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# Governmental Takings, Court of Appeals: Kim v. City of New York

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In conclusion, a takings claim is likely to fail under the Federal and New York State constitutional standards when a petitioner was aware of the inherent limitations on the property at the time of purchase<sup>137</sup> and the governmental body had a valid legislative purpose for its regulation.<sup>138</sup> In addition, when a property has merely suffered a diminution in value,<sup>139</sup> the regulation has not interfered with the petitioner's reasonable investment backed expectations,<sup>140</sup> and the limitation does not entirely extinguish the Petitioner's economic and recreational use of the property, no taking will have occurred.<sup>141</sup>

Kim v. City of New York<sup>142</sup>  
(decided February 18, 1997)

Plaintiff, Soon Duck Kim, and other property owners, appealed from the Supreme Court's decision denying plaintiffs' motion for summary judgment and granting the City of New York's [Hereinafter, "City"], cross-motion for summary judgment.<sup>143</sup> The Supreme Court concluded that no taking of the plaintiffs' property had occurred "because the City was authorized by New York City Charter § 2904<sup>144</sup> to compel [the] plaintiffs to raise

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 614, 679 N.E.2d at 1039, 657 N.Y.S.2d at 559.

<sup>139</sup> *Id.* at 618, 679 N.E.2d at 1042, 657 N.Y.S.2d at 562.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 619, 679 N.E.2d at 1043, 657 N.Y.S.2d at 563.

<sup>142</sup> 90 N.Y.2d 1, 681 N.E.2d 312, 659 N.Y.S.2d 145, *cert. denied*, 118 S. Ct. 50 (1997).

<sup>143</sup> *Id.* at 5, 681 N.E.2d at 314, 659 N.Y.S.2d at 147.

<sup>144</sup> N.Y. CITY CHARTER § 2904 [2] (1992) provides that:

The owner of any property at his own cost, shall . . . fill any sunken lot or lots comprising part or all of such property or cut down any raised lot or lots comprising part or all of such property whenever the transportation department shall so order pursuant to standards and policies of the transportation department . . . . In the event that the owner fails to comply with the provisions of this section, the transportation

their property to the legal grade.”<sup>145</sup> The Appellate Division affirmed.<sup>146</sup>

The Court of Appeals rejected the plaintiffs’ argument that the City engaged in an unconstitutional taking<sup>147</sup> of their property when the City placed side fill on approximately 2400 square feet of their property.<sup>148</sup> The court held that critical to a takings analysis is the question of “whether the allegedly taken property interest was a stick in the ‘bundle of property rights’ acquired by the owner.”<sup>149</sup> Here, the court concluded that by “virtue of the common-law and the City Charter obligation of lateral support to a public roadway, plaintiffs’ title never encompassed the property interest they claim has been taken.”<sup>150</sup>

Plaintiffs acquired a parcel of land in 1988 adjoining College Point Boulevard in Queens, New York.<sup>151</sup> At the time they acquired title to the land, a map reflecting the proper grade of College Point Boulevard was filed in the Office of the Queens Borough President.<sup>152</sup> The actual grade of College Point Boulevard in 1988 was 9.1 feet however, the filed map reflected a legal grade of 13.5 feet.<sup>153</sup> As a result of the grade disparity, in

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department may provide for the doing of same at the expense of the owner in the manner to be provided by local law.

*Id.*

<sup>145</sup> *Kim*, 90 N.Y.2d at 5, 681 N.E.2d at 314, 659 N.Y.S.2d at 147.

<sup>146</sup> *Id.*

<sup>147</sup> U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: “nor shall private property be taken for public use, without just compensation.” *Id.*; N.Y. CONST. art.1, § 7(a). This section provides that “[p]rivate property shall not be taken for public use without just compensation.” *Id.*

<sup>148</sup> *Kim*, 90 N.Y.2d at 5, 681 N.E.2d at 314, 659 N.Y.S.2d at 147.

<sup>149</sup> *Id.* at 6, 681 N.E.2d at 314, 659 N.Y.S.2d at 147 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)). In *Lucas*, the court stated: “[The] recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those ‘existing rules or understandings’ is surely unexceptional.” *Id.* at 1030.

<sup>150</sup> *Kim*, 90 N.Y.2d at 5, 681 N.E.2d at 314, 659 N.Y.S.2d at 147.

<sup>151</sup> *Id.* at 4, 681 N.E.2d at 313, 659 N.Y.S.2d at 146.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

1990, the City engaged in a project to raise the roadway to its legal grade.”<sup>154</sup>

The City notified plaintiffs in March of 1990 of their obligation pursuant to the City Charter to raise their property to the legal grade.<sup>155</sup> The City indicated that if the plaintiffs responded within ten days, the regarding would be completed by the City at no cost to plaintiffs.<sup>156</sup> The notice also indicated that if the plaintiffs failed to respond, the grading would be performed by the City at a cost to plaintiffs.<sup>157</sup> Plaintiffs failed to respond and the City undertook the regarding of plaintiffs’ property.<sup>158</sup>

According to the court, the pivotal issue in this case centers around the proposition that “[p]roperty interests . . . are not created by the Constitution.”<sup>159</sup> The court noted that property interests are created by state law and existing interpretations of such laws.<sup>160</sup> Having determined that the Constitution was not the place to begin its analysis, the court began its inquiry with the common law and the New York City Charter.<sup>161</sup>

Plaintiffs’ obligation to preserve and maintain the legal grade has its roots in New York’s common law obligation of lateral

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 5-6, 681 N.E.2d at 314, 659 N.Y.S.2d at 147. The court reasoned:

Because the State defines the rights and obligations that constitute “property” in the absence of any superseding Federal law, the threshold step in a takings inquiry is to determine whether, in light of the “existing rules or understandings of State law,” plaintiffs *ever* possessed the property interest they now claim has been taken by the challenged governmental action.

*Id.* (citation omitted).

<sup>160</sup> *Id.*

<sup>161</sup> Note, however, that even though the court discussed the common law principles defined by New York case law, the court based its finding that no taking occurred in this case on the existence of the City Charter, and not the common law.

support.<sup>162</sup> In *Village of Haverstraw v. Eckerson*<sup>163</sup> the court stated that an adjacent landowner's duty with respect to the public roadway "will be somewhat broader" than the duty to an adjoining private landowner . . . ."<sup>164</sup> The court in *Haverstraw* explained that the "preservation of lateral support to a highway as constructed and prepared for the public use, is an obligation to the community which rests upon the adjacent landowner."<sup>165</sup>

The court also cited to a leading treatise<sup>166</sup> which states that:

An exception to the general rule that the absolute right to support extends only to the land in its natural state occurs when the supported land is an adjacent public highway. The duty to provide lateral support includes the duty to support the highway in its improved condition. The courts have held that the public interest in highways justifies the enlargement in the scope of duty.<sup>167</sup>

Nevertheless, having discussed the above common law principles, the court decided to base its conclusion that the

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<sup>162</sup> See BARRON'S LAW DICTIONARY 283 (4th ed. 1996). Lateral support is defined as "[A]n owner of real property has the right to have his land, in its natural condition, supported and held in place from the sides' by his neighbor's land." See also BLACK'S LAW DICTIONARY 883 (6th ed. 1990). Lateral support is defined as

The right of lateral and subjacent support is the right to have land supported by the adjoining land or the soil beneath. The right of a landowner to the natural support of his land by adjoining land. The adjoining owner has the duty not to change his land (such as lowering it) so as to cause this support to be weakened or removed.

*Id.*

<sup>163</sup> 192 N.Y. 54, 84 N.E. 578 (1908).

<sup>164</sup> *Id.* at 59, 84 N.E. 580. See *Kim*, 90 N.Y.2d at 9, 681 N.E.2d at 316, 659 N.Y.S.2d at 149.

<sup>165</sup> *Haverstraw*, 192 N.Y. at 59, 84 N.E. at 580.

<sup>166</sup> 9 RICHARD R. POWELL, POWELL ON REAL PROPERTY ¶699[1], at 63-6 (Matthew Bender & Co., Inc. 1997).

<sup>167</sup> *Id.* (citation omitted). See *Kim*, 90 N.Y.2d at 10, 681 N.E.2d at 317, 659 N.Y.S.2d at 150.

plaintiffs were obligated to provide lateral support to the public roadway on the New York City Charter.<sup>168</sup>

The court relied on *Laba v. Carey*<sup>169</sup> in reaching its conclusion that § 2904 of the City Charter was applicable in this case.<sup>170</sup> In *Laba*, purchaser unsuccessfully argued that title to the premises was unmarketable because the existing grade of the public road was lower than the legal grade and this meant that at some time in the future he might be required to raise the level of the adjoining property.<sup>171</sup> The court held that such a requirement would amount to “nothing more than a normal incident to the ownership of real property within the City of New York. Section 230 of the New York City Charter [the predecessor provision to § 2904] places the responsibility for the maintenance and repair of sidewalks on the individual owner.”<sup>172</sup>

Applying the principle announced in *Laba*, the *Kim* court concluded that the City Charter obligation of lateral support to the legal grade was in force when the plaintiffs bought their property.<sup>173</sup> Therefore, maintaining legal grade was a normal incident of ownership of real property within the City of New York.<sup>174</sup> In addition, the *Kim* court noted that the plaintiffs acquired their property with constructive notice that the existing grade was below legal grade, as was established by the filing of a revised city map in accordance with statutory procedure.<sup>175</sup>

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<sup>168</sup> *Id.* The court stated that “the property owner's obligation of lateral support to a public roadway finds its specific, contemporary formulation in the New York City Charter” and declined to “define the precise contours of the common-law duty in this case.” *Id.*

<sup>169</sup> 29 N.Y.2d 302, 277 N.E.2d 641, 327 N.Y.S.2d 613 (1971).

<sup>170</sup> *Kim*, 90 N.Y.2d at 11, 681 N.E.2d at 150, 659 N.Y.S.2d at 317.

<sup>171</sup> *Laba*, 29 N.Y.2d at 312, 277 N.E.2d at 647, 327 N.Y.S.2d at 621.

<sup>172</sup> *Id.*

<sup>173</sup> *Kim*, 90 N.Y.2d at 12, 681 N.E.2d at 318, 659 N.Y.S.2d at 151. The court stated that the “plaintiffs acquired a ‘sunken lot’ insofar as it was below legal grade of the road and, accordingly, took the property subject to the section 2904 obligation to raise it to the legal grade.” *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* “The city map is to be deemed final and conclusive with respect to the location, width and grades of the streets shown thereon, so far as such location, width and grades have been duly adopted.” *Id.* (citation omitted).

The *Kim* court concluded that the Constitution is implicated only when plaintiff actually acquires the property interest at issue. The creation of a property interest is not founded in the Constitution but in state law. Here, since the plaintiffs purchased their property subject to the restriction imposed in the City Charter to provide lateral support, the plaintiffs never acquired an interest in property that could be the subject of a taking.<sup>176</sup>

Judge Smith wrote a lengthy dissent and stated that an unconstitutional taking occurred when the City placed side fill on the plaintiffs' property to be used for public purposes without just compensation.<sup>177</sup> Judge Smith argued that the City Charter was not even applicable here because the plaintiffs' property was not "sunken" within the meaning of the statute.<sup>178</sup> Moreover, the common law notion of lateral support that the majority found in the language of the statute was "certainly open to debate" and unsupported by the decision in *Haverstraw*, which the court cited as authority.<sup>179</sup>

The majority disposed of Judge Smith's argument that the plaintiffs' property was not "sunken" within the meaning of the statute by pointing out that the word "sunken" is amenable to more than one interpretation.<sup>180</sup> Since the language of the statute

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<sup>176</sup> *Kim*, 90 N.Y.2d at 12, 681 N.E.2d at 318, 659 N.Y.S.2d at 151. The court stated that the plaintiffs could not convert their deliberate failure to comply with the City Charter into a takings claim. *Id.*

<sup>177</sup> *Id.* at 14, 681 N.E.2d at 319, 659 N.Y.S.2d at 152 (Smith, J., dissenting).

<sup>178</sup> *Id.* at 20-21, 681 N.E.2d at 323, 659 N.Y.S.2d at 156 (Smith, J., dissenting) (citation omitted). Judge Smith defined "sunken" as "having sunk or been sunk beneath the surface or having sunk to a lower level." *Id.* The majority defined "sunken" as "below the legal grade of the road." *Id.* at 12, 681 N.E.2d at 318, 659 N.Y.S.2d at 151 (Smith, J., dissenting). This distinction is important because if Judge Smith's definition were to prevail, the City Charter would not apply and therefore the majority's reliance on the City Charter would be misplaced. *Id.* (Smith, J., dissenting).

<sup>179</sup> *Id.* at 20, 681 N.E.2d at 323, 659 N.Y.S.2d at 156 (Smith, J., dissenting).

<sup>180</sup> *Id.* at 13, 681 N.E.2d at 319, 659 N.Y.S.2d at 152. "Thus, while the dissent might plausibly disagree with the Court's interpretation of section 2904, its concession that the statute 'is amenable to two differing yet reasonable interpretations' . . . forecloses its contention that the application of the statute in this case works a taking of plaintiff's property." *Id.*

can reasonably support differing interpretations, the majority's interpretation of the word "sunken" is wholly acceptable and permits application of the City Charter to the plaintiff's property.<sup>181</sup>

The dissent argued that the doctrine of lateral support founded in the common law is unsupported by the language of the statute and by existing case law.<sup>182</sup> *Haverstraw*, according to the dissent, established the principle that an adjoining landowner of a public roadway could not do certain acts upon his own property that would injure a public street.<sup>183</sup> The dissent argued that acts such as excavating or obstructing the lateral support of the public roadway are impermissible,<sup>184</sup> however, the holding in *Haverstraw* said nothing about the "placing of side fill on property without the owner's consent or about any compensation due an owner as a result."<sup>185</sup>

The majority opinion did not respond to the dissent's assertions that *Haverstraw* provided no support for its argument.<sup>186</sup> As the majority noted, it chose not to rely on common law principles in its finding that no taking had occurred; instead, the majority relied on the City Charter which it found to be in full force and effect when plaintiffs purchased their property.

Having determined that in the absence of overriding Federal law, the state defines the rights and obligations that constitute property, plaintiffs never acquired an interest free from the

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 22-23, 681 N.E.2d at 324-25, 659 N.Y.S.2d at 157-58 (Smith, J., dissenting).

<sup>183</sup> *Id.* at 23, 681 N.E.2d at 324, 659 N.Y.S.2d 157 (Smith, J., dissenting).

<sup>184</sup> *Id.* (Smith, J., dissenting).

<sup>185</sup> *Id.* at 23, 681 N.E.2d at 325, 659 N.Y.S.2d at 158 (Smith, J., dissenting). The dissent argued that the majority read *Haverstraw* much too broadly. *Id.* "The 'existing understanding' of the obligation of lateral support clearly does not apply here when it is the City that has caused the disparity." *Id.* Basically, the dissent argued that the common law doctrine of lateral support does not negate the plaintiffs fundamental property right to be free from governmental invasion of their property. *Id.*

<sup>186</sup> The dissent's argument was futile because the majority did not base its finding on the common law notion of lateral support but on the existence of the City Charter.



obligation to maintain lateral support pursuant to the City Charter.<sup>187</sup> Therefore, a takings claim, under the Federal or State Constitution cannot be sustained<sup>188</sup> when plaintiff purchases property that is subject to an existing restriction.<sup>189</sup>

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<sup>187</sup> *Kim*, 90 N.Y.2d at 6, 681 N.E.2d at 314, 659 N.Y.S.2d at 147.

<sup>188</sup> *Id.* at 10, 681 N.E.2d at 317, 659 N.Y.S.2d at 150.

<sup>189</sup> *Id.* at 14, 681 N.E.2d at 319, 659 N.Y.S.2d at 152. The court concluded that merely enforcing a legal obligation already in place when the plaintiffs purchased their property does not constitute a taking. *Id.* In addition, plaintiffs still own their property in its entirety including the portion abutting the roadway where the side fill was placed. *Id.*