

New York Wrestles with 'Takings' Rulings

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"In Kelo, the Court held that while government may not take one's property for the sole benefit of another private party..."

By **Michael R. Martone**, Esq., as published by [Globest.com](#) - July 2010

Constitutional limits on the government's power to take property for use by private entities for the public purpose of economic revitalization have been the subject of much debate in New York. The state has struggled to define itself in the wake of the Supreme Court's controversial 2005 ruling in *Kelo v. City of New London*, which sparked a national debate about the eminent domain power.

In *Kelo*, the Court held that while government may not take one's property for the sole benefit of another private party, it may do so for the public purpose of economic revitalization. The ruling deferred to the City's taking of private property for inclusion in its redevelopment plan, hoping to revitalize its depressed economy.

The Takings Clause of the Fifth Amendment of the Federal Constitution mandates "nor shall private property be taken for public use, without compensation." *Kelo* says that where a legislature adopts a comprehensive economic plan it determines will create jobs, increase revenues and revitalize a depressed area, the project serves a public purpose and qualifies as a permissible public use under the Takings Clause.

An outraged public ridiculed *Kelo* as a gross violation of property rights for the benefit of large corporations at the expense of individual property owners. Since the ruling, 43 states have taken legislative action limiting the use of eminent domain. New York, however, has been criticized for failing to take similar action.

Condemnation in New York

Under New York's Eminent Domain Procedure Law, the State must first conduct a public hearing and determine that a taking would serve a public purpose so as to qualify as a public use. Next, the State must provide the property owner with just compensation for property taken. Each step is subject to judicial review.

Historically, it is extremely difficult for affected property owners to challenge a finding of public necessity to prevent a taking. Courts generally defer to a legislative prerogative, and vague definitions of public purpose can be used to justify most seizures. The courts have scrutinized economic revitalization as a justifiable cause for seizure, however, property owners have challenged the power of the Empire State Development Corp. (ESDC) to force the sale of private property.

The ESDC, the state's development arm, can force the sale of property either for a civic purpose or to eradicate urban blight - amorphously defined as substandard and insanitary. Two recent decisions closely examined the ESDC's involvement with private development projects in the name of economic revitalization.

Atlantic Yards Project

In *Goldstein v. NYS Urban Development Corp.*, the Court of Appeals upheld the ESDC's taking of private properties in Brooklyn for inclusion in a 22-acre mixed-use development project known as the Atlantic Yards. The project includes a basketball arena for the New Jersey Nets and 16 commercial and residential high-rise towers.

The ESDC relied upon studies finding that the area was blighted and warranted condemnation for development. The Court noted that the removal of blight is a sanctioned predicate for the exercise of eminent domain and rejected the challenge to the blight findings, accepting as reliable the comprehensive studies supporting the ESDC's determinations.

The Court said it must defer to what is the legislature's prerogative and may intervene only where no reasonable basis exists, which was not the case in *Goldstein*. The dissent invited close scrutiny of blight findings, arguing that the courts give too much deference to the self-serving determinations of the ESDC.

Columbia University Expansion

Meanwhile, in *Kaur v. NYS Urban Development Corp.*, the Appellate Division rejected as unconstitutional the ESDC's takings to assist Columbia University in building a satellite campus in the Manhattenville area of West Harlem. The court denounced the ESDC's blight determination as mere sophistry that was concocted years after Columbia developed its plans. Citing a conflict of interest, the Court chastised the ESDC for hiring Columbia's own planning consultant to conduct the blight study.

The Court declared that as a private, elite institution, Columbia could not claim a civic purpose to its expansion sufficient to meet the public use standards. That the University was the sole beneficiary of the project is reason alone to invalidate the taking, the Court wrote, especially because the alleged public benefit is incrementally incidental to the private benefits of the project.

The State appealed and it remains to be seen how the Court of Appeals harmonizes the Appellate Division's aggressive *Kaur* approach with its own deferential *Goldstein* holding. The rights of property owners throughout the state hang in the balance.



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