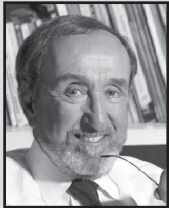


Real Estate Journal

COVERING ALL OF LONG ISLAND, NEW YORK CITY AND UPSTATE NEW YORK

Blurring the line between public and private use: Eminent domain

pg Peter Goetz



Goetz
Fitzpatrick
LLP

During the past few years, the issue of acquiring properties under New York State's Eminent Domain Procedure Law (McKinney's EDPL § 101 et seq.) for private use has been brought into the general public's eye with the proliferation of projects utilizing takings including the New York Times Co.'s new headquarters in Manhattan, the proposed New York Jets stadium at the Hudson Yards in Manhattan, Columbia University's expanded campus in West Harlem, and the New Jersey Nets' arena which is planned for construction on Atlantic Ave. in downtown Brooklyn.

While projects like the Jets stadium did not get past the planning stage due to financial, infrastructure and of course, political issues, others, such as the Nets new arena, are moving forward at a rapid pace. The latter project, which is being developed by the Forest City Ratner Corporation, is part of a large scale development dubbed the "Atlantic Yards" which, in its current publicized form, consists of 16 buildings, including 7,300 new apartments (at least 2,500 of which are to be set aside for low and middle income housing), a hotel, retail and office space, and seven acres of open space. The sheer magnitude of this project requires the acquisition of private properties by the developer. To accomplish these takings, the developer has been steadily buying out property owners and now says it controls a majority of the site. (11/30/05 Plain Dealer (Clev.) A1).

However, Forest City Ratner has had to use the eminent domain power of the

ab Aaron Boyajian



Goetz
Fitzpatrick
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Empire State Development Corporation (ESDC) to take properties from the owners who have refused to sell. See, *Eminent Domain for Private Sport Stadiums: Fair Ball or Foul?*, 35 Envtl. L. 311, 314. For example, in February, 2006, Brooklyn community groups filed a lawsuit against the Empire State Development Corporation for being overly willing to accommodate Forest City Ratner's Atlantic Yards project. The lawsuit claimed that six of the "blighted" buildings now slated for demolition to make way for the Nets' arena have not been inspected by an independent party and do not pose an immediate threat to public safety. All six of the buildings are owned by Forest City Ratner. This case was decided in late February by New York State Supreme Court justice Carol Edmead who ruled that Forest City Ratner can proceed with the demolition of the buildings. This decision may be appealed. There will no doubt be more battles to follow along these lines which will be carefully watched by not only New Yorkers, but other municipalities around the country where arena development is contemplated in the near future.

Any lawsuit brought by or against the ESDC will hinge upon whether the taking of the real property is for a public use, benefit or purpose. The black letter definition of public use is best seen where a city proposes condemnation for the purpose of constructing housing. In that instance, "a public use is generally found in and of itself if (1) the project will eliminate or prevent slums or blighted areas, even if the property is subsequently developed privately, or (2) the project will provide low-rent housing"

Matter of Russin v. Town of Union of Broome County, 133 A.D.2d 1014, 1015, 521 N.Y.S.2d 160 (3rd Dept., 1987). This litmus test has been used over and over again to allow municipalities to raze slums to promote redevelopment. The line is not so clear when determining if takings are proper for private uses in areas which are not easily defined as slums or blighted.

For years, governments have utilized their eminent domain powers to transfer property from private owner to private developers. The property being transferred is not always "urban blight"-type areas. These private condemnations are beneficial to both governments and to developers. In these types of situations, the government and the developer agree that the developer will pay all costs of acquisition, including attorneys' fees, permits, studies, etc. In exchange for this agreement, the developer will have to pay "just compensation" to persons who are going to be displaced, which usually is less than what the developer would have to pay on the open market. Since the developer has an agreement with the government, if an owner of a property refuses to move, the eminent domain powers will be applied and such owner can be forced to move.

Lawsuits arise when an owner refuses to take the compensation and fights the eminent domain takings. However, if the intended use of an improvement is not restricted to private parties nor private interests but is open to the public at large, it is no objection to the statute authorizing the exercise of the right of eminent domain in the accomplishment of such improvement. This is true even if the improvement will benefit one person or class of persons more than others, nor that it originated in private interests and was intended to some degree to serve private purposes. *6A Fletcher Cyclopedia of Private Corp.* § 2914.100; see also, *Oneonta Light & Power Co. v. Schwarzenbach*, 164 App. Div. 548, 150 N.Y.S. 76 (3rd Dept., 1914).

A recent case involving the Port Chester waterfront and downtown areas raised the issue of private use and takings. *Diden v. Village of Port Chester*, 304 F. Supp.2d

548 (S.D.N.Y. 2004). In *Diden*, several individual owners of properties to be condemned as part of the revitalization project in Port Chester sued the Village and the developer after failing to agree to terms for their buyouts. The crux of plaintiffs' argument was that the Village and the Developer conspired "to deprive Plaintiffs of the use of their property in order to pursue their own private interests—specifically, their development plans with Walgreens—rather than the interests of the public." In denying the plaintiffs' request for a preliminary injunction to halt the redevelopment, the Court held that "once a legitimate public purpose for the overall project is conceded ... the court cannot get involved in parsing the particular degree of public or private motivation behind the inclusion of a particular site in the Project area, so long as that inclusion could rationally be related to the public purpose of the plan as a whole."

By applying this holding to the Atlantic Yards project, it would follow that if the total development as a whole, including the open space and retail and commercial centers, is found to promote a legitimate public purpose, certain portions of the project can be used for private interests so long as such private interests are related to the public purpose.

If Forest City Ratner can continue to maintain the support of many of the borough, city and state politicians and groups already behind the Atlantic Yards project, opponents and soon to be displaced property owners in the redevelopment zone will have an uphill battle in stopping the project from moving forward due to the fact that while greater scrutiny is being evidenced in court decisions, the line between public use intertwining with private interests in eminent domain cases still leans in favor of development. It appears that the good of the majority may very well penalize some of the minority.

Peter Goetz, Esq., is founding partner of and Aaron Boyajian, Esq., is associate attorney for Goetz Fitzpatrick LLP, New York, N.Y.