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New York Law Journal

SECOND CIRCUIT REVIEW

The Relevance of Pretextual Motives in Takings Clause Challenges

By Martin Flumenbaum and Brad S. Karp
May 21, 2024

In *Brinkmann v. Town of Southold*, 96 F.4th 209 (2d Cir. 2024), the U.S. Court of Appeals for the Second Circuit addressed whether compensated takings for public use may be challenged as the product of bad-faith or pretextual motives under the Takings Clause of the Fifth Amendment to the U.S. Constitution.

The question was arguably left open by the Supreme Court in its landmark Takings Clause decision in *Kelo v. City of New London*, 545 U.S. 469 (2005) and by the Second Circuit in its application of *Kelo*. In a majority opinion authored by Circuit Judge Dennis Jacobs and joined by Circuit Judge Amalya L. Kearse, the Second Circuit held that the Takings Clause permits the use of eminent domain for public purposes even when there are plausible allegations that the government had "ulterior motives." *Brinkmann*, 96 F.4th at 218.

Circuit Judge Steven J. Menashi dissented and, reading *Kelo* differently and relying on out-of-circuit precedent, would have held that takings aimed at "thwarting the rightful owner's lawful use of his property" are not permitted, even if they are also "for public use" or in furtherance of "a public purpose."

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The majority opinion confirms that the Second Circuit—unlike some state Supreme Courts—will continue to extend maximum deference to legislative judgments in Takings Clause cases as long as a public use is established, even when plausible allegations of pretextual motivations are present.

The 'Kelo' and 'Goldstein' Decisions

The Takings Clause of the Fifth Amendment provides that "private property" may not "be taken for public use, without just compensation." *Brinkmann* implicated two leading precedents interpreting the Takings Clause: *Kelo* and the Second Circuit's decision applying *Kelo* in *Goldstein* v. *Pataki*, 516 F.3d 50 (2d Cir. 2008).

In *Kelo*, the Supreme Court approved the use

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of eminent domain for the purpose of "economic development," *i.e.*, development by a private party that would, if successful, result in "economic rejuvenation" of the local community. 545 U.S. at 483–84. In language central to the Brinkmanns' appeal, *Kelo* cautioned that the government cannot "take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."

In *Goldstein*, decided three years later, plaintiffs challenging the Atlantic Yards development in Brooklyn alleged that the project's public benefits were a "pretext" masking an intent to benefit a particular private developer. 516 F.3d at 52–53. Upholding the taking, Katzmann explained that the court did "not read *Kelo*'s reference to 'pretext' as demanding…a full judicial inquiry into the subjective motivation of every official who supported the [p]roject."

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He added, though, that "a fact pattern may one day arise in which the circumstances of the approval process so greatly undermine the basic legitimacy of the outcome reached that a closer *objective* scrutiny of the justification being offered is required."

Facts and the District Court's Decision

The Brinkmann family runs a chain of midsize hardware stores with four locations on Long Island. *Brinkmann (Dist. Ct.)*, 2022 WL 4647872, at *1. In 2016, the Brinkmanns agreed to purchase a vacant lot in Southold from a local bank for $700,000, conditioned on the Brinkmanns securing the required approvals to build a new location there.

For the next three-and-a-half years, the Brinkmanns engaged with the Town of Southold in an attempt to secure those approvals. After residents expressed concerns about traffic related to the new store at public meetings, the Brinkmanns offered to pay for any required improvements to the implicated intersections; a study eventually concluded that none were required.

When the town demanded that the Brinkmanns fund a $30,000 "Market and Municipal Impact Study," the Brinkmanns agreed. At that point, the town attempted to purchase the lot itself, even though it was under contract to the Brinkmanns. The local bank refused, and the Brinkmanns closed on the lot (through an LLC) in November 2018.

The town then imposed a moratorium on building permits in a one-mile zone including the Brinkmanns' lot (the town made at least three exceptions, but the Brinkmanns—believing it would be futile—did not seek one). In September 2020, after a required public hearing and formal findings that a "passive use park" on the Brinkmanns' lot would constitute a "public use," the Town authorized the taking of the lot.

In May 2021, Ben and Hank Brinkmann, and their LLC, filed suit under 42 U.S.C. § 1983. They alleged that the taking of their lot was "pretextual" and therefore invalid under the Takings Clause. They claimed that the true purpose was not to create a new park but to prevent them from opening a new location in Southold after other attempts to block the store failed.

District Judge LaShann DeArcy Hall dismissed the complaint, holding that *Kelo* and *Goldstein* do not permit a "pretext" inquiry into the exercise of eminent domain when the government identifies a recognized public use for the taken property, such as opening a new park.

The Second Circuit's Opinions

A split panel of the Second Circuit affirmed the dismissal of the complaint. The majority opinion framed the question presented as "whether the Takings Clause is violated when a property is taken for a public amenity as a pretext for defeating the owner's plans for another use." *Brinkmann*, 96 F.4th at 210. The majority held, without qualification,

that "a taking is permitted by the Takings Clause if the taking is for a public purpose—as a public park indisputably is."

Before the Second Circuit, the Brinkmanns renewed their argument that "the Public Use Clause requires the government's stated objective to be genuine, and not a pretext for some other, illegitimate purpose."

The majority disagreed, explaining that *Goldstein* had interpreted the discussion of "pretext" in *Kelo* as a "passing reference" and that, in the majority's view, a pretext inquiry is only appropriate when there are plausible allegations that the taking was executed to bestow a private, rather than public, benefit. And because "there can be no dispute that a public park, even an unimproved one, is a public use," no pretext inquiry was appropriate here (the majority added that investigating subjective motivations of legislatures is, in the words of Justice Antonin Scalia, "almost always an impossible task").

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Finally, the majority distinguished various state decisions appearing to endorse a "bad faith" inquiry into the use of eminent domain as generally applying state law. It also distinguished "dicta" from other Circuits approving a similar review as inconsistent with *Kelo*.

Menashi would have reversed the dismissal of the complaint and found that the Brinkmanns stated a claim that the town violated the Takings Clause. In his dissenting opinion, he emphasized that the complaint plausibly alleged that the town exercised its eminent domain power with the primary motivation of preventing the Brinkmanns from opening a new hardware store, rather than building a new park (which the majority did not contest).

In other words, Menashi would have held that "the Constitution contains no Fake Park Exception to the public use requirement of the Takings Clause."

Under Menashi's reading of *Kelo* and *Goldstein*, inquiries into the subjective motivations behind the use of eminent domain are permitted, and he pointed out that such inquiries are common in other constitutional challenges (such as those alleging invidious discrimination) and even in other Takings Clause challenges (such as takings allegedly for a private benefit).

In Menashi's view, *Kelo* discussed a pretext analysis with specific reference to whether the taking was aimed at bestowing a private benefit not because that is the only context in which pretext can be considered, but because that was the question before the court in *Kelo*.

Menashi concluded that the facts of the Brinkmanns' appeal fit within *Goldstein*'s acknowledgment that when "the circumstances of the approval process so greatly undermine the basic legitimacy of the approval process…a closer *objective* scrutiny of the justifications being offered is required."

Conclusion

The Second Circuit's decision in *Brinkmann* v. *Town of Southold* confirms that the court will continue to extend maximum deference to legislatures exercising the eminent domain power as long as a public use is established.

Looking ahead, property owners considering a challenge to the use of eminent domain should take note of the Second Circuit's words in *Goldstein*—restated by the district court in *Brinkmann*—that "[t]he primary mechanism for enforcing the public-use requirement has been the accountability of political officials to the electorate, not the scrutiny of the federal courts." *See Brinkmann (Dist. Ct.)*, 2022 WL 4647872, at *3 (quoting *Goldstein*, 516 F.3d at 57).