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Eminent Domain

BY ANTHONY S. GUARDINO

A constitutional battle over land use planning and a municipality's power to condemn privately owned property by eminent domain that arose in New London, Conn., and traveled through that state's court system is now pending in the U.S. Supreme Court, in *Kelo v. City of New London*.¹

Much is at stake in this dispute, both for local governments and for property owners across the country, because the Court will soon decide whether the U.S. Constitution protects property owners from having their land condemned by government and turned over to private interests for redevelopment with more economically beneficial uses.

The issues in *Kelo* resonate on Long Island, where the counties and their towns, villages and cities continue their efforts to improve their communities through a variety of methods, including eminent domain.

The City of Long Beach, for example, recently approved a \$150 million "superblock" development consisting of 250 condominiums units, a condominium



hotel, two restaurants, a catering facility, a health club, a swimming pool and boutiques that will be constructed on property the city will acquire using its eminent domain powers.²

The Suffolk County legislature recently considered using the power of eminent domain to add land to Lake Ronkonkoma County Park. If a legislator's resolution to that effect had passed, it would have required that 30 people living in a trailer park on the property move elsewhere.³

The Town of North Hempstead has made it clear that it will use condemnation and eminent domain to revitalize the area known as New Cassel. Indeed, the town board recently authorized the condemnation of two vacant lots in New Cassel if the out-of-state owner failed to properly maintain them, and Town Supervisor Jon Kaiman has indicated that the town will use the power of eminent domain if

absentee property owners fail to keep up their properties.⁴

Similar efforts have occurred recently in the Town of Hempstead, where the town board voted to condemn a motel and turn it into a parking lot,⁵ and in the Town of Islip, which sought to condemn a number of properties to make room for an affordable housing development.⁶

These kinds of local actions take place within the context of both the provisions of the state law⁷ and of the state Constitution⁸ that govern eminent domain and, of course within the overarching context of the Fifth Amendment to the U.S. Constitution.⁹ It is the Fifth Amendment that is at the heart of the *Kelo* case.

In *Kelo*, the Supreme Court will decide whether a local government may exercise the power of eminent domain only for limited public uses, such as to construct a park, roadway, sewer line or school, or for broader purposes, such as to allow private redevelopment to enhance a blighted or economically depressed area or even just to increase jobs and tax receipts. Across the country, state courts are divided on this issue, with some permitting eminent domain under these circumstances¹⁰ and others prohibiting it.¹¹

The "public use" issue arose in a Long Island case, *Matter of Northville Dock Pipe Line Corp. v. Fanning*,¹² about 40 years

Anthony S. Guardino is a partner with Farrell Fritz in Uniondale.

ago. Here, Northville Dock Pipe Line Corp., a large independent wholesale supplier of heating oils and other petroleum products on Long Island, sought to construct and operate a pipe line from Riverhead—on the north shore of eastern Long Island, where its parent company maintained a deep water oil unloading terminal—to Pine Aire, in southern Suffolk County. Part of the proposed line was to pass through farm land owned by three individuals. As part of the process of evaluating the plan, Northville had to survey the farm land. The owners denied Northville's request to conduct the survey, and Northville went to court for an injunction restraining them from forcibly obstructing its efforts.

Northville pointed out that, as a pipe line corporation organized under the New York Transportation Corporations Law, it had been authorized to "construct and operate for public use...lines of pipe for conveying or transporting therein petroleum, gas, liquids or any products." To fulfill this purpose, Northville observed, it was empowered to make such surveys "as it may deem necessary" and, once its route had been finally designated, "to acquire any necessary property by condemnation." The property owners argued, however, that Northville had failed to show that the pipe line, if constructed, would be employed for "public use."

The hearing at Special Term dealt exclusively with the question of "public use." At its conclusion, that court refused to issue the restraining order sought by Northville and instead characterized the proposed use of the pipe line to be other than the public use necessary to permit Northville to use the condemnation powers contained in the Transportation Corporations Law. This determination

was affirmed by the Appellate Division in a memorandum opinion that stated that Northville "may not exercise the power of condemnation unless it seeks to take private property for a public use."

Unfortunately, the Court of Appeals did not rule on the issue in this case. It pointed out that Northville was not seeking to exercise its condemnation

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power but merely was seeking to conduct a survey. The Court stated that only after the survey had been completed, and a definite route selected, should Northville have to show "public use." The Court then reversed the Appellate Division, and ordered that Special Term determine whether any safeguards should be put in place to protect the farm land while Northville conducted its survey.

Although the Court of Appeals did not specifically decide the public use issue in *Northville*, it appears that New York is in the group of states that permit eminent domain proceedings for economic development purposes. For example, two earlier decisions by the Court, *Cannata v. City of New York*,¹³ involving a "substandard" area albeit not a "slum," and *Courtesy Sandwich Shop, Inc. v. Port of New York Auth.*,¹⁴ arising under the state's authority over ports, implied that economic development is a public use. Moreover, the Appellate Division, Second Department, in *Vitucci v. New York City*

School Construction Auth.,¹⁵ has clearly held that private business development is a public use.

Of course, the issue is now with the U.S. Supreme Court. Its decision, which is likely to either broadly uphold the authority of a municipality to exercise the power of eminent domain or to impose restrictions—and possibly severe limits—on that power, will be of great interest to property owners and government officials on Long Island, and elsewhere across the state and nation.

A decision is expected in June.

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1. No. 04-108 (S.Ct. 2005).
 2. Sid Cassese, "Long Beach City Council Approves Superblock Plan," *Newsday*, A18, April 6, 2005.
 3. Sumathi Reddi and Emi Endo, "Lake Ronkonkoma Controversy," *Newsday*, A14, Aug. 4, 2004.
 4. Victor Ramos, "North Hempstead Revitalization," *Newsday*, A40, May 13, 2004.
 5. Joseph Mallia, "Hempstead; Board votes to condemn motel," *Newsday*, A30, May 12, 2004.
 6. Valerie Burgher, "Homeowners Stall Development," *Newsday*, A27, March 9, 1999.
 7. See, Eminent Domain Procedure Law.
 8. See, Art. 1, Sec. 7 ("Private property shall not be taken for public use without just compensation.")
 9. The Fifth Amendment provides, in pertinent part, "nor shall private property be taken for public use, without just compensation."
 10. See, e.g., *General Bldg. Contractors v. Board of Shawnee County Comm'rs*, 66 P.3d 873 (Kan. 2003) (upholding condemnation for industrial use and construction of Target distribution center).
 11. See, e.g., *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451 (Fla. 1975) (shopping mall not public purpose for which condemnation may be exercised).
 12. 21 N.Y.2d 616 (1968).
 13. 11 N.Y.2d 210 (1962).
 14. 12 N.Y.2d 379 (1963).
 15. 289 A.D.2d 479 (2nd Dept. 2001).

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