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**TESTIMONY OF PATRICIA E. SALKIN**  
**EMINENT DOMAIN**  
**NYS SENATE JUDICIARY COMMITTEE**

**APRIL 3, 2006**



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**Patricia E. Salkin, Esq.**  
**Associate Dean and Director**

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**New York State Senate  
Standing Committee on the Judiciary**

**Testimony of Patricia E. Salkin  
Associate Dean & Director  
Government Law Center of Albany Law School  
April 3, 2006  
Legislative Office Building  
Albany, New York**

Good morning. My name is Patricia Salkin and I am Associate Dean and Director of the Government Law Center of Albany Law School. I am also the Chair of a Special Task Force appointed by the President of the New York State Bar Association to study and report on eminent domain reform in New York. I teach land use law at both Albany Law School and at the University at Albany, as well as courses in both planning ethics and government ethics and housing law and policy. All of these courses intersect with the complexities of eminent domain law and policy. The Government Law Center is a research center based at Albany Law School that focuses on legal aspects of public policy reform. We are a neutral academic think tank that strives to provide lawmakers and policymakers with comprehensive unbiased information to help government leaders best design creative solutions for critical public policy challenges.

I am appearing before you today first and foremost in my role as Chair of the State Bar Task Force. The testimony I offer this morning reflects areas where there was unanimous agreement among Task Force members on specific issues. There are some items in the Notice of Public Hearing that have not yet been addressed by the Task Force, and to the extent I comment on these items, I will so indicate that I am not speaking for the Task Force.

Before I begin, I want to thank you Senator DeFrancisco for continuing to study the complex issues involved in eminent domain reform, and for your leadership in listening around the State to the various viewpoints including benefits, challenges and opportunities for reform within the current framework under which we operate in New York.

In November 2005, New York State Bar Association President A. Vincent Buzard appointed a Special Task Force on Eminent Domain to provide legal analysis and recommendations about appropriate legislative and regulatory considerations in the practice of eminent domain law in the aftermath of the recent U.S. Supreme Court ruling in *Kelo v. City of New London*, 125 S.Ct. 2655 (2005). I will not review the facts and holding in this case since I believe the Committee is well versed in this by now. The Task Force met four times to review research on eminent domain laws in New York and to evaluate state and local legislative proposals introduced in the aftermath of the *Kelo* decision. On Friday and Saturday of this past week, the State Bar Executive Committee and the House of Delegates reviewed the March 2006 report of the Task Force. I am pleased to report that they accepted and adopted the report. A full copy of the report with the resolution passed is being provided to the Committee for your use.

The Task Force is comprised of lawyers and law professors who practice in the public, private and non-profit sectors. Lawyers on the Task Force represent both public and private clients, developers and property owners. In addition, the Task Force includes members active in the following NYSBA Sections and/or

Committees: Environmental Law, Municipal Law, Real Property Law, and the Committee on Attorneys in Public Service. To date, the Task Force has met four times, once each in November, December, January and March for the purpose of reviewing the current state of the law in New York, analyzing existing federal, state and local legislative proposals introduced following the Supreme Court ruling, examining the need for reform in all areas of the Eminent Domain Procedure Law and the Urban Development Corporation Law, and exploring the impact of eminent domain reform at the local government level. The Task Force considered, among other things, federal and state constitutional implications of reform proposals, and issues of fairness and access to administrative and/or judicial review of eminent domain actions.

The Task Force has unanimously adopted eight recommendations in response to legislation introduced in recent months. These recommendations largely reflect the Task Force focus to date on the legal issues contained in the seventeen bills currently pending before the New York State Legislature. At this time, the Task Force has not adopted recommendations that address all of the proposed areas of reform contained in the various bills, nor has it had the time yet to more thoroughly review additional opportunities for reform of the Eminent Domain Procedure Law. Thus, the work of the Task Force is continuing.

The following recommendations have so far been issued by the Task Force:

1. Eminent domain should not be restricted to specified public projects.

Some of the bills introduced in the wake of the *Kelo* decision have attempted to list certain purposes, such as roads, parks and schools, as

the only exercises of eminent domain to be allowed by law. The Task Force believes it is unduly restrictive, and probably not practicable, to so circumscribe the power of eminent domain. This would speak to Senate Bill 5938. In my own personal review of the bill, I recommend that the Senate be careful of providing a laundry list of items where eminent domain may be used. Although the language on line 6 uses the word “including,” the practical reality is that if a particular use is not listed, it will wind up in litigation because it was not explicitly included on the list. From a drafting standpoint, and to avoid unnecessary costly litigation, it would be better to list specific exclusions. This does not mean, however, that the Task Force as a whole, nor I, believe that the use of eminent domain for economic development should be excluded entirely as in Senate Bill 5961-A.

2. Local governments should not have a veto over exercises of eminent domain by public authorities of larger entities within their borders. Where public authorities such as the Empire State Development Corporation or Metropolitan Transportation Authority employ eminent domain, the legislative intent supporting the grant of that power would be subverted by proposals to allow localities to override it. Were that the case, local governments would be enabled to veto proposals of statewide or regional benefit. It is unclear from the short description provided, how far Senator Alesi’s proposal would go in this regard. Senate Bill 5938 presents an alternate approach by suggesting that where a local IDA approves the use

of eminent domain, the county or city legislature of the municipality wherein the affected property lies, must vote to approve the condemnation.

3. Agencies exercising eminent domain for economic development purposes should be required to prepare a comprehensive economic development plan and a property owner impact assessment. This would improve the existing process by mandating that agencies document the economic benefits they anticipate from exercises of eminent domain for economic development, as well as the expected impact on those whose property is to be acquired. These documents, like those prepared under the State Environmental Quality Review Act (SEQRA) (Environmental Conserv. Law art. 8), should be subject to judicial review at the instance of aggrieved parties. This legislation will require agencies to examine the likely benefits and impacts of economic development projects before irreversibly committing public resources and displacing owners from their property.
  
4. The present 30-day statute of limitations in EDPL § 207 for judicial review of the condemnor's determination and findings should be expanded. EDPL § 204 requires the condemning agency to find that the project has a "public use, benefit or purpose," as well as describe its "general effect . . . on the environment and residents of the locality." The extremely short current time limit places residents in limbo. Thirty days is simply not sufficient time for many property owners to retain an attorney and for that

attorney to bring suit to challenge agency determinations and findings for projects the agency has often been working on for months if not years. Lengthening the time limit will level the playing field.

5. A new public hearing under EDPL § 201 should be required where there has been substantial change in the scope of a proposed economic development project involving the exercise of eminent domain. In the course of large-scale phased development projects, the scope of the project, as well as the nature of the development itself, may well shift. When that occurs, a further hearing should be held, and further findings made, to support the project as a public use. The SEQRA process furnishes an effective model here, since it requires a supplemental environmental impact statement when significant changes in a project are contemplated. See the Department of Environmental Conservation's SEQRA regulations, 6 N.Y.C.R.R. § 617.9(a)(7), providing for a supplemental environmental impact statement to address "changes proposed for the project; or newly discovered information; or a change in circumstances related to the project." Contrary to these concerns, EDPL § 205, authorizing condemnors to amend projects where "field conditions warrant," explicitly states that "[s]uch amendments or alterations shall not require further public hearings[.]" This provision should be repealed. Its practical effect is to preclude public participation and examination despite dramatic changes in the nature, and perhaps the size, of an acquisition, as well as whether it continues to serve a public use at all.

6. No exceptions to the EDPL are necessary for acquiring property for public utility purposes. Legislation has been proposed creating a separate procedure where municipalities seek to acquire property to operate a public utility under Gen. Mun. Law § 360. There is no justification for singling out these acquisitions for different treatment. The EDPL was expressly enacted “to provide the exclusive procedure by which property shall be acquired by exercise of the power of eminent domain in New York state.” EDPL § 101.
7. Acquisitions should not be exempted from the EDPL’s eminent domain procedures simply because other statutes provide for land-use review. Some have suggested exempting acquisitions from the EDPL’s procedural requirements where alternative statutes regulating land use, such as the City of New York’s Uniform Land Use Review Procedure (ULURP), exist. We disagree. Not only is the EDPL intended to “provide the exclusive procedure” for eminent domain (see item 6, *supra*), but the purposes of ULURP, SEQRA and similar statutes are different from those of the EDPL. The courts have developed an appropriate interaction between the EDPL and SEQRA. EDPL § 207 expressly provides for judicial review of compliance with SEQRA. See *Pizzuti v. MTA*, 67 N.Y.2d 1039, 503 N.Y.S.2d 720 (1986). Similarly, EDPL § 206 now sensibly exempts de minimis takings from its provisions, as well as takings governed by other laws, such as the Public Service Law siting articles, where the condemnor “considers and submits factors similar to those” mandated by the EDPL.

But laws such as ULURP and SEQRA serve fundamentally different purposes from those of the EDPL, and should not be employed to bypass the EDPL's procedures.

8. A Temporary State Commission on Eminent Domain should be established. The *Kelo* decision and the publicity it engendered have focused attention on the complex legal, economic and constitutional issues surrounding eminent domain. While this Task Force may indeed make additional recommendations, and is continuing to study topics such as defining public use, the appropriate level of judicial scrutiny, just compensation, and others, we believe legislative proposals for a Temporary State Commission on Eminent Domain make sense. Resolving these issues will best be accomplished through study by a variety of stakeholders to assure that all viewpoints are represented. This is consistent with one of the items in Senator Alesi's draft legislation. The State Bar Task Force is in unanimous agreement that the most prudent course of action for New York State at this point is to immediately establish such a Commission.

In evaluating the various legislative proposals in New York, the Task Force realized that little State-specific research and data exists to accurately assess both the need for, and impact of, many of the proposed reforms. The Task Force urges, among other things, that the State Legislature, perhaps through a Temporary State Commission, begin the collection and analysis of this data before deciding on appropriate substantive modifications to the law. What

follows is a listing of questions that could be answered through empirical research.

- How is eminent domain used in the State?
- How many times each month or each year is a condemnation proceeding instituted?
- How many times is eminent domain used for roads, highways, bridges, sidewalks, schools, government buildings and sewers (among other things)?
- How many times does the use of eminent domain result in the loss of a home?
- How many times does the use of eminent domain result in the loss of a business?
- How many times is eminent domain used for economic development?
- Of the number of times eminent domain is used for economic development in New York, what are the results of the proposed projects? Are they successful? How is success to be benchmarked?
- Is the use of eminent domain more prevalent in upstate or downstate? Is it used more often in urban, suburban or rural areas?
- How often is eminent domain used in New York by the federal government, the state government, local governments, and/or other public benefit corporations? Is it used by agencies with land use and planning oversight or agencies whose portfolio is only economic development?

- Has the use of eminent domain increased dramatically, as is implied by some? If so, what is responsible for that increase?
- How often do we use public-private partnerships to effectuate eminent domain for redevelopment projects in New York?
- To what extent are the so-labeled “private” transfers for matters such as industrial development that are essentially public/private partnerships?
- How many times is eminent domain not needed because there were willing sellers to enable projects to be completed?
- What efforts are made by government and developers to reach private agreements with property owners?
- Are there financial differences between property owners who settle quickly and those who do not?
- How many times are condemnations challenged based on the final compensation offer? What is the outcome of these court cases? How many times does a court award increased compensation to property owners?
- What compensation is being paid, and how does that compensation relate to market value, to costs such as relocation costs, and to subjective values, such as the nature of the planned projects?
- How many instances of abuse exist in New York State over a defined period of time (and how should “abuse” be defined)?
- Is there any information about redevelopment projects that involved the use of eminent domain and those that did not to determine whether they

were equally successful? What have been the social costs and benefits of such efforts?

While this list of questions is not exclusive of the type of information that would help to inform the ongoing dialogue, the Task Force offers these as a starting point should a Temporary State Commission on Eminent Domain be established. In addition to these issues that specifically relate to the use of eminent domain for economic development, the Task Force began to examine the need and opportunity for reform in other aspects of condemnation law in New York. The report contains some background information on the last state commission on eminent domain which was created in 1970 by the Legislature at the urging of Governor Rockefeller, and which resulted in the 1977 version of the Eminent Domain Procedure Law. The Task Force noted that in the approximately twenty-eight years since enactment of the EDPL, little recodification has occurred, and that the vast majority of its provisions remains in its original form. In those instances where the EDPL has been amended, alterations consist primarily of word substitutions.

The Task Force report states that there is a critical need today for codification in the substantive law of eminent domain. While hesitancy is understandable in cases where there are no takings to bring losses within the ambit of just compensation, this concern should not thwart reform in instances where governments have made acquisitions for public purposes. Indeed, one commissioner in 1974 was adamant in urging that “the entire concept of damages in condemnation should be modernized.” It is the substantive law of

eminent domain which remains most murky today. It cries out for serious study and immediate clarification. The impetus for any future reform in the field of eminent domain should be directed at the substantive law. With this as a goal, it is possible that needed changes in the area of compensation will relieve some of the pressures that have recently arisen with regard to the procedures integral to the acquisition process.

With respect to other issues raised in the proposed legislation you are considering as part of today's hearing, the Task Force has not yet had the opportunity to make specific findings and recommendations. We do plan to continue our work. I offer the following personal observations, however, for future consideration.

Bill 5938 speaks of relocation costs. While I personally agree that appropriate relocation costs should be provided to the condemnee, it would be helpful if the legislation would clearly articulate how such relocation costs are to be calculated. Senate bill 5936 begins by discussing the "purpose" of a "public project." My concern these days is that although there are many ways in which condemnation may be used in less controversial settings, a lot of these "purposes" could be alleged to have an "economic development purpose" even if such is to be avoided by a legislative enactment. For example, I believe one could argue in court that eminent domain exercised for a road widening or the installation of sidewalks could have an unstated (on the record) "purpose" of economic development where the road to be widened is located in a commercial corridor or where the sidewalks to be installed would pass by retail

establishments. We need to further study the definition of “blight” and “blighted area” to determine an appropriate statutory definition for New York. There are dozens of bills under consideration across the country attempting to define this term. The bill further refers to “unproductive lands.” It would be beneficial if this term could be defined.

Lastly, with respect to Senator Alesi’s draft legislation, the establishment of an Ombudsman Office to deal with eminent domain is an idea, I believe, modeled on the ombudsman program that started in Utah to assist property owners in understanding their private property rights. By all accounts, this office has had wonderful success in Utah and this concept is being considered in a number of other states. Whether the office should be placed within the Department of Economic Development or an agency that does not get involved with condemnation (such as the Department of State) ought to be further discussed. The proposal also addresses compensation for relocation costs as well as replacement costs. These standards not only need to be defined, but to be best able to conduct an economic impact assessment on any new standards of compensation, in my opinion, we need answers to some of the empirical research questions suggested by the State Bar Task Force.

Thank you for the opportunity to appear before you today to share these remarks. In closing, I offer the assistance of both the New York State Bar Association through its Task Force on Eminent Domain and the Government Law Center of Albany Law School to provide you with further specific feedback and/or

research on continuing issues of interest to the Committee on this important topic.