THE EDPL REVISITED

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The issue of how eminent domain power is to be used or not used and what constitutes a "public purpose" is an emotional issue in the wake of *Kelo v. City of New London*, if not before.[2] If *Kelo* involved the taking of a commercial property and not someone's home, I doubt it would have attracted the attention it did. Every year, the American Law Institute-American Bar Association (ALI-ABA) gives a two-and-a-half day series of courses relating to different aspects of condemnation proceedings.[3] It is attended, for the most part, by attorneys from around the country who practice in the field. After the United States Supreme Court handed down its *Kelo* decision, the attendees reported the outpouring of popular discontent with the possibility of condemnation of someone's house for "economic development" by a private party.[4] They also reported that everyone was envisioning their home would be next. Lawmakers took note. As a result, state after state has adopted new laws

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[1] Although this article stands on its own as a contemporary contribution to condemnation law and land use scholarship, some of the topics in this essay have been derived from the author's regular column on condemnation law and tax certiorari in the *New York Law Journal* which he co-writes with his firm partner, Michael Rikon. All references to statutory sections in this article are to the EDPL unless otherwise noted.

[2] 545 U.S. 469 (2005).

[3] ALI-ABA.org, Eminent Domain and Land Valuation Litigation, http://www.ali-aba.org/index.cfm?fuseaction=courses.course&course_code=CR030 (last visited Dec. 27, 2010).

[4] *Id.*; James S. Burling, *Do the Economic Results of a Transfer to a Private Developer Constitute "Public Use?"*, SL049 ALI-ABA 679, 681–82 (2006).

putting restrictions on the use of eminent domain power; mostly aimed at economic development projects by private developers supposedly designed to create jobs and tax revenues.[5] The New York Legislature had approximately eighteen bills introduced seeking to do the same.[6] Only one was adopted and that was aimed at a particular proposed condemnation of a country club.[7]

I participated in a debate centered on that issue. I posed a question to one of the participants who had been arguing against taking the property from A to give it to B. I asked whether that person would have a problem with a particular development being built by the community which was designed to demolish dilapidated commercial structures and replace them with new buildings providing needed employment and tax revenues. The answer was no. I then asked the obvious next question: What was the objection to building the exact same project with the exact same objectives if it were given over to a private developer to complete, who could do it cheaper, better and faster? The answer was because it would be given over to a private developer.

On another occasion, I asked an audience of lawyers (who had already expressed anti-condemnation sentiment) if the following scenario would justify the use of the condemnation power.

> There is a small community in the south. It is a one industry town where that industry had fallen on bad times and ceased operations. This had large ripple effects on the community. Shops were closing and residents were starting to relocate. A proposal is made to the City fathers to condemn the vacant industrial property and additional surrounding property and sell it to a new company. It would guarantee starting up a large manufacturing operation in it and provide 1,000 new jobs to the town residents.

What I got in return was, "It should not be done! No condemnation for economic development!" Anti-condemnation apparently ran deep and this was not a New York audience. While that was the answer prior to 2008, I suspect it might be substantially different today. What I am driving at, at least from where I sit, is that it depends on the times. While some might rest on their principles, in such matters it gets to "whose ox is gored." New York is a state which is not inclined to limit

[5] Terry Pristin, *Columbia Setback Puts Eminent Domain in Spotlight*, N.Y. TIMES, Jan. 20, 2010, at B6.

[6] M. Robert Goldstein & Michael Rikon, *What Hath 'Kelo' Wrought?*, N.Y. L.J., June 28, 2006, at 3.

[7] M. Robert Goldstein & Michael Rikon, *Winds of Change Across Eminent Domain Landscape?*, N.Y. L.J., June 27, 2007, at 3, 6.

condemnation, at least so far.[8] However, today this is still an emotional issue, and reasonable people have differing viewpoints. Thus, I do not join in the debate in this article; I content myself with commenting on the process.

I start with Sections 101 and 104 of the EDPL. They provide that the EDPL shall be the exclusive procedure which shall be uniformly applied by which property shall be acquired by exercise of the power of eminent domain.[9] But it is not a fact. Even internally, it has two distinct procedures, one for the State and the other for every other body (this was a compromise between upstate and downstate practitioners). Further, if you examine the session laws, you will find that section 123 of chapter 840 of the laws of 1977, the very next chapter law after that enacting the EDPL, is an amended reenactment of the New York City Administrative Code chapter containing the Consolidated Condemnation Procedure.[10] While similar to the EDPL and making reference to it, it has some different provisions. If the EDPL is the exclusive procedure, I do not perceive the reason for the continued existence of the Administrative Code as pertaining to condemnation proceedings. The City of New York apparently has an effective lobbyist.

The "Section 206 Exemptions" contains a broad exemption for any "other state, federal, or local law or regulation" which "submits factors similar to those enumerated in subdivision (B) of section [204]" in approving a condemnation proceeding.[11] In essence, this requires the generality of providing a public hearing before authorizing a condemnation proceeding. If this is provided, none of the other EDPL provisions relating to the authorization of a project would apply, except that an authorization to condemn is "deemed abandoned" if proceedings are not commenced within three years.[12]

In reality, the EDPL is not the exclusive procedure for approving a condemnation proceeding. The EDPL was a carefully considered procedure designed to strike a balance between competing interests. A body of law has grown in interpreting it. I

[8] Pristin, *supra* note 5, at B6; *see* Charles V. Bagli & Lisa W. Foderaro, *Court Bars New York's Takeover of Land for Columbia Campus*, N.Y. TIMES, Dec. 4, 2009, at A1.

[9] N.Y. EM. DOM. PROC. LAW §§ 101, 104 (McKinney 2003).

[10] 1977 N.Y. Laws 141 (amending the administrative code of New York City).

[11] N.Y. EM. DOM. PROC. LAW § 206.

[12] *Id.* § 401(B).

do not pretend to be familiar with the exempt procedures. That is the whole point. Everyone knows what is required pursuant to the EDPL; however, this is not so with exemption procedures. Take another example: land use decisions in New York City, including condemnation, can only be adopted by use of its Uniform Land Use Review Procedure (ULURP) as per its charter.[13] That procedure is one of the exemptions. It typically takes around nine months to complete, and sometimes more, resulting in the adoption of a resolution. The EDPL requires specific findings (Section 204), a thirty day window to challenge them,[14] and an expedited challenge procedure pursuant to Section 207.[15] This is not so with ULURP. Under ULURP, the challenge must come in an Article 78 proceeding within four months after approval by the City Planning Commission plus the statutory time for the City Council to consider it, unless the same is taken up by the City Council, in which case it runs from its decision.[16] However, if ULURP is used, neither Sections 204 nor 207 would apply. There are no specific findings required in ULURP. The only time a "written explanation" of an action is required is if that action is contrary to the recommendations of either the Community Planning Board or Borough President.[17] Recently, the City, despite a ULURP approval, also sought approval under the EDPL for its Hudson Yards Development Program.[18] Thus, there were two discrete approvals. With both approvals, that leads to two questions. First, when did the condemnation approval take place? Second, what started the various time periods for challenging the authorization to condemn running? The second approval was after the time period for challenging the first had expired. Challenges were, in fact, launched as to the second approval as if the first had not

[13] N.Y. City Charter § 197-c(a)(11) (2009), *available at* http://www.nyc.gov/html/charter/downloads/pdf/citycharter2009.pdf.

[14] N.Y. EM. DOM. PROC. LAW § 204(C)(3) (McKinney Supp. 2010).

[15] *Id.* § 207(B).

[16] *In re* City of New York, 847 N.E.2d 1166, 1170 (N.Y. 2006).

[17] N.Y. City Charter § 197-c(h).

[18] *See* NYC.GOV, *Hudson Yards—Approved!*, http://www.nyc.gov/html/dcp/html/hyards/proposal.shtml (last visited Dec. 27, 2010); NYC.GOV, *Hudson Yards: Follow-Up Actions*, http://www.nyc.gov/html/dcp/html/hyards/implementation.shtml (last visited Dec. 27, 2010); M. Robert Goldstein & Michael Rikon, *Zoning Actions With Respect to Hudson Yards, Williamsburg*, N.Y. L.J., June 29, 2005, at 3 (commenting on the validity of rezoning in the Hudson Yards area).

occurred.[19] The City did not raise the issue, treating the second approval as if it were the only approval. I can only guess the result if there was such an objection. It appears to me that one single procedure should be required for all purposes (the EDPL), even if there was an approval pursuant to another procedure.

Section 103 contains the definitions of terms used in the EDPL, and subdivision B defines an acquisition map sometimes known as a damage map.[20] That map, similar to a survey, is to be filed with the Order of Condemnation or by itself in an appropriation, and it defines what is being taken.[21] However, the map only requires a perimeter description.[22] Clearly, that is not sufficient. Takings are not so limited. It should also describe upper and lower limiting planes and elevations, where appropriate, as well as the estate or interest being acquired. Despite this limited requirement, in recent acquisitions for subways in New York City as well as in other proceedings, the maps do in fact contain such information. This is an instance where practice has filled in the blanks left in the statute. The statute should be amended as should Section 402(B)(2) which replicates it.

State appropriation maps are also deficient. Where there is more than a single ownership being acquired, the map is only of the single parcel without showing its relationship to what surrounds it. I have had to deal with maps of a single floor of a building in which easements were being taken which showed only individual segments on different maps. This required the claimant to use a surveyor to put them all on a single map to ascertain the impact of the takings as a whole. This should not be necessary.

Section 202 is seriously defective. It provides for how notice of a public hearing shall be given.[23] The statute provides that notice is required to be given by publication and, pursuant to subdivision (C)(1), by mail to those property owners listed for real property assessment purposes.[24] That is not sufficient. While that might be sufficient if the sole occupant of the property is the property owner, it does not provide for notice to the tenants or

[19] *See* C/S 12th Ave. LLC v. City of N.Y., 815 N.Y.S.2d 516, 520 (App. Div. 2006).

[20] N.Y. EM. DOM. PROC. LAW § 103(B) (referred to in the statute as an "Acquisition Map").

[21] *Id.* § 402(A)(1).

[22] *Id.* § 402(B)(2)(a).

[23] *Id.* § 202 (McKinney Supp. 2010).

[24] *Id.* § 202(B)–(C)(1) (McKinney Supp. 2010).

occupants of the properties to be condemned or others who have recorded property rights. Their rights are no less important than those of the property owners. I suspect that if one of those challenged the approval of a condemnation for failure to give them any notice other than by publication, it might be upheld as a denial of due process of law as in *Brody v. Village of Port Chester*.[25] Prior to this decision, there was another ruling by the Appellate Division where a mortgagee was denied payment of its mortgage on statute of limitation grounds, even though notice was by publication and the bank made no claim or appearance in the proceeding.[26] If written notices to the "condemnees" had been required, it probably would not have happened.

Even if publication alone were sufficient for due process purposes, it still should require notice to those whose names can be learned with a modicum of effort. A buyer of real estate is charged with notice of there being a tenant in the property by the fact of occupancy. Why should a condemnor not be chargeable with the same knowledge? Those occupants can receive notice addressed to them at the property. Why should it not be required to give notice to those with recorded property interests to at least the address set forth in that instrument? It should be noted that, in many instances, the mortgagees get the tax notices—not the property owners—and limiting notice to those who are registered for receipt of tax bills may not result in notice to the property owner. None of this is so arduous a task that it would unreasonably impede condemnation of property. Those with less than a fee ownership have substantial property rights which should be protected and, by definition, are condemnees. Again, this is an instance where practice has filled in blanks left by the statute. It is not unusual for condemnors, despite the limited notice for which the statute provides, to give more fulsome notice than the statute requires.

The above discussion with respect to Section 202 equally applies to Section 204(C) with respect to who notice of the synopsis of the Determination and Findings should go.[27] The same list can be used as was generated for giving notice of the hearing and should be given for the same reasons. Of course, those who appeared at the hearing, even if they are not on that

[25] Brody v. Vill. of Port Chester, 509 F. Supp. 2d 269, 284 (S.D.N.Y. 2007).

[26] N. Side Sav. Bank v. Town of Hempstead, 653 N.Y.S.2d 649, 650–51 (App. Div. 1997).

[27] N.Y. EM. DOM. PROC. LAW § 204(C) (McKinney Supp. 2010).

list or registered for receipt of tax bills should receive notice.

Section 207 has been the subject of much contention and has been at the heart of the national debate concerning use of the power of eminent domain ever since the U.S. Supreme Court's decision in *Kelo*. The critics call it "condemnation abuse"[28]—often raising the question: what is public use? The critics also claim that the eminent domain power has been abused. The critics point to economic development projects where the land is turned over to private developers. In New York, the issue came front and center in the Atlantic Yards condemnation[29] and in the expansion of Columbia University.[30]

I believe a large part of the problem lies in the popular belief that governmental power is abused in support of the "favored few." The frustration is exacerbated when the decision to condemn is made by anonymous people. Where elected officials make the decision, there is the possibility of retribution at the next election, albeit that it is more likely in smaller political entities than in the larger ones like New York City. In smaller political entities, condemnation is a dirty word. It was for this reason the New York State Urban Development Corporation (UDC), with its power to disregard local restrictions, was created.[31] However, where the decision is made by appointed officials whose names are not even known, such as in the UDC, it results in deep cynicism. It is increased when the courts enunciate a standard of review when the power to condemn is challenged that is almost impossible to meet. The courts treat such decisions as legislative in character, and place the burden of proof on those seeking to challenge it as proof beyond a reasonable doubt. This, for practical purposes, makes such a challenge virtually impossible, particularly as there is no right to require the type of disclosure one is afforded in other litigation.

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[28] *See* Steven J. Eagle, *Private Property, Development and Freedom: On Taking Our Own Advice*, 59 SMU L. REV. 345, 377 (2006); Kenneth H. Hemler, Note, *Michigan's Proposed Constitutional Amendment in Response to Kelo: Adequate Protection Against Eminent Domain Abuse or False Hope to Private Property Owners?*, 84 U. DET. MERCY L. REV. 187, 189 (2007); Brett D. Liles, Note, *Reconsidering Poletown: In the Wake of Kelo, States Should Move to Restore Private Property Rights*, 48 ARIZ. L. REV. 369, 390 n.207 (2006).

[29] *See* Goldstein v. N.Y. State Urban Dev. Corp., 921 N.E.2d 164, 165 (N.Y. 2009).

[30] *See* Kaur v. N.Y. State Urban Dev. Corp., 933 N.E.2d 721 (N.Y. 2010), *cert. denied*, 2010 WL 3712673, at *1 (U.S. Dec. 13, 2010) (No. 10-402).

[31] *See* 1968 N.Y. Laws 807–11 (noting the purpose of the New York State Urban Development Corporation).

In the Columbia University expansion project litigation, the challengers handed to the court a copy of an E-mail between officials obtained under the Freedom of Information Law (FOIL), stating: "Why do this? . . . I am uncomfortable with us shining a spotlight on the process used to manufacture support for condemnation."[32]

I recognize there is another side to this issue. Small groups of determined people sometimes make the loudest noise. A vocal minority can sometimes impose its will. Condemnation is an essential tool of government, and legislators are to use their best judgment, and ideally, not be limited by the noise of the moment. Using a developer to accomplish a public purpose is not bad where the objective is the public purpose, and not taking care of the politically favored. The resulting cynicism is understandable. Does anyone really believe Columbia University, in sponsoring this project, was doing it to clear blight? Was not the real objective to permit an educational institution to expand? That is a public purpose. Why was it necessary to allege blight?

However, there is a partial solution which, albeit not perfect, should help. It will at least allow the public to have some recourse. That solution is to divide the decision to condemn into two categories: one where the decision to condemn is made by elected officials, and the second as to the balance. When the decision is made by elected officials, the usual rules would apply. Recourse, while rarely possible in the courts, at least in theory, is available at the ballot box.

When made by public corporations, authorities, utilities, railroads and the like, where the decision makers are appointed, in private corporations and/or anonymous, different rules would apply. In such cases, I propose a burden would be placed on the proponents to prove public use. The burden of challenging such a finding would be less than that in challenging findings by elected officials, but more than just a weighing of the evidence. There still could be a presumption of regularity. To overcome it would require clear and convincing evidence. Further, challengers should be granted the tools to gather information and conduct

[32] *See generally In an Effort to get Supreme Court to Hear Columbia Eminent Domain Case, Atlantic Yards Precedent and New York Practices Seen as Outliers Favoring Condemnors*, ATLANTIC YARDS (Dec. 8, 2010), http://atlanticyardsreport.blogspot.com/2010/12/in-effort-to-get-supreme-court-to-hear.html (last visited Dec. 27, 2010) (discussing the petition for certiorari that was filed for the Columbia University case).

discovery as in other litigation so as to be able to make a record for review by the Courts. Just having the FOIL has not proved sufficient. The Appellate Division in the *Kaur* case commented on the stonewalling.[33] Where, in approving the Atlantic Yards condemnation, one of the judges could say that he was not persuaded by the facts shown by UDC, but still felt compelled to approve the condemnation—it added fuel to the fire.[34] I dare say not one person in a thousand, if that many, knows any of the names of those who are on the board of UDC who approved that condemnation. One cannot escape the fact that one of the very reasons for creating these authorities was to shield lawmakers from being held accountable over making such decisions.[35] They got what they wanted in that regard and there must be a rebalancing.

While the decision to condemn has been deemed legislative in character, in that the legislature has delegated that power, it is not truly legislation with which we are dealing in this context. They are not the same. With the legislature, there is accountability, with the others there are none, at least insofar as the public is concerned.

For the following discussion as to Sections 301, 303 and 304, these sections should be looked at as a unit as they relate to offers or advance payments.[36] It is a given or one cannot disagree with any policy which affords a property owner, or one with a property interest, an opportunity to receive a fair price for his property, without being dragged into court to receive it. To that extent, these sections are well intentioned in that it is their purpose. In fact, if the EDPL did not make such a provision, New York State could not qualify for any federal subsidies by reason of the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.[37] It is also a given that it is sound public policy for a condemnor to make immediately available to a condemnee, after the property has been condemned,

[33] Kaur v. N.Y. State Urban Dev. Corp, 892 N.Y.S.2d 8, 14–15 (App. Div. 2009) (requiring disclosures under FOIL), *rev'd*, 933 N.E.2d at 721, *cert. denied*, 2010 WL 3712673, at *1.

[34] Develop Don't Destroy (Brooklyn) v. N.Y. State Urban Dev. Corp., 874 N.Y.S.2d 414, 425–26 (App. Div. 2009) (Catterson, J., concurring); *see Goldstein*, 921 N.E.2d at 175–76 (Read, J., concurring).

[35] *See generally* ROBERT CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK 623–31(1975) (discussing the powers of public authorities).

[36] *See* N.Y. EM. DOM. PROC. LAW §§ 301, 303–304 (McKinney 2003).

[37] *See* 42 U.S.C. § 4601 (2006).

all of the compensation over which there is no dispute. To do otherwise would be to use the withholding of his money as a whip to compel a condemnee to forfeit his constitutional rights, in that he might not have the funds to resist an inadequate payment for his property. Before there was a requirement for an offer, there were requirements for advance payments.[38]

But what actually happens is that there are few governmental bodies which game the system and there are some unfortunate court decisions which make a mockery of that policy. Before discussing this, however, it takes an explanation of the particular provisions and the reasons for them.

Section 304 provides that the condemnor shall, prior to condemnation, have the property appraised and make an offer of the amount of its "highest approved appraisal."[39] This provision was added for a number of reasons. Prior to the EDPL, studies revealed that some condemnors would have the property appraised and then offer to pay less than the amount of that appraisal.[40] During that period, there were many highway widenings in which small strips of land were taken from properties fronting on highways.[41] The amount of dollars involved were such that the cost of challenging the amount in court would probably exceed the benefit gained, and since there were no small claims procedures available, the property owners had no recourse but to take what was offered.[42] One study showed that, in Nassau County, the amounts paid to property owners in such cases were less than the appraisals made by the County approximately eighty-five percent of the time.[43]

That was also the time of vast federal subsidies for urban renewal projects. What had previously been called "slum clearance projects" became "urban renewals."[44] To qualify for

[38] 1971 N.Y. Laws 3052.

[39] N.Y. EM. DOM. PROC. LAW § 304.

[40] *See* M. Robert Goldstein & Michael Rikon, *The Need to Amend the Eminent Domain Procedure Law*, N.Y. L.J., Oct. 25, 2000, at 3–4.

[41] Curtis J. Berger & Patrick J. Rohan, *The Nassau County Study: An Empirical Look Into the Practices of Condemnation*, 67 COLUM. L. REV. 430, 437 (1967).

[42] *See id.* at 441–50.

[43] *Id.* at 442–43.

[44] *See* Amy Lavine & Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project*, 42 URB. LAW. 287, 340–41 (2010) (referencing a 1936 New York Court of Appeals decision concluding that "slum clearance" was a public use); *see also* James W. Ely, Jr., *Post*-Kelo *Reform: Is the Glass Half Full or Half Empty?*, 17

those subsidies, the municipalities had to meet federal guidelines. These required, at that time, at least two appraisals. They had to be subject to peer review and had to represent "just compensation," which is where we got the term in the EDPL of "highest approved appraisal."[45] It was to take the gamesmanship out of the process. The highest was also the amount that had to be paid to the condemnee before he was required to move and was to be the condemnor's appraisal on the trial. The federal rules also provided for an updating of the appraisal before title was taken and a revised written offer based on the same and the advance payment. Thus, the offer was not as we think of one in other litigation, a figure between competing parties used to settle litigation. There was to be no making of one appraisal for an offer and another for trial, and it actually worked that way for a long time.

Not only that, since it was likely that the litigation to fix the amount the condemnee would ultimately receive would not have been concluded prior to the time he would have to relocate his business from the property, he needed that money in order to acquire a new location. The condemnee could rely on the money being paid as the minimum amount he would receive because of the methodology in fixing the amount of advance payment. While it worked that way in the beginning, as time went on there were changes.

The first thing that happened is that the courts determined that making a pre-title vesting offer was not jurisdictional, but precatory.[46] As a result, some condemnors, notably the City of New York, in many instances where there is no federal subsidy, fail to make a written pre-title vesting offer and, as a result, do not make an advance payment until substantially after title vesting (while that has Section 701 implications, we will discuss that aspect later).

While this is in clear violation of the intent of the statute, it still remains as a practice in non-federally subsidized projects. A few judges will not sign a proffered order of condemnation

SUP. CT. ECON. REV. 127, 129 (2009) (noting that in *Berman v. Parker*, the U.S. Supreme Court "broadened the meaning of 'public use' to encompass urban renewal").

[45] N.Y. EM. DOM. PROC. LAW § 304(A)(1) (McKinney 2003).

[46] *See* M. Robert Goldstein & Michael J. Goldstein, *Suggested Changes to the Eminent Domain Procedure Law*, N.Y. L.J., Feb. 28, 1996, at 3; s*ee also* City of New Rochelle v. Sigel, 319 N.Y.S.2d 208, 211–12 (Sup. Ct. 1970) (discussing the necessity for a realistic advance payment).

without a showing of a good faith attempt to comply, but that is not the usual rule and it should be. The burden should be on the condemnor to show why it could not comply.

There is another problem. While perhaps complying with the language of the statute, it is in disregard of its intent. This occurs in cases where an appraisal is made for the purpose of an offer and/or advance payment and another for trial. This does happen. While that might be good litigating tactics in hiding from view what the condemnor will contend in the condemnation proceeding is the value of the property, which is in clear violation of the intent of the statute. When that occurs, a condemnee may find that the offer made bears no relationship to the value the condemnor contends in the pre-title vesting offer. When that happens, he is caught between a rock and a hard place in seeking to buy a replacement property and relocate. If it is a low-ball offer and it turns out to be substantially higher, he will have spent less to buy a replacement property, leaving him unable to take full advantage of the reinvestment provisions of the Internal Revenue Code.[47] The real mischief is when he overspends; therefore, leaving himself open to a later liability when he has already reinvested or has spent the money with a potential judgment against him for the difference and he has no ability to repay. Something is wrong with a system which permits this to happen.

Now we come to a court imposed rule which does violence to the intent of the statute, and compounds the problem. The courts have held that a condemnee cannot offer the amount of an advance payment into evidence, as it was predicated upon an appraisal made for a settlement offer.[48] This is neither correct nor in accordance with the statutory scheme.

Condemnation is not private litigation with no holds barred and the devil take the hind most. A condemnee is entitled to just compensation. There is a duty which flows from a government to its citizens, and therefore, from a government attorney to a condemnee. Fairness is the key word. A condemnee is dragged against his will into this situation. It is not based on something he did or did not do. There is a constitutional imperative to treat him fairly. To permit a lower appraisal at trial than the advance payment on which he has a right to rely is not fair or just. This is

[47] 26 U.S.C. § 1033 (2006).

[48] Michael Rikon, *The Use of Prior Appraisals in Condemnation and Tax Certiorari Cases*, 70 AUG N.Y. ST. B. J. 42, 44 (1998).

not a negligence action. A court which fixes the award must be given all the facts on which to make a fair judgment, including the amount at which the condemnor certified as just compensation as reflected in the advance payment. It is an admission in every sense of the word. This requires a statutory change to undo the courts' decisions which precludes the trial judge being made aware of the condemnor's advance payment. It was never the intent in drafting the EDPL for the advance payments to differ from the condemnor's appraisal used at trial. Where there is such a difference, and it was because of an error, that error can be explained and it should be up to the judge with knowledge of the facts to determine where justice lies. Where this difference was the result of a deliberate act by the condemnor—that too should come before the court.

The requirement for an advance payment is independent of the fact that an offer must be made. The fact that the same appraisal is used for both should not mean that the amount of an advance payment should be kept from the court. Certainly in federally subsidized projects, the condemnor must certify to the government that the appraisal represents a fair value. How can such be certified and kept from the court? This is not the making of an offer to settle litigation which has an element of an additional amount to avoid litigation. The federal statute in effect is predicated on the fact that this is an admission of value. You are not talking about an offer which might be in excess of value. We are talking about what by statute must, in the condemnor's opinion, be fair market value. In federally subsidized projects, one finds the written offer, advance payment and trial appraisal are almost always the same amount. The problem is with the other projects. The fact that the project is not federally subsidized should not obviate the obvious.

This is not an academic problem. A condemnee subject to condemnation has real world choices to make. Key among them is how much money he can count on to relocate. If he cannot rely on the amount of the advance payment being a minimum, he is in an impossible situation. He, at the end of the litigation, might be called upon to reimburse the condemnor with money he has already spent, plus interest. He must be able to count on the fairness of the condemnor in his dealings, and if not, making the court aware of what has occurred.

While one is tempted to suggest a remedy of an award being no less than the advance payment, certainly no one should object to

permitting the amount of the advance payment into evidence.

There is yet another problem inherent in these sections. An offer is required for "the real property to be acquired."[49] Under New York law, a tenant's trade fixtures are deemed real property in the context of a condemnation proceeding.[50] However, it is rarely the case that a pre-title vesting offer is made to a tenant for his fixtures. We can understand the difficulty. A condemnor cannot know what, among the removable trade fixtures, the tenant intends to move with him. Being movable is not inconsistent with being a trade fixture. That does not mean there are not clearly items which cannot be moved (wiring, piping and the like). While in all likelihood an offer would have to be later added, that does not mean that such offers should not be made. The statute should be clarified to require such an offer and an advance payment. Without an advance payment, how can a tenant be expected to relocate? This is recognized in Section 405 where it provides that "no condemnee shall be required to surrender possession prior to the condemnor's payment to him of its advance payment."[51] That is supposed to be a payment, not a loan repayable with interest.

Section 304 (E)(1)(2) provides that where there is a conflict of title or an issue as to who is entitled to receive the amount payable, the money may be deposited into court by the condemnor. The condemnor then would have no further liability for interest on that amount.[52] Some condemnors, as a tactic, even when there is no such conflict, will deposit the funds. While that then can be challenged, it takes time, money, and effort. What such condemnors are probably doing is attempting to get around the clear language of the EDPL in an attempt to avoid the ninety days of interest it must pay during the time the condemnee is given to prove title.[53] Some condemnors have used the mere existence of a mortgage as an excuse to deposit even though there is no dispute between mortgagor and mortgagee. What should be added to this section is a provision that a condemnor not be permitted to deposit, without specific proof of a conflict, a court

[49] N.Y. EM. DOM. PROC. LAW § 303.

[50] *In re* Lincoln Square Slum Clearance Project, 198 N.Y.S.2d 260, 264–65 (Sup. Ct. 1960); *see* M. Robert Goldstein & Michael J. Goldstein, *Trade Fixtures*, N.Y. L.J. Apr. 3, 1972.

[51] N.Y. EM. DOM. PROC. LAW § 405(A).

[52] *Id.* § 304(E)(1)(2).

[53] *Id.* § 304(C).

authorization and after notice to the claimant. Even this is not guaranteed to solve the problem. I have seen a court fail to enforce this requirement of a valid title conflict in order to deposit a condemnee's funds when the deposit was challenged.

Lastly, in commenting on these sections, it must be noted that there is a gaping hole as commented on by some court decisions.[54] While an advance payment is mandated after the vesting of title, there is no required time during which it must be made. I have seen cases which an appraiser was first hired after the vesting of title, and it took two years after title vesting to make an advance payment and then only after court proceedings to compel the same. An outside time limit of no more than three months after title vesting to make an advance payment should be added to the statute. A condemnee should not be placed in the position of having to make a motion to compel a reasonably prompt advance payment to enforce his rights, as is sometimes the case.

The statutory scheme of Section 401 is that after completion of the procedure authorizing a condemnation, a condemnor has up to three years to "commence proceedings . . . to acquire the property."[55] One court decision has held that proceedings are deemed commenced upon completion of the notice procedure under the EDPL.[56] That is probably not what was intended. It probably was intended for it to be the start of publication. If so, it should be clarified. It also provides that, if the project is to be undertaken in sections, if the first section is taken within that three year period, the condemnor may take a total of ten years to complete the acquisitions pursuant to the original procedures authorizing same.

It is my belief that the entire statutory scheme must be rethought. The 42nd Street Project in Manhattan, New York City is worthy of study in this regard. In the late 1970s, the subject of the 42nd Street project was a matter of public discussion. It took until 1984 to secure project approval pursuant to the EDPL.[57] That set off a series of lawsuits seeking to stop the project that lasted until 1990 when the UDC took title to most of the

[54] *See In re* Hudson Tubes, 271 N.Y.S.2d 95 (Sup. Ct. 1966).

[55] *Id.* § 401(A).

[56] *See In re* City of N.Y., No. 35057/04, 2005 WL 429912, at *2, *6 (N.Y. Sup. Ct. Feb. 17, 2005).

[57] *See* M. Robert Goldstein & Michael Rikon, *Why Keep Property Under Approved Condemnation for 20 Years?*, N.Y. L.J., Apr. 24, 2002, at 3.

properties on West 42nd Street.[58] It took an additional ten years to acquire additional properties at the west end of the block.[59] That later acquisition was pursuant to a reauthorizing of the project before the ten years had expired. Never tested was whether that meant that the project was "abandoned" pursuant to Section 401(B) based on the 1984 approval. If so, that would have Section 702 implications (to be discussed hereafter). It then took until 2002 to complete the project by acquiring the westerly half of the block facing on 8th Avenue between West 40th Street and West 41st Street.[60] This was a total of nineteen years from the initial approval. By the time of the last acquisition, the street scene had completely changed. What the area was like when its approval was initially given and then reauthorized was totally different by that time. If authority were first given at that time based on then conditions, we believe UDC would have been hard pressed to justify it on the same basis that it was earlier approved.

Now look at the situation from the property owner's point of view. Since 1978, the property was under the threat of condemnation, virtually ensuring there would be no serious money spent to improve the properties. In the meantime, the surrounding area was undergoing a transformation for the better. The arguments were correctly put forward that there was no real reason for the public to be involved after either the first or second takings because the market would have completed what the initial phases had started. The only properties in the entire area not being transformed were the properties earmarked for condemnation.

It is inherently unjust to permit the approval of a project to remain unchallengeable for ten years. If the condemnor does not want to pay for the taking of property it does not intend to develop until later, it should be prepared to have what occurs, a change in the situation on the ground which might impact its ability to later take the property. A taking three years after approval to condemn is long enough. The time limit on taking property approved for condemnation should be no more than three years.

Section 402(B)(2) provides that at least a twenty day notice be

[58] *Id.*
[59] *Id.*
[60] *Id.*

given to "the owner of record of the property to be acquired."[61] This is very imprecise language. While most condemnors treat it as meaning fee title, fixtures are also "property." No provision is made for service on others having an interest in the property, such as tenants and/or occupants, mortgagees and lien holders. Now compare this to Section 402(A)(2) where in State appropriations it shall "notify condemnees by first class mail" of the intention to appropriate the property.[62] I can perceive no good reason why there should not be a requirement of similar notice in non-State takings. Note that Section 403 requires the attorney for the condemnor to certify "the names of the reputed condemnees of [each] parcel[]."[63] Pursuant to the definitions in Section 103, the term "condemnee" is much more inclusive than record owner.[64] It includes everyone: fee owner, tenant, occupant, mortgagee, easement holder, lien holder, etc. If such a list is able to be compiled for the purposes of Section 403, it likewise can be compiled for the purposes of the various other notice provisions in the EDPL. If nothing else, the language should be made consistent. Property owner and condemnee are not the same.

Section 402(B)(3)(f) presents an interesting problem in what it does not provide. It does provide that a non-governmental condemnor (such as a railroad or utility) must provide a bond, when condemning property, to guarantee payment. This is pursuant to the rule that when property is condemned there should be "sure and certain compensation."[65] This is consistent with having the power to tax. Thus, when UDC applied to condemn the property for the 42nd Street Project, one of the challenges to the taking was that, as UDC did not have the taking power and its bonds were not guaranteed by the State, there was no sure and certain compensation sufficient to authorize the condemnation.[66] The result was that the condemnation court required UDC to post a letter of credit, the money for which was supplied by the sponsor of the project, before it would sign the order.[67] To satisfy itself as to the amount

[61] N.Y. EM. DOM. PROC. LAW § 402(B)(2) (McKinney 2003).
[62] *Id.* § 402(A)(2).
[63] *Id.* § 403 (McKinney Supp. 2010).
[64] *See id.* § 103(C) (McKinney Supp. 2010).
[65] *In re* N.Y. State Urban Dev. Corp., 563 N.Y.S.2d 788, 790 (App. Div. 1990).
[66] *See id.* at 789–90; *see also* M. Robert Goldstein & Michael Rikon, *Not So Sure and Certain Compensation*, N.Y. L.J., Apr. 25, 2001, at 3–4.
[67] *In re Urban Dev. Corp.*, 563 N.Y.S.2d at 789–90; Goldstein & Rikon, *supra* note 66, at 4.

of the letter of credit, it required the condemnor to supply the court, in camera, with updated appraisals of the real estate being acquired.[68] The amount fixed was then computed to be twenty percent in excess of those appraisals.[69] It is to be noted that the amount did not take into account any fixture claims or appraisals. While I never computed the total of all of the awards, I am virtually certain they exceeded the amount of the letter of credit. Since all awards were timely paid, it did not prove to be a problem. But, what if?

A similar situation happened in Syracuse where the Syracuse Industrial Development Agency (IDA) sought to condemn properties where the proposed developer was to supply the money.[70] The IDA had no independent source of funds. A similar challenge was raised and the court took appraisals from both the condemnor and the condemnees in fixing the required bond or letter of credit.[71] Even then, there is an interesting issue of what makes the obligation of a bank or insurance company "sure and certain," especially after 2008. Do two questionable risks equal one acceptable risk? I suspect that in the "real world" that is the best one can get, unless we are prepared to go back to the now defunct Condemnation Law, where title did not pass to the condemnor until final payment was made, or limit the power to condemn to those entities with the taxing power.

However, none of this was pursuant to provisions of the EDPL because there was no such provision—and there should be. Pursuant to this section, a bond is to be provided by "a non-governmental condemnor subject to the jurisdiction, supervision and regulation of the public service commission or the commissioner of transportation."[72] It should be more inclusive as there are around 1,000 public authorities on the state and local level, many of them with the power of eminent domain and none with the taxing power.[73] Unless their debt is guaranteed by another body with taxing power, they cannot ensure a sure and certain compensation to those whose property they seek to

[68] *In re Urban Dev. Corp.*, 563 N.Y.S.2d at 790; Goldstein & Rikon, *supra* note 66, at 3.

[69] Goldstein & Rikon, *supra* note 66, at 3.

[70] *See* Mobil Oil Corp. v. City of Syracuse Indus. Dev. Agency, 646 N.Y.S.2d 741, 745 (App. Div. 1996); *see also* Goldstein & Rikon, *supra* note 66, at 3.

[71] *See Mobil Oil Corp.*, 646 N.Y.S.2d at 746.

[72] N.Y. EM. DOM. PROC. LAW § 402(B)(3)(f) (McKinney 2003).

[73] M. Robert Goldstein & Michael Rikon, *Sure and Certain Compensation and Public Agencies*, N.Y. L.J., Dec. 23, 2009, at 3.

condemn any more than could UDC or Syracuse IDA.[74] Instead of courts having to make up their own procedure in such circumstances, it should be provided in the EDPL.

Section 404 provides a condemnor and "its officers, agents or contractors" with the right to enter onto property proposed to be acquired "for the purpose of making surveys, test pits and borings, or other investigations, and also for temporary occupancy during construction."[75] In my view, this is patently wrong. One of the incidents of ownership of private property is in the right to exclusive possession by its owner. The EDPL is designed to protect property owners by regulating how the power of eminent domain is exercised. This should apply no matter the duration of the taking. While the State can appropriate property, all other rights to condemn, whether permanently or temporarily, require at a minimum a court order.[76] This section is the one exception. The right of entry prior to acquisition should only be pursuant to court order, not at the unbridled demand of whomever. Without it, the potential for abuse is evident.

Section 405 provides that before a condemnee can be removed from occupancy an advance payment be provided to him.[77] For an advance payment to be of practical use to a condemnee, he needs time to use it to help him to relocate. This section should be amended to provide there be a reasonable time, at least ninety days, provided between the time of an advance payment and an application to remove the condemnee from possession; I have seen condemnors attempt to do them simultaneously.

Section 406 was added to the EDPL as the result of lobbying by an owner whose property was taken to build an addition to a courthouse which was never built.[78] It provides that if the project for which the property was acquired was abandoned, and if the condemnor seeks to "dispose of the property or any portion thereof for private use within ten years of acquisition," it has to first be offered to its former fee owner at the then fair market

[74] *See id.*

[75] N.Y. EM. DOM. PROC. LAW § 404.

[76] *Id.* § 402(B).

[77] *Id.* § 405(A).

[78] *See id* § 406; *see also* Fur-Lex Realty, Inc. v. Lindsay, 367 N.Y.S.2d 388, 390 (Sup. Ct. 1975) (prior to the drafting of Section 406, this court stated the well established rule that a municipality may convert property for other uses or abandon it entirely, provided it is in good faith and for a particular public purpose).

value.[79] In the instance which generated this section, the land was sold to a private developer.

There are too many things wrong with this section. First, if property is being condemned for a particular use, as it must, then it should not take ten years to know that the project has been abandoned. It is not fair to hold the property just in case the condemnor can find a different use. Second, I have seen condemnors get around this provision by not "disposing" of the property by giving a ninety-nine year lease instead, which is designed to circumvent the intent of the statute. Any lease should be set forth as a covered disposition of the property. Further, upon a project being abandoned within that ten year period, unless there is an immediate use for it, the condemnor should be immediately obligated to offer it back to the condemnee at a fair value. It should not take intent to dispose of the property. Public use is a required constitutional predicate to condemn. If it turns out there is no such use, the property should be returned.

Section 501(B) gives the supreme court "exclusive jurisdiction to hear and determine all claims arising from the acquisition of real property . . . without a jury or without referral to a referee or commissioners."[80] New York may be the only state which precludes a jury trial in condemnation proceedings.[81] I admit to very limited experience with respect to juries in general and condemnation in particular. I am told that what is usually the result in such cases are quotient verdicts having little to do with the facts of the case. My experience tells me that in cities such as New York, where valuation concepts are much more complex than in a large part of the rest of the state, a sophisticated judge is a necessity. Certainly, knowledge of real estate economics is very helpful. While some judges may not know how to deal with, for example, a discounted cash flow analysis, unless explained by an expert witness, I suspect it would be totally beyond most juries even when explained. This is one section I would not meddle with.

Section 502(B) leaves it up to the court signing the order of condemnation to fix a date when claims must be filed.[82] A claim,

[79] N.Y. EM. DOM. PROC. LAW § 406(A).

[80] *Id.* § 501(B).

[81] M. Robert Goldstein & Michael Rikon, *Where is Temporary Commission on Eminent Domain?*, N.Y. L.J., Mar. 14, 2008, at 3.

[82] N.Y. EM. DOM. PROC. LAW § 502(B)(4).

in this instance, is akin to a pleading. As such, the court has the discretion in the instance of a late service or filing to afford relief. Where there is a claim for the value of the fee interest, or even the leasehold, it should be quite easy to comply. At that stage of the proceeding all that is required is to ask for "just compensation," not a particular amount. In all probability, the condemnee does not yet have an appraisal of either the fee interest or of the leasehold (if it has not been precluded by a "condemnation clause" in the lease).

The tenant with a trade fixture claim is in a different position. Pursuant to the statute, his claim should have an inventory of the trade fixtures for which he is making his claim attached.[83] Here, we have a balancing problem. The condemnor is entitled to know the extent of the claim it is facing. The condemnee has a practical problem in first hiring an appraiser and then having him compile an inventory of the items being claimed in sufficient detail to be meaningful. In a city like New York, a typical commercial building may contain many tenants with such a trade fixture claim. It may take a considerable amount of time for them to compile such an inventory, particularly where there are few competent appraisers available. The same is true for a manufacturing plant anywhere in the state. Either the court rules should be modified to provide flexibility, as to the time to file such a claim, or a provision be made in the statute for filing a claim without an inventory, which is to be later supplemented with an inventory. Many condemnors understandably ask the court in issuing the order of condemnation to provide for as short a time as they can get for filing of the claims; condemnees seek the opposite. Rather than leave it to the happenstance of what a particular court may view as an appropriate time-frame, one way or the other, the statute should address the problem, probably by providing that such a claim may be filed without an immediate inventory, with the inventory to be supplied within a reasonable time thereafter. In State appropriations, a condemnee is given three years to file a claim,[84] and interest stops six months after the date of the appropriation if a claim is not filed.[85] Why in one and not in the other?

Section 701 has a history.[86] The Law Revision Commission

[83] *Id.* § 503(C).
[84] *Id.* § 503(A).
[85] *Id.* § 514(B).
[86] *Id.* § 701.

originally proposed that besides his award in a condemnation proceeding, a condemnee was entitled to an additional allowance of his litigation expenses on the theory that having to expend money to secure his just compensation would leave him with less than just compensation.[87] A bill so providing was vetoed by the Governor as promoting litigation which might not otherwise occur.[88] Two provisions were added in the newly adopted bill.[89] One was that an additional allowance was necessary to achieve just compensation (which no court, to my knowledge, has ever attempted to interpret) where the award be substantially in excess of the condemnor's appraisal.[90] By court interpretation, this was changed to the amount of the pre-acquisition offer where that amount was less than the amount of the condemnor's appraisal.[91] The statute clearly was drawn in the belief that the offer, advance payment, and trial appraisal would all be the same, as I previously noted.

So what happens when there is no pre-acquisition offer? The courts have treated that as one that is less than the appraisal, using zero as the base.[92] What happens when there is no pre-acquisition offer but there is an advance payment sometime after the property is condemned? One would think it would make no difference. Some condemnors think differently. This section needs revision to clarify that no pre-vesting offer is a zero.

Section 702(B) provides that where "the procedure to acquire . . . property is abandoned by the condemnor" prior to the institution of proceedings or where a court "determines that the condemnor was not legally authorized to acquire the property," the condemnor becomes liable to reimburse the condemnee for his "actual and necessary costs," including expert and attorney's fees and his "damages."[93] As of now, we have three New York Appellate Divisions weighing in on interpreting the statute. The Second Department would find the abandonment had to take place between the application to condemn and the vesting of titles

[87] M. Robert Goldstein & Michael J. Goldstein, *EDPL §701: Dead or Alive?*, N.Y. L.J., July 23, 1992, at 3.

[88] *See id.*

[89] *Id.*; *see* N.Y. LEGISLATIVE SERV., NEW YORK STATE LEGISLATIVE ANNUAL 1987, at 262 (Pamela A. Sibener et al. eds., 1987).

[90] N.Y. EM. DOM. PROC. LAW § 701; Goldstein & Goldstein, *supra* note 87, at 3.

[91] S*ee* Karas v. State, 565 N.Y.S.2d 185, 186 (App. Div. 1991); Goldstein & Goldstein, *supra* note 87, at 3.

[92] Goldstein & Goldstein, *supra* note 46, at 3, 9.

[93] N.Y. EM. DOM. PROC. LAW § 702(B).

to qualify, interpreting the term procedure as if it read proceeding.[94] The Third and Fourth Departments would find abandonment any time after the adoption of the Determination and Findings.[95] Additionally, the Fourth Department would find an abandonment from the fact no proceedings to acquire title were instituted within the three year period provided for in Section 401(A)(B), making the distinction between "proceedings" and "procedure," a distinction the Second Department did not make.[96] Absent a ruling by the Court of Appeals, clarifying the matter, a clarification may be required in the EDPL.[97] Having been involved in litigation on the winning side in the Fourth Department, it is not hard to determine which side I think is correct.

[94] *See* 49 WB, LLC v. Vill. of Haverstraw, 839 N.Y.S.2d 127, 143 (App. Div. 2007), *abrogated by* Hargett v. Town of Ticonderoga, 918 N.E.2d 933 (N.Y. 2009); *see also* M. Robert Goldstein & Michael Rikon, *§702(B): Attorney's Fees and Successful Near-Condemnee*, N.Y. L.J., Oct. 24, 2007, at 3, 9.

[95] Goldstein & Rikon, *supra* note 94, at 3, 9.

[96] *See* Buffalo Airport Ctr. Assoc. v. Niagara Frontier Transp. Auth., 649 N.Y.S.2d 858, 858 (App. Div. 1996). Note, however, that the decision affirmed the holding of the late justice, Hon. Vincent E. Doyle of the Erie County Supreme Court, and is unpublished. The author was counsel to the claimant's attorney's in the above case and has provided an analysis of this unpublished holding in Goldstein & Rikon, *supra* note 94, at 3.

[97] As previously mentioned in note 94, the New York State Court of Appeals has partly resolved some of the issues under Section 702(B) by holding that reimbursement for attorney's fees and other costs incurred by a condemnee may be sought after it is determined in an EDPL Article 2 proceeding that the condemnor lacked authority to pursue the proposed acquisition. *Hargett*, 918 N.E.2d at 933. The case, however, only focused on attorney's fees and costs and did not deal with the meaning of "damages" as used in the statute.