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ZONING AND LAND USE PLANNING

Eminent Domain Rulings Affirm Broad Authority for Government

By **Anthony S. Guardino**

Two decisions this term by the New York Court of Appeals in eminent domain cases—the second coming almost five years to the day after the U.S. Supreme Court's June 23, 2005, eminent domain ruling in *Kelo v. City of New London*[1]—make it clear that, at least in New York, government has broad power to use its statutory and constitutional eminent domain authority. With little likelihood in the near future that the legislature will limit that power—which opponents might view, especially now, as virtually unfettered—there may only be one practical limitation on eminent domain in New York, i.e., the cost, as illustrated in the recent decision by the Court of Claims in *Gyrodyne Co. of America Inc. v. State*.[2]

Atlantic Yards

Last November, the Court of Appeals decided *Matter of Goldstein v. N.Y. State Urban Dev. Corp.*,[3] holding that the findings of the Empire State Development Corporation (ESDC), formerly the New York State Urban Development Corporation, of blight and its determination pursuant to Eminent Domain Proceedings Law (EDPL) §204 that the condemnation of privately owned property known as the "Atlantic Yards" in downtown Brooklyn for inclusion in a proposed 22-acre mixed-use development qualified as a "land use improvement project" were rationally based and entitled to deference, notwithstanding that the project was to be undertaken by developer Bruce Ratner and the real estate entities of which he is a principal.

The project is to involve, in its first phase, construction of a sports arena to house the National Basketball Association's Nets franchise, as well as various infrastructure improvements—most notably reconfiguration and modernization of the Vanderbilt Yards rail facilities and access upgrades to the subway transportation hub already present at the site. The 16 towers planned for the project are intended to serve both commercial and residential purposes and are slated to contain between 5,325 and 6,430 dwelling units, more than a third of which are proposed to be affordable either for low or middle income families.

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Section of property at **125th & Broadway** that Columbia University plans to use for its satellite campus.

The project was sponsored by the ESDC as a "land use improvement project" within the definition of Urban Development Corporation Act §6253(6)(c), upon findings that the area in which the project is to be situated was "substandard and insanitary," or, in other words, "blighted."

In support of its exercise of the condemnation power with respect to these properties, the ESDC, based on studies conducted by a consulting firm, made findings that the blocks in which they are situated possess sufficient indicia of actual or impending blight to warrant their condemnation for clearance and redevelopment in accordance with a §6253(6)(c) land use improvement plan, and that the proposed land use improvement project would, by removing blight and creating in its place a mixed-use development, served a "public use, benefit or purpose" in accordance with the requirement of EDPL §204(B)(1).

Property owners challenged the ESDC's decision, and the dispute reached the Court of Appeals. The petitioners alleged that the proposed taking was not for a "public use," but for the benefit of a private party and, thus, would be in violation of Article I, §7(a) of the state constitution, which provides that "[p]rivate property shall not be taken for public use without just compensation," and EDPL §207(C)(1).

The petitioners also claimed that the condemnation proceeding was not in conformity with the state constitution for the additional reason that the project it was to advance, although financed with state loans or subsidies, was not limited in occupancy to persons of low income in accordance with the requirement of Article XVIII, §6 of the state constitution.

In a decision by Chief Judge Jonathan Lippman, the Court first rejected the "public use" argument. The Court declared that it was "indisputable" that the removal of urban blight is a proper, and "constitutionally sanctioned" predicate for the exercise of the power of eminent domain. The Court noted that it has been deemed a "public use" within the meaning of the state's takings clause at least since *Matter of New York City Housing Authority v. Muller*[4] and that it is "expressly recognized" by the state constitution as a ground for condemnation.[5]

The petitioners maintained that the blocks at issue

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were not, in fact, blighted and that the allegedly mild dilapidation and inutility of the property could not support a finding that the property was substandard and insanitary within the meaning of Article XVIII.

In response, the Court stressed that "lending precise content to these general terms has not been, and may not be, primarily a judicial exercise." Moreover, it declared, whether a matter should be the subject of a public undertaking—whether its pursuit will serve a public purpose or use—is "ordinarily the province of the Legislature, not the Judiciary," and the actual specification of the uses identified by the Legislature as public has been largely left to quasi-legislative administrative agencies. Indeed, the Court added, 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 as to the adequacy with which the public purpose of blight removal has been made out for that of the legislatively designated agencies."

The Court also rejected the property owners' argument that the proposed condemnation should not have been authorized because the land use improvement project it was to advance was not in conformity with Article XVIII, §6 of the state constitution, which states that "[n]o loan, or subsidy shall be made by the state to aid any project unless such project is in conformity with a plan or undertaking for the clearance, replanning and reconstruction or rehabilitation of a sub-standard and unsanitary area or areas and for recreational and other facilities incidental or appurtenant thereto…. The occupancy of any such project shall be restricted to persons of low income as defined by law and preference shall be given to persons who live or shall have lived in such area or areas."

The Court stated that it did "not seem plausible that the constitutionality of a project of this sort was meant to turn upon whether its occupancy was restricted to persons of low income," finding although the creation of low income housing is a generally worthy objective, "it is not constitutionally required" under Article XVIII, §6 as an element of a land use improvement project "that does not entail substantial slum clearance."

Columbia University

Then, on June 24, the Court decided *Matter of Kaur v. N.Y. State Urban Devel. Corp.*,[6] another eminent domain case involving property in New York City, this time, near the Columbia University campus. The question before the Court in *Kaur* was whether the exercise of the power of eminent domain to acquire the petitioners' property for a Columbia project that contemplated 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, was supported by a sufficient public use, benefit or purpose.

ESDC sponsored the Columbia project both as a "land use improvement project" pursuant to the Urban Development Corporation Act (UDC Act)[7] and as a "civic project" pursuant to a different subdivision of the same act.[8] ESDC specified the public uses, benefits and purposes of the project pursuant to its obligations under EDPL §204(B)(1).

It found, for example, that the project would address the city and statewide "need for educational, community, recreational, cultural and other civic facilities" and would enable the city and state to maintain their positions as "global center[s] for higher education and academic research." ESDC further determined that Manhattanville "suffer[ed] from long-term poor maintenance, lack of development and disinvestment" and the project would help curb the "current bleak conditions [that] are and have been inhibiting growth and preventing the site's integration into the surrounding community."

In addition, ESDC noted that the project would create 14,000 jobs during the construction of the new campus as well as 6,000 permanent jobs following its completion. ESDC also found that the project would generate substantial revenue, estimating that "tax revenue derived from construction expenditures and total personal income during this period" at $122 million for the state and $87 million for the city.

Moreover, ESDC indicated that another purpose of the project was the creation of public space. Specifically, it found that the project site would create "approximately 94,000 square feet of accessible open space and maintained as such in perpetuity that will be punctuated by trees, open vistas, paths, landscaping and street furniture and an additional well-lit 28,000 square feet of space of widened sidewalks that will invite east-west pedestrian traffic."

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ESDC also highlighted that the project made provision for infrastructure improvements—most notably to the 125th Street subway station—as well as substantial financial commitment by Columbia to the maintenance of West Harlem Piers Park. ESDC further acknowledged that Columbia would open its facilities, including its libraries and computer centers, to students attending a new public school that Columbia is supplying the land to rent-free for 49 years. Columbia also would open its new swimming facilities to the public.

The Court, in an opinion by Judge Carmen Beauchamp Ciparick, first rejected the property owner's main argument that the project was unconstitutional because the condemnation was not for the purpose of putting properties to "public use" within the meaning of Article I, §7(a) of the state constitution because it only served the private interests of Columbia.

The Court found that the project qualified as a "land use improvement project" within the meaning of the UDC Act, and it found that the Appellate Division, First Department, had erred as a matter of law when it conducted a de novo review of the administrative record and concluded that the project site was not blighted.

Relying on *Goldstein*, the Court then reiterated that a court may only substitute its own judgment for that of the legislative body authorizing the project "when such judgment is irrational or baseless." Finding that the ESDC had considered a wide range of factors including the physical, economic, engineering and environmental conditions at the project site, and that there was support in the record for the ESDC's determination that the project site was blighted, the Court upheld the ESDC determination.

In addition, the Court concluded that the ESDC had properly qualified the project, in the alternative, as a "civic project" within the meaning of the UDC Act.[9] The Court found that nothing in the law barred the expansion of a private university from qualifying as a "civic purpose," and that there was no statutory language limiting a proposed educational project to public educational institutions. It added that the Columbia project was "at least as compelling in its civic dimension as the private development" in *Goldstein*. The Court concluded that there was "no doubt" that the Columbia project qualified as a "civic project" under the UDC Act.

Conclusion

Two identical bills to amend the EPDL have been introduced in the Legislature and were referred to the Judiciary Committee early last year, but it is not clear that they are being actively considered.[10] In the absence of a willingness on the part of the Court of Appeals to effectively limit the exercise of government's eminent domain powers, and an apparent legislative unwillingness to do so, the limits on the exercise of eminent domain may be practical ones. For example, as a political matter, government officials need to use eminent domain carefully in order to avoid being accused of trampling on the property rights of their constituents.

However, the most practical limitation on the use of eminent domain may be financial. As illustrated by the recent *Gyrodyne* ruling in the Court of Claims, the costs associated with the use of eminent domain may prove to be significantly greater than anticipated. In that case, which involved the state's condemnation of about 300 acres of land in Stony Brook and St. James, Long Island, the court determined that the property's "highest and best" use was residential, rather than industrial, and it ordered the state to pay the owner approximately $100 million in addition to the approximately $25 million it had offered—plus interest from Nov. 2, 2005. The large award could very well give pause to government officials thinking of using eminent domain to redevelop privately owned property.

1. 545 U.S. 469 (2005).
2. 2010 NY. Slip Op. 51129U (Ct. Cl., June 21, 2010).
3. 13 N.Y.3d 511 (2009).
4. 270 N.Y. 333 (1936).
5. Article XVIII, §1 grants the Legislature the power to "provide in such manner, by such means and upon such terms and conditions as it may prescribe…for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas"; Section 2 provides "[f]or and in aid of such purposes, notwithstanding any provision in any other article of this constitution, …the legislature may…grant the power of eminent domain to any…public corporation…."
6. 2010 N.Y. Slip Op. 5601 (Ct. App., June 24, 2010).
7. Uncons Laws of NY §6253(6)(c).
8. Uncons Laws of NY §6253(6)(d).
9. A civic project is "[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." Uncons Laws of NY §6253(6)(d).
10. See, http://open.nysenate.gov/legislation/api/1.0/html/bill/S1653; http://open.nysenate.gov/legislation/bill/A3069.