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**EMINENT DOMAIN LAW IN NEW YORK  
STATE: ISSUES AND OPPORTUNITIES**

*Testimony before the New York State Senate  
Committee on Commerce, Economic Development and Small Business  
and  
Committee on Local Government*

**OCTOBER 18, 2005**



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

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**New York State Senate  
Committee on Commerce, Economic Development and Small Business  
and  
Committee on Local Government**

**Testimony of Patricia E. Salkin  
Associate Dean & Director  
Government Law Center of Albany Law School  
October 18, 2005  
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 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.

First and foremost, I want to thank you Senators Alesi and Little and your colleagues on the Commerce, Economic Development and Small Business Committee and the Local Government Committee for providing hearings around the State to explore the issues and opportunities with respect to the eminent domain law in New York.

As you know, the U.S. Supreme Court's decision in *Kelo v City of New London* has attracted unusual media attention and has captured the emotion of many Americans because the case reminded people, with an example that hit close to home,

literally, the powers enjoyed by federal, state and local governments pursuant to the Fifth Amendment of the U.S. Constitution. This media frenzy has caused, in some corners, an unfortunate hysteria based largely on misunderstandings of law and fact.

In the interest of full disclosure, I am the current Chair of the amicus curiae committee of the American Planning Association, and I did participate in the preparation of a brief to the U.S. Supreme Court in that capacity. In addition, I lent my name to a brief filed by Professor Robert Freilich on behalf of thirteen law professors. Both of these briefs were filed in support of the position advanced by the City of New London, but the briefs focused on different doctrinal aspects of the case. The brief of the American Planning Association focused heavily on the planning aspects of redevelopment, and the brief on behalf of the law professors addressed the interpretation and application of the Fifth Amendment, the relevant standard of review to be applied, and aspects of federalism in judicial review.

However, the testimony that I offer to you today is not reflective of any organizational points of view, including the Government Law Center, but rather represents my personal thoughts based upon research and study of this area of the law and my interactions and involvements with state and local governments in New York.

Attached to my testimony are three documents that I thought the Senate might find of interest. The first is an article that I co-authored that appeared in *The Urban Lawyer Law Review* after the oral arguments in the *Kelo* case and prior to the decision being handed down. The article predicted that the Supreme Court would do exactly what they did in terms of the decision, and this was based upon my analysis of the Fifth Amendment and the historical, constitutional and common law development in this area.

Of course reasonable minds can differ, and I know that there were passionate legal arguments and interpretations on the other side. However, at this point in debate, the U.S. Supreme Court has spoken and the interpretation of application of the Fifth Amendment has been settled now, at least as far as the Court is concerned. I will address more about this shortly. The Second article attached is from the New York State Bar Association's Municipal Lawyer. This article also discusses the decision in *Kelo*, but it adds a New York perspective. In a nutshell, the *Kelo* decision in and of itself did not change the legal landscape in New York. The decision afforded New York State and local governments no greater or additional powers than already exist under the State constitution, our enabling statutes, and decisions of the Court of Appeals. The third document attached is a recently completed chapter for a book forthcoming by the end of this year from the American Bar Association. This work summarizes the various arguments advanced in the 37 amicus curiae briefs submitted to the Court in support of both the petitioner and the respondent. It is interesting to note that while there were 37 friend of the court briefs filed, more than 130 organizations and individuals signed onto these briefs. For your future resource information, all of these briefs are posted on the Albany Law School website ([www.als.edu/faculty/salkin/landluse.eminentdomain/](http://www.als.edu/faculty/salkin/landluse.eminentdomain/)), as is a chart that we have been working on listing all of the federal and state legislative and constitutional proposals introduced in reaction to the decision in *Kelo*.

This morning, I want to focus my remarks on a few different aspects of eminent domain in the aftermath of *Kelo*. First, I want to emphasize again, that the decision handed down by the U.S. Supreme Court did not change the legal landscape in New York. It granted our governments no more (nor less) power than they possessed prior

to the decision. Congress, as well as state legislatures across the United States have been quick to introduce a wide range of legislative approaches to in essence either overturn or severely curtail the effect of the holding by the U.S. Supreme Court in *Kelo*. Lawmakers in more than half of the states have introduced more than 100 bills offering various responses to the use of eminent domain. Resolutions and bills in Congress and five states simply express disapproval of the *Kelo* decision. Bills in at least 5 states would redefine the term “public use,” and bills in at least 9 states propose new specific procedures and guidelines that must be followed in the exercise of eminent domain. Legislation in more than a dozen states would either, through constitutional amendments or statutory change, prohibit the use of eminent domain for economic development projects, and legislation introduced in 9 states, including New York would establish task forces to examine specific issues in eminent domain law and regulation. Bills in 11 states address the issues related to compensation when eminent domain is used, and dozens of other bills address various other issues.

In my opinion, New York State and local governments should continue to possess the power of eminent domain and they should retain the authority to exercise eminent domain to accomplish a wide array of public use purposes including economic development.

While there is no denying that over the long course of history in this State and every other, advocates can point to a very small number of instances where government improperly used or abused its power of eminent domain, in the grand scheme of the thousands of times the power has been properly exercised for legitimate purposes in New York, these isolated instances of abuse are individually important and

provide some insights into potential areas for statutory reform, but such needed reforms do not necessitate outright prohibitions on the exercise of the police power.

Furthermore, in addition to recognizing instances of and potential for abuse, it is equally important to acknowledge the significantly greater number of examples of successful projects that could not have been developed without the government's ability to use eminent domain. The Empire State Plaza where we are today is but one local example.

When government chooses to use its power of eminent domain, it should do so only after carefully weighing the potential benefits and detriments of its actions; considering whether there are any other techniques or opportunities to accomplish the desired goals and outcomes without using eminent domain; and engaging in an open and inclusive public process that includes the development and adoption of a comprehensive [re]development plan. Social equity issues are an important consideration that must be factored into the decisionmaking process. Consistent with the views articulated by the American Planning Association, legislation in New York should preserve the ability of municipalities to use redevelopment tools and techniques, including eminent domain, when appropriate to achieve a well-defined public purpose adopted through an inclusive public process. The use of local development corporations and similar quasi-public or government connected non-profit organizations can help to advance the government's ability to accomplish redevelopment goals and when their plans follow a public process and are subject to government approval and oversight, they carry out a legitimate governmental function not unlike the many services and functions performed through privatization arrangements for traditional governmental services such as the operation of a correctional facility.

That being said, there are a number of other areas that the Legislature may wish to examine for potential reform including, but not limited to: notice provisions for property owners; and better defining appropriate just compensation. In addition, the Legislature should consider creating a task force or study commission to, among other things: collect and analyze data that would examine more in depth the extent to which eminent domain is used across the State including documenting the purposes for which eminent domain is typically used; examine the cost to government in exercising eminent domain; look at the number of displaced households and businesses and the resulting impacts; explore the extent to which success can be measured from redevelopment projects; consider whether the term “blight” is an appropriate standard to determine whether an area is in need of redevelopment, and if so, compare and contrast myriad ways other state statutes define the term to consider whether New York could benefit from any statutory modification; and determine whether there are other ways to provide incentives for public and private economic development beyond the eminent domain technique to promote eminent domain as more of a tool of last resort.

With respect to the issue of just compensation, Alabama, Georgia, Hawaii, Idaho, Maine, Minnesota, New Jersey and Pennsylvania have joined New York with pending legislation to provide enhanced compensation for landowners of condemned property. While the bills vary considerably both in scope and nature of compensation, the common denominator is the premise that the current fair-market value standard does not suffice as “just compensation.” Whether there can be or should be a set formula or fixed percentage over fair market value is one option to explore, as are proposals that would factor into the equation length of time and emotional attachment to the property;

and/or the anticipated value of the property after a successful redevelopment project. In Minnesota, Oregon and Wisconsin, current legislative proposals offer pre-condemnation procedural requirements that reach just compensation issues through appraisal and discovery procedures. It has also been suggested that ADR may be an effective means of addressing just compensation in a timely and efficient manner without the burdens associated with full court hearings.

Furthermore, when considering compensation issues, public policy should address adequate assistance to displaced residents who may not be landowners but rather renters, as well as business owners. While a plan and some level of relocation allowance is required under New York law, this issue has not been studied to make certain that it is being implemented in an equitable and appropriate manner. Some of these issues might warrant more intensive study by a special task force or commission.

On the issue of notice to property owners, New York law has been criticized for lack of direct notification of possible condemnations to property owners, resulting at times in an inability to meet the 30-day statutory timeframe for challenging the condemnation. Issues of notice and an opportunity to be heard are part of our constitutional safeguard and frankly speak to fundamental fairness in the process. New York should be able to do better in this regard. Somewhat related, the American Planning Association's Policy Guide on Redevelopment states that, "An open and inclusive public participation process should be a part of all redevelopment planning. Keeping the public informed and involved, especially those property owners and residents who are most affected, is essential for any successful redevelopment project.

An extensive public participation process will prevent the frequent accusations of secret government maneuverings and developer favoritism that often plague redevelopment programs.” (a copy of the redevelopment guide is available at: [www.planning.org/policyguides/redevelopment.htm](http://www.planning.org/policyguides/redevelopment.htm) ) This offers sound advice for best practices in the exercise of eminent domain.

In conclusion, eminent domain is a vital tool for governments to provide needed and expected public infrastructure and services to benefit the public as a whole. Without specifically detailing the historical development of the public use clause of the United States Constitution (upon which language New York’s Constitution is modeled) since this is discussed in the papers attached to this testimony, The Supreme Court’s ruling that economic development is a valid public purpose should not be legislatively altered in New York, especially absent significant evidence of widespread abuse and misuse. However, the Legislature should - pardon the pun, - seize the opportunity to make other meaningful and appropriate reforms with respect to the exercise of eminent domain consistent with the issues I have raised herein. The Government Law Center of Albany Law School would be honored to assist the Legislature in conducting more detailed surveys and research on these issues.

Thank you again for the opportunity to share these observations with you.