

## One Planner's Blight Is Another Man's Treasure: Two New York City Cases Bring Eminent Domain Back to the Spotlight

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Two recent New York appellate decisions shed a contrasting light on the extent to which eminent domain can be used to facilitate an urban redevelopment project that will ultimately be privately owned. The decisions also provide an interesting contrast about the extent to which the exercise of the condemnation power will be or should be subjected to judicial scrutiny.

On December 3, 2009, the Appellate Division, First Department (the intermediate appellate court sitting in Manhattan) rejected the use of eminent domain in connection with the proposed \$6.28 billion expansion of Columbia University's campus between West 125th Street and West 133rd Street in Manhattan. *In re Parminder Kaur, et al. v. New York State Urban Development Corporation, etc.* In a 3-2 decision, the court rejected the finding that the Manhattanville neighborhood in West Harlem is blighted. The court also ruled that the urban renewal agencies involved in the project had "engineered" a need to eradicate blight as a pretext to aid a major private development. Additionally, two of the justices in the three-vote majority declared that the "time has come to categorically reject eminent domain takings solely based on underutilization" of property.

Only a week earlier, on November 24, 2009, New York's highest court upheld the use of eminent domain in connection with the Atlantic Yards redevelopment in Brooklyn. *Goldstein v. New York State Urban Development Corporation*. This high-profile project will construct the NBA Nets basketball arena; add new subway infrastructure; build 16 towers for commercial and residential use; and provide eight acres of landscaped, publicly accessible open space. The Atlantic Yards project, however, confronted planners with the problem that a significant portion of the targeted area contains "relatively mild conditions of urban blight" due primarily to the proximity of rail yards. Expressing some doubt about the blight determination ("It may be that the bar has now been set too low..."), the Court of Appeals' 6-1 majority nevertheless displayed great deference to the use of condemnation by the other branches of government. In the Court of Appeals' view, limiting "the sovereign power of eminent domain as it has come to be defined in the urban renewal context is a matter for the Legislature, not the courts."

Notably, the deference to the legislative and administrative process shown by the Court of Appeals follows the plurality view expressed by the United States Supreme Court in the controversial eminent domain decision, *Kelo v. City of New London*. (Ironically, on the heels of the New York decisions, a major player in *Kelo* announced that it would no longer be participating in the project due to changed financial circumstances.) Whether agitation over cases like *Kelo*, *Goldstein* and *Parminder* will garner support for tougher review of condemnation matters remains to be seen. No doubt additional developments will occur on a variety of judicial and legislative fronts.

### ***Parminder*: A Storage Business and Two Gas Stations Prevail Over the State, City and University**

In 2001, Columbia and "numerous other organizations" began working with New York City's Economic Development Corporation (the "EDC") to redevelop the West Harlem area. In 2002, the EDC issued a master plan. At the same time, Columbia began purchasing properties in a 17-acre "Project Area" consisting of 67 different tax lots. By October 2003, Columbia controlled 51% of the properties in the Project Area.

In March 2004, the Empire State Development Corporation (the "ESDC") — a state agency formally known as the New York State Urban Development Corporation and endowed, among other things, with the power of eminent domain — began meeting with Columbia and the EDC. Subsequently, numerous consultants were hired as part of the public/private redevelopment team. In December 2004, the EDC's consultant characterized the Project Area as "blighted." The ESDC then commenced its own blight analysis, relying upon a different consultant whose fees were paid by Columbia. In late 2007, the ESDC's consultant agreed that the Project Area

was blighted. 72% of the lots had one or more substandard conditions; a vacancy rate of 25% existed in the area; and there was “site utilization of 60 percent or less.” Commenting on these facts, the Appellate Division noted with pointed irony that Columbia owned or had under agreement 72% of the lots. The court implied that deterioration of the area had taken place on the university’s watch as part of the redevelopment effort.

As the urban renewal process rolled forward with environmental impact studies and rezoning measures, local businesses began to resist. These businesses included the plaintiffs: Tuck-It-Away-Associates L.P., which operates four commercial storage facilities; Parminder Kaur, the owner of a gasoline station on 125th Street; and P.G. Singh Enterprises LLP, the owner of another nearby gas station. Seeking evidence to prove that the project was private and not public, the plaintiffs were soon embroiled in a dispute with the ESDC and the EDC under New York’s Freedom of Information Law (“FOIL”). The FOIL dispute inspired the ESDC to hire yet another consultant who audited the earlier blight analysis and found that the Project Area had continued to deteriorate, making “a blighted and discouraging impact on the surrounding community.” Subsequently, the ESDC authorized the taking of properties not yet controlled by the university. The plaintiffs commenced suit in February 2009.

The Fifth Amendment to the United States Constitution states, in part: “[N]or shall private property be taken for public use, without just compensation.” (Emphasis added.) The New York state constitution contains similar “public use” language. While conceding that earlier precedents construe public use broadly to encompass “any use...which contributes to the health, safety and general welfare of the public,” the Appellate Division roundly rejected the “ESDC’s determination that the [Manhattanville] project has a public use, benefit or purpose.” In a harshly worded opinion, the court characterized the blight determination as “mere sophistry,” and concluded the determination had been made merely to assist the massive capital project of an elite university with eminent domain takings. While acknowledging that *Kelo*’s plurality opinion had “reaffirmed the broad deference accorded to the legislature in determining what constitutes a valid public use,” the Appellate Division relied heavily upon Justice Kennedy’s concurring opinion in *Kelo*. That concurrence “placed particular emphasis on the importance of the underlying planning process” and identified seven factors to consider for a proper process:

- A neutral municipal determination of depressed economic conditions
- A comprehensive plan to address depression
- Commitment of public money *before* private developers are identified
- Neutral consideration of development alternatives
- A private developer chosen from a group of applicants
- Incidental private beneficiaries being unknown when the plan was made
- Compliance with detailed public comment and other procedures

The *Parwinder* majority ruled that the ESDC, the EDC and Columbia had failed Justice Kennedy’s test on nearly all counts. In the majority’s view, planning came after the fact; private money funded studies; adequate alternatives were not considered; and “the ultimate private beneficiary of the scheme for the private annexation of Manhattanville was the progenitor of its own benefit.” Worse, the administrative record “contain[ed] no evidence whatsoever” that the Project Area was blighted before the university began buying properties. In a particularly harsh finding, the court ruled: “Having committed to allow Columbia to annex Manhattanville, the EDC and ESDC were compelled to engineer a public purpose for a quintessentially private development: eradication of blight.”

With its dander up, the Appellate Division pushed the ruling a few steps further. It held that “the time has come to categorically reject eminent domain takings solely based on underutilization.” Citing sympathetic decisions from other states (New Jersey, Pennsylvania, California and Illinois), the Appellate Division declared that the underutilization percentages considered acceptable by the ESDC’s consultants were “wholly arbitrary.” For good measure, the court held that a private university does not constitute a “civic project” within the meaning of

New York's Urban Development Corporation Act ("UDCA"), and the court further held the UDCA unconstitutionally vague as applied to the Manhattanville project. Accusing the ESDC and the EDC of using "greatly divergent criteria...to define blight," the court held that "[o]ne is compelled to guess what subjective factors will be employed in each claim of blight." Ironically, the Appellate Division compared the blight studies for the Atlantic Yard project with those of the Manhattanville project in order to emphasize its point that the blight standards applied to the latter project were mere guesswork.

### **Goldstein: The State's Highest Court Rules That Any Limitation Upon the Sovereign Power of Eminent Domain in the Urban Renewal Context is a Matter for the Legislature, Not the Courts.**

The Court of Appeals displayed great deference to the legislature and the administrative redevelopment agencies in its 6-1 ruling in favor of the Atlantic Yards project. The court declared it "indisputable that the removal of urban blight is a proper, and, indeed, constitutionally sanctioned, predicate for the exercise of the power of eminent domain." Noting that the exercise of eminent domain in the urban renewal context classically arose in matters involving slums, the court cited longstanding precedent to the effect that blight does not have to reach Dickensian levels to justify the condemnation of private property. In a telling reference that may bode ill for any future review of *Parminder*, the Court of Appeals cited a 1975 decision emphasizing that "the areas eligible for such renewal are not limited to 'slums'...among other things, *economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose.*" (Emphasis added.)

The Court of Appeals very explicitly put forward the view that setting limits on the reach of eminent domain is primarily a policy-making exercise better left to the legislature and the administrative agencies to which the legislature has delegated urban renewal oversight. In a statement that approached the point of abdicating any judicial role in determining when the power of eminent domain can be exercised, the majority wrote: "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." Only condemnations that are the product of corruption or irrational decision making invite judicial intervention. Moreover, in another statement that may prove problematic for certain aspects of the *Parminder* decision, the Court of Appeals declared that "any...limitation upon the sovereign power of eminent domain as it has come to be defined in the urban renewal context is a matter for the Legislature, not the courts."

The *Goldstein* opinion does not include a comprehensive summary and analysis of the ESDC's blight determination. The Court of Appeals characterized the dispute over that determination as a mere "reasonable difference of opinion as to whether the area in question is in fact substandard and insanitary." Keeping its compass firmly fixed on the lodestar of judicial deference, the court refused to substitute its own view for that of the ESDC.

### **Can Goldstein and Parminder Be Reconciled?**

The *Goldstein* court's strong emphasis on judicial deference suggests that at least portions of the *Parminder* plurality decision may not survive further review. Two judges in the Appellate Division voted to do away with "underutilization" as a stand-alone basis for condemnation decisions. (The third judge in the *Parminder* majority rejected the blight determination on the grounds that the ESDC had unfairly and unconstitutionally closed the administrative hearing prematurely. The judge declined to reach the other issues presented in the case.) The intermediate court's determination about the grounds on which eminent domain can rest may fail in light of the Court of Appeals' view that legislators and not judges should set the boundaries in the field of eminent domain.

The ultimate outcome in *Parminder* — the rejection of eminent domain in Manhattanville — may depend on whether or not the Court of Appeals embraces Justice Kennedy's *Kelo* views on what procedures are legitimate in the urban renewal process. Notably, the *Goldstein* court ruled solely upon *state* constitutional grounds. The Atlantic Yards opponents had previously raised and lost their federal constitutional arguments in a federal forum.

Unlike the Atlantic Yards case, in *Parminder* both federal and state constitutional issues are before the court. As

noted above, the Appellate Division reviewed the Manhattanville condemnation process in great detail and applied Justice Kennedy's seven *Kelo* factors. Under Justice Kennedy's test, analysis of the process is supposed to reveal whether or not the condemnation is truly for a public use or whether it is a pre-packaged private development not eligible for eminent domain assistance. While *Parminder's* broad policy pronouncements on underutilization may encounter an unfriendly reception in the Court of Appeals, the Appellate Division's *Kelo*-based analysis of the condemnation process might receive a more favorable hearing.

*This alert was authored by Robert McDonnell of Bingham's Environmental and Natural Resources Group. For more information on this alert, please contact any of the lawyers listed below:*

Peter Batten, Of Counsel, Real Estate Group  
[peter.batten@bingham.com](mailto:peter.batten@bingham.com)  
212.705.7248

Judah Gribetz, Of Counsel, Environmental and Natural Resources Group  
[judah.gribetz@bingham.com](mailto:judah.gribetz@bingham.com)  
212.705.7221

Ken Lore, Co-Chair, Real Estate Group  
[k.lore@bingham.com](mailto:k.lore@bingham.com)  
212.705.7535  
202.373.6281

Robert McDonnell, Partner, Environmental and Natural Resources Group  
[robert.mcdonnell@bingham.com](mailto:robert.mcdonnell@bingham.com)  
617.951.8507

Barbara Schussman, Co-chair, Land Use, Construction and Real Estate Litigation Group  
[barbara.schussman@bingham.com](mailto:barbara.schussman@bingham.com)  
415.393.2380

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