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**Eminent Domain
in the Aftermath of *Kelo***

*2006 Warren M. Anderson Legislative
Breakfast Series*

February 7, 2006



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The 2006
Warren M. Anderson Legislative
Breakfast Seminar Series

Eminent Domain
in the Aftermath of *Kelo*

February 7, 2006

A Presentation by—

Lisa Bova-Hiatt

Deputy Chief

Tax & Bankruptcy Litigation Division
New York City Law Department

and

John A. Humbach

Professor of Law
Pace Law School

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WARREN M. ANDERSON

Warren M. Anderson is a distinguished alumnus of Albany Law School, and an active member of the Government Law Center Advisory Committee. Having served in the New York State Senate for thirty-five years, he is perhaps best known for his leadership during his tenure as President Pro Tem and Majority Leader from 1973 to 1988. Warren Anderson began his legal career as an Assistant County Attorney in Broome. He then joined the law firm of Hinman, Howard & Kattell where he is currently practicing law. Throughout his career he has received numerous honors and awards.

PROGRAM DESCRIPTION

In furtherance of its mission to serve as a resource to government at all levels in the resolution of specific problems, the Government Law Center is pleased to present the fifteenth annual Warren M. Anderson Breakfast Seminar Series. Monthly breakfast programs feature experts who address the legal aspects of a variety of policy issues pending before the Legislature. The seminars are designed to provide access to current legal information on a given topic. The Government Law Center welcomes your suggestions for future programs.

HONORARY CO-HOSTS

The Government Law Center is grateful to the Leadership of the New York State Senate and Assembly for serving as honorary co-hosts of the 2006 Series:

Senator Joseph L. Bruno
Speaker Sheldon Silver
Senator David Pattison
Assemblyman James Tedisco

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PATRICIA E. SALKIN
Associate Dean & Director
Government Law Center
Albany Law School

Good morning. Thank you for coming. My name is Patty Salkin. I am the Director of the Government Law Center at Albany Law School. It is my pleasure to welcome you to the first program of the 2006 Warren M. Anderson Legislative Breakfast Seminar Series.

As many of you know, we are now in our 13th year of providing this educational program. Warren Anderson is not only a distinguished alumnus of the New York State Senate, but he is also a distinguished alumnus of Albany Law School, and he's an active member of the Government Law Center's Advisory Board. We continue to be pleased and honored that he allows us to do this in his name. Each year during the Legislative Session we

present a series of topical discussions on legal aspects of public policy issues facing New York State. This year we have selected four important issues: Eminent Domain, as you know, is our topic for today. Next month, we will look at the issue of Civil Confinement; in April, we'll be discussing Procurement Law Reform, and in May we are going to talk about The State of Racing and Gaming Law and Policy in New York.

I want to thank our honorary co-hosts for this series: Senator Joseph Bruno, Speaker Sheldon Silver, Senator David Pattison and Assemblyman James Tedisco. I also want to acknowledge our program sponsors. Although Albany Law School provides significant underwriting support for this program and for many other Government Law Center initiatives that are designed to educate lawmakers and policy-makers in the state, we still would not be able to offer this breakfast program without the generous support and help from our underwriters. They are: CSEA, The Energy Association of New York State, Girvin & Ferlazzo, Hinman, Howard & Kattell, Hinman Straub, PC,

New York State Association of Counties, State Academy of Public Administration, and Wilson, Elser, Moskowitz, Edelman & Dicker LLP. Last, but certainly not least, I would like to thank the Government Law Center staff, the Government Law Center Advisory Board and the Anderson Breakfast Committee for all of their dedicated work to make this series truly one of the highlights of the legislative session each year.

If you are not already a member of the Government Law Network, I encourage you to consider joining. It is one small way to show your support for the programs of the Government Law Center. There is an informational brochure in your materials.

Since the Supreme Court handed down the decision in *Kelo v. City of New London* in June of 2005, there has been nothing short of a firestorm of activity both in Congress and in state legislatures across the country. Our state has not been immune from this debate. In New York alone there have been more than a dozen bills introduced in both the Senate and the Assembly, and there are hundreds of

bills that have been introduced in State houses across the counties. We might talk later this morning about the various approaches of some of those bills.

Today we have two fantastic speakers to talk about the *Kelo* case, and eminent domain in general, and to provide some insights and ideas as to where we might be—or could be heading—in New York. I'll introduce both of our speakers up front. Professor John Humbach will speak first followed by Lisa Bova-Hyatt.

John Humbach is a Professor of Law at Pace University School of Law in White Plains, New York. He teaches in the areas of Property Law, Lawyers' Ethics and Criminal Law. He has written a number of scholarly articles on Constitutional Limits on Government Actions to Restrict Property Rights on Public Interest, including "Constitutional Limits on the Power to Take Private Property: Public Purpose and Public Use" which was printed in the *Oregon Law Review*.

Lisa Bova-Hiatt is a Deputy Chief in charge of condemnation in the Tax and Bankruptcy Litigation Division of the New York City Law Department. The division represents the City of New York in the acquisition of real property by eminent domain. She provides advice to New York City agencies on condemnation matters, is responsible for coordinating and implementing acquisitions through eminent domain, and manages and counsels the attorneys and support staff who handle the proceedings in areas of procedure, vacation and title.

JOHN A. HUMBACH

Professor of Law

Pace Law School

Thank you. Last night, when I got to my hotel room and flipped on the television, there was a program on eminent domain on FOX News, talking about how a group is making an effort to take Justice Souter's house in New Hampshire in retaliation for his vote on the Kelo case. I think the thing that I noticed most is that the fellow being interviewed said at least 5 or 6 times that the government should not "steal" property. Interestingly, he overlooked the point, of course, that in all of the situations to which the Kelo situation applies, the owner receives compensation. Whether or not it's enough compensation to be truly just is a different issue, but I'll come back to that in a moment.

I'd like to start out by putting the Kelo case into context. We all know the Kelo case was the case that came before the United States Supreme Court last year from the City of New London, Connecticut, which had an urban revitalization program. The program was challenged because a core aspect of that program entailed the taking of a neighborhood of largely private homes. I believe there were at least 115 private homes in this neighborhood. It wasn't the most stylish of neighborhoods, I suppose you could say, but it was a nice, waterfront location. The hope was to take the economically declining city of New London and give it a boost with an urban revitalization project. Again, a core feature of this program was to take private property and ultimately put it into the hands of other private owners. So the power of the state was being used, one might say, to help private interests acquire other people's property against the will of the current owners.

The Supreme Court said, in upholding the program, that it was just "following the law." We've heard that judicial activism is a "bad" thing and we've

heard it decried in the various hearings for the nominations for the Supreme Court Chief Justice and Associate Justice that have recently occurred. But what the Supreme Court did in *Kelo* that got it into all kinds of hot water, in many eyes, was refuse to be activist. It said that whatever decision was made by the elected representatives of the people is a decision that the Court should not overturn. The Court should take a hands-off view and just follow the law. And they did follow the law as it existed for over 100 years.

Historically, the Supreme Court never actually got to determining exactly the contours of the government's power to take private property until after the Civil War. This was because the United States government never had occasion to exercise its power of eminent domain until a few years after the Civil War. The U.S. government managed to get along for almost 100 years without ever doing that. Moreover, the Fifth Amendment takings clause did not apply to the states until 1897, so until 1897 there was just no occasion to even consider the issue of the breadth of the government's takings

power under the takings clause. And the first time the Supreme Court did consider the issue (under the due process clause), it made clear there was a broad power on the part held by the government to promote the public interest. Anything that would promote the public interest—to serve a public purpose—could also justify the particular tool of eminent domain. The Court talked of eminent domain along with taxing powers and the other powers of Government as being just part of the package that government has available to it in order to promote the public interest.

Some of the early challenges to government takings are kind of quaint by modern standards. One such challenge addressed whether government had the power to create a national park. Congress wanted to create a park out of the Gettysburg Battlefield. The people, who owned the Gettysburg Battlefield or some of it, thought that this was just going "way overboard." They took the position that it is none of federal government's business to create parks. Of course, the Supreme Court held that government did have the power to create a national park. But in the

process of that deciding case and other cases involving railroads, dam sites, mills (which, of course, were a very important source of power in the 19th century), and public utilities of various sorts, the Court has consistently upheld the use of the power of eminent domain to acquire private property in order to turn it over to other private interests, as long as there was a public interest involved. Frequently it could be argued in these cases that there was public use involved too, if a case involved a port, or a railroad, for example, or a mill which grinds the grain for farmers in the vicinity. But some of the cases went rather far from the irrigation district-mill-railroad model of public use.

For example, in one case the Supreme Court upheld a delegation of the power of eminent domain to a gold mining corporation so that it could condemn its neighbor's land in order to create buckets and cables in connection with its gold mining operation. It was, I suppose, in the public interest to have more gold. Actually, what the Supreme Court said was that the legislature's decision in that regard is not

for the Court to re-decide. What the Supreme Court has consistently said is that it would be deferential to legislative decisions.

Of course, in *Kelo* things were a little different, as is true in many of the modern cases of the uses of eminent domain for economic development purposes. A local government entity is making decisions—not the state legislature but a local legislature or, even, a delegate of a local legislature. And of course, as one arguable difference, local legislatures are not as transparent as the state legislature. There are fewer people involved. Another difference is that it is easier for a local body to get into the developer's influence because the developer has a small number of people to be convinced to take the private property at eminent domain rates and turn it over to the developer. So, perhaps, there is more of an opportunity for "hanky-panky" in the case of a small local body, and that may be a concern. Nevertheless, the Supreme Court has not drawn the distinction between state and local legislative bodies and it has decided to leave to the legislature the decision of

how government power should be exercised in order to promote the public interest.

There is only one case that I know of in which the Supreme Court has ever struck down a use of eminent domain to transfer private property to another private person. It's called *The Missouri Pacific Railway v. Grafton*. There, the Supreme Court struck down a state order that a railroad turn over some of its private property to a grain elevator company. It held that this went beyond the police power.

What really is at stake in cases like *Kelo* is not whether eminent domain decisions ought to be made by the Supreme Court as distinguished from the state legislature or the local legislative body. What's at stake is not whether eminent domain, even for economic development purposes, is a good thing or a bad thing—although people who would like government to be generally smaller would like to see presumably less use of eminent domain; people who are more sanguine about government's exercises of power may be willing to put up with greater uses of eminent domain. And even though it

goes too far to say the government is literally "stealing" in these takings for economic projects, not at least in the sense of taking without compensation, what is really motivating this outcry about the *Kelo* case is that the traditional measure of just compensation systematically under-compensates the kind of property that most Americans own, namely, their own homes. It systematically provides a measure of compensation that is too small to be truly just. The reason it under-compensates is because of a particular characteristic of that asset that we call our home.

The traditionally presumptive measure of just compensation is the "fair market value" at which property would change hands between a willing buyer and a willing seller. In the case of a home, however, the "willing seller" part is difficult because most homeowners are not at any given moment "willing sellers" at anything like "fair market value." If they were willing to sell at fair market value, their house would already be on the market and it probably would have been sold. But most people don't regard their homes as

commodities or as commercial assets that are interchangeable or easily replaceable. In fact, they may not be genuinely replaceable at all, at least not for anything approaching fair market value. There are a number of reasons. One reason is sentimental value. There also are structural reasons that might be mentioned.

In a lot of the places where eminent domain is thought of as a useful tool for economic development, the neighborhood may not be the classiest in town. They're not the neighborhoods you will see on a postcard to attract visitors. But, nonetheless they are—for the people who live there—their homes. These are their communities and these homes may be more or less impossible to replace for the amounts of money even close to the "just compensation" awards that the owners might receive.

People who are living in what is gently called affordable housing (by that I'm talking about older housing that may be past its prime) are faced with a particular problem. People in those kinds of

neighborhoods in Westchester County might receive \$150,000 to \$200,000 for a home (because that is the "fair market" value). But, in their own community (for example, New Rochelle, Yonkers or White Plains), they will not be able to find another house for that price anywhere. And if their whole neighborhood is taken, a whole neighborhood of homeowners may suddenly end up forced to become renters, or to move 30 or 40 miles away in order to find a house of comparable price. These are the unpalatable choices. The threat of eminent domain, then, goes right to the gut, and for understandable reasons.

Another structural reason why eminent domain's traditional measure of just compensation tends to under-compensate is because people who have lived in their homes for a while have made their homes their own. They've put their personalities into their homes by doing things to create a place that is very suitable for them but which do not necessarily add to the market value. In lots of cases, perhaps, the personal choices people make even detract from the market value. Think about that pine paneling in the

den, or that purple tile in the bathroom, or even a swimming-pool—which can actually reduce the fair market value of the property—although the owner of the home may have put lots of money into these amenities. In fact, every once in awhile you'll see an article in the newspaper about which home improvements can increase the resale value of your home, but it turns out that people routinely spend lots of money on a variety of home "improvements" that actually reduce the value of their homes. Now why do they do this? They do this because the changes according to personal taste makes the home more valuable to them. Although this "value" doesn't begin to be reflected in the "fair market" value between a willing buyer and a willing seller, it's still value if the owner can stay and enjoy it. But if the home is taken by eminent domain, the owners are not compensated.

Apparently, that was one of the factual problems in Mrs. Kelo's case, in particular, that she spent a lot of money putting things into her home that were valuable to her but that did not add to the "fair market value" for purposes of measuring just

compensation. So the result was systematic under-compensation, not to mention the tremendous cost and inconvenience of relocation. Forcing people to move for the greater public good is something that we may not want to do; but it seems to me it's even worse in the minds of the people who are forced to move if they have to dig into their own pockets to any substantial degree for the moving expenses, for the inconvenience expenses that are associated with the move, even assuming they can replace the home in the same community at more or less the value of what they get as a traditional just compensation award.

I think these kinds of concerns are what motivate the resistance to what is seen (erroneously) as the change in the law in the Kelo case. Personally I think the city of New London made a bad decision in Kelo. Not the Supreme Court, but the city of New London. It made a bad decision not because it was trying to carry out a very valuable, valid and, I'll assume, a socially useful development project, but because it was trying to do so partly on the backs of some of the least well-off people in the

community. That's just not fair. Certainly projects should go forward but they should not go forward on a basis where they cause a significant uncompensated loss to the people in the community, particularly those people in the community who may not be so well-off.

The losses should be compensated, and I think it would be possible to make offers to these people that would have been accepted. It would have been possible to make offers that would have put homeowners in a good position. It would have been possible, perhaps, even to offer Mrs. Kelo a waterfront home, instead of having all those homes go to other "nicer" folks and packing off Mrs. Kelo and her neighbors to heaven-knows-where. There is nothing wrong with a profitable, valuable project, but there is something morally wrong about carrying on such a project on the backs of somebody else, at the uncompensated expense of owners who are already there.

Even if you may not believe that it's morally wrong to do what they allegedly tried to do in Kelo, it is

certainly economically inefficient. The free enterprise system works so well because it directs resources to their most valuable uses and the way it directs resources to their most valuable uses is by making sure that people pay the fair market value of the resources they use— that they pay what the seller is demanding. And if a person is willing to pay an owner enough so that the owner is willing to part with a resource, that means the resource is worth more to the buyer than the seller. That is the mechanism that moves resources to their more valuable uses. However, if a buyer can use the power of government to force people to part with property at prices they would not ordinarily be willing to accept—prices that under compensate them for what they are giving up—that's a great thing for the buyer but it is a terrible thing for the seller. It has the economic effect of externalizing costs and carrying on a project at the cost of persons other than the beneficiaries of the project. And that's economically inefficient. Not only is it economically inefficient, but it also fosters this moral problem of forcing people to bear losses for other peoples' projects.

We ought to look for a remedy. The remedy that I would suggest is that there be some sort of special "mechanism" for compensating properties that are well-known to not be held by their owners for the commodity value or commercial asset value, but are held instead for the personal use value and enjoyment. We ought to allow owners of these kinds of properties to prove that the property is actually worth more than the traditional measure of just compensation—"objective" fair market value. This could be done with a presumption that there are additional values that can only be reflected by, for example, a replacement cost measure of damages. While it should be open to demand a jury and also to bring in evidence that the presumption should be overcome, I think there should be a possibility of a jury trial in the background so that owners who feel like they are really getting squeezed by the proponents of a project, can say, "In the end we will go back to the conscience of the community. You may not believe that my house is worth more to me than the fair market value, but I truly believe it and I want a chance to convince twelve of my peers."

I doubt that this will actually result in very many jury trials. But just having it in the background will increase the negotiating power of the individuals who are up against—what seems to them—the "behemoth" municipality or the "behemoth" developer. It would help correct the disparity of bargaining power that exists today, and it would deter the local offers and the "low-ball" prices at which property is acquired. It would greatly relieve the discontent caused by the Kelo case.

LISA BOVA-HIATT

Deputy Chief

Tax & Bankruptcy Litigation Division

New York City Law Department

Good morning. I'm here to tell you about the beneficial effects of eminent domain. It's the City's position—and it is the position of many municipalities across the state—that eminent domain is a vital economic tool that allows government to acquire and assemble lands for many public uses, not just economic development uses: for schools, parks, hospitals, transportation centers, and for new development projects that generate jobs, investments and tax revenue.

Since the decision by the United States Supreme Court in *Kelo*, unfortunately, there is a misperception that local governments are forcing homeowners from their properties in large numbers

and homeowners in New York have no protection against arbitrary government seizures. But those fears are misplaced, both in New York and outside of New York. In New York, *Kelo* affects no legal change whatsoever in the state of the law and we will look at that this morning.

I think it's important to look at the facts of *Kelo* because the media has spun this decision into something that I really don't think it is. I think if you look at the particular facts of *Kelo* you can see that the acquisition by NLDC was part of a well-established, long-standing plan by the town of New London to revitalize the area. Now, Professor Humbach said that we should let the market do what the market can do and that in and of itself can fix a problem in a specific area. But I think that's a problem. That cannot always happen if there's a situation where there is a blighted area and I know we can discuss what blight is because blight is in the eye of the beholder. What I consider to be blighted is not necessarily what you may consider to be blighted, and what is blighted downstate might not be considered blighted upstate. I think

that's one of the problems; also, nobody wants anybody to tell them that their house is blighted, because as everyone knows, a man's home is his castle. I do not want somebody coming to tell me that my house is blighted. Unfortunately, blight, like the value of property, is very subjective.

But let's look at the facts of Kelo for just a moment. In 1978, the town of New London established a local development corporation to assist in revitalizing the area. Now, what people don't realize is that it wasn't until 20 years later that Pfizer was identified and decided to come in and build a major research facility in New London. So, as the Court noted in a footnote (footnote 6 if you are interested), it is very hard to say that the acquisition was done purely for Pfizer's benefit, because Pfizer was not identified when the plan was undertaken back in 1978. I think a fact that is often missed is that when there's a transfer from a municipality to a private developer, the transfer is done to facilitate the plan of the municipality. It's not done for the benefit of the developer, but, it is actually a creative idea to have a municipality with a project—their

vision—funded by a third party. I think this is a fact that is often lost. In Connecticut there is a statute that allows the acquisition of private property purely for economic development, but there is no such statute in New York State. Therefore, what happened in Kelo is not something that at this time could happen in New York. Interestingly enough, there was a blight statute that the New London Development Corporation could have proceeded under, but instead they chose to use a statute that stated that economic development is a public use. The majority decision in Kelo reiterated that economic development is a valid public use.

In New York State, public use has been broadly defined by the Court as anything that enhances the health, the safety and the general welfare of the citizens of the state. Since Kelo, several state legislatures and governors have seized on the Kelo decision which said that states were free to impose greater limits on their own exercise of eminent domain than what the constitution allows. So what happened? Some states have imposed a moratorium on further takings, often for the purpose of studying

eminent domain within their states; while other states have created study commissions and some have been revisited and narrowed their definitions of blight. My personal favorite is a statute out of Texas where it does not allow the acquisition of property for blight—except for the construction of a stadium for the Dallas Cowboys. There are currently 17 bills pending in this state's legislature. I am not going to address specific bills but I would like to just talk about why municipalities use eminent domain and then discuss some of the provisions that are pending in the bills.

Although most people don't agree, the use of eminent domain is rarely a government's first choice. It is very costly; it is very time-consuming; and there are layers and layers of process. But it can be necessary to achieve the greater good, whether it is a park, street widening, bridge reconstruction or economic development. But both New York City and municipalities across the state do not have a blank check to condemn properties whether for economic development or for a park. Under New York law, both pre- and post-Kelo, government

cannot condemn for purely economic development purposes in the absence of blight. The only other exception would be if there was special state legislation passed for the acquisition and an example of that would be for the New York Stock Exchange.

So let us take a look at the proposals that are pending. My purpose for coming here today to speak to you is to make sure that you are aware that if some of the legislation is passed as it stands, there could be unintended consequences. And I think there is a general misunderstanding of eminent domain and how the processes work (the layers of procedure currently in place). I'm going to also talk briefly about the so-called "lowball offers" which I take personal offense to because it's never a municipality's intent to "lowball" a person whose property is being acquired by eminent domain. The City of New York hires independent appraisers who appraise the property at its highest and best use. The idea that a municipality wants them to come in with the lowest offer possible is an image that has been portrayed both by certain organizations like the

Institute for Justice as well as the media, but I can assure you that it is certainly not true.

So one pending bill suggests increasing the amount of compensation; either for all condemnations, or only where a homeowner's property is taken, or where land is taken for economic development. I think what we are forgetting in these proposals is that the condemnation award has to be just; both for the person whose property is being acquired, as well as for the municipality who is acquiring the property. By increasing the amount of compensation, a potential for unintended consequence may occur; municipalities may not be so willing to undertake large scale projects—whether urban renewal, parks, bridge reconstruction, or road widening—because they are going to have to pay a substantial amount above the fair market value.

Professor Humbach talked about uncompensated loss and I can appreciate that. The purple tile in your bathroom might be something that is valuable to you but there is no way to quantify the value of

these intangibles. I think you have to be careful when you try to quantify this in legislation. Another proposal suggests compensation for tenants. Under the Uniform Relocation Act, tenants are provided with relocation benefits. Aside from being very expensive and costly, any additional compensation for tenants has the potential for fraud and it is very difficult to ascertain. Do you have to be living in the property for one year, or for two years? What if you don't have a lease? Oftentimes in an area considered blighted, or within an urban renewal plan, you might not have a paper trail like a lease or other written agreement. So if a tenant is there for a year, he or she or they should be compensated. But what about the homeowner or the tenant who has been there 364 days?

Let me give you an example: when Empire State Development Corporation undertook the revitalization of Times Square, site 8 south was acquired in 2002. One of the properties to be acquired was a dormitory. There were students moving in, and moving out because the acquisition was taking place in August. So, how do you

compensate somebody who hasn't even moved in? What happened was that although the property was acquired by condemnation, the owner and the ESDC settled the value of the fee. (The City worked in conjunction with Empire State Development on this acquisition.) The tenants were called and told we have good news and bad news. The bad news is that your dorm has been acquired by eminent domain. The good news is they were told "Here's \$5,000. We're going to put you up in a hotel and we are going to find you another place to live." To be 18 years old, coming from Iowa, and to get a check for \$5,000, a hotel stay in New York City, and the opportunity to find somewhere else to live. This is pretty substantial.

A lot of the bills also talk about increased process. At least in New York City, the layers and layers of process are tremendous. They already provide for substantial procedural protection to people whose properties are being acquired by eminent domain. The process that takes place in New York City is the Uniform Land Use Review Procedure (ULURP). ULURP involves hearings before

effective community boards. The relevant borough president is also given the chance to review the application. Another hearing is held before the City Planning Commission and additionally, the City Council must approve all significant land-use applications by a majority vote. Following this, as you are aware, there is an extensive adversarial hearing to insure that effected property-owners receive just compensation.

Some of the pending bills discuss a comprehensive economic development plan or a homeowner's impact statement. What the drafters may not have been aware of is that an economic development plan is already prepared when the property is acquired in an urban renewal plan. Additionally, a homeowner's impact statement is already provided for, as this is one of the required elements of an environmental impact study.

Another proposal suggests that there be additional time to challenge a municipality's acquisition under §207 of the Eminent Domain Procedure Law. There have been some proposals that say that the 30

days—which is the current statute of limitations—should be increased to 60, 90, or 120. I would just suggest that the longer the time period it takes (especially when this ULURP procedure takes over a year) might be damaging to a municipality and would create the significant burden on a condemning authority.

Sometimes, when I watch the news in New York City, people will say "you know, this project for a street-widening was proposed back in 2000 and nothing has happened." I laugh to myself because there are so many procedural hurdles going on behind the scenes. The local legislature is moving the process through its community boards, through city planning, and through ULURP. So, when people assume that there is no process taking place to ultimately end in acquisition, that is simply not the case. Another proposal states that additional time should be given or a new hearing should be held when the scope of the project changes. I would suggest that when a project is changed significantly a new EDPL is usually held.

Jury trials are my personal favorite. Unfortunately,

when you try condemnation cases (at least in the City) regarding both fee and fixtures it is oftentimes difficult to keep the judges' attention when we are discussing the value of a drop ceiling or a light bulb or carpeting. I would suggest that jury trials might not be most beneficial to the municipality or to the condemnee because there is already a vehicle in place for trying these cases. Condemnation is a very narrow area of the law, and it is often difficult to find anyone who has a broad understanding of this. We're very fortunate—at least downstate—that each borough has its own judge assigned to the condemnation part, because there's such a large learning curve. I would suggest that this is the way the procedure should stay.

We wouldn't be here today if eminent domain was not used by Governor Rockefeller to acquire property for the South Mall. Lincoln Center would not be the area that it is today without the benefits of eminent domain. Times Square, which I touched on briefly, had rampant crime in the 1970's. Broadway theaters struggled to exist in the midst of peep-shows in rundown buildings. Times Square

today is a vibrant, tourist-friendly location. Metrotech in Brooklyn would not have been the leading "phased office development project" as lauded in the New York Times. The world headquarters for Bausch & Lomb in Rochester would not have been created without the benefits of eminent domain.

So in conclusion, you should appreciate the fact that eminent domain in New York State is used sparingly and it is vital to the social and economic well-being of New York City and the entire state. Over the years that the Eminent Domain Procedure Law has been in effect it has really served the citizens of the state well. Should it be changed? Should it be modified? Maybe, but I think that before changes are made we have to be careful not to upset the current balancing of interests which have served the state and its residents well. On behalf of New York, I urge you to defer consideration of the substantive proposals pending before you and instead create a temporary commission that will carefully consider the ramifications of altering the state's already

extensive eminent domain process. Thank you.