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Defending Eminent Domain During Economic Development

This is the second of two columns examining the work of the Law Department's Tax and Bankruptcy Litigation Division. The previous column focused on tax and bankruptcy matters handled by the division. Here I will focus on the work of the division's condemnation unit, which handles matters relating to eminent domain, and involves the division in some of the city's most important economic development and capital projects.

Eminent domain is the power of the sovereign to take private property for public use, so long as just compensation is paid to the owner for the property acquired. The term "public use" has been the subject of widespread debate, especially since the U.S. Supreme Court's 5-4 decision in Kelo v. City of New London, 545 U.S. 469 (2005), which held that condemnation that results in the transfer of property from one private owner to another for economic development purposes could be a "public use" justifying the exercise of the power of eminent domain under the Fifth Amendment to the United States Constitution.

New York courts have adopted a definition of the term "public use" that encompasses uses that contribute to the health, safety, general welfare, convenience or prosperity of the community. See New York City Housing Authority v. Muller, 270 NY 333, 340 (1936); see also New York State School Bus Operators Ass'n v. County of Nassau, 39 NY2d 638, 640 (1976). Urban renewal is one such use which fits squarely within New York's definition of public use. See Yonkers Community Development Agency v. Morris, 37 NY2d 478 (1975); see also Muller, supra 270 NY at 337.

In New York, the state constitution authorizes the Legislature to provide for "the clearance, replanning, reconstruction and rehabilitation of substandard and unsanitary areas," commonly known as "urban blight." New York State Constitution, Art. XVIII, §§1, 2. The use of eminent domain for this type of acquisition has undergone significant development in recent years, in which attorneys of the condemnation unit have participated. In two recent cases, both involving development projects in the city, the New York Court of Appeals 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.

This article is not a consideration of the merits of these projects or of the process by which they were approved. Both projects—the development of the Long Island Railroad yards and some surrounding area (Atlantic Yards), and the expansion of Columbia University in West Harlem—have been the subject of considerable controversy. The Atlantic Yards project has even become the subject of a musical production, "In the Footprint," which uses both song and excerpts from the public record to bring home the impact of the use of eminent domain as viewed from the perspective of the affected community. The City of New York was not a named party in either case. The Law Department filed amicus briefs on appeal in support of generally applicable statutory and constitutional principles that are important to the city's economic health and public welfare.

Atlantic Yards

The first of these cases to be decided, Goldstein v. New York State Urban Development Corp., 13 N.Y.3d 511 (2009), rearg. den. 2010 N.Y. Lexis 65, 2010 (Feb. 18, 2010), involved the 22-acre mixed-use development in Brooklyn known as Atlantic Yards, undertaken in conjunction with a private developer and including affordable housing as well as a planned sports arena to house the Nets basketball team. The Empire State Development Corporation (ESDC), a public corporation established by the Legislature and vested with the power to condemn property, see Unconsolidated Laws §§6260, 6263, concluded on the basis of a consultant's report that the area was blighted and determined to use its authority to take certain privately owned properties located in the area for inclusion in the project.

Although most of the project area had been previously found by the city to be blighted and designated the Atlantic Terminal Urban Renewal Area (ATURA), a small segment of developed land in the south of the project area lay outside the confines of ATURA. Pursuant to section 207 of the Eminent Domain Procedure Law (EDPL), property owners in that segment of land sought judicial review in the Appellate Division, Second Department, of the ESDC determination to condemn, arguing primarily that (a) the takings clause of the State Constitution (see Art. I, §7[a]) prohibits private property taken by condemnation from being used in any way for private economic gain, and (b) the properties in question, contrary to ESDC's determination, were not blighted within the meaning of Constitution Art. XVIII.

After the Appellate Division affirmed ESDC's determination (Goldstein v. New York State Urban Development Corp., 64 A.D.2d 168 (2d Dept.), aff'd, 13 N.Y.3d 511 (2009), the Court of Appeals granted an appeal as of right on constitutional grounds. The Law Department then submitted an amicus curiae brief on behalf of the city of New York, urging dismissal of the proceeding on procedural grounds, or, in the alternative, affirmance of the Appellate

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Division's judgment on the grounds that it had properly applied the deferential standard for reviewing determinations to condemn property, that the taking was rationally related to traditional and undisputed public purposes, and that an incidental benefit to private entities did not invalidate the action or call into question its public purpose. Although the Court rejected the city's (and ESDC's) procedural argument, it upheld the Appellate Division on all substantive points.

The Court concluded, first, that the exercise of the power of eminent domain for the removal of urban blight is a "public use" explicitly provided for in Article XVIII of the state constitution, even where such use results in incidental private economic gain, 13 N.Y.3d at 524, 525. The Court of Appeals applied a deferential standard in reviewing the ESDC's findings of blight. In an opinion written by Chief Judge Jonathan Lippman, it upheld those findings even though the case of Atlantic Yards might provide grounds for disagreement: "It is only where there is no room for reasonable difference of opinion as to whether an area is blighted, that judges may substitute their views[.]" Id. at 526.

Columbia University

The second recent Court of Appeals decision regarding the power of eminent domain, Kaur v. New York State Urban Development Corp., 15 N.Y.3d 235 (2010), involved a plan by Columbia University, in cooperation with ESDC and the New York City Economic Development Corporation (EDC), to construct a new urban campus in the West Harlem area of Manhattan, also known as "Manhattanville." The project includes sixteen new buildings, multi-level below-ground support space, two acres of publicly accessible open space, widened sidewalks and a retail market.

Following discussions among EDC, ESDC and Columbia, the submission of three studies prepared by consultants (one retained by EDC, two by ESDC) that surveyed the West Harlem area and concluded that it suffered from urban blight, and rezoning of the area by the city council to accommodate the proposed change in use, ESDC adopted a project plan and subsequently issued its findings and determination. It concluded that the plan was both a "land use improvement project" (that is, a project to remove urban blight) and a "civic project" (that is, a project undertaken to provide "facilities for educational, cultural, recreational, community, municipal, public service or other civic purposes"). Pursuant to the statute governing ESDC, both purposes justified the use of ESDC's power of eminent domain to acquire certain properties in the project area. See Unconsolidated Laws §6253(6)(c), (d).

Following adoption of the project plan and the issuance of the determination and findings, the owners of property ESDC sought to condemn petitioned for review of the ESDC's determination by the Appellate Division, First Department. Petitioners argued primarily that the plan would benefit only the private interests of Columbia University and, consequently, that their property was not being taken for "public use" as required by the state and federal constitutions.

Petitioners further asserted that ESDC acted in bad faith in concluding that the West Harlem area was blighted and that the plan would not bring to the area the benefits of a "civic project." A plurality of the Appellate Division agreed with petitioners, stating that the true purpose of the plan was to benefit a "private elite educational institution" and concluding, on the basis of its own review of the facts, that ESDC's determination of blight was "mere sophistry," made in bad faith and unsupported by the record. The court also held that the expansion did not qualify as a "civic project" under ESDC's governing statute because Columbia was a private university. Kaur v. New York State Urban Development Corp., 72 A.D.3d 1,3 (1st Dept. 2009), rev'd, 15 N.Y.3d 235.

When ESDC appealed the Appellate Division's determination to the Court of Appeals, the Law Department submitted an amicus curiae brief on behalf of the city in support of ESDC's position, urging reversal in part on the basis of the recently issued Court of Appeals decision in Goldstein. The Law Department's brief also stressed the substantial benefits the project would realize for the city, including revitalization of the West Harlem area, maintaining the city's position as a leader in higher education, and job creation.

The Court of Appeals agreed and reversed the Appellate Division's determination. Citing Goldstein, the Court emphasized the substantial deference owed to ESDC's finding of blight, which it affirmed as "extensively documented" by evidence in the record, and concluded that the Appellate Division's de novo review of the project area's condition was improper. The Court also concluded, contrary to the Appellate Division, that a "civic project" could include facilities provided by a private educational or cultural institution such as Columbia, noting that the ESDC's governing statute "encourages participation in projects by private entities."

Accordingly, the Court concluded, ESDC's project plan for the West Harlem area served a public purpose under the statute and the state constitution and its determination to condemn should be affirmed. 15 N.Y.3d at 252-259. The petitioners in the Kaur case filed a petition for a writ of certiorari with the United States Supreme Court, which was denied on Dec. 13, 2010. Tuck-It-Away Inc. v. New York State Urban Development Corp., U.S.S.C. Docket No. 10-402, 562 U.S.—.

'Uptown Holdings'

The principles of law established by the Court of Appeals in the Goldstein and Kaur cases were recently applied by the Appellate Division, First Department, in the case of Uptown Holdings, LLC v. City of New York, 2010 N.Y. App. Div. LEXIS 7343 (1st Dept., Oct. 12, 2010). In Uptown Holdings,

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the city, following its Uniform Land Use Review Procedure, amended its Harlem-East Harlem Urban Renewal Plan (the Plan) to provide for the rezoning and redevelopment of three parcels of land located within two blocks on and adjacent to East 125th Street in Manhattan.

The city's action followed submission of a blight study which concluded that the area and surrounding blocks contained "abandoned, vacant, substandard, underutilized and/or obsolete buildings and structures characterized by physical deterioration, high levels of code violations, defective construction, outmoded design, lack of proper sanitary facilities, and/or inadequate fire or safety protection." After the City Council had approved the Plan amendment, the city's Department of Housing Protection and Development (HPD), the lead agency in the project, determined that the City should exercise its power of eminent domain to acquire a number of private properties located within the project area.

Following HPD's determination, petitioners, owners of the subject properties, brought a proceeding under the EDPL to challenge the action in the Appellate Division, First Department. This followed an earlier Article 78 proceeding brought by petitioners in New York State Supreme Court (and litigated for the city by attorneys of the Environmental Law Division), challenging the Plan amendment on the ground that it lacked "any proper and required factual basis or legislative findings." East Harlem Alliance of Responsible Merchants et al. v. City of New York et al., 2010 N.Y. Misc. LEXIS 1257 (Sup. Ct., N.Y. Co., Jan. 7, 2010).

In both proceedings, petitioners argued, among other things, that their own properties were not blighted or otherwise in poor condition and that the city's action served no public purpose, but rather was undertaken to benefit the private developer. Both the Appellate Division (citing Goldstein and Kaur) and the New York State Supreme Court (citing Goldstein) ruled for the city in holding that the record adequately supported the finding that taking the property in question for urban renewal purposes served the public interest. The Appellate Division further concluded that HPD's determination was a proper use of the power of eminent domain, while the New York State Supreme Court rejected petitioners' challenge to the selection of the project developer. The petitioners in the Uptown Holdings case have filed a notice of appeal to the Court of Appeals.

Other Public Uses

In addition to economic development projects, the city acquires properties for other public uses, such as the Bluebelt System. Beginning in the late 1980's DEP pioneered a creative approach to controlling the chronic street flooding on Staten Island's south shore, the last large unsewered part of New York City. The city has used its powers of eminent domain to acquire more than 300 acres of land for DEP's Bluebelt System, which preserves and restores streams and ponds and other wetland areas for storm water management and alleviates the need for sewers. It has been a considerable success, and it is anticipated that the city will acquire by eminent domain an additional 155 acres of land in the upcoming years for other Bluebelts on Staten Island.

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