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Via Federal Express

The Hon. Stuart M. Cohen
Clerk of the Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: Goldstein, et al. v. New York State Urban Development Corporation d/b/a Empire State Development Corporation (App. Div. 2nd Dep't Docket No. 2008-07064)

Dear Clerk of Court:

My law firm, together with Berger & Webb, LLP, serves as counsel to respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") in this special proceeding. Purportedly filed pursuant to Section 207 of the Eminent Domain Procedure Law ("EDPL"), the proceeding seeks an order rejecting the Determination and Findings adopted by ESDC on December 8, 2006 for the Atlantic Yards Land Use Improvement and Civic Project (the "Atlantic Yards Project") in Brooklyn. A copy of petitioners' notice of appeal is enclosed.

We write to request that the Court exercise its authority pursuant to § 500.10 of its rules to dismiss the appeal on the ground that it fails to raise a substantial constitutional question. In the alternative, we request an expedited briefing schedule, pursuant to § 500.17(b) of the Court's rules, so that the appeal is argued no later than September 9, 2009 (the date of the Court's first session in September). Our request for expedited review is based on the statutory directive that a proceeding brought under Section 207 of the EDPL "be heard and determined … as expeditiously as possible and with lawful preference over other matters," EDPL § 207(B), and due to specific circumstances, discussed below, that make it imperative that this case be resolved as expeditiously as possible.

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The Atlantic Yards Project

Once constructed, the Atlantic Yards Project will eliminate long-standing blighted conditions on a 22 acre project site with the construction of a professional sports arena, 16 other buildings providing commercial space and thousands of new housing units, including 2,250 affordable units, a new subway entrance, an improved Long Island Rail Road yard and the creation of eight acres of publicly accessible open space. Both the State and City of New York have deemed the Atlantic Yards Projects to serve important public purposes; indeed, each government's legislative body has appropriated $100 million in funding, much of which has already been spent on Project construction and site preparation. However, because of this litigation, which has been pending in federal or state court for almost three years, the acquisition of the site has been delayed, halting project construction – notwithstanding the fact that every court has found petitioners' claims (and the overlapping claims of other litigants[1]) to be meritless.

Procedural History of this Litigation

Petitioners filed this litigation challenging ESDC's use of eminent domain in federal court, alleging that the Atlantic Yards Project was not a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the U.S. Constitution and alleging companion federal Due Process and Equal Protection claims. The EDPL requires that any challenge to a condemnor's Determination and Findings be made by direct petition in the Appellate Division within 30 days, so as to provide for the unified and expedited judicial review of public projects that entail the use of eminent domain. *See* EDPL §§ 207 and 208. Petitioners ignored these procedures and instead amended their federal complaint to plead a purported claim under EDPL § 207. The federal courts dismissed the case on the ground that their allegations as to "public use," Due Process and Equal Protection were so patently meritless as to not even warrant discovery. *See* Goldstein v. Pataki, 488 F. Supp.2d 254 (E.D.N.Y. 2007), *aff'd*, 516 F.3d 50 (2d Cir.), *cert. denied*, 128 S. Ct. 2964 (2008). Once the federal claims were dismissed on the merits, the EDPL § 207 claim was dismissed without prejudice.

Instead of immediately re-filing their EDPL § 207 claim in state court, petitioners waited six months from the Second Circuit's affirmance, claiming that the tolling provision of CPLR 205(a) trumps the 30-day deadline set forth in EDPL § 207. ESDC moved to dismiss the proceeding as untimely and, in the alternative, for expedited review. The Appellate Division declined to dismiss the proceeding, but established an expedited briefing schedule, heard argument and then dismissed the proceeding on the merits. Petitioners immediately issued a press release that they would appeal, but then – in line with their previous delay tactics – waited 30 days to file their notice of appeal to this Court.

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[1] *See, e.g.,* Anderson v. N.Y.S. Urban Dev. Corp., 45 A.D.3d 583 (2d Dep't 2007) (affirming the EDPL Determination and Findings); Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp., 59 A.D.3d 312 (1st Dep't 2009) (rejecting challenge to the environmental impact statement, to ESDC's determination that the site is blighted and thus the proper location for a land use improvement project and to ESDC's determination that an arena is a civic facility), *motion for leave to appeal pending.*

The Appeal Does Not Raise A Substantial Constitutional Question and Should Be Dismissed

The principal claim pleaded in this case is whether clearing a blighted area is a constitutionally sufficient public purpose to satisfy the "public use" clause of the State Constitution (Art. 1 § 7(a)). Petitioners argue that it is not. But, notwithstanding any asserted difference between State and federal takings law, it is well settled under both New York and federal law that slum clearance is a valid public purpose for the exercise of eminent domain. *See, e.g.,* Jackson v. N.Y.S. Urban Dev. Corp., 67 N.Y.2d 400, 425 (1986); Yonkers Community Dev. Agency v. Morris, 37 N.Y.2d 478, 481 (1975); Kaskel v. Impellitteri, 306 N.Y. 73, 78 (1953); Berman v. Parker, 348 U.S. 26, 32-34 (1954); Goldstein v. Pataki, 516 F.3d at 58-64.

The Project will not only eliminate blight (a sufficient purpose standing alone); it will also accomplish numerous other valid public purposes, as explained in the Appellate Division decision (p. 13). Petitioners now argue that the use of eminent domain to clear a blighted area and achieve other well recognized public purposes requires the condemning authority to present to the public a dollars and cents estimate of any benefit to private parties participating in the re-development effort. To our knowledge, no condemning authority – including the municipality whose use of eminent domain was upheld in Aspen Creek Estates, Ltd. v. Brookhaven, 12 N.Y. 735, 736-37 (2009) – has ever included this type of information in the EDPL record. In fact, this Court's opinion in Yonkers Community Dev. Agency v. Morris expressly held that once the land at issue is found to be blighted, no further inquiry is required. *See* 37 N.Y.2d at 482 ("Where, then, land is found to be substandard, its taking for urban renewal is for a public purpose.... The fact that the vehicle for renewed use of the land, once it is taken, may be a private agency [such as Otis Elevator Company] does not in and of itself change the permissible nature of the taking of the substandard property."). Petitioners' citation to Aspen Creek Estates Ltd. is not to the contrary because, *inter alia*, that case did not concern blighted land. Petitioners' arguments are squarely at odds with clearly established New York law and do not pose a substantial constitutional question.

Finally, a subsidiary claim, which petitioners never mentioned in federal court, is that the State Constitution (Art. 18 § 6) supposedly requires that any project receiving State funding and involving the exercise of eminent domain must be occupied exclusively by persons of low income. According to petitioners, the State Legislature is precluded from providing State funds for the construction of any project requiring condemnation – whether it be a SUNY facility, a courthouse, an office building, a hospital or a mixed use development – since none of these projects is occupied exclusively by persons of low income. Petitioners' argument would hamstring the State's ability to advance important capital projects across the State and is utterly meritless, for the reasons explained in the Appellate Division decision (pp. 14-15).

Since the appeal does not raise a substantial constitutional question, it should be dismissed.

If the Appeal Is Not Dismissed, It Should Be Expedited and Scheduled for Argument No Later Than September 9, 2009

The EDPL requires that a proceeding under § 207(A) be decided "as expeditiously as possible" and be given "lawful preference over other matters." EDPL § 207(B). *See* East Thirteenth Street Community Ass'n v. N.Y.S. Urban Dev. Corp., 84 N.Y.2d 287, 294 (1994) (discussing importance of reducing delay). If this appeal is not dismissed, ESDC respectfully requests that an expedited schedule be set such that it is argued no later than September 9, 2009. Expedited review is called for, as required by § 207(A), and for the reasons stated below.

First, this case has dragged on for years, in direct contravention of the statutory scheme established by the Legislature. The EDPL mandates that challenges to public projects involving the use of eminent domain be brought directly in the Appellate Division within 30 days of the condemnor's determination and findings. EDPL § 207(A). These procedures are jurisdictional: no State court has jurisdiction to entertain a judicial challenge "[e]xcept as expressly set forth in [EDPL § 207(A)]." EDPL § 208. Petitioners manifestly failed to follow this required procedure, and have thereby thwarted the Legislature's objective of bringing this § 207 challenge to a speedy resolution. Almost three years have passed since ESDC issued its determination and findings, and those findings remain under the cloud of this litigation. As a result, ESDC has been unable to acquire the necessary property, and the project is stalled.

Second, the inordinate delay occasioned by petitioners' failure to follow statutory procedures is putting the future of the Atlantic Yards Project in jeopardy. ESDC's General Project Plan (at p. 24) specifically anticipated that the arena – the first project building to be constructed – would be financed by tax exempt bonds. Under governing IRS regulations, the deadline for issuance of these bonds is December 31, 2009, *see* 26 CFR § 1.141-15(k)(3), and the bonds must be marketed before they can be sold. Given the realities of the bond markets and the current economic climate, the continuing pendency of this litigation will likely adversely affect the pricing and marketability of any tax-exempt bond financing that is concluded. It is imperative that this litigation be resolved well prior to the end of this calendar year.

Third, the State and the City have contributed $200 million towards this Project, most of which has already been spent. The public benefits of these significant public expenditures cannot be realized until the arena and Project facilities are constructed.

For these reasons, the appeal should be dismissed or, in the alternative, the argument should be set for no later than September 9, 2009.

Respectfully submitted,

Philip E. Karmel

cc: all counsel