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Standing Pat in a Post-*Kelo* World: Preservation of Broad Eminent Domain Power in *Kaur v. New York State Development Corp.*

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STANDING PAT IN A POST-*KELO* WORLD: PRESERVATION OF BROAD EMINENT DOMAIN POWER IN *KAUR V. NEW YORK STATE DEVELOPMENT CORP.*

Abstract: On June 24, 2010, the New York Court of Appeals in *Kaur v. New York State Urban Development Corp.* upheld a state taking of private property to expand Columbia University's campus into the Manhattanville neighborhood of New York City. In doing so, the court reaffirmed precedent holding that the determinations of state agencies vested with the condemnation power are entitled to substantial judicial deference. This deferential posture assumed by the Court of Appeals helps preserve a broad power of eminent domain in New York.

Introduction

The right of property has been called "the guardian of every other right."[1] It is not, however, an absolute right—property has always been subject to reasonable statutory and judge-made regulations.[2] The consequent tension between state power and individual rights is particularly evident in cases of eminent domain, or the right of a government, through the formal process of condemnation, to seize private property without consent.[3]

The Takings Clause, part of the Fifth Amendment of the U.S. Constitution, limits the exercise of eminent domain through the "public use" requirement, which mandates that any government taking serve a public purpose.[4] To illustrate, it would be unconstitutional for the federal government to take private property from *A* and transfer it to *B* for the sole private benefit of *B*.[5] Disputes involving eminent domain, how-

[1] James W. Ely, The Guardian of Every Other Right 26 (3d ed. 2008) (citing Arthur Lee, American revolutionary and diplomat).

[2] *See* Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse 18–20 (1991).

[3] *See generally* Kelo v. City of New London, 545 U.S. 469 (2005).

[4] U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation."). The U.S. Supreme Court has interpreted "public use" broadly to mean public purpose, such that condemned property must be put to use for public benefit but need not be accessible for actual use or occupation by the general public. *See Kelo*, 545 U.S. at 479–80.

[5] *See Kelo*, 545 U.S. at 477.

ever, are often not so clear-cut.[6] For instance, what if *B* is a private party but promises to develop the land in a manner that yields substantial public benefit?[7]

This was the question that confronted the U.S. Supreme Court in 2005 in *Kelo v. City of New London*.[8] The state was attempting to seize private property through eminent domain, and then turn it over to other private parties for commercial development.[9] The Court upheld the taking in a contentious 5–4 decision, reasoning that economic development by private parties could be a valid public use within the meaning of the Takings Clause.[10]

In response to *Kelo* and the public outcry it provoked, many state legislatures sought to limit eminent domain.[11] By June 2008, thirty-seven states had enacted some form of legislation curtailing its exercise.[12] New York, however, was not one of them.[13] Although the movement to rein in eminent domain found no traction in the state legislature, it persisted in the state courts in the form of petitions challenging state condemnations of property.[14] In 2009, *Kaur v. New York State Urban Development Corp.* (*Kaur I*) came to the First Department of the New York Supreme Court, Appellate Division, presenting many of the same issues at controversy in *Kelo*.[15] Although the Appellate Division took the opportunity to curtail the state's power of eminent domain in *Kaur I*, it was ultimately reversed by the Court of Appeals, New York's highest court, in the 2010 case *Kaur v. New York State Urban Development Corp.* (*Kaur II*).[16]

Part I of this Comment provides a brief legal history of eminent domain in New York—with a specific focus on condemnations for blight

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[6] *See generally id.*

[7] *See generally id.*

[8] *See id.* at 472.

[9] *See id.* at 473–75.

[10] *See id.* at 490.

[11] Edward J. Lopez et al., *Pass a Law, Any Law, Fast! State Legislative Responses to the* Kelo *Backlash*, 5 Rev. L. & Econ. 101, 102 (2009).

[12] *See id.* at 101–02. For example, ballot initiatives proposing limitations on regulatory takings appeared in Washington, Idaho, California, and Arizona, where voters passed Proposition 207 or the "Private Property Rights Protection Act." *See* Rebecca L. Puskas, Note, *Measure 37's Federal Law Exception: A Critical Protection for Oregon's Federally Approved Land Use Laws*, 48 B.C. L. Rev. 1301, 1310 (2007).

[13] *See* Lopez et al., *supra* note 11, at 101–02.

[14] *See generally* Goldstein v. N.Y. State Urban Dev. Corp., 921 N.E.2d 164 (N.Y. 2009); Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp., 874 N.Y.S.2d 414 (App. Div. 2009).

[15] *See* Kaur v. N.Y. State Urban Dev. Corp. (*Kaur I*), 892 N.Y.S.2d 8, 16–20 (App. Div. 2009) (comparing the facts of the case to those of *Kelo*), *rev'd*, 933 N.E.2d 721 (N.Y. 2010).

[16] *See* Kaur v. N.Y. State Urban Dev. Corp. (*Kaur II*), 933 N.E.2d 721, 737 (N.Y. 2010), *cert. denied*, 131 S. Ct. 822 (2010).

removal and civic projects—to contextualize the decisions reached in *Kaur I* and *Kaur II*.[17] Part II examines how the two courts reached their respective decisions, with a particular emphasis on the standards of review employed and the degree of deference accorded to agency determinations.[18] Finally, Part III argues that the standards for review and deference that won out—those employed by the Court of Appeals—help to preserve the tradition of broad eminent domain power in New York by limiting the judiciary's power to invalidate state condemnations.[19]

I. Eminent Domain in New York: A Brief Legal History

The takings clause of the New York state constitution, like that of the U.S. Constitution, includes a public use requirement that requires state takings of private property to serve a public purpose.[20] In 1936, in *New York City Housing Authority v. Muller*, the Court of Appeals held that removal of blight constitutes a public purpose.[21] The U.S. Supreme Court reiterated as much in 1954 in *Berman v. Parker*, holding that blight removal, slum clearance, and redevelopment could permissibly trigger eminent domain.[22] It has since become a well-established principle in New York case law that blight removal is a public use within the meaning of the state takings clause, and therefore a valid predicate for the exercise of eminent domain.[23]

Moreover, the state constitution expressly empowers the legislature to provide for the "clearance, replanning, reconstruction and rehabilitation" of blighted areas.[24] Accordingly, the state legislature in 1968 passed the New York State Urban Development Corporation Act (the "UDC Act"), which created and vested with eminent domain power a quasi-legislative public authority known as the Empire State Development Corporation ("ESDC").[25]

Under the UDC Act, ESDC can authorize condemnation for a limited number of public use purposes, among them land use improve-

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[17] *See infra* notes 20–46 and accompanying text.

[18] *See infra* notes 47–81 and accompanying text.

[19] *See infra* notes 82–93 and accompanying text.

[20] N.Y. Const. art. I, § 7(a) ("Private property shall not be taken for public use without just compensation.").

[21] *See* 1 N.E.2d 152, 155 (N.Y. 1936).

[22] *See* 348 U.S. 26, 32–33 (1954).

[23] *See* Goldstein v. N.Y. State Urban Dev. Corp., 879 N.Y.S.2d 524, 533–34 (App. Div. 2009), *aff'd*, 921 N.E.2d 164 (N.Y. 2009).

[24] N.Y. Const. art. XVIII, § 1.

[25] N.Y. Unconsol. Law §§ 6254(1), 6255(7) (McKinney 2010).

ment projects and civic projects.[26] A land use improvement project is an undertaking to ameliorate blight through the "clearance, replanning, reconstruction, and rehabilitation . . . of a substandard and insanitary area."[27] A civic project is "[a] project . . . designed and intended for the purpose of providing facilities for educational, cultural, recreational, community, municipal, public service or other civic purposes."[28]

Challenges to ESDC's use of condemnation for land use improvement projects have typically presented two questions for the courts: What constitutes blight, and how extensive must it be before the state can use condemnation to ameliorate it?[29] ESDC's use of condemnation in connection with civic projects has likewise raised two primary questions: How much public benefit must an undertaking provide to qualify as a civic project, and can this benefit spring from a private party or entity?[30]

With regard to identifying blight, New York courts have traditionally deferred to quasi-legislative agencies like ESDC, which have been empowered by the legislature to make objective blight determinations.[31] In 2009, in *Goldstein v. New York State Urban Development Corp.*, the Court of Appeals clarified this limited standard of review: "It is only where there is no room for reasonable difference of opinion as to whether an area is blighted, that judges may substitute their views . . . for those of the legislatively designated agencies."[32] Court are thus confined to a rational basis review of ESDC's determinations.[33]

New York courts have accorded ESDC similar deference to qualify its condemnation undertakings as civic projects.[34] For example, in 2009, in *Develop Don't Destroy (Brooklyn) v. Urban Development Corp.*, the Appellate Division determined that construction of a privately owned

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[26] *Id.* §§ 6253(6), 6255(9).

[27] *Id.* § 6253(6)(c).

[28] *Id.* § 6253(6)(d).

[29] *See, e.g.*, Kaur v. N.Y. State Urban Dev. Corp. (*Kaur I*), 892 N.Y.S.2d 8, 20–23 (App. Div. 2009) (scrutinizing the findings of a study ESDC relied upon for its blight designation).

[30] *See id.* at 23–25 (casting doubt upon the putative public benefit of a project, especially given the private nature of the entity providing the benefit).

[31] *See* Kaskel v. Impellitteri, 115 N.E.2d 659, 662 (N.Y. 1953) ("[T]he Legislature has authorized the city officials . . . to make a [blight] determination, and so the making thereof is simply an act of government, . . . legislative in fundamental character, which, whether wise or unwise, cannot be overhauled by the courts.").

[32] 921 N.E.2d 164, 172 (N.Y. 2009).

[33] *See id.*

[34] *See, e.g.*, Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp., 874 N.Y.S.2d 414, 424 (App. Div. 2009).

basketball arena qualified as a civic project because ESDC's determination that it would provide recreational and entertainment benefits to the public was not irrational.[35] The court also held that a private entity can provide the public benefit requisite for a civic project.[36]

These principles of eminent domain jurisprudence were again questioned in 2009 when *Kaur I* came to New York's Appellate Division.[37] Brothers Parminder and Amanjit Kaur challenged the proposed condemnation of seventeen acres in the Manhattanville neighborhood of West Harlem (the "Project").[38] ESDC had ordered the condemnation, which called for acquisition of a gas station owned by the Kaurs, to clear the way for nearby Columbia University to build a new campus.[39]

In fact, Columbia had been eyeing expansion into Manhattanville since at least 2002, when it began privately buying up property so aggressively that within six years it owned or had contracted to purchase forty-eight of sixty-seven lots in the Project area.[40] The Kaurs were among the few holdouts.[41] Their refusal was rendered moot, however, when ESDC declared the Project area blighted based on two studies it had commissioned, enabling it to condemn the property as part of a land use improvement project.[42] ESDC also justified the condemnation as a civic project, citing numerous public benefits Columbia's expansion would provide.[43] The Kaurs' only hope was to challenge the condemnation under New York's Eminent Domain Procedure Law. [44]

In a move that cut against the recent trend of New York decisions upholding state takings, most notably *Goldstein*, the court invalidated ESDC's planned condemnation, ruling it unconstitutional on four grounds: (1) the taking was not for public use because it did not qualify as a land use improvement project; (2) the UDC Act, if not unconstitutionally vague, was at least unconstitutional as applied by ESDC; (3) the taking was not for public use because it did not qualify as a civic project; and (4) ESDC's premature closure of the administrative record violated the petitioners' right to due process.[45] The petitioners' victory was

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[35] *See id.*
[36] *See id.* at 424.
[37] *See* 892 N.Y.S.2d at 20–26.
[38] *See id.* at 15.
[39] *See id.* at 11–12, 15.
[40] *See id.* at 13.
[41] *See id.* at 15.
[42] *See id.* at 14–15.
[43] *See Kaur I*, 892 N.Y.S.2d at 14–15.
[44] N.Y. Em. Dom. Proc. Law § 207(A) (McKinney 2010).
[45] *See Kaur I*, 892 N.Y.S.2d at 20–27.

short-lived, however: less than seven months later the Court of Appeals unanimously reversed in *Kaur II*, upholding the condemnation and clearing the way for Columbia's expansion.[46]

II. Rational Basis Review as Applied by the New York Court of Appeals

In *Kaur II*, the Court of Appeals reversed the Appellate Division on all four grounds, three of which warrant further discussion in this Comment: (1) there was a rational basis for ESDC's determination that the project area suffered from blight, removal of which qualified as a land use improvement project under the UDC Act; (2) the UDC Act was neither unconstitutionally vague nor unconstitutional as applied by ESDC; and (3) ESDC had a rational basis for qualifying the condemnation and Columbia's expansion as a civic project.[47]

A. *There Was a Rational Basis for ESDC's Blight Determination*

The Court of Appeals held that the lower court, in rejecting ESDC's blight determination, did not properly apply the rational basis test articulated in *Goldstein v. New York State Urban Development Corp.*[48] Under this standard, the court explained, the only question for the judiciary was whether ESDC had a rational basis in concluding that the Project area was blighted.[49] The Court of Appeals concluded that there was a rational basis, given the two separate blight studies relied upon by ESDC.[50]

The *Kaur I* court had acknowledged these two studies, but nevertheless ruled that ESDC had failed to provide credible and sufficiently independent proof of blight in Manhattanville.[51] The court was referring to the fact that Allee, King, Rosen and Fleming, Inc. ("AKRF"), the firm ESDC commissioned in 2006 to conduct the first blight study, had been helping Columbia develop a plan for expansion into Manhattanville since at least 2004.[52] Columbia even indirectly funded the AKRF

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[46] *See* Kaur v. N.Y. State Urban Dev. Corp. (*Kaur II*), 933 N.E.2d 721, 737 (N.Y. 2010).
[47] *See* Kaur v. N.Y. State Urban Dev. Corp. (*Kaur II*), 933 N.E.2d 721, 730–37 (N.Y. 2010).
[48] *See id.* at 731.
[49] *See id.* at 730.
[50] *Id.* at 731.
[51] Kaur v. N.Y. State Urban Dev. Corp. (*Kaur I*), 892 N.Y.S.2d 8, 20–22 (App. Div. 2009).
[52] *Id.* at 12, 21–22.

study, since it had agreed to cover all of ESDC's costs in connection with the Project.[53]

According to the lower court, this presented an obvious conflict of interest that predisposed AKRF to a finding of blight, arrived at through a "methodology biased in Columbia's favor."[54] Also of significance to the lower court was the fact that by the time AKRF issued the results of its study in 2007, Columbia owned seventy-two percent of the lots in Manhattanville.[55] Whereas AKRF's study found that forty-eight of the sixty-seven lots in this area exhibited "substandard condition[s]," an earlier 2002 study conducted by Ernst & Young had concluded that fifty-four of the same sixty-seven lots were in "fair," "good," or "very good" condition.[56] Thus, even if AKRF's blight findings were accurate, much of the deterioration giving rise to blight potentially occurred while Columbia was the majority property owner in Manhattanville.[57] This raised the possibility that Columbia intentionally allowed property to deteriorate to make condemnation more likely.[58]

For the lower court, this possibility betrayed a concerted, collusive effort on the part of ESDC and Columbia to manufacture a blight finding.[59] Although intensive scrutiny of the factual record led the lower court to this conclusion, the Court of Appeals in *Kaur II* determined that such scrutiny constituted an improper de novo review of the record.[60] The Court of Appeals further held that, although the lower court's concerns about collusion may have been valid, the two blight studies presented sufficient evidence that ESDC's blight determination was rationally based.[61]

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[53] *Id.* at 12.

[54] *Id.* at 21–22. The court also rejected the credibility of a second study by a different firm, Earth Tech Inc., because it duplicated much of the methodology used in AKRF's study. *Id.* at 22.

[55] *See id.* at 13.

[56] *Id.* at 12–13.

[57] *Kaur I*, 892 N.Y.S.2d at 21.

[58] *See id.* (noting that Columbia forced out tenant businesses in the Project area and allowed water infiltration problems to go unaddressed).

[59] *See id.* at 21–22.

[60] *See Kaur II*, 933 N.E. 2d at 731.

[61] *See id.* (noting that the lower court's review merely established a difference of opinion as to whether the Project area was blighted or not, which was not enough under the *Goldstein* standard to overturn ESDC's determination).

B. *The UDCA Was Not Unconstitutionally Vague*

The Court of Appeals next held that even though the UDC Act lacked clear standards for what constituted blight, it was not unconstitutionally vague.[62] The court relied heavily on the proposition that blight is dependent on a number of variable factors and therefore "must be viewed on a case-by-case basis."[63] The court also relied on the 1954 U.S. Supreme Court case *Berman v. Parker*, in which the Court noted that blight is an elastic concept that does not call for an inflexible definition.[64] Accordingly, the UDC Act provided enough meaning to the term "substandard or insanitary area" for it to pass constitutional muster.[65]

Oddly, the *Kaur I* court never explicitly declared the statutory language of the UDC Act unconstitutionally vague.[66] Rather, the court had held the UDC Act unconstitutional as applied because its lack of standards necessarily granted ESDC too much discretion in determining what constituted blight.[67] The lower court pointed in particular to a previous study of the Atlantic Yards area of Brooklyn, in which AKRF had designated buildings at least fifty percent vacant as indicative of blight.[68] Yet AKRF's Manhattanville study designated buildings only twenty-five percent vacant as indicative of blight.[69] The lower court was also highly skeptical of ESDC's reliance on underutilization as an indicator of blight.[70]

This argument failed to persuade the Court of Appeals, however, which maintained in *Kaur II* that ESDC had relied on more than just underutilization to support its blight determination.[71] The court endorsed ESDC's determination as a thorough evaluation of the project site based on a host of factors, including "the physical, economic, engineering and environmental conditions at the Project site."[72] Furthermore, the fact that ESDC's standards diverged from those used by other

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[62] *See id.* at 732–33.

[63] *See id.*

[64] *See* 348 U.S. 26, 33–34 (1954) (noting that a "wide variety of values" can be taken into account when evaluating blight).

[65] *See Kaur II*, 933 N.E.2d at 732–33.

[66] *See* 892 N.Y.S.2d at 25.

[67] *Id.* at 26.

[68] *Id.* at 25.

[69] *Id.*

[70] *See id.* at 22–23. AKRF designated buildings as underutilized—and therefore indicative of blight regardless of physical condition—if they were not built up to nearly the maximum floor space allowable by the local zoning regulations. *Id.*

[71] *See* 933 N.E.2d at 731.

[72] *Id.*

agencies or in previous studies did not render the UDC Act unconstitutional as applied, since it was not necessary that "the degree of deterioration or precise percentage of obsolescence . . . be arrived at with precision."[73]

C. *There Was a Rational Basis for ESDC's Civic Project Designation*

Finally, the *Kaur II* court held that ESDC had a rational basis for determining that a sufficient public benefit would flow from Columbia's expansion to deem it a civic project.[74] The court relied heavily on the language of the UDC Act, which explicitly defined a civic project as one intended to provide "facilities for educational, cultural, recreational, community, municipal, public service or other civic purposes."[75] As a university, Columbia was clearly a provider of "educational" services within the meaning of the statute.[76]

The *Kaur I* court had acknowledged that Columbia's new campus would provide educational services, but interpreted the statute to require even those services to have a civic purpose.[77] That was the not the case with Columbia, the court reasoned, because the university's private nature rendered it "virtually the sole beneficiary of the Project."[78]

The Court of Appeals disagreed, reasoning that the Project was not disqualified from being a civic project just because a private party benefitted; the UDC Act, after all, explicitly permitted private involvement in redevelopment projects.[79] Moreover, the court in *Kaur II* asserted that Columbia's expansion would produce a bevy of cognizable public benefits, such as education and expansion of knowledge, stimulation of job growth, and valuable scientific research.[80] The court held that the anticipation of such benefits provided a rational basis for ESDC to qualify Columbia's expansion as a civic project.[81]

III. Rational Basis Review in Practice: A Low Bar

Kaur II preserved broad eminent domain power in New York by signaling that agencies like ESDC have broad discretion to justify con-

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[73] *Id.* at 732.
[74] *Id.* at 733–35.
[75] N.Y. Unconsol. Law § 6253(6)(d) (McKinney 2010).
[76] *See Kaur II*, 933 N.E.2d at 733–34.
[77] *See* 892 N.Y.S.2d at 23.
[78] *Id.* at 24.
[79] *See* N.Y. Unconsol. Law § 6252 (McKinney 2010); *Kaur II*, 933 N.E.2d at 733.
[80] *Kaur II*, 933 N.E.2d at 734–35.
[81] *Id.* at 733–35.

demnations as blight removal projects or civic projects, and the Court of Appeals will not step in to invalidate the taking unless the agency's justification was completely irrational and baseless.[82] The differing results in *Kaur II* and *Kaur I* are explained the different standards of deference employed: the Court of Appeals in *Kaur II* held that ESDC's proposed condemnation was constitutional not because it definitively constituted a land use improvement project and civic project, but because ESDC had a rational basis for qualifying it as such.[83] This highly deferential stance contrasted sharply with *Kaur I*'s more assertive posture, which was all the more striking given that it occurred just ten days after the Court of Appeals had reaffirmed the rational basis standard of review for agency determinations in *Goldstein v. New York State Urban Development Corp.*[84]

Even though the *Kaur I* court never explicitly conducted a rational basis test, it arguably did so implicitly when it scrutinized the factual record and concluded that ESDC's blight determination was "mere sophistry."[85] Through even minimal scrutiny, the court discovered that the studies relied on by ESDC were potentially colored by bias and suspect methodology, while the history between ESDC and Columbia raised the possibility that the condemnation was a product of collusion.[86]

Although it acknowledged that corruption and bad faith could be relevant in a rational basis review, the Court of Appeals summarily dismissed the concerns of the lower court as utterly insufficient to prove bad faith or the irrationality of ESDC's determinations.[87] The Court of Appeals' decision in *Kaur II* therefore set the bar for proving bad faith very high in New York: it clearly requires more than the questionable pattern of behavior identified by the lower court, and probably even requires clear evidence of a specific act of bad faith.[88]

After setting the bar for proving bad faith extremely high, the *Kaur II* court set the bar for upholding ESDC's determinations correspond-

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[82] *See infra* notes 83–93 and accompanying text.

[83] *Compare* Kaur v. N.Y. State Urban Dev. Corp. (*Kaur II*), 933 N.E.2d 721, 731, 737 (N.Y. 2010), *with* Kaur v. N.Y. State Urban Dev. Corp. (*Kaur I*), 892 N.Y.S.2d 8, 16 (App. Div. 2009).

[84] *See Kaur I*, 892 N.Y.S.2d at 16 (positing that courts must make an independent determination as to the public purpose of a condemnation); *see also* Goldstein v. N.Y. State Urban Dev. Corp., 921 N.E.2d 164, 174 (N.Y. 2009).

[85] *See Kaur I*, 892 N.Y.S.2d at 16.

[86] *See id.* at 21–23.

[87] *See Kaur II*, 933 N.E.2d at 732.

[88] *See id.* at 731–32.

ingly low.[89] To show blight, ESDC merely must produce a study that identifies and measures specific indicia of blight through objective methods, which the court will not rigorously question.[90] Similarly, to show a civic project, ESDC must show that the public will derive some cognizable benefit from the project.[91] This does not represent a significant burden, as ESDC's determination that the condemnation will serve a civic purpose creates a presumption of validity and the scope of public benefits recognized by the Court of Appeals is, in practice, quite broad.[92] It appears that as long as these rather modest requirements are met, the courts will be unwilling to step in and overturn ESDC's blight or civic project determinations.[93]

Conclusion

The Appellate Division in *Kaur I* proposed that the judiciary must make an independent determination that a state taking has a public purpose. The Court of Appeals in *Kaur II* rejected this notion, noting that eminent domain is primarily a question for the legislature and calls for broad judicial deference to agency determinations. After *Kelo*, many states moved quickly to restrict the exercise of eminent domain, but the New York legislature stood pat—a move the Court of Appeals arguably regarded as a legislative mandate that eminent domain was not to be independently reined in by the judiciary. The result is a state of eminent domain in New York much the same today as it was before *Kelo*: a broad power, entrusted to the discretion of quasi-legislative agencies, that does not require independent judicial sanction and is subject only to a lenient rational basis review.

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[89] *See id.* at 730–31 (holding that the court can only step in to invalidate an agency-made blight determination if there is no room for disagreement that it is irrational or corrupt).

[90] *See id.* at 731.

[91] *See id.* at 733–35.

[92] *See id.* (recognizing, for example, that economic effects like stimulation of job growth can constitute a public benefit, even if those effects flow somewhat indirectly from a private endeavor).

[93] *See Kaur II*, 933 N.E.2d at 730–31, 733–35.