

MUNICIPAL LAW

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Eminent Domain in the City: From Metrotech to 42nd Street

Eminent domain is the power of the government to take private property for public use, provided that just compensation is paid to the owner for the property acquired.

Last month, the U.S. Supreme Court heard arguments in a highly charged property rights case, *Kelo v. City of New London*, in which the owners of property slated for condemnation called upon the High Court to revisit a 51-year precedent on eminent domain set forth in *Berman v. Parker*, 348 US 26 (1954). In that decision, it was held that government officials were authorized to condemn property in "blighted areas" through eminent domain so long as "that power [was] being exercised for a public purpose."

The law enunciated in *Berman* was the basis for condemnations undertaken in connection with major redevelopment projects in New York City from the Metrotech project in Brooklyn to the 42nd Street development project in Manhattan, and its principle was affirmed by the Connecticut Supreme Court in *Kelo*, see 843 A2d 500 (2004). In *Kelo*, the Connecticut Supreme Court held that the public use clauses of the federal and state constitutions authorized the exercise of eminent domain power in furtherance of a significant economic development plan that was projected to create in excess of 1,000 jobs, increase tax and other revenues, and to revitalize the economically distressed city of New London, including its downtown and waterfront areas.

'Public Use' and the 'Kelo' Case

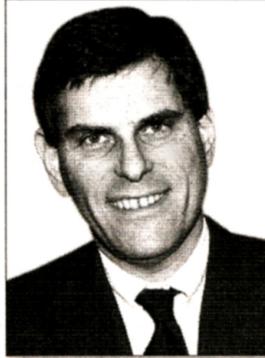
The term "public use" has been the subject of widespread debate, which is reflected in the *Kelo* litigation. Although *Kelo* concerns a specific set of facts, which may be distinguished from other projects, due to the great importance of the outcome in that case, the Law Department has submitted an amicus brief that advocates the use of eminent domain to advance economic redevelopment and urges the Court to leave to state courts the job of reviewing what, under local conditions and needs, is in fact a reasonable and appropriate public use.

Indeed, in a city like New York, assembling properties for a development site would sometimes prove impossible without the aid of condemnation.

The Law Department's tax and bankruptcy litigation division is assigned the responsibility for the acquisition by the city of title to property by condemnation.

In this article I will discuss some recent challenges to that power which the division has successfully defended and highlight the more noteworthy acquisitions handled by the division and other condemning authorities within New York State.

The power of eminent domain was conferred on the federal government when the union was created, but each state retained the power to acquire property within its jurisdiction. The Fifth Amendment to the U.S. Constitution provides that "private property [shall not] be



taken for public use, without just compensation." The same principle is set forth in Article 1, §1(a) of New York State Constitution, and Article 9, §1(e) confers upon local governments the "power to take by eminent domain property within their boundaries for public use[.]"

New York courts have adopted a broad definition of the term "public use" to encompass any use, including urban renewal, which contributes 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). Among

the takings upheld by the New York Court of Appeals as fulfilling a legitimate public purpose was the condemnation by the Port Authority of New York and New Jersey of 150 parcels of land in a 13-block area of Lower Manhattan to create the World Trade Center. *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*, 12 NY2d 379 (1963), appeal dismissed, 375 US 78 (1963), rehearing denied, 375 US 960.

Eminent Domain Procedure Law

The procedure for acquiring property by eminent domain in New York State is set forth in the Eminent Domain Procedure Law (EDPL), whose articulated purpose is to ensure just compensation and to balance the need to acquire property for public use against the legitimate interests of private property owners, local communities and the quality of the environment. EDPL §101. The city of New York is also subject to the condemnation procedures set forth in Title 5, Chapter 3 of the New York City Administrative Code. Further, since condemnation involves the acquisition of real property, the city's Uniform Land Use Review Procedure (ULURP), as set forth in §§197-c and 197-d of the New York City Charter, must also be complied with.

The EDPL provides for public participation in the condemnation process, as well as consideration of various factors such as environmental impact and the significance of the proposed public use. Before title can vest in the city or other condemning authority, the law requires a pause for consideration in the form of notice and comment and a public hearing on the proposed taking. Pursuant to EDPL §206, the city need not conduct a separate public hearing if it has provided a functionally equivalent hearing under a different statute.

Recently, courts have upheld the city's reliance on the ULURP hearing for this purpose on the ground that ULURP, which provides for extensive review of a proposed land acquisition and a number of opportunities for public input, requires the consideration of factors similar to those that must be considered under the EDPL. *Matter of West Bushwick Urban Renewal Area, Phase 2*, *New York Law Journal*, March 2, 2005, page 18, col.3 (Sup. Ct., Kings Co.) (Gerges, J.); *Matter of Sanitation Garage Brooklyn Districts 3 and 3A*, 5 Misc3d 1014A (Sup. Ct., Kings Co. 2004).

Once it has been determined that a proposed taking should proceed, the city or other condemning authority

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ty must set the appropriate level of compensation for the owner or owners of the condemned property. The procedures for determining just compensation are set forth in Article 5 of the EDPL. Courts have held that the measure of just compensation is the fair market value of the property taken, i.e., the price a willing buyer would pay for the highest and best use of the property at the time of the taking, so long as that use is reasonably probable and not speculative. *Matter of the Town of Islip (Mascioli)*, 49 NY2d 354 (1980); *Matter of Rochester URA, Upper Falls Project*, 48 NY2d 694 (1979); *Matter of the City of New York—Broadway Cary Corp.*, 34 NY2d 535 (1974).

When the procedural requirements of the EDPL have been met, courts have been reluctant, absent a clear showing of unreasonableness, to interfere with a condemning authority's determination that a particular site is needed for a public purpose. That determination includes the size or extent of a particular taking. *Matter of Neptune Associates, Inc. v. Consolidated Edison*, 125 AD2d 473, 475 (2d Dept. 1986); *Cugler v. Power Authority of the State of New York*, 4 Misc 2d 879 (Sup. Ct. Special Term, St. Lawrence Co. 1957), aff'd, 3 NY2d 1006 (1957). The courts have ruled in favor of the city in challenges to the exercise of eminent domain, thus facilitating the completion of large infrastructure and economic development projects. Several of the city's noteworthy recent acquisitions are highlighted below.

• **City Water Tunnel No. 3 and Shaft Sites:** The city has exercised its power of eminent domain to acquire property for the construction of City Water Tunnel No. 3. Completion of this critical infrastructure project will allow the city's Department of Environmental Protection (DEP) to take City Tunnels 1 and 2, each over 75 years old, out of service for inspection and repair. Along with the tunnel, the city must also acquire shaft sites located at certain points along the tunnel's route. These shafts will enable DEP to bring water up from the tunnel, which is located approximately 550 feet below the surface, so that the water can be conveyed to businesses and residences.

In the past 35 years, the city has acquired by condemnation easements for construction of the water tunnel beneath property covering 32 miles of the 60-mile planned length of City Water Tunnel No. 3, as well as title to several shaft sites that could not be acquired by negotiated purchase. For both types of acquisition, the procedures enumerated in the EDPL must be followed. No issue of

just compensation arose in the acquisition of underground easements, since the property owners' use of their surface land is unaffected. Nevertheless, although the EDPL exempts de minimis takings from the hearing requirement, actual notice to property owners under Article 4 of the EDPL is still required. In order to acquire the easements needed for City Tunnel No. 3 Stage 2 Phase 3, the city mailed notices of its condemnation vesting petition to over 1,100 owners.

When the city recently sought to acquire a parcel of property on Grand and Lafayette streets in Manhattan for a water tunnel shaft, which affects surface property rights, the owner opposed the city's application to condemn on the ground, inter alia, that, at most, the city needed an easement over the property for the shaft and that the city's acquisition of the entire site was unnecessary. The court held that the city had met all the procedural requirements set forth in the EDPL and, accordingly, had broad discretion in deciding what land is necessary to fulfill its public purpose. Therefore, the extent of the appropriation would not be interfered with by the court.¹

Bluebelt Proceedings

• **Bluebelt Proceedings:** Beginning in the late 1980s, the DEP pioneered a creative approach to controlling the chronic street flooding on Staten Island's south shore, the last remaining large portion of New York City not served by the public sewer system. The city has used its power of eminent domain to acquire more than 249 acres of land for the 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. Although there was no challenge to the public purpose in these proceedings, the city has engaged in extensive valuation litigation for over 200 parcels acquired for this purpose.

The bluebelt system has been a success, and it is anticipated that the city will acquire by eminent domain an additional 197 acres of land in the upcoming years for other bluebelts on Staten Island.

• **Metrotech:** As early as 1969, the city had identified the area in Brooklyn surrounding Polytechnic University as an appropriate site for urban renewal. The university's immediate neighborhood was developed to only 26 percent of its allowable zoning density and was severely underutilized. The area's existing lots were small and irregular, and their ownership was spread among 70 different owners, thereby impeding assem-

blage and development. Notwithstanding the availability of vacant lots and buildings, no new buildings had been constructed in the prior 20 years.

This depressed and blighted area eventually became one of the city's largest and most successful urban renewal sites. Although there were several unsuccessful challenges to the public purpose for this project, the city ultimately condemned 123 parcels of land to create a seven-million-square-foot academic and office "urban campus" on 16 acres, encompassing eight new and three renovated buildings, ground-floor retail space and restaurants, with a three-acre plaza at its center. Metrotech also made possible the Renaissance Plaza development, which houses a 32-story office tower and a Marriott hotel, the first new hotel in Brooklyn since the 1930s. Without the assistance of condemnation, a project like Metrotech would never have come to fruition.

• **42nd Street-Times Square:** Beginning in the 1980s and continuing through 2002, the Empire State Development Corp. (ESDC), the development arm of New York State, successfully revitalized approximately 13 acres of land in the Times Square area of Manhattan. The city's Economic Development Corp. partnered with ESDC for this undertaking.

The project was developed in response to the rampant crime, physical blight and social problems that plagued the area. Like Metrotech, without the assistance of condemnation, the project would not have been possible, since it consisted of more than 60 separately owned, small and underutilized lots. Acquisition of these properties by eminent domain enabled ESDC to assemble sustainable development sites for the six major office towers, two major hotels and retail stores, which currently occupy the area. Although ESDC was the condemning authority for the project, the city provided assistance and counsel to the state in this undertaking.

The Future

The next significant project that will rely in part on the use of the city's condemnation power is the Hudson Yards development project, where condemnation is anticipated in connection with the planned new open-space network, including a six-acre mid-block park and boulevard system, and the extension of the No. 7 subway line.

1. *Third Water Tunnel, Shaft 30B*, Index No: 403784/04 (Sup. Ct. NY Cty) (Schoenfeld, J.), transcript Jan. 7, 2005; This matter is currently on appeal.