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**PUBLIC-PRIVATE PARTNERSHIPS IN NEW YORK
CITY, IN KELO'S WAKE**

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Most legal scholars and municipal lawyers would agree that eminent domain is a vital economic tool that allows local governments to acquire and assemble land for both public and private development projects that generate many benefits, including new housing, new jobs, and increased tax revenue. The use of eminent domain for this purpose is crucial to the fiscal health of any city, and is often a necessary part of a carefully considered plan of economic development. In municipalities both large and small, most significant public redevelopment projects are facilitated by public-private partnerships. Indeed, without private resources, many government initiatives designed to improve the municipal landscape would never be realized. For example, in New York, private investment used in conjunction with eminent domain helped facilitate the rebirth of Times Square into a tourist friendly location. As you may recall, in the 1970s, Times Square -- one of the great symbols of New York City -- became a national showcase for urban decay and blight. Crime was rampant and Broadway theaters struggled to exist in the midst of peep shows and rundown buildings. In the 1990's, with the assistance of eminent domain, the City and State, in partnership with private developers, revitalized the area and eradicated the blight. Today, the area has more than 33,000 residential households, one in four Midtown-Manhattan employees work in the area, and pedestrian activity has increased 200%.

However, the reaction to the decision of the United States Supreme Court in *Kelo v. City of New London*, 545 U.S. 469 (U.S. 2005), which upheld, by a 5-4 vote, the power of the City of New London, Connecticut to condemn private property for an economic development project, placed the future of public-private partnerships in jeopardy. Today, there is virtually no public policy issue facing local governments, especially those in large urban environments, as important as the question of the circumstances under which it should be permissible for the

government to acquire property by eminent domain for the purpose of conveying it to a private developer who will use it to develop new sites for housing and employment.

Urban renewal projects are the most common form of public-private partnerships which have been historically utilized across the country. The United States Supreme Court decision in *Berman v Parker* 348 U.S. 26 (1954), paved the way for urban renewal across the country when the Court affirmed that the acquisition of a non-blighted property included within a generally blighted urban renewal area was a valid public purpose justifying the exercise of eminent domain. In an urban renewal context, a municipality or government entity, rather than condemning the land for a school or a public park or some other traditional public purpose, identifies a particular area as deteriorated or “blighted.” More often than not, a government entity partners with a private developer to eliminate blight and develop the land for housing or commercial uses. If a particular property owner within the area refuses to sell his or her land to the designated developer, the municipality? may acquire it through eminent domain. Understandably, a developer will only invest in these blighted areas and assume the financial risk, if a municipality or government entity can deliver the land, infrastructure, and a sound and practical plan for redevelopment in a timely fashion. Since the court’s decision in *Kelo*, these types of projects are under attack, and the future of public-private partnerships remains in jeopardy. This is because there is a widespread misperception that local governments, desperate for increased tax revenue, are forcing homeowners from their property in huge numbers in order to turn the property over to private developers whose sole motivation is their own financial gain. These unfortunate misperceptions are inaccurate and overlook the fact that societal benefits produced by these public-private projects greatly outweigh any incidental benefit that a private developer might receive.

Ironically, despite the backlash caused by the decision, the facts in *Kelo* are actually a good illustration of how a public-private partnership should evolve. In 1978 New London, Connecticut, established a local development agency, the New London Development Corporation (NLDC), to assist the city in revitalizing New London's depressed economy. Twenty years later Pfizer, Inc. decided to build a major research facility in the Fort Trumbull area of New London. Hoping to capitalize on the economic opportunity a major new employer offers, the city authorized NLDC, pursuant to chapters 130, 132, and 588 of the Connecticut General Statutes, to move forward with an extensive economic redevelopment plan of the Fort Trumbull area, which required the acquisition of private property. Chapter 132 declares that economic development is, by itself, a public use that justifies acquisition of private property, including acquisition by eminent domain.¹

Several New London residents, whose property was being condemned under the plan, sued the city, alleging that the statute and development plan violated the takings clauses of the U.S. and Connecticut Constitutions because economic development was not a valid public use. A bench trial granted permanent injunctive relief to four of the plaintiffs, but the Connecticut Supreme Court overturned the decision and held that Chapter 132 was constitutional

¹ Chapter 132 of the Connecticut General Statute -- the Municipal Development Projects Law -- declares that "economic welfare of the state depends upon the continued growth of industry and business. . . [and] that permitting and assisting municipalities to acquire and improve unified land and water areas . . .for industrial and business purposes. . .are public uses and purposes. . . ." Conn. Gen. Stat. § 8-186. The statute allows a municipality's legislative body to designate a development agency, which then gains specified powers through the Municipal Development Projects Law. § 8-188. The law requires that the development agency prepare a plan that "shall include: . . .(k) a statement of the number of jobs which the development agency anticipates would be created by the project . . . (l) . . .that the project will contribute to the economic welfare of the municipality and the state; and that to carry out and administer the project, public action under this section is required." § 8-189. After the plan is approved by the municipality's legislative body, the development agency may begin to acquire land, and "may, with the approval of the legislative body, and in the name of the municipality, acquire by eminent domain real property located within the project area and real property and interests therein for rights-of-way and other easements to and from the project area. . ." § 8-193. While the statute requires findings that a municipality is distressed for special financial grants, a municipality may acquire property through eminent domain for economic development without any findings of blight or findings that the municipality is distressed.

and that the economic development project could proceed. *Kelo v. City of New London*, 2002 Conn. Super. LEXIS 789 (Conn. Superior Court, Judicial District of New London, March 13, 2002), affirmed in part and reversed in part, 268 Conn. 1, 843 A.2d 500 (Conn. Sup. Ct. 2004).

The United States Supreme Court granted certiorari to resolve whether the city's taking was for a valid public use under the Fifth Amendment to the Federal Constitution. In June 2005, the Court upheld, by a 5-4 vote, the power of the City of New London, Connecticut to condemn private property for an economic development project. Relying heavily on the precedents set by the Court in *Hawaii Housing Authority v. Midkiff*² and *Berman*³, the Supreme Court stated that courts must give legislatures broad latitude in determining public use.

From one perspective, there was nothing new about the ruling. The Court was simply re-affirming prior case law to the effect that the Due Process Clause of the Fifth Amendment was not violated if a state condemned property for economic development purposes. As Justice Stevens, in a concurring opinion, emphasized, the boundaries of an acceptable public use are best determined by state and local governments, and each state was free to limit its eminent domain power. *Kelo*, 545 U.S. at 489. The Court held that the condemnation was rationally related to a valid public purpose because it was part of a carefully formulated economic development plan. *Kelo*, 545 U.S. at 483-84. While a private party may incidentally benefit, achieving the public good must be the primary intent. *Kelo*, 545 U.S. at 477-78.

It was Justice O'Connor's dissent that created nationwide alarm and misunderstanding. She wrote that as a result of the Court's decision, "[T]he specter of

² 467 U.S. 229 (1967)

³ 348 U.S. 26 (1954)

condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton.” *Kelo*, 545 U.S. at 503. The public outcry in the wake of this dissent was nothing short of hysterical. Articles about eminent domain were abundant; even *Parade Magazine* and *Women’s Wear Daily* ran articles about Suzette Kelo’s plight. Thereafter, challenges to condemnations on the ground that a private, not public purpose, was being served, ensued, hundreds of bills that would severely restrict the government’s power of eminent domain were introduced in virtually every state legislature, and in at least 43 states, legislation was passed in an attempt to curb “eminent domain abuse.” Equally disturbing were the federal bills pending in Washington D.C. which would severely limit a municipality’s ability to use eminent domain, or risk the loss of federal funding.

Undue restriction or outright prohibition of eminent domain for economic development purposes would limit the ability of a municipality to partner with a private developer to facilitate its plan for redevelopment. Furthermore, without eminent domain and the use of public-private partnerships, the ability to clean up blighted neighborhoods in urban areas will be severely curtailed, and municipalities will lose much of their ability to rebuild depressed areas into multi-use communities, where small businesses and middle income housing can thrive.

New York State and New York City have used eminent domain to improve neighborhoods, foster home ownership and provide affordable housing. New York has not permitted the use of eminent domain solely for economic development but has required that there be a finding of blight. If a public purpose is the elimination of “blight,” in New York, it must be shown that the project area is substandard, insanitary, deteriorated, or deteriorating (GML § 502[4]). An area may be blighted because of such factors as crime, lack of sanitation, fire hazards, traffic congestion, or pollution. *Yonkers Community Development Agency v.*

Morris, 37 NY2d 478, 483 (1975). An area may also be blighted if it is economically underdeveloped and stagnant. *Yonkers*, 37 NY2d at 481. However, a conclusory assertion of “blight” is not sufficient. Specific facts supporting a conclusion of blight must be “spelled out.” *Yonkers*, 37 NY2d at 484.

Recently, the New York State Court of the Appeals handed down two major decisions which upheld the government’s broad role in decisions regarding eminent domain, paving the way for two significant public/private partnerships: the revitalization of the Atlantic Yards section in downtown Brooklyn and the expansion of Columbia University. At issue was the standard of review for blight determinations made by government agencies. Owners of property slated for acquisition by eminent domain challenged the determinations and findings of the Empire State Development Corporation⁴ (“ESDC”) the economic development arm of New York State, which declared that the areas were blighted and that the State could proceed to acquire the properties by eminent domain. The owners claimed, *inter alia*, that the blight studies relied upon were flawed, and the projects lacked a public purpose because they were intended to benefit private parties. In allowing the State to proceed with the condemnations, the Court reaffirmed the long-standing principle of law that an agency’s findings of blight are entitled to broad deference and the reviewing role of the judiciary is limited. The Court also made clear that the eradication of “blight” has evolved from “slum clearance,” and that under the current urban landscape, economic underdevelopment and stagnation can also constitute blight.

⁴ Though the State of New York was the condemning authority for both projects, the New York City Law Department on behalf of the City of New York submitted amicus curiae briefs due to the great importance of the projects and to urge the Court to affirm the legal principles that are critical for a City that is at the forefront of urban renewal.

ATLANTIC YARDS

Atlantic Yards is a 22-acre mixed-use development, undertaken in conjunction with a private developer, Bruce Ratner, and well-known for the inclusion of a sports arena to house the Nets basketball franchise. For decades, the majority of the area to be developed was identified as an area which suffered from physical deterioration and economic inactivity. It was included within the Atlantic Terminal Urban Renewal Area or “ATURA,” an area that the City of New York first designated as blighted in the late 1960’s. The part of the ATURA that falls within the project boundaries consists chiefly of a below-grade Metropolitan Transit Authority rail yard and a depot for retired buses. As late as April 2004, the City reconfirmed, for the tenth consecutive time, the ATURA’s blight designation and accompanying urban renewal plan. More than half of the Project site falls inside the ATURA, while the balance is made up of privately owned commercial and residential properties.

In December of 2003, ESDC sponsored a plan for the development of the Atlantic Terminal area of Brooklyn (the “Atlantic Yards Project” or the “Project”). Memoranda of understanding concerning the Project were signed by ESDC and its private sector partner, the Forest City Ratner Companies (“FCRC”), in early 2005. The plan proposed the construction of a sports arena, over 6,000 housing units, approximately 600,000 square feet of office space, and a hotel. In order to facilitate the development, property would need to be acquired either by negotiated acquisition or by eminent domain. After the ESDC held its public hearing and issued its determination and findings that the area was blighted and that it was authorized to acquire the properties, several property owners sought review of the ESDC’s determination and findings in federal court. The plaintiffs opposed the condemnation on the basis that the takings were not for a valid public purpose, but rather a pretext to benefit a private entity. Finding that a taking is

unlawful only where the sole purpose is to benefit a private party, the Court dismissed the complaint, for failure to state a claim, because the complaint identified clear public benefits. *Goldstein v. Pataki*, 488 F. Supp. 2d 254, E.D.N.Y. 2007. "Because plaintiffs concede that the project will create large quantities of housing and office space, as well as a sports arena, in an area that is mostly blighted,... no reasonable juror could conclude "that the 'sole purpose' of the project is to confer a private benefit." *Id.*

In February 2008, the Second Circuit affirmed the district court's dismissal, once again reaffirming the limited scope of judicial review in eminent domain proceedings and held that it does not matter that New York has enlisted the services of a private developer to implement its development. Once we discern a valid public use to which the project is rationally related, it 'makes no difference that the property will be transferred to private developers' (citations omitted). *Goldstein v. Pataki*, 516 F.3d 50, 59,60 (2nd Circuit 2008). The Court concluded that the Project unquestionably rationally served several acknowledged public uses, including redressing blighted conditions, creating affordable housing, constructing a publicly owned sports arena, creating public open space, and improving mass transit. The Court explicitly rejected plaintiffs' claim that the public purposes were a mere pretext to confer a benefit on the developer, saying that it "defies both logic and experience." *Id at 63.*

The plaintiffs then petitioned the US Supreme Court for a writ of certiorari. On June 23, 2008, the third anniversary of the Court's decision in *Kelo*, the justices refused to hear the plaintiffs' argument that the seizure of their property would violate the United States Constitution.

Thereafter, pursuant to section 207 of the New York State Eminent Domain Procedure Law ("EDPL"), the same plaintiffs sought relief in state court, and commenced a

proceeding in the Appellate Division to challenge ESDC's determination to acquire private property through eminent domain. Disputing the validity of blight studies relied on by ESDC, the opponents contended that the properties were in good condition. The Court was asked to determine, *inter alia*, whether "a public use, benefit or purpose will be served by the proposed acquisition," and whether or not the New York Constitution limits the taking of private property solely for use by the public. *Matter of Goldstein v. New York State Urban Dev. Corp.*, 64 A.D.3d 168, 181 (2nd Dep't 2009).

The Court held that "what qualifies as a public purpose or public use is broadly defined as encompassing virtually any project that may confer upon the public a benefit, utility or advantage," and that in New York, these terms have been held to include any use, including urban renewal, which contributes to "the health, safety, general welfare, convenience or prosperity of the community. *Id.* "If an adequate basis for a determination is shown and the objector cannot show that the determination was without foundation, the agency's determination should be confirmed." *Id.* After reviewing the record, the Court found that the facts "amply support ESDC's finding that the project site is underdeveloped and characterized by unsanitary and substandard conditions, and thus provides an adequate foundation for its conclusion that the land is substandard." *Id. at 182.* The Court also found that the project served the additional public purposes of creating an arena, publicly accessible open space, affordable housing, improvements to public transit, and new job opportunities.

Finally, in dealing with the question of private gain, the Court noted that it has long been recognized as a matter of State constitutional law that where the public good is expected to be enhanced by a project, "it does not matter that private interests might be benefited." *Id. at 184.* It thus found, in light of the evidence in the record that much of the land

to be acquired was substandard, and since the taking is rationally related to the purpose of remedying these substandard conditions, any incidental profit that may inure to private parties from the remediation of the blighted project site does not undercut the public purpose of the condemnation of the substandard land.

Thereafter, the Petitioners sought review in the Court of Appeals. In affirming the Appellate Division's rejection of the petition, the Court of Appeals acknowledged that on this record it was possible to disagree with the State's blight finding, but reaffirmed that the Constitution accords government broad power to take property and that whether a property is blighted is in the province of the agencies, not the judiciary, and that only "... where there is no room for reasonable difference of opinion as to whether an area is blighted that judges may substitute their views as to the adequacy with which the public purpose of blight removal has been made out for that of the legislatively designated agencies..." *Id. at 526*. Stating that the findings of blight were extensively documented, the majority found that all that was at issue was "a reasonable difference of opinion." *Id. at 528*

COLUMBIA UNIVERSITY

While plans to redevelop the Atlantic Yards area were going forward, another hotly contested private/public development project, the expansion of Columbia University, was taking place in upper Manhattan. Finding that the area was blighted and that this project would constitute a civic project consistent with the New York State Urban Development Corporation Act (UDCA), ESDC issued determinations and finding that would allow it to proceed with acquisition of property for the project. The Columbia University expansion project contemplates the construction of a new urban campus that would consist of 16 new state-of-the-art buildings, the adaptive reuse of an existing building and a multi-level below-grade support space. The

Project also provides for the creation of about two acres of publicly accessible open space, a retail market and widened, tree-lined sidewalks. The new buildings would house, among other things, teaching facilities, academic research centers, graduate student and faculty housing as well as an area devoted to services for the local community. Columbia University, a not-for-profit educational corporation, will exclusively underwrite the cost of this Project and not seek financial assistance from the government.

Owners of property slated for condemnation brought an EDPL §207 proceeding challenging ESDC's determination of blight in the area surrounding Columbia University. Just nine days after the *Goldstein* decision was issued, the Appellate Division, by a plurality, and notably without any mention of the *Goldstein* decision at all, rejected ESDC's blight finding and determination to condemn properties needed for the development of the expanded urban campus. *Kaur v. State of New York*, 72 A.D.3d 1, (1st Dept, 2009). In a scathing decision, the Appellate Division, relying heavily on *Kelo*, made much of the fact that one of the blight studies was prepared by the same consultant who was hired by Columbia in connection with its planning applications, and held that ESDC's blight determination was "mere sophistry," was the result of collusion between ESDC, Columbia University, and the expert who conducted the blight study, and that the project's true purpose was to benefit a "private elite educational institution" *Id. at 3*.

Just seven months later, the Court of Appeals, relying substantially upon the principles it pronounced in *Goldstein*, reversed the Appellate Division's ruling. *Matter of Kaur, etc.* 15 NY3d 235 (2010). The issue before the Court of Appeals was whether ESDC's exercise of its power of eminent domain to acquire the property was supported by a sufficient public use, benefit, or purpose. The Court found that ESDC had considered a wide range of factors, including the physical, economic, engineering, and environmental conditions of the site, and

thus, the finding of blight was not irrational or baseless. In addition, the Court found that ESDC had the right to acquire the properties on the independent ground that the project properly qualified as a "civic project" within the meaning of the UDC Act.

With respect to ESDC's finding of blight, the Court quoted from its own decision in *Goldstein* that 'the Constitution accords government broad power to take and clear substandard and insanitary areas for redevelopment. In so doing, it commensurately deprives the Judiciary of grounds to interfere with the exercise. *Goldstein* at 527' *Id.* at 253. The Court found that the evidence of blight was extensively documented, that at issue was simply a "reasonable difference of opinion," and the Appellate Division's de novo review of the record was improper. *Id.* at 254.

Additionally, in a case of first impression in New York, the Court upheld the condemnation on the independent ground that it constituted a civic project under the UDC Act. Pursuant to the UDC Act, (New York State Uncons Laws § 6253 [6] [d]), a civic project is defined as "[a] project or that portion of a multi-purpose project designed and intended for the purpose of providing facilities for educational, cultural, recreational, community, municipal, public service or other civic purposes." The Court found that the Appellate Division's conclusion that the expansion of a private university does not qualify as a "civic purpose" lacked statutory support. Indeed, the Court, in a victory for public/private partnerships, held that private party participation was contemplated by the UDC statute and that "...consonant with the policy articulated in the UDC Act, ESDC has a history of participation in civic projects involving private entities." *Id.* at 258. Recognizing that education is a pivotal governmental interest, particularly vital for the State and City of New York, the Court found that the purpose of the Project was unquestionably to promote education and academic research while providing public

benefits to the local community. Thus, the Court held that “...the concern that a private enterprise will be profiting through eminent domain is not present.” *Id.*

On September 22, 2010, the Petitioners petitioned the US Supreme Court for a writ of certiorari. The Court is expected to decide whether or not it will grant certiorari by mid January 2011.

CONCLUSION

In *Goldstein* and *Kaur*, the federal court and New York’s highest court reaffirmed that where a project achieves a public purpose, sponsorship by a private entity does not preclude the use of eminent domain. The Court rejected arguments in both cases that the condemnation was not for a “public use,” but to enable a private entity to use the properties for private economic gain. These victories are significant for a City where most major development projects can only be accomplished through public/private partnerships, as demonstrated in the rebirth of Times Square. Hopefully, post-*Kelo* decisions such as those issued in connection with Atlantic Yards and Columbia University will continue to raise awareness that eminent domain is a necessary tool to facilitate public development projects that generate new housing, new jobs, and increased tax revenue and that projects involving the partnership between the public and private sectors are crucial to the growth and development of any municipality, especially the City of New York.