



# BUILDING EMPIRES, DESTROYING HOMES:

*Eminent Domain Abuse in New York*



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## INTRODUCTION

New York is perhaps the worst state in the nation when it comes to eminent domain abuse—the forcible acquisition of private property by the government for private development. Over the past decade, a host of government jurisdictions and agencies statewide have condemned or threatened to condemn homes and small businesses for the New York Stock Exchange, The New York Times, IKEA, Costco, and Stop & Shop. An inner-city church lost its future home to eminent domain for commercial development that never came to pass. Scores of small business owners have been threatened with seizure for a private university in Harlem and for office space in Queens and Syracuse. Older homes were on the chopping block near Buffalo, simply so newer homes could be built. From Montauk Point to Niagara Falls, every community in the Empire State is subject to what the U.S. Supreme Court has accurately called the “despotic power.” This enthusiasm for eminent domain is encouraged by the New York courts, which habitually rubber-stamp condemnations and seem to consider any kind of private undertaking a public use.

But things may be changing. This month, New York’s highest court will hear a case that could at last place limits on the state’s condemning authorities when they seek to take private property for someone else’s private development.

This report is designed to serve as a resource to anyone trying to understand the complex and byzantine laws that allow eminent domain abuse to happen and the issues surrounding the government’s power to take property. It presents both the law and the stories that make up New York’s reprehensible history of eminent domain abuse, but it also suggests solutions the courts and the Legislature can implement to ensure everyone keeps what is rightfully theirs to own.

## LEGAL OVERVIEW: HOW EMINENT DOMAIN IS USED IN NEW YORK

“Eminent domain” is the power of government to take away a person’s private property. In the United States, this power is limited in several important ways. The New York and United States constitutions both state that private property shall not “be taken for public use without just compensation.”<sup>1</sup> This constitutional provision imposes two limits on the taking of private property: First, that the use must be public, and second, that just compensation must be paid. If private property could be taken for any use at all or strictly for private use, the term “public” would not have been included.

When New York’s constitution was adopted in 1826, “public use” was understood by everyone—courts, local governments and the general citizenry—to have its ordinary meaning: Eminent domain was intended only for projects that would be owned by and open to the public.<sup>2</sup> Eminent domain was a power that allowed the government to condemn property in order to construct public works, like roads and water systems, and to erect public buildings, such as post offices.<sup>3</sup> Courts further explained that government was limited to taking only that property “necessary” for the public use.<sup>4</sup> It could not simply grab additional land to increase its holdings.

The original understanding of “public use,” however, proved too narrow for the tastes of many New Yorkers, so they changed it the old-fashioned way—by amending the state constitution. First, in 1846, the constitution was amended to expressly permit the use of eminent domain for the construction of private roads (that is, roads owned and maintained by private individuals).<sup>5</sup> Then, in

1894, the state constitution was amended again to allow the use of eminent domain on behalf of agricultural property owners who needed to construct “drains, ditches and dikes” on neighboring properties for drainage purposes.<sup>6</sup>

Gradually, though, constitutional amendments fell out of favor as a means of expanding the meaning of “public use,” and today the government simply ignores any limits on its power to exercise eminent domain. Courts, instead of fulfilling their traditional role as a check on abuses of power by legislatures and members of the executive branch, have abdicated their role and often simply defer to whatever claims of “public purpose” the Legislature or administrative agency makes, no matter how preposterous. With one notable exception (see “A Small Step Forward in Haverstraw” sidebar), New

York courts have essentially abandoned their vital job of policing the boundaries of “public use.”

In the absence of meaningful judicial supervision, state agencies and local governments have run rampant. Local governments

now routinely take property and give it to a private party for their economic profit, hardly a public use.<sup>7</sup> After a private business or developer identifies the parcels of land it wants to acquire and city agencies approve a “redevelopment project,” the city attempts to confiscate these private properties and transfer them to the developer. At the same time, governments give less and less consideration to the necessity of taking property for whatever project is planned. They also ignore the personal loss to the individuals being evicted.

With strong economic incentives for government to abuse eminent domain and no meaningful limitations imposed by the courts, it comes as no surprise that government has responded to these incentives with the torrent of abuses that has steadily eroded private property rights in the state.

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Where New Yorkers could once treat their homes as their castles, it is no exaggeration to say that private property can now routinely be condemned for any reason—or, as we will see, for no reason at all.

New York law not only makes it easy to condemn property, it actively encourages city agencies to do so. A variety of incentives are in place to motivate cities to create redevelopment zones, and to invite private developers to use government force to obtain the private properties contained in them, instead of negotiating in the free market. In this perverse system, city agencies and private developers are actually encouraged to team up together against local property owners.

Normally, when cities exercise eminent domain for public purposes such as road expansion, the prohibitive legal costs make authorities consider the necessity of eminent domain very carefully. But when private developers offer to pay the legal costs of condemnation, the city and the developer stand to make a profit from the violation of local property owners' rights.

The eminent domain process in New York is astonishingly, almost maddeningly complex, and can unfold over the course of years or even decades. For all the public hearings, resolutions, and trappings of accountability the process features, however, it actually provides vanishingly little protection for property owners' rights or real public participation.

The process frequently begins with the creation of a redevelopment area, declaring an area of a city "blighted" or "in need of redevelopment." This declaration can proceed on the flimsiest of excuses—that buildings have "outmoded design" (a contemporary urban planner might design it differently), "lack of suitable off-street parking,"<sup>78</sup> or even "impairing the 'economic soundness' of nearby buildings" and "threatening the source of public revenues."<sup>79</sup> Indeed, to adopt a redevelopment plan, the government does not even need to find that the area it is designated is *actually* a substandard

area—it can proceed on the grounds that an area is "in danger of becoming a substandard or insanitary area."<sup>10</sup>

Once the government agency determines the area to be "redeveloped," it then adopts a redevelopment "plan" for the area after a public hearing.<sup>11</sup> While these plans often specify which particular properties the government intends to take through eminent domain, they do not necessarily mean the government intends to take these properties *soon*. Indeed, it is not uncommon for redevelopment zones—and the resulting cloud of future condemnation—to persist for decades.<sup>12</sup> To actually use eminent domain, the government must conduct a public hearing on that topic and issue a "Determination and Findings," a document that grants it the power to use eminent domain.<sup>13</sup> Other hearings are also generally required, for example, to determine the environmental impact of a proposed project.<sup>14</sup>

Of course, all of these hearing requirements provide little in the way of practical protection. Indeed, the government will often conduct several required public hearings in a single meeting—to a lay observer, what looks like one hearing can count for as many as seven, making it difficult for people to take steps necessary to preserve their legal rights. It can be difficult for property owners to even figure out which hearings count for what, as the government sometimes issues its Determination and Findings in the middle of the process (while assuring citizens that they are still in the early stages of the process). In certain circumstances, the government can even bypass ordinary procedural requirements altogether (including the requirement of issuing a Determination and Findings), making it all the more difficult for property owners to protect themselves.<sup>15</sup>

Moreover, these hearings are most notable for what they *lack*. There is no requirement that anyone testify under oath, no opportunity for property owners to challenge the government's evidence or cross-examine its witnesses, and no requirement

that the government allow property owners to get access to documents or even answers to their questions. In other words, the government can declare your property blighted without anyone ever testifying under oath or answering questions about why.

Things do not get any better if property owners try to mount a legal challenge. Most of the time, a property owner's legal challenge must be heard directly by an appellate court, which confines its review to the record from the public hearing.<sup>16</sup> Property owners are entitled to nothing that even resembles a trial—there are no sworn witnesses, no cross-examination, and no meaningful way to challenge the government's evidence at all. Unsurprisingly, the overwhelming majority of property owners fail to overcome this incredibly stacked deck.<sup>17</sup>

As if all this weren't enough, New York stacks the deck even further by forcing property owners to challenge condemnations months or even years before the government actually tries to take their property. New York law does not allow property owners to raise objections to the legality of the condemnation of their property at the time of the taking.<sup>18</sup> Instead, once the government issues its Determination and Findings—that is, once the government announces it might possibly, someday want to seize property through eminent domain—property owners have only *30 days* in which to file their own affirmative lawsuit objecting to the future taking.<sup>19</sup> If property owners do not do this, they are helpless when the condemnation notice arrives years later.

New York is virtually unique in requiring property owners to defend their rights before they even know when and if their property will be condemned—or lose them forever. Requiring owners to appeal from Determination and Findings made by the condemnor after a public hearing makes no sense at all. Property owners have no meaningful incentive to challenge the decision, because there is no guarantee the government

will ever even try to take their property. The government can change the properties included in the plan, can wait years before actually condemning, or could never receive approval from other government agencies. Yet if the owner doesn't appeal, he loses all rights to make those arguments later. The system couldn't be better designed to prevent owners from asserting their rights. Not surprisingly, most states use a more logical system, allowing property owners to raise their defenses at the time the government moves to take their property.<sup>20</sup> Plans change, and it is at the time that the government tries to take the property that an owner is in a position to fully object. Only a handful of states use New York's irrational system of requiring owners to bring their constitutional challenges to a condemnation that hasn't even taken place.<sup>21</sup>

New York's system violates the fundamental due process rights of New York property owners. Although owners are allowed to stand and express their concerns about the process, there is no opportunity to question the condemning government body or the developer who stands to benefit. Should property owners somehow learn of the hearing and appear, they may present evidence, but they may not cross-examine witnesses or ask questions. Four minutes of presentation is hardly a meaningful hearing. But due process requires that when a person is deprived of his property, the hearing the government provides must be "adversarial"—with an opportunity for questioning and for each side to present arguments.<sup>22</sup>

Simply put, New York has created a system that is almost impossible for property owners to navigate without expert guidance, structured it in such a way so as to remove the ordinary owner's incentive to challenge eminent domain at the only time challenges are allowed, and then stacked the deck so heavily in favor of the government that challenges are almost unwinnable. Unsurprisingly, this relentlessly pro-condemnation system has turned New York into one of the nation's most egregious abusers of eminent domain.





## EMINENT DOMAIN IMPEDED TIMES SQUARE'S REVIVAL SAYS MAN WHO OVERSAW GOVERNMENT PLAN

There is an old expression in journalism: "Consider the source." So, when a former government official who oversaw a development as prominent as Times Square says his agency and its use of eminent domain actually impeded the area's development, that is news.

In a report released by the Institute for Justice, William J. Stern, former chairman and chief executive of New York State's Urban Development Corporation—the agency tasked with orchestrating Times Square's revival—tells the story of government incompetence and eminent domain abuse in *The Truth About Times Square*.

Since its revival in the 1990s, Times Square has been touted as the standard of urban planning, with government and private actors working harmoniously to produce the great tourist destination we know today. But in *The Truth About Times Square*, Stern documented how all of that is a myth. In his report, Stern said, "Almost none of the grandiose plans my colleagues and I created and aggressively spearheaded at the time ever came to fruition. Our extravagant plans actually retarded development for decades. The changes in Times Square occurred despite government, not because of it."

"Eminent domain was not needed in Times Square," continued Stern. "In fact, it delayed the development, added tremendous cost, and was unfair and inefficient. There was no shortage of developers willing to acquire property the old-fashioned way—through the private market."

"Times Square succeeded for reasons that had little to do with our building and condemnation schemes and everything to do with government policy that allowed the market to do its work, the way development occurs every day nationwide," concluded Stern. "By lowering taxes, enforcing the law, and getting out of the way instead of serving as real estate broker, the government incentivized investment and construction and encouraged the rebirth of Times Square to what it is today."

The full report is available at [www.ij.org/stern](http://www.ij.org/stern)

## EMINENT DOMAIN ABUSES IN NEW YORK: WHO IS AFFECTED?

New York is undoubtedly one of the worst abusers of eminent domain in the country. But with all the talk about the reasons why that is the case, it is often easy to overlook the fact that eminent domain abuse has real-world effects on everyday people. The following are just a few of the most outrageous instances of abuse to happen over the past several years, showing exactly how the law is stacked in favor of the government, and just how overwhelming the situation is for home and small business owners.

### *Albany*

- Homes of 1,800 people threatened with seizure for undefined redevelopment<sup>23</sup>
- 30-year resident says eminent domain is “scary as hell”<sup>24</sup>

In March 2005, the city council threw the Park South neighborhood of Albany into fearful uncertainty when it designated the 26-acre community an urban renewal area, giving the city power to seize property via eminent domain.<sup>25</sup> Projects have already begun in Park South, as 18 buildings were razed and rebuilt in 2008.<sup>26</sup> Condemnation was not filed against those properties, but the threat of it is often enough to pressure owners to sell, and that threat continues to loom over nearly 2,000 residents in the area.<sup>27</sup> Although developers try to reassure residents that they aren’t interested in forcing sales, eminent domain remains in the development plan in broad terms, for “unusual cases where a strategic parcel cannot be obtained through voluntary negotiations.”<sup>28</sup> Pat Kelly, a community activist who rode around Park South on a scooter monitoring drug dealers, lived

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for 43 years on Dana Avenue. “She was so worried about her house getting demolished ... she would cry, she was so upset,” her friend Emily Washburn told reporters.<sup>29</sup> Kelly passed away in 2005, still in fear of her home being seized. “She kept saying that all she has is Park South,” Albany police officer Loren Grugan remembers.<sup>30</sup> Other projects are expected for that area and nearby, including a convention center, and every new plan places more properties in the path of the eminent domain bulldozer.<sup>31</sup>

### *Elmira*

- Land seized for no particular plan sits vacant

In 2004, eight properties were condemned and six purchased under the threat of eminent domain for the city of Elmira’s South Main Street Urban Development project. The properties included apartment houses, a garage and a carriage house. City officials wanted to demolish these along with an adjacent parcel to create a 6.38-acre lot for future retail development. Elmira’s director of public services, Ron Hawley, said, “It will be a better-looking site without those houses standing.”<sup>32</sup>

Apparently “a better-looking site” is an empty one, as the City Manager said at the time that officials had no particular plans for the site. Instead, they hoped that assembling the land in a neat package ahead of time would entice a private developer to submit plans.<sup>33</sup> “We’re taking a risk, and we understand that,” said Councilman Dan Royle. Thirty tenants have been displaced.<sup>34</sup> Most of the residents affected by the condemnations and buy-outs are low-income—people who lack the resources to defend their property and their rights—which made it easier for City Manager Samuel Iraci Jr. to bully them out of the community. Iraci believes that “the [eminent domain] law is there to serve the public purpose—one where government can go

in and assemble properties that a private developer would not be able to do, and do it at a price that's fair."<sup>35</sup> One local businessman, Bren Alleman, didn't think the idea was fair. "They always pick on the people who can't fight them," he said of Elmira's record of eminent domain abuse.<sup>36</sup>

#### *Farmingdale*

- Eminent domain as "ethnic cleansing" according to local immigrant advocacy group

Racial tension and eminent domain are closely linked in Farmingdale. A longtime destination for migrant workers, in recent years Farmingdale has become a popular home to Hispanic day laborers. Village officials have tried a variety of ways to discourage contractors from coming to Farmingdale to hire day laborers, from establishing hiring spots to enforcing strict traffic regulations. In 2004, when village officials restored a plan to condemn and redevelop a largely Hispanic six-acre area of Farmingdale, local immigrant advocacy groups alleged that eminent domain was being abused as a form of "ethnic cleansing of Latinos."

Currently, the project calls for the acquisition of an apartment complex at 150 Secatogue, with 56 apartments and about 150 people; a commercial strip including a pizzeria, a Chinese restaurant, a liquor store, a deli, and a gas station; and 11 multifamily and seven single-family homes.

The property at 150 Secatogue, owned by John Tossini, is the largest property on the village's list for demolition. The apartment building has been issued citations for multiple code violations, but Tossini feels less than compelled to make improvements to the property since it might not be there for much longer. (This is commonplace across the nation; when eminent domain is threatened, property owners rarely invest more money into a property because they know there is a great risk that they will never recover what they invest. As a result, eminent domain causes even well-maintained properties to fall into disrepair.) Although he expressed interest in redeveloping, the village began condemnation proceedings against him, leaving the tenants largely unaware of what was going on.<sup>37</sup>

In August 2005, 150 Secatogue was put under contract to be sold to a "nationally recognized real estate corporation."<sup>38</sup>

Village officials claim that the redevelopment is intended to revitalize Farmingdale after a recent and noticeable decline, but some see it as an attempt to eliminate a pesky immigrant problem. Resident Carlos Canales refuses to stand by and watch as residents' homes are pulled out from under them: One night a week, after English classes, he teaches some of the tenants of 150 Secatogue about eminent domain and what they can do about it.<sup>39</sup>

## **NOT-SO-FUN FACTS ABOUT NEW YORK & EMINENT DOMAIN ABUSE**

During the past decade, New York has been a hotbed of activity for eminent domain abuse. Because the numbers of instances of eminent domain abuse are greatly under-reported, no one knows exactly how often eminent domain is used for private gain in the Empire State. Since 1998, here is a conservative estimate of the numbers we found through news reports:

- 2,226—properties condemned or threatened with condemnation for private development.
- 74—development projects around the state used eminent domain for private development
- 0—laws passed to decrease government's ability to engage in eminent domain abuse.



### *Haverstraw (Kanner)*

- Holocaust survivor's family business threatened with condemnation

Andrew Kanner survived Auschwitz and immigrated to the United States in 1951 to pursue the American Dream. He began sweeping floors at the Empire State Chair Factory and rose to become president and co-owner of the factory in the 1970s. Shortly before he passed away in 1995, he closed the plant, leaving his property in the hands of his partner, Raymond Knoop, his widow, Agnes, and his son, Bruce.<sup>40</sup>

Bruce and Agnes decided to develop the nearly 10-acre property. In 1998 they proposed to village trustees their plan to build homes and a community resource center complete with computers and staff to help students with their homework.<sup>41</sup>

Mayor Francis “Bud” Wassmer denies such a site plan was ever submitted. Village officials were anxious to redevelop the land and they had their own ideas on how to do it—ones that drew the profit away from the Kanners and into their own pockets.<sup>42</sup> In March 1998, the village offered to let the Kanners sell their land to a developer if 50 percent of the profits went to the village.<sup>43</sup>

Then in July 1999, developer Martin Ginsburg of the Ginsburg Development Corporation entered the scene and proposed building a massive, multi-use project on the Kanners’ property and the surrounding area along the Hudson River. The plan includes luxury condominiums and homes, a hotel conference center, a restaurant and a parking garage, mainly on inactive former industrial sites.<sup>44</sup>

Village trustees were more than eager to oblige and initiated a planning process that has been marked by secrecy and disorder.<sup>45</sup> For instance, three village board trustees met with Ginsburg for dinner at another of his developments. Since there are only five trustees in Haverstraw, the trio constituted a majority and the dinner was therefore an illegal public meeting under state law, according to Robert Freeman, executive director of the state Committee on Open Government.<sup>46</sup>

In a January 2003 letter to the Mayor and Board of Trustees, Special Counsel Liam J. McLaughlin complained that the board was scheduling votes and meeting with the developer’s lawyers without informing him. He further admonished them for rushing through the planning stages, at Ginsburg’s behest, without leaving time for proper consideration of Ginsburg’s proposals and their impacts.<sup>47</sup>

That letter appears to have had little effect. In July 2003, officials scheduled seven public hearings necessary for a vote on the redevelopment plan for one single evening.<sup>48</sup> The meeting had to be rescheduled twice: First, because the village staff did not give ten days public notice as required by law and again, after a trustee, Ricky Sanchez, left in anger because two other trustees were not there. One was on vacation in the Dominican Republic.<sup>49</sup>

Wassmer and Village Attorney J. Neslon Hood had told citizens that consultants would be at the hearings to answer questions. The consultants were there but not allowed to speak. “If we had that kind of back and forth, we’d have been here till 3 a.m.,” said Wassmer. Officials did not so much as present an agenda to the 150 residents who showed up. Nor did they provide any materials in Spanish, although the town is 60 percent Spanish-speaking. Residents pleaded for information about whether their homes would be condemned. Officials said they could not be sure.<sup>50</sup>

Ricky Sanchez and another trustee, Angelo Cintron, also criticized Wassmer and Hood for meeting with the County Planning Commissioner, James Cymore, without notifying the village board.<sup>51</sup> Sanchez even requested that state Attorney General Eliot Spitzer investigate Wassmer and Ginsburg.<sup>52</sup>

In the land acquisition and disposition agreement, signed in 2003, village officials required Ginsburg to help pay for renovations on properties along Main St., to set aside a portion of the project for “affordable housing” and to help secure state and federal funding for the project.<sup>53</sup> In return, they gave him a lifetime purchase option, despite the fact that neither the village nor Ginsburg actually owns the land, and further agreed to use eminent domain to seize it for

him, which they can do because the land is in an urban renewal district.<sup>54</sup> This effectively means the Kanners must pay taxes—about \$90,000 a year—but cannot sell or develop their land.<sup>55</sup>

“We’re paying our property taxes and [the developers] aren’t giving us any offer. They just talk about our property like it’s theirs,” said Agnes in July 2003.<sup>56</sup> Indeed, Ginsburg has said that he may not buy the property for several years while he works on other phases of the project.<sup>57</sup> “It’s unfair to burden us with the property’s expenses while Ginsburg decides when they want to take our property,” said Bruce Kanner. “Mom is in her mid-70s. Another partner is in their 80s. When do they get to enjoy what their families worked for?”<sup>58</sup>

Ginsburg did make offers—one in 2000 and one in November 2004—but they were not well received. According to Kanner, each of Ginsburg’s offers for the land, on which he plans to build 150 units, amounted to the sale price of a single unit in a part of the development already under construction.<sup>59</sup>

The 2004 offer—for \$1.5 million—was based on a highly subjective village appraisal and “subject to the completion of Phase I and Phase II Site Assessment Studies.” Remediation, if any, as well as demolition, would be deducted from the value of the offer.<sup>60</sup>

Negotiations grew frosty: In March 2005, Kanner told Ginsburg to offer market value for the property, based on offers from other developers rather than a biased village appraiser, or to leave his property out of the redevelopment.<sup>61</sup> Ginsburg declined.<sup>62</sup>

In February 2005, the Kanners paid \$100,000 to demolish the factory after village officials granted them the permits to do so.<sup>63</sup>

In the meantime, Ginsburg asked the state’s Department of Environmental Conservation’s Brownfield Cleanup Program to conduct tests, using taxpayer money, to see if the soil on the site was

contaminated, without notifying or getting permission from the Kanners to enter their property.<sup>64</sup>

As this debacle enters its tenth year, the Kanners continue ask for what they’ve always asked: To be paid a price for their land beneficial to all parties or to be left alone to develop it themselves in the free exercise of their property rights.

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As of June 2008, the Kanners’ title had been seized, and they had received no compensation for their property, reportedly due to pending lawsuits filed by the Kanners against the village.<sup>65</sup>

*Haverstraw (AAA Electricians)*

- Local business pushed out for waterfront development

Private developer Martin Ginsburg wanted to buy the property of AAA Electricians, owned by Ruby Josephs, to build 490 new housing units as part of a waterfront redevelopment project in the village of Haverstraw. When three years of negotiations between the owner and the developer did not result in a sale, the village stepped in. After designating the area an urban renewal district, village officials decided to condemn the property. As Mayor Bud Wassmer said, although they would “prefer that the developer and property owners work things out,” the need for the property in the near future for the redevelopment project meant the village could not “allow this to drag on for years.”<sup>66</sup> Avoiding any subtlety, once the property was condemned in November 2003, the city admitted its plan to set up an escrow account to pay for it, in which Ginsburg would deposit the money to purchase the property. Once the money was deposited, the village would hand the seized property to Ginsburg.<sup>67</sup>

*Haverstraw (HOGAR)*

- Court holds that village was wrong to choose redeveloper of someone else’s property

On June 22, 2005, Ken Griffin and Patrick Lynch bought a commercial building to fix up. Eight days

later, they learned that village officials had ongoing plans to condemn the property.<sup>68</sup> During the past several years, various ideas had been floated, including a supermarket or offices for the village.<sup>69</sup> The latest plan was to transfer the building to Housing Opportunities for Growth, Advancement and Revitalization (HOGAR), an affordable-housing agency, which rents space in the building, with the idea that HOGAR would construct affordable housing.<sup>70</sup>

The new owners made clear they were willing to work with officials to redevelop the building, but the village was not interested.<sup>71</sup> In December 2005, Village officials started the condemnation process despite the new owners' offer to build a remarkably similar project to HOGAR's, but using private instead of public funding. They proposed affordable housing, office space, and a medical facility in addition to a mix of retail shops. According to Mayor Wassmer, the village did not want retail in that space. Instead, the village wants to spend approximately \$4.39 million, most of which will come from a federal Community Development Block Grant loan, for a strikingly similar project.<sup>72</sup> Griffin and Lynch opposed the project in court.<sup>73</sup>

In June 2007, the Appellate Division of the State Supreme Court issued a landmark ruling, holding that the use of eminent domain to acquire the Graziosi Medical Complex was inappropriate, forcing HOGAR to take its plans elsewhere.<sup>74</sup> (see "A Small Step Forward in Haverstraw" sidebar below)

#### *Haverstraw (Main Street apartments)*

- Low-income families threatened by unnecessary urban renewal

In 2004, the village board members commissioned a study of properties along Main Street that determined they were eligible to become part of an urban renewal zone, exposing them to the threat of condemnation.

At issue is a stretch of eight apartment buildings between Second and Third Streets that several landlords rent to low-income families. Village officials say they envision a developer, possibly Ginsburg, constructing buildings with residential space above first floor shops.

Village officials claim that the buildings' current landlords are not renovating their rundown properties fast enough. "If the landlords don't move forward in a timely manner, we will take the

### **A Small Step Forward in Haverstraw**

As the laundry list recounted in this report makes clear, the village of Haverstraw is well-acquainted with eminent domain abuse. But that torrent of abuse created an unexpected silver lining: Through a case litigated out of Haverstraw, a New York court has issued the most pro-property rights decision the Empire State has seen in years.<sup>149</sup>

In *49 WB, LLC v. Village of Haverstraw*, the Appellate Division of the Supreme Court of New York invalidated the village's attempt to condemn property to create affordable housing, based on the commonsense observation that the village's plan would actually have destroyed more affordable housing than it would create.<sup>150</sup> The court's opinion acknowledged how controversial the U.S. Supreme Court's *Kelo* decision had been, and anticipated that it would give rise to "a growth industry for litigation over the purported public uses which have formed the basis for takings of private property."<sup>151</sup>

The court's opinion may not seem groundbreaking; after all, why should one be surprised when a court simply looks at the facts of a case and makes a decision as obviously correct as this? But, both in its willingness to take seriously the property owners' objections and in its anticipation of future litigation, *49 WB* represents a post-*Kelo* shift in the tenor New York courts have taken in eminent domain challenge. Property owners in the Empire State can only hope the Appellate Division's decision presages a similar shift from other state courts.

properties and sell them to someone who will—simple as that,” says Mayor Wassmer.

The apartments’ residents, however, do not seem to think that they are living in substandard housing. “It’s not a perfect place, but it’s not bad, either,” says Gene Sams, who lives in a one-bedroom apartment with his wife and two stepchildren. “It’s basically something people can afford.”

Residents are worried that if the village uses eminent domain to seize the properties, they will not be able to find new housing in Haverstraw. “If they remove us, then new people are going to come in,” says Ginita Hernandez. “If we had to move, I’m not sure where we would go.”

Some landlords simply cannot afford to renovate the properties. “There’s only so much I can collect in rent,” says Josue Minaya, who owns 76 Main Street. “I already had to raise it. I can’t squeeze any more out of these people. They’re good tenants and they look after the building. I feel bad for them. I see these families working, struggling.”<sup>75</sup>

In February 2007, Mayor Wassmer said the village board members would consider a resolution putting the area in an urban renewal zone soon.<sup>76</sup>

#### *Village of Hempstead*

- At least 58 privately owned properties in working-class minority neighborhood offered to developer

In July 2002, consultants Saccardi & Schiff released a study finding eight blocks along North Main Street to be blighted. Factors contributing to the bogus blight designation include “small and inconsistently sized rooms,” and small lot sizes that developers supposedly could have trouble assembling without the threat of eminent domain. In addition to businesses, the affected area contains single-family homes for a total of 89 properties.<sup>77</sup>

According to the consultant, 43 percent of the buildings in the area are “deteriorated and deteriorating.” In a letter to the Castle Coalition, however, one property owner says Saccardi & Schiff stretched the definition of “deteriorated” to include his recently renovated building, now used as artist and commercial space.<sup>78</sup>

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### Officials plan to seize properties via eminent domain and turn the land over to private developers who, they hope, will attract upscale retailers to the downtown area.

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In January 2004, Saccardi & Schiff released an urban renewal plan for the area calling for the acquisition and demolition of properties to create new retail, residential and office space.<sup>79</sup>

After one developer’s plan for bringing in big box stores fell through, officials began

pushing a different scheme—thousands of new upscale condos built by developer UrbanAmerica near the village’s Long Island Rail Road station. Housing constructed in the \$2 billion plan will price out the village’s primarily working class Hispanic and African-American population, including the residents displaced by eminent domain abuse for the project.<sup>80</sup>

As of late July 2007, officials incorporated a performing arts center into the design, which would be subsidized by taxpayer money. No fewer than 58 private properties were offered by the village to the developer as part of the deal, even though those properties remained in private hands.<sup>81</sup>

#### *Town of Hempstead (Baldwin)*

- 36 properties declared blighted because of two found to be in poor condition in Hispanic community

In September 2005, Hempstead officials commissioned consultant Saccardi & Schiff to conduct a blight study in Baldwin. In March 2006, the town board voted to accept the study, which found the 38 properties on five acres “blighted” despite the consultant’s own findings that only two of the properties were in poor condition.<sup>82</sup>

Officials plan to seize properties via eminent domain and turn the land over to private developers who, they hope, will attract upscale retailers to the downtown area. The plan calls for forcing successful businesses and the tenants of some 47 apartments out of their homes and property.<sup>83</sup>

The properties that officials want to raze are those that house and cater to much of Baldwin's immigrant Hispanic community. When shown a copy of Saccardi & Schiff's blight study, Francisco Lopez, the manager of Andy's Mini Market, says the consultant included "the worst pictures, but they don't show the good stuff."<sup>84</sup>

In April 2007, officials selected three finalists among the would-be developers. Plans generally call for building several new big box stores anchoring other retail stores.<sup>85</sup>

As of January 2009, the redevelopment project was stalled by the failure of the favored developer to attract nationally known retailers. EBBK at Baldwin LLC (a partnership between Garden City-based Engel Burman and Lawrence-based Bassar-Kaufman) is backing out of the project. Town officials wasted no time in searching for another developer to complete the redevelopment. The town's plan is to use eminent domain whenever the developer cannot negotiate a deal with the owner, though reportedly the developer is offering far lower than market value. The delays are a product of a temporary economic downturn, and the town shows no signs of backing off from the project.<sup>86</sup>

#### *New York City (Brooklyn/Atlantic Yards)*

- \$2 billion in taxpayer money
- Only 12 percent of planned housing will be affordable to current residents

A three-pronged attack on property owners in Brooklyn is being perpetrated by the city, developer Bruce Ratner and the courts for the new Atlantic Yards project. In 2009, the New York appellate court

approved the use of eminent domain for a plan the city approved that calls for the purchase or seizure of 53 private properties, which Ratner will then destroy to construct an arena for the New Jersey Nets and 16 mammoth and wildly unpopular commercial and residential towers.<sup>87</sup> Even in the face of these major powers, the residents are putting up a passionate and well-organized fight. Resident Daniel Goldstein's organization, *Develop Don't Destroy – Brooklyn* (DDDB), has more than 4,000 donors and many more supporters, and has fought the project in court, in the media and on the streets.<sup>88</sup> Goldstein, the sole

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Not only do Goldstein and his neighbors stand to lose their property; many of them will be denied the opportunity to return to the neighborhood.

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remaining condo owner in his building, is fighting to save the homes and businesses of his neighbors. His DDDB website thoroughly debunks Ratner's claim to provide affordable housing for the residents he would displace:

"The Brooklyn area median income is \$35,000/year. 83 percent of ALL 6,430 [housing] units will NOT be affordable to families making less than \$56,000/year. If you or your family earn less than \$21,270, there is no home for you in the proposed project."<sup>89</sup> To make matters worse, the Ratner plan snatches the American Dream of property ownership from middle- and lower-income Brooklyn residents without any hope of return: "ALL of the 'affordable' units are rentals," DDDB reports. Not only do Goldstein and his neighbors stand to lose their properties; many of them will be denied the opportunity to return to the neighborhood.

Construction has not yet begun, six years after the plan was first revealed, and the New York Court of Appeals (the state's highest court) has scheduled an oral argument for October 14, 2009. Some hope for those opposed to the government-forced project arose when the famed architect on the project Frank Gehry accidentally said publicly that, "I don't think [the project is] going to happen." But the clear intention of the Empire State Development Corporation to abuse eminent domain for this project despite its financial woes keeps the properties of downtown Brooklyn treacherously close to demolition.<sup>90</sup>



## DEVELOP, DON'T DESTROY & GRASSROOTS

Develop Don't Destroy Brooklyn (DDDB) is a key example of an effective, organized grassroots effort against eminent domain abuse.

DDDB is a volunteer non-profit organization formed in February 2004. Its mission is to promote healthy economic development in Brooklyn by working with community members, instead of destroying their homes and businesses to rebuild them for other people. DDDB is on the frontlines in the fight against the Forest City Ratner plan that would raze acres of private property, as well as cost taxpayers more than \$1 billion. DDDB takes action by uniting the voices of community members; regularly publishing an e-newsletter and website with the latest updates on the Ratner disaster; organizing protests and events; and raising public awareness of the injustice of eminent domain abuse. They have also banded with other community groups, growing in strength by pooling common goals. Their achievements include public outreach, legal initiatives and the proposal of alternative plans to the city. They organized a march to City Hall which attracted 3,000 participants, and five annual walk-a-thons that have been immense crowd-draws.

DDDB's board is composed of community leaders, scholars, and famous actors and artists, including Steve Buscemi, Jhumpa Lahiri, and Jonathan Safran Foer. Former Institute for Justice client Susette Kelo, lead plaintiff in the universally reviled eminent domain decision *Kelo v. City of New London*, is also on the advisory board. Visit DDDB's website at <http://dddb.net>

### *New York City (Brooklyn: Downtown Plan)*

- Possible Underground Railroad sites threatened

In August 2004, city council members passed the Downtown Brooklyn Plan and put 130 residences and 100 businesses on seven acres (60 blocks) in the path of the wrecking ball. Activists say at least 300 businesses will be displaced.<sup>91</sup> The plan calls for 4.5 million square feet of new commercial office space, 800,000 square feet of retail space and 1,000 housing units.<sup>92</sup>

In addition to residents and business owners who may be forcibly removed from their property, historic preservationists dislike the plan, which calls for the destruction of several notable 19th-century buildings.<sup>93</sup> Several buildings along Duffield Street that city officials want to turn into a parking lot may have been stops on the Underground Railroad. Residents cite atypical constructions, such as a fireplace in the basement with shafts leading to the street and holes in the foundation that seem to have been filled as evidence of the homes' significance. Several

nearby churches are known to be Underground Railroad sites and noted abolitionist Henry Ward Beecher frequented the area.<sup>94</sup> Abolitionists Thomas and Harriet Truesdell lived at 227 Duffield Street.<sup>95</sup>

Officials in charge of the development were, however, anxious to raze the buildings. Joshua Sirefman, the chief operating officer of the city's Economic Development Corporation, testified in June 2004 that the Duffield Street houses had no connection to the Underground Railroad and that the EDC had consulted a dozen historic organizations. At least three of those organizations—the Schomburg Center for Research in Black Culture, the Weeksville Society, and the Bridge Street Church—were never even contacted. “Had any representative of your firm actually spoken to me, I would have informed them, without hesitation, that the entire length of Duffield Street is one of the city's most promising areas for the study of the Underground Railroad activity,” stated Christopher Moore, exhibitions research coordinator for the Schomburg Center and also a Landmarks Preservation commissioner.

Joy Chatel, who owns 227 Duffield Street, said nobody had come to investigate her building, in which she runs a hair salon. A spokeswoman for City Planning said researchers had visited the house but declined to ring the doorbell “out of respect.”<sup>96</sup>

In May 2007, city council members, who have no authority to stop the Economic Development Commission from using eminent domain to seize the houses, denounced a \$500,000 study undertaken to determine if the houses were part of the historic railroad. The EDC hired consultants AKRF, which completed the environmental impact study for the very same project and has worked on other projects including Atlantic Yards. The firm found that there was not enough evidence to support historical significance. “For you to get paid half a million dollars to conclude what the EDC wanted you to conclude, I think that is despicable,” said Councilman Charles Barron. “You’ve revised history, and we’ve landmarked things that have much less evidence than what you’ve listed here.” The homes are set to be razed for a park built above an underground garage that will serve ritzy new Aloft and Sheraton hotels and offices nearby.<sup>97</sup> Although the city pledged in late 2007 that at least one historic house would be spared from condemnation (227 Duffield Street.), officials are moving forward with the overall redevelopment.<sup>98</sup> Economic woes in the new construction market have delayed the project as of November 2008.<sup>99</sup>

#### *New York City (East Harlem)*

- Businesses thrive despite being surrounded by city-owned vacant land; in limbo for entertainment center. Developer files for bankruptcy.

The East Harlem Alliance of Responsible Merchants is suing the city and its development corporation to protect their businesses against condemnation. The city wants to level their community to make way for an entertainment center.<sup>100</sup> This is the second time this decade property owners in East Harlem have been threatened by eminent domain for private

development. In 2005, city officials threatened to condemn at least nine businesses for a four-block residential and commercial development project, even though officials had failed to complete two studies required to determine the feasibility of the project. Much of the four-block area consists of city-owned vacant land that city officials refuse to develop without taking out neighboring businesses that actually contribute to the area’s economy. Damon Bae, the owner of Fancy Cleaners, one of the threatened businesses, pointed out the project is facing major difficulties but the city still wants to seize the properties.<sup>101</sup> The main developer just filed for bankruptcy in April 2009.<sup>102</sup> There are 17 businesses operating in the condemnation zone.

#### *New York City (West Harlem/Manhattanville/Columbia)*

- 17 acres on chopping block for private university

When Columbia University decided to expand its campus into West Harlem, where long-time family businesses and homes stood, they expected the local owners to roll over and give up their property rights. But the people of Harlem have held firm, refusing to be bullied by the abuse of government force for Columbia’s \$5 billion, 18-acre private expansion.<sup>103</sup> Mayor Bloomberg and Governor Paterson support the expansion, and in 2008 the Empire State Development Corporation declared the area blighted and began the process of eminent domain.<sup>104</sup> Neighborhood businesses have refused to be extorted from their property for the sake of another private interest, and have taken the fight to court. Norman Siegel, the attorney for some of the Harlem property owners, explained, “Nobody’s opposed to Columbia expanding. They’re opposed to eminent domain.”<sup>105</sup> Oral arguments were heard by the New York State Supreme Court Appellate Division, First Department on May 22, 2009, and although New York courts have notoriously sided with developers against property rights, reports from the court hearing were hopeful for a Harlem win.<sup>106</sup> Without success in court, the property rights of West Harlem business owners will be dangerously

exposed to the abuse of eminent domain. Aman Kaur, the 17-year-old daughter of a family that owns two gas stations under the threat of eminent domain, told *The New York Times*, “It is unjust and cruel to take this away from us.”<sup>107</sup>

*New York City (Queens/Willets Point/Iron Triangle)*

- City creates blight for decades through overt neglect
- Multi-generational family businesses threatened

In November 2004, officials issued a “request for expressions of interest” from developers for Willets Point, a 62-acre area east of Shea Stadium that is home to a thriving mix of industrial businesses, including auto parts stores, sewer parts manufacturing, and a spice manufacturer. Known as the “Iron Triangle,” the area is shadowed by the threat of eminent domain abuse because the city thinks the successful businesses located there are not attractive enough. A bogus blight designation has been pursued by the city based on the lack of sewer, electric and garbage services, which the city itself has refused to grant existing property owners. The city even gets most of its sewer pipes from Willets Point business T. Mina Supply Co., but has not seen fit to build a sewer to its building despite taking from it about \$50,000 in annual taxes for many years. Meanwhile, the businesses in the Iron Triangle have flourished despite years of government neglect, plowing their own streets and making their own improvements to infrastructure. Now, their businesses are threatened with eminent domain abuse specifically *because* of the lack of public services the city itself is supposed to provide: well-maintained roads, sewers and other public services.

Local business owners are fighting back. They formed “Willets Point United Against Eminent Domain Abuse” and launched a website. The group’s spokesman, Jake Bono, head of family-

owned Bono Sawdust Company, has organized opposition at public hearings on the plan, as well as attending press appearances to speak against the land grab. In March 2009, 20 businesses from the area filed a lawsuit against the use of eminent domain, citing flaws in the city’s environmental review of the area. The redevelopment plan would not only displace already thriving businesses; drastic rezoning would prevent them from returning after their land is seized. “This is more than just wrong,” said Dan Feinstein, the third-generation owner of Feinstein Ironworks. “It’s un-American. We’re not going to let someone steal our livelihoods so

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“We’re not going to let someone steal our livelihoods so a developer can come in and make billions at our expense.”

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a developer can come in and make billions at our expense.” Since the economic downturn, redevelopment plans have been scaled back to a three-phase schedule, but the city’s own neglect still leaves Willets Point property owners exposed to the

threat of eminent domain, a threat that has hung over the community from various projects since 1985.

*Niagara Falls (casino)*

- 72-year-old widow evicted for casino

In 2002, then-Governor George Pataki signed an agreement with the Seneca Nation to build a casino in the former Niagara Falls Convention Center. The deal ensured the use of eminent domain to seize all of the property within a 50-acre area surrounding the convention center. The sole property owner exempted from condemnation is St. Mary’s of the Cataract Catholic Church.<sup>108</sup>

Because the Senecas were unable to acquire 26 acres through private negotiations, they turned to government force: the Empire State Development Corp. decided in November 2005 to use eminent domain to seize the remaining properties—two blocks containing nine houses, a water park, a parking lot, two hotels, a Pizza Hut, a small building and seven vacant lots. The Senecas will pay all the costs of the eminent domain proceedings and will

not pay property taxes on any land in the 50-acre footprint.<sup>109</sup> “This is not a piece of property; it’s a home,” said Trisha Villani, whose 72-year-old mother, Patricia Von Egmond, has lived on Rainbow Avenue for 50 years. “There’s no price you can put on it that can replace that.”<sup>110</sup> Von Egmond, a widow, raised four children in her house.<sup>111</sup>

Property owners were given just over one month to file objections. Knowing his property would be seized anyway, the owner of a Ramada Inn sold his hotel as well as a small building and six vacant parcels to the Senecas in December 2005. Niagara Falls Redevelopment, owner of the water park and parking lot, also decided not to file an objection, even though they had planned an \$800 million redevelopment of their own on their 17 acres.<sup>112</sup> Their property was seized in 2006.

Four property owners did fight the decision to use eminent domain—including Von Egmond and the owner of a Holiday Inn, who wanted to keep operating and develop his vacant property next door.<sup>113</sup> By the summer of 2006, however, Von Egmond and two others decided to settle out of court. The Senecas, meanwhile, do not have firm plans for the properties they acquired via eminent domain or the threat of it. “We’re aggressively looking at development and expansion options,” said spokesman Phil Pantano. “We don’t have [anything specific] at this point.”<sup>114</sup>

As of July 2009 the Senecas have put an indefinite hold on plans to develop the site.<sup>115</sup>

#### *Niagara Falls (Niagara Falls Redevelopment)*

- \$110 million project stalls indefinitely

Private developer Niagara Falls Redevelopment (NFR), whose properties—a water park and a parking lot—were condemned for the Senecas’ private casino (see above), has exclusive development rights to 220 properties on 142 acres for a separate project nearby. And because they are authorized to ask city officials to use eminent domain on those who do not want to sell, any

negotiations in this development are inherently stacked against the property owners.<sup>116</sup>

In 2003, officials approved an agreement with NFR calling for the construction of a \$110 million project in the area. Since then, precisely zero progress has been made. As of May 2007, officials were calling for another extension for NFR to begin building.<sup>117</sup>

As of March 2008, no progress had been made, but local property owners still sit under the shadow of potential condemnation.<sup>118</sup>

#### *Patchogue*

- 21 properties sold under threat

In the summer of 2005 village Mayor Paul Pontieri and Suffolk County Executive Steve Levy said they might condemn the homes and businesses on some 21 private properties on a five-acre site so private developer Pulte Homes could build Copper Beech Village—80 attached houses, half of which were to be subsidized. By July of 2006, all of the property owners, many of whom said they did not want to leave, had sold.<sup>119</sup> Their tenants, who likewise wanted to stay, were forced out.

#### *Peekskill (Downtown)*

- Architects begin before blight study is even complete
- 1,435 protesting citizens ignored

In May 2006, council members commissioned Cleary Consulting to conduct a blight study of four downtown blocks. According to a councilmember, officials provided no public notice of the proposal prior to the vote. Downtown business and property owners packed the next council meeting to protest the 20-acre study. Council members responded to the concern by voting to hire Warshauer Mellusi Warshauer Architects to create a redevelopment plan—before the blight study had even been finished.<sup>120</sup>

At the next public meeting, property owners presented officials with a petition opposing the blight study and plan. Mayor John Testa promptly dismissed the 1,435

signatures and has since said that many people who opposed eminent domain for private development in May had warmed up to the idea by July. Testa appears to believe that many signers were hoodwinked by “an organized campaign of misinformation, scare tactics and outright lies” he claims is taking place. This campaign appears to consist of some council members pointing out that if the city is *authorized* to use condemn properties, officials may *actually* condemn properties.<sup>121</sup>

The plan that emerged calls for a retail and residential development where 22 properties now sit. According to Cleary’s blight study, 77 percent of those are in fair to excellent condition.<sup>122</sup>

The plan threatens La Placita produce market, two diners, a Laundromat, the Hudson River HealthCare Clinic, Peekskill Paint & Hardware and a lot that has remained vacant since the building there was razed for an urban renewal project in the 1960s. Ironically, Peekskill Paint & Hardware survived that debacle—entire blocks and hundreds of properties were razed—only to be threatened by this new one.<sup>123</sup>

There are rundown properties within the project area—but these appear to be rundown because city officials refuse to grant the requisite rebuilding permits. Arnie Paglia, who owns commercial buildings in the threatened area, has a tenant lined up for the Karl Ehmer building, which is vacant. Planning commissioners have stalled the process—hindering redevelopment in an area officials say needs redevelopment. As of January 2007, the plan authorizing eminent domain is still working its way through the Planning Commission and the Committee of the Whole.<sup>124</sup>

#### *Peekskill (Waterfront)*

- 50 years of ineffective “urban renewal”
- Owner’s property was her retirement fund

In February 2004, private developer GDC Ginsburg Development LLC proposed building

40 acres of condos, restaurants and cafes along the city’s waterfront. Council members apparently liked the idea and in February 2004 hired consultants Saccardi & Schiff to “determine” if the area was blighted. Ginsburg paid for the study. In exchange, officials granted the developer exclusive privileges to build in the area.<sup>125</sup>

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The city has had the neighborhood in its redevelopment sights since 1958. According to Saccardi & Schiff’s study, 50 years of urban renewal has done little for the area.<sup>126</sup>

The consultants found that although 87 percent of the buildings in the area are in “fair” to “good” condition, the area is blighted. According to local definitions of blight, properties with “cosmetic deficiencies,” homes that sit next to businesses and parking lots (“incompatible land use relationship”), and “railings that are ... absent from stairway entries to some commercial buildings” give officials the excuse to abuse eminent domain.<sup>127</sup> The study area consists of 43 private properties including homes, commercial and industrial properties, a homeless shelter and an undeveloped lot. The city owns parking lots, a park and a brownfield site. Businesses include cafes, retail shops and offices, a residential hotel, a bakery, auto-repair shops, two restaurants, a bar, a sheet metal products distributor, a stone and building supply center, and a lumberyard. Council members voted to accept the study and “blighted” the properties, again, in June 2004.<sup>128</sup>

In September 2005, Mayor John Testa told concerned property owners that officials did not intend to seize anyone’s property, but that the option would be left on the table. Property owners were not reassured. “I saved and sacrificed because that was going to be my 401(k),” said Helen Christian, owner of a vacant lot that’s been in the family for 50 years. Ginsburg has offered her far less than what other developers offered for the riverfront property and certainly not enough to retire on.<sup>129</sup>



According to Saccardi & Schiff’s draft Environmental Impact Statement, Ginsburg’s “transit-related” plan would be a “higher and better” use for the area. The statement says the redevelopment will leave 23 parcels untouched—meaning some property owners may dodge the bullet. The statement also considers various alternatives to Ginsburg’s plan. If officials choose “no action,” the waterfront will supposedly remain in its current “underutilized” and “uninviting” condition. Officials could also pursue “redevelopment without the use of eminent domain.” Under this scenario, officials would not seize any property until “the preferred developer is unable” to acquire properties with the threat of eminent domain alone.<sup>130</sup> For residents, the only difference is if their homes will be seized now or later. This is the equivalent of a thief’s threat, “Your money or your life.” Your life is only taken when the thief was “unable” to acquire your money by other means.

At public meetings in July and August 2006, Peekskill residents presented many concerns about the project, among them the use of eminent domain to “twist the arms” of property owners.<sup>131</sup> Officials adopted the environmental impact statement in November 2006.<sup>132</sup>

#### *Schenectady*

- Historic building seized after years of failed negotiations

In December 2006, Metroplex Development Authority Chairman Ray Gillen said officials may seize the vacant but architecturally significant Foster building via eminent domain for a retail project after the authority was unable to reach a sales agreement with the owner.

In June 2009, authorities began taking steps to seize the Foster building through eminent domain after years of negotiations with the owners Dennis Todd and Craig Alsdorf, who are unwilling to accept the price offered by the Metroplex Development Authority. Gillen, who “still hopes a

sales agreement can be reached,” will not disclose how much he has offered for the property.<sup>133</sup>

If “ownership” means anything in this nation, it is supposed to mean that the owner is supposed to decide if or when they sell it, to whom and for how much they would be willing to settle for to part with what is rightfully theirs. When the government can force an owner to sell their land, then owners are reduced to what amounts to glorified lease holders who must give up what they own when the government demands it.

#### *Spring Valley*

- 41 tenants, including immigrants, evicted
- Compensation far below market value

In November 2004, village trustees approved a downtown urban renewal project that calls for Community Preservation Corp, a nonprofit developer, to build two mixed-use buildings with “affordable” residences, retail and parking, where two commercial buildings housing 41 tenants stood.<sup>134</sup> The development will be financed with federal, state and county funding.<sup>135</sup>

In June 2005, officials asked the state Supreme Court for the authority to condemn 15 properties along Main and Grove streets—including the two commercial buildings—whose tenants objected to the city taking their livelihoods for “far, far under market value.” Businesses affected include tax preparation services, a communications business, a diner owned by a Haitian immigrant and Caribea Botanical, which was owned by a Jamaican immigrant.<sup>136</sup> In August, the court ruled that officials could seize those properties and additional 15 for as-yet unspecified future development projects.<sup>137</sup>

As of March 2007, the city estimated it would spend \$450,000 to settle the lawsuits filed by the victims of eminent domain in this redevelopment. Spring Valley originally spent \$2.9 million as “just compensation” for the 15 properties, between \$110,000 and \$460,000 per property.<sup>138</sup>

### *Yonkers*

- 450 acres encompassing 1,360 properties, Yonkers' entire business district and two miles of waterfront
- Eminent domain is called "an essential tool of last resort"

In February 2006, Mayor Phillip Amicone approved a \$3.1 billion plan by developers Louis Cappelli, the Streuver Bros. and Fidelco Corp. to build a massive project stretching over two miles of waterfront and Yonkers' entire business district. The 450-acre, three-phase project calls for condos, apartments, retail, entertainment and office space as well as a baseball stadium.<sup>139</sup> It also calls for Yonkers to use eminent domain after 180 days (starting February 2, 2006) if the developers cannot convince property owners in the first phase to sell.<sup>140</sup> Of course,

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[The plan] calls for Yonkers to use eminent domain after 180 days . . . if the developers cannot convince property owners in the first phase to sell.

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eminent domain, according to City consultants G.L. Blackstone & Associates LLC, is only "an essential tool of last resort."<sup>141</sup> Again, just like the thief's "your money or your life" proposition, force will only be used as a last resort.

That February, Cappelli was poised to take control of nearly 75 percent of the affected properties, which include homes and businesses.<sup>142</sup> There are, however, quite a few properties still to be acquired. A satellite image of the project areas shows at least 1,360 properties in the areas still subject to acquisition—

meaning the developers must acquire at least 340 more.<sup>143</sup>

As of May 2009, city council leaders were doubtful as to whether they could reach the "firm deadline" set by the developer to transfer 17 acres of downtown property to be acquired by the city. There

is some opposition in the Council to the use of eminent domain.<sup>144</sup>

## **BRODY V. VILLAGE OF PORT CHESTER**

Bill Brody's fight to keep his property was a real victory for property rights in New York, though a pyrrhic victory for Brody himself. Although his struggle changed the laws in New York and elsewhere, it did not happen soon enough to save Brody's property from the bulldozer.

New York still has a long way to go before its citizens can feel secure in their homes and businesses. It took Bill's nine-year battle just to prove that citizens have the right to be informed personally before their property is considered for condemnation.

In 1996, Bill Brody bought property in the village of Port Chester and through a huge personal investment of money, time and hard work he renovated it into a thriving business. During the laborious process of obtaining building permits, Brody was never informed that his property was slated for condemnation and redevelopment. So in 2000, after Brody was told he had missed his only chance of defending his right to own the buildings he had revitalized with his own hands, the Institute for Justice filed suit on his behalf to protect his due process and property rights.

After a nine-year legal battle, in June 2009, the village of Port Chester finally and officially apologized to Brody for violating his constitutional rights. But Brody's dream of property ownership now lies buried under a Stop-n-Shop parking lot. It took five years for the courts to acknowledge that Port Chester had violated Brody's rights; seven years to rule that the law should be altered to prevent a repetition of this violation; and nine years for his own city to admit and apologize for its injustice to him. As recently as 2008, Port Chester tried to appeal the court decision that it violated Brody's rights. Brody's property was never returned and he has was awarded \$2 in damages.

## PREPARING FOR LEGAL ACTION: HOW YOU CAN FIGHT BACK

By this point, it should be obvious to even the casual reader that eminent domain abuse is rampant in New York, and that the legal system is fundamentally flawed and stacked in the government's favor. But property owners do have a right to contest the government's attempt to take their property. The following section will use the outline of the law discussed earlier and describe specific actions property owners and tenants can do to stand up for themselves before it is too late.

New York once gave this right to contest only token acknowledgement. Before 2007, property owners were not even given individual notification of an agency's intent to condemn their property. (That means that all the government had to do was merely place a notice announcing its intention to involve certain projects in a development—never listing the properties' addresses or mentioning that eminent domain might be used—and that was sufficient notice to set the clock running on filing objections to the government's actions.) Now, because of the *Brody* case out of Port Chester, N.Y., and recent legislation the case inspired, property owners should receive a specific letter in the mail regarding pending condemnation, which the owner can use to take action immediately to defend their property. Of course, the fact that property owners *should* receive notice does not mean that they actually *will*—and the complexity of New York law means they should not wait to receive a mailing before they start preparing to protect their rights.

Because New York law establishes such a short timeframe for objection, and because failure to meet these deadlines can cost property owners

their rights to protest the seizure, it is imperative for those under the threat of eminent domain to act quickly and boldly. New York law, as this report has shown, can be very confusing and is purposefully stacked in favor of the government, so the following advice on what to do to protect owners' property from being condemned must be viewed only as an overview—they need to contact an attorney who handles these kinds of matters for a living. In the meantime, though, this should help them get started.

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New York's eminent domain law places its citizens at a tremendous disadvantage when resisting their government's proposed condemnation of their land.

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New York's eminent domain law places its citizens at a tremendous disadvantage when resisting their government's proposed condemnation of their land. Property owners in New York face a battle more difficult than that faced by owners almost anywhere else in the

nation. New York does not just stack the deck against property owners; it makes it hard to even get in the game. New York does not leave a lot of room to challenge a condemnation—and it leaves hardly any room at all for mistakes. But property owners can fight eminent domain in New York.

These are some tips to help them in their fight, but the most important tip is to be ***thorough, attentive and pro-active.***

Most of the time, before exercising eminent domain, New York governments must follow the public hearing requirements of the Eminent Domain Procedure Law (EDPL). They can (and often will) do this ***months or years*** before they plan to take one's property through eminent domain, but regardless, the public hearing process ***affects the rights of property owners.***

Even if a public official tells a property owner that he or she does not need to worry about eminent domain for quite some time, there may be things owners need to do to protect ***themselves right***

*now*. By the time the government files its papers to actually condemn their property, the property owners will have already lost most of their rights to fight the condemnation. Remember: The government and the developer ***can lie and often do lie to property owners and tenants*** without suffering any consequences. Unless the city actually passes a law, it cannot be bound by anything anyone tells the property owner; no matter what they are told, property owners must take steps to protect their rights.

### Public Hearing

As mentioned previously, prior to adopting a plan for a public project that uses eminent domain, the EDPL requires governments to hold a ***public hearing***. Many projects in New York will require a variety of public hearings for various purposes; the hearing required by the EDPL, however, is the property owners' ***only chance as owners or tenants*** to raise any "issues, facts, or objections" on which they may want to base any challenge to the government's use of eminent domain. The government is supposed to both publish a notice of the hearing (and the fact that it is a property owner's only opportunity to raise objections) and mail that notice to the "assessment record billing owner" of any affected property.<sup>145</sup>

The fact that the government is supposed to mail something, however, does not mean owners will get it—they need to keep close watch on what's happening with the proposed project. ***They should keep an eye out for this notice. Attend this hearing.*** They should hire a lawyer ***before*** this hearing. Owners will need to ***present their legal objections*** and their own facts at the hearing in order to use them in a lawsuit.

### Determination and Findings

Within 90 days of the public hearing, the government has to issue a "***determination and findings***"—basically, it needs to decide that it's moving forward with the project that

involves eminent domain. The government is, again, supposed to both publish a notice of its determination and findings and mail one to the "assessment record billing owner."<sup>146</sup> If the property owner's mailing address is incorrect, however, he or she may not receive this notice; as always, it is important to pay close attention and begin working with local legal experts as soon as possible.

The government's publishing of this notice ***triggers the property owners' only chance to challenge the legality of the taking of their property***. Once the government completes the mandatory publication of its notice (which must be published for two consecutive issues of a newspaper of general circulation), property owners have only ***30 days*** to file any objections they have to the project pursuant to ***EDPL 207***.

### EDPL 206

To make matters worse, the Eminent Domain Procedure Law has a provision, EDPL 206, that allows the government to bypass the whole public-hearing and determination-and-findings process. This can happen in a wide variety of circumstances: If the condemnor has obtained a license or permit from another governmental agency; if it is building a particular thing; or if it believes the taking is minor ("de minimis") or required by an emergency, the procedures outlined above ***do not apply***. It is not enough to sit and wait for a hearing notice. Property owners need to be aware and keep close track of what the government is doing; the fact that there hasn't been a public hearing yet does not mean the city is not planning to use eminent domain.

### Article 78

Article 78 of the New York Civil Practice Law & Rules (CPLR) provides the most common route for challenging government action in New York. Anyone who is a potential condemnee challenging a determination and findings, however, ***cannot***

bring his or her case under Article 78—their only means of review is to file within the 30-day window allowed by EDPL 207.

If the government has decided to proceed under EDPL 206 or if the person is not a potential condemnee (that is, if they are just a citizen concerned about eminent domain abuse), or if they are challenging something other than the determination and findings itself, they may need to file a challenge under Article 78. For example, even if they are not a potential condemnee, they can file an Article 78 petition challenging the government’s plan under the State Environmental Quality Review Act (SEQRA), which requires it to take a “hard look” at the socioeconomic and environmental consequences of its action and to consider any alternatives to its plan before moving forward with a redevelopment plan.

### Kinds of Legal Challenges

By the time property owners attend the public hearing (discussed above), they should already have retained a lawyer. The time to appeal under EDPL 207 after the public hearing is short, and they will be at a serious disadvantage if they do not already have an attorney on board. That said, if property owners do not have time to contact a lawyer before the hearing, they should attend and raise **every objection they can think of**. The list below gives some examples, but it is not exhaustive, and every situation will have unique facts that may require raising different objections.

In addition to raising objections, the hearing is property owners’ and tenants’ opportunity to present evidence that contradicts the government’s. If the government claims the area is blighted, those who wish to fight eminent domain abuse should bring evidence of their own—not just about their property, but about the entire area—which can consist of pictures, descriptions or other documents. Although the hearing may seem like its purpose is to help the government decide whether it *wants* to use eminent domain, it is also, legally, the property

owners’ one chance to present evidence about whether the government should *be able* to use eminent domain, and the owners should take full advantage of it.

Residential and business tenants face similar hurdles and must follow similar procedures for fighting the takings. The question of whether to follow the EDPL or Article 78 procedures, however, may be even more complex for tenants and cannot be fully addressed here. As usual, however, any technical error may result in the loss of all rights to challenge the taking, so tenants must consult a lawyer about how to bring their challenges.

### Statutory Challenges

- Failure to comply with the Eminent Domain Procedure Law (NY CLS EDPL Article 2) (*e.g., improper notice of the hearing, failure to sufficiently describe the proposed project or location, etc.*)
- Failure to comply with the State Environmental Quality Review Act (SEQRA) (NY CLS ECL Article 8) (*e.g., lack of an environmental impact statement, errors in the environmental impact statement, failure to take a “hard look” at environmental or socioeconomic consequences of the project, failure to evaluate alternative proposals*)
- Improper designation, expansion, or alteration of Urban Renewal Area or Urban Renewal Plan (NY CLS GMU Article 15) (*e.g., inadequate evidence of blight, lack of justification for project boundaries, inclusion of more land than necessary, pretextual blight study*)
- Other statutory challenges (*e.g., possible condemnor lacks the power of eminent domain, city is misappropriating funds, city failed to get proper zoning or planning authorization, local ordinance forbids project*)



### Constitutional Challenges

- No public use/purpose
- Primarily private benefit
- No assurance of future public use
- Pretextual condemnation
- Unconstitutional delegation
- Lack of procedural due process (*e.g., insufficient time to review city's evidence, inability to depose or cross-examine city's experts, insufficient time to prepare for hearing*)
- Lack of necessity for taking

## SUCCESS STORIES

Despite the stacked deck against them, New Yorkers have been able to stop government land grabs. Armed with a good understanding of the law and a keen awareness of the stakes, these communities won outside the courtroom using grassroots activism.<sup>147</sup> They are an inspiration to all and show that the New York redevelopment machine can be defeated.

### Cheektowaga

Cheektowaga city officials considered a proposal that would wipe out the entire neighborhood of Cedargrove Heights—including 300 homes and 700 apartments—and replace it with what they felt was a more glamorous development. Alarmed by the thought of losing their beloved homes, property owners stood up to the city. They banded together to form the Cedargrove Heights Neighborhood Action Committee and attended every town board meeting wearing red shirts in their effort to make their voices heard. In October 2005, after “nine months of hell,” as one activist put it, they won when the city backed down from the controversial plan.

### New Rochelle

In 1999, New Rochelle’s mayor devised plans to condemn and demolish an entire working-class community so he could hand it over to IKEA for

a new store. A core of homeowners and business owners formed a citizen’s group to combat the land grab. They worked with a legal services clinic at Pace University Law School, and roused grassroots support from nearby towns. The activists organized creative protests, like a “drive in” to illustrate the impact the store would have on traffic. The group even demonstrated outside the Swedish consulate in New York. Their persistence succeeded; IKEA decided the project was not worth the fight, and the condemnation plans were abandoned.

### Syracuse

The Onondaga County Industrial Development Agency decided in 2005 to seize numerous businesses via eminent domain for a private developer. But 29 business owners in the threatened area took matters into their own hands, joining together to form the “Salina 29.” These community activists wrote letters to the editor and op-eds in local newspapers. They staged rallies and launched their own website, voicing their opposition to the plan, and attended the Castle Coalition’s national workshop in Washington, D.C. After two years, their tireless work and persistence paid off. The OCIDA amended the plan, taking out any reference to eminent domain. The developer later re-submitted his application requesting the use of only public property.

## THE SOLUTION

Since the U.S. Supreme Court’s infamous *Kelo* decision in 2005, 43 states have changed their laws through the legislative process to increase protections for property owners against the abuse of eminent domain. Unfortunately, New York has not been one of them—which explains its F grade in the Castle Coalition’s 50 *State Report Card: Tracking Eminent Domain Reform Legislation Since Kelo*.<sup>148</sup> Here’s what the report found:

As a state that is among the leaders in eminent domain abuse, it is not surprising

that New York trailed far behind the other states in its response to *Kelo*. The only bill that seemed to have any traction did little more than create another study committee, yet the New York State Legislature failed to even pass that.

The state did pass legislation specifically targeting a large electric-line project, as well as a private golf club on Long Island. However, there is no momentum toward comprehensive reform, so the Legislature continues to allow the government to take homes and small businesses for private gain.

Beyond the legislative reforms, the highest courts of some states, such as Ohio and Oklahoma, have ruled that the *Kelo* rationale—that the pursuit of increased jobs or taxes is reason enough to use eminent domain—does not apply under their state constitutions. Whereas the U.S. Supreme Court stripped Americans nationwide of federal constitutional protection against eminent domain for private gain, these state supreme courts raised the protections enjoyed by citizens in their states under their state constitutions.

New York remains one of only a handful of states that has done absolutely nothing to protect home and small business owners in the past four years.

That need not remain New York's legacy, however. There are a handful of changes to New York's eminent domain laws that would make things more fair, less confusing and ultimately level the playing field between the government and the average New Yorker.

The state's High Court has the best opportunity to address some of these issues this month. If, however, it does not rule in favor of property owners and act as a check against clear abuses by legislatures and members of the executive branch across the state, the court will leave needed reforms in the very hands of the governmental bodies that

are the worst abusers of this awesome power. If New Yorkers are to enjoy any real protection of what is rightfully theirs, the court must:

- **Bar eminent domain for private development:** Although the U.S. Constitution may allow private development takings, the New York Constitution should be read emphatically to reject *Kelo*. No entity in New York should have the power to take property from one private individual and transfer it to another for possible increased tax revenue.
- **Invigorate the prohibition on pretextual takings:** Condemning authorities in New York should only be able to take property for the reasons they asserted at the beginning of the project. They should not be able to state one reason—a pretext—but actually use eminent domain for another reason. An example is the supposed use of eminent domain to build affordable housing, but ultimately destroying more affordable housing that will ultimately be built to replace it.
- **Create greater ability for property owners to challenge the taking of their land:** Property owners should have the ability to challenge the constitutionality of a taking, as well as offer evidence that the taking is pretextual. Property owners should have the right to an ordinary trial proceeding; it is nothing short of offensive that property owners can be stripped of their rights without anyone ever being forced to explain, under oath, why their property should be taken away.
- **Give property owners a more timely ability to challenge takings:** Property owners should also be permitted to challenge the legality of a condemnation at the actual time of the condemnation, not within the 30-day window allowed under current law. Often, the condemnation comes years after eminent domain is first authorized, and it is not until the official notice of a lawsuit comes that ordinary citizens realize their right to their home or small business is in jeopardy.

## CONCLUSION

It is no secret that things are bad in New York. In nearly every respect, eminent domain law is written to favor the very entities that engage in eminent domain abuse, and as this report shows, they have not hesitated to take advantage of the situation.

But it is not all bad news. Awareness of the abuse of eminent domain is at an all-time high. Individuals are fighting back in the court of public opinion and winning. And, for the first time in decades, there is an opportunity for New York's Court of Appeals to say, once and for all, that eminent domain cannot be used for private economic development. That, along with other solutions offered in this report, are the only ways to bring meaningful protection to the Empire State's property owners.

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