



The surprising power of New York's eminent domain law - by David Wilkes

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Here today, gone tomorrow. That is how fleeting real estate ownership can be in New York in the face of our state's eminent domain laws. Clients who wake up to learn that the property they worked hard to acquire and maintain, and that for some owners was the recognized home of their business, is about to be taken by a government authority, are often shocked to learn that the only real question that remains is how much the real estate is worth. Nearly every client that reaches out to our firm with a notice that their property will be taken begins with the question: "How do I fight this?"

In 2005, a landmark U.S. Supreme Court case known as "Kelo" permitted a private entity to take an entire neighborhood of Connecticut homes for private development in the wake of pharmaceutical giant Pfizer's construction of a manufacturing plant nearby. The stated goal was to create office buildings, luxury apartments and a new marina where there was once a community of small private homes.

Following the court's decision, which held that economic development was a "public use" that allowed for the taking of private property, there was a nationwide backlash against the use of eminent domain. Citizens and property rights advocates were outraged. Eight state supreme courts and 43 state legislatures strengthened property owners' rights to provide greater protection against the abuse of the government's power to acquire property for a so-called "public use" that could in many instances amount to almost anything.

But, not in New York. Here, stopping a condemnation proceeding remains exceedingly difficult and usually a costly and maddening effort in futility. The only method to attack the basis for a taking in New York is to file a prescribed petition in the Appellate Division of the state court within 30 days of the taking authority's publication of its "determination and findings." The only party that can file the petition is the one whose property is being taken, so concerned adjacent owners are generally without legal recourse. And there are only four grounds to challenge the condemnation, most of which are focused on whether the legal procedure was properly followed and whether the entity that is doing the taking had the authority to do so.

The only ground that on its face would seem to offer the property owner a glimmer of hope purports to examine whether a public use, benefit or purpose will be served by the proposed acquisition. But it is merely a tease.

Unfortunately for the one whose property is being taken, the court's scope of review of this question is remarkably narrow. The Appellate Division, in considering this question, does not look at the proposed acquisition from scratch in a so-called "de novo" review. Rather, the court applies a highly deferential standard of review to the condemning authority's decision, simply asking whether it was rationally related to a conceivable public purpose. In other words, the government authority's intended ultimate purpose may be misguided, poorly informed, and just plain stupid in the view of others and even the court. Some courts have stated that it is "entirely irrelevant" what end the government is actually seeking and it may be unsupported by evidence or empirical data. If there is some loose logic to support the connection between the taking and the stated purpose, the court will not stop the condemnation.

Ultimately, a taking of private property by a governmental authority in New York State comes down to the question of whether the proposed financial compensation equates to fair market value for the real property (no, generally the value of the owner's on-site business is not an item of compensation). We are often able to successfully obtain a much higher payment to the owner than the government had offered, but the question of whether the government gets to take the property is rarely the issue.

Ultimately, the wisdom of many property takings has been proved lacking: In the Connecticut case mentioned earlier, after spending some \$80 million in taxpayer money the new construction envisioned did not occur and the seized property remained vacant for well over a decade. Pfizer, the lynchpin of the economic development plan, announced it was leaving just as its tax breaks were set to expire. While the silver lining to those events may have been the strengthening of owners' rights in many other states, New York did not follow. Today, the only question that remains in the face of a taking here is, "How much is it worth?"

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