the EDPL is that the proposed acquisition is not within the condemnor's statutory jurisdiction or authority. Although rarely imposed, it does occasionally occur. In *Syracuse University v. Project Orange Associate Services Corp.*, the New York Appellate Division, Fourth Department held that the "'public benefit [was] incrementally incidental to the private benefits' of the condemnation."[115] More interestingly, it held that the condemnor lacked statutory authority to acquire the subject property.[116] In another case, a town highway supervisor was held to have exceeded his authority when he condemned property for a highway to improve tourism.[117] Furthermore, in another case, the Metropolitan Transportation Authority did not have jurisdiction to condemn any property owned by another railroad because federal law preempts any state proceeding pertaining thereto.[118]

Generally, a property presently used for a public purpose may not be condemned.[119] Nor may property owned by a higher sovereign be acquired without consent. This is known as the prior public use doctrine. As the New York State Court of Appeals has noted, "[t]o defeat the attainment of an important public purpose to which lands have already been subjected, the legislative intent must unequivocally appear."[120] It should also be noted that pursuant to Section 3 of the General Municipal Law, where there is a taking from a municipality for a purpose for other than that for which it was used, the condemnee is entitled to "just compensation" as is any other claimant in a condemnation proceeding.[121]

Any discussion of prior public use must also include *Westchester Creek Corp. v. New York City School Construction Authority*, which involved the re-condemnation of property that was condemned by the City of New York for an urban renewal proceeding and leased to a private developer.[122] In a challenge to the taking, the lessee alleged there was no statutory authority for

[115] 897 N.Y.S.2d 335, 337 (App. Div. 2010) (citation omitted).

[116] *Id.* at 338.

[117] *See* Hargett v. Town of Ticonderoga, 826 N.Y.S.2d 819, 820 (App. Div. 2006).

[118] *See In re* Metro. Transp. Auth., 823 N.Y.S.2d 88, 91 (App. Div. 2006).

[119] *See* New York, L. & W.R. Co. v. Union Steam-Boat Co., 1 N.E. 27, 31–33 (N.Y. 1885).

[120] *In re* City of Buffalo, 68 N.Y. 167, 175 (1877).

[121] City of New York v. State of New York, 371 N.Y.S.2d 189, 190 (App. Div. 1975).

[122] 774 N.E.2d 749, 750 (N.Y. 2002).

the School Authority to condemn the land because it was already being put to public use.[123] The Court of Appeals, looking at the statutory powers conferred on the School Authority, concluded that the Legislature had impliedly granted the power to it.[124] As the court stated: "There can be no higher priority than creating a physical environment in the schools that fosters rather than impedes, the education of our children," and the statute authorized it "to do any and all things necessary or convenient to carry out and exercise the powers given and granted by this section."[125] The court further noted that while the State Constitution "gives the Legislature the power to establish urban renewal projects, it does not confer any protection on redevelopers against condemnation."[126] As the old adage goes, "those that live by the sword, die by the sword."

Another fascinating case is *Vitucci v. New York City School Construction Auth*ority.[127] In *Vitucci*, the School Authority, after condemning property for a school site, abandoned the project.[128] Section 406 of the EDPL provides that if the condemnor abandons the project within ten years of acquisition, it is to be offered to the former fee owner who has a right of first refusal to purchase the property at the amount of the fair market value at the time.[129] But, what appears to be a clearly defined procedure is not necessarily so if another lusts for your property. In its decision, the court held that a municipality could change the purpose of the acquisition and deem it an urban renewal proceeding so as to convey to a private owner holding adjacent property.[130] The public benefit, it was said, would flow from strengthening an important employer and this satisfied public use requirements.[131]

[123] *Id.* at 750–51.
[124] *Id.* at 751.
[125] *Id.* at 751 (quoting 1988 N.Y. Laws 3432).
[126] *Id.*
[127] 735 N.Y.S.2d 560 (App. Div. 2001).
[128] *Id.* at 560–61.
[129] N.Y. EM. DOM. PROC. LAW § 406(A) (McKinney 2003 & Supp. 2010).
[130] *See Vitucci*, 774 N.E.2d at 562.
[131] *Id.*

### *A. Whether the Condemnor's Determination and Findings Were Made in Accordance with Article 2 of the EDPL and Article 2 of the Environmental Conservation Law*

The third basis for review is the failure to follow the procedures set forth in Article 2 of the EDPL and to comply with Article 8 of the Environmental Conservation Law. The first part deals with the mandatory notice requirements that must be strictly complied with as specified in Section 202 of the EDPL.[132] The notice is of the public hearing required by Section 201.[133]

Section 202 of the EDPL requires notice to the public at least ten, but no more than thirty days, prior to the hearing by publication in five successive issues of an official daily newspaper.[134] The condemnor has the burden of proving literal compliance with the requirements of Article 2 of the EDPL, which deals with the public hearing and steps leading to the adoption of a Determination and Findings to condemn.[135] If a condemnor fails to strictly adhere to the publication requirements of Section 202(A) of the EDPL, the instant matter is devoid of jurisdiction.[136] As the New York Appellate Division, Second Department has stated, "[t]he lack of subject matter jurisdiction 'may be [raised] at any stage of the action, and the court may, *ex mero motu*, at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action.'"[137]

Notice of the public hearing is jurisdictional. The failure to strictly adhere to the publication requirements of Section 202(A) of the EDPL renders a Determination and Findings jurisdictionally defective and a petition must be granted because the publication is a condition precedent to further proceedings by the condemnor.[138] In New York, literal compliance with

---

[132] N.Y. EM. DOM. PROC. LAW § 202(A)–(D).

[133] *Id.* § 201.

[134] *Id.* § 202(A).

[135] *See* § 402(B)(3)(a); Iroquois Gas Corp. v. Jurek, 290 N.Y.S.2d 140, 142,144 (App. Div. 1968), *appeal dismissed*, 242 N.E.2d 74 (N.Y. 1968).

[136] *See* W.C. Lincoln Corp v. Vill. of Monroe, 743 N.Y.S.2d 177, 178 (App. Div. 2002); *see also* Town of Carmel v. Blanks, 703 N.Y.S.2d 209, 210 (App. Div. 2000); New Life Fellowship, Inc. v. City of Cortland, 572 N.Y.S.2d 421, 421 (App. Div. 1991).

[137] *See In re* Metro. Transp. Auth., 823 N.Y.S.2d 88, 90 (App. Div. 2006) (quoting Robinson v. Oceanic Steam Nav. Co., 19 N.E. 625, 625 (N.Y. 1889)).

[138] *See* Green v. Oneida-Madison Elec. Coop., 522 N.Y.S.2d 36, 36 (App. Div. 1987).

publication requirements has always been mandated.[139] The fact that a property owner knows of the hearing or even appears and speaks is irrelevant for it is a "public hearing for the public." If the notice requirements are not literally complied with, the public hearing is invalid.

The second part of Section 207(C)(3) of the EDPL is the failure to comply with the State Environmental Quality Review Act (SEQRA). The leading case in New York dealing with SEQRA is *Jackson v. New York State Urban Development Corp.*[140] Judge Kaye, who wrote the decision involving a challenge to the 42nd Street Development project, stated: "The heart of SEQRA is the Environmental Impact Statement (EIS) process . . . . Under the act, an EIS must be prepared regarding any action that 'may have a significant effect on the environment.'"[141] It was held that SEQRA "does not require an agency to impose every conceivable mitigation measure, or any particular one," but rather, "requires the imposition of mitigation measures only 'to the maximum extent practicable.'"[142] Essentially, what was required was to identify those impacts of the proposed development and to take "a hard analytical look at them."[143]

The entire holding thus can be summarized, as it was recently by the Appellate Division, Second Department, as the condemnor identifying "'the relevant areas of environmental concern,' [taking] a 'hard look' at them, and [making] a 'reasoned elaboration' of the basis for its determination."[144] Even a major change in the project, specifically the removal of a new football stadium for the New York Jets and the proposed enlargement of the Javits Convention Center was not enough to render reliance on an environmental study to "give rise to the need for the preparation of a supplemental EIS (SEIS)."[145] The new stadium was to be Mayor Bloomberg's centerpiece for the City's bid for the 2012 Olympics but was vetoed by Assembly Speaker, Sheldon Silver.[146] This is not to say that a condemnor cannot fail to

[139] *See* Young v. Fowler, 25 N.Y.S. 875, 876 (Gen. Term 1893).
[140] 494 N.E.2d 429, 432, 435 (N.Y. 1986).
[141] *Id.* at 435.
[142] *Id.* at 439.
[143] *Id.* at 429.
[144] Gyrodyne Co. of America, Inc. v. State Univ. of N.Y. at Stony Brook, 794 N.Y.S.2d 87, 89 (App. Div. 2005) (citations omitted).
[145] C/S 12th Ave., LLC v. City of New York, 815 N.Y.S.2d 516, 522 (App. Div. 2006).
[146] Charles V. Bagli & Michael Cooper, *Bloomberg's Stadium Quest Fails;*

comply with SEQRA. In *Sun Company, Inc. v. City of Syracuse Industrial Development Agency*, which involved the Carousel Landing Shopping Mall project in Syracuse, New York, the proposed taking was rejected because of the failure "to consider all the environmental ramifications of the . . . [p]roject and . . . to analyze reasonable alternatives . . . ."[147] Since SEQRA mandates the preparation of an EIS when the proposed action may include the potential for at least one significant environmental effect, "there is a relatively low threshold for the preparation of an EIS."[148]

Pursuant to SEQRA, a proposed condemnor may issue a negative declaration, obviating the need for an EIS only after it has "identified the relevant areas of environmental concern, [taken] a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination."[149] But if there is an open issue not addressed completely by the Determination and Findings, the negative declaration will be invalid.[150]

In *Board of Cooperative Educational Services v. Town of Colonie*, the "petitioner maintain[ed] that [the condemnor] issued its negative determination without addressing petitioner's concerns that the increased use of its access road would create traffic problems and increase the threat of harm to [its] students."[151] The Appellate Division, Third Department granted the petition noting that:

> In its negative determination, respondent failed to identify or address petitioner's concerns even though those concerns arguably involve factors of significant environmental impact, instead baldly

*Olympic Bid Is Hurt*, N.Y. TIMES, June 7, 2005 at A1.

[147] 625 N.Y.S.2d 371, 381 (App. Div. 1995).

[148] Uprose v. Power Auth. of N.Y., 729 N.Y.S.2d 42, 46 (App. Div. 2001); *see* Silvercup Studios, Inc. v. Power Auth. of N.Y., 729 N.Y.S.2d 47, 49 (App. Div. 2001) (citing Omni Partners, L.P. v. County of Nassau, 654 N.Y.S.2d 824, 826 (App. Div. 1997)).

[149] Jackson v. N.Y. State Urban Dev. Corp., 494 N.E.2d 429, 436 (N.Y. 1986) (citations omitted); s*ee* Chinese Staff & Workers Assn. v. City of New York, 502 N.E.2d 176, 178 (N.Y. 1986); *see* Vill. of Tarrytown v. Planning Bd. of Vill. of Sleepy Hollow, 741 N.Y.S.2d 44, 48 (App. Div. 2002); Hubbard v. Town of Sand Lake, 622 N.Y.S.2d 126, 127 (App. Div. 1995).

[150] *See* Munash v. Town Bd. of the Town of E. Hampton, 748 N.Y.S.2d 160, 162 (App. Div. 2002); s*ee also* Settco, LLC v. N.Y. State Urban Dev. Corp., 759 N.Y.S.2d 833, 834–35 (App. Div. 2003); Concern, Inc. v. Pataki, 801 N.Y.S.2d 232, 232 (Sup. Ct. 2005) (noting that the Appellate Division, Fourth Department did not properly consider "that it was the Empire State Development Corporation, and not the Governor, that transferred . . . title" in *Settco*).

[151] 702 N.Y.S.2d 219, 222 (App. Div. 2000).

> asserting that "the general effect of the proposed project on the environment . . . is minimal . . . [and] will not result in any significant adverse environmental impacts." Since the proposed taking will have some impact on the environment, respondent's failure to identify relevant concerns and elaborate on the reasons for its conclusions that those concerns were not significant requires rejection of the determination and findings.[152]

Thus, an environmental issue may be a fruitful basis for a Section 207 challenge in the EDPL.

### *B. Whether a Public Use, Benefit, or Purpose Will Be Served by the Proposed Acquisition*

The fourth provision of Section 207(C) of the EDPL is subdivision (4), "a public use, benefit or purpose will be served by the proposed acquisition."[153] This, of course, is the most difficult hurdle to jump over to have a petition granted and a Determination and Findings authorizing a condemnation rejected by an Appellate Division. Although much criticism surrounds the U.S. Supreme Court's decision in *Kelo*, its holding really had no effect on the State of New York, which had long permitted takings for economic development.[154] What qualifies as a "public use" or "benefit or purpose"[155] is broadly defined as encompassing virtually any project that may confer upon the public a benefit, utility, or advantage.[156] As was stated by the New York State Court of Appeals, while "courts are required to be more than rubber stamps"[157] in determining whether a taking furthers a public use, a condemnor's "determination that property is needed for a public purpose is regarded as 'well-nigh conclusive' and not a question of fact for de novo determination[s]."[158]

---

[152] *Id.* at 222–23 (citations omitted).

[153] N.Y. EM. DOM. PROC. LAW § 207(C)(4) (McKinney 2003).

[154] *See In re* Fisher, 730 N.Y.S.2d 516, 516 (App. Div. 2001).

[155] *See* N.Y. EM. DOM. PROC. LAW § 207(C)(4); s*ee also* N.Y. CONST. art. I, § 7(a) (note that Section 207(C)(4) of the EDPL uses the phrase "a public use, benefit or purpose," but the New York State Constitution limits the exercise of the power of eminent domain "for public use").

[156] W. 41st St. Realty LLC v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121, 125 (App. Div. 2002).

[157] Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 333 (N.Y. 1975).

[158] 49 WB, LLC v Vill. of Haverstraw, 839 N.Y.S.2d 127, 135 (App. Div. 2007) (citing Greenwich Assoc. v. Metro. Transp. Auth., 548 N.Y.S.2d 190, 192–93 (App. Div. 1989)) (*49 WB, LLC* is a very important decision regarding Section 207 of the EDPL, but its holding regarding the entitlement to legal fees for successfully defeating a proposed condemnation was in error); *see* Hargett v.

Indeed, the criticism by Judge Smith of the Court of Appeals, who dissented in *Goldstein*, was that the court was much too deferential to the self-serving determination of blight.[159] The deference to determinations made by the condemnor that property is needed indicates the judiciary's abandonment of its function. If it can be said that the exercise of authority under the EDPL is an essentially legislative function, then a court should avoid violence to the fundamental separation of powers doctrine, which represents the constitutional check on powers in our form of government. The fact is that the courts have, by making determinations to take private property "legislative," abdicated the responsibility of safeguarding property owners' constitutional rights. Indeed, the decisions made to condemn are not legislative determinations. They are not made by legislatures, or sometimes even by elected officials who are responsible to those that elect them. Rather, the determination of what property to take and who to give it to is made by a handful of appointees who are responsible to no one. The decision making process to condemn private property is not made by a deliberate assembly. Thus, a finding that a property condemnation furthers a public use or purpose will be affirmed unless it is "without foundation" in the hearing record.[160]

### *C. Other Grounds for a Petition Under Section 207 of the EDPL*

The remaining grounds for a Section 207 petition under the EDPL are that the condemnor is making an excessive taking, that the project is a pretext and that the proceeding is being brought in bad faith.[161] A condemnor may not take, through use of eminent domain, property not necessary to fulfill a public purpose.[162] Nor could it condemn a fee interest when an easement would be sufficient.[163] There is, however, deference to the

Town of Ticonderoga, 918 N.E.2d 933, 936 (N.Y. 2009) (holding that legal fees may be recovered after a successful EDPL Article 2 challenge).

[159] *See* Goldstein v. N.Y. Urban Dev. Corp., 921 N.E.2d 164, 186 (N.Y. 2009) (Smith, J. dissenting).

[160] Waldo's, Inc. v. Vill. of Johnson City, 543 N.E.2d 74, 76 (N.Y. 1989); *see* Stankevich v. Town of Southold, 815 N.Y.S.2d 225, 226 (App. Div. 2006).

[161] *See Waldo's, Inc.*, 534 N.E.2d at 75, 77; Pfohl v. Vill. of Sylvan Beach, 809 N.Y.S.2d 367, 367–68 (App. Div. 2006); *see also* Butler v. Onondaga County Legislature, 833 N.Y.S.2d 829, 831 (App. Div. 2007).

[162] Hallock v. State of New York, 300 N.E.2d 430, 432 (N.Y. 1973).

[163] Davis Holding Co. v. Vill. of Margaretville, 865 N.Y.S.2d 736, 739 (App. Div. 2008); *see also* Feeney v. Town of Harrison, 771 N.Y.S.2d 382, 383 (App.

condemnor which "has broad discretion in deciding what land is necessary to fulfill that purpose" of the condemnation.[164]

The second additional challenge is the general classification of a pretext taking. Here the proposed taking is really a sham. There is no public benefit, or purpose, but rather a pretextual justification for providing property to another person. An example was the Village of Haverstraw's attempt to condemn property to assist its developer in meeting its affordable housing obligation and to reduce costs to the developer.[165] It is clear that "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."[166] In a well-known California case, a condemnation was proposed to condemn a relatively new store in a shopping center "to prevent future blight" when it was actually a pretext to eliminate a competitor to Costco, a major tenant.[167] A pretextual taking will be indicated by a lack of a well-developed plan. The United States Supreme Court recognized that a pretextual taking violates the Fifth Amendment Public Use requirement.[168] The burden will be on a petitioner to establish the improper attempt to condemn but the condemnor is bound by the record it produced at the public hearing.[169]

Finally, the last basis for challenge is that the condemnation is premised on the bad faith of the condemnor. As noted by Justice Dillon in his remarkable decision in *49 WB, L.L.C. v. Village of Haverstraw*, "[b]ad faith is a concept separate and distinguishable from pre-textual condemnations. Cases involving bad faith address procedural violations allegedly committed by municipalities resulting in condemnations that serve a legitimate public purpose."[170] Unfortunately, petitioners face significant

Div. 2004).

[164] Rafferty v. Town of Colonie, 752 N.Y.S.2d 725, 729 (App. Div. 2002); Wechsler v. New York Dep't of Envtl. Conservation, 550 N.Y.S.2d 749, 751 (App. Div. 1990), *aff'd*, 564 N.E.2d 660 (N.Y. 1990).

[165] 49 WB, L.C.C. v. Vill. of Haverstraw, 839 N.Y.S.2d 127, 141 (App. Div. 2007).

[166] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984).

[167] 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F.Supp. 2d 1123, 1129–30 (C.D. Cal. 2001).

[168] Kelo v. City of New London, 545 U.S. 469, 478 (2005).

[169] N.Y. EM. DOM. PROC. LAW § 207(A) (McKinney 2003).

[170] *WB 40, L.L.C*, 839 N.Y.S.2d at 138; s*ee* Hargett v. Town of Ticonderoga, 826 N.Y.S.2d 819, 820 (App. Div. 2006); Westchester Creek Corp. v. N.Y. City Sch. Constr. Auth.,774 N.E.2d 749, 750 (N.Y. 2002).

hurdles in challenging condemnations based on alleged bad faith.[171] A petitioner would have to make a clear showing as to how the facts undermine the *bona fides* of the legislative body in acquiring the property. Absent such demonstration, there is no basis to overturn the legislative act.[172]

### *D. Exemptions to the Public Hearing Requirement*

The EDPL provides "exemptions" to the public hearing requirement.[173] Basically, the exceptions apply to situations where another forum is presented for a public hearing and a hearing under Article 2 would be duplicative.[174] Another exception exists which applies if the acquisition is in the opinion of the condemnor to be *de minimis* in nature, or because of an emergency situation.[175] If the condemnor elects to have a hearing in another context, as the City of New York frequently does before the City Planning Commission, it effectively extends the time of challenge from thirty days to four months after the resolution becomes final.[176] While the Appellate Division normally has exclusive jurisdiction for challenges under Section 207 of the EDPL,[177] this does not apply in any claimed exemption where the New York Supreme Court has jurisdiction.[178]

Proceeding on an exemption basis not only extends the time to challenge the resolution to take property to four months, but it also may provide for an application to the New York Supreme Court for permission to conduct discovery, extending the

[171] *See, e.g.*, Woodfield Equities, LLC v. Vill. of Patchogue, 813 N.Y.S.2d 184, 186 (App. Div. 2006) (challenging the Village's decision to condemn Woodfield's property, which was acquired for the housing of recovering alcoholics and drug addicts); *see also* Rafferty v. Town of Colonie, 752 N.Y.S.2d 725, 728 (App. Div. 2002) (proposed taking was to eliminate adult entertainment business); Broadway Schenectady Entm't, Inc. v. County of Schenectady, 732 N.Y.S.2d 703, 704 (App. Div. 2001) (adult bookstore); Faith Temple Church v. Town of Brighton, 794 N.Y.S.2d 249, 250–51 (App. Div. 2005) (church).

[172] Vill. Auto Body Works. v. Vill. of Westbury, 454 N.Y.S.2d 741, 742–43 (App. Div. 1982).

[173] N.Y. EM. DOM. PROC. LAW § 206.

[174] *See id.* § 206(C).

[175] *See id.* § 206(D).

[176] Rather than a thirty day challenge under Section 207 of the EDPL, the property owner would have the period set forth to commence an Article 78 proceeding, or four months. N.Y. C.P.L.R. § 217(1) (McKinney 2003); *see* City of New York v. Grand Lafayette Prop., 847 N.E.2d 1166, 1170 (N.Y. 2006).

[177] N.Y. EM. DOM. PROC. LAW § 208.

[178] Steel Los III, L.P. v. Power Auth. of N.Y., 823 N.Y.S.2d 490, 491–92 (App. Div. 2006).

proceedings extensively.[179] Further, a property owner would then have the right to appeal to the Appellate Division as of right. If a condemnor is proceeding on an exemption, it is clear that it must file its petition to condemn within three years.

The use of an allegation of *de minimis* acquisition may also result in the condemnation court finding otherwise upon the presentation of a petition to condemn. A town's proposed taking of an eight-foot strip along the edge of a parcel was not *de minimis* and the town was directed to comply with the public hearing requirements of Section 201 of the EDPL.[180] The Appellate Division, Third Department has expounded that "[t]he fact that the amount of land is not substantial does not necessarily render a taking *de minimis*."[181] An emergency taking must be clearly established and predicated on substantial evidence.[182]

## VIII. WHERE DOES NEW YORK GO FROM HERE?

It should be clear that any property owner who objects to the condemnation of its property has a substantial burden to stop the condemnation in New York. Simply put, the law vastly favors the condemning authority. The judiciary believes it is severely limited in its ability to review proposed takings. After *Kelo* was decided, no fewer than seventeen bills were introduced in the New York State Legislature to protect property from government-aided developers.[183] Only four were adopted.[184] Certainly it is time for a change. It was the U.S. Supreme Court that stated "[w]e see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First

[179] *See* N.Y. C.P.L.R § 7801 ; *Grand Lafayette Prop.*, 847 N.E.2d at 1170.

[180] Marshall v. Town of Pittsford, 482 N.Y.S.2d 619, 620 (App. Div. 1984).

[181] *In re* County of Cortland, 899 N.Y.S.2d 467, 470 (App. Div. 2010) (citation omitted).

[182] *See* Vill. of Saranac Lake v. Bujold, 906 N.Y.S.2d 735, 738–39 (Sup. Ct. 2010). Justice DeMarest decided the case wherein it appeared that the condemnor never complied with the notice requirements of Article 2 of the EDPL and were therefore dismissed. Rather than hold the public hearings, the condemnor elected to proceed by order to show cause pursuant to Section 402(B) of the EDPL seeking immediate emergency access to repair or alter a sewer line. *Id.* But it appears that there were serious misrepresentations made to the court in the application for emergency access.

[183] John Caher, *Kelo-Related Bills Pass Senate Judiciary Body*, 235 N.Y. L.J., May 3, 2006, at 2.

[184] *Id.*

Amendment or the Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."[185] Clearly, private property is a fundamental, constitutional right that must be respected. Eminent domain is coercive—it is a forced sale; a taking of property without an owner's consent. The constitutionally required just compensation that courts award to property owners when government condemns their property is generally viewed as uncompensatory.[186] As a result of the *Kelo* decision, forty-three states have now enacted legislative reform.[187]

The New York State Bar Association formed a special task force to study eminent domain. The task force held several meetings in Albany and listened to the presentation of members of the Judiciary, law professors, and practitioners in the area of eminent domain. The task force issued a final report in July 2007.[188] In its earlier March 2006 report it noted that seventeen bills were pending at that time in the state Legislature, which would affect eminent domain.[189] Since that date, the Legislature only adopted two bills which were extremely limited. The task force observed the "little State-specific research and data exists to accurately assess both the need for, and impact of, many of the proposed reforms."[190] It was reported that in the thirty years since the enactment of the Eminent Domain Procedure Law, "little recodification has occurred."[191] As noted by the report,"[a]ctually, the vast majority of its provisions remains[sic] in its original form."[192]

The task force report stated "[t]here is a critical need today for codification in the substantive law of eminent domain."[193] A total of eight recommendations were made which involved significant

[185] Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).

[186] Yun-chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City, 1990-2002*, 39 J. LEGAL STUD. 201, 239 (2010).

[187] Editorial, *Pfizer and Kelo's Ghost Town*, WALL ST. J., Nov. 11 2009, at A20.

[188] N.Y. STATE BAR. ASS'N. TASK FORCE ON EMINENT DOMAIN, EMINENT DOMAIN TASK FORCE REPORT (2007), http://www.nysba.org/Content/ContentFolders/SubstantiveReports/ED_Task_Force_Final_ Report_June07 _2_.pdf.

[189] N.Y. STATE BAR. ASS'N. SPECIAL TASK FORCE ON EMINENT DOMAIN, EMINENT DOMAIN TASK FORCE REPORT 3 (2006), http://www.nysba.org/Content/ContentFolders/SubstantiveReports/EDTaskForcereportrevised.pdf.

[190] *Id.* at 35.

[191] *Id.* at 41.

[192] *Id.*

[193] *Id.* at 42.

change to the existing law[194]—but nothing happened in the State Legislature.

There are legislators who are concerned about the unbridled and unchecked power of eminent domain,[195] but there is little evidence that New York's law on eminent domain will undergo the study and revision it urgently requires, let alone curb the ability to take private property to give to a private developer.

## CONCLUSION

The Eminent Domain Procedure Law should be amended to

[194] *See id.* at 43–46. The task force recommended the following:

1.) Eminent domain should not be restricted to specified public projects;
2.) Local governments should not have a veto over exercises of eminent; domain by public authorities of larger entities within their borders;
3.) Agencies exercising eminent domain for economic development purposes should be required to prepare a comprehensive economic development plan and a property owner impact assessment;
4.) The present 30-day statute of limitations in EDPL § 207 for judicial review of the condemnor's determination and findings should be expanded;
5.) A new public hearing under EDPL § 201 should be required where there has been substantial change in the scope of a proposed economic development project involving the exercise of eminent domain;
6.) No exceptions to the EDPL are necessary for acquiring property for public utility purposes;
7.) Acquisitions should not be exempted from the EDPL's eminent domain procedures simply because other statutes provide for land-use review;
8.) A Temporary State Commission on Eminent Domain should be established.

These would resolve issues such as defining "public use," the appropriate level of judicial scrutiny, just compensation, and others through study by a variety of stakeholders represented.

[195] Senator Bill Perkins of Harlem is notable in his efforts to change how eminent domain works in New York, or rather, as he says, "doesn't work." He has recently drafted a bill that would redefine blight, which he said, "is in the eye of the beholder." Kim Kirschenbaum, *As Manhattanville Hearing Approaches, Perkins Pushes for Eminent Domain Law Reforms*, COLUMBIA SPECTATOR, May 31, 2010, *available at* http://222.columbiaspectator.com /printer/view?nid=30330. In addition, the Westchester County Legislature is studying a bipartisan measure introduced by Board Majority Leader, Thomas J. Abinanti, and Minority Leader, James Maisano, which would prohibit the county from condemning private properties for developments that include retail shopping centers, commercial offices, industrial and residential facilities. Benefits which are solely economic would not qualify as a permitted use to justify its taking by eminent domain. *See* Westchester County Board of Legislators, *Legislators Maisano & Abinanti Propose Legislation to Protect Private Property Owners*, WESTCHESTER LEGISLATORS, Aug. 24, 2010, http://www.westchesterlegislators.com/MediaCenter/article Detail.asp?artid=1363.

take into account and correct the inconsistencies in the existing statutory provisions. More importantly, the law should focus on the need to define and perhaps limit the definition of public purpose and permissible acquisitions in the wake of the public outrage following *Kelo*—the time is at hand for a thorough study of New York eminent domain substantive law and procedures, particularly how New York defines "blight," and answer the query of how can a building which was converted to luxury apartments be deemed "blighted"?[196]

It is time for the creation of a Temporary Commission to study and propose a new Eminent Domain Procedure Law for New York. In addition to the above, the Temporary Commission should study whether the power of eminent domain should be limited to true public use and should there be restrictions on takings which would enable developers to take private property for large scale developments.

[196] *See* Goldstein v. N.Y. State Urban Dev. Corp., 921 N.E.2d 164, 166 (N.Y. 2009).