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# New York Court of Appeals Roundup:

## Eminent Domain, Same-Sex Benefits, Environmental Challenges

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DECEMBER 10, 2009

Last month the Court of Appeals addressed the state's exercise of its power of eminent domain for the Atlantic Yards project, as well as whether petitioners who first challenged the state's determination in federal court could then appeal the determination to the Appellate Division. In another decision, the Court rejected challenges to two directives by executive and county officials that recognized same-sex marriages performed out of state for the purpose of making certain benefits available to the same-sex spouses of public employees. And in an action involving development near the Pine Bush area, the Court recognized that even good faith environmental challenges can be very burdensome and engender delay, and thus sought to strike a balance in deciding both of the issues before it, namely standing to challenge development on environmental impact grounds and the standard for judicial review of government assessments of the impact of rezoning. We discuss these decisions below.

**Eminent Domain**

In the *Matter of Goldstein v. New York State Urban Development Corp.*, the Court was confronted for the second time this term[1] with a significant real estate-related case—this time with state-wide implications. The issue was the legality of the exercise by respondent Empire State Development Corporation (ESDC) of its power of eminent domain to acquire certain properties of the petitioners for a land use improvement project called Atlantic Yards. The case produced three opinions totaling 59 pages: one by Chief Judge Jonathan Lippman for a four-judge majority that found the actions of ESDC to be lawful; a second, vigorous opinion by Judge

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Susan Phillips Read joined by Judge Eugene F. Pigott, Jr., that concurred in the result, but on a totally different basis; and lastly a dissent by Judge Robert S. Smith.

The project involved a 22-acre site to be developed by Bruce Ratner on which he proposed to build a sports arena to be the home court of the NBA Nets, make various infrastructure improvements, and then construct 16 high rise towers for commercial and residential use, as well as eight acres of public space. A significant number of the apartments were planned to be affordable by low and middle income families.

On Dec. 8, 2006, ESDC issued its determination to exercise its eminent domain power to take private properties owned by petitioners for inclusions in the development. The project was sponsored by ESDC on the basis that the site was to a significant degree (but not totally) in an area that was "substandard and insanitary" (a/k/a "blighted"). While it appears that petitioners' properties were not then blighted, ESDC made a finding that the condemnation should nonetheless proceed in light of the actual or impending "blight" in the blocks in which the properties were situated, in order to serve a "public use, benefit or purpose" in accordance with §204 of the Eminent Domain Proceedings Law (EDPL).

It was the path that petitioners took to seek review of ESDC's determination that provoked the concurring opinion by Judge Read. Rather than seek review in the Appellate Division within 30 days of publication of the ESDC determination, as provided in §207(A) of the EDPL, petitioners sought relief in federal district court based, in part, upon the assertion that the condemnation was not for a public purpose and violated the takings clause to the federal constitution. The complaint was dismissed by the district court, the U.S. Court of Appeals affirmed, and petitioners' petition for a writ of certiorari was denied by the Supreme Court. Having exhausted their efforts in the federal courts, six months after the U.S. Court of Appeals for the Second Circuit's affirmance the petitioners filed an appeal to the appellate division.

The concurrence concluded, in an exhaustive review of the legislative history of New York's eminent domain laws, that the petitioners had lost their right to state court review of the ESDC determination by their failure to comply with the 30-day limitation period contained in §207(A). Judge Read reasoned such a reading of the EDPL was necessary, and that the petition should be dismissed to preserve the

rights of both condemnors and condemnees and to avoid prolonged litigation of proposed public projects. The concurrence, therefore, while agreeing with the ultimate result, in the case, did not agree with how the majority got there.

The opinion of the majority immediately met the conclusion of the concurrence principally on the basis of CPLR 205(a), which provides that if a timely filed action is dismissed on other than enumerated grounds (including by final judgment on the merits), another action on which the statute of limitations otherwise would have run will be timely if it is commenced and the defendant is served within six months. The majority held that CPLR 205(a) applies to EDPL proceedings, and thus effectively tolled the running of the 30-day limitations provision of EDPL §207(A) to permit refiling within the six-month period provided by §205 of that statute. The majority also disagreed with the assertion that the EDPL could preclude a challenge to a condemnation determination on federal constitutional grounds, as the petitioners had made in the district court.

The majority then turned to the merits. The first argument that petitioners put forth was that the state constitution prohibited condemnation of private property unless done for public use and not for a public purpose. The majority held that the removal of urban blight constituted a "public use." And while petitioners' properties were not blighted, precedent supported condemnation where a substantial part of the area being condemned is. In addition, judicial deference was required to determinations made by ESDC, a body created by the legislature to make such decisions.

Petitioners' remaining argument was that approval of the condemnation was not lawful because the project had received $100 million in state financing, and under the state constitution, the project therefore had to be "restricted" to persons of low income. However, Mr. Ratner's plan for the site provided for a majority of the apartments to be rented or sold at market rates.

The majority concluded that the intent of the relevant constitutional provision was to clear slums and the construction of low rent housing, and that these two objectives need not be pursued together. Nor did the existence of state financing require that the project be limited to low rent housing. Moreover, the record of the 1938 Constitutional Convention where the relevant eminent domain provision was "crafted" showed that it was included to deal with the elimination of slums and

replacing them with low cost housing for those who lost their housing in the slum clearance. Here, 146 persons lived within the footprint of the project. The majority found that the provision of low income housing is not constitutionally required in a non-slum clearance project.

The majority therefore affirmed the Appellate Division's denial of the petition.

It is highly likely that the Court will have before it in the near term another major eminent domain case. On Dec. 3, 2009, the Appellate Division, First Department, in *In re Kaur v. New York State Urban Development Corp.*, (No. 777-778), in a 3-2 decision, granted the petition challenging the determination of ESDC to permit the acquisition of real property for a Columbia University project in Manhattan. The Court will clearly be ready for the case.

**Same-Sex Spousal Benefits**

A number of foreign countries and four U.S. states allow same-sex couples to marry. New York is not among them. In *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), the Court held that the Domestic Relations Law restricts marriage to opposite-sex couples and that such restriction does not violate the state constitution. *Godfrey v. Spano*, decided last month, afforded the Court an opportunity to resolve the question of whether same-sex marriages that are valid where performed are entitled to full legal recognition in New York under the marriage recognition rule. The majority side-stepped that issue and resolved the case on other grounds. The three concurring judges would have reached it, however, and decided in favor of recognition.

The Alliance Defense Fund represented the plaintiff taxpayers in two actions. The first, *Godfrey*, challenged a Westchester County executive order directing the recognition of same-sex marriages lawfully performed out of state in the same manner that out-of-state opposite-sex marriages are recognized, for the purpose of extending health and other benefits to the spouses of employees. In doing so, Westchester County Executive Andrew J. Spano cited a 2004 informal opinion letter of the attorney general stating that New York law "presumptively requires" the treatment of the parties to same-sex marriages as spouses, and a 2004 opinion letter from the comptroller providing that, under the principle of comity, the state

retirement system would recognize a same-sex Canadian marriage in the same manner it would an opposite-sex New York marriage.

The second action, *Lewis v. New York State Department of Civil Service*, challenged a policy memorandum issued by the president of the State Civil Service Commission (Commission President) mandating recognition of parties to same-sex marriages that were performed where legal be recognized as spouses for purposes of all health benefit plans.

In the Court of Appeals, the *Godfrey* plaintiffs pursued only their cause of action arising under General Municipal Law §51, which requires fraud or illegal dissipation of municipal funds. Plaintiffs did not allege that Mr. Spano engaged in fraud, and the Court found their allegations of dissipation too conclusory to survive a motion to dismiss. Not only had plaintiffs failed to identify any specific instance in which taxpayer funds were expended as a result of the executive order, but Mr. Spano submitted an affidavit of Westchester's Commissioner of Finance stating that he could recall no instance in which Westchester had spent funds or extended benefits as a result of the order. Judge Eugene F. Pigott, Jr.'s opinion for the Court observed that this was not surprising because for years prior to the order the county had provided benefits to the domestic partners and children of public employees in committed relationships, regardless of whether the partners were of the same or opposite sex.

Plaintiffs in *Lewis* abandoned all but two of their claims. They alleged that defendants violated Section 123-b of the State Finance Law by unlawfully spending state funds. A claim under Section 123-b requires "some specific threat of an imminent expenditure." Here, too, the claim failed due to a lack of specific allegations of expenditures made under the policy memorandum that would not otherwise have been made. The Court noted that the Department of Civil Service has offered benefits to same-sex domestic partners since the mid-1990s.

The *Lewis* plaintiffs also asserted that the policy memorandum contravened Civil Service Law §161(1) and the Commission President therefore had acted inconsistently with the legislature's "pronouncements" of spousal benefits. The Court interpreted this as a separation of powers argument. The cause of action was dismissed because both the language and legislative history of the statute indicate

an intent to vest the Commission President with broad discretion to define "spouse" and "dependent children," and to determine who will qualify for health benefits.

Finally, while noting that the narrow grounds of its decision made it unnecessary to reach defendants' marriage recognition rule arguments, the Court (as it had in *Hernandez*) expressed the hope that the legislature would address the issues around same-sex marriage.

Judge Carmen Beauchamp Ciparick authored the concurring opinion in which Chief Judge Jonathan Lippman and Judge Theodore T. Jones joined. These judges would have upheld the defendants' conduct based upon the marriage recognition rule because neither of two exceptions to the rule applied. The Legislature may expressly state an intent to void certain marriages legally entered into in another jurisdiction, but New York has not adopted a so-called "Defense of Marriage Act."

The concurring judges also found inapplicable the narrow exception that denies recognition to marriages "abhorrent to New York public policy." They looked to constitutional, statutory and decisional law, as well as prevailing public attitudes, to find a public policy of acceptance of same-sex life partners as family members. Significantly, Judge Ciparick's opinion stated that the Court should look to evolving, rather than historical, attitudes to assess the social and moral attitudes of the community.

**Environmental Challenges**

In *Matter of Save the Pine Bush Inc. v. Common Council of the City of Albany*, the Court dismissed a petition because it found that, although petitioners had standing, the government action they challenged passed the "rule of reason" test despite the fact that not every possible environmental issue had been scrutinized in the City of Albany's review under the State Environmental Quality Review Act (SEQRA).

Petitioners were several individuals who alleged that they lived near a proposed hotel project, used the Pine Bush, a protected nature preserve, and belonged to Save the Pine Bush Inc., which was also a petitioner. The city moved to dismiss the petition on the ground that petitioners lacked standing. In an opinion by Judge Robert S. Smith, the Court stated that plaintiffs must prove that "their injury is real and different from the injury most members of the public face." The Court

attempted to strike a balance between making the standing barrier insuperable and making it too low. Although the petitioners did not reside adjacent to or across the street from the proposed project, by demonstrating use of the Pine Bush "more than that of the general public," they established standing to maintain the action.

The action failed on its merits, however. From the outset of the SEQRA process, it was recognized that the key issue was the impact on the endangered Karner Blue butterfly. The environmental impact statement (EIS) ordered by the city directed that this issue be studied. The Department of Environmental Conservation and others commented on the over 500-page draft EIS, but the only species other than the Karner Blue butterfly they mentioned were the Frosted Elfin butterfly and Adder's Mouth orchid. The author of the EIS supplemented his report to address those two species.

Petitioners alleged that the final EIS was deficient in its evaluation of threats to the Frosted Elfin butterfly and other non-plant, non-butterfly species that had not been raised in any comments to the draft EIS.

Again, the Court believed that a balance was needed to be struck between requiring public agencies to comply with their duties under the SEQRA and "common sense" limits on the extent of those duties. SEQRA proceedings can lead to "interminable delay," such as the six years that had passed since the developer had first sought rezoning for his hotel project. The Court stated that a government agency is not required to examine every conceivable environmental problem brought to its attention. Instead, an agency may "within reasonable limits, use its discretion in selecting which [problems] are relevant." A "rule of reason" must be applied not only to an agency's judgments about those environmental concerns it investigates, but also to its decision as to which concerns to investigate, the majority held.

Judge Eugene F. Pigott, Jr., joined by Judge Susan Phillips Read, concurred in the result. They agreed with the majority on the merits of the petition, but disagreed as to standing. A presumption of standing exists for those adjacent to or "in close proximity" to a project, however none of the petitioners lived within a half-mile of the proposed hotel. Moreover, the petitioners had not demonstrated "special harm" different from harm to the community at large, according to the concurrence. Judge Pigott wrote that "the appropriate place for [a] petitioner is in the proceedings

before the lead agency and not, in all instances, before the court, where little is accomplished except delay."

**Endnote:**

1. See *Roberts v. Tishman Speyer Properties, L.P.*, addressing the availability of luxury rent decontrol for the owners of Stuyvesant Town and Peter Cooper Village, discussed in our Nov. 3, 2009, column.