# Land Use Law Case Law Update

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After a long drought during which there was little exciting to write about, this quarter brings us two constitutional cases in which the Court of Appeals (on appeal from the Second Department) on the one hand, and the First Department, on the other, address the issue decided in *Kelo v. City of New London*,[1] namely, when and under what circumstance the State may take property from Peter and give it (or sell it, or lease it) to Paul. Both decisions are fascinating on a number of fronts, both are extremely well-written, and their juxtaposition in time is especially interesting in that they reach different results in contexts which are not all that different. Both cases involve the New York State Urban Development Corporation ("UDC") as respondent, doing business as Empire State Development Corporation ("ESDC").[2] Although the different outcomes in the two cases may well be attributed to the stark difference in their factual contexts, one important subtext emerges from the two decisions in the form of a marked difference in the two courts' views on the degree of deference to be accorded the determination of an administrative agency underlying the taking of private property.

In *Goldstein v. New York State Urban Development Corporation*,[3] the Court of Appeals affirmed the Second Department, which upheld a taking of property for development by a private developer of a large mixed-use project (the "Atlantic Yards Project") involving, among other things, a sports arena as well as market-rate and low-income housing. In *Kaur v. New York State Urban Development Corporation*,[4] the First Department annulled a determination by the UDC approving the acquisition of private property in the vicinity of Columbia University for use by the university, a private educational institution, to expand its campus. *Goldstein* explores a taking on very *Kelo*-like facts in the light of the New York State Constitution; *Kaur* is a glaring example of what genuinely bad facts can do. A brief discussion of *Kelo* is in order.

In *Kelo*, the City of New London, relying on a Connecticut statute that expressly authorized the taking of private land (without the requirement that it be "blighted") to foster a broad plan of economic development, had approved an integrated development plan intended to revitalize the City's economy.[5] The City had managed to acquire most of the property within

the redevelopment zone by arm's length purchase from willing buyers and initiated condemnation proceedings when certain property owners within the redevelopment area refused to sell.[6] Without discussing *Kelo* at length, it is sufficient for the purposes of understanding *Goldstein* and *Kaur* that the Supreme Court recognized, in the context of a broad, well-planned, and well-documented economic redevelopment plan, that "public use" as used in the United States Constitution does not necessarily mean public ownership or even unlimited public access, and that economic revitalization is, in and of itself, a sufficient public use to justify a taking, notwithstanding that major portions of the properties to be taken would not be "used" by the public but will end up in private hands.[7]

In *Goldstein*,[8] the Court of Appeals held that UDC properly exercised the power of eminent domain in acquiring private property for incorporation in a "land use improvement project" as that term is defined in the Urban Development Corporation Act ("UDCA")[9] on findings that the area in which the Atlantic Yards project is located is "substandard and unsanitary" or in common parlance "blighted." In *Goldstein*, this question is expressly decided with reference to the New York, and not the Federal, Constitution.

It was not disputed that a portion of the Atlantic Yards Project is and has been a "blighted" area designated by the City of New York as the Atlantic Terminal Urban Renewal Area ("ATURA") since 1968. At issue in the case, however, are properties located to the south of ATURA which lay within the project footprint but which had not been previously designated as "blighted."[10] The developer of the Atlantic Yards Project, Forest City Ratner Companies ("FCRC"),[11] acquired many of the properties within the project area by arm's length purchase. There remained some properties that it was unsuccessful in acquiring, and it was those properties that UDC sought to acquire by condemnation.[12] But for the fact that *Goldstein* involves a single developer in a project initiated by that developer (in *Kelo*, the project was initiated by the City and the developer(s) had not been identified at the time of initiation), the facts of the two cases are much the same. The difference is that the Connecticut statute recognizes economic revitalization as an end in itself so that a finding of blight is not required, while the New

York statute and Constitution appear to view economic revitalization as a means of eliminating "blight," so that presumably there must be a finding that blight exists in order for economic revitalization of an area to justify a taking. As *Goldstein* shows, the difference is more apparent than real.

Petitioners, owners of condemned property in the non-ATURA portion of the Atlantic Yards Project, initially commenced an action in Federal Court, arguing that the taking was not supported by a public use and thus violated the Fifth Amendment of the Federal Constitution.[13] The petitioners in that action also asserted a pendent State claim seeking a review of the UDC's action pursuant to the Eminent Domain Procedure Law (EDPL § 207).[14] Petitioners' federal claims were rejected by the District Court, and that decision was affirmed by the Second Circuit. The District Court declined to exercise its supplemental jurisdiction so that, as respects the State claim, the dismissal was without prejudice to being re-filed in State Court.[15]

The petitioners then brought their State claim directly to the Appellate Division, the petition alleging two surviving claims: first, that the proposed taking was not for "a public use," but rather for the benefit of a private party and thus would violate Article I, Section 7(a), of the State Constitution as well as EDPL § 207(C)(1); and second, that the condemnation proceeding itself was not in conformity with the requirement of Article XVIII of the State Constitution in that the residential portions of the project, although partially funded by State funds, were not limited exclusively to low-income individuals.[16] Petitioners' central argument was that, insofar as the condemned properties would be used by a private developer, such properties would not be put to "public use" within the meaning of Article I, Section 7(a) of the State Constitution, which provides that "private property shall not be taken for public use without just compensation."[17] The question is whether the term "public use" in the State Constitution is to be interpreted so literally and narrowly as to limit the State's power of eminent domain to the taking of property that will be owned by the State and used by the public, or whether "public use" can include a taking for a broader public purpose such as economic development, with the property reverting to private ownership. The Appellate Division rejected Petitioners' argument, recognizing that "public use" had taken on a much broader meaning. The Court of Appeals agreed.[18]

Initially, the Court noted that even if Petitioners' narrow definition of "public use" were correct the State Constitution expressly recognizes that the alleviation of blight is a valid public purpose for which the power of eminent domain may be used both by the State directly and by public corporations organized for that purpose.[19] That having been said, the Court examined the question of what degree of inutility or dilapidation has to exist in order to justify a finding of "blight." Citing its own earlier decisions, the Court recognized that, over time, "it has become clear that the areas eligible for such renewal are not limited to 'slums' as that term was formally applied, and that, among other things, economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose."[20]

The Court then went on to address the degree of deference that a reviewing Court should accord an administrative agency or public corporation charged with the duty (or the power) to determine when an area or a property is sufficiently "blighted" to justify the exercise of the power of eminent domain. In *Goldstein*, the Court of Appeals accords great deference to those determinations. Citing its own decision in *Kaskel v. Impellitteri*,[21] the Court found that where an agency's findings were "not [made] corruptly or irrationally or baselessly, there is nothing for the courts to do about it."[22] The Court recognized that it was quite possible to differ with UDC's findings that the properties in question are subject to incipient blight, but the Court makes a clear statement that it is limited in the degree to which it may second-guess what it views as essentially "a legislative prerogative":

> It may be that the bar has now been set too low—that what will now pass as "blight," as that expression has come to be understood and used by political appointees to public corporations relying upon studies paid for by developers, should not be permitted to constitute a predicate for the invasion of property rights and the razing of homes and business. But any such limitation upon the sovereign power of eminent domain as it has come to be defined in the urban renewal context is a matter for the Legislature, not the courts.[23]

A close reading of *Goldstein*, including the Court's deferential description of the breadth of the record underlying UDC's determination, indicates that the Court was persuaded more by the fact that the properties in question were part of a coherent, well-documented plan of community redevelopment and economic revitalization than it was troubled by the question of whether the contested properties were in fact "blighted" by any definition of that term. Indeed, it may be argued that after *Goldstein*, and in the absence of legislative action to the contrary, blight in the traditional sense has ceased to be the genuine question, and that the term "blighted" with respect to any specific property has become a shorthand term for—*located in or sufficiently close to an area as to which the need (or the*

*opportunity) for economic development has been identified, adequately documented, and addressed by a broad plan*—almost without regard to the condition of the property. In deferring to the "legislative prerogative" the Court may, in fact, have legislated, so broadening the New York statute as to turn it into the Connecticut statute upheld in *Kelo.*

*Kaur*[24] involves the planned expansion by Columbia University into an area of West Harlem known as Manhattanville. With the exception of some publicly accessible space and a market along 12th Avenue, the proposed project would create more than 6,000,000 gross square feet of space for the University—an institution which the Court was quick to point out is a private institution although it is, admittedly, engaged in the business of education, which is generally recognized as a public good.[25]

In reading Justice Catterson's decision (writing only for himself and Justice Nardelli; Justice Richter filed a concurring opinion and Justices Tom and Renwick dissented) one immediately detects that this is a case decided on egregiously bad facts; the Court's contempt for respondent UDC (and by extension, Columbia), and the process by which UDC reached its determination, is not hidden.[26] The Court found that "[t]he process employed by ESDC predetermined the unconstitutional outcome, was bereft of facts which establish the neighborhood in question was blighted, and ultimately precluded the petitioners from presenting a full record before either the ESDC or, ultimately, this Court. In short, it is a skein worth unraveling."[27]

Indeed, the precedential value of *Kaur* may be compromised by its uniquely extreme factual context. While it is often said that bad facts make bad law, this may be an instance in which bad facts end up making no law at all.

Petitioners were owners of commercial properties in the area of Manhattan known as Manhattanville. Beginning in 2002, Columbia commenced a program of acquiring property in the area in order to implement a plan to expand its facilities. By late 2003, Columbia controlled 51 percent of the properties in the project area, and in March of 2004 initiated meetings with UDC regarding its expansion project and the condemnation of land. Columbia retained an environmental consultant ("AKRF") to assist it in planning and in the approval process and entered into an agreement with UDC to pay UDC's costs in connection with the project.[28] In 2006 UDC retained Columbia's consultant, AKRF (the inherent conflict in this relationship greatly irritates the Court), to evaluate conditions at the project site. AKRF retained an engineering firm to evaluate the subject properties. Ultimately, AKRF and its engineering firm issued studies which relied mostly on the underutilization (based upon the theoretical Floor Area Ratio ("FAR") permitted under existing zoning as compared to the FAR of existing buildings) of the properties in the area for a finding of blight. The AKRF studies, as well as engineering studies relating to the physical condition of the properties in the project area, were relied upon by UDC in making its blight determination.[29]

While the *Kaur* Court acknowledged the standard of review articulated by the Court of Appeals in *Goldstein,* albeit without citing *Goldstein* ("if an adequate basis for the agency's determination is shown, and the petitioner cannot show that the determination was corrupt or without foundation, the determination should be confirmed")[30] the Court in fact refused to accord any deference to the agency's findings, although there was no allegation of corruption, and it can hardly be said that the determination was "without foundation," unless one gives no credibility to the agency's consultants and no credit to the agency's determination. The Court found that "ESDC's determination that the project has a public use, benefit or purpose is wholly unsupported by the record and precedent. A public use or benefit must be present in order for an agency to exercise its power of eminent domain."[31] Citing both the Fifth Amendment to the U.S. Constitution, Article I, Section 7 of the State Constitution, and Section 204(B)(1) of the EDPL.

Having given lip service to the rule that a court can, in this context, overturn an administrative determination only on a determination that it was "corrupt or without foundation," the Court went on to cite *Yonkers Community Development Agency v. Morris,*[32] to state that "it is clear that in such situations, courts are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases. The findings of the agency are not self-executing. A determination of public purpose must be made by the courts themselves and they must have a basis on which to do so."[33] The clear implication is that an agency's findings are not, in and of themselves, a sufficient basis on which the Court can uphold such a taking—the Court is free to (in fact, is required to) examine and evaluate the record. The First Department is unwilling to be as deferential as the Court of Appeals in *Goldstein* is to a blight determination by the condemnor.

In reading *Kaur* it becomes clear that apart from what it considered to be a flawed process in the case, the Court was moved in the broader sense by a clearly expressed suspicion of any process that permits property to be taken from one and given to another, and by a desire to circumscribe that process by applying a set of rules which will protect against "improper motive in transfers to private parties with only discrete secondary benefits to the public."[34] Justice Catterson found that set of rules in a concurring opinion written by Mr. Justice Kennedy in *Kelo.* Briefly summarized, those

rules require (1) a pre-existing determination that a distressed condition exists; (2) the formulation of a comprehensive development plan meant to address that condition; (3) a substantial commitment of public funds to the project before most of the private beneficiaries are known; (4) the condemnor's review of a variety of development plans; (5) the condemnor's choice of a private developer from a group of applicants rather than picking out a particular developer beforehand; (6) the identities of most of the private beneficiaries being unknown at the time the condemnor formulated its plan; and (7) the condemnor's compliance with elaborate procedural requirements that facilitate the review of the record and inquiry into its purposes.[35]

Strict application of the Kennedy rules would most likely disqualify any project (such as Atlantic Yards and Columbia) that is initiated by a developer rather than by the State, the obvious intent of the rules being to prevent the State from becoming the powerful procurement agent of a favored private party.

Here, the Court states that "[t]he contrast between ESDC's scheme for the redevelopment of Manhattanville and New London's plan for Fort Trumbull could not be more dramatic."[36] The Court goes on to find that on the facts in *Kaur,* Columbia and UDC have failed on essentially all seven prongs of the Kennedy test, in effect finding that Columbia was using UDC to accomplish what it could not accomplish negotiating at arm's length. Here, there was no pre-existing determination of blight or distress with respect to the contested properties; there was no comprehensive development plan; no funds were committed to the project before the private beneficiary was known, indeed, all the funds came from the private beneficiary; there was no variety of development plans from which to choose; the city's choice of a private developer was limited to Columbia, the protagonist in the play; the identities of all the private beneficiaries (namely Columbia) were known; and, in the Court's eyes, respondents failed entirely to adhere to elaborate procedural requirements.[37] Ultimately, the Court finds no valid public purpose in the taking.[38] Finally, the Court iced the cake by finding the UDCA so vague as to be unconstitutional as applied in this case because the UDC had failed to adopt, retain, or promulgate any regulations or written standards relating to a finding of blight.[39]

UDC has appealed, and briefs are due in the Court of Appeals in May. The question remains whether the Court of Appeals will take the opportunity to adopt the Kennedy test in affirming the First Department's decision or will side with the *Kaur* dissent which cites *Goldstein* in recognizing the "structural limitations upon [the Court's] review of what is essentially a legislative prerogative"[40] and which would accord great deference to "two blight studies [which] documented substandard and insanitary conditions by photographic evidence and other indicia."[41] The dissenters find that Petitioners present merely "a difference of opinion" with the conclusions to be drawn from the evidence, in which event the courts are bound to defer to the agency.[42] Although at first blush a reversal would seem likely as being consistent with the Court of Appeals' holding requiring extreme deference to the agency's findings except in the most egregious of circumstances, this may be an opportunity for the Court, having defined one end of the deference spectrum with reference to the record in *Goldstein,* to define the other end by rejecting the agency's findings in *Kaur.* In any event, one would guess that the Court of Appeals will not adopt the Kennedy test. Had it done so in *Goldstein,* the respondents would likely have failed on four of the seven prongs of the test.

## A Hardship That Is Common to Surrounding Residentially Zoned Lots Is Not Sufficient to Constitute a "Unique Hardship" in the Context of an Application for a Use Variance

In *Vomero v. City of New York,*[43] the Court of Appeals held that the subject property's location in close proximity to commercial uses on a main thoroughfare was not sufficient to support a finding of uniqueness under the use variance standard because nearby properties shared similar conditions and thus such conditions were common to the neighborhood rather than unique to the subject property.

In *Vomero,* GAC Catering, Inc. ("GAC") purchased a residentially zoned corner parcel at the intersection of Hylan Boulevard and Otis Avenue on Staten Island directly across Otis Avenue from a catering facility also owned by GAC.[44] At the time GAC purchased the residentially zoned property, it was improved with a single-family residence. Shortly after it purchased the residentially zoned property, GAC demolished the house located on the property and applied to the City's Department of Buildings for a building permit to construct a two-story building that it intended to use as a photography studio in connection with its nearby catering business. The Department of Buildings denied the building permit on the grounds that the proposed photography studio use was not a permitted use of the property.[45]

GAC applied to the New York City Board of Standards and Appeals (the "BSA") for a use variance to permit the proposed photography studio use of the property. In support of its application, GAC submitted evidence showing that many of the corner properties in the surrounding neighborhood have become commercial and therefore its proposed use was not out of character with the surrounding neighborhood, and that the property was unique because of its purported irregular

shape and its location at the corner of Hylan Boulevard and Otis Avenue, which area, GAC explained, was predominately developed for commercial use. GAC also submitted a financial analysis in support of its contention that it could not realize a reasonable return if it were to use the property for a use permitted under the City's Zoning Resolution.[46]

The BSA found that GAC satisfied the applicable use variance standard and granted the variance. GAC's next door neighbor commenced this Article 78 proceeding challenging the approval.[47]

The Supreme Court, Richmond County, granted the petition and annulled the grant of the variance.[48] It held that the evidence in the record demonstrated that (1) GAC could realize a reasonable return on the property if it were to use or sell the property for a permitted use; (2) GAC's hardship was self-created since it admitted that it purchased the property with knowledge of the residential zoning in place (which, in the City of New York, apparently is relevant but not outcome determinative on an application for a use variance);[49] (3) granting the variance would have a negative impact on the character of the community notwithstanding the predominately commercial character of the surrounding neighborhood since the granting of the variance would further weaken the continuing viability of residential properties in the immediate area surrounding the property; and (4) that hardship was not unique to the property since GAC's property was similarly situated with respect to lot size and proximity to commercial uses to the surrounding residentially zoned and developed lots with frontage on Hylan Boulevard in the Otis Avenue/Bryant Avenue block. The court noted that the only difference between GAC's property and the other residentially zoned properties on Hylan Boulevard in the Otis Avenue/Bryant Avenue block was that GAC's property was on the corner (apparently not enough of a distinction in and of itself to make the property unique).[50]

The Second Department, with two justices dissenting, reversed the Supreme Court's annulment of the variance and dismissed the petition, holding that the BSA's decision granting the requested use variance had a rational basis in the record and was not arbitrary and capricious.[51] With regard to whether a "unique physical condition" rendered the property unusable for a permitted use, the majority focused on the fact that "other properties in the area, which have similar characteristics to and are in locations similar to the property at issue here, had 'unique physical conditions' such that 'practical difficulties or unnecessary hardships' would arise with conforming uses" and that there was no evidence in the record to distinguish GAC's property from such other properties.[52] On the issue of uniqueness, the dissent agreed with the lower court that the property was not materially different from surrounding residential properties and thus any hardship the zoning classification of the property imposed was not unique to the property.[53]

The Court of Appeals reversed the decision of the Second Department and reinstated the Supreme Court, Richmond County, decision, reasoning that

> The physical conditions of the parcel relied on by the board did not establish that the property's characteristics were "unique" as defined by New York City Zoning Resolution § 72-21(a). Proof of uniqueness must be "peculiar to and inherent in the particular zoning lot" (N.Y. City Zoning Resolution § 72-21[a]), rather than "common to the whole neighborhood."...The fact that this residentially zoned corner property is situated on a major thoroughfare in a predominantly commercial area does not suffice to support a finding of uniqueness since other nearby residential parcels share similar conditions.[54]

The holding in *Vomero* is not new law; it simply reinforces decades of case law which has consistently held that where a condition in a neighborhood affects several similarly situated properties in a substantially similar manner, that characteristic may not be relied on by any one of those property owners to support a finding that his or her property is unique in the context of the statutory use variance analysis.[55] *Vomero* should not be read as a wholesale preclusion of the consideration of the nature of the use of properties surrounding a property that is the subject of an application for a use variance when determining whether the subject property is unique. In fact, the Court of Appeals expressly states that GAC's proximity to commercial uses was not unique "*since other nearby residential parcels share similar conditions.*"[56] This qualifying language demonstrates that the Court did not hold that the nature of the surrounding area was itself insufficient or irrelevant to support a finding of uniqueness under the use variance standard; rather, the Court simply held that based on the facts in the record before it GAC's property was not unique.

## Fourth Department Case Notes

This quarter the Fourth Department decided several land use and zoning-related cases on such issues as, among others, the deference that a court must show a zoning board's interpretation of a zoning ordinance, religious land uses, and protest petitions.

With respect to the interpretation of a town's zoning ordinance, the Fourth Department reminds us in *McLiesh v. Town of Western*[57] and *Emmerling v. Town of Richmond Zoning Board of Appeals*[58]—that "'[a]lthough a

zoning board's interpretation of a zoning ordinance is entitled to deference, its interpretation is not entitled to unquestioning judicial deference, since the ultimate responsibility of interpreting the law is with the court.'"[59] In both cases, the Fourth Department held that the respondent zoning boards of appeals' interpretations of their respective town zoning codes were contrary to the language and intent of such codes and thus were arbitrary and capricious.

In *McLiesh*, the petitioner sought to erect an accessory structure (a detached garage) on his property. The respondent zoning board of appeals determined that the garage had to be set back from the petitioner's property lines in accordance with the principal structure setback requirements, notwithstanding the fact that the town code had different (and apparently less stringent) setback requirements for accessory structures. The zoning board then denied petitioner's application for an area variance from the principal structure setback requirements for the garage. Petitioner commenced this Article 78 proceeding and the Supreme Court, Oneida County, granted the petition, holding that the zoning board's determination that the principal structure setbacks applied to this accessory structure was arbitrary and capricious, and directed the zoning board to grant petitioner the requested area variance to build the garage (apparently the garage did not comply with the setback requirements for principal or accessory structures under the town's code). The Fourth Department affirmed the Supreme Court's finding that the zoning board's application of the principal structure setback requirements to petitioner's application was arbitrary and capricious; however, it reversed the lower court's direction to the board to grant the variance and remanded the case back to the zoning board for a *de novo* review of the application in the context of the accessory use setback requirements.[60] In *Emmerling*,[61] the petitioners sought to erect a fence, which was classified in the town's zoning code as an accessory use, on their property. The zoning board of appeals determined that petitioners required site plan approval from the town's planning board before they could obtain a zoning permit to erect the fence. Petitioners challenged the board's determination that they required site plan approval on the grounds that the town's code exempted accessory uses from site plan review. The Fourth Department agreed with petitioners that the "clear wording" of the town's code exempted their application to construct a fence on their property from the requirement that they obtain site plan approval from the planning board and held that the zoning board's decision otherwise was arbitrary and capricious.[62]

In *Libolt v. Town of Irondequoit Zoning Board of Appeals*,[63] petitioner, a religious order, established a home for men who were convicted of and incarcerated for non-violent drug- and alcohol-related offenses and recently released from prison to facilitate their reentry into society. The zoning district in which the home was located permitted single-family homes and churches, but did not permit halfway houses. The town issued petitioner a notice of violation on the grounds that it was operating a halfway house on the property in contravention of the zoning ordinance.[64] Petitioner appealed the determination that it was using the property for a prohibited halfway house to the respondent zoning board of appeals. The zoning board of appeals held that the petitioner was not using the property as a single-family residence, and confirmed the determination that the petitioner was using the property as a halfway house.[65] Petitioner brought an Article 78 proceeding challenging the zoning board's determination on the grounds that it was arbitrary and capricious and that such determination violated petitioner's rights under the First Amendment to the United States Constitution and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). The Court upheld the zoning board's determination that petitioner's use did not fall within a category of uses permitted on the subject property. With regard to petitioner's claim that the zoning board's decision violated the order's rights under the First Amendment, the Court held: "The ZBA's determination was in furtherance of the compelling governmental interest in maintaining the R-1 district as a single-family residential zone."[66] The Court also rejected petitioner's RLUPIA claim, holding that the zoning board's decision did not impose "a substantial burden on the religious exercise of a person, including a religious assembly or institution[.]"[67]

Finally, with regard to protest petitions, in *Gosier v. Aubertine*,[68] the Court held that "the signature of only one spouse with respect to property held as tenants by the entirety is sufficient for the property to be included in order to meet the 20 percent threshold required for a valid protest petition," even where the names of both spouses are included on the tax roll.[69] Petitioners, residents of the Town of Lyme, were opponents of legislation pending before the Lyme town board that would restrict the development of wind energy facilities within the town. Accordingly, petitioners signed a protest petition pursuant to Town Law § 265 with respect to the proposed amendment and submitted the protest petition to the town board. The town assessor's office reviewed the protest petition and determined that it was invalid because the valid signatures on the protest petition did not amount to 20 percent of the properties affected by the proposed amendment. The assessor's office came to this conclusion by, among other things, excluding as invalid signatures of only the husband or wife for properties owned as tenants by the entirety where both spouses were listed on the tax roll, reasoning that both spouses were required to sign the protest petition in order for the signature of either one to be valid. The town board, agreeing with the as-

sessment office's determination, adopted the disputed legislation by a vote of 3-2.[70]

Petitioners commenced an Article 78 proceeding to have the town board's determination that the protest petition was invalid annulled on the grounds that with respect to properties held by tenants by the entirety the signature of one spouse constitutes a valid signature for the purpose of the protest petition and that the town board's determination otherwise was arbitrary and capricious. The Supreme Court, Jefferson County, granted the petition, holding that the signature of either a husband or wife is a valid signature on a protest petition for property held by a husband and wife as tenants by the entirety, even where both names appear on the tax roll, and that the protest petition was valid. The Court also annulled the adoption of the legislation since it was not adopted by the required supermajority vote to overcome a valid protest petition challenge. The Fourth Department affirmed, relying primarily on the "'unique relationship between a husband and wife each of whom is seized of the whole [property] and not of any undivided portion of the estate, such that 'both and each own the entire fee.'"[71]

## Endnotes

1. *Kelo v. City of New London*, 545 U.S. 469 (2005).
2. For simplicity's sake, Respondent UDC together with ESDC will be referred to as "UDC" in the discussion of both cases which follow.
3. *Goldstein v. New York State Urban Development Corporation*, 13 N.Y.3d 511 (2009).
4. *Kaur v. New York State Urban Development Corporation*, 892 N.Y.S.2d 8 (1st Dep't 2009).
5. *Kelo*, 545 U.S. at 473-474.
6. *Id.* at 475.
7. *Id.* at 478-480.
8. *Goldstein, supra* note 3.
9. Urban Development Corporation Act, McKinney's Unconsolidated Laws of New York § 6253(6)(c)).
10. *Goldstein*, 13 N.Y.3d at 518.
11. The authors and the law firm with which they are affiliated have represented Forest City Ratner Companies in various matters, none of them related, however, to the subject of this litigation.
12. *Goldstein*, 13 N.Y.3d at 518.
13. *Id.*
14. *Id.*
15. *Id.* at 518-519.
16. *Id.* at 519. The *Goldstein* case actually raises three important issues—the two discussed in the foregoing sentence, as well as a discussion of procedural issue under EDPL § 207(A), providing that a proceeding challenging an EDPL § 204 condemnation determination must be filed in the appropriate Appellate Division within 30 days following the determination's completion and publication. Although the latter two issues are discussed thoroughly and at length in the decision, that discussion is beyond the spatial limitations of this "update." This discussion is limited to a determination of the central *Kelo* question, namely, when and under what circumstances private property can be taken from one person for use by another.
17. *Goldstein*, 13 N.Y.3d at 523.
18. *Id.* at 523-528.
19. *Id.* at 524.
20. *Id.* at 525 (*quoting Yonkers Community Development Agency v. Morris*, 37 N.Y.2d 478, 481-482 (1975)).
21. *Kaskel v. Impellitteri*, 306 N.Y. 73 (1953).
22. *Goldstein*, 13 N.Y.3d at 526 (*quoting Kaskel*, 306 N.Y. at 78).
23. *Id.* at 526-527.
24. *Kaur v. New York State Urban Development Corporation, supra* note 4.
25. *Kaur*, 892 N.Y.S.2d at 11-12, 23-25.
26. Columbia is the alma mater of one of your authors. Interestingly enough, of the 19 Justices in the First Department, four went to Columbia Law School; none were on this panel.
27. *Kaur*, 892 N.Y.S.2d at 11.
28. *Id.* at 12.
29. *Id.* at 13.
30. *Id.* at 16.
31. *Id.* at 15-16.
32. *Yonkers Community Development Agency v. Morris*, 37 N.Y.2d 478 (1975).
33. *Kaur*, 892 N.Y.S.2d at 16 (*quoting Yonkers Community Development Agency, supra; and citing Matter of City of Brooklyn*, 143 N.Y. 596, 618 (1894), *aff'd*, 166 U.S. 685 (1897)).
34. *Kaur*, 892 N.Y.S.2d at 18.
35. *Id.* at 18-19.
36. *Id.* at 19.
37. *Id.* at 19-20.
38. *Id.* at 23.
39. *Kaur*, 892 N.Y.S.2d at 25-26.
40. *Id.* at 34.
41. *Id.* at 34.
42. *Id.* at 34.
43. *Vomero v. City of New York*, 13 N.Y.3d 840 (2009).
44. *Vomero v. City of New York*, 13 Misc. 3d 1214(A), 824 N.Y.S.2d 759 (Sup. Ct., Richmond Co. 2006) (Table Case).
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *See Vomero v. City of New York*, 54 A.D.3d 1045, 1046-1047, 864 N.Y.S.2d 159, 160-161 (2d Dep't 2008).
50. *Vomero v. City of New York*, 13 Misc. 3d 1214(A), 824 N.Y.S.2d 759, *supra* note 44.
51. *Vomero*, 54 A.D.3d at 1046.
52. *Id.*
53. *Id.* at 1050.
54. *Vomero*, 13 N.Y.3d at 841.
55. *Clark v. Board of Zoning Appeals of Town of Hempstead*, 301 N.Y. 86, 90 (1950); *Douglaston Civic Ass'n, Inc. v. Klein*, 51 N.Y.2d 963, 965 (1980) ("Uniqueness does not require that only the parcel of land in question and none other be affected by the condition which creates the hardship...What is required is

that the hardship condition be not so generally applicable throughout the district as to require the conclusion that if all parcels similarly situated are granted variances the zoning of the district would be materially changed. What is involved, therefore, is a comparison between the entire district and the similarly situated land."); *Citizens for Ghent, Inc. v. Zoning Bd. of Appeals of Town of Ghent*, 175 A.D.2d 528, 530, 572 N.Y.S.2d 957, 959 (3d Dep't 1991) ("While respondents point to the close proximity of an industrial park, the nearness of a heavily traveled highway, and the unsuitability of the soil to distinguish the proposed site, the record evidence is that neighboring properties share these very same characteristics. Thus, any claim of uniqueness is dispelled."); *Kallas v. Board of Estimate of City of New York*, 90 A.D.2d 774, 455 N.Y.S.2d 288 (2d Dep't 1982).

56. *Vomero*, 13 N.Y.3d at 841.
57. *McLiesh v. Town of Western*, 68 A.D.3d 1675, 891 N.Y.S.2d 825 (4th Dep't 2009).
58. *Emmerling v. Town of Richmond Zoning Board of Appeals*, 67 A.D.3d 1467, 888 N.Y.S.2d 703 (4th Dep't 2009).
59. *McLiesh v. Town of Western*, *supra*; *Emmerling*, 67 A.D.3d at 1467-1468.
60. *McLiesh v. Town of Western*, *supra*.
61. *Emmerling*, *supra* note 58.
62. *Emmerling*, 67 A.D.3d at 1468-1469.
63. *Libolt v. Town of Irondequoit Zoning Board of Appeals*, 66 A.D.3d 1393, 895 N.Y.S.2d 806 (4th Dep't 2009).
64. *Libolt*, 66 A.D.3d at 1393-1394.
65. *Id.* at 1394.
66. *Id.* at 1395.
67. *Id.*
68. *Gosier v. Aubertine*, 891 N.Y.S.2d 788 (4th Dep't 2009).
69. *Id.*
70. *Id.*
71. *Id.*


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