COURT OF APPEALS
STATE OF NEW YORK

DANIEL GOLDSTEIN, et al. Appellants, – against – NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, Respondent.	No. 178 **OPPOSITION TO MOTION TO REARGUE**

The New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") respectfully submits this opposition to Appellants' motion to reargue. The motion should be summarily and swiftly denied. It is utterly without merit and is nothing other than a transparent effort to further delay the Atlantic Yards Project in Brooklyn, New York. ESDC specifically requests a preference with respect to the adjudication of the motion pursuant to section 207(B) of the Eminent Domain Procedure Law ("EDPL"), which requires that this proceeding be given "lawful preference over other matters" and be decided "as expeditiously as possible."

Based on its review of the record in the instant case, this Court held, on November 24, 2009, that ESDC had a rational basis for finding that the Atlantic

Yards project site is a "substandard and insanitary" area. This Court's majority opinion (the "Opinion") was in keeping with the unanimous holdings to the same effect of the Appellate Division for the First Department, the Appellate Division for the Second Department, the State Supreme Court for New York County, the U.S. Court of Appeals for the Second Circuit and the U.S. District Court for the Eastern District of New York, all of which also held that ESDC properly determined the Atlantic Yards project site to be a blighted area. *See* ESDC Br. at 22-23 (citing cases).

Appellants make no reference to the record in this proceeding, much less state "the points claimed to have been overlooked or misapprehended by the Court, with proper reference to the particular portions of the record and to the authorities relied upon." Court of Appeals Rule § 500.24(c). Instead, they assert that the two-judge plurality opinion of an inferior appellate court (Kaur v. N.Y.S. Urb. Dev. Corp., 2009 N.Y. Slip Op. 08976 (App. Div. 1st Dep't Dec. 3, 2009 ("Kaur")) in a different matter, based on a different record concerning properties in Manhattan, calls this Court's decision into question. There is no logical basis for Appellants' contentions. Inferior courts are required to follow the decisions of this Court, not the other way around. The plurality opinion of the inferior court in Kaur is not controlling authority and does not in any way establish that this Court "overlooked or misapprehended" the law in its decision. If, as Appellants contend,

the plurality opinion in Kaur is not consistent with this Court's decision, then the inconsistency merely means that Kaur was wrongly decided.

Nor is there any basis for Appellants' contention that this Court erred in construing Article XVIII, Section 6 of the State Constitution. Appellants merely repeat arguments previously made to this Court, going so far as to quote their own reply brief at some length. They do not identify any facts in the record that are inconsistent with the Court's analysis and do not identify any legal authority that this Court overlooked or misapprehended. Moreover, as explained below, their contention that the Opinion is internally inconsistent is based on a mischaracterization of this Court's reasoning.

Finally, Appellants' plea that their own motion for reargument be stayed is tantamount to an admission that they have failed to satisfy their heavy burden of establishing that reargument is warranted. The request for a stay is nothing more than a delaying tactic that is at odds with the EDPL's directive that this proceeding be decided "as expeditiously as possible."

POINT I

THE PLURALITY OPINION IN KAUR DOES NOT WARRANT REARGUMENT OF THE ATLANTIC YARDS CASE

The plurality opinion of two Appellate Division justices in Kaur does not warrant reargument in the instant case (hereinafter, "Goldstein"). Even aside from the fact that Kaur is not controlling authority, Appellants' arguments are strained and illogical, for the reasons stated below.

First, contrary to Appellants' contention that Goldstein and Kaur are "materially identical," this Court may not even reach the blight issue in Kaur. Instead, this Court (like the two dissenting justices in Kaur) may determine that ESDC's authority to construct facilities for "educational ... purposes" – as provided for in sections 3(6)(d) and 10(d) of the Urban Development Corporation Act, Unconsol. L. §§ 6253(6)(d), 6260(d) – provides a separate, independent and constitutionally sufficient justification for the use of eminent domain in that case. *See* Kaur, slip op. at 59 (dissenting opinion). Such a holding would make the blight issue in Kaur academic.

Second, the Goldstein decision did not make new law on the subject of "blight." The Court merely applied the blight standard that has long been the law of this State to the record before it. *See* Opinion at 15-19. Indeed, even the dissenting opinion of Judge Smith did not say that the majority had departed from this Court's prior precedents. Rather, Judge Smith stated (on the first page of his

dissent) that he differs with the majority as to whether "the record supports ESDC's determination." Whatever facts can be gleaned from the record in Kaur are of no relevance here, because the Atlantic Yards case was decided on the administrative record before ESDC in Atlantic Yards, not on the record in some other proceeding. *See* EDPL § 207(A). This Court has already held that the record before ESDC in this case provided a rational basis for ESDC's determination that the Atlantic Yards project site is a substandard and insanitary area. Opinion at 18-19. Nothing in the lower court's plurality opinion in Kaur undermines or is even relevant to that conclusion.

Third, there is no danger of an inconsistency between this Court's future decision in Kaur and its decision in Goldstein. If this Court reaches the blight issue in Kaur, there are two alternate scenarios: (i) this Court may decide that the record in Kaur provided a rational basis for ESDC's blight finding in that case under the standard applied in Goldstein; or (ii) this Court may decide that the record in Kaur did not provide a rational basis for ESDC's blight finding in that case under the standard applied in Goldstein. Neither result would be inconsistent with the Court's decision in Goldstein, which merely held that – on the record before the Court – ESDC had a rational basis for its blight finding with respect to the Atlantic Yards project site under well established legal principles.

Fourth, Appellants have been given every opportunity to challenge the rationality of ESDC's blight finding with respect to the Atlantic Yards project site. They have filed brief after brief, in case after case, in both the state and federal courts. To this day, however, notwithstanding all of their rhetoric about the supposed bias of ESDC and its consultant (AKRF, Inc.), they have yet to identify a single factual error in the Blight Study for Atlantic Yards. Their new motion is more of the same. They make sweeping allegations that ESDC has mischaracterized the blighted condition of the project site without putting forward any proof whatsoever to support those allegations. The record establishes an ample basis for ESDC's blight findings here. *See* ESDC Br. at 24-32.

Fifth, Appellants repeatedly suggest that there is something sinister about ESDC having made the blight finding in Atlantic Yards in connection with a proposal by a private developer with respect to the project site. This is the very same argument they have been making in the state and federal courts for the last three years and, once again, they fail to cite any legal or factual basis for their allegations. Since the redevelopment of the Atlantic Yards project site will eliminate the substandard and insanitary conditions that exist there, there is a rational nexus between the use of eminent domain and the public purpose of eliminating blight. Where such a nexus exists between the effect of the project and a legitimate public purpose, the agency's use of eminent domain serves a public

purpose and is constitutional. *See, e.g.*, Waldo's Inc. v. Village of Johnson City, 74 N.Y.2d 718 (1989) (upholding municipality's use of eminent domain to construct traffic improvements paid for in part by shopping center owner); Yonkers Commun. Dev. Agency v. Morris, 37 N.Y.2d 478 (1975) (upholding city's use of eminent domain, based on blight, for Otis Elevator Company factory); Murray v. LaGuardia, 291 N.Y. 320 (1943) (upholding city's use of eminent domain, based on blight, for Metropolitan Life Insurance Company's market-rate housing development). Indeed, even in the 19th Century, this Court (or its predecessors) repeatedly upheld legislative determinations that eminent domain could be used to provide land to a specific railroad corporation for its use. *See, e.g.*, Bloodgood v. Mohawk & Hudson R.R. Co., 18 Wend. 9 (N.Y. Ct. for Correc. Err. 1837); Beekman v. Saratoga & Schenectady R.R. Co., 3 Paige Ch. 45 (N.Y. Ch. 1831). Appellants' empty rhetoric implicitly contending that eminent domain cannot be used in such cases merely rehashes issues it already argued unsuccessfully in this case. *See* ESDC Br. at 70. Other than the two-judge plurality in Kahr, they do not identify any legal authority for their position.

Sixth, without citation to the record, Appellants claim that ESDC's blight finding in Atlantic Yards was "largely premised" on "underutilization." Appellants appear to have forgotten that they already have conceded that 5 of the 8 blocks comprising the Atlantic Yards Project site are blighted (*see* ESDC Br. at 24-

.25) and that the record establishes the existence of numerous severely deteriorated buildings on the other 3 blocks (*see* ESDC Br. at 25-32). Nor does the Opinion rely on the concept of "underutilization" as the principal basis for upholding ESDC's finding that the project site is blighted.

Finally, Appellants question the standard of review applied by this Court, but that standard is consistent with the standard of review the Court has applied in many other cases. *See* Opinion at 18; ESDC Br. at 21-22.

In the Opinion, this Court upheld ESDC's blight determination by applying well established law to the record before it. Nothing in the Kaur plurality opinion remotely supports re-evaluation of the Court's eminent domain jurisprudence so as to overturn decades of precedent, which has always been the Appellants' principal argument in this case. *See* Opinion at 12-13.

POINT II

THERE IS NO BASIS FOR REARGUMENT OF THE DECISION THAT ATLANTIC YARDS IS NOT SUBJECT TO ARTICLE XVIII, SECTION 6 OF THE STATE CONSTITUTION

In contending that they should be given the opportunity to reargue that the restrictions contained in Article XVIII, Section 6 of the State Constitution apply to Atlantic Yards, Appellants make no mention of any point previously raised that was either "overlooked" or "misapprehended" by the Court. Instead, they simply criticize the Opinion, contending that the Court's legal analysis is

"untenable and warrants reargument." Appellants' Motion at 9. Thus, Appellants' motion is deficient on its face.

Nor is there any basis for Appellants' contention that reargument is needed "in order to reconcile the stark conflict created by the Court's inconsistent interpretations of the term[s] 'substandard and insanitary.'" Id. at 7. As Appellants describe it, the Court interprets these terms one way for purposes of determining whether ESDC is empowered under Article XVIII, Section 2 of the State Constitution to acquire property on the project site by eminent domain, and then veers off in a different direction in deciding whether the restrictions of Article XVIII, Section 6 apply. Appellants' contention is based on a mischaracterization of the Opinion.

Appellants correctly observe that for purposes of Article XVIII, Section 2 the Court concluded that its prior precedents reflect an "evolution of the crucial terms' [*i.e.*, the terms "substandard and insanitary"] signification and permissible range of application." Opinion at 15. Appellants are incorrect, however, in asserting that the Court determined, for purposes of Article XVIII, Section 6, that the term "'substandard and insanitary' ... must be strictly construed in keeping with its original meaning as understood by the People who ratified it in 1938." Appellants' Motion at 9. Appellants also err in asserting that the Court's

conclusion that Section 6 does not apply here turned on whether the project site is mildly blighted or a "slum." Id.

Contrary to Appellants' assertions, the Opinion's holding with respect to the non-applicability of Section 6 to this case is not based upon a strict interpretation – or any interpretation – of the term "substandard and insanitary." The Court's reasoning is described below.

First, the Court notes that Article XVIII was adopted in order to achieve two "principal objectives" – the clearance of slums and the provision of low-rent housing. Opinion at 20. The Court then reviews its earlier decisions, which confirm that such objectives "were not ... necessarily, or even ordinarily, to be pursued in tandem." Id. at 21. With this background, the Court framed the issue before it: "whether the commitment of [state] funds to a land use improvement project involving in its redevelopment phase the construction of housing necessarily effects a linkage of the article's otherwise independent purposes." Id.

The Court's rejection of Appellants' attempt to link the two independent purposes of Article XVIII had nothing to do with the scope of the terms "substandard and insanitary" as used in Section 6. Rather, the Opinion notes that when Article XVIII was first adopted, projects were envisioned that would "clear large swaths of slum dwellings – in some cases entire neighborhoods." Id.

Because such projects would entail "the massive direct displacement of slum dwellers" (id. at 21), the framers of Article XVIII crafted a provision that would provide housing to "replace the low rent accommodations lost during the clearance." Id. at 22. With this constitutional purpose in mind, the Court found no housing prerequisite for a State-funded land use improvement project "that does not entail substantial slum clearance." Id. at 23. To hold otherwise, according to the Court, would encumber the exercise of one of the "independent purposes" of Article XVIII (the eradication of blight) "in a manner plainly without the framers' contemplation." Id. at 21, 23.

Thus, the Opinion does not turn on any interpretation of the severity of the conditions that must exist in an area for it to be "substandard and insanitary" for purposes of Article XVIII. The Court would have come to the same conclusion that Section 6 does not apply here even if every building on the project site was a burned out wreck and thus severely blighted. Instead of turning on the degree of blight, the Opinion is keyed to the *scope and displacement effects* of a project that is proposed for such an area. Thus, a project that entails the "wholesale eradication of slums" and the "massive" displacement of existing residents would come within the strictures of Article XVIII, Section 6, while a project like Atlantic Yards, which will not affect "large concentrations of low income individuals," would not. Id. at 21, 23.

Thus, there is no internal "tension" in the Opinion. It was entirely consistent for the Court to rule that it was not unreasonable for ESDC to exercise its Article XVIII, Section 2 condemnation power, in light of the well-documented blight found to exist on the project site, while at the same time ruling that the Project's modest displacement impacts do not trigger a constitutional obligation to provide on-site low rent housing. There is no basis for reargument on this issue.

POINT III

APPELLANTS' REQUEST FOR A STAY SHOULD BE REJECTED

Appellants state that "fundamental fairness" necessitates holding their motion in abeyance until Kaur is decided. There is no basis for this contention. As explained above, the Court may not even reach the blight issue in Kaur and, if it does, there is no reason to believe that Kaur would change the legal definition of "substandard and insanitary" established by the numerous prior precedents of this Court, *see* ESDC Br. at 2 (citing cases), much less change the definition in a manner that could affect the Court's decision in Atlantic Yards. Their request for a stay of their own motion is merely another delaying tactic and is inconsistent with the EDPL requirement that this case be decided "as expeditiously as possible."

The opportunity to bring litigation to challenge a government decision is the constitutional right of every American. Appellants have exploited that right to the hilt, having brought parallel cases in both the state and federal courts and

having obtained plenary review by this Court and the U.S. Court of Appeals for the Second Circuit. They have lost at every turn, not because they were treated unfairly but because their arguments pay no heed to the record and are contrary to well established law.

While this case and other unsuccessful litigations have been pending, the State and City have invested approximately $160 million of scarce public funds in construction and other development activities at the project site. Construction work has proceeded to the point that the temporary rail yard for the Long Island Rail Road is now complete and in active use, portions of the permanent rail yard formerly in use are being demolished to start construction of the Arena, and more than 30 buildings on the project site have been cleared to make way for the development. More than *three years* have passed since ESDC's approval of the Project in 2006. It is time to bring this controversy to a prompt and final conclusion so that the project can proceed, and its significant public benefits (*see* ESDC Br. at 16-17) can be realized.

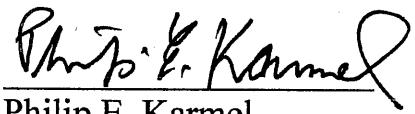
CONCLUSION

ESDC respectfully requests that the motion for reargument be denied as expeditiously as possible and that ESDC be granted any further and additional relief the Court deems just and equitable.

Dated: New York, New York
December 18, 2009

Respectfully submitted,

BRYAN CAVE LLP

By: 

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