

2011

## NEW YORK'S FIGHT OVER BLIGHT: THE ROLE OF ECONOMIC UNDERUTILIZATION IN KAUR

Kaitlyn L. Piper

*Fordham University School of Law*

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Housing Law Commons](#)

---

### Recommended Citation

Kaitlyn L. Piper, *NEW YORK'S FIGHT OVER BLIGHT: THE ROLE OF ECONOMIC UNDERUTILIZATION IN KAUR*, 37 Fordham Urb. L.J. 1149 (2011).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol37/iss4/6>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

# NEW YORK'S FIGHT OVER BLIGHT: THE ROLE OF ECONOMIC UNDERUTILIZATION IN KAUR

## **Cover Page Footnote**

I would like to thank Professor Aaron Saiger for his guidance as my advisor. I would also like to thank my family for their support.

# NEW YORK’S FIGHT OVER BLIGHT: THE ROLE OF ECONOMIC UNDERUTILIZATION IN *KAUR*

*Kaitlyn L. Piper*\*

Introduction .....	1150
I. Blight Condemnations.....	1154
A. “Public Use” Under the Fifth Amendment of the United States Constitution.....	1154
B. “Public Use” in New York .....	1156
1. The Evolution of “Public Use” .....	1156
2. Relevant New York Eminent Domain Statutory Law .....	1157
C. Removal of Blight as a “Public Use” .....	1160
II. Economic Underutilization’s Relationship to Blight .....	1162
A. Who Determines Whether There is a “Public Use”?.....	1162
1. United States Supreme Court: Leave it to the Legislature! .....	1162
2. New York Courts: We Will Not Interfere! .....	1164
B. Economic Underutilization in the Eminent Domain Context .....	1166
1. Economic Underutilization as a Factor Used to Determine Blight .....	1166
a. Federal Courts .....	1166
b. New York Courts .....	1167
2. The Problem with Using Economic Underutilization Alone to Determine Blight.....	1171
C. Societal Effects of Blight Condemnations Based on Economic Underutilization.....	1173
1. Does the Political Majority Know What’s Best? .....	1173
2. Government and Private Developers Working Together to Redistribute Property .....	1174
3. Effects on Poor and Minority Populations.....	1176
4. Is Eminent Domain Efficient? .....	1177

---

\* J.D. Candidate, 2011, Fordham University School of Law. I would like to thank Professor Aaron Saiger for his guidance as my advisor. I would also like to thank my family for their support.

D. <i>Kaur</i> : How Two New York State Courts Could Come to Drastically Different Conclusions .....	1178
1. The Appellate Division’s Decision.....	1178
2. Reversed by the New York Court of Appeals .....	1181
III. New York Must Limit the Extent to Which Economic Underutilization can be Used to Determine Blight.....	1183
A. <i>Kaur</i> . . . Worse Than <i>Goldstein</i> ? .....	1184
1. The Columbia Project Exhibits “Impermissible Favoritism” Toward Columbia and Provides Only Incidental Public Benefits.....	1184
2. The Failure to Address the Issue of Economic Underutilization Undercuts the Decision.....	1188
B. Legislative Changes are Necessary to Help Prevent Future Eminent Domain Abuse.....	1190
C. Supporting Stricter Judicial Scrutiny of Blight Determinations .....	1193
Conclusion .....	1194

### INTRODUCTION

Where have the courts permitted the state to kick people out of their homes in order to build a sports stadium and expand a private university by taking land from existing home and business owners? In the great state of New York. In two recent decisions, the New York Court of Appeals<sup>1</sup> further eroded the community’s protection against eminent domain abuse by permitting the state to use eminent domain to take private property to build a stadium for the New Jersey Nets basketball team in Brooklyn,<sup>2</sup> and permitting the state to take private property to expand Columbia University in Manhattan.<sup>3</sup> Eminent domain is “[t]he inherent power of a governmental entity to take privately owned property, esp[ecially] land, and convert it to public use, subject to reasonable compensation for the taking.”<sup>4</sup> Although eminent domain abuse is particularly rampant in New York, it is certainly not unique to the Empire State.<sup>5</sup>

All over the United States, state and local governments are using eminent domain to force the transfer of property from one private owner to

---

1. The Court of Appeals is the highest state court in New York.

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

3. *Kaur v. N.Y. State Urban Dev. Corp.*, No. 125, 2010 N.Y. LEXIS 1181 (June 24, 2010).

4. BLACK’S LAW DICTIONARY 601 (9th ed. 2009).

5. See *50 State Report Card*, CASTLE COALITION, <http://www.castlecoalition.org/about/component/content/2412?task=view> (last visited Aug. 23, 2010).

another.<sup>6</sup> Although the government may claim that its taking of the property is for the purpose of eradicating blight, often the real purpose is to transfer the property to a private party that will use it in a way the government deems more favorable.<sup>7</sup> The assertion that an area or property is blighted is merely a label that is a necessary legal prerequisite for the government to take the land.<sup>8</sup> The forced taking of property from unwilling property owners for the purpose of transferring it to a private party who will make “better” economic use of the property is the essence of eminent domain abuse.<sup>9</sup>

One of the purposes for which New York and other states purportedly use their eminent domain power is to eradicate blight.<sup>10</sup> The statutory definition of blight varies from state to state and is often broad and imprecise.<sup>11</sup> In general, to establish that a property is blighted, the condemning authority must show that it is characterized by “one or more factors that are detrimental to the safety, health, morals, or welfare of the community.”<sup>12</sup> This allows states to use a variety of factors to justify condemning a broad range of properties in order to eradicate blight and improve the community. New York courts are guided by the language in *Yonkers Community Development Agency v. Morris*, which states that many factors can constitute blight, including “irregularity of the plots, inadequacy of the streets, diversity of land ownership making assemblage of property difficult, incompatibility of the existing mixture of residential

---

6. *Private Property Rights*, INSTITUTE FOR JUSTICE, [http://www.ij.org/index.php?option=com\\_content&task=view&id=561&Itemid=241](http://www.ij.org/index.php?option=com_content&task=view&id=561&Itemid=241) (last visited Aug. 23, 2010).

7. See Ilya Somin, *Blight Sweet Blight*, LEGAL TIMES, at 1-2, [http://www.law.gmu.edu/assets/homepages/isomin/files/LegalTimes\\_Blight.pdf](http://www.law.gmu.edu/assets/homepages/isomin/files/LegalTimes_Blight.pdf) (last visited Aug 27, 2010).

8. Carolina Journal Staff, *Friday Interview: Government Misuse of the Blight Label*, CAROLINA JOURNAL ONLINE (March 19, 2010), [http://www.carolinajournal.com/exclusives/display\\_exclusive.html?id=6200](http://www.carolinajournal.com/exclusives/display_exclusive.html?id=6200).

9. *Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765, 786 (Mich. 2004) (“[The] ‘economic benefit’ rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity. After all, if one’s ownership of private property is forever subject to the government’s determination that another private party would put one’s land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, ‘megastore,’ or the like.”).

10. *Cannata v. City of N.Y.*, 221 N.Y.S.2d 457, 458 (App. Div. 1961) (“[C]ondemnation is authorized, not only for slum clearance, but also to eliminate areas of ‘intangible’ physical blight, i.e., areas which tend to create slums or which tend to impair or arrest the sound growth of the city. Such a purpose is public; redevelopment may properly be accomplished by private persons; and the area condemned may thereafter be properly used for nonresidential purposes.”).

11. See generally Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305 (2004).

12. Harold L. Lowenstein, *Redevelopment Condemnations: A Blight or a Blessing upon the Land?*, 74 MO. L. REV. 301, 308 (2009).

and industrial property, overcrowding, the incidence of crime, lack of sanitation, the drain an area makes on municipal services, fire hazards, traffic congestion, and pollution.”<sup>13</sup>

One of the contemporary problems of condemning properties for the purpose of eradicating blight is that some states consider certain purely economic conditions to be factors that can be used to determine that an area is blighted.<sup>14</sup> Some examples of these economic factors are stagnant property values, high business vacancy rates, and an excess of liquor stores or adult-oriented businesses.<sup>15</sup> One of the more controversial economic factors commonly used to determine blight is economic underutilization.<sup>16</sup>

In 2009, two different New York state courts that considered condemnation actions based on blighted properties came to two markedly different conclusions.<sup>17</sup> In *Goldstein v. New York State Urban Development Corp.*, the New York Court of Appeals stated that “economic

---

13. 335 N.E.2d 327, 332 (N.Y. 1975).

14. In California, for example, the following economic conditions are considered to cause blight:

- (1) Depreciated or stagnant property values.
- (2) Impaired property values, due in significant part, to hazardous wastes on property where the agency may be eligible to use its authority as specified in Article 12.5 (commencing with Section 33459).
- (3) Abnormally high business vacancies, abnormally low lease rates, or an abnormally high number of abandoned buildings.
- (4) A serious lack of necessary commercial facilities that are normally found in neighborhoods, including grocery stores, drug stores, and banks and other lending institutions.
- (5) Serious residential overcrowding that has resulted in significant public health or safety problems. As used in this paragraph, “overcrowding” means exceeding the standard referenced in Article 5 (commencing with Section 32) of Chapter 1 of Title 25 of the California Code of Regulations.
- (6) An excess of bars, liquor stores, or adult-oriented businesses that has resulted in significant public health, safety, or welfare problems.
- (7) A high crime rate that constitutes a serious threat to the public safety and welfare.

CAL. HEALTH & SAFETY CODE § 33031(b) (West 2008).

15. *Id.* § 33031(b)(1), (3), (6).

16. Compare *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164 (N.Y. 2009), and *Tierney v. Planned Indus. Expansion Auth.*, 742 S.W.2d 146 (Mo. 1987) (using economic underutilization of land as a proper basis for condemnation by city), with *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8 (App. Div. 2009), *rev'd*, No. 125, 2010 N.Y. LEXIS 1181 (June 24, 2010), and *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007) (finding a statute that allowed redevelopment of stagnant land did not give the borough authority to redevelop land simply because it was unproductive).

17. *Goldstein*, 921 N.E.2d 164 (considering whether it was permissible to condemn land in Brooklyn to build a stadium); *Kaur*, 892 N.Y.S.2d 8 (considering whether it was permissible to condemn land in Manhattanville in order to expand Columbia University).

underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose.”<sup>18</sup> Nine days later, in *Kaur v. New York State Urban Development Corp.*, the Appellate Division, First Department, called for an end to “eminent domain takings solely based on underutilization.”<sup>19</sup> Seeking reversal of the Appellate Division’s decision in light of the recent *Goldstein* decision, the Empire State Development Corporation (ESDC)<sup>20</sup> appealed the *Kaur* decision to the New York Court of Appeals.<sup>21</sup> Although the *Kaur* decision was promptly overturned,<sup>22</sup> the stark contrast between the views of the Court of Appeals and the Appellate Division highlights the ongoing controversy over eminent domain abuse in New York.<sup>23</sup> Despite having the perfect opportunity to set limits on the extent to which economic factors may provide the basis for blight determinations, the Court of Appeals flatly dismissed the Appellate Division’s arguments because they were “unsupported by the record.”<sup>24</sup> By avoiding the issue of allowing

---

18. 921 N.E.2d at 172 (internal quotation marks and citations omitted).

19. 892 N.Y.S.2d at 23. The alternative justification that the Empire State Development Corporation asserted for the condemnation was that the project qualified as a “civic project” pursuant to the New York State Urban Development Corporation Act (“UDCA” or “UDC Act”). *Id.* The Appellate Division rejected this argument as well, stating that “a private university does not constitute facilities for a ‘civic project’” within the definition of the UDCA. *Id.*

20. The ESDC is the New York State agency that condemned the Manhattanville property.

21. *Kaur v. N.Y. State Urban Dev. Corp.*, No. 125, 2010 N.Y. LEXIS 1181 (June 24, 2010).

22. The New York Court of Appeals found that that the project qualified as both a “land use improvement project” and as a “civic project” within the meaning of the UDCA. *Id.* at \*38-39. Because the requirement that the land in question be blighted applies primarily to land use improvement projects, this Note does not address civic projects. Compare N.Y. UNCONSOL. LAW § 6253 (6)(c) (McKinney 2009) (defining “[l]and use improvement project” as an “undertaking for the clearance, replanning, reconstruction and rehabilitation . . . of a substandard and insanitary area”), with *id.* § 6253(6)(d) (defining “[c]ivic project” without any reference to the condition of the land). In order to qualify as a civic project, the Court must find that there is a “civic purpose.” See *id.* Although the condemning authority must still satisfy the “public use” clauses of the United States and New York Constitutions when asserting that a project is a “civic project,” that public use may be any public use, not necessarily the removal of blight. *Kaur*, 2010 N.Y. LEXIS 1181, at \*40 (Smith, J., concurring) (noting that “if [the court] did reject the blight rationale, [it] would have to consider whether this taking can be characterized as being for ‘public use’ on some other ground”). In his concurring opinion, Judge Smith correctly stated that “[o]nce [the court has] decided that the removal of urban blight provides a sufficient constitutional basis for the taking, and that the project is a ‘land use improvement project’ within the meaning of the UDC Act, there is no reason to consider [the] UDC’s alternative argument that the taking may also be justified as one for a ‘civic project.’” *Id.* at \*39 (Smith, J., concurring).

23. Compare *Kaur*, 892 N.Y.S.2d 8, with *Kaur*, 2010 N.Y. LEXIS 1181.

24. *Kaur*, 2010 N.Y. LEXIS 1181, at \*27.

economic underutilization *alone* to render a property blighted,<sup>25</sup> the Court of Appeals failed to address a controversy that has led to the introduction of eminent domain reform in the New York legislature.<sup>26</sup>

Part I of this Note describes the background of eminent domain and, in particular, the elimination of blight as a qualifying public use. It summarizes the history of the “public use” requirement in the federal and state context and how economic underutilization fits into the analysis. Part II examines the problem of permitting economic underutilization to be used as evidence in determining whether an area is blighted, as well as the role that economic underutilization played in the outcome of *Kaur*. Part III argues that New York needs to limit the extent to which a blight determination can be based on economic underutilization. It contends that the legislature should address *Kaur* and the issue of economic underutilization by restricting the statutory definition of blight.

## I. BLIGHT CONDEMNATIONS

### A. “Public Use” Under the Fifth Amendment of the United States Constitution

According to the Fifth Amendment, there are two limits on the federal government’s power to take land: first, the taking must be for a “public use,” and second, “just compensation” must be paid.<sup>27</sup> At the outset, public use was interpreted to mean that the government could only take private property when the project would directly benefit the public.<sup>28</sup> However, public use is an evolving concept that has changed with the times, and now is often interpreted to mean “public purpose.”<sup>29</sup> In 1916, in *Mount Vernon-Woodbury Cotton Duck Co. v. Alabama Interstate Power Co.*, the United States Supreme Court permitted Alabama to use eminent domain to manufacture, supply, and sell energy to the public.<sup>30</sup> The Court found that providing energy qualified as a public purpose and rejected the “use by the general public” test as it applied to state takings.<sup>31</sup> In a series of later decisions, the Court rejected a narrow interpretation of public use and

---

25. *See id.* at \*20-24.

26. *See* S.B. 6791 and A.B. 10811, 2010 Leg., 233rd Legis. Sess. (N.Y. 2010) (defining blighted properties and areas).

27. U.S. CONST. amend. V.

28. *See, e.g.*, *Bloodgood v. Mohawk & Hudson R.R.*, 18 Wend. 9 (1837).

29. William Woodyard & Glenn Boggs, *Public Outcry: Kelo v. City of New London—A Proposed Solution*, 39 ENV'T. L. 431, 444 (2009).

30. 240 U.S. 30, 32 (1916).

31. *Id.*



instead adopted a broad interpretation that permitted almost any condemnation project that benefitted the public in some way to qualify.<sup>32</sup>

The Court embraced a broad view of public use in *Berman v. Parker* and allowed eminent domain to be used to redevelop property in order to remove blight.<sup>33</sup> The Court specifically found that the removal of blight qualified as a public use.<sup>34</sup> Additionally, the Court embraced the concept of urban renewal as a public use.<sup>35</sup> It emphasized the importance of not only eliminating slums, but also preventing them from being created in the future.<sup>36</sup> This signaled a departure from earlier cases where condemnation was exercised as a response to an area that was already considered a slum.<sup>37</sup>

In *Hawaii Housing Authority v. Midkiff*, the Supreme Court upheld Hawaii's Land Reform Act of 1967, which provided for the taking and transfer of title and real property from lessors to lessees for the purpose of reducing the concentration of land ownership.<sup>38</sup> The Court stated that it was not necessary for the entire community, or even a considerable portion of the community, to benefit from an improvement in order for it to constitute a public use.<sup>39</sup> Similarly, in 2005, the Court held that an economic development plan that used eminent domain to transfer land that was not blighted to private redevelopers satisfied the public use requirement of the Fifth Amendment.<sup>40</sup>

---

32. In *Berman v. Parker*, "public use" was interpreted to mean "public purpose." 348 U.S. 26, 33 (1954). Subsequently, as long as the public benefitted from the project in some tangible way, it would survive constitutional scrutiny as to public use. *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 479-81 (2005).

33. 348 U.S. at 33-36.

34. *Id.* at 35. In *Berman*, the owner of a department store contested a finding that the property was included in an area that was blighted. *Id.* at 34. The Supreme Court ruled that Congress and its authorized agencies have the power to redevelop an area as a whole in order to prevent future slums from developing. *Id.* at 35. The Court stated, "the standards prescribed were adequate for executing the plan to eliminate not only slums as narrowly defined by the District Court but also the blighted areas that tend to produce slums." *Id.*

35. *See id.* at 34-35.

36. *Id.* at 35 ("In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented.").

37. *See, e.g.*, *Gohld Realty Co. v. City of Hartford*, 104 A.2d 365, 369 (Conn. 1954) ("[T]here can be no doubt that the elimination of such substandard, insanitary, deteriorated, slum or blighted areas as are described therein and in the portions of the statute which authorize condemnation is for the public welfare.").

38. 467 U.S. 229 (1984).

39. *Id.* at 244 (quoting *Rindge Co. v. L.A. Cnty.*, 262 U.S. 700, 707 (1923)).

40. *Kelo v. City of New London*, 545 U.S. 469 (2005).

## B. “Public Use” in New York

### 1. *The Evolution of “Public Use”*

The New York Constitution provides some of the framework for New York’s eminent domain powers.<sup>41</sup> Article XVIII, section 1 provides the state legislature with the power to clear areas that are “substandard and insanitary.”<sup>42</sup> Article XVIII, section 2 gives the legislature permission to “grant the power of eminent domain to any city, town or village, to any public corporation and to any corporation regulated by law as to rents, profits, dividends and disposition of its property or franchises and engaged in providing housing facilities.”<sup>43</sup> Article XVIII, section 6 prohibits the state from funding a project “unless such project is in conformity with a plan or undertaking for the clearance, replanning and reconstruction or rehabilitation of a sub-standard and unsanitary area or areas and for recreational and other facilities incidental or appurtenant thereto.”<sup>44</sup>

At first, New York addressed unfavorable eminent domain decisions by the courts by amending the State Constitution.<sup>45</sup> For example, in 1843, the court in *Taylor v. Porter* struck down a statute permitting owners of landlocked parcels to condemn part of a neighbor’s property in order to construct a road that reached a public street.<sup>46</sup> In response, lawmakers amended the New York Constitution to authorize a private owner to condemn property for the purpose of constructing private roads.<sup>47</sup> In 1894, the legislature again amended New York’s Constitution to allow the use of eminent domain on behalf of agricultural property owners.<sup>48</sup> Subsequently, the state used its eminent domain powers to allow farmers to construct drains and ditches on neighboring properties for drainage purposes.<sup>49</sup>

---

41. See N.Y. CONST. art. XVIII.

42. *Id.* § 1 (“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.”).

43. *Id.* § 2.

44. *Id.* § 6.

45. INSTITUTE FOR JUSTICE, BUILDING EMPIRES, DESTROYING HOMES: EMINENT DOMAIN ABUSE IN NEW YORK 2 (2009) [hereinafter BUILDING EMPIRES, DESTROYING HOMES].

46. 4 Hill 140 (N.Y. Sup. Ct. 1843).

47. Eric Kades, *The End of the Hudson Valley’s Peculiar Institution: The Anti-Rent Movement’s Politics, Social Relations, and Economics*, 27 LAW & SOC. INQUIRY 941, 954 (2002).

48. BUILDING EMPIRES, DESTROYING HOMES, *supra* note 45.

49. *Id.*

Eventually, the method through which the government expanded its eminent domain power shifted from amending the New York Constitution to facilitating change through common law developments in the state courts.<sup>50</sup> The state courts began to interpret “public use” broadly to facilitate the expansion of state eminent domain powers.<sup>51</sup> The courts also started to construe “blight” liberally to cover a broad range of physical conditions.<sup>52</sup>

New York passed the first “urban renewal” legislation in the United States in 1941,<sup>53</sup> more than a decade before *Berman* was decided.<sup>54</sup> Today, many states’ statutory language defining blight is flexible enough to cover a variety of situations.<sup>55</sup> However, New York does not currently have a codified definition of blight to guide state agencies and judges, so courts rely on the language from *Yonkers*<sup>56</sup> to guide their determination of blight under the New York Constitution Article XVIII §1.<sup>57</sup>

## 2. *Relevant New York Eminent Domain Statutory Law*

New York also has statutory law that governs its eminent domain powers. Section 74 of the New York General Municipal Law grants a municipal corporation the power of condemnation.<sup>58</sup> Section 502 of the New York General Municipal Law defines a “substandard or insanitary area” as “interchangeable with a slum, blighted, deteriorated or deteriorating area, or an area which has a blighting influence on the surrounding area.”<sup>59</sup> New York State delegates its authority to condemn private property for public use to a governmental or quasi-governmental agency, such as a municipality, public service commission or a quasi-

---

50. *Id.*

51. *See id.*

52. *See Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 330-31 (N.Y. 1975).

53. The New York statute authorized the creation of local organizations with the authority to condemn and clear blighted areas in order for them to be developed privately. Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 32 (2003).

54. *Berman v. Parker*, 348 U.S. 26 (1954); *see also supra* notes 33-37 and accompanying text.

55. *See Lowenstein, supra* note 12, at 302.

56. The interrelationships of many factors may be significant in the determination of whether blight exists. *Yonkers*, 335 N.E.2d at 332.

57. *See, e.g., Kaur v. N.Y. State Urban Dev. Corp.*, No. 125, 2010 N.Y. LEXIS 1181, at \*12 (June 24, 2010); *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 188 (N.Y. 2009).

58. N.Y. GEN. MUN. LAW § 74 (McKinney 2007).

59. N.Y. GEN. MUN. LAW § 502 (McKinney 1999).

public corporation.<sup>60</sup> In both *Goldstein* and *Kaur*, the condemning authority was the ESDC.<sup>61</sup>

Before condemning a property for purposes of blight removal, a blight study is usually conducted.<sup>62</sup> The condemning authority usually contracts with a private consultant to conduct this blight study.<sup>63</sup> The study examines the conditions of the property or area that is to be condemned in order to determine whether there is sufficient evidence to show that the property or area is blighted.<sup>64</sup> For example, the 2006 Atlantic Yards Arena and Redevelopment Project Blight Study, the controversial study in *Goldstein*,<sup>65</sup> found that the “22-acre area proposed for the Atlantic Yards Arena and Redevelopment Project (‘project site’) [was] characterized by blighted conditions that [were] unlikely to be removed without public action.”<sup>66</sup> Such studies are used as evidence to support the government’s assertion that an area or property is blighted.<sup>67</sup>

In terms of procedural law, section 201 of the New York Eminent Domain Procedure Law (EDPL) provides that condemnation hearings be held to “inform the public and to review the public use to be served.”<sup>68</sup>

---

60. *In re Inwood Hill Park*, 219 A.D. 478, 483-84 (N.Y. App. Div. 1927) (“The State may delegate the power to take such land to its agent, the municipality.”); *see also* IRVING L. LEVEY & JACOB S. MANHEIMER, CONDEMNATION IN NEW YORK 12 (1937).

61. The ESDC, formally known as the Urban Development Corporation “oversees important development projects, aimed at fostering sustainable growth, creating jobs, reviving our economy and expanding opportunities for all New Yorkers.” *Major Development Projects*, NEW YORK STATE’S EMPIRE STATE DEVELOPMENT, [http://esd.ny.gov/Subsidiaries\\_Projects.html](http://esd.ny.gov/Subsidiaries_Projects.html) (last visited Sept. 16, 2010).

62. *See* *Tuck-It-Away Assocs. v. Empire State Dev. Corp.*, 861 N.Y.S.2d 51, 54 (App. Div. 2008) (noting that a blight study is usually performed in order to provide support that the area is “substandard and insanitary”).

63. In both *Goldstein* and *Kaur*, the blight studies were prepared by Allee, King, Rosen and Fleming, Inc. (AKRF). *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 189 (N.Y. 2009); *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 13 (App. Div. 2009), *rev’d*, No. 125, 2010 N.Y. LEXIS 1181 (June 24, 2010). The ESDC later hired another consultant, Earth Tech, Inc., to review AKRF’s blight study in *Kaur*. *Kaur v. N.Y. State Urban Dev. Corp.*, No. 125, 2010 N.Y. LEXIS 1181, at \*12 (June 24, 2010).

64. *See generally* Robert H. Freilich & Robin A. Kramer, *Condemnation for Economic Development Violates Public Use Clause: The Michigan Supreme Court Overturns Historic Poletown Decision*, SL005 A.L.I.-A.B.A. 217, 223-24 (2005) (providing an overview of the difficulties associated with conducting blight studies).

65. 921 N.E.2d at 189-90 (Smith, J., dissenting) (“Choosing their words carefully, the consultants concluded that the area of the proposed Atlantic Yards development, taken as a whole, was ‘characterized by blighted conditions.’ They did not find, and it does not appear they could find, that the area where the petitioners live is a blighted area . . .”).

66. *See* AKRF, INC., ATLANTIC YARDS ARENA AND REDEVELOPMENT PROJECT BLIGHT STUDY i (July 2006).

67. *See Goldstein*, 921 N.E.2d at 173.

68. N.Y. EM. DOM. PROC. § 201 (McKinney 2002).

These hearings allow relevant parties to discuss the project and alert the condemning party to factors that may make the project more costly than projected.<sup>69</sup> The condemning authority must publish a determination and findings<sup>70</sup> within ninety days of the hearing.<sup>71</sup> Section 204(c) of the EDPL requires that anyone opposing the condemnation must bring an action directly to the Appellate Division within thirty days after the hearings are held.<sup>72</sup> New York is unique in this respect because most other states allow affected property owners to file suit at the time the government actually moves to take the property.<sup>73</sup> Often, the government will not move to condemn the property for months or even years after the determination has been made, which gives property owners in states without a thirty day statute of limitations a much longer timeframe to file a lawsuit.<sup>74</sup> The statute of limitations for bringing a federal § 1983 claim is three years,<sup>75</sup> beginning when the plaintiff “knows or has reason to know” of the injury that is the basis of the action.<sup>76</sup> This language has been interpreted to mean that a plaintiff is deemed to have knowledge when the condemning authority announces its public purpose finding.<sup>77</sup>

Section 207(c) of the EDPL limits the Appellate Division’s review to whether:

- (1) the proceeding was in conformity with the federal and state constitutions, (2) the proposed acquisition is within the condemnor’s statutory jurisdiction or authority, (3) the condemnor’s determination and findings were made in accordance with procedures set forth in this article and with article eight of the environmental conservation law, and (4) a public use, benefit or purpose will be served by the proposed acquisition.<sup>78</sup>

---

69. Jon M. Santemma & Andrew M. Mahony, *The Acquisition of Property in Non-State Takings*, in CONDEMNATION LAW AND PROCEDURES IN NEW YORK 29, 33 (Jon Santemma ed., 2005).

70. Section 204(b) of the EDPL states that determinations and findings must specify: (1) the public use, benefit or purpose to be served by the proposed public project; (2) the approximate location for the proposed public project and the reasons for selection of that location; (3) the general effect of the proposed project on the environment and residents of the locality; (4) such other factors as it considers relevant. N.Y. EM. DOM. PROC. § 204(b) (McKinney 2005).

71. Santemma & Mahony, *supra* note 69.

72. EM. DOM. PROC. § 204(c).

73. BUILDING EMPIRES, DESTROYING HOMES, *supra* note 45, at 4.

74. *See id.*

75. 42 U.S.C. § 1983 (1996) (providing a federal cause of action for the violation of constitutional rights).

76. Leon v. Murphy, 988 F.2d 303, 309 (2d Cir. 1993).

77. Didden v. Vill. of Port Chester, 173 F. App’x 931, 933 (2d Cir. 2006).

78. N.Y. EM. DOM. PROC. § 207(c) (McKinney 2002).

Since it is an appellate court, its review is limited to the record from the public hearings.<sup>79</sup> As a result, the Appellate Division cannot review any issue that was not raised during the hearings.<sup>80</sup> This is troublesome because the public hearings permit property owners to present evidence but do not allow them to cross-examine witnesses or ask questions.<sup>81</sup> Because these proceedings are not adversarial, questions about potential due process violations have been raised regarding the procedural mechanism provided by the state.<sup>82</sup>

The scope of judicial review of a proposed condemnation in New York is limited to “whether the procedural requirements of EDPL article 2 were met and, with respect to the substantive determinations and findings, whether there exists a rational factual basis.”<sup>83</sup> Early court decisions in New York emphasized that the question of whether there is a “public use” is a judicial question that must be determined by the courts.<sup>84</sup> Since removal of blight is a public purpose, one would assume that courts regularly scrutinize whether an area is blighted. In reality, however, New York courts affirm most state agency decisions regarding whether a property or area is blighted as long as there is some evidence, regardless of how insubstantial, supporting blight.<sup>85</sup>

### C. Removal of Blight as a “Public Use”

In *Kaskel v. Impellitteri*, the New York Court of Appeals weighed in on the government’s determination that an area adjacent to Columbus Circle in Manhattan was subject to condemnation for the purpose of slum clearance.<sup>86</sup> In upholding the condemnation, the Court of Appeals stated that courts should not overturn an agency finding of blight as long as the finding was not made “corruptly or irrationally or baselessly.”<sup>87</sup> The logic behind this decision was that determining whether a property is blighted is a legislative function, and the power to make that determination is vested in the state agencies.<sup>88</sup> In turn, the court may only review agencies’ findings

---

79. BUILDING EMPIRES, DESTROYING HOMES, *supra* note 45, at 4.

80. *Id.*

81. *Id.*

82. *Id.*

83. Greenwich Assocs. v. Metro. Transp. Auth., 152 A.D.2d 216, 219 (N.Y. App. Div. 1989).

84. *See, e.g.,* Erie R.R. v. Steward, 63 N.E. 118, 119 (N.Y. 1902); Pocantico Water Works Co. v. Bird, 29 N.E. 246, 258 (N.Y. 1891).

85. BUILDING EMPIRES, DESTROYING HOMES, *supra* note 45.

86. 115 N.E.2d 659 (N.Y. 1953).

87. *Id.* at 661.

88. *See* Yonkers Cmty Dev. Agency v. Morris, 335 N.E.2d 327, 332 (N.Y. 1975).

on a limited basis.<sup>89</sup> In fact, if a government agency finds a public purpose, that finding is “well-nigh conclusive,” and as long as the exercise of eminent domain is rationally related to this “conceivable” public purpose, the taking will be upheld.<sup>90</sup> In *Goldstein*, the New York Court of Appeals emphasized 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 views as to the adequacy with which the public purpose of blight removal has been made out for those of the legislatively designated agencies . . . .”<sup>91</sup> Courts deferring to legislative determinations of whether the “public use” requirement has been satisfied, despite the fact that it is a judicial function, is a source of tension in eminent domain challenges.

Although several states have made legislative changes to prevent it, many states still permit blight condemnations based on economic underutilization.<sup>92</sup> In upholding the condemnation of the Atlantic Yards properties in *Goldstein*, the Court of Appeals recognized that “economic underdevelopment and stagnation” were threats to the public that justified their removal as a “public purpose.”<sup>93</sup> This decision was not surprising given the New York Court of Appeals’ general reluctance to invalidate eminent domain condemnations.<sup>94</sup> However, in *Kaur*—handed down nine days later—the Appellate Division called for an end to blight findings based on economic underutilization, indicating that there should be a limit to the legislature’s discretion on blight determinations.<sup>95</sup> Significantly, the language used by the Appellate Division in *Kaur* rejected the precedential line of cases in New York supporting blight determinations based on economic factors,<sup>96</sup> and accordingly was subsequently overturned by the

---

89. *Id.*

90. *Jackson v. N.Y. State Urban Dev. Corp.*, 494 N.E.2d 429, 441 (N.Y. 1986) (internal quotation marks and citations omitted).

91. *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 172 (N.Y. 2009). The court went on to explain that “[t]he Constitution accords government broad power to take and clear substandard and insanitary areas for redevelopment. In so doing, it commensurately deprives the Judiciary of grounds to interfere with the exercise.” *Id.* at 173.

92. See generally Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009) (analyzing state reactions to the Supreme Court’s *Kelo* decision in 2005).

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

94. See, e.g., *Jackson*, 494 N.E.2d 429; *Yonkers*, 335 N.E.2d 327; *Kaskel v. Impellitteri*, 115 N.E.2d 659 (N.Y. 1953).

95. *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 23 (App. Div. 2009), *rev’d*, No. 125, 2010 N.Y. LEXIS 1181 (June 24, 2010).

96. See, e.g., *Goldstein*, 921 N.E.2d 164; *Jackson*, 494 N.E.2d 429; *Yonkers*, 335 N.E.2d 327; *Kaskel*, 115 N.E.2d 659.

Court of Appeals.<sup>97</sup> The conflict between the views of the Court of Appeals and the Appellate Division on the issue of blight determinations provides insight into the controversy regarding New York's eminent domain powers.<sup>98</sup>

## II. ECONOMIC UNDERUTILIZATION'S RELATIONSHIP TO BLIGHT

This section will discuss the different opinions on what branch of government is responsible for deciding whether the Fifth Amendment's "public use" requirement is satisfied. It will examine the debate over the use of economic underutilization as a factor in determining whether a property is blighted, including a discussion of some of the public policy problems associated with blight determinations based on economic factors. Finally, it explores the starkly different ways that the New York Court of Appeals and Appellate Division have treated economic underutilization as a factor to determine blight.<sup>99</sup>

### A. Who Determines Whether There is a "Public Use"?

The Fifth Amendment to the United States Constitution provides that private property may not be taken for public use unless just compensation is paid.<sup>100</sup> This is sometimes interpreted to mean that federal and state governments may only take private property if it is for a "public use."<sup>101</sup> However, there is much debate regarding whether certain projects satisfy the public use requirement and who should determine whether a project has a public use.

#### 1. *United States Supreme Court: Leave it to the Legislature!*

The United States Supreme Court has expressed the view that the legislature, not the judiciary, is responsible for determining whether a project has a public use.<sup>102</sup> In *Berman* the Court announced that "[i]n such cases, the legislature, not the judiciary, is the main guardian of the public

---

97. *Kaur v. N.Y. State Urban Dev. Corp.*, No. 125, 2010 N.Y. LEXIS 1181 (June 24, 2010).

98. Compare *id.*, with *Kaur*, 892 N.Y.S.2d 8.

99. Compare *Goldstein*, 921 N.E.2d at 164, and *Kaur*, 2010 N.Y. LEXIS 1181, at \*1, with *Kaur*, 892 N.Y.S.2d at 8.

100. U.S. CONST. amend. V.

101. The Fifth Amendment's "public use" requirement is applicable to the states through the Fourteenth Amendment. *Kelo v. City of New London*, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting).

102. *Berman v. Parker*, 348 U.S. 26, 32 (1954).



needs to be served by social legislation.”<sup>103</sup> The Court deferred to the legislative determination that there was a public purpose because, “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”<sup>104</sup> This established a policy of limiting the role of the judiciary in deciding whether an area was blighted. The *Berman* decision was not surprising given the general reluctance of the Supreme Court to invalidate federal or state condemnations over the years.<sup>105</sup> Although the Supreme Court emphasized that private property could not be condemned and transferred to another private person even under legislative mandate, its broad reading of the Fifth Amendment lent support to urban renewal advocates and paved the way for redevelopment authorities to exercise their power in any way they saw fit so long as it was somewhat related to a public use.<sup>106</sup>

In allowing a department store that was indisputably not blighted to be included in a community redevelopment project, the Court emphasized in *Berman* that community redevelopment programs do not have to be implemented on a piecemeal basis.<sup>107</sup> This allowed the Court to look at the overall condition of all of the property proposed to be condemned for redevelopment purposes as a whole, instead of determining if each individually owned property was itself blighted.<sup>108</sup> The decision relieved some of the burden from redevelopment agencies to prove blight and opened the door to urban renewal projects all over the country.<sup>109</sup>

In *Midkiff*, the Supreme Court ruled that eminent domain was a police power of the state.<sup>110</sup> Therefore, “[t]he ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers,” and the Court has a limited role in reviewing a legislative judgment of what constitutes a

---

103. *Id.*

104. *Id.*

105. In 1896, the United States Supreme Court invalidated a state act that required the Missouri Pacific Railroad to allow farmers to construct grain elevators on its property. The rationale behind this was that, because the grain elevators were used by the farmers and not the general public, the act was a violation of the Due Process Clause of the Fourteenth Amendment. *Mo. Pac. Ry. v. Nebraska*, 164 U.S. 403 (1896). In 1923, the Supreme Court noted that while determining whether a use is public or private is a judicial question, the Court should give “great respect” to the judgment of state courts in determining whether it is a public use. *Rindge Co. v. L.A. Cnty.*, 262 U.S. 700, 705-06 (1923).

106. Pritchett, *supra* note 53, at 12.

107. 348 U.S. at 35.

108. *Id.*

109. Urban renewal is defined as “[t]he process of redeveloping urban areas by demolishing or repairing existing structures or by building new facilities on areas that have been cleared in accordance with an overall plan.” BLACK’S LAW DICTIONARY 1680 (9th ed. 2009).

110. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241-42 (1984).

public use.<sup>111</sup> In *Kelo*, the Supreme Court ruled that although there was no evidence of physical blight, New London's finding that the area was "sufficiently distressed" to justify a program of economic revival required the Court's deference.<sup>112</sup> Clearly, the Supreme Court has tried to avoid ruling on the merits of a legislative decision when it is not necessary.

## 2. *New York Courts: We Will Not Interfere!*

In general, state courts are more likely to view public use as a judicial question than federal courts.<sup>113</sup> In 1891, the New York Court of Appeals in *Pocantico Water Works Co. v. Bird*, emphasized the fact that "[t]he question of public use is a judicial one and must be determined by the courts."<sup>114</sup> In 1902, the New York Court of Appeals in *Erie Railroad Co. v. Steward*, stated that "[t]he courts are to decide whether the uses, for which the land is demanded, are, in fact, public and within the intendment of the statute."<sup>115</sup> However, judicial interpretation of whether the project in question had a public use, as exemplified by *Pocantico* and *Erie*, eventually fell out of favor. New York courts transitioned from treating the interpretation of public use as a judicial exercise to being highly deferential to the legislature's decision of whether the project had a public use.<sup>116</sup> In *Kaskel*, the New York Court of Appeals refused to overturn a legislative body's finding that an area was "substandard and insanitary" as long as it was not made "corruptly or irrationally or baselessly."<sup>117</sup> The court went as far as to say that the city officials' decision was "simply an act of government, that is, an exercise of governmental power, legislative in fundamental character, which, whether wise or unwise, cannot be overhauled by the courts."<sup>118</sup> Such deference to legislative decisions has stripped the courts of most of their power to determine whether there was a public use to justify the use of eminent domain. Twenty-two years later in *Yonkers*, the New York Court of Appeals confirmed that the agencies and

---

111. *Id.* at 240.

112. *Kelo v. City of New London*, 545 U.S. 469, 483 (2005).

113. James W. Ely, Jr., *Post-Kelo Reform: Is The Glass Half Full Or Half Empty?*, 17 SUP. CT. ECON. REV. 127, 146 (2009).

114. 29 N.E. 246, 248 (N.Y. 1891).

115. 63 N.E. 118, 119 (N.Y. 1902).

116. The shift of the New York Court of Appeals' view on the amount of judicial deference owed to the legislature can be seen by contrasting *Pocantico*, 29 N.E. 246, with *Kaskel v. Impellitteri*, 115 N.E.2d 659 (N.Y. 1953).

117. 115 N.E.2d at 661.

118. *Id.* at 662.

municipalities had “extensive authority” to make the determination of whether an area is blighted.<sup>119</sup>

More recently, in *Goldstein*, the Court of Appeals reaffirmed its deference to legislative determinations regarding the application of the government’s power to take “substandard and insanitary” areas.<sup>120</sup> The court stated 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 views as to the adequacy with which the public purpose of blight removal has been made out for those of the legislatively designated agencies . . . .”<sup>121</sup> In upholding the condemnation, the court noted that there was only evidence of a “reasonable difference of opinion” regarding whether the properties to be condemned in Brooklyn were “substandard and insanitary.”<sup>122</sup> This “reasonable difference of opinion” between the ESDC and petitioners was not substantial enough for the court to overturn the ESDC’s findings.<sup>123</sup> New York courts generally do not involve themselves in deciding whether an area is blighted unless it is absolutely clear that the state agency or municipality has erred in its determination.

Not surprisingly, the degree of deference courts give to the legislature has been highly criticized.<sup>124</sup> The dissent in *Kaskel* emphasized that the question of public use is a judicial question.<sup>125</sup> While discussing the deference that should be given to the decision of the legislature, the *Yonkers* opinion emphasized that courts are required to be “more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases.”<sup>126</sup> In *Goldstein*, the New York Court of Appeals admitted that it was possible that the bar has been set too low and perhaps blight should not be defined by studies that are paid for by the developers themselves.<sup>127</sup> In his dissent in *Goldstein*, Justice Smith argued that “[t]o let the agency itself determine when the public use requirement is satisfied is to make the agency a judge in its own cause.”<sup>128</sup> His view aligns with other commentators who believe the

---

119. *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 332 (N.Y. 1975).

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

121. *Id.* at 172.

122. *Id.* at 173.

123. *Id.*

124. *See, e.g., Goldstein*, 921 N.E.2d at 186 (Smith, J., dissenting); *Kaskel v. Impellitteri*, 115 N.E.2d 669, 669-70 (N.Y. 1953) (Van Voorhis, J., dissenting).

125. *Kaskel*, 115 N.E.2d at 665 (Van Voorhis, J., dissenting).

126. *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 333 (N.Y. 1975); *see also infra* notes 195-99 and accompanying text.

127. *Goldstein*, 921 N.E.2d at 164.

128. *Id.* at 190 (Smith, J., dissenting).

judiciary gives too much deference to the legislative agency's determination of whether a "public use" exists.<sup>129</sup>

## B. Economic Underutilization in the Eminent Domain Context

Economic underutilization, as it refers to property, is the concept that land or property has the potential to be put to a better or more efficient use.<sup>130</sup> Some examples of factors that reflect economic underutilization include a high number of tax delinquencies, tax delinquencies that are greater than the value of the land, and a high number of defective titles, which hinder the transferability of the property.<sup>131</sup> A finding that a property is blighted because of economic underutilization is tantamount to taking land for the purpose of economic development.<sup>132</sup> Instead of saying that the condemned land could be put to a better use in a straightforward manner, a state agency might say that because the condemned land is not being put to the best or most efficient use possible, it is blighted and therefore subject to condemnation for urban renewal purposes.

### 1. Economic Underutilization as a Factor Used to Determine Blight

#### a. Federal Courts

One of the major United States Supreme Court cases that supports the use of economic underutilization as a factor to determine blight is *Berman*.<sup>133</sup> The owner of a department store that was not physically blighted argued that his store could not be included in the area to be

---

129. See, e.g., Dick M. Carpenter & John K. Ross, *Robin Hood in Reverse*, CITY J., Jan. 15, 2010, available at <http://www.city-journal.org/2010/eon0115dcjr.html>.

130. In her dissent in *Kelo*, Justice O'Connor highlighted the problem with takings based on economic factors:

In the prescient words of a dissenter from the infamous decision in *Poletown*, "[n]ow that we have authorized local legislative bodies to decide that a different commercial or industrial use of property will produce greater public benefits than its present use, no homeowner's, merchant's or manufacturer's property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a 'higher' use."

*Kelo v. City of New London*, 545 U.S. 469, 504-05 (2005) (O'Connor, J., dissenting) (quoting *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 464 (Mich. 1981)).

131. Steven J. Eagle & Lauren A. Perotti, *Coping With Kelo: A Potpourri of Legislative and Judicial Responses*, 42 REAL PROP. PROB. & TR. J. 799, 813 (2008).

132. See Timothy Neidbalski, Comment, *Imminent Change: A Recommended Response For Missouri in the Wake of the Supreme Court*, 25 ST. LOUIS U. PUB. L. REV. 449, 478 (2006).

133. *Berman v. Parker*, 348 U.S. 26 (1954); see also *supra* notes 102-08 and accompanying text.

redeveloped because it was not blighted like other properties.<sup>134</sup> The Court disagreed and allowed the department store to be included in the condemned area.<sup>135</sup> The Court stated that “[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”<sup>136</sup> This opened the door for the government to take property for redevelopment “which, standing by itself, is innocuous and unoffending.”<sup>137</sup> The Court reasoned that if the government had a redevelopment plan, it did not have to be implemented on a piecemeal, lot-by-lot basis.<sup>138</sup> Rather, the condition of the area as a whole was to be considered when deciding whether the exercise of eminent domain was constitutional.<sup>139</sup>

*b. New York Courts*

In *Kaskel*, the New York Court of Appeals began to depart from the traditional view that there needed to be actual slum conditions to justify the removal of urban blight.<sup>140</sup> The court pointed out that although the area in question was not like the slums described in “[Charles] Dickens’ novels,” the record nonetheless showed that the area was “substandard and insanitary by modern tests.”<sup>141</sup> The court found that the buildings were below modern standards because of age, obsolescence, and decay.<sup>142</sup> These conditions supported the legislative agency’s determination that the Columbus Circle area was blighted.<sup>143</sup> These conclusions were met with a strong dissent from Judge Van Voorhis.<sup>144</sup>

The New York Court of Appeals supported economic underutilization as a factor for determining blight in *Yonkers*.<sup>145</sup> The court stated that, “among other things, economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public

---

134. *Berman*, 348 U.S. at 34.

135. *Id.* at 33.

136. *Id.*

137. *Id.* at 35.

138. *Id.*

139. *Id.*

140. *Kaskel v. Impellitteri*, 115 N.E.2d 659 (N.Y. 1953).

141. *Id.* at 661.

142. *Id.* at 662.

143. *See id.*

144. *Id.* at 663 (Van Voorhis, J., dissenting); *see also infra* notes 190-94 and accompanying text.

145. *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327 (N.Y. 1975).

purpose.”<sup>146</sup> It even went as far as saying that “improper land use” is evidence that supports the finding that an area is blighted.<sup>147</sup> This hinted that the court was open to considering economic concerns, such as whether the land is being put to its “best” use possible, when considering whether it is blighted. Additionally, the court noted that the factors that determine blight did not have to be precise since the “combination and effects of such things are highly variable.”<sup>148</sup> For an area to be termed blighted and thus subject to urban renewal condemnation, it is not necessary for the “degree of deterioration or precise percentage of obsolescence or mathematical measurement of other factors be arrived at with precision, since the combination and effects of such things are highly variable.”<sup>149</sup>

More recently, in *Goldstein*, the ESDC issued a determination that it would be using its eminent domain power to take privately owned residential and commercial properties in Brooklyn and turn them over to a private redeveloper, Forest City Ratner Companies (FCRC).<sup>150</sup> The area to be condemned included the Vanderbilt rail and Metropolitan Transit Authority (MTA) bus yards (known as “Atlantic Yards”), and certain blocks to the south.<sup>151</sup> The project is slated to include the construction of a stadium for the National Basketball Association’s Nets franchise, a modernized Vanderbilt rail and MTA subway hub, and several high-rise buildings of mixed commercial and residential use.<sup>152</sup> The project was characterized by the ESDC as a “land use improvement project” for the purpose of eliminating blight.<sup>153</sup>

The New York Court of Appeals was given the task of determining whether the ESDC violated the New York State Constitution by using its eminent domain power to acquire petitioners’ properties, which had not been previously declared blighted.<sup>154</sup> In upholding the condemnation, the court recognized that it was possible to differ from the ESDC’s findings, but in light of the photographic evidence, the difference did not amount to more than “another reasonable view of the matter.”<sup>155</sup> The court reasoned

---

146. *Id.* at 330.

147. *Id.* at 332.

148. *Id.*

149. *Id.*

150. Bruce Ratner is a private developer who is the principal of Forest City Ratner Companies. *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 166 (N.Y. 2009).

151. *Id.*

152. *Id.* Approximately one-third of the residential dwelling units in the high-rise buildings will be reserved for low and/or middle income families. *Id.*

153. *Id.*

154. *Id.* at 165.

155. *Id.*

that similarly to *Kaskel*,<sup>156</sup> there was only a reasonable difference in opinion of whether the area in question was “substandard and insanitary.”<sup>157</sup> The court refused to interfere with the ESDC’s decision that the property was blighted unless it was “irrational and baseless to call it substandard or insanitary.”<sup>158</sup>

The Court of Appeals emphasized that evidence of blight was not required to be as severe as the conditions of the slums during the Great Depression.<sup>159</sup> It went on to say that areas eligible for redevelopment were not limited to traditional “slums,” but could also encompass other threats to the public such as “economic underdevelopment and stagnation.”<sup>160</sup> Although this does not go as far as embracing economic development as a public purpose in itself, it provides strong support for blight findings based on economic underutilization. It also permits agencies to condemn property whenever the legislature decides that the economic underdevelopment of a property is so severe that it constitutes blight.

In December 2009, nine days after the *Goldstein* decision was handed down,<sup>161</sup> the Appellate Division rejected an ESDC condemnation proceeding in *Kaur*.<sup>162</sup> In *Kaur*, Columbia University—a private university—was seeking to expand its campus in West Harlem using eminent domain.<sup>163</sup> In 2001, Columbia began working with the New York City Economic Development Corporation (EDC) to redevelop the Manhattanville area.<sup>164</sup> The project itself, which is projected to cost \$6.28 billion, is to be funded entirely by Columbia.<sup>165</sup>

In 2006, the ESDC hired Allen, King, Rosen & Fleming (AKRF), a consulting firm that evaluated the physical conditions of the project site and concluded that the project site was “substantially unsafe, unsanitary, substandard, and deteriorated.”<sup>166</sup> Because of the potential conflict of interest associated with AKRF being retained by both Columbia and the ESDC, the ESDC hired Earth Tech, Inc. in 2008 to evaluate AKRF’s

---

156. *Kaskel v. Impelletteri*, 115 N.E.2d 659 (N.Y. 1953).

157. *Goldstein*, 921 N.E.2d at 173.

158. *Id.* (quoting *Kaskel*, 115 N.E.2d at 659).

159. *Id.* at 171.

160. *Id.*

161. *Id.* at 164.

162. *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8 (App. Div. 2009), *rev'd*, No. 125, 2010 N.Y. LEXIS 1181 (June 24, 2010).

163. *Id.* at 11-15.

164. *Id.* at 12.

165. *Id.*

166. *Id.* at 13.

study.<sup>167</sup> Earth Tech found that a majority of the buildings had “substandard and deteriorated conditions.”<sup>168</sup> After a public hearing, the ESDC determined that the project qualified as a Land Use Improvement Project and a Civic Project pursuant to the New York State Urban Development Corporation Act.<sup>169</sup> Subsequently, several property owners in West Harlem brought suit challenging the blight determination.<sup>170</sup>

Although the Appellate Division rejected the contention that economic underutilization should be used to determine blight,<sup>171</sup> Judge Tom wrote a dissenting opinion that relied heavily on the rationale of the *Goldstein* majority, the case that the Court of Appeals based its later decision on when *Kaur* came up on appeal.<sup>172</sup> He found the term “substandard or insanitary area” not to be unconstitutionally vague, contrary to the majority’s assertion.<sup>173</sup> He emphasized that deference should have been given to the ESDC’s decision, stating that “[p]etitioners present merely ‘a difference of opinion’ with the conclusions to be drawn from this evidence, in which event the courts are bound to defer to the agency.”<sup>174</sup> By referencing *Goldstein*,<sup>175</sup> the dissent highlights the noticeably absent discussion of that decision in the majority’s opinion.<sup>176</sup> *Kaur*,<sup>177</sup> as a result, was likely to, and ultimately did, face heavy scrutiny by the Court of Appeals.<sup>178</sup>

Six months later, the Court of Appeals resolved the apparent conflict regarding the state’s eminent domain power by reversing the Appellate

---

167. *Id.* at 14. Although the Appellate Division frames Earth Tech’s study to be a review of AKRF’s study, the Court of Appeals takes the position that Earth Tech “conducted its own independent research and gathered separate data and photographs of the area before arriving at its own conclusions.” *Kaur v. N.Y. State Urban Dev. Corp.*, No. 125, 2010 N.Y. LEXIS 1181, at \*25 (June 24, 2010).

168. *Kaur*, 892 N.Y.S.2d at 14.

169. *Id.* at 15.

170. *Id.*

171. *Id.* at 23.

172. *Id.* at 33 (Tom, J., dissenting); *see also infra* note 180 and accompanying text.

173. *Id.* at 33 (Tom, J., dissenting).

174. *Id.* at 34.

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

176. *Kaur*, 892 N.Y.S.2d at 34 (Tom, J., dissenting). Although it is not known why Judge Catterson did not spend much time addressing *Goldstein* in the majority opinion, it may have been because the rationale of the case would lead to a different conclusion in *Kaur*, or because the majority did not agree with the conclusion in *Goldstein* and felt it was inapplicable to *Kaur* because of factual distinctions.

177. 892 N.Y.S.2d 8.

178. *See Kaur v. N.Y. State Urban Dev. Corp.*, No. 125, 2010 N.Y. LEXIS 1181 (June 24, 2010).



Division's decision.<sup>179</sup> Relying primarily on its decision in *Goldstein*, the Court of Appeals found that the Appellate Division erroneously substituted its judgment for that of the ESDC's where there was no evidence of bad faith on the part of the ESDC, the taking was not pretextual, the project was a civic project, and respondents' due process claims were meritless.<sup>180</sup>

## 2. *The Problem with Using Economic Underutilization Alone to Determine Blight*

One of the major problems with states' definitions of blight is that they are so broad that they could apply to practically every neighborhood in the country.<sup>181</sup> State statutes are filled with vague and general terms making a finding of blight "little more than a procedural hurdle" for redevelopment agencies.<sup>182</sup> An example of a problematic definition of blight is a statute defining a property that exhibits an obstacle to "sound growth" as blighted.<sup>183</sup> The vague nature of the term "sound growth" allows almost any obstacle to economic development to be framed as blight.<sup>184</sup> There are also factors that are out of a property owner's control that agencies may consider to determine if a property is blighted such as a structure's age and diverse ownership of the property or area.<sup>185</sup> All of this points to the conclusion that blight condemnations could be used to circumvent bans on economic development takings.<sup>186</sup> As a result, politicians and developers can easily mold any neighborhood to fit within the definition of blight in order to suit their needs.

Although the New York Court of Appeals held that the city officials were justified in determining that the area was substandard and subject to slum clearance in *Kaskel*,<sup>187</sup> it admitted there could be a case in which "the physical conditions of an area might be such that it would be irrational and baseless to call it substandard or insanitary, in which case it is probable that the conditions for the exercise of the power would not be present."<sup>188</sup> Although the Court of Appeals ruled that the Columbus Circle area could

---

179. *Id.*

180. *Id.* at \*19-39.

181. George Lefcoe, *After Kelo, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 TUL. L. REV. 45, 47 (2008).

182. Lowenstein, *supra* note 12, at 302.

183. *See* Somin, *supra* note 92, at 2122.

184. *See id.* at 2124.

185. Lowenstein, *supra* note 12, at 311.

186. *See* Ely, *supra* note 113, at 136.

187. *Kaskel v. Impellitteri*, 115 N.E.2d 659 (N.Y. 1953).

188. *Id.* at 662.

be included in the redevelopment, it left open the possibility that the good physical condition of a particular area or piece of property might permit a court to reject the finding of a redevelopment agency.<sup>189</sup>

Judge Van Voorhis wrote a powerful dissent in *Kaskel* that seriously called the administrative officials' decision to deem the Columbus Circle area blighted into question.<sup>190</sup> He criticized the report's finding that some buildings were "substandard and insanitary" because they were old law tenements, despite being well-maintained."<sup>191</sup> He also rejected the idea that a slum clearance project is merely incidental to the redevelopment of other property.<sup>192</sup> Therefore, if property that is not a slum is included in the project merely for the sake of its own redevelopment, the statutory power to condemn fails.<sup>193</sup> He believed that there was "possible evasion of this law upon a large scale" if the existence of a few slum buildings was enough to insulate the agency's decision to condemn the entire area.<sup>194</sup>

One of the New York cases with the most conflicting language both in support of and against wide agency discretion in condemnation decisions is *Yonkers*.<sup>195</sup> While recognizing that eliminating economic underdevelopment and stagnation could be a "public purpose," the Court of Appeals also stated that if the land was not substandard and there was a private benefit involved, the public purpose had to be "dominant."<sup>196</sup> Additionally, while recognizing that the law gives agencies wide discretion to decide what constitutes blight, the court emphasized that the facts supporting the determination of blight should be spelled out.<sup>197</sup> It is the court's role to determine whether there is a "public purpose," not that of the agency.<sup>198</sup> Because of the conflicting language in *Yonkers*, the decision is drawn on by both supporters of judicial deference to agencies and supporters of meaningful judicial review of agencies' blight determinations.<sup>199</sup>

---

189. *Id.* at 663.

190. *See id.* (Van Voorhis, J., dissenting).

191. *Id.* at 665.

192. *Id.*

193. *Id.* at 666.

194. *Id.* at 665.

195. *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327 (N.Y. 1975).

196. *Id.* at 330-31.

197. *Id.* at 332.

198. *Id.* at 333.

199. *See, e.g.*, *Kaur v. N.Y. State Urban Dev. Corp.*, No. 125, 2010 N.Y. LEXIS 1181 (June 24, 2010) (citing *Yonkers* in support of judicial deference to legislative agencies); *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164 (N.Y. 2009) (citing *Yonkers* both in the majority opinion in support of judicial deference, and in the dissenting opinion in support of meaningful judicial review of agencies); *Jackson v. N.Y. State Urban Dev. Corp.*,

### C. Societal Effects of Blight Condemnations Based on Economic Underutilization

#### 1. Does the Political Majority Know What's Best?

In order to gain support for their cause, advocates of broad eminent domain powers made the argument that urban decline is occurring and the only solution to the problem is to exercise eminent domain.<sup>200</sup> When the use of blight findings became popular as a way to promote urban renewal, advocates contrasted the current physical state of the property with a more modern picture of what the city would look like after the property was put to a better use.<sup>201</sup> In areas a layperson would not necessarily consider a "slum," within the common sense meaning of the word, the prevention of future urban decay was used as the justification for urban renewal.<sup>202</sup> However, eventually courts adopted a looser definition of blight to cover areas that were not viewed as traditional "slums."

Today, blight determinations are used to address the economic concerns of the political majority.<sup>203</sup> Politicians have become concerned with underutilized properties failing to provide the highest possible tax revenue to the community and view condemnation as a way to increase tax revenues in the long run.<sup>204</sup> In fact, one of the justifications the ESDC used to find the property in question blighted in *Kaur* was that the estimated tax revenues during construction would be \$112 million for the state and \$87 million for New York City.<sup>205</sup> As a result of the state delegating its condemnation power to governmental and quasi-governmental agencies,

---

494 N.E.2d 429 (N.Y. 1986) (citing *Yonkers* in support of judicial deference to legislative agencies); *Syracuse Univ. v. Project Orange Servs. Corp.*, 897 N.Y.S.2d 335 (App. Div. 2010) (citing *Yonkers* in support of courts deciding whether a property is used for the public benefit); *Sunrise Props. v. Jamestown Urban Renewal Agency*, 614 N.Y.S.2d (App. Div. 1994) (stating that as long as the public purpose is dominant, the fact that a private party will benefit does not invalidate the condemnation).

200. See Pritchett, *supra* note 53, at 1.

201. *Id.* at 3.

202. For example, in *Berman v. Parker*:

It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented.

348 U.S. 26, 34-35 (1954).

203. See Pritchett, *supra* note 53, at 18.

204. See *id.* at 21.

205. *Kaur v. N.Y. State Urban Dev. Corp.*, No. 125, 2010 N.Y. LEXIS 1181, at \*17 (June 24, 2010).

some of the agencies are largely insulated from political accountability.<sup>206</sup> Quasi-governmental agencies that can use the power of eminent domain without being held directly politically accountable include authorities such as airport authorities, highway commissions, community development agencies, and utility companies.<sup>207</sup> There is a growing concern regarding to whom quasi-governmental agencies are accountable and whether the public interest is being protected over private interests.<sup>208</sup> The ESDC in particular has been criticized for its “deplorable lack of transparency.”<sup>209</sup> Allowing unelected officials to condemn private property seemingly permits them to decide for the entire community what the “best” use of the land is without actually having to consult that community. Because citizens affected by condemnation cannot resort to the political process for help, the only avenue left is judicial redress.<sup>210</sup> Unfortunately, the courts usually defer to agency decisions,<sup>211</sup> producing a cyclical effect in which there is no accountability. As Judge Smith states in his dissent in *Goldstein*, “[t]o let the agency itself determine when the public use requirement is satisfied is to make the agency a judge in its own cause.”<sup>212</sup>

## 2. *Government and Private Developers Working Together to Redistribute Property*

One of the problems with blight findings based on economic underutilization is that the resulting condemnation prevents the market from determining how property is distributed.<sup>213</sup> Instead, “blight has become the primary vehicle by which municipalities and private developers can redistribute property.”<sup>214</sup> Because many state legislatures enacted bans on economic development takings in response to *Kelo*, blight findings are

---

206. Pritchett, *supra* note 53, at 5.

207. *Eminent Domain*, U.S. DEP’T OF HOUSING & URB. DEV., <http://www.hud.gov/offices/pih/centers/sac/eminent/> (last visited Sept. 27, 2010).

208. KEVIN R. KOSAR, CONG. RESEARCH SERV., RL 30533, THE QUASI GOVERNMENT: HYBRID ORGANIZATIONS WITH BOTH GOVERNMENT AND PRIVATE SECTOR LEGAL CHARACTERISTICS I (2008).

209. *Develop Don’t Destroy (Brooklyn), Inc. v. Empire State Dev. Corp.*, No. 114631/09, 2010 WL 936220, at \*8 (N.Y. Sup. Ct. Mar. 10, 2010).

210. Steven J. Eagle, *Kelo, Directed Growth, and Municipal Industrial Policy*, 17 SUP. CT. ECON. REV. 63, 117 (2009).

211. *See, e.g., Kelo v. City of New London*, 545 U.S. 469 (2005); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954).

212. *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 190 (2009) (Smith, J., dissenting).

213. *See* Lowenstein, *supra* note 12, at 307-08.

214. *Id.* at 306.

now being utilized as a tool to circumvent these bans.<sup>215</sup> According to Ilya Somin, many of the reform laws passed in response to *Kelo* are ineffective because the laws continue to allow takings justified by the eradication of blight.<sup>216</sup> Since blight is so broadly defined, the states are able to continue allowing economic development takings, using blight as a mask.<sup>217</sup> Economic development condemnations are essentially let in through the back door by allowing factors such as underdevelopment and stagnation to contribute to the determination that an area is blighted.<sup>218</sup>

Consultants who conduct blight studies are given wide discretion to find blight when an area does not meet economic standards for the city or municipality—just as beauty is in the eye of the beholder, “blight . . . is evidently in the eye of the consultant.”<sup>219</sup> Therefore, government agencies simply hire consultants who are willing to find blight where the agencies want it found.<sup>220</sup> This makes it even easier for the government to put land to use in the way that it deems “best,” regardless of the interests of the current property owners.

Today, the trend of government entities partnering with private redevelopers continues.<sup>221</sup> This raises the concern that undemocratic practices such as “influence peddling, cronyism and corruption” contribute to the use of eminent domain for politically influential redevelopers to be awarded lucrative contracts.<sup>222</sup> By awarding contracts to politically powerful redevelopers, politicians can expect to receive substantial campaign contributions, which in turn help such condemnation-friendly politicians get re-elected.<sup>223</sup> William J. Stern, who worked as chairman and chief executive of New York State’s Urban Development Corporation (UDC),<sup>224</sup> expressed the view that “[u]sing eminent domain for private development gives the private sector the opportunity to wield public

---

215. *Id.*

216. Somin, *supra* note 92, at 2114.

217. *See id.* at 2124.

218. *See* Lowenstein, *supra* note 12, at 312.

219. *Id.* at 310.

220. *Id.* at 307.

221. Eagle, *supra* note 210, at 64.

222. William J. Stern, *The Truth About Times Square*, PERSPECTIVES ON EMINENT DOMAIN ABUSE, Apr. 2009, at 1, 4, available at [https://www.ij.org/index.php?option=com\\_content&task=view&id=2676&Itemid=249](https://www.ij.org/index.php?option=com_content&task=view&id=2676&Itemid=249).

223. Eagle, *supra* note 210, at 116.

224. The Urban Development Corporation is now known as the Empire State Development Corporation. *See History of Empire State Development*, NEW YORK STATE’S EMPIRE STATE DEVELOPMENT, <http://esd.ny.gov/aboutus/history.html> (last visited Sept. 27, 2010).

power—which is more or less for sale—in order to benefit privately.”<sup>225</sup> Instead of letting the market decide which developers are awarded contracts, lenient eminent domain laws allow developers with greater political influence to win contracts regardless of whether they are the most qualified.<sup>226</sup>

### 3. *Effects on Poor and Minority Populations*

Communities targeted by private developers and city governments are largely composed of ethnic and racial minorities.<sup>227</sup> The New York metropolitan area is no exception.<sup>228</sup> According to a study conducted by the Institute for Justice, eminent domain abuse in the New York metropolitan area disproportionately affects ethnic and racial minorities as well as those with lower incomes and lower levels of education.<sup>229</sup>

Allowing economic underutilization to be a factor in determining blight perpetuates this problem. As previously stated, blight is a vague term that can be used by the politically powerful to separate desirable and undesirable land uses.<sup>230</sup> When economic underutilization is used as a factor in determining blight, it penalizes the poor for failing to use their property in the way the government views most favorable. If property owners cannot afford to implement features found in newer structures, their properties may be considered blighted.<sup>231</sup> This leaves some people with a higher risk of being subject to condemnation simply because they cannot afford to maintain their property in the most desirable way. Because the poor and minority groups often have the least political power, they often have scarce resources with which to defend themselves from powerful actors who control the process.<sup>232</sup> Just as economic development takings

---

225. Stern, *supra* note 222.

226. *Id.* at 6.

227. DICK M. CARPENTER & JOHN K. ROSS, INST. FOR JUSTICE, VICTIMIZING THE VULNERABLE: THE DEMOGRAPHICS OF EMINENT DOMAIN ABUSE 1 (2007), available at [http://www.ij.org/images/pdf\\_folder/other\\_pubs/Victimizing\\_the\\_Vulnerable.pdf](http://www.ij.org/images/pdf_folder/other_pubs/Victimizing_the_Vulnerable.pdf).

228. *Id.*

229. *Id.* Of the eleven locations in metropolitan New York that were studied, minorities accounted for 92% of residents, compared to a countywide 57%; median incomes were \$21,323.32, compared to a countywide average of \$29,880.25; 28% of the residents were impoverished, compared to 17% countywide; 40% of residents did not have high school diplomas, compared to 24% countywide; and the percentage of residents that rented was 87%, compared to 62% countywide. *Id.*

230. Pritchett, *supra* note 53, at 18.

231. Lefcoe, *supra* note 181, at 62.

232. CARPENTER & ROSS, *supra* note 227, at 2. City agencies and private developers are encouraged to team up together against local property owners. See BUILDING EMPIRES, DESTROYING HOMES, *supra* note 45, at 3.

“guarantee[] that these losses will fall disproportionately on poor communities,”<sup>233</sup> blight findings based on economic underutilization produce the same result.

#### 4. *Is Eminent Domain Efficient?*

Supporters of a broad eminent domain power argue that it increases efficiency because without it, private developers cannot easily assemble pieces of land necessary for large beneficial projects.<sup>234</sup> They argue that by allowing the government to condemn necessary properties, hold-outs and high transaction costs are avoided.<sup>235</sup> Hold-outs occur when a landowner refuses to sell until she is offered a higher price because she knows a developer is interested in starting a project for which her land is necessary.<sup>236</sup> However, Steven Eagle argues that condemnations actually lead to secondary rent-seeking.<sup>237</sup> Secondary rent-seeking is an inefficient result that occurs when redevelopers and businesses compete for a share of the increased value of the property that has been condemned.<sup>238</sup> What is gained by avoiding hold-outs is often lost by secondary rent-seeking.<sup>239</sup>

Additionally, the partnerships between developers and members of local government may cause further inefficiencies.<sup>240</sup> As previously stated, these partnerships may cause an official to choose a redeveloper because of a personal relationship rather than the merits of his or her plan.<sup>241</sup> Alternatively, they could lead to harmful bidding contests between redevelopers that leave businesses “unwilling to bribe out of consideration.”<sup>242</sup> Additionally, providing subsidies to businesses reduces the opportunities for other possibly more efficient businesses from coming to an area.<sup>243</sup> Generally, the market is better suited to adapt to changing conditions than the government, which has largely been unsuccessful in predicting technological and business trends.<sup>244</sup>

Outside pressures, such as extensive litigation over whether the government has the right to condemn the property, often hamper and delay

---

233. *Kelo v. City of New London*, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting).

234. Eagle, *supra* note 210, at 79.

235. *Id.* at 80.

236. *See id.* at 81-82.

237. *Id.* at 82.

238. *See id.*

239. *See id.*

240. *See id.* at 84.

241. *Id.*; *see also supra* notes 221-26 and accompanying text.

242. Eagle, *supra* note 210, at 90.

243. *Id.*

244. *See id.* at 92.

redevelopment projects for years.<sup>245</sup> The risk of condemnation can also act as a disincentive for potential property owners to invest in their property. Also, people who feel there is a chance the government will take their property will be less likely to invest time and resources into a starting a business.<sup>246</sup> This results in “condemnation blight,”<sup>247</sup> which actually leads to reduced economic development, thus defeating the purpose of the condemnation.<sup>248</sup>

#### **D. *Kaur*: How Two New York State Courts Could Come to Drastically Different Conclusions**

##### *1. The Appellate Division’s Decision*

In *Kaur*, several Manhattanville property owners contested the blight determination made by the ESDC.<sup>249</sup> The Appellate Division severely criticized the blight study upon which the ESDC relied in making its condemnation determination.<sup>250</sup> To begin with, the blight study was not conducted until after Columbia had gained control of most of the properties.<sup>251</sup> A previous study conducted by the ESDC in 2002 did not find any blight and recognized that West Harlem had great potential for development if it were re-zoned.<sup>252</sup> By the time AKRF conducted the blight study, Columbia had previously gained control of the very buildings being evaluated and had since let them fall into disrepair.<sup>253</sup> To make matters worse, the Appellate Division found that the ESDC instructed AKRF to use a methodology that was biased in Columbia’s favor.<sup>254</sup> The study produced by AKRF found that forty-eight of the sixty-seven lots in

---

245. *See id.* at 94.

246. *See id.* at 102.

247. Condemnation blight is defined as “[t]he reduction in value that the property targeted for condemnation suffers in anticipation of the taking.” BLACK’S LAW DICTIONARY 332 (9th ed. 2009).

248. Eagle, *supra* note 210, at 102.

249. *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 15 (App. Div. 2009), *rev’d*, No. 125, 2010 N.Y. LEXIS 1181 (June 24, 2010).

250. *Id.* at 21-22.

251. *Id.* at 21.

252. *Id.*

253. *Id.* There was evidence that Columbia vacated 50% of tenants in seventeen buildings, left water infiltration problems unaddressed, left building code violations open, and let its tenants use the premises in violation of the local codes. *Id.*

254. *Id.* Specifically, AKRF was told to “highlight” blight conditions found and prepare individual building reports “focusing on characteristics that demonstrate blight conditions.” *Id.*



the project area had at least one substandard condition.<sup>255</sup> Such conditions included “poor or critical physical lot conditions, a vacancy rate of 25 percent or more, or site utilization of 60 percent or less.”<sup>256</sup> The Appellate Division discredited the evidence used to support the blight findings, pointing out that such evidence could be found in virtually every neighborhood in New York City.<sup>257</sup>

Although the ESDC eventually replaced AKRF with Earth Tech due to conflicts of interest,<sup>258</sup> Earth Tech used the same flawed methodology to review AKRF’s report.<sup>259</sup> Earth Tech’s review of the study found that some buildings had deteriorated further since AKRF’s study and that thirty-seven out of sixty-seven lots were in “critical or poor condition.”<sup>260</sup> Earth Tech found extensive building code violations and concluded that the buildings had not been well maintained.<sup>261</sup> Earth Tech attributed these problems to “long-standing lack of investor interest in the neighborhood.”<sup>262</sup> The Appellate Division found that the ESDC did not show evidence of any significant health or safety issues other than minor building code violations.<sup>263</sup> The court emphasized that the ESDC’s study should have included factors that the petitioners included in their “no blight study,” such as real estate values, rental demand, rezoning applications, prior proposals for the development of the waterfront, and new commercial ventures.<sup>264</sup>

Next, the Appellate Division explicitly rejected eminent domain takings based solely on underutilization.<sup>265</sup> AKRF and Earth Tech attempted to find blight based on the underutilization of the properties, relying on the floor area ratio (FAR) of the properties.<sup>266</sup> A low FAR indicates that a

---

255. *Id.* at 13.

256. *Id.*

257. *Id.* at 22.

258. In *Tuck-It-Away Associates v. Empire State Development Corp.*, several businesses in the West Harlem area requested documents relating to the proposed condemnation pursuant to the Freedom of Information Law (FOIL). The Appellate Division found that the documents should be disclosed because AKRF’s representation of both Columbia and the ESDC “creates an inseparable conflict for purposes of FOIL.” 54 A.D.3d 154, 164 (N.Y. App. Div. 2008).

259. *Kaur*, 892 N.Y.S.2d at 22.

260. *Id.* at 14.

261. *See id.* Specifically, there were “410 open violations” that spanned three-quarters of the project site as of July 2006. *Id.*

262. *Id.*

263. *Id.* at 22.

264. *Id.*

265. *Id.* at 23 (“The time has come to categorically reject eminent domain takings solely based on underutilization.”).

266. According to the New York City Department of City Planning:

property owner is not fully utilizing its development rights due to lack of demand.<sup>267</sup> The problem with using FAR to determine blight in Manhattanville is that the maximum FAR is two, which essentially allows owners to construct either a one- or two-story structure.<sup>268</sup> Although the New York City Department of City Planning uses a 50% standard to identify “underbuilt” lots, the ESDC used an arbitrary standard of 60%, without any justification for the figure.<sup>269</sup> A 60% standard essentially forces owners to build the maximum two-story structure in order for their properties not to be considered “underbuilt.”<sup>270</sup> The court viewed the 60% figure as unreasonable and instead decided that a 40% FAR would be acceptable to classify a building as underutilized in the Manhattanville area.<sup>271</sup>

Ultimately, the court held that blight findings based on underutilization transform “the purpose of blight removal from the elimination of harmful social and economic conditions in a specific area to a policy affirmatively requiring the ultimate commercial development of all property regardless of the character of the community subject to such urban renewal.”<sup>272</sup> It noted that blight findings predominantly based on underutilization have only been upheld in conjunction with other factors such as zoning defects or insufficiently sized or configured lots.<sup>273</sup> The court also concluded that because the redevelopment had been centered around Columbia’s needs from the beginning, Columbia was the private beneficiary of the project—

---

The floor area ratio (FAR) is the principal bulk regulation controlling the size of buildings. FAR is the ratio of total building floor area to the area of its zoning lot. Each zoning district has an FAR control which, when multiplied by the lot area of the zoning lot, produces the maximum amount of floor area allowable in a building on the zoning lot. For example, on a 10,000 square-foot zoning lot in a district with a maximum FAR of 1.0, the floor area of a building cannot exceed 10,000 square feet.

*NYC Zoning Glossary*, N.Y.C. DEP’T OF CITY PLAN., <http://www.nyc.gov/html/dcp/html/zone/glossary.shtml> (last visited Sept. 27, 2010).

267. *See Kaur*, 892 N.Y.S.2d at 22.

268. *Id.*

269. *See id.*

270. *Id.*

271. *Id.* The court reasoned that the M-1, M-2, and M-3 zoning of the Manhattanville industrial area was intended for uses in which a one-story structure would be preferable. *Id.* Additionally, “for uses requiring loading docks, or storage of trucks or heavy equipment, or gas stations, for example, full lot coverage is not desirable.” *Id.* Using a 40% FAR instead of a 60% FAR would result in a decrease from 39% to 20% of properties being characterized as “underutilized” in the project area. *Id.* at 22-23.

272. *Id.* at 23.

273. *Id.*

the project itself was not a public purpose.<sup>274</sup> Collectively, these factors led the Appellate Division to conclude that the condemnation of the area in Manhattanville was unconstitutional under both the United States and New York State Constitutions.<sup>275</sup>

## 2. *Reversed by the New York Court of Appeals*

Relying on its *Goldstein* decision from the prior year, the New York Court of Appeals flatly rejected the Appellate Division's analysis in *Kaur*.<sup>276</sup> To begin, the court emphasized 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 views as to the adequacy with which the public purpose of blight removal has been made out for that of the legislatively designated agencies.”<sup>277</sup> Because the ESDC's decision was not “irrational or baseless,” the Court of Appeals ruled that the Appellate Division erred by substituting its own opinion for the ESDC's.<sup>278</sup> The Court found that the ESDC considered “a wide range of factors including the physical, economic, engineering and environmental conditions at the Project site,” and based its decision on the “conditions as a whole.”<sup>279</sup> Because the Court of Appeals did not find any defects in the ESDC's blight study, the court found that the Appellate Division had substituted its view impermissibly.<sup>280</sup>

The Court of Appeals was also quick to dismiss the respondents' argument that the ESDC acted in “bad faith” or that the taking was pretextual.<sup>281</sup> The court stated that although Columbia had previously hired AKRF to prepare its environmental impact statement (EIS), the record did not substantiate any claim of a conflict of interest.<sup>282</sup> With regard to the Appellate Division's criticism of the methodology used by the second consulting firm, Earth Tech, the court found that Earth Tech “conducted its own independent research and gathered separate data and

---

274. The Appellate Division noted that in *Kelo* the plurality assumed that the redevelopment itself was a public purpose. This could not be assumed in the present case. *Id.* at 20.

275. *Id.*

276. *See generally* *Kaur v. N.Y. State Urban Dev. Corp.*, No. 125, 2010 N.Y. LEXIS 1181 (June 24, 2010).

277. *Id.* at \*21 (citing *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 172 (N.Y. 2009)).

278. *Id.* at \*22-24.

279. *Id.* at \*23.

280. *Id.* at \*22-24.

281. *See id.* at \*24-25.

282. *See id.* at \*24.

photographs of the area before arriving at its own conclusions.”<sup>283</sup> Essentially, in two short paragraphs the Court of Appeals dismissed any claim that the ESDC had acted in bad faith or that the taking was pretextual.<sup>284</sup>

Next, the Court of Appeals found the statutory term “substandard or insanitary” to be constitutional.<sup>285</sup> It emphasized that “[m]any factors and interrelationships of factors may be significant’ for a blight finding,”<sup>286</sup> and because of this, agency determinations that a property is blighted or “substandard or insanitary” must be evaluated on a case-by-case basis.<sup>287</sup> Because blight “is an elastic concept that does not call for an inflexible, one-size-fits-all definition,” the court held that the statutory term “substandard and insanitary” was not unconstitutionally vague.<sup>288</sup>

Finally, the Court of Appeals chastised the Appellate Division for finding that there was no evidence of blight prior to Columbia’s acquiring the majority of the properties.<sup>289</sup> It stated that the Appellate Division ignored the “Urbitran blight study,” commenced in 2003 by the EDC, which provided evidence that the area was blighted prior to Columbia’s acquisition.<sup>290</sup> Without going into detail, the court stated that the Urbitran study “unequivocally concluded that there was ample evidence of deterioration of the building stock in the study area and that substandard and unsanitary conditions were detected in the area.”<sup>291</sup> Earth Tech provided additional support for the claim that the area was previously blighted by finding that “the neighborhood has suffered from a long-standing lack of investment interest.”<sup>292</sup>

Judge Smith, who dissented in the prior *Goldstein* decision,<sup>293</sup> wrote a concurring opinion stating that although the finding of blight seemed

---

283. *Id.* at \*24-25.

284. *See id.*

285. *Id.* at \*25-27.

286. *Id.* at \*26 (quoting *Yonkers Cmty. Dev. Agency v. Morris*, 37 N.Y.2d 478, 483 (1975)).

287. *Id.* at \*27.

288. *Id.*

289. *See id.* at \*27.

290. *Id.*

291. *Id.* at \*28 (internal quotation marks omitted).

292. *See id.*

293. Judge Smith raised several significant points in his dissent in *Goldstein*. While recognizing that cases such as *Yonkers* expanded the definition of “public use,” he noted that this did not mean that a state agency could condemn property and hand it over to a private developer simply to turn it into a better neighborhood. He believed that New York’s definition of blight invited officials to use blight as a pretext for transferring property from less-favored to more-favored owners and that officials accepted this invitation routinely. In

“strained and pretextual,” it was “no more so than the comparable finding in *Goldstein*.”<sup>294</sup> Judge Smith reluctantly stated, “[a]ccepting *Goldstein* as I must, I agree in substance” with the majority’s opinion.<sup>295</sup>

After the decision, Nicholas Sprayregen, one of the owners of Tuck-It-Away, Inc.,<sup>296</sup> vowed to appeal the decision—his petition for certiorari is currently pending before the United States Supreme Court.<sup>297</sup>

### III. NEW YORK MUST LIMIT THE EXTENT TO WHICH ECONOMIC UNDERUTILIZATION CAN BE USED TO DETERMINE BLIGHT

New York’s legislature and judiciary must work together to limit blight determinations based on economic underutilization. Since *Kaur* was reversed by the Court of Appeals, it seems that legislative reform is the

a sense, Judge Smith stated explicitly what everyone else was thinking: it was clear that the elimination of blight was never the purpose of the Atlantic Yards redevelopment. Only part of the area, the Vanderbilt rail and subway hub, could fairly be described as blighted; the rest of the area was arguably characterized as blighted to pave the way for the stadium. See generally *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 186-90 (N.Y. 2009) (Smith, J., dissenting).

294. *Kaur*, 2010 N.Y. LEXIS 1181, at \*39 (Smith, J., concurring).

295. *Id.* Judge Smith did not accept Section VI of the *Kaur* opinion because he felt that once the Court “decided that the removal of urban blight provides a sufficient constitutional basis for the taking, and that the project is a ‘land use improvement project’ within the meaning of the UDC Act, there is no reason to consider UDC’s alternative argument that the taking may also be justified as one for a ‘civic project.’” *Id.*

296. Tuck-It-Away, Inc., a self-storage company, was one of the businesses set to be condemned in the case. *Kaur*, 2010 N.Y. LEXIS 1181, at \*2.

297. See Karen Freifeld, *Columbia Expansion Backed by New York’s Top Court*, BLOOMBERG BUSINESSWEEK (June 24, 2010), <http://www.businessweek.com/news/2010-06-24/columbia-expansion-backed-by-new-york-s-top-court.html>. Sprayregen’s petition asks the Supreme Court to address two questions:

1. Whether it was error for the Court of Appeals of New York to disregard the principles enunciated in *Kelo v. City of New London*, 545 U.S. 469 (2005)[,] in sanctioning the use of eminent domain for the benefit of a private developer, when the circumstances presented by the instant case exemplify the very bad faith, pretext, and favoritism that this Court warned could result if *Kelo*’s safeguards were ignored?
2. Whether the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States imposes any minimum procedural standards, in accordance with the requirement of fundamental fairness, to preserve a property owner’s meaningful opportunity to be heard within the context of an eminent domain taking?

Petition for Writ of Certiorari at i, *Tuck-it-Away, Inc. v. N.Y. State Urban Dev. Corp.*, \_\_\_ U.S. \_\_\_ (Sept. 21, 2010) (No. 10-402). Since the Supreme Court is asked to review more than 700,000 petitions each year, the likelihood that the Supreme Court will grant petitioner a writ of certiorari is slim. See *U.S. Supreme Court Procedures*, United States Courts, <http://www.uscourts.gov/EducationalResources/ConstitutionResources/SeparationOfPowers/USSupremeCourtProcedures.aspx> (last visited Oct. 11, 2010).

only remaining avenue to limit blight findings based on economic underutilization. New legislation that gives a meaningful definition to blight will give judges the ability to scrutinize blight findings more substantively.

### A. *Kaur* . . . Worse Than *Goldstein*?

#### 1. *The Columbia Project Exhibits “Impermissible Favoritism”<sup>298</sup> Toward Columbia and Provides Only Incidental Public Benefits*

The New York Court of Appeals should not have held that the Columbia project was constitutional because the project lacks a “public use” as required by both the United States and New York Constitutions. The Appellate Division distinguished *Kaur* from *Kelo* on the grounds that the Columbia redevelopment was not, in and of itself, a public purpose.<sup>299</sup> However, the Court of Appeals ignored this argument and, in actuality, ignored *Kelo* altogether, failing to even mention the controlling Supreme Court precedent on eminent domain.<sup>300</sup> Instead of considering whether there was a public use, the Court of Appeals simply stated that removal of urban blight was a public purpose and that the records of the project site supported the ESDC’s determination.<sup>301</sup> Apparently, the Court of Appeals forgot that “transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.”<sup>302</sup>

By refusing to review the ESDC’s decision, the court ignored troubling issues, such as evidence that Manhattanville was not in a depressed economic condition.<sup>303</sup> The 2002 West Harlem Master Plan stated that West Harlem was in a period of economic rejuvenation and that its great potential for increased economic development could easily be accomplished through rezoning.<sup>304</sup> Without specifically addressing the 2002 West Harlem Master Plan, the Court of Appeals rejected the Appellate Division’s argument by citing a 2004 Urbitran blight study that found “substandard and unsanitary conditions were detected in the area.”<sup>305</sup>

---

298. *Kelo v. City of New London*, 545 U.S. 469, 493 (2005) (Kennedy, J., concurring).

299. *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 19-20 (App. Div. 2009), *rev’d*, No. 125, 2010 N.Y. LEXIS 1181 (June 24, 2010).

300. *See Kaur*, 2010 N.Y. LEXIS 1181, at \*1-39.

301. *Id.* at \*20-24.

302. *Kelo*, 545 U.S. at 490 (Kennedy, J., concurring).

303. *See Kaur*, 2010 N.Y. LEXIS 1181, at \*20-24; *Kaur*, 892 N.Y.S.2d at 19.

304. *See Kaur*, 892 N.Y.S.2d at 21.

305. *Kaur*, 2010 N.Y. LEXIS 1181, at \*27-28. The Court of Appeals did not elaborate on the Urbitran study findings, except to note that the study found several buildings to be

However, the legitimacy of the 2004 Urbitran blight study was questioned in petitioner's brief.<sup>306</sup> Urbitran allegedly used a biased methodology to find the Manhattanville area blighted and failed to produce any individual building reports or offer any evidence of interior inspection of any of the buildings.<sup>307</sup> After an eleven page draft was composed without any individual building reports, the Urbitran Study was abandoned without explanation.<sup>308</sup>

Instead of considering a variety of plans to redevelop Manhattanville, the expansion of the Columbia campus was the only plan seriously considered by the ESDC.<sup>309</sup> Although the Court of Appeals stated that nine different plans were evaluated in 2007, it nevertheless admits that by as early as July 30, 2004, the ESDC had entered into an agreement with Columbia, "which provided that Columbia would pay ESDC's costs associated with the Project."<sup>310</sup> Nothing in the Court of Appeals' opinion refutes the assertion that the blight designation was entirely pretextual in order to justify the use of eminent domain for a "massive capital project" for Columbia.<sup>311</sup>

---

dilapidated and numerous buildings to have poor exterior conditions and structural degradation. *Id.* at \*5-6. Urbitran defined dilapidated as "significant evidence of aesthetic degradation (usually a combination of broken windows, peeling paint, and façade damage, among other things)." *Id.* at \*5 n.4.

306. Brief for Petitioner at 2, *Kaur v. N.Y. State Urban Dev. Corp.*, No. 125, 2010 N.Y. LEXIS 1181 (June 24, 2010), available at <http://www.scribd.com/doc/30951605/Spray-Reg-En-Brief>.

307. For example, Urbitran used "inappropriate criteria such as lack of light and air, traditionally associated with densely populated tenement neighborhoods," as blighting factors. *Id.* at 48. Urbitran also found seven residential buildings to be "incompatible uses" without "actual evidence of any actual impairment of either residential or commercial or industrial uses." *Id.* at 48-49. It also counted "site conditions" separately from "building conditions" to inflate the number of allegedly blighted properties. *Id.* at 49. This method allowed for "a building in otherwise perfect condition [to] be rated as blighted for something as slight as a crack in the sidewalk and one broken exterior light fixture." *Id.* Finally, Urbitran found thirteen properties to be in poor condition while the allegedly biased ARKF study rated these same thirteen properties as "fair." *Id.* at 49-50.

308. *Kaur*, 2010 N.Y. LEXIS 1181, at \*19-20.

309. *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 19 (App. Div. 2009), *rev'd*, No. 125, 2010 N.Y. LEXIS 1181 (June 24, 2010). The only alternative plan considered was West Harlem Community Board 9's 197-a plan. *See id.* This plan called for diversified development in the Manhattanville industrial area to maximize economic benefits for local residents. *See id.* It called for Columbia to play a role in the redevelopment but rejected the idea that Columbia would use eminent domain to achieve its goals. *See id.* There was no mention of the 197-a plan until 2007, well after plans for Columbia to redevelop the area were under way. *See id.* The ESDC rejected the 197-a plan on the basis that it "d[id] not meet Columbia's needs as Columbia had defined them." *Id.*

310. *Kaur*, 2010 N.Y. LEXIS 1181, at \*6.

311. *See id.* at \*1-39; *see also Kaur*, 892 N.Y.S.2d at 16 (noting that "this project has always primarily concerned a massive capital project for Columbia").

Thus, the sole beneficiary of the project will be Columbia,<sup>312</sup> whereas the beneficiaries of the *Goldstein* project will be the public—who can use the stadium—and the people that occupy the commercial and residential spaces.<sup>313</sup> With the exception of the public swimming facilities and several other improvements that the ESDC claims will benefit the public,<sup>314</sup> the beneficiaries of the proposed Columbia project are by and large limited to Columbia's employees and students.<sup>315</sup> Although the project plans to create “14,000 jobs during the construction of the new campus as well as 6,000 permanent jobs following the [p]roject's completion,”<sup>316</sup> little evidence was presented in support of the contention that it was necessary that the properties in question be condemned in order to achieve such results.<sup>317</sup> Furthermore, it is likely that these claims are inflated, since the ESDC is not “legally required to actually produce the economic gains that supposedly justified the condemnation in the first place.”<sup>318</sup>

Despite any purported public benefits, it is clear that any such benefits are incidental to the improvement of Columbia's facilities. Condemnation is impermissible if any “clearance that may be involved is merely incidental to the redevelopment of other types of real property.”<sup>319</sup> The argument that a private university conveys “public benefits” sufficient to justify the use of condemnation is flawed.<sup>320</sup> By and large, universities provide “private goods” that are “fully captured by their students and faculty.”<sup>321</sup> There is no need for the government to subsidize the benefits

---

312. *Kaur*, 892 N.Y.S.2d at 24.

313. *See* *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 166 (N.Y. 2009).

314. The project plans to create “approximately 94,000 square feet of accessible open space and maintained as such in perpetuity that will be punctuated by trees, open vistas, paths, landscaping and street furniture and an additional well-lit 28,000 square feet of space of widened sidewalks that will invite east-west pedestrian traffic.” *Kaur*, 2010 N.Y. LEXIS 1181, at \*17. It also provides for infrastructure improvements to the 125th Street subway station and maintenance of the West Harlem Piers Park. *Id.* at \*18. Finally, Columbia has agreed to “open its facilities—including its libraries and computer centers—to students attending a new public school that Columbia is supplying the land to rent-free for 49 years.” *Id.*

315. *See Kaur*, 892 N.Y.S.2d at 20.

316. *Kaur*, 2010 N.Y. LEXIS 1181, at \*17

317. *See* Ilya Somin, *New York High Court Upholds Columbia University Takings*, THE VOLOKH CONSPIRACY (June 24, 2010, 5:44 PM), <http://volokh.com/2010/06/24/new-york-high-court-upholds-columbia-university-takings/>.

318. *Id.*

319. *Kaskel v. Impellitteri*, 115 N.E.2d 659, 665 (N.Y. 1953) (Van Voorhis, J., dissenting).

320. *See* Todd Zywicki, *Universities, Public Use, and Eminent Domain*, THE VOLOKH CONSPIRACY (June 5, 2006, 6:25 PM), [http://volokh.com/archives/archive\\_2006\\_06\\_04-2006\\_06\\_10.shtml#1149365300](http://volokh.com/archives/archive_2006_06_04-2006_06_10.shtml#1149365300).

321. *Id.*



students receive from going to college.<sup>322</sup> Two arguably “public benefits” that private universities provide are scientific research and education for the underprivileged.<sup>323</sup> Both of these “public benefits,” however, are already “heavily subsidized by the government through a wide variety of programs.”<sup>324</sup> Condemnation, which usually provides aesthetic and lifestyle-related benefits, is rarely used to advance research or educate poor students.<sup>325</sup> Furthermore, “[e]ducation and research can be conducted in a wide variety of locations and thus are not vulnerable to the ‘holdout’ problems usually cited as a justification for condemning property.”<sup>326</sup> Whereas the general population has the opportunity to buy a ticket to see a New Jersey Nets game, rent an apartment, or purchase commercial space, Columbia chooses the employees it hires and the students it accepts. The population that truly has an opportunity to benefit from the proposed Columbia project is a much smaller subset of the general public than the population that has an opportunity to take advantage of the stadium and residential and commercial space in the Atlantic Yards project.

The ESDC’s treatment of the Columbia project is what Justice Kennedy would characterize as “impermissible favoritism.”<sup>327</sup> In his concurring opinion in *Kelo*, Justice Kennedy addressed improper motives behind property transfers to private parties that have only pretextual public benefits.<sup>328</sup> He argued that courts should strike down those takings where it is clearly shown that the taking was intended to favor a particular party and the benefits to the public are incidental.<sup>329</sup> In *Kelo*, both the private parties and the government were aware of New London’s depressed economic condition and need for economic rejuvenation.<sup>330</sup> In *Kaur*, the purpose of eradicating blight was not even mentioned until years after the project was initiated.<sup>331</sup> This blatant showing of “impermissible favoritism” clearly warrants a “presumption (rebuttable or otherwise) of invalidity” under the Public Use Clause.<sup>332</sup> In sum, the Columbia project is

---

322. *See id.*

323. *See id.*

324. *Id.*

325. *See id.*

326. *Id.*

327. *See Kelo v. City of New London*, 545 U.S. 469, 490-93 (2005) (Kennedy, J., concurring).

328. *Id.*

329. *Id.* at 491.

330. *Id.*

331. *See Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 16 (App. Div. 2009), *rev'd*, No. 125, 2010 N.Y. LEXIS 1181 (June 24, 2010).

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

the quintessential example of a case “in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose.”<sup>333</sup> The stark differences between the redevelopment in *Kelo* and *Kaur* should have been sufficient to render the Columbia project unconstitutional.<sup>334</sup> However, in its reversal of the Appellate Division’s decision, the Court of Appeals failed even to mention *Kelo*,<sup>335</sup> which is arguably the leading Supreme Court case on eminent domain. In addition, the Court of Appeals did not provide evidence that the taking was not pretextual; instead, it dodged the issue stating that claims of pretext were “unsubstantiated by the record.”<sup>336</sup>

2. *The Failure to Address the Issue of Economic Underutilization Undercuts the Decision*

To the extent that it matters, the lacking evidence of actual physical blight renders *Kaur* factually distinct from the 2009 Court of Appeals’ decision in *Goldstein*.<sup>337</sup> The property to be redeveloped in the Columbia project was not blighted to the extent that a majority of the property was in the Atlantic Yards redevelopment.<sup>338</sup> The *Goldstein* case involved the question of whether land that itself was arguably not blighted, but is adjacent to land that was indisputably blighted, could be included in the redevelopment.<sup>339</sup> In *Kaur*, however, there was a dispute as to whether *any* of the property to be condemned for the Columbia Project was blighted.<sup>340</sup> In *Goldstein*, the Court of Appeals was able to rely on a *Berman* argument: what the legislature thought should be included in the project should not be questioned as long as there is a “public purpose.”<sup>341</sup> Because the Atlantic Yards were already undisputedly established as blighted, the Court of Appeals had little difficulty in deferring to the ESDC’s determination of

---

333. *Id.*

334. *Compare id.*, with *Kaur*, 892 N.Y.S.2d at 12.

335. *See Kaur v. New York State Urban Dev. Corp.*, No. 125, 2010 N.Y. LEXIS 1181 (June 24, 2010).

336. *Id.* at \*25.

337. *Compare id.* at \*1, with *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164 (N.Y. 2009).

338. *See discussion supra* Part II.D. In *Goldstein*, there was no dispute regarding whether more than half of the project area was blighted. *See* 921 N.E.2d at 166. This blighted area has been designated the Atlantic Terminal Urban Renewal Area (ATURA) since 1968. *See id.*

339. *Goldstein*, 921 N.E.2d at 164.

340. *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 20 (App. Div. 2009), *rev’d*, No. 125, 2010 N.Y. LEXIS 1181 (June 24, 2010).

341. *Berman v. Parker*, 348 U.S. 26, 33 (1954).

what land was necessary to achieve the public purpose of eradicating blight.<sup>342</sup> In contrast, the public purpose of eradicating blight was not established prior to the ESDC partnering with Columbia to redevelop the area according to Columbia's needs.<sup>343</sup>

The Court of Appeals found "all that is at issue is a reasonable difference in opinion as to whether the area in question is in fact substandard and insanitary,"<sup>344</sup> despite the fact that the majority of the evidence that the ESDC used to substantiate its blight finding was based on the underutilization of property.<sup>345</sup> The physical evidence the ESDC found consisted primarily of building code violations,<sup>346</sup> most of which were found in buildings that Columbia previously purchased and failed to properly maintain.<sup>347</sup> The factors considered to contribute to blight included conditions that a majority of New York City neighborhoods exhibit.<sup>348</sup> The Appellate Division pointed out that "[e]ven a cursory examination of the study reveals the idiocy of considering things like unpainted block walls or loose awning supports as evidence of a blighted neighborhood."<sup>349</sup> Conversely, the Court of Appeals, relying on Earth Tech's apparently flawless study, found evidence of blight.<sup>350</sup> However, the study makes no mention of the identity of the owners of these properties, notably failing to refute the Appellate Division's claim that Columbia owned the blighted properties.<sup>351</sup>

Not only did the Court of Appeals fail to confirm the Appellate Court's opinion that "[t]he time has come to categorically reject eminent domain

---

342. *Goldstein*, 921 N.E.2d at 166.

343. The ESDC met with Columbia and EDC for the first time in March 2004 to discuss the proposed condemnation, five months *before* the study conducted by Urbitran was issued. *See Kaur v. N.Y. State Urban Dev. Corp.*, No. 125, 2010 N.Y. LEXIS 1181, at \*6 (June 24, 2010).

344. *Id.* at \*23 (citing *Goldstein*, 921 N.E.2d at 173).

345. *See Kaur*, 892 N.Y.S.2d at 22-23.

346. *See id.* at 14.

347. *See id.* at 21.

348. *See id.* at 22.

349. *Id.*

350. *Kaur v. N.Y. State Urban Dev. Corp.*, No. 125, 2010 N.Y. LEXIS 1181, at \*12-13 (June 24, 2010). The Court of Appeals' opinion states that Earth Tech "noted certain variables including current land uses, structural conditions, health and safety issues, utilization rates, environmental contamination, building code violations and crime statistics." *Id.* Earth Tech also apparently found "extensive building code violations in the area" and "chronic problems that the buildings had with water infiltration." It also found "deteriorated facades," "widespread vermin on the streets and graffiti on the walls of the buildings and other structures." *Id.* at \*13.

351. *Compare id.* at \*12-13, with *Kaur*, 892 N.Y.S.2d at 21.

takings solely based on underutilization,”<sup>352</sup> it also failed to address economic underutilization at any point in its opinion.<sup>353</sup> Although the Court of Appeals stated that factors such as “economic underdevelopment and stagnation” could be used to determine blight in *Goldstein*, it did not go as far as ruling that strictly economic development takings were permissible.<sup>354</sup> Instead of addressing the issue of whether economic development takings are permissible, the Court of Appeals chose to hide behind its limited review of blight findings in eminent domain proceedings. In doing so, it blindly accepted the ESDC’s contention that there was actual evidence of physical blight, as ludicrous as the purported evidence was.

### **B. Legislative Changes are Necessary to Help Prevent Future Eminent Domain Abuse**

Since the Court of Appeals refused to limit the definition of blight in *Kaur*,<sup>355</sup> legislative changes are necessary to help curb eminent domain abuse. New York is one of the few states that did not pass legislation limiting economic development takings in response to the *Kelo* decision in 2005.<sup>356</sup> As a result, there is no legislative basis for preventing courts from recognizing economic development as a public purpose. In order to provide greater protection of private property rights, common law protections must be supplemented by legislation.<sup>357</sup> Although New York courts are free to interpret the New York Constitution as affording broader

---

352. *Kaur*, 892 N.Y.S.2d at 23.

353. See *Kaur*, 2010 N.Y. LEXIS 1181, at \*1-39.

354. *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 172 (N.Y. 2009). While unhappy with the majority opinion, Judge Smith notes in his dissent that the “good news from today’s decision is that our Court has not followed the lead of the United States Supreme Court in rendering the “public use” restriction on the Eminent Domain Clause virtually meaningless.” *Id.* at 186 (Smith, J., dissenting).

355. See generally *Kaur*, 2010 N.Y. LEXIS 1181.

356. In fact, New York is only one of seven states that failed to pass any legislation restricting eminent domain in the wake of *Kelo*. For an up-to-date list of legislation enacted in response to *Kelo*, see *Enacted Legislation Since Kelo*, CASTLE COALITION, [http://www.castlecoalition.org/index.php?option=com\\_content&task=view&id=510&Itemid=107](http://www.castlecoalition.org/index.php?option=com_content&task=view&id=510&Itemid=107) (last visited Aug. 19, 2010).

357. After *Kelo* was decided, the Institute for Justice released a white paper urging states to take legislative action in order to prevent the “floodgates” of eminent domain abuse from opening. The white paper suggested ways to design an effective law to protect citizens from losing their land for the benefit of private parties. See INSTITUTE FOR JUSTICE, *KELO V. CITY OF NEW LONDON: WHAT IT MEANS AND THE NEED FOR REAL EMINENT DOMAIN REFORM* (2005), available at [http://www.castlecoalition.org/pdf/Kelo-White\\_Paper.pdf](http://www.castlecoalition.org/pdf/Kelo-White_Paper.pdf).

protection to individual rights and liberties than the federal Constitution,<sup>358</sup> legislative reform would provide more consistent protection to property owners from eminent domain abuse.

Many states that have passed legislative reform in response to *Kelo* failed to close loopholes allowing economic development takings through broad exemptions for blight condemnations.<sup>359</sup> This essentially negates any prohibition on economic development takings because using economic underutilization as evidence of blight renders the blight requirement useless.<sup>360</sup> Although passing legislation prohibiting economic development takings is a start, New York needs to go further by restricting the definition of blight. In order to do so, New York must define blight in a meaningful way.<sup>361</sup> A satisfactory example of a restricted definition is one that limits blight to factors such as property with the presence of buildings unfit for human habitation, fire hazards, safety hazards, defective or unusual titles, structures with utilities unfit for their intended use, vacant land with overgrowth or trash accumulation, a property that is a public or attractive nuisance, a property with health or safety code violations, tax delinquencies exceeding the value of the property, and environmental contamination.<sup>362</sup>

New York may also want to set a minimum threshold for the amount of property that must be blighted before non-blighted property is subject to eminent domain.<sup>363</sup> Minor building code violations that can be easily remedied should not suffice to designate a property as blighted. This is especially true in the Columbia project because Columbia itself was responsible for failing to keep the properties it had previously purchased up to building code standards.<sup>364</sup> Columbia should not have been permitted to

---

358. See, e.g., *Cooper v. Morin*, 399 N.E.2d 1188, 1193-94 (N.Y. 1979); *Sharrock v. Dell Buick-Cadillac, Inc.*, 379 N.E.2d 1169, 1173 (N.Y. 1978); *People v. Perri*, 423 N.Y.S.2d 674, 677-78 (App. Div. 1980).

359. See *Somin*, *supra* note 92, at 2120-22. Ten states have passed laws banning economic development but have left blight exemptions intact by broadly defining blight as any obstacle to "sound growth" or an "economic or social liability." *Id.*

360. See *id.* at 2121.

361. Currently, New York courts are guided by *Yonkers Community Development Agency v. Morris*, which lists factors that may determine blight such as "irregularity of the plots, inadequacy of the streets, diversity of land ownership making assemblage of property difficult, incompatibility of the existing mixture of residential and industrial property, overcrowding, the incidence of crime, lack of sanitation, the drain an area makes on municipal services, fire hazards, traffic congestion, and pollution." 335 N.E.2d 327, 332 (N.Y. 1975).

362. ALA. CODE 24-2-2(c) (2010).

363. Lowenstein, *supra* note 12, at 320 (suggesting that either two-thirds or three-quarters of the property should be blighted before other property is condemned alongside it).

364. See *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 21 (App. Div. 2009), *rev'd*, No. 125, 2010 N.Y. LEXIS 1181 (June 24, 2010).

benefit from its unwillingness to perform simple repairs on the buildings it owned. Setting more tangible standards for condemnations can help curb eminent domain abuse and the seemingly endless litigation that stems from it.

New York may also want to consider adopting heightened procedural requirements for blight determinations. Some states have put significant procedural burdens on the government entity attempting to condemn a property for the stated purpose of eliminating blight.<sup>365</sup> For example, in Colorado, an agency is required to show clear and convincing evidence that the taking is necessary to eliminate blight.<sup>366</sup> A procedural burden like the one in Colorado could force New York state agencies to condemn properties only where the eradication of blight is the true purpose of the taking.

Motivated by the Appellate Division's 2009 *Kaur* decision, in February 2010, New York State Senator Bill Perkins introduced a bill designed to define blighted properties and areas more specifically.<sup>367</sup> The bill proposes to amend section 103 of the EDPL to define "blighted property," "slum," "substandard and insanitary property," "unfit for human habitation," and "abandoned property."<sup>368</sup> It adds a new section to the EDPL—section 204-a—that provides conditions upon which a single property can be declared blighted, including, but not limited to: (1) dilapidated or deteriorated; (2) abandoned property; (3) environmentally contaminated property; (4) a public nuisance; (5) an unsafe structure; (6) vacant property; (7) defective or unusual conditions of title; (8) tax delinquencies that exceed the value of the property; and (9) property used for persistent criminal activity.<sup>369</sup> Multiple properties and project areas may be declared blighted if "seventy-five percent of the individual parcels in the area are declared blighted."<sup>370</sup> The Urban Development Corporation Act (UDCA) will still include the language that recognizes there are blighted properties that "impair or arrest the sound growth of an area."<sup>371</sup> However, the UDCA will be amended to

---

365. See Lynn E. Blais, *Urban Revitalization In The Post-Kelo Era*, 34 FORDHAM URB. L.J. 657, 674-75 (2007).

366. *Id.* at 675-76. Other takings are conditioned on satisfying a lower standard—preponderance of the evidence—that the taking is necessary. *Id.*

367. S.B. 6791 and A.B. 10811, 2010 Leg., 233rd Legis. Sess. (N.Y. 2010).

368. *Id.*

369. *Id.* Each condition provides more specific qualifications in the bill. For example, property that is "environmentally contaminated" must require "remediation for current or future use under state or federal law, if the owner fails to remedy the problem within six months of receiving notice of violation from the appropriate governing body." *Id.*

370. *Id.*

371. *Id.*

define “blighted property” and “blighted area” as “property that is declared blighted under section 204-a” of the EDPL.<sup>372</sup> Under the revised UDCA, “substandard and insanitary” will be defined as property that is “declared blighted under section 204-a” of the EDPL.<sup>373</sup> Another notable change is that the UDCA will require the corporation to offer “substantially comparable housing accommodations to displaced residents in projects that include a residential component, and insofar as is feasible, the corporation shall offer substantially comparable industrial or commercial accommodations to displaced businesses in projects that include an industrial or commercial component.”<sup>374</sup> As of April 21, 2010, the bill had been referred to the judiciary.<sup>375</sup> If the bill or a similar future bill passes, there will be significantly greater protection against eminent domain abuse for property owners.

### C. Supporting Stricter Judicial Scrutiny of Blight Determinations

The projects that are included under the umbrella of blight eradication demonstrate the need for stronger judicial review of agencies’ blight determinations in New York. Even in states that made statutory changes, “anti-*Kelo* backlash has not turned out to be a complete substitute for strong judicial enforcement of public use limits on eminent domain.”<sup>376</sup> A stronger judicial role could help alleviate the problem of unelected agencies that are insulated from political accountability.<sup>377</sup> If the judiciary does not act as a check on legislative agencies’ findings, who will? The elected officials who appoint agency personnel do not have an incentive to oversee the agencies’ findings because the officials are often the ones benefitting from the partnerships with private developers through campaign support and/or campaign contributions.<sup>378</sup> Meaningful judicial scrutiny of agency determinations and findings will help eliminate some of the cronyism and unfair partnerships between local government and private developers.<sup>379</sup> If agencies know they will no longer be able to team up with developers freely to facilitate private-to-private transfers, there will be less incentive to engage in this type of behavior. Surely meaningful judicial scrutiny of

---

372. *Id.*

373. *Id.*

374. *Id.* (emphasis added).

375. *Id.*

376. Somin, *supra* note 92, at 2170-71; *see also supra* notes 216-18 and accompanying text.

377. *See supra* notes 206-12 and accompanying text.

378. *See supra* notes 222-26 and accompanying text.

379. *See Stern, supra* note 222.

agency determinations will not completely eliminate partnerships between the government and private developers, but it may make these parties think twice about the land they are proposing to condemn and whether there is truly a valid public purpose behind the project.

Part of engaging in a meaningful review of the agency's determination involves conducting a detailed review of the facts supporting the determination that a property is blighted. Some argue that judges are not competent to review the facts of an agency's determination because they are not eminent domain experts, and instead the agency is in the best position to know whether the condemnation will benefit the community.<sup>380</sup> It has always been the role of the judiciary, however, to weigh in on whether a constitutional right has been violated.<sup>381</sup> The protection of a constitutional right, particularly the right not to have private property unjustly taken by the government, must be a priority over deference to a quasi-legislative state agency. New York courts cannot continue to affirm virtually every condemnation action, even if some degree of deference is owed to the legislature.

### CONCLUSION

New York must limit the extent to which economic underutilization can be used as evidence of blight. Despite the reversal of the Appellate Division's *Kaur* decision, the people of New York should advocate for legislative reform of eminent domain. Clearly, New York courts have expressed their refusal to interfere with the ESDC's decisions, regardless of how nonsensical the evidence that supports the decisions may be. Even in an eminent domain-friendly state such as New York, blight findings based solely on economic underutilization should be categorically rejected to help prevent eminent domain abuse in blight condemnations. In order to curb eminent domain abuse, the legislature should enact legislation that explicitly prohibits economic development takings and blight determinations based solely on economic underutilization. For added protection against eminent domain abuse, New York courts need to support

---

380. *See* Jackson v. N.Y. State Urban Dev. Corp., 494 N.E.2d 429, 436 (N.Y. 1986) (“[I]t is not the role of the courts to weigh the desirability of any action or choose among alternatives.”).

381. *See* Goldstein v. N.Y. State Urban Dev. Corp., 921 N.E.2d 164, 190 (N.Y. 2009) (Smith J., dissenting) (“It is hard to imagine any court saying that a decision about whether an utterance is constitutionally protected speech, or whether a search was unreasonable, or whether a school district has been guilty of racial discrimination, is not primarily a judicial exercise.”).



the legislation by exercising more meaningful judicial scrutiny of agencies' blight determinations.