COURT OF APPEALS
STATE OF NEW YORK

----------x

DANIEL GOLDSTEIN, PETER WILLIAMS, ENTERPRISES, INC., 535 CARLTON AVE. REALTY CORP., PACIFIC CARLTON DEVELOPMENT CORP., THE GELIN GROUP, LLC, CHADDERTON'S BAR AND GRILL INC., d/b/a FREDDY'S BAR AND BACKROOM, MARIA GONZALEZ, JACKIE GONZALEZ, YESENIA GONZALEZ, and DAVID SHEETS,

Petitioners-Appellants,

- against -

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent-Respondent.

----------x

No. 178

NOTICE OF MOTION TO REARGUE APPEAL AND/OR HOLD MOTION IN ABEYANCE PENDING HEARING AND DETERMINATION OF RELATED APPEAL

PLEASE TAKE NOTICE that upon the annexed Motion to Reargue Appeal And/Or Hold Motion in Abeyance Pending Hearing and Determination of Related Appeal, dated December 10, 2009, and accompanying exhibits; this Court's Opinions, Order and Remittitur on the Appeal, dated November 24, 2009 (attached as Ex. A); the Decision and Order of the Appellate Division, First Department in *Kaur v. New York State Urban Dev. Corp.,* dated December 3, 2009 (attached as Ex. B); and upon all the papers, briefs, and proceedings heretofore had herein, the undersigned will move this Court at 20 Eagle Street, Albany, New

21st day of December, 2009, at the opening of the Court on that day, or as soon thereafter as counsel may be heard, pursuant to this Court's Rules of Practice § 500.24 (22 NYCRR § 500.24), for an order:

1. holding this motion to reargue in abeyance pending the Court's determination of the imminent appeal to this Court, as of right pursuant to CPLR 5601(a) (dissent by two justices), from the Decision and Order of the Appellate Division, First Department, in *Kaur v. New York State Urban Dev. Corp.*, dated December 3, 2009 (Ex. B) (granting petition and rejecting the EDPL § 204 Determination and Findings of the New York State Urban Development Corporation under circumstances materially indistinguishable from those presented by this appeal), and then disposing of Appellants' motion to reargue in accordance with the disposition of the *Kaur* appeal; and/or,
2. granting reargument, and directing that the appeal be reargued along with the *Kaur* appeal, *see People v. Salemi*, 308 N.Y. 976 (1955) ("reargument granted and case directed to be reargued"); and/or
3. granting reargument of the appeal as decided in the Court's Opinions, Order and Remittitur dated November 24, 2009 (Ex. A), which

affirmed the judgment of the Appellate Division, Second Department denying Appellant's Petition pursuant to N.Y. Em. Dom. Proc. Law ("EDPL") § 207, and upon reargument, reversing that judgment and thus rejecting Respondent's Determination and Findings pursuant EDPL § 204; and/or

4. correcting or amending the concurring opinion to remove or modify an inadvertent factual error; and

5. granting such other relief as the Court may deem appropriate.

The grounds upon which reargument is requested are set forth in detail in petitioners-appellants' accompanying Motion for Reargument of Appeal.

Dated: December 10, 2009
New York, New York

Respectfully submitted,

EMERY CELLI BRINCKERHOFF
& ABADY LLP

By:_____
Matthew D. Brinckerhoff

75 Rockefeller Plaza, 20th Floor
New York, New York 10019
(212) 763-5000

Attorneys for Petitioners-Appellants

To: Philip E. Karmel, Esq.
Bryan Cave LLP
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000

Charles S. Webb III, Esq.
Berger & Webb
1633 Broadway, 46th Floor
New York, New York 10019
(212) 319-1900

COURT OF APPEALS
STATE OF NEW YORK

----------x

DANIEL GOLDSTEIN, PETER WILLIAMS, ENTERPRISES, INC., 535 CARLTON AVE. REALTY CORP., PACIFIC CARLTON DEVELOPMENT CORP., THE GELIN GROUP, LLC, CHADDERTON'S BAR AND GRILL INC., d/b/a FREDDY'S BAR AND BACKROOM, MARIA GONZALEZ, JACKIE GONZALEZ, YESENIA GONZALEZ, and DAVID SHEETS,

Petitioners-Appellants,

- against -

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent-Respondent.

----------x

No. 178

MOTION TO REARGUE APPEAL AND/OR HOLD MOTION IN ABEYANCE PENDING HEARING AND DETERMINATION OF RELATED APPEAL

Petitioners-Appellants ("Appellants") respectfully submit this Motion to Reargue Appeal and/or Hold Motion in Abeyance Pending Hearing and Determination of Related Appeal. This motion concerns this Court's Opinions and Order dated November 24, 2009 (attached as Ex. A), which affirmed the judgment of the Appellate Division, Second Department, which denied Appellants' Petition pursuant to N.Y. Em. Dom. Proc. Law ("EDPL") § 207.

SUMMARY OF MOTION

Appellants do not move to reargue lightly. We are aware that a majority of the members of this Court rejected Appellants' arguments after due consideration. But it is truly "extraordinary and compelling," 22 NYCRR § 500.24, that scarcely one week after this Court confirmed the plan of Respondent New York State Urban Development Corporation (the "ESDC") to condemn Appellants' homes and businesses based on the ESDC's *post hoc* finding of "relatively mild conditions of urban blight," *Goldstein*, slip op. at 23, the Appellate Division – confronted with a materially identical blight record compiled by the ESDC and the same trusted consultant, Allee, King, Rosen and Fleming, Inc. ("AKRF") – rejected a strikingly similar condemnation determination. *See Kaur v. N.Y. State Urban Dev. Corp.*, 2009 WL 4348472 (1st Dep't Dec. 3, 2009) (granting EDPL § 207 petition by a vote of 3-2) (attached as Ex. B).

Kaur will be appealed to this Court as of right pursuant to CPLR 5601(a) (two dissents). When this Court hears and decides *Kaur*, it necessarily will consider whether the facts in *Kaur* are distinguishable from the facts in this case. If the Court concludes that the facts are indistinguishable, the Court will have to decide whether the ESDC's eagerness to find blight in *Kaur* through the very same procedure used in this case – one that the Appellate Division concluded

was nothing short of "idiocy" and "sophistry," *Kaur*, slip op. at 29 – gives this Court pause with respect to the degree of judicial deference that the ESDC's blight determinations warrant. *Kaur* presents compelling evidence that the ESDC's willingness to play fast and loose with blight findings is a pattern, and not just an isolated occurrence.

Appellants' request is a modest one. Appellants simply urge the Court to hold this motion in abeyance until it hears and decides *Kaur*. Otherwise, it is possible that the Court could conclude that the ESDC's conduct in *Kaur*, whether viewed in isolation or in conjunction with its conduct in this case, presents the "case in which [the Court] might intervene to prevent an urban redevelopment condemnation on public use grounds," *Goldstein*, slip op. at 18 – which affirming *Kaur* necessarily would require the Court to do – but lack the ability to readily apply any such reconsideration to this case. Given *Kaur*'s conclusion that the tipping point has been reached, and given this Court's obligation to review that conclusion open-mindedly, fundamental fairness requires that the Court preserve its ability to provide Appellants with redress by holding this motion in abeyance until *Kaur* is decided.

Insofar as the Court may find it helpful, while considering the appeal in *Kaur*, to affirmatively review the nearly identical records compiled by the ESDC

in both cases, and/or for further briefing or argument, Appellants respectfully request that the Court grant reargument and direct that this appeal be reheard along with *Kaur*. *See, e.g.*, *People v. Salemi*, 308 N.Y. 976 (1955) ("reargument granted and case directed to be reargued").

ARGUMENT

I. *KAUR* IS MATERIALLY INDISTINGUISHABLE FROM THIS CASE

Justice Catterson's opinion in *Kaur* explains that the ESDC's "blight designation" was "mere sophistry" created "by ESDC years after the scheme was hatched to justify the employment of eminent domain."[1] *Kaur*, slip op. at 16. Instead of addressing blight, the "project has always primarily concerned a massive capital project for Columbia" and "[i]ndeed, it is nothing more than economic redevelopment wearing a different face." *Id*. Precisely the same is true of the ESDC's "blight" designation in this case.

In *Kaur*, Columbia University selected the properties it desired for its expansion project. Years thereafter, the ESDC made *post hoc* "findings" that these properties were "substandard and insanitary" and approved the Columbia

[1] "Even a cursory examination of the study reveals the idiocy of considering things like unpainted block walls or loose awning supports as evidence of a blighted neighborhood. Virtually every neighborhood in the five boroughs will yield similar instances of disrepair that can be captured in close-up technicolor." *Kaur*, slip op. at 29-30.

University Educational Mixed Use Development Land Use Improvement and Civic Project. In this case, Ratner selected the properties he coveted for building thousands of units of luxury housing and an arena for his professional basketball team. Years thereafter, the ESDC made *post hoc* "findings" that the targeted properties were "substandard and insanitary" and approved the Atlantic Yards Land Use Improvement and Civic Project.

In *Kaur*, the ESDC hired AKRF to study Columbia's preselected takings area, and AKRF found that the entire area was "substantially unsafe, unsanitary, substandard, and deteriorated." *Kaur*, slip op. at 6-8. AKRF's findings were largely premised on underutilzation, which Justice Catterson characterized as a "wholly arbitrary standard of counting any lot built to 60% or less of maximum FAR as constituting a blighted condition." *Id*. at 31.[2] Here, the ESDC similarly hired AKRF to conduct a study of the preselected takings area, and AKRF found that the entire area was characterized by blighted conditions. Like its findings for

[2] "The time has come to categorically reject eminent domain takings solely based on underutilization. This concept put forward by the respondent transforms the purpose of blight removal from the elimination of harmful social and economic conditions in a specific area to a policy affirmatively requiring the ultimate commercial development of all property regardless of the character of the community subject to such urban renewal." *Kaur*, slip op. at 32.

Columbia, AKRF's findings for Ratner were largely premised on "underutilization" based on the same 60% FAR benchmark.[3]

In *Kaur*, the property owners resisting condemnation submitted their own competing study of the project area contesting the blight findings. *Kaur*, slip op. at 30. Here, Appellants also submitted their own extensive critique of the AKRF blight study. Record on Review at 19122-19315.

Kaur will now be appealed to and heard by this Court. There is a substantial possibility that the Appellate Division will be affirmed, and there is a substantial possibility that it will be reversed. If this Court were to affirm based on Justice Catterson's reasoning, it necessarily would have to reconsider its decision in this case. But this Court would have little flexibility to do so if its decision in this case were rendered final by an outright denial of the instant motion to reargue. Because there is no need for this Court to tie its hands in this case prior to hearing the appeal in *Kaur*, Appellants respectfully request that the Court hold this motion in abeyance pending the hearing and determination of the appeal in *Kaur*, or allow reargument and hear the two cases in tandem.

[3] In *Kaur*, Columbia University had retained AKRF to consult about the project *prior* to AKRF being hired by ESDC. Here, Ratner similarly retained a leading environmental lawyer, David Paget, to consult on the Atlantic Yards project, after which the ESDC hired Mr. Paget to assist it in conducting the environmental review process. *See Develop Don't Destroy (Brooklyn) v. N.Y. State Urban Dev. Corp.*, 31 A.D.3d 144 (1st Dep't 2006).

II. THE TERM "SUBSTANDARD AND INSANITARY" SHOULD BE INTERPRETED CONSISTENTLY THROUGHOUT ARTICLE XVIII

Reargument is also warranted in order to reconcile the stark conflict created by the Court's inconsistent interpretations of the term "substandard and insanitary" as it appears in Sections 1 and 2 of Article XVIII of the New York Constitution (authorizing the use of eminent domain and the delegation of eminent domain power to "public corporations" when used to rehabilitate "substandard and insanitary" areas) and Section 6 of Article XVIII (restricting occupancy to persons of low income when state loans or subsidies are used to rehabilitate a "substandard and insanitary" area).

Appellants argued in their reply brief as follows:

> Respondent asserts that the seizure of Appellants' homes and businesses for transfer to a wealthy and politically powerful real estate developer is justified by the express authorization of the use of eminent domain for slum clearance and low income housing contained in Article XVIII of the Constitution. In doing so, Respondent seems to be aware of the marked tension between its invocation of Article XVIII to justify the taking of Appellants' homes on the one hand, and its simultaneous contention that Section 6 of Article XVIII has nothing to do with this case.
>
> Respondent cannot have it both ways. Respondent could claim, notwithstanding all evidence to the contrary, that the Project is truly aimed at eliminating slum conditions of the sort that drove the decision in *Muller* and the adoption of Article XVIII, which would, if true, justify the use of eminent domain. But that would trigger the requirements of Section 6 of Article XVIII, thus dooming the Project as currently configured.

> Alternatively, Respondent could assert that Section 6 does not apply by acknowledging that the Project is not truly aimed at slum clearance of the sort that drove the decision in *Muller* and the adoption of Article XVIII, in which case Section 6 would not be triggered, but the use of eminent domain would not be justified.
>
> The one thing that Respondent cannot plausibly claim – and that this Court should not hold – is that the taking of Appellants' homes and businesses is authorized by Section 2 of Article XVIII, but that Section 6 somehow does not apply.

Appellants' Reply Brief at 13-14.

The Court rejected Appellants' argument that the term "substandard and insanitary" in Article XVIII, Section 2 should be interpreted as those words were understood when Article XVIII was ratified in 1938. *Goldstein*, slip op. at 15. Although the Court recognized that, when Article XVIII was ratified in 1938, the term "substandard and insanitary" was understood to mean "the dire circumstances of urban slum dwelling described by the *Muller* court in 1936," *id.* at 14, the Court concluded that the meaning of the term "substandard and insanitary" in the Constitution has since *evolved* and now means nothing more than "relatively mild conditions of urban blight." *Id.* at 23.[4]

[4] The Court also held that "lending precise content" to the meaning of the term "substandard and insanitary" in the Constitution is "not primarily a judicial exercise," and that any "limitation on the sovereign power of eminent domain . . . is a matter for the Legislature, not the courts." *Goldstein*, slip op. at 16-17. It is, however, "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also*

At the same time, however, the Court also rejected Appellants' challenge under Article XVIII, Section 6, concluding that the very same language in Section 6 – "substandard and insanitary" – must be strictly construed in keeping with its original meaning as understood by the People who ratified it in 1938. The Court held that, because the ESDC's plan for the "clearance, replanning and reconstruction or rehabilitation of a substandard and insanitary area" is not directed at the "eradication of slums, but rather at alleviating relatively mild conditions of urban blight," the low-income occupancy restriction contained Section 6 does not apply.

Appellants respectfully submit that the tension between these holdings is untenable and warrants reargument. Whereas the Legislature has the inherent power to condemn property regardless of the authority granted by Article XVIII, it is indisputable that *the ESDC's* authority to condemn property is derived exclusively from the delegation of power in the UDC Act pursuant to Article XVIII, Section 2. It simply cannot be that the prerequisite for exercising the ESDC's power to condemn property (the existence of "substandard and insanitary" conditions) has been satisfied, but that the low-income occupancy restriction

---

In re Jacobs, 98 N.Y. 98 (1885) (holding that whether "a use is a public one . . . is a judicial inquiry" and that "[a]lthough the legislature may declare it to be public . . . it must in fact be public, and if it be not, no legislative fiat can make it so").

contained in Section 6 (which likewise is triggered by the existence of "substandard and insanitary" conditions) does not apply. Perhaps the term "substandard and insanitary" should be interpreted as it was understood in 1938, and perhaps it should be interpreted as an evolving concept, but it is plain that the very same words cannot mean two wholly different things in the very same Article of the Constitution that was ratified as a whole by the People in 1938.

Accordingly, Appellants respectfully request that the Court grant reargument and, upon reargument, reverse the Court below.

III. THE CONCURRING OPINION SHOULD BE AMENDED TO CORRECT AN INADVERTENT FACTUAL ERROR

Finally, Appellants request that the Court consider issuing an amended opinion to correct an inadvertent factual error that appears in the concurring opinion of Judge Read. The concurring opinion states that Appellants "never mentioned 28 USC § 1367(d) in their briefs to us or the Appellate Division," and that Appellants' counsel merely "alluded to an unspecified federal tolling provision in response to questioning during oral argument." Goldstein, slip op. at 18-19 & n.1 (Read, J. concurring). That is not true. Appellants actually devoted two full pages to the topic in their reply brief as follows:

> First, Respondent's suggestion that the sky is falling is, at best, greatly exaggerated. As discussed above (*see* Point III.A, *supra*), it cannot seriously be questioned that *all* condemnation challengers are entitled to assert their state law EDPL claims as

supplemental claims in federal court if they so choose, and that the State of New York has no constitutional authority to evade Congress's decision to allow plaintiffs to do so. Notably, if a plaintiff avails himself of this entirely legitimate option, and if the federal court declines to exercise supplemental jurisdiction over his state claim and dismisses it without prejudice under 28 U.S.C. § 1367(c), then federal law affords him a grace period of at least 30 days in which to refile the state claim in state court – *without regard to the applicability of CPLR 205(a)*. *See* 28 U.S.C. § 1367(d) ("The period of limitations for any claim asserted under subsection (a) . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."); *see also Jinks v. Richland County*, 538 U.S. 456 (2003) (upholding the constitutionality of section 1367(d) against a claim that it impermissibly intruded on state sovereignty). Given the fact that Congress afforded condemnation plaintiffs an *independent federal tolling period* of at least 30 days in which to refile in state court state claims that have been dismissed without prejudice, the stakes are far less dramatic than Respondent would have this Court believe.

In this case, for example, 28 U.S.C. § 1367(d) afforded Appellants the federal right to reassert their state claims in state court until March 3, 2008 (30 days after the Second Circuit affirmed the dismissal of Appellants' state law claims without prejudice), which was 15 months after Respondent issued its Final Determination. CPLR 205(a), which goes beyond the bare minimum tolling period required by federal law, afforded Appellants the right to reassert their state law claims until August 1, 2008, 20 months after Respondent issued its Final Determination. The difference between the "delay" caused by the minimum federal tolling period (15 months) and the "delay" caused by the tolling period provided for in CPLR 205(a) (20 months) hardly shocks the conscience.

Appellants' Reply Brief at 70-72 (emphasis in original).[5]

Appellants' respectfully request that the Court issue an amended order correcting this factual error.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant reargument.

Dated: December 10, 2009
New York, New York

Respectfully submitted,

EMERY CELLI BRINCKERHOFF
& ABADY LLP

By:_____
Matthew D. Brinckerhoff
Eric Hecker

75 Rockefeller Plaza, 20th Floor
New York, New York 10019
(212) 763-5000

Attorneys for Petitioners-Appellants

[5] The concurring opinion also suggests that the 30-day toll required by 28 U.S.C. § 1367(d) begins to run when a claim is dismissed by the federal district court. *Goldstein*, slip op. at 19 & n.3 (Read, J. concurring(. That is not true. It is well settled that the 30-day toll required by 28 U.S.C. § 1367(d) does not begin to run until the disposition of any appeal that may be taken as of right. *See*, *e.g.*, *Turner v. Knight*, 406 Md. 167, 957 A.2d 984 (2008); *Kendrick v. City of Eureka*, 86 Cal. App. 4th 364 (Ca. Ct. App. 2000); *Huang v. Ziko*, 132 N.C.App. 358, 511 S.E.2d 305 (N.C. Ct. App. 1999).

DISCLOSURE STATEMENT PURSUANT TO § 500.1(f)

Appellants, Peter Williams Enterprises, Inc., 535 Carleton Ave. Realty Corp., Pacific Carlton Development Corp, Gelin Group, LLC, and Chadderton's Bar and Grill Inc., d/b/a Freddy's Bar and Backroom, each state that it has not parents, subsidiaries or affiliates.