

# STROOCK

## SPECIAL BULLETIN

### Eminent Domain: The Taking of Private Property for Public Use – An Examination of Recent New York State Decisions in Light of *Kelo v. City of New London*

---

December 9, 2009

In the last month, New York courts have issued two important decisions regarding the use of eminent domain/condemnation powers. The first was the November 24, 2009 decision by the Court of Appeals of the State of New York in *In the Matter of Daniel Goldstein v. N.Y.S. Urban Development Corp.*,<sup>1</sup> in which the court upheld the exercise of eminent domain powers in the Atlantic Yards area of Brooklyn, New York to acquire private property for future development by a private developer. In the second, *In re Parminder Kaur v. N.Y.S. Urban Development Corp.*,<sup>2</sup> the First Department held on December 3, 2009 that the taking of private property in the Manhattanville area of West Harlem, New York for use by Columbia University was improper.

This **Stroock Real Estate Practice Group Special Bulletin** looks at these two decisions in light of *Kelo v. City of New London*,<sup>3</sup> a landmark decision in which the U.S. Supreme Court upheld

the taking of private property to effectuate an economic development plan.

#### Background: The *Kelo* Decision

In 2005, the U.S. Supreme Court upheld the Supreme Court of Connecticut's decision that the use of the power of eminent domain to acquire private properties for economic revitalization and subsequent transfers to private developers qualified as a public use within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.

The area in question was the Fort Trumbull area of the City of New London, which in 2000, was an economically depressed city with an unemployment rate that was double that of the State of Connecticut and had the lowest population since 1920. These conditions prompted the New London Development Corporation, a private nonprofit entity previously established to assist the City in

planning economic development, to produce an integrated development plan for the Fort Trumbull area, later approved by the City Council, pursuant to which the City began condemnation proceedings.

In *Kelo*, the Supreme Court held that the use of condemnation powers to effectuate the Fort Trumbull economic development plan unquestionably served a public purpose, noting that since the Supreme Court began applying the Fifth Amendment<sup>4</sup> to the states, it has embraced the “broader and more natural interpretation of public use as public purpose,” rather than the literal interpretation that the condemned property be put into use for the general public, and has defined the concept of “public purpose ... broadly, reflecting [the] longstanding policy of deference to legislative judgments.”<sup>5</sup>

The Supreme Court gave deference to the City’s determination that the area was sufficiently distressed to justify a program of economic rejuvenation. It explained that in determining public purpose, what matters is the taking’s purpose, not its mechanics, and that the government’s pursuit of public purpose often benefits individual private parties. Consequently, the Supreme Court concluded that “[t]he public end may be as well or better served through an agency of private enterprise than through a department of government,” and held that “public ownership is [not] the sole method of promoting the public purposes of community redevelopment.”<sup>6</sup>

## Atlantic Yards

### The Project

Atlantic Yards is an area in downtown Brooklyn, New York that had been found to be substandard and unsanitary and proposed as a “land use improvement project”<sup>7</sup> under the Urban Development Corporation

Act (“UDCA”). The project, sponsored by the Empire State Development Corporation (“ESDC”), the condemning authority, would include the construction of a sports arena, numerous mixed-use developments and public space, all by a private developer. The petitioners contended that the condemnation of Atlantic Yards, particularly the area south of the railyard (the railyard is indisputably blighted), would not serve a public use within the meaning of the State Constitution – that the private property was not being taken for use by the public, as it would enable a private developer to use the properties for private economic gain and any public benefit would be incidental.

### The Court of Appeals’ Decision

As in *Kelo*, the case turned in part on the interpretation of what constitutes a legitimate “taking.” Like the Fifth Amendment, the New York State Constitution allows the government’s taking of private property for a public use, with just compensation. In *In the Matter of Daniel Goldstein v. N.Y.S. Urban Development Corp.*, the New York Court of Appeals held that the removal of urban blight is a proper exercise of the power of eminent domain.

In reaching that decision, the Court of Appeals broadly applied the takings provision of the New York State Constitution, rejecting the literal interpretation of public use (*i.e.*, that the taking must be for a public *use*, not merely for a public *purpose*), in favor of a broader interpretation, similar to the Supreme Court’s application of the Fifth Amendment in *Kelo*. The Court of Appeals noted that the areas “eligible for ... renewal are not limited to slums” and that it has never required that “a finding of blight...be based upon conditions replicating those...in the midst of the Great Depression.”<sup>8</sup>

The Court of Appeals, like the Supreme Court in *Kelo*, gave deference to the findings of the quasi-leg-

islative administrative body, which is given eminent domain powers, noting that judges may substitute their views on whether certain pursuits of the government are for public use only when “there is no room for reasonable difference of opinion as to whether an area is blighted.”<sup>9</sup> The Court of Appeals found that the area was sufficiently blighted and that the eradication of blight through an economic development plan to revitalize the Atlantic Yards area served a public purpose, noting that “economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose.”<sup>10</sup>

## Manhattanville/Columbia

### The Project

In 2001, Columbia approached the New York City Economic Development Corporation (“EDC”) with the intent of redeveloping the West Harlem area. Subsequently, in August 2002, EDC issued the West Harlem Master Plan, which set forth the economic development plan for the area. The plan stated that the area had, at one time, been denser and livelier and had served as a waterside gateway for Manhattan, and stated that a renewed future for the area seemed possible. This plan also noted that most of the lots were in fair, good or very good condition.

Columbia began purchasing property in the area and by October 2003, controlled approximately 51 percent of the property in the area. In 2004, Columbia, EDC and the ESDC began meeting regarding the plan and the condemnation of land. The EDC and the ESDC found in separate studies that the area was blighted, with the ESDC study concluding that the area was substantially unsafe, unsanitary, substandard and deteriorated. A subsequent study by the ESDC, after disclosure of certain project documents was required by the court, con-

firmed that the area was blighted and that certain buildings in the area had suffered further deterioration since the first blight study.

### The First Department’s Decision

In *In re Parminder Kaur*, the First Department employed standards similar to those used by the Supreme Court in *Kelo* and by the New York Court of Appeals in *In the Matter of Daniel Goldstein*. However, in contrast to those decisions, the First Department reached a decision that the acquisition by condemnation of private property in the Manhattanville area for the development of a new campus for Columbia University was an improper exercise of eminent domain powers. Unlike the decisions in *Kelo* and *In the Matter of Daniel Goldstein*, which focused on the application of the legal standards and principles regarding the finding of blight and public purpose, the decision in *In re Parminder Kaur* turned on procedure and timing in eminent domain law.

In reaching its decision, the First Department relied on the discussion in Justice Kennedy’s concurring opinion in *Kelo* on the issue of improper motive in the use of eminent domain for the transfer to private parties with only discretionary benefits to the public. On the issue of improper motive, the First Department characterized the determination of the area in question as blighted as an afterthought to support the condemnation of properties for Columbia, and described that designation as a “mere sophistry.”<sup>11</sup> It should be noted that the First Department also rejected the use of eminent domain power on the ground that the plan in question is not a “civic project”<sup>12</sup> as required under the Urban Development Corporation Act (“UDCA”).<sup>13</sup>

Though recognizing that agencies have wide discretion in deciding what constitutes blight, the First Department noted that facts supporting a determination of blight must be spelled out, and held that in

cases where improper motives may be present, courts must determine whether private properties are being taken for public use. The First Department found there was no credible evidence of blight in Manhattanville – a finding of blight was required for the ESDC to exercise its eminent domain powers – and noted there was no evidence that Manhattanville was blighted before Columbia gained control over the vast majority of properties in the area. The First Department recognized that in 2002, prior to when the plan to redevelop the area materialized, the West Harlem Master Plan found no blight (and even stated that the area had great potential for development), and that just a little more than a year later, “EDC joined with Columbia in proposing the use of eminent domain” powers for Columbia’s benefit.<sup>14</sup> Consequently, the First Department concluded that the public purpose of eliminating blight was engineered to give life to the plan.

Though recognizing “the broad deference accorded to the legislature in determining what constitutes a valid public use,”<sup>15</sup> the First Department, relying on Justice Kennedy’s concurring opinion, held that the redevelopment plan was not for a public purpose. In reaching this decision, the First Department concluded that (i) the Manhattanville area was not in a depressed economic condition when EDC and ESDC first began the “Columbia-prepared-and-financed quest;” (ii) the 2002 West Harlem Master Plan stated that the area had “great redevelopment potential that could be easily realized through rezoning;” (iii) the blight study was not completed until 2008; (iv) EDC and ESDC did not produce a “comprehensive development plan to address a Manhattanville-wide economic depression; (v) no municipality had committed “any public funds for the redevelopment of Manhattanville;” (vi) the “expansion was not selected from a list of competing plans;” and (vii) EDC committed to rezone Manhattanville “solely for the expansion of Columbia.”<sup>16</sup>

These conclusions formed the basis for the First Department’s holding that the exercise of eminent domain power in the case appeared to be motivated by a desire to benefit Columbia rather than to serve a public purpose.

## Reconciling the Decisions

The *Kelo*, *In the Matter of Daniel Goldstein* and *In re Parminder Kaur* decisions are, on some levels, quite similar. All three involve the use of the power of eminent domain for the removal of blight and economic development, and all three were decided applying similar (though different) constitutional provisions and statutes; however, there are significant differences – certainly, between *Kelo* and *In re Parminder Kaur*. The three decisions are generally consistent regarding the standards employed in determination of blight and public use, prerequisites for the exercise of eminent domain powers, and the deference accorded legislative bodies in eminent domain proceedings. All three cases are either based on or, at a minimum, recognize the broader interpretation that public use means public purpose and that legislative bodies are accorded great deference in eminent domain proceedings.

There is a temptation to question whether the decision *In re Parminder Kaur* – which held the use of eminent domain to be unconstitutional under the facts of that case – is inconsistent with the decisions in *Kelo* and *In the matter of Daniel Goldstein*. However, even though *In re Parminder Kaur* also involves the use of eminent domain for the removal of blight and economic development, the facts are sufficiently different that the decision can be distinguished from *Kelo* and *In the matter of Daniel Goldstein*.

Perhaps the most significant difference is that in *In re Parminder Kaur*, the finding of blight was made *after* the selection of the private party receiving majority of the benefit of the condemnation, whereas in both *Kelo* and *In the Matter of Daniel Goldstein*, the finding that

the area was blighted and in need of economic redevelopment was made *before* the private developer was selected. In fact, the area was deemed to be in fair, good or very good condition only a year prior to Columbia's plan. This brought into play the issue of improper motive, which weighed heavily in the First Department's decision. Had the timing of the finding of blight and the identification of Columbia been reversed, the First Department may have reached a different decision. In any event, the decision highlights the importance that courts may place on procedure and timing in eminent domain proceedings.

The issues raised by the *Kelo*, *In the Matter of Daniel Goldstein* and *In re Parminder Kaur* decisions are complex. This **Stroock Special Bulletin** provides only a brief overview of some of these issues and the law of eminent domain. This area of the law remains highly contentious and is likely to continue to be defined over time by both the judicial and the legislative branches of our government. The *In re Parminder Kaur* decision, for example, is appealable to the New York Court of Appeals,<sup>17</sup> and the First Department's application of the improper motive/impermissible favoritism standards (discussed in Justice Kennedy's concurring opinion in *Kelo*) certainly will be contested in any such appeal. We will provide updates regarding any significant developments.

---

By Ross F. Moskowitz (rmoskowitz@stroock.com), a Partner in the Real Estate Practice Group of Stroock & Stroock & Lavan LLP, and Joon H. Kim, an associate in Stroock's Real Estate Practice Group.

1. *In the Matter of Daniel Goldstein v. N.Y.S. Urban Development Corp.*, 2009 WL 4030939 (N.Y. 2009).
2. *In re Parminder Kaur v. N.Y.S. Urban Development Corp.*, 2009 WL 4348472 (1st Dep't 2009).
3. *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005).
4. The Fifth Amendment states that property shall not be taken for public use without just compensation. U.S. Const., Amdt. 5. That clause is applicable to the states by the Fourteenth Amendment.
5. *Kelo*, 545 U.S. at 480.
6. *Id.* at 486 (citing *Ruckelshaus v. Monsanto*, CO, 467 U.S. 986, 1014 (1984)).
7. "Land use improvement project" is a plan or undertaking for the clearance, replanning, reconstruction and rehabilitation or a combination of these and other methods, of a substandard and insanitary area, and for recreational or other facilities incidental or appurtenant thereto, pursuant to and in accordance with article eighteen of the constitution and this act. The terms "clearance, replanning, reconstruction and rehabilitation" shall include renewal, redevelopment, conservation, restoration or improvement or any combination thereof as well as the testing and reporting of methods and techniques for the arrest, prevention and elimination of slums and blight. McKinney's Uncons. Laws of NY, § 6253(6)(c) (2009).
8. *In the Matter of Daniel Goldstein*.
9. *Id.*
10. *Id.* (citing *Yonkers Comm. Dev. Agency v. Morris*, 37 N.Y.2d 478, 481-82 (1975)).
11. *In re Parminder Kaur* at 6.
12. "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. McKinney's Uncons. Laws of NY, § 6253(6)(d) (2009).
13. It should be noted that the First Department ruled that "civic project" as defined in the New York State Urban Development Corporation Act was unconstitutionally vague as applied, agreeing with the petitioner's contention that the ESDC has "failed to adopt, retain or promulgate any regulation or written standards for the finding of blight[.]" necessary to give "notice of what constitutes a blighted area." *In re Parminder Kaur* at 15.
14. *Id.* at 11-12.
15. *Id.* at 8.
16. *Id.* at 9-10.
17. N.Y. Eminent Domain Procedure Law, §207(B); the jurisdiction of the Appellate Division of the Supreme Court is exclusive and its judgment/order is subject to final review by the Court of Appeals.

New York

180 Maiden Lane  
New York, NY 10038-4982  
Tel: 212.806.5400  
Fax: 212.806.6006

Los Angeles

2029 Century Park East  
Los Angeles, CA 90067-3086  
Tel: 310.556.5800  
Fax: 310.556.5959

Miami

Wachovia Financial Center  
200 South Biscayne Boulevard, Suite 3100  
Miami, FL 33131-5323  
Tel: 305.358.9900  
Fax: 305.789.9302

[www.stroock.com](http://www.stroock.com)

---

This *Stroock Special Bulletin* is a publication of Stroock & Stroock & Lavan LLP © 2009 Stroock & Stroock & Lavan LLP. All Rights Reserved. Quotation with attribution is permitted. This Stroock publication offers general information and should not be taken or used as legal advice for specific situations, which depend on the evaluation of precise factual circumstances. Please note that Stroock does not undertake to update its publications after their publication date to reflect subsequent developments. This Stroock publication may contain attorney advertising. Prior results do not guarantee a similar outcome.

Stroock & Stroock & Lavan LLP is a law firm with a national and international practice serving clients that include investment banks, commercial banks, insurance and reinsurance companies, mutual funds, multinationals and foreign governments, industrial enterprises, emerging companies and technology and other entrepreneurial ventures.

For further information about *Stroock Special Bulletins*, or other Stroock publications, please contact Richard Fortmann, Senior Director-Legal Publications, at 212.806.5522.