

# Recent Developments in Condemnation Law: Public Use, Private Property

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THIS ARTICLE SUMMARIZES RECENT CASES IN WHICH THE ISSUE was the power of condemnors to take property, including challenges under the Public Use Clause, as well as other challenges on the power to take.

## I. *Kelo's* Context

The backdrop for the renewed judicial interest in the public use limitations in the federal and state constitutions was the Supreme Court's controversial decision in *Kelo v. City of New London*.<sup>1</sup> In *Kelo*, the Court declined to categorically bar all takings supported only by the claim that a different owner would make more economically intense use of property than its current owner. The *Kelo* Court did not, however, rule out considering future challenges under the Public Use Clause if a condemnor's asserted public use or purpose was a "pretext to hide private benefit."<sup>2</sup> Justice Kennedy—the majority's fifth vote—concurred separately, and provided deeper analysis of what might qualify as a "pretextual" taking:

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>3</sup>

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1. 545 U.S. 469 (2005).

2. *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.")

3. *Id.* at 491 (Kennedy, J., concurring) (citing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-47 (1985) and *Dep't of Agric. v. Moreno*, 413 U.S. 528, 533-36 (1973)). Justice Kennedy did not provide details, noting 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." *Kelo*, 545 U.S. at 492.

Justice Kennedy also noted that an exercise of eminent domain must also have systemic indications that the results produced are trustworthy, or it might be subject to a more searching judicial inquiry than the rational basis test in *Kelo*.<sup>4</sup>

## II. Pennsylvania: If It Walks Like a Private Taking and Quacks Like a Private Taking, It Might Be a Private Taking

A state statute that allows one private landowner to compel the building of a private road over the land of a neighbor might violate the Public Use Clause. In *In re Opening a Private Road ex rel. O'Reilly*,<sup>5</sup> a property owner whose land was being taken in order to be turned over to a neighbor challenged the Pennsylvania Private Road Act ("Road Act") as unconstitutional. The Road Act allows:

[T]he owner of a landlocked property . . . to petition the court of common pleas for the appointment of a board of viewers to evaluate the necessity of a private road to connect such property with the nearest public thoroughfare or private way leading to a public thoroughfare. Upon a finding of necessity, the board will lay out a private road to cause the least damage to [the] private property. The Act requires the owner of the landlocked property to pay damages to persons over whose property the new road is built; the owner is then afforded exclusive use of the road.<sup>6</sup>

When O'Reilly began the process to open a private road over his neighbors' land (he asserted the Commonwealth's taking of land to build I-79 caused his property to become landlocked), the neighbors asserted the Road Act "facilitates an unconstitutional taking of private property for a private purpose" in violation of both the U.S. and Pennsylvania Constitutions.<sup>7</sup> Two lower courts rejected the challenges, and upheld the Road Act as constitutional. The Commonwealth Court concluded "*sua sponte*, that, from the beginning of the Commonwealth, all lands in Pennsylvania were encumbered with a six percent incorporeal bur-

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4. *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.") (citing *Eastern Enters. v. Apfel*, 524 U.S. 498, 549-50 (1998) (Kennedy, J., concurring in judgment and dissenting in part) (using heightened scrutiny for retroactive legislation under the Due Process Clause)).

5. 5 A.3d 246 (Pa. 2010).

6. *Id.* at 248 (citations omitted).

7. *Id.* at 249.

den for the building of a public road system, which included private roads.”<sup>8</sup> According to the court, original land grantees were granted six percent extra land, so the Road Act was “not a taking in the ordinary sense,” but an exercise of the Commonwealth’s police power, and merely regulated a property owner’s use of her land.<sup>9</sup> The court also held that even if analyzed as an exercise of eminent domain power, the Road Act served the public purpose of insuring that “otherwise inaccessible swaths of land in Pennsylvania would [not] remain fallow and unproductive.”<sup>10</sup>

The Pennsylvania Supreme Court rejected both rationales. The court concluded that the Road Act was not merely regulation of property, but was a taking because it requires property owners to allow physical invasions of their land:

[W]e reject Appellee’s argument that the creation of a private road under the Act is not a taking, but, instead, embodies reasonable regulation of property usage or provision of an otherwise unavailable private easement, both exercised under the Commonwealth’s police power. As Appellants correctly observe, irrespective of the police-powers rubric, a physical invasion and permanent occupation of private property, such as that which would be accomplished by the creation of a private road under the Act, is a taking.<sup>11</sup>

The court held that both the U.S. and Pennsylvania Constitutions require that takings be for public use, and “[t]his Court has maintained that, to satisfy this obligation, the public must be the primary and paramount beneficiary of the taking.”<sup>12</sup> The court relied on *Middleship Township v. Lands of Stone*,<sup>13</sup> to reject the commonwealth court’s conclusion that some public benefit is enough to constitute “public use.” It is not enough to simply measure the public benefit to see if any might exist, but a court must compare the claimed public benefit to the private benefit that results from the taking, and in order for the taking to be constitutional, the public benefits must be primary and paramount. Consequently, although the supreme court accepted that there might be some public benefit stemming from the Road Act’s keeping of otherwise inaccessible land from being “fallow and unproductive,” it concluded that the court below did not “attempt to confirm that the public is the primary and

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8. *Id.* at 251.

9. *Id.* at 257 (quoting *Opening a Private Road ex rel. O’Reilly v. Hickory on the Green Homeowners Ass’n*, 954 A.2d 57, 72 (Pa. Commw. Ct. 2008)).

10. *In re Opening a Private Road*, 5 A.3d at 258 (quoting *Opening a Private Road ex rel. O’Reilly v. Hickory on the Green Homeowners Ass’n*, 954 A.2d at 72).

11. *In re Opening a Private Road*, 5 A.3d at 257 (citations omitted).

12. *Id.* at 258.

13. 939 A.2d 331 (Pa. 2007).

paramount beneficiary” of the road taking.<sup>14</sup> The court remanded the case for an inquiry into whether the private taking was so connected to the Commonwealth’s earlier taking for I-79 which allegedly landlocked O’Reilly’s parcel such that it could be said that the public is the primary beneficiary of the otherwise private taking.

Three justices dissented and would have held the Road Act constitutional and “the constitutionality of the Private Road Act [] is well settled” because the Pennsylvania Supreme Court, despite many opportunities, had never held it unconstitutional, and the Pennsylvania legislature has never repealed it, even after *Kelo*. The dissenting justices also analogized the Road Act to the common law doctrine of easement by necessity, “which has long been used to allow a landlocked landowner to access a public highway over another’s private land when no other relief is available.”<sup>15</sup>

### III. New York: An Agency’s Blight Findings Are Virtually Immune from Judicial Review

#### A. *We Meant What We Said In* Goldstein

In *Kaur v. New York State Urban Development Corp.*,<sup>16</sup> the New York Court of Appeals reaffirmed its 2009 decision in *Goldstein v. New York State Urban Development Corp.*,<sup>17</sup> and held that New York courts take a hands-off approach to an agency’s conclusion that private property is “blighted” and therefore subject to condemnation. The court reversed the appellate division’s conclusion that a taking of land near Columbia University in New York City was invalid because the area was not truly blighted.<sup>18</sup> The appellate division had invalidated the taking on the ground that the condemnor’s blight claim was pretextual and masked overwhelming private benefit to the university, which plans to use the area for a new campus.<sup>19</sup>

In *Goldstein*, the court of appeals had earlier held that “[i]t is only where there is no room for reasonable difference of opinion as to whether an area is blighted, that judges may substitute their view as

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14. *In re Opening a Private Road*, 5 A.3d at 258.

15. *Id.* at 259 (Eakin, J., dissenting).

16. 933 N.E.2d 721 (N.Y. 2010).

17. 921 N.E.2d 164 (N.Y. 2009).

18. *See Kaur v. New York State Urban Dev. Corp.*, 892 N.Y.S.2d 8 (N.Y. App. Div. 2009), *rev’d*, 933 N.E.2d 721 (N.Y. 2010).

19. *Id.*

to the adequacy with which the public purpose of blight removal has been made out for those of the legislatively designated agencies[.]”<sup>20</sup> The appellate division’s opinion was issued only weeks after *Goldstein*, and there were questions of whether it could be distinguished from that case, or whether the court of appeals would curtail its rule that courts cannot examine an agency’s blight findings with anything approaching meaningful judicial scrutiny. The New York Court of Appeals’ unanimous opinion in *Kaur* came swiftly (oral arguments were held just a month earlier), suggesting it was not a close call for the court, which held that in light of *Goldstein*:

The term “substandard or insanitary area” is defined as “a slum, blighted, deteriorated or deteriorating area, or an area which has a blighting influence on the surrounding area.” Here, the two reports prepared by ESDC consultants—consisting of a voluminous compilation of documents and photographs of property conditions—arrive at the conclusion that the area of the Project site is blighted. Just as in *Matter of Goldstein*, “all that is at issue is a reasonable difference of opinion as to whether the area in question is in fact substandard and insanitary,” which is “not a sufficient predicate . . . to supplant [ESDC’s] determination.”

Thus, given our precedent, the *de novo* review of the record undertaken by the plurality of the Appellate Division was improper.<sup>21</sup>

In other words, “blight” is whatever the agency says it is.

Finally, the court included benefit to a private educational institution as a “civic purpose” that is also insulated from judicial review, and used the controversial Atlantic Yards project—the case that resulted in *Goldstein*—as the exemplar:

Moreover, consonant with the policy articulated in the UDC Act, ESDC has a history of participation in civic projects involving private entities. The most recent example of a civic project is the Atlantic Yards project, which authorized a private entity to construct and operate an arena for the Nets professional basketball franchise. The petitioners in that case argued that the project did not qualify as a “civic project” because the arena would be used by a professional basketball team and operated by a private profit-making entity. In rejecting that argument, the Appellate Division explained, “that a sports arena, even one privately operated for profit, may serve a public purpose.” Looking to the plain language of section 10(d) of the UDC Act, the court observed that “the proposed arena will serve a public purpose by providing a needed recreational venue in the area of the project.”

The proposed Project here is at least as compelling in its civic dimension as the private development in *Matter of Develop Don’t Destroy (Brooklyn)*. Unlike the Nets basketball franchise, Columbia University, though private, operates as a non-profit educational corporation. Thus, the concern that a private enterprise will be profiting through eminent domain is not present.<sup>22</sup>

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

21. *Kaur*, 933 N.E.2d at 731 (citations omitted).

22. *Id.* at 734 (citations omitted).

Thus, it appears at least New Yorkers love their schools as much as their sports. The property owners sought review from the U.S. Supreme Court, but the Court denied certiorari.

B. “[T]here Is No Longer Any Judicial Oversight of Eminent Domain Proceedings.”<sup>23</sup>

If *Goldstein* and *Kaur* left observers wondering whether there are any limits on the government’s power of eminent domain in New York, they were not alone, and at least one judge agreed. In *Uptown Holdings, LLC v. City of New York*,<sup>24</sup> the Appellate Division held that the city’s Department of Housing Preservation and Development validly condemned property, upholding the taking against a due process and a public use challenge:

Relying on *Kelo v. New London*, petitioners contend that the public benefits are illusory and speculative because there is no carefully considered, integrated development plan to which a developer is contractually bound. However, *Kelo* does not say that land may be condemned only if there is such a plan. Moreover, the Court of Appeals’ decision in *Matter of Aspen Cr. Estates, Ltd. v. Town of Brookhaven* suggests that such a plan is not required.<sup>25</sup>

The court also distinguished the facts in *49 WB, LLC v. Village of Haverstraw*,<sup>26</sup> a case in which the appellate division invalidated a taking because the condemnor’s “sole purpose [was] assisting private entities by means of condemnation.”<sup>27</sup>

The holding of the unanimous three-judge panel was not surprising given *Goldstein* and *Kaur*, but one judge specially concurred to note his disagreement with the state of New York law. Judge Catterson agreed with the majority, but apparently only because as an intermediate appellate court judge, he felt he was bound by the decisions of the court of appeals:

In my view, the record amply demonstrates that the neighborhood in question is not blighted, that whatever blight exists is due to the actions of the City and/or is located far outside the project area, and that the justification of under-utilization is nothing but a canard to aid in the transfer of private property to a developer. Unfortunately for the rights of the citizens affected by the proposed condemnation, the recent rulings of the Court of Appeals [in *Goldstein* and *Kaur*], have made plain that there is no

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23. *Uptown Holdings, LLC v. City of New York*, 908 N.Y.S.2d 657, 661 (N.Y. App. Div. 2010) (Catterson, J., concurring).

24. *Id.*

25. *Id.* at 660 (citing *Matter of Aspen Cr. Estates, Ltd. v. Town of Brookhaven*, 904 N.E.2d 816 (N.Y. 2009)).

26. 839 N.Y.S.2d 127 (N.Y. App. Div. 2007).

27. *Id.* at 141.

longer any judicial oversight of eminent domain proceedings. Thus, I am compelled to concur with the majority.<sup>28</sup>

Judge Catterson authored the majority opinion for the appellate division in *Kaur* where he had concluded “the record overwhelmingly establishes that the true beneficiary of the scheme to redevelop Manhattanville is not the community that is supposedly blighted, but rather Columbia University, a private elite education institution.”<sup>29</sup> It appears Judge Catterson has not changed his mind, only his vote.

### *C. Eminent Domain Can't Be Used to Get Out of a Contract*

“Bust a deal and face the wheel.”<sup>30</sup> That old adage of contract law certainly played a part in an appellate division case considering whether, once an agency with the power of eminent domain makes a deal, it must live with it or whether it can use its condemnation power to try and avoid its contractual obligations. The court invalidated an attempt to take property, in this case land used by Syracuse University for “co-generation facility and steam plants.”<sup>31</sup> The taking, the court held, was purely private since it was an attempt by the condemnor to free its affiliate from its contractual obligations. In *Syracuse University v. Project Orange Associates Services Corp.*,<sup>32</sup> the contract made by the affiliate was economically “unsustainable,” and it had attempted on several occasions to reform or bust it. When that did not work, a statutory electric corporation with the power of eminent domain was created, and “approximately one year later, provided notice of its intent to condemn the subject property.”<sup>33</sup> The court provided the details:

We agree with petitioner that the underlying basis for the exercise by the POASC of its eminent domain powers is undoubtedly the outdated business model of its affiliate, Project Orange Associates, LLC (POA). The record establishes that POA entered into a series of 40-year lease agreements with SU in 1990 that allowed POA to construct a cogeneration facility on property owned by SU and to assume operation of two existing steam plants located there. In exchange, POA agreed to sell steam at prices substantially below what SU was paying to produce steam at the existing steam plants. SU both used that steam and sold excess steam to neighboring not-for-profit entities, all of which oppose the

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28. *Uptown Holdings*, 908 N.Y.S.2d at 660-61 (Catterson, J., concurring).

29. *Kaur v. New York State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 20 (N.Y. App. Div. 2009), rev'd, 933 N.E.2d 721 (N.Y. 2010).

30. MAD MAX: BEYOND THUNDERDOME (Kennedy Miller Productions, 1985).

31. *Syracuse Univ. v. Project Orange Assocs. Servs. Corp.*, 897 N.Y.S.2d 335, 336 (N.Y. App. Div. 2010).

32. *Id.* at 337.

33. *Id.*

proposed condemnation. POA was able to provide that steam at a reduced price because of its expected profits from the sale of electricity under a 40-year contract between POA and Niagara Mohawk Power Corporation (NIMO) that required NIMO to purchase electricity produced at the cogeneration facility. The threat of a NIMO bankruptcy in 1998 caused POA and NIMO to reach a settlement that allowed NIMO to discharge its obligation to purchase electricity from POA in exchange for a significant settlement that permitted POA to provide SU with steam at a significantly reduced rate until July 2008.

The record further establishes that, by 2008, POA took steps to renegotiate its lease agreements with SU, which were unsustainable based on the demise of POA's contractual relationship with NIMO. Indeed, POA commenced a declaratory judgment action against SU in connection with one of its agreements with SU and in addition twice sought emergency judicial relief adjusting the steam price, withheld payment to the contractor responsible for operating the cogeneration facility and disputed certain water and electric charges for the facility. In May 2008, POASC was incorporated as an electric corporation under article 2 of the Transportation Corporations Law and, approximately one year later, provided notice of its intent to condemn the subject property.<sup>34</sup>

The court also concluded that the condemnor lacked the statutory authority to acquire the steam distribution system at issue. New York law delegates the power of eminent domain to certain electric corporations "as may be necessary for its corporate purposes," but steam distribution is not an enumerated purpose of an electric corporation.<sup>35</sup>

#### **IV. New Jersey: For Property to Be Blighted, City Must Do More Than Say It Is Blighted**

A New Jersey court took a decidedly different approach to a condemnor's claim of blight than its neighbor New York. In *Cottage Emporium, Inc. v. Broadway Arts Center, LLC*,<sup>36</sup> the appellate division struck down the city of Long Branch's declaration that properties located in an area of the city known as the "Broadway Corridor" are blighted. The court held that the city must do more than recite the statutory criteria for blight and then assert the properties met the criteria. The city determined the properties were in "poor" condition using only "cosmetic and superficial" criteria, and by visually inspecting the buildings' exteriors.<sup>37</sup> Nor did the city attempt "even in small part, to establish what *Gallenthin*<sup>38</sup> requires, namely a degree of 'deterioration or stagnation that negatively affects surrounding areas' by promoting conditions there that can de-

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34. *Id.*

35. *Id.* at 338.

36. *Cottage Emporium, Inc. v. Broadway Arts Ctr., LLC*, 2010 WL 1526045 (N.J. Super. Ct. App. Div. 2010) (per curiam).

37. *Id.* at \*13.

38. *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007).

velop into blight.”<sup>39</sup> Although a city’s blight determination is presumed valid and challengers have the burden of overcoming the presumption by demonstrating that the determination was not supported by “substantial evidence,” the appellate division noted that in *Gallenthin*, the New Jersey Supreme Court held that the “substantial evidence” standard required that the city do more than recite the “applicable statutory criteria [regarding blight] and a declaration that those criteria are met.”<sup>40</sup>

The court contrasted Long Branch’s blight determination with the survey taken in *Lyons v. City of Camden*,<sup>41</sup> where the city looked at the exterior and interior of each structure, and three engineers and an architect evaluated each building’s deficiencies before a structure was declared to be substandard.<sup>42</sup> Long Branch’s blight report, by contrast, concluded that the Broadway Corridor properties were blighted because “[t]he generality of the buildings are substandard, unsafe, unsanitary, dilapidated or obsolescent, or possess any of such characteristics.”<sup>43</sup> The court held this was a “bland recitation of statutory criteria” that failed to explain its basis.<sup>44</sup> The court concluded:

We conclude that the City’s designation of the study area properties as in need of redevelopment does not satisfy the heightened standard made applicable to such determinations by the Supreme Court’s decision in *Gallenthin*. Therefore, because the record does not contain substantial evidence to support the City’s findings under any of the subsections upon which it relied, we reverse the judgment appointing condemnation commissioners and vacate the declarations of taking.<sup>45</sup>

The court remanded the case to the trial court to allow the city to make a better record, if possible.

## V. Arkansas: Pipeline Taking Not a Private Use

In *Smith v. Arkansas Midstream Gas Services Corp.*,<sup>46</sup> the Arkansas Supreme Court concluded that a taking for a natural gas pipeline by a private, for-profit utility company was not a violation of the state constitution’s public use clause. Arkansas law delegates the power of eminent domain to certain pipeline companies and deems them to be common carriers: “All pipeline companies operating in this state are given the

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39. *Cottage Emporium*, 2010 WL 1526045 at \*13.

40. *Id.* at \*10.

41. 243 A.2d 817 (N.J. 1968).

42. *Cottage Emporium*, 2010 WL 1526045 at \*13.

43. *Id.* at \*9.

44. *Id.*

45. *Id.* at \*1 (citation omitted).

46. 2010 WL 2724427 (Ark. 2010).

right of eminent domain and are declared to be common carriers, except pipelines operated for conveying natural gas for public utility service.”<sup>47</sup> The public use clause in the Arkansas Constitution is not that much different than similar provisions in other constitutions: “The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.”<sup>48</sup>

The landowners argued that the taking of a sixty-foot right of way over their land for the natural gas pipeline was a private, not public, use because the pipeline is for use by less than the public, and the public at large is not able to ship materials through the pipeline.<sup>49</sup> The court rejected the argument because, as a common carrier, the pipeline company is required by law to allow public access to the pipeline, even if the public does not actually use the pipeline. It is the right of the public to use the pipeline that makes the taking public, not the present actual use.<sup>50</sup>

The court also rejected the property owner’s argument that the statutory delegation is unconstitutionally vague. Because the statute does not guide the property owner’s conduct, the owner has no standing to challenge the statute. A statute is void for vagueness if it does not provide a discernible standard to which a person may conform their conduct. Since the delegation statute does not require the property owner to do (or not do) anything, he could not challenge the law.

## **VI. Missouri: Good Faith Negotiation Statute Requires Appraisal Using “Generally Accepted Appraisal Practices”**

In the wake of *Kelo*, many state and local governments adopted measures designed to limit exercises of the power of eminent domain. Some jurisdictions went for substantive limits. For example, Nebraska adopted a statute prohibiting takings that are “primarily” for economic development.<sup>51</sup> Other jurisdictions took the procedural route, and adopted procedural limitations on the exercise of the eminent domain power. Missouri is one of the latter jurisdictions. It adopted a statute requiring

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47. ARK. CODE ANN. § 23-15-101(a) (2011).

48. ARK. CONST. art. 2, § 22.

49. *Smith*, 2010 WL 2724427 at \*3.

50. *Id.* (“Again, the character of a taking, whether public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised.”) (citing *Linder v. Arkansas Midstream Gas Servs. Corp.*, 2010 Ark. 117 (2010)).

51. NEB. REV. STAT. § 76-710.04 (2009).

a condemnor to engage in “good faith negotiations” before filing an eminent domain action.<sup>52</sup>

In *Planned Industrial Expansion Authority of Kansas City v. Ivanhoe Neighborhood Council*,<sup>53</sup> the Missouri Court of Appeals held that pursuant to subsection (2) of the new statute (which incorporates by reference section 523.253), a court must invalidate a taking if the condemnor has not made a good faith offer. A “good faith offer” means that it must be supported by an appraisal by a state licensed or certified appraiser, using “generally accepted appraisal practices.”<sup>54</sup> The issue in the case was whether the Expansion Authority’s appraisal was valid under these standards. The trial court determined “the appraisals provided fell short of a good faith appraisal” because it did not find the appraiser’s testimony credible.<sup>55</sup> On appeal, the Expansion Authority argued that sections 532.256 and 532.253 did not give the trial court the power to question the credibility of the appraiser, but that it must accept the appraiser’s direct testimony that he used a generally accepted appraisal practice. The court of appeals rejected the argument:

The Expansion Authority argues that the 2006 amendments to chapter 523 do not affect a condemning authority’s requirement to negotiate in good faith. We disagree. The legislature enacted the 2006 amendments to chapter 523 in response to *Kelo*, which held that it did not violate the United States Constitution when private property was taken and given to another private entity for public development purposes even when the property was not located in a blighted area. Thus, the legislature’s aim was

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52. MO. REV. STAT. § 532.256 (2010). The statute provides:

Before a court may enter an order of condemnation, the court shall find that the condemning authority engaged in good faith negotiations prior to filing the condemnation petition. A condemning authority shall be deemed to have engaged in good faith negotiations if:

- (1) It has properly and timely given all notices to owners required by this chapter;
- (2) Its offer under section 523.253 was no lower than the amount reflected in an appraisal performed by a state-licensed or state-certified appraiser for the condemning authority, provided an appraisal is given to the owner pursuant to subsection 2 of section 523.253 or, in other cases, the offer is no lower than the amount provided in the basis for its determination of the value of the property as provided to the owner under subsection 2 of section 523.253;
- (3) The owner has been given an opportunity to obtain his or her own appraisal from a state-licensed or state-certified appraiser of his or her choice; and
- (4) Where applicable, it has considered an alternate location suggested by the owner under section 523.265.

If the court does not find that good faith negotiations have occurred, the court shall dismiss the condemnation petition, without prejudice, and shall order the condemning authority to reimburse the owner for his or her actual reasonable attorneys’ fees and costs incurred with respect to the condemnation proceeding which has been dismissed. *Id.*

53. 316 S.W.3d 418, 426 (Mo. Ct. App. 2010).

54. *Id.*

55. *Id.* at 424.

to strengthen the rights of landowners in eminent domain actions. The precise language at issue here—the requirement that any appraisal be conducted using generally accepted appraisal practices—was inserted “to prevent condemnors from providing the landowner with slipshod or incompetent appraisals.”

Thus, section 523.253 gave landowners the added protections that an appraisal (or an explanation with supporting financial data) be included in the condemning party’s good faith offer and that any appraisal be made using generally accepted appraisal practices.<sup>56</sup>

In short, a trial court is not required to take an appraiser’s claim that his method is generally accepted at “face value.”<sup>57</sup> While the court held that the post-*Kelo* amendments permit a trial court to measure the credibility of an appraiser to determine whether she used generally accepted appraisal practices, “[w]e stress that section 523.253 does not contemplate a full determination of the fair market value of the subject property at the initial hearing.”<sup>58</sup> It appears that the court contemplated a procedure similar to the typical *voir dire* examination of expert witnesses to determine they are qualified.<sup>59</sup>

## VII. 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 and New Jersey. While New York has settled on an impossibly deferential standard, New Jersey takes a more skeptical approach, and permits judicial inquiry in some cases. *Kelo* continues to loom in the background, and will likely remain a source of confusion until the Supreme Court decides to clarify.

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56. *Id.* at 426 (citations omitted) (citing *Kelo v. City of New London*, 545 U.S. 469 (2005), and Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 MO. L. REV. 721, 723 (2006)).

57. *Planned Industrial Expansion Authority of Kansas City*, 316 S.W.3d at 427.

58. *Id.* at 427.

59. The court also awarded attorneys’ fees, holding that the term “owner” in section 532.256 includes the owner and holder of a note secured by a deed of trust upon the property because the note is “property” subject to condemnation. *Id.* at 428. The court also awarded attorneys’ fees incurred in the appeal, and remanded the case to the trial court for a determination of the award.