

# Recent Developments in Challenging the Right to Take in Eminent Domain

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TRUE OR FALSE: “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”<sup>1</sup> Still true, technically speaking: legislative determinations about whether a taking is in the public interest are entitled to a high degree of judicial deference. But after the United States Supreme Court’s decision in *Kelo v. City of New London*,<sup>2</sup> that phrase no longer means that if the government wants to take property, the courts will simply rubber stamp it. *Kelo* reinvigorated judicial and public interest in the Public Use requirement of the Fifth Amendment and its counterparts in state constitutions and courts nationwide are more willing to examine the reasons for the exercise of eminent domain.

This article summarizes recent developments in litigation challenging the ability of condemning authorities to take property. There were couple of blockbuster cases from New York state courts, and these cases are summarized in Part I, but overall, the developments in the law were incremental. Consequently, this article will focus not only on cases where public use was challenged, but will include in Part II cases where other limitations on the eminent domain power such as delegation and choice of forum were analyzed. Finally, Part III summarizes recent cases involving recovery of attorneys’ fees for unsuccessful condemnations, an issue that is sure to grow should courts continue to be more willing to invalidate takings.

## I. Pretext, Blight, and Economic Development Takings

In *Kelo*, the majority refused to adopt a categorical rule invalidating all “economic development” takings, but did not rule out finding in a

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1. *Berman v. Parker*, 384 U.S. 26, 32 (1954).  
2. 545 U.S. 469 (2005).

future case that a taking supported only by claims of economic development violated the Public Use Clause.<sup>3</sup> It also held that takings in which the stated public use or purpose was a “pretext to hide private benefit” would not survive judicial scrutiny.<sup>4</sup> Justice Kennedy wrote separately with details on the pretext issue:

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.<sup>5</sup>

Justice Kennedy also noted that exercises of eminent domain may be subject to more stringent judicial review if they lack systemic indicators that the results produced are trustworthy.<sup>6</sup>

Almost as soon as the Supreme Court issued the opinion, “*Kelo*” became shorthand for everything bad about eminent domain, at least the right-to-take part of eminent domain: unwilling landowners; forced relocation; big money and big influence developers; bullying bureaucrats. If not considered eminent domain *abuse*, then at least eminent domain *incompetence*. Legal commentators and courts have been more equivocal, with some commentators asserting that *Kelo* changed the

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3. *Id.* at 489.

4. *Id.* at 478 (“Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit”).

5. *Id.* at 491 (Kennedy, J., concurring) (citing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-47 (1985); *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533-36 (1973)). Justice Kennedy also did not elaborate, noting only that “[a] court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government’s actions were reasonable and intended to serve a public purpose.” *Id.* at 491 (Kennedy, J., concurring).

6. *Kelo*. 545 U.S. at 493 (Kennedy, J., concurring).

My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause. Cf. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 549-550, 141 L. Ed. 2d 451, 118 S. Ct. 2131 (1998) (Kennedy, J., concurring in judgment and dissenting in part) (heightened scrutiny for retroactive legislation under the Due Process Clause).

rules while others viewed the public reaction as hype,<sup>7</sup> or as strictly a “property rights,” right wing, or anti-government issue.<sup>8</sup>

Just when it looked like the *Kelo* phenomenon may have peaked, along came several cases from New York to refocus attention on the issue.

#### A. New York: Defining “Blight” Is Beyond Judicial Competence

In *Goldstein v. New York State Urban Development Corp.*,<sup>9</sup> a 6-1 majority of the New York Court of Appeals held that the meaning of the term “substandard and insanitary”<sup>10</sup> in the state constitution was incapable of judicial definition, and that courts should not interfere with takings purportedly designed to remedy blight unless “there is no room for reasonable difference of opinion as to whether an area is blighted.”<sup>11</sup> The court

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7. See Lynne B. Sagalyn, *Positioning Politics: Kelo, Eminent Domain, and the Press*, in *LAND AND POWER: THE IMPACT OF EMINENT DOMAIN IN URBAN COMMUNITIES* 49 (Timothy N. Castano ed., 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1331049](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1331049).

The *Kelo* ruling did not substantively alter that precedent, legally. The justices did not see *Kelo* as a landmark case, according to one inside account, even though different views on the case led them to write four separate opinions. As a marker of populist politics, however, *Kelo* became a defining event in America. Homeowners, politicians, opinion makers, and special interest groups vented strong and immediate opposition to the [C]ourt’s ruling in editorials, op-eds, editorial cartoons, letters-to-the editor, and opinion polls. Ideology, rhetoric, reason, symbolism, and emotion—all were enjoined in backlash commentary about two formerly obscure Latin words that had suddenly become common household words.

*Id.*

8. See, e.g., Jennifer Bradley & Timothy J. Dowling, *Eminent Domain as Trojan Horse: How the Property Rights Movement Is Misusing Kelo to Advance a Radical Agenda*, in *LAND AND POWER: THE IMPACT OF EMINENT DOMAIN IN URBAN COMMUNITIES* 39 (Timothy N. Castano ed., 2008), available at [http://www.communityrights.org/PDFs/Update/Eminent\\_Domain\\_as\\_Trojan\\_Horse.pdf](http://www.communityrights.org/PDFs/Update/Eminent_Domain_as_Trojan_Horse.pdf).

Beyond the well-known legislative efforts to respond to *Kelo* at both the federal and state levels, there emerged a pernicious, parallel effort to exploit the negative reaction to *Kelo* to advance a different, far more radical agenda. The motivating argument was simple: there is no difference between a government condemning your property through eminent domain, and a government regulating your use of your property. This argument muddles two different lines of constitutional inquiry based on the takings clause in the Constitution’s fifth Amendment, which states, “[N]or shall private property be taken for public use, without just compensation.” The condemnations at issue in the *Kelo* case, like all condemnations, were clearly takings of private property, transfers of ownership from one person to another, and required just compensation. By contrast, regulations that leave property in the hands of the owner, but limit what she can do with it, rarely constitute takings.

*Id.* (citations omitted).

9. 921 N.E.2d 164 (N.Y. 2009).

10. N.Y. CONST. art. XVIII, § 1.

11. *Goldstein*, 921 N.E.2d at 172.

answered the question of how much scrutiny New York courts should give a blight designation used as a trigger to eminent domain. The short answer: nearly none.<sup>12</sup>

Article XVIII of the New York Constitution allows the state's eminent domain power to be used to rehabilitate blighted areas:

Subject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for low rent housing and nursing home accommodations for persons of low income as defined by law, or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto.<sup>13</sup>

The property owners challenged a determination by the Empire State Development Corporation (ESDC), asserting that ESDC's blight designation was overbroad and included both blighted and nonblighted properties in the footprint of the proposed Atlantic Yards project in Brooklyn.<sup>14</sup> Six of the eight city blocks needed for the project had been designated as blighted since 1968.<sup>15</sup> The other two blocks, however, were recently deemed to be blighted even though they are not "substandard and insanitary" by any stretch of the imagination.<sup>16</sup>

The court of appeals first rejected a procedural objection by ESDC, which asserted the claims were time-barred.<sup>17</sup> The property owners had not asserted their claims in state court within New York's thirty-day statute of repose for challenging findings and determinations.<sup>18</sup> Instead, they filed a federal action alleging the takings violated the United States Constitution, and timely raised their state law arguments as supplemental claims in the federal action.<sup>19</sup> The federal court ultimately rejected their federal constitutional claims,<sup>20</sup> but expressly avoided adjudicating the supplemental state law claims. When the property owners filed a new state court action asserting these claims, the ESDC argued it was untimely.<sup>21</sup> The court rejected the argument because "[i]t is plain—indeed expressly so—that the federal dismissal of petitioner's state law

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12. *See id.*

13. N.Y. CONST. art. XVIII, § 1.

14. *See Goldstein*, 921 N.E.2d at 166.

15. *Id.*

16. *Id.*

17. *See id.* at 169.

18. *See* N.Y. EM. DOM. PROC. LAW § 207(A) (Consol. 2010).

19. *See Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008), *cert. denied*, 128 S. Ct. 2964 (2008).

20. *Id.* at 58-60.

21. *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 167 (N.Y. 2009).

claim . . . explicitly contemplated the re-filing of the state law claim in state court.”<sup>22</sup>

On the merits, the court concluded an agency’s blight determination is essentially immune from judicial review because the task of judging what properties are blighted has been delegated by the constitution to the legislature.<sup>23</sup>

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; where, as here, “those bodies have made their finding, not corruptly or irrationally or baselessly, there is nothing for the courts to do about it, unless every act and decision of another departments of government is subject to revision by the courts.”<sup>24</sup>

While the majority cast a skeptical eye on the blight finding, it nonetheless refused to get involved:

It may be that the bar has now been set too low—that what will now pass as “blight,” as that expression has come to be understood and used by political appointees to public corporations relying upon studies paid for by developers, should not be permitted to constitute a predicate for the invasion of property rights and the razing of homes and businesses. But any such 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.<sup>25</sup>

The dissenting judge had a different view, noting that judges are not shy when it comes to judicial review of other parts of the constitution, and there is no reason to believe that they are not up to the task when it comes to “public use” or blight.<sup>26</sup>

On one hand, the majority’s conclusion is old hat: that a condemner may blight the baby with the bathwater has been a part of redevelopment takings since at least *Berman v. Parker*,<sup>27</sup> the case in which the U.S. Supreme Court held that a non-blighted store could be taken

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22. *Id.* The court noted the legislative policy of promoting “swift resolution of legal challenges to condemnation determinations,” but held that the right to challenge a condemnation does not depend on state law, but is inherent. *Id.* at 168. The delay, the court noted, was due to “the availability of the federal forum.” *Id.* at 186. Further, the court noted that the property owners “had every right to litigate their federal claims in federal court and to include in their federal cause of action a supplemental state law cause of action.” *Id.* at 169.

23. See *Goldstein*, 921 N.E.2d at 173 (“The [New York] Constitution accords government broad power to take and clear substandard and insanitary areas for development. In so doing, it commensurately deprives the Judiciary of grounds to interfere with the exercise.”).

24. *Id.* at 172 (quoting *Kaskel v. Impellitteri*, 115 N.E.2d 659, 661 (N.Y. 1953), *cert. denied*, 347 U.S. 934 (1954)).

25. *Id.*

26. *Id.* at 189 (Smith, J., dissenting) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982); *Ker v. California*, 374 U.S. 23, 34 (1963)).

27. 348 U.S. 26 (1954).

as part of a larger redevelopment project designed to remedy urban blight.<sup>28</sup> The Court reached this conclusion by equating the power of eminent domain with the police power, and by characterizing the non-blighted properties as a part of the problem, even if they were not dilapidated.<sup>29</sup> Had the *Goldstein* court simply adopted *Berman's* rationale and applied it to the New York Constitution's takings clause, the opinion would not be particularly unusual. The *Goldstein* majority, however, did not hold that the Atlantic Yards taking could condemn blighted as well as nonblighted properties, but concluded that courts must accept an agency's determination that a parcel is in fact blighted.<sup>30</sup>

The court's total deference to the stated reasons for a taking establishes a standard so minimal it is questionable whether even the *Kelo* majority would likely accept it. At least two other courts—the District of Columbia Court of Appeals and the Hawaii Supreme Court—have viewed the Fifth Amendment and *Kelo* as requiring substantial deference to a legislative determination that a class of uses is public, but reserving for judicial review under the Public Use Clause the question of whether a particular use or purpose is in fact the reason for a taking.<sup>31</sup> These cases stand somewhat apart from other post-*Kelo* decisions which hold that the public use clause in a state constitution provides greater protection to property owners than does the Fifth Amendment,<sup>32</sup> because both *Franco*<sup>33</sup> and *Coupe*<sup>34</sup> concluded that the Fifth Amendment

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28. *Id.* at 34.

29. *See id.*

The experts concluded that, if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole. It was not enough, they believed, to remove existing buildings that were insanitary or unsightly.

*Id.*

30. *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 174 (N.Y. 2009).

31. *See Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 169 n.8 (D.C. Cir. 2007) ("apply[ing] the decision of the *Kelo* majority, written by Justice Stevens," a claim of pretext should be taken seriously and a court has the power of judicial review); *County of Hawai'i v. C & J Coupe Family Ltd. P'ship*, 198 P.3d 615, 644 (Haw. 2008) ("However, both *Haw. Hous. Auth. v. Ajimine*, 39 Haw. 543, 550 (1952) and *Kelo* make it apparent that, although the government's stated public purpose is subject to *prima facie* acceptance, it need not be taken at face value where there is evidence that the stated purpose might be pretextual.").

32. *See, e.g., County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (holding economic development alone will not support a taking under the Michigan Constitution's public use clause); *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006) (holding similarly under the Ohio Constitution).

33. *See Franco*, 930 A.2d at 169.

34. *See C & J Coupe*, 198 P.3d at 644.

and the majority opinion in *Kelo* require meaningful judicial review. Thus, the *Goldstein* majority's assertion that judges have virtually no role in reviewing claims that property is blighted arguably falls below even *Kelo*'s standard.

B. *New York: Blight is “Highly Malleable” and “Elastic”*

The hands off approach to blight determinations had been confirmed by an earlier opinion by an intermediate appellate court in another case involving Atlantic Yards. In *In re Develop Don’t Destroy (Brooklyn) v. Urban Development Corp.*,<sup>35</sup> the court first rejected several challenges to the sufficiency of the environmental impact statements before holding that because the question of whether the area was blighted was a matter of “a difference of opinion,”<sup>36</sup> the court was required to defer to the agency’s judgment. The court held that only if the area did not “absolutely def[y] description as ‘substandard and insanitary,’ ”<sup>37</sup> the court must accept the blight conclusion: “[t]he issue posed is not which of the parties has more persuasively characterized the area in question, but whether there was any basis at all for the exercise by the agency of the legislatively conferred power to make a blight finding, and plainly there was.”<sup>38</sup>

The court recognized this standard of review in reality means no judicial review at all, or at least no review that is in any way meaningful:

In the many years since *Kaskel*, agency blight findings have been found deficient in this State only where they were utterly unsupported, and there has been *no case* in which the condition of an area has been deemed sufficiently at odds with an agency blight finding to raise a factual issue as to whether the agency exceeded its authority in making the finding.<sup>39</sup>

Not a single case where a claim that a blight finding was wrong has gone to trial. The court cited another example of how “highly malleable”<sup>40</sup> the concept of blight is in New York.<sup>41</sup> The property in that case was the New York Coliseum site on Columbus Circle, “undoubtedly, even at the time of the litigation, one of the most valuable pieces of real estate in the city, bordering upon the very exclusive southwestern corner of Cen-

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35. 874 N.Y.S.2d 414 (App. Div. 2009).

36. *Id.* at 423.

37. *Id.*

38. *Id.*

39. *Id.* at 424 (emphasis added) (citation omitted).

40. *Develop Don’t Destroy Brooklyn*, 874 N.Y.S.2d at 424.

41. *See Jo & Wo Realty Corp. v. City of New York*, 555 N.Y.S.2d 271 (App. Div. 1990).

tral Park.”<sup>42</sup> But the court deferred to the agency’s determination that the property was “blighted” because it was “outmoded, underbuilt and insufficiently utilized,”<sup>43</sup> and therefore subject to redevelopment into the present Time Warner Center, an upscale shopping mall:

The point to be made is that “blight” has proved over time to be a highly malleable and elastic concept capable of enormously diverse application. This is not in the main attributable to the ingenuity of consultants eager to please the developers who pay their bills, but because the concept, within the field of its likely use, is more facilitative than limiting.<sup>44</sup>

One justice concurred separately to note that despite his belief that the agency “is ultimately being used as a tool of the developer to displace and destroy neighborhoods that are ‘underutilized,’ ”<sup>45</sup> there was nothing for the court to do, because “[w]hile I deplore the destruction of the neighborhood in this fashion, I cannot say, as a matter of law, that the [agency] did not have sufficient evidence of record to find ‘blight.’ ”<sup>46</sup>

### C. New York: “Blight” Review

The ink was barely dry on the court of appeals’ *Goldstein* opinion when a New York intermediate appellate court issued a decision which appeared to challenge *Goldstein*’s central premise. In *Kaur v. New York State Urban Development Corp.*,<sup>47</sup> the Appellate Division (First Department) struck down the attempted taking of land north of Columbia University in New York City because the record reflected the condemnor’s claim the properties are “blighted” was a pretext to mask overwhelming private benefit.<sup>48</sup> The *Kaur* court undertook an extensive review of the facts and concluded “there is no independent credible proof of blight in Manhattanville.”<sup>49</sup> The court deconstructed the blight determination, using language which reflected strong suspicion of the process and the results.<sup>50</sup>

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42. *Develop Don’t Destroy Brooklyn*, 874 N.Y.S.2d at 424.

43. *Id.*

44. *Id.*

45. *Id.* at 425 (Catterson, J., concurring).

46. *Id.* at 430. (Catterson, J., concurring).

47. 892 N.Y.S.2d 8 (App. Div. 2009).

48. *Id.* at 30.

49. *Id.* at 20.

50. See *id.* at 21. “This ultimately became the defining moment for the end game of blight.” *Id.* “It is important to note that the record before ESDC contains no evidence whatsoever that Manhattanville was blighted prior to Columbia gaining control over the vast majority of property therein.” *Kaur*, 892 N.Y.S.2d at 22. “This search for distinct ‘blight conditions’ led to the preposterous summary of building and sidewalk defects complied by [the planning consultant].” *Id.*

However, the New York Court of Appeals reversed the decision of the appellate division by relying on *Goldstein*'s great deference to blight determinations made by legislatively created agencies.<sup>51</sup> The court of appeals found that there was a rational basis for the "determination of the ESDC that the Project qualifies as both a land use improvement project and as a civic project serving a public purpose under the UDC Act," and that the petitioners were not denied due process.<sup>52</sup> In arriving at this conclusion, the court disagreed with several of the findings of the appellate court. The court of appeals concluded that the ESDC based its determination on a lot by lot basis supported by extensive documentation,<sup>53</sup> that the blight determination was not made in bad faith because ESDC hired a second, disinterested firm (Earth Tech) to conduct another blight determination, and the blight determination was the same,<sup>54</sup> and that the statutory term "substandard or insanitary" is not unconstitutionally vague because not only the New York Court of Appeals, but also the United States Supreme Court, has "consistently held that blight is an elastic concept that does not call for an inflexible, one-size-fits-all definition."<sup>55</sup> Thus, the New York Court of Appeals brought *Kaur* back in line with the central holding of *Goldstein*, giving almost total deference to an agency's determination of blight.

#### D. New Jersey: Pretext Measured by Objective Evidence

In an expansive opinion in *Township of Readington v. Solberg Aviation Co.*,<sup>56</sup> the appellate division of the New Jersey Superior Court determined that a municipality abused its condemnation power when it attempted to take property to thwart the expansion of a nearby airport.<sup>57</sup> The most interesting portion of the opinion deals with the property owner's claim of pretext. It argued that the condemnation was "at least substantially motivated, by the desire of township officials to limit airport expansion and to prevent [Solberg-Hunterdon Airport] from becoming a jetport."<sup>58</sup> The township did not dispute the contention, but

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51. See *Kaur v. N.Y. State Urban Dev. Corp.*, 15 N.Y.3d 235 (2010); see also *supra* Part I.A.

52. *Kaur*, 15 N.Y.3d. at 260-61.

53. *Id.* at 254-55.

54. *Id.* at 255.

55. *Id.* at 256.

56. 976 A.2d 1100 (N.J. Super. Ct. App. Div. 2009).

57. *Id.* at 1122-23.

58. *Id.* at 1116.

argued the motivations of individual officials are not relevant in determining the public use or purpose of a taking.<sup>59</sup> Under New Jersey law, a court will not overturn a decision to use eminent domain “in the absence of an affirmative showing of fraud, bad faith or manifest abuse.”<sup>60</sup> A condemnation may be set aside when the “real purpose” is other than the “stated purpose.”<sup>61</sup>

The court avoided an inquiry into the “mental processes and subjective considerations that induce a legislator’s action,”<sup>62</sup> instead examining the objective factors surrounding the adoption of the condemnation ordinance.<sup>63</sup> Examining the circumstances, the court concluded the “objective facts surrounding the adoption of the ordinance”<sup>64</sup> revealed the taking was adopted for reasons other than the professed reason.<sup>65</sup> First, the ordinance was unlikely to achieve its stated purpose. The taking was purportedly for “open space and farmland preservation[,] land for recreational uses, conservation of natural resources, wetlands protection, water quality protection, preservation of critical wildlife habitat, historic preservation, airport preservation, and preservation of community character.”<sup>66</sup> However, “[r]eports prepared by the Township’s experts indicate that the airport is in poor physical condition and has limited prospects for future economic success.”<sup>67</sup> The court compared expert reports which questioned the viability of the airport.<sup>68</sup> It also examined the context of the condemnation to conclude the real purpose of the taking was to control airport operations, and that much of the area was already open space.<sup>69</sup>

The fact that the condemnation of development rights to the airport will not achieve its stated purposes indicates that the true purpose of the condemnation was to secure a greater measure of land use authority over the airport than the Township currently enjoys. Further, objective evidence suggests that the condemnation was initiated to secure Township control over airport operations. These are improper purposes in that they subvert the Commissioner’s ultimate authority over aeronautical facilities.<sup>70</sup>

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59. *Id.*

60. *Twp. of W. Orange v. 769 Assocs., L.L.C.*, 800 A.2d 86, 90 (N.J. 2002).

61. *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 103 (N.J. Super. Ct. Law Div. 1998).

62. *Solberg Aviation*, 976 A.2d at 1117.

63. *Id.*

64. *Id.* (citing *Riggs v. Twp. of Long Beach*, 538 A.2d 808 (N.J. 1988)).

65. *Id.*

66. *Id.*

67. *Solberg Aviation*, 976 A.2d at 1117-18.

68. *Id.* at 1118.

69. *Id.* at 1119.

70. *Id.*

The court concluded the township abused its power of eminent domain “to avoid the limitations on municipal zoning power imposed by State airport statutes and regulations, [and] is not within the police powers delegated to the municipalities by the Legislature.”<sup>71</sup>

#### E. *Nebraska: Taking Not “Primarily” For Economic Development*

After *Kelo*, many jurisdictions, including Nebraska, prohibited takings related to economic development. In *City of Omaha v. Tract No. 1*,<sup>72</sup> the Nebraska Court of Appeals held that a post-*Kelo* “no takings for economic development” statute did not prohibit the city from taking property for a deceleration lane on a public road simply because the lane leads to a “well-known national retailer of consumer goods.”<sup>73</sup>

The court held that the statute only prohibits takings that are “primarily for an economic development purpose,”<sup>74</sup> and that even though the lane is contiguous to the retailer’s property, “the primary purpose of the deceleration lane clearly is to promote traffic safety and the efficient flow of traffic on the City’s streets.”<sup>75</sup>

Four factors supported the court’s conclusion that the taking was not for economic development: the city owns the property taken; the deceleration lane will not increase the tax revenue or tax base of the city; the acquisition did not serve the primary purpose of increasing employment; and there was no evidence that the city used its eminent domain power to improve the city’s “general economic conditions.”<sup>76</sup> Even though there might have been an incidental benefit to the retailer, any benefit was collateral and the taking was not primarily to foster economic development.<sup>77</sup>

## II. Other Limitations on the Eminent Domain Power

#### A. *Washington: Delegations of Eminent Domain Power Narrowly Construed*

A state law providing that airport boards may exercise the powers of the municipalities that appoint them, but which also requires a condemnation action by an airport board “be instituted, in the names of the

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71. *Id.* at 1121.

72. 778 N.W.2d 122, 128 (Neb. Ct. App. 2010).

73. *Id.* at 125.

74. *Tract No. 1*, 778 N.W.2d at 253.

75. *Id.*

76. *Id.* at 253-54.

77. *Id.* at 254-55.

municipalities jointly,”<sup>78</sup> prohibits an airport board from instituting an eminent domain suit in its own name.<sup>79</sup> In *Spokane Airports v. RMA, Inc.*,<sup>80</sup> the Washington Court of Appeals held that any condemnation suit filed by the airport board that is not in the names of the municipalities lacks subject matter jurisdiction<sup>81</sup> and could be raised for the first time on appeal.<sup>82</sup>

### B. Minnesota: Conditions Precedent

In *Eagan Economic Development Authority v. U-Haul Company*,<sup>83</sup> the Minnesota Court of Appeals held that when a delegation of eminent domain power from a municipality requires a redevelopment agency to enter into a development agreement before acquiring property, the agency is without power to take property until it enters such an agreement.<sup>84</sup> As noted by the court, section 1-8 of the resolution provided:

The Redevelopment Plan contemplates that the City may acquire property and re-convey the same to another entity. *Prior to formal consideration of the acquisition of any property, the City will require the execution of a binding development agreement with respect thereto* and evidence of Tax Increments or other funds will be available to repay the Public Costs associated with the proposed acquisition.<sup>85</sup>

The agency, however, argued that the redevelopment plan granted it broader authority and did not require it to enter into a development agreement first:

The second provision is section 1-12, which is a broader statement of acquisition of land: “The City may acquire such property, or appropriate interest therein, within the Redevelopment Project Area as the City may deem necessary or desirable to assist in the implementation of the Redevelopment Plan.”<sup>86</sup>

The agency did not enter into a development agreement, and the district court accepted its argument that the “broad language . . . swallow[ed] the limiting language.”<sup>87</sup> The court of appeals held the opposite, that the

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78. WASH. REV. CODE § 14.08.200(9) (2010).

79. *Id.*

80. 206 P.3d 364 (Wash. Ct. App. 2009).

81. *Id.* at 371.

82. *Id.* at 371. “We conclude that Spokane Airports had no authority to condemn property, that its activities here were more than ministerial, and that the superior court then had no jurisdiction over the subject matter of this controversy.” *Id.*

83. 765 N.W.2d 403 (Minn. Ct. App. 2009), *rev. granted*, *Eagan Econ. Dev. Auth. v. U-Haul Co. of Minn.*, No. A08-767, 2009 LEXIS 579 (Minn. Aug. 26, 2009).

84. *Id.* at 410.

85. *Id.* at 408.

86. *Eagan Econ. Dev. Auth.*, 765 N.W.2d at 408.

87. *Id.*

broad delegation in 1-12, which provided the “full extent” of the city’s condemnation power, was “unequivocally qualif[ied]”<sup>88</sup> by section 1-8 which made the entry into a development agreement the condition precedent to the exercise of the condemnation power.<sup>89</sup>

The court also rejected the argument that the language limited the city’s condemnation power but did not limit the agency’s.<sup>90</sup> The court noted that the city could delegate “no more power than the city possessed,”<sup>91</sup> and the delegation was limited by the city’s self-imposed development agreement precondition.<sup>92</sup>

### C. Minnesota: Statutory Consent Required

In *City of Jordan v. Church of St. John the Baptist of Jordan*,<sup>93</sup> the Minnesota Court of Appeals held that a state law requiring the consent of a church’s governing board before its land can be taken for road or street purposes requires consent before a city can take property for sidewalks and traffic signals.<sup>94</sup> A Minnesota statute provides that “[n]o roads or streets shall be laid through the property without the consent of the corporation’s governing board.”<sup>95</sup>

The city intended to place a new sidewalk and traffic signal lights on the church’s property and could not negotiate a purchase.<sup>96</sup> The issue was whether the sidewalk and signal constituted “roads and streets” under the statute.<sup>97</sup> The appellate court noted that the statute had never been interpreted since its enactment in 1881, but that the Minnesota Supreme Court in a case decided roughly contemporaneously with the statute, held that “sidewalk” was ordinarily understood to be part of a “street.”<sup>98</sup> The *Jordan* court concluded:

And because a religious corporation’s land cannot be taken for street purposes without consent of the corporation’s governing board, the church’s land cannot be taken for sidewalk purposes without its consent. . . .

For purposes of Minn. Stat. § 315.42 (2008), sidewalks are part of streets. Also, because a city is to place traffic-control devices on a highway or street, the prohibition in Minn. Stat. § 315.42 (2008) on using the land of religious corporations for

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88. *Id.*

89. *Id.*

90. *Eagan Econ. Dev. Auth.*, 765 N.W.2d at 409.

91. *Id.*

92. *Id.*

93. 764 N.W.2d 71 (Minn. Ct. App. 2009).

94. *Id.* at 76.

95. MINN. STAT. § 315.42 (2008).

96. *Church of St. John the Baptist*, 764 N.W.2d at 72.

97. *Id.* at 73.

98. *Id.* at 75.

road or street purposes without the consent of the corporation's governing board precludes the use of the church's land for sidewalk and signal light purposes without consent of the church's governing board.<sup>99</sup>

#### D. *First Circuit: Public Use Challenges*

##### *Belong In State Courts*

In *Lichoulas v. City of Lowell*,<sup>100</sup> the United States Court of Appeals for the First Circuit declined to rule on a property owner's objection to a taking for redevelopment, holding that public use challenges belong in state court.<sup>101</sup> Interestingly, the court cited the case requiring *regulatory* takings to be ripe, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,<sup>102</sup> for the proposition that "any objection to the taking, or deficiency in adequate compensation, could be and preferably is to be done in state proceedings."<sup>103</sup>

In 2006, the city took Lichoulas' property, on which sat a hydroelectric power facility, inactive since 1994.<sup>104</sup> The Federal Energy Regulatory Commission (FERC) earlier sent a notice to the owner that unless the facility began operating, it would consider the federal license abandoned.<sup>105</sup> The property owner responded that he would forward a work plan to FERC, but it was never sent.<sup>106</sup> Shortly thereafter, the city began eminent domain proceedings for a redevelopment project.<sup>107</sup> The property owner sued in federal court seeking to enjoin the taking under two theories. First, that the Federal Power Act precluded the taking, and second, that the taking was not for a public use.<sup>108</sup> The district court dismissed the case as not ripe, holding the property owner could refile the case after FERC proceedings were terminated.<sup>109</sup>

The First Circuit affirmed.<sup>110</sup> It did not address the property owner's two arguments, holding any claims that the property owner has that the taking is not for public use under the Fifth Amendment could be raised

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99. *Id.* at 75-76.

100. 555 F.3d 10 (1st Cir. 2009).

101. *Id.* at 14.

102. 473 U.S. 172 (1985).

103. *Lichoulas*, 555 F.3d at 13.

104. *Id.* at 11-12.

105. *Id.* at 12.

106. *Id.*

107. *Id.*

108. *Lichoulas*, 555 F.3d at 12.

109. *Id.*

110. *Id.* at 14.

in the state condemnation proceedings. “To the extent that *Lichoulas* seeks compensation for the taking, the claim is properly brought in state court, as *Williamson* makes clear.”<sup>111</sup>

Rather than muddy the waters by bringing in *Williamson County*,<sup>112</sup> the court would have been on more solid footing if it based its decision on the abstention doctrine of *Younger v. Harris*,<sup>113</sup> which embodies “a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances.”<sup>114</sup> Under *Younger* and its progeny, “abstention is appropriate . . . if (1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal questions.”<sup>115</sup> It is not clear from the *Lichoulas* opinion whether the state court eminent domain proceedings were ongoing: on one hand, the court noted the parcels “were taken” by the city and that the city “took” the property, indicating that the state case was concluded;<sup>116</sup> but on the other, the court noted the property owner sought to enjoin the taking, implying the state proceedings were not yet complete.<sup>117</sup> Even so, this case seems like a good candidate for a *Younger* analysis and not an application of *Williamson County*, which involved a regulatory taking or inverse condemnation claim for compensation,<sup>118</sup> not an effort to stop a taking because it lacked a public use. The First Circuit’s reliance on *Williamson County* reflects the lower courts’ continuing confusion about what the case means. Some courts even apply it to cases not involving the takings clause (despite the fact that the rationale of *Williamson County* is based in the text of the takings clause), and now the First Circuit has applied it to public use challenges.<sup>119</sup>

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111. *Id.* at 13.

112. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

113. 401 U.S. 37 (1971).

114. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982).

115. *Fresh Int'l Corp. v. Agric. Labor Relations Bd.*, 805 F.2d 1353, 1357-58 (9th Cir. 1986).

116. *Lichoulas*, 555 F.3d at 11.

117. *Id.* at 12.

118. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 175 (1985).

119. Compare *Lichoulas*, 555 F.3d at 14 with *Rumber v. District of Columbia*, 487 F.3d 941, 941-45. (D.C. Cir. 2007) (holding that a public use challenger need not seek compensation in state procedures before coming to federal court).

### E. *Tenth Circuit: Immunity*

In *Sable v. Myers*,<sup>120</sup> the United States Court of Appeals for the Tenth Circuit held that city council members are absolutely immune from claims that they used the domain power to take the property of an owner as retaliation for his having successfully brought a quiet title action against the city.<sup>121</sup>

Sable's property was immediately north of the city's public works facility.<sup>122</sup> His predecessor in title had adversely possessed from the city a portion of a former city street on the southern boundary of the property, and this "strip" was fenced in along with Sable's main parcel.<sup>123</sup> The city wanted to expand the public works facility and entered into negotiations with Sable to purchase the strip, but he eventually refused to sell.<sup>124</sup> After Sable's state-court quiet title suit began gaining traction, however, the city council voted to condemn both the strip and Sable's main property.<sup>125</sup> The Tenth Circuit highlighted the council's deliberations, which formed the basis for Sable's belief:

Before the vote the Council discussed its power to acquire Mr. Sable's property even if he did not want to sell it:

VICE-MAYOR FELTON: But in any case, could we acquire [Mr. Sable's land], though? I mean, if [Mr. Sable] didn't want to sell it?

JOHN WILLIAMS [a private attorney apparently retained by the City]: Yes, we can.

VICE-MAYOR FELTON: Just because of where it's sitting, and why we want it?

CITY ATTORNEY MOLER: That's right. If it's for a public purpose—

At that point, as we understand the transcript of the meeting, various conversations began simultaneously. But one exchange (on which Mr. Sable relies to show Defendants' improper motive) was recorded:

COUNCILMAN RAWLS: . . . There's none.

VICE-MAYOR FELTON: It's good to be King.<sup>126</sup>

When the city instituted condemnation proceedings, Sable objected, but the state courts upheld the taking as having a public purpose.<sup>127</sup> Sable then filed suit in state court against the council members and the city, seeking damages under a federal civil rights statute for a retaliatory taking.<sup>128</sup> The city removed the suit to federal court, which declined to

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120. 563 F.3d 1120 (10th Cir. 2009).

121. *Id.* at 1124.

122. *Id.* at 1121.

123. *Id.* at 1121-22.

124. *Id.*

125. *Sable*, 563 F.3d at 1122.

126. *Id.* (citation omitted).

127. *Id.* at 1123.

128. *Id.*

grant absolute legislative immunity, and the appeal to the Tenth Circuit followed.<sup>129</sup> The Tenth Circuit held that decisions to condemn property are legislative judgments, and the council members were thus completely immune from suit, regardless of their motivations:

The decision to expand the public-works facility was neither an administrative matter (such as the conduct of a meeting) nor an essentially ministerial task (as when applying the law and predetermined criteria to select a bid). Oklahoma law authorizes municipalities to exercise the power of eminent domain to obtain land for public works. The City's decision to take Mr. Sable's land was undoubtedly an exercise of discretion regarding a matter of public policy that would impact the functioning of public services for years to come. That the councilors may have exercised that discretion on the basis of motives that were irrelevant to public purposes does not affect the councilors' legislative immunity.<sup>130</sup>

This case isn't all that groundbreaking on the legal issue—legislators are generally completely personally immune from suits involving their legislative decisions—but does give a peek behind the curtain at how and why decisions to take property are often made. The opinion ended with recognition that while the legislators are immune from suit, the city itself is not:

We appreciate the discomfort that may arise from the recognition of legislative immunity in this case. Mr. Sable's allegations (whose truth has not been adjudicated) create an ugly picture of the abuse of public power to achieve improper ends. Perhaps such pettiness is more likely to arise in municipal legislative bodies than in legislatures with more members and broader jurisdiction. It is also true, however, that charges of improper motive are likely easier to bring at the local-government level. And the honor and fortune that come from service in local government are slight enough that many capable candidates for municipal office would surely forgo the rewards of such service if faced with the possibility of being sued for every decision taken without public consensus. Moreover, those mistreated by municipal legislators are not without remedy. Not only are political remedies available, but a municipality, as opposed to its officials, is subject to suit under § 1983. History has shown that the greater good comes from protecting legislators from suit based on their legislative acts. This conclusion may be little solace to one who perceives himself to be the victim of abuse of power. But perhaps it emphasizes each citizen's duty, for the public interest as well as one's own, to seek the election of honest, capable leaders, or even run for office oneself.<sup>131</sup>

### III. Attorneys Fees and Damages Issues

#### A. New York

Under New York's eminent domain law, the condemning authority is liable to the property owner for attorney's fees and costs incurred

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129. *Id.*

130. *Sable*, 563 F.3d at 1126 (citations omitted).

131. *Id.* at 1127.

“because of the acquisition procedure.”<sup>132</sup> In *Hargett v. Town of Ticonderoga*,<sup>133</sup> the New York Court of Appeals held that a property owner is entitled under this statute to be reimbursed for its attorney’s fees and costs incurred when it successfully challenges the government’s authority to take under New York’s two-step condemnation process.<sup>134</sup>

Generally, a two-step process is required under the Eminent Domain Procedure Law before a condemnor obtains title to property for public use. The condemnor first makes a determination to condemn the property after invoking the hearing and findings procedures of EDPL 203 and 204. Thereafter, the condemnor must seek the transfer of title to the property by commencing a judicial proceeding known as a vesting proceeding pursuant to EDPL article 4.<sup>135</sup>

The court rejected the town’s argument that section 702 only requires the reimbursement of fees and costs incurred in a vesting proceeding, and held the “acquisition proceeding” language includes the first phase.<sup>136</sup> When a property owner challenges a determination to take pursuant to section 204, she must do so within thirty days, and cannot wait until the vesting proceeding.<sup>137</sup> The court noted:

Thus, § 702 (B) provides for reimbursement to the condemnee who successfully challenges a “proposed acquisition” at the first step of the eminent domain process and obtains a judicial determination that the condemnor lacks the authority to pursue the proposed acquisition. Moreover, contrary to appellant’s argument, we can discern no reason why the Legislature would have been disposed to allowing condemnees successful in EDPL article 4 proceedings to obtain reimbursement while simultaneously barring the same relief to condemnees successful in EDPL article 2 proceedings.<sup>138</sup>

The court did not expressly say so, but what seems to be driving the decision is that a property owner cannot claim “that the condemnor was not legally authorized to acquire the property”<sup>139</sup> during the vesting phase, so the court’s holding is the only one that would give full meaning to the plain language of the statute. The court left open the question of whether fees and costs incurred in preparing for and participating in the public hearing which is required before the decision to take property would qualify as part of the “acquisition proceeding.”

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132. N.Y. EM. DOM. PROC. LAW § 702(B) (Consol. 2010).

133. 918 N.E.2d 933 (N.Y. 2009).

134. *Id.* at 936.

135. *Id.* at 933-34.

136. *Id.* at 935.

137. *See id.* at 935.

138. *Hargett*, 918 N.E.2d at 936.

139. N.Y. EM. DOM. PROC. LAW § 702(B) (Consol. 2010).

### B. Hawaii: Owner Entitled to Fees Incurred on Appeal

Under a Hawaii statute, when a condemnation action is “abandoned or discontinued before reaching a final judgment, or if, for any cause, the property concerned is not finally taken for public use,”<sup>140</sup> the condemnor is liable for:

[a]ll such damage as may have been sustained by the defendant by reason of the bringing of the proceedings and the possession by the plaintiff of the property concerned if the possession has been awarded including the defendant's costs of court, a reasonable amount to cover attorney's fees paid by the defendant in connection therewith, and other reasonable expenses. . . .<sup>141</sup>

In *County of Hawai'i v. C & J Coupe Family Limited Partnership*,<sup>142</sup> the Hawaii Supreme Court held that a condemnee who appeals a trial court's denial of damages for a failed taking is entitled to the damages it sustains on appeal.<sup>143</sup> The court held that a property owner is entitled to be made economically whole—including the attorney's fees incurred while appealing the trial court's denial of a fee award.<sup>144</sup> In an earlier opinion,<sup>145</sup> the court held that property is not “finally taken” in a condemnation action when a single condemnation fails or is dismissed, even if the condemnor succeeds in a subsequent—or in that case, concurrent—attempt to take the property.<sup>146</sup> The second opinion addresses damages sustained on appeal.<sup>147</sup> The court noted that the hourly rate and hours spent are deemed reasonable unless the condemnor specifically objects.<sup>148</sup> The court subsequently amended the opinion to clarify that a property owner who ultimately prevails is entitled to all fees it reasonably incurs, even if it loses on interlocutory issues.<sup>149</sup> In other words, what matters for the determination of governmental liability under the statute is whether the property is “finally

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140. HAW. REV. STAT. § 101-27 (2010).

141. *Id.*

142. 208 P.3d 713 (Haw. 2009), *amended by County of Hawai'i v. C & J Coupe Family Ltd. P'ship*, No. 28822, 2009 Haw. LEXIS 126 (May 22, 2009).

143. *C & J Coupe*, 208 P.3d at 719.

144. *Id.*

145. *County of Hawai'i v. C & J Coupe Family Ltd. P'ship*, 198 P.3d 615 (Haw. 2008).

146. *Id.* at 620.

147. *C & J Coupe*, 208 P.3d at 720.

148. *Id.*

149. *See County of Hawai'i v. C & J Coupe Family Ltd. P'ship*, No. 28822, 2009 Haw. LEXIS 126, at \*2 (May 22, 2009).

taken," not whether the government may win intermediate steps along the way.<sup>150</sup> If the taking fails, the government is liable for all of the property owner's fees and costs, even those related to motions the government may have won.<sup>151</sup>

#### **IV. Conclusion**

Courts continue to grapple with the issue of the degree and intensity of judicial review of decisions to take property, as illustrated by the competing decisions from New York. While one New York intermediate appellate court has joined the highest courts of the District of Columbia and Hawaii in viewing *Kelo* as requiring a searching review of the record in certain instances, *Kelo* continues to be viewed by state and lower federal courts through vastly different lenses.

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150. *See id.*

151. *See id.*