

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

-----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,

No. 2008-7064

Petitioners,

- against -

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

Respondent.
-----X

**MEMORANDUM OF LAW IN OPPOSITION
TO RESPONDENT'S MOTION TO DISMISS
PETITIONERS' EDPL § 207 PETITION**

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Petitioners submit this memorandum of law in opposition to Respondent's¹ motion to dismiss this N.Y. Em. Dom. Proc. Law ("EDPL") § 207 proceeding.

PRELIMINARY STATEMENT

In this EDPL § 207 action, Petitioners seek a judgment rejecting Respondent ESDC's determination approving the Atlantic Yards Land Use Improvement and Civic Project, and the concomitant seizure of Petitioners' private homes and businesses for transfer to Bruce Ratner so he can build a project of unprecedented scale and density – and thus realize unprecedented profits. As set forth in the Petition, ESDC's determination, and the forcible taking of their properties it authorizes, violates various provisions of the New York State Constitution and the EDPL itself.

Unhappy with this Court's long-standing rules which already provide a preference for all actions under EDPL § 207, *see* NYCRR § 670.18, and having failed in its prior efforts to obtain an even greater preference than is automatically provided by requesting one properly and candidly, ESDC's new tack is to unilaterally grant itself a preference and accelerate the determination of the merits of this action by filing a motion to dismiss on the merits with a thirty-five page brief. Respondent's motion is out of order. It should be denied without prejudice to ESDC raising its arguments at the procedurally appropriate time, *i.e.*, when it files its brief on the merits. *See* NYCRR § 670.18(c).

¹ Respondent is the New York State Urban Development Corporation which currently does business under the name Empire State Development Corporation ("ESDC"). ESDC is a quasi-governmental corporation. Its members are unelected, have no constituents and are beholden only to the Governor. N.Y. Unconsol. L. § 6254(1).

Insofar as this Court deems it appropriate to consider the substantive merits of this motion, it should deny it. And, the denial should be with prejudice so that ESDC is not afforded a second opportunity to present the same arguments when it files its brief.

This action is timely by operation of CPLR 205(a). Respondent's argument that the six month savings provision contained in CPLR 205 should not apply to an EDPL § 207 action fails because this Court has applied CPLR 205 in analogous contexts, *see Winston v. Fresh Water Wetlands Appeal Board*, 224 A.D.2d 160, 646 N.Y.S.2d 565 (2d Dep't 1996) (applying CPLR 205 to action under N.Y. Env. Cons. Law ("ECL") § 24-1105 which contains a 30 day deadline for challenging wetlands designations), and because the 30 day time limit for commencing an action under EDPL § 207 is a statute of limitations, *not* a condition precedent to suit.

This action is not barred by the doctrine of collateral estoppel because Petitioners expressly and timely raised their EDPL § 207 claim as a supplemental state law claim in their federal court action, including the claim that the proposed taking violates EDPL § 207(C)(4) which is raised here as Petitioners' Fifth Claim, and the federal court expressly declined to address the claim, dismissing it "without prejudice to its being re-filed in state court," *Goldstein v. Pataki*, 488 F.Supp.2d 254, 291 (E.D.N.Y. 2007), *aff'd*, 516 F.3d 50, 56 (2d Cir. 2008) (affirming "the judgment of the district court dismissing the federal claims with prejudice and the state claim without prejudice"), *cert. denied*, 128 S. Ct. 2964 (June 23, 2008) ("Justice Alito would grant the petition for a writ of certiorari").

Finally, ESDC's determination violates Article XVIII, Section 6, of the New York Constitution which provides that when the State pursues a project "for the clearance, replanning

and reconstruction or rehabilitation of a sub-standard and unsanitary area,” and also agrees to provide “a loan, or subsidy . . . to aid” such a project, the occupancy of the “project shall be restricted to persons of low income,” with preference given to “persons who live or shall have lived” in the area being cleared and rehabilitated. Respondent’s “slum clearance” project and the condemnation of Petitioner’s properties it requires, violates the plain language of this constitutional mandate because it *does not* provide housing for “persons of low income” at all, much less a preference for the persons of low income displaced by the project.

BACKGROUND

1. *This Case*

The “Determination and Findings by the New York State Urban Development Corporation Pursuant to EDPL, Section 204 with Respect to the Atlantic Yards Land Use Improvement and Civic Project” (“Determination”) was issued on December 8, 2006. *See* Petition Ex. A; *see also* Affirmation of Charles S. Webb III In Support Of Motion To Dismiss EDPL § 207 Proceeding (“Webb Aff.”) Ex. A.

Less than thirty days later, on January 5, 2007, Petitioners’ filed a timely challenge to the Determination pursuant to EDPL § 207 as a supplemental state law claim in *Goldstein, et al. v. Pataki, et al.*, No. 06-CV-5827 (E.D.N.Y.), pursuant to 28 U.S.C. § 1367. *See* Amended Complaint (Webb Aff. Ex. D).

On January 19, 2007, ESDC moved to dismiss Petitioners’ supplemental state law EDPL § 207 claim. On June 6, 2007, the federal district court dismissed the first three counts of Petitioners’ amended complaint – the federal constitutional claims – with prejudice. At the same time, the federal district explained that “Count Four of the Amended Complaint is dismissed

without prejudice to its being re-filed in state court.” Goldstein v. Pataki, 488 F.Supp.2d 254, 291 (E.D.N.Y. 2007) (emphasis supplied). Count Four was Petitioners’ claim seeking an order rejecting ESDC’s Determination pursuant to EDPL § 207. See Amended Complaint (Webb Aff. Ex. D).

On February 1, 2008, the Second Circuit Court of Appeals affirmed “the judgment of the district court dismissing the federal claims with prejudice *and the state claim without prejudice.” Goldstein v. Pataki, 516 F.3d 50, 65 (2d Cir. 2008) (emphasis supplied).*

On June 23, 2008, Petitioners’ petition for writ of certiorari was denied by the Supreme Court of the United States over the objection of Justice Alito.

On August 1, 2008, within six months after Petitioners’ EDPL § 207 claim was terminated without prejudice in federal court, this Petition was filed. This Petition seeks an order rejecting ESDC’s determination pursuant to EDPL § 207. It arises from the same transaction or occurrence as the supplemental state law EDPL § 207 claim which challenged the same Determination and was expressly dismissed without prejudice in federal court.

The Petition in this action asserts that ESDC’s Determination should be rejected because it violates: the public use clause contained in the Bill of Rights of the New York Constitution (Art. 1, § 7(a)); the due process clause contained in the Bill of Rights of the New York Constitution (Art. 1, § 6); the equal protection clause contained in the Bill of Rights of the New York Constitution (Art. 1, § 11); the low-income and current resident requirements of the New York Constitution (Art. 18, § 6); and the “public use, benefit or purpose” requirement contained in EDPL § 207(C)(4).

2. *Anderson, et al. v. New York State Urban Development Corporation*

On or about January 10, 2007 (five days after petitioners filed their EDPL § 207 claim in federal court), a group of thirteen rent-stabilized tenants in buildings slated for condemnation pursuant to ESDC's Determination ("Anderson Petitioners") filed a petition in this Court seeking an order rejecting ESDC's Determination pursuant to EDPL § 207. *See* Petition, attached as Ex. 1 to the Affirmation of Matthew D. Brinckerhoff, dated September 11, 2008 ("Brinck. Aff.").

The Anderson Petitioners challenged ESDC's Determination on a number of grounds, but not on any of the grounds asserted by Petitioners in this action or in Petitioners' predecessor action in federal court. *Compare* Brinck. Aff. Ex. 1 (Anderson Petition), *with* Brinck. Aff. Ex. 6 (Petition in this case), *with* Webb Aff. Ex. D. (Petitioners' federal complaint).

On February 6, 2007, in accordance with this Court's rules, specifically 22 NYCRR § 670.18(b), ESDC, represented by the same counsel that represents it in this action, filed an answer to the Anderson Petition, thus triggering the three month period allotted by this Court's rules for the Anderson Petitioners to file their brief, 22 NYCRR § 670.18(c). *See* Answer, attached to Brinck. Aff. as Ex. 2.

On or about February 7, 2007, ESDC filed a motion seeking "a preference in the hearing date," as provided by "22 N.Y.C.R.R. § 670.7(b)(1)." *See* Affirmation of Charles S. Webb III In Support Of Respondent's Motion For A Preference And Expedited Briefing Schedule, dated Feb. 7, 2007 ("Webb Anderson Aff.") ¶ 1, attached to Brinck. Aff. as Ex. 3.

Respondent ESDC no doubt took this approach in the Anderson case because it understood that EDPL § 207 proceedings in this Court are governed by 22 NYCRR § 670.18

which already provides for a preferred three month deadline for the filing of the initial brief instead of the typical six month period² and expressly states that in “all other respects” an EDPL § 207 proceeding “shall be governed by this Part as if it were an appeal.” 22 NYCRR § 670.18(e).

Recognizing that the rules of this Court already provide an automatic preference, this Court denied ESDC’s motion for a preference “as unnecessary” and also denied ESDC’s related request for a briefing schedule. *See* Decision & Order On Motion, dated February 22, 2007 (attached as Ex. 4 to the Brinck. Aff.).

ARGUMENT

I. A MOTION TO DISMISS ON THE MERITS IMPROPERLY CIRCUMVENTS THIS COURT’S RULES

Respondent’s motion should be summarily denied. It is procedurally improper. It violates this Court’s rules which provide, in pertinent part:

- (1) that after a petition is filed the “respondent shall file an answer to the petition and . . . the transcript of the hearing and the determination and findings,” 22 NYCRR § 670.18(b);
- (2) that no later than “three months after service of the answer, the petitioner shall file nine copies of a brief,” 22 NYCRR § 670.18(c);
- (3) that no “more than 30 days” thereafter, “the respondent shall file nine copies of an answering brief.” *id.*;

² Compare 22 NYCRR § 670.18 (providing three months from answer to initial brief in EDPL § 207 action), with 22 NYCRR § 670.8(e)(1) (providing six months from notice of appeal to initial brief in typical appeal).

- (4) that no “more than 10 days” after that, “petitioner may file a reply brief,”
id.;
- (5) that the “proceeding will be heard upon the original record,” 22
NYCRR § 670.18(d); and
- (6) that in “all other respects” this “proceeding shall be governed by
this Part as if it were an appeal,” 22 NYCRR § 670.18(e).

The word “motion” is not so much as mentioned in 22 NYCRR § 670.18. That said, there’s nothing improper about making various procedural motions as allowed on any appeal. So, for example, the ESDC can move for a preference or to expedite as it did in the *Anderson* case. 22 NYCRR § 670.7. It can move for leave to file a brief in excess of 14,000 words. 22 NYCRR § 670.10.3(a)(3). It cannot, however, consistent with 22 NYCRR § 670.18, move to dismiss this action on the merits anymore than a respondent to an appeal can short circuit the rules by moving for an order affirming the final judgment on appeal. But that is precisely what Respondent has done here.

In due course, a panel of this Court tasked with responsibility for hearing appeals (1) will review the record on appeal, including the hearing transcript, and the briefs of the parties, (2) will conduct oral argument, (3) will consider Petitioners’ arguments that the project and the forcible seizure of their homes and businesses violates the New York State Constitution and the EDPL, (4) will consider Respondent’s arguments to the contrary, including Respondent’s statute of limitations and collateral estoppel arguments, and (6) will render a decision on the merits either rejecting or affirming Respondent’s Determination. Respondent’s motion should be denied so that the Court’s rules governing this proceeding can be followed.

II. THIS ACTION IS TIMELY

Respondent ESDC acknowledges that CPLR 205(a), if applicable, makes this action timely. This is correct.

This EDPL § 207 action was timely commenced as a supplemental state law claim in federal court within 30 days of ESDC's Determination and Findings and was expressly dismissed "without prejudice to its being re-filed in state court," *Goldstein v. Pataki*, 488 F.Supp.2d 254, 291 (E.D.N.Y. 2007), *aff'd*, 516 F.3d 50, 56 (2d Cir. 2008), *cert. denied*, 128 S. Ct. 2964 (June 23, 2008) and was recommenced in this Court "within six months" thereafter as provided by CPLR 205(a).

CPLR 205 has been referred to by this Court as redemptive, "remedial, or ameliorative in that it tolls, extends, saves, revives, reinstutes, and even resuscitates" claims that were timely and then dismissed for reasons other than the merits. *Winston v. Fresh Water Wetlands Appeal Board*, 224 A.D.2d 160, 164 n.2, 646 N.Y.S.2d 565, 568 n.2 (2d Dep't 1996) (applying CPLR 205 to action under ECL § 24-1105 which contains a 30 day statute of limitations) (citations omitted).

Notwithstanding CPLR 205's long remedial history, Respondent contends: (1) that CPLR 205's presumptive applicability to condemnation related proceedings was repealed, *sub silentio*, by the legislature when the EDPL was passed in 1977; or, alternatively (2) that CPLR 205 and its notably liberal construction should not apply to the 30 day time limitation contained in the EDPL because it is not a statute of limitation, but rather a condition precedent to bringing suit. Both arguments fail.

A. CPLR 205 Applies to Actions Under the EDPL

“The restorative provisions of CPLR 205(a) have been on our books for a very long time, reflecting the idea that a diligent litigant who commenced a timely action but who failed on some generally technical ground, deserves an adjudication on the merits.” *Winston*, 224 A.D.2d at 164. Indeed, “CPLR 205(a) has existed in New York law since at least 1788” *Reliance Ins. Co. v. Polyvision Corp.*, 9 N.Y.3d 52, 56 (2007), and “may even lay claim to English statutes that are over 350 years old,” *Winston*, 224 A.D.2d at 164. “Its history therefore suggests that its capacity for rescue should not be frittered away by any narrow construction.” *Id.* at 165 (internal quotation marks and citations omitted).

The EDPL was enacted in 1977. It expressly provides that the CPLR “shall apply to practice and procedure in proceedings under this law except where other procedure is specifically provided by this law or rules governing or adopted by the appropriate court.” EDPL. § 703.

Respondent argues that CPLR 205 should not apply to EDPL proceedings because to do so would “defeat the clear legislative intent” for expeditious resolution. To be sure, the EDPL does require that a legal challenge to a proposed condemnation be filed within 30 days of the condemning authorities’ determination and findings. And, such a short statute of limitations does indicate that the legislature was interested in providing for an expeditious process when the EDPL was enacted in 1977. This Court, however, addressed and rejected this same argument under nearly identical circumstances in *Winston*.

In *Winston*, this Court held that the six-month saving period provided by CPLR still applied notwithstanding the 30 day limitation set forth in ECL § 24-1105:

We recognize the arguable incongruity in applying CPLR 205(a) to a proceeding pursuant to CPLR article 78: the petitioner would get a six month life-line to recommence a proceeding governed by a 30-day Statute of Limitations, thereby making the extension longer than the limitations period itself. However, the Court of Appeals rejected this argument in *Morris Investors v. Commissioner of Fin. Of the City of N.Y.*, 69 N.Y.2d 933, 516 N.Y.S.2d 635 (1987) in which CPLR 205(a) was held applicable to proceedings pursuant to CPLR article 78. . . . A six month extension may seem asymmetrical when tacked on to a four month (or, as here, a one month) limitations bar, but the purpose of this ameliorative statute is to blunt the fatal effects of time-bars when a defendant or respondent has had timely notice of the case to begin with.

224 A.D.2d at 165 (citation omitted). The same analysis applies here.

B. The EDPL 30 Day Time Limitation Is a Statute of Limitation, Not a Condition Precedent to Suit

Relying on *Yonkers Contracting Co. v. Port Authority Trans-Hudson Corp.*, 93 N.Y.2d 375, 690 N.Y.S.2d 512 (1999), Respondent next argues that CPLR 205 does not apply because the 30 day limitation for commencing an EDPL § 207 proceeding is not a statute of limitation, but rather a condition precedent to suit. Respondent contends that the difference between a statute of limitation and a condition precedent is governed by whether a single statute both created a cause of action and the period for commencement of the action. This is a gross oversimplification. It is at odds with *Yonkers Contracting's* actual holding and is flatly contradicted by this Court's decision in *Winston* holding that the 30 day time period for commencing a challenge to the designation of property on wetlands map is a statute of limitations and may be saved by CPLR 205 even though the ECL sets forth both the right to bring the claim and the time period doing so. *Winston*, 224 A.D.2d at 162 (citing ECL 24-1105(2)).

The argument for holding that CPLR 205 does not apply to EDPL § 207 is even weaker than the argument that this Court rejected in *Winston* because Petitioners' causes of action challenging whether the taking of their properties violate the New York Constitution, which existed long before the EDPL was enacted in 1977. *See Hallock v. State*, 32 N.Y.2d 599, 347 N.Y.S.2d 60 (1973) (adjudicating action for a judgment declaring that proposed condemnation violates New York Constitution); *see also Kaskel v. Impellitteri*, 306 N.Y. 73 (1953).

To be sure, the analysis for determining whether a deadline for commencing an action is a statute of limitation or a condition precedent is derived from *Yonkers Contracting*, 93 N.Y.2d at 378-39. As explained by the court in *Hakala v. Deutsche Bank AG*, 343 F.3d 111, 114 (2d Cir. 2003), the Court of Appeals in *Yonkers Contracting* “gave three reasons for its conclusion that the time limitation” for suing the otherwise immune Port Authority for damages “fell into the category of condition precedent, making § 205(a) inapplicable.”

“The first reason was that the right to sue in that case resulted from a statutory waiver of sovereign immunity.” *Id.*

“The second reason was drawn from the Court of Appeals’s prior assertion, in *Romano v. Romano*, 19 N.Y.2d 444, 447, 280 N.Y.S.2d 570 (1967), of a ‘general rule’ that ‘if a statute creates a cause of action and attaches a time limit to its commencement, the time is an ingredient of the cause.’” *Id.*

“As the third reason, the Court of Appeals found in the language of [the statute], which allowed suit against the Port Authority only ‘*upon the condition* that [plaintiffs satisfy the

time requirement],’ a clear indication of legislative intent to make the right of action conditional on institution within one year.” *Id.*

Here, as in *Hakala*, only one of the three factors is even arguably “found in our case, and that is the least persuasive of the three – the fact that a single statute both created a cause of action and prescribed the time within which it could be brought.” *Hakala*, 343 F.3d at 114. Moreover, it is even less persuasive here than in *Hakala* because, as explained above, the EDPL did not *create* Petitioners’ causes of action, it merely sets forth procedures for the adjudication of claims involving eminent domain that have existed for centuries.

The other two factors – waiver of sovereign immunity³ and the statute’s use of the word “condition” – are not presented here. Their absence resoundingly slams the door on Respondent’s argument that the 30 day limitation contained in the EDPL is a condition precedent to suit.

III. THIS ACTION IS NOT BARRED BY COLLATERAL ESTOPPEL

This action is not barred by the doctrine of collateral estoppel because Petitioners expressly and timely raised their EDPL § 207 claim as a supplemental state law claim in their federal court action, including the claim that the proposed taking violates EDPL § 207(C)(4)

³ The waiver of sovereign immunity factor is particularly important because courts “generally read such waivers conservatively, lest the sovereign be forced to defend a suit to which it never consented.” *Hakala*, 343 F.3d at 116 (citing *Lane v. Pena*, 518 U.S. 187, 195, 116 S. Ct. 2092 (1996)). “Given the fact that a sovereign entity was free to make itself completely immune to suit by simply declining to waive its immunity, the harsh result of disallowing the remedial provision of § 205(a) was far less unfair” in *Yonkers Contracting* than it would be here. *Id.*

which is raised here as Petitioners' Fifth Claim. *Compare* Webb Aff. Ex. D. (federal complaint) ¶ 177 (asserting EDPL § 207(C)(4) claim), *with* Brinck. Aff. Ex. 6 (Petition) ¶¶ 104-05.

The federal court expressly declined to address Petitioners' EDPL § 207 cause of action, dismissing it "without prejudice to its being re-filed in state court," *Goldstein v. Pataki*, 488 F.Supp.2d 254, 291 (E.D.N.Y. 2007), *aff'd*, 516 F.3d 50, 56 (2d Cir. 2008) (affirming "the judgment of the district court dismissing the federal claims with prejudice and the state claim without prejudice"), *cert. denied*, 128 S. Ct. 2964 (June 23, 2008) ("Justice Alito would grant the petition for a writ of certiorari").

The only issue that was litigated to conclusion in Petitioner's federal action was whether Petitioners' federal complaint stated a claim under the federal constitution. Contrary to Respondent's intimations, the federal court did not "find" that the Project's purpose is public which would be the only legitimate basis for even arguing that collateral estoppel might apply. There was no fact-finding of any kind. It did not have to be that way. If Respondent were as eager for an expeditious ruling on the merits as it now claims to be,⁴ it could have sought a merits based ruling on Petitioners' EDPL § 207 claim, or cross-appealed for such a ruling before the Second Circuit. Having chosen not to avail itself of those opportunities, ESDC cannot now invoke the doctrine of collateral estoppel.

The argument presented in part by this Petition – that the New York Constitution is more protective of property rights than its federal counterpart – was never presented to the federal court. Petitioners cannot be estopped from presenting it now.

⁴ Indeed, had Respondent simply agreed to the expedited discovery sought by Petitioners this case would be over right now and both sides would have finality. The irony is that the delay was caused by Respondent's litigation decisions and tactics, *not* Petitioners.

IV. RESPONDENT'S DETERMINATION VIOLATES ARTICLE XVIII, SECTION 6, OF THE NEW YORK STATE CONSTITUTION

ESDC's power to condemn is derived from the New York State Urban Development Corporation Act (codified at N.Y. Unconsol. Law § 6251 *et seq.*) (hereafter "UDCA") and is limited to circumstances specifically enumerated under the UDCA. According to ESDC's Determination, one of the primary public benefits served by the seizure of Petitioner's homes and businesses is the elimination of blight.

In order to exercise jurisdiction over the Project, thus allowing ESDC to provide financial subsidies to Ratner and permitting it to wield the power of eminent domain to seize Petitioners' homes, Respondent ESDC declared it to be a "land use improvement project" as that term is defined in the UDCA. A "land use improvement project" is one for the clearing and redevelopment of a slum or blighted area, and the "plan" for its clearance and rehabilitation must be "in accordance with Article XVIII of the [New York] Constitution."⁵ UDCA § 6253(6)(c). Though it seems ludicrous to those familiar with the area slated for redevelopment, the Project was justified and approved as "slum clearance."

Article XVIII of the Constitution (the Housing Article) is concerned with the related but distinct purposes of slum clearance, rehabilitation, and the provision of housing affordable to low-income people. *See* N.Y. Const. Art. XVIII § 1. The Article, in its entirety, empowers the legislature to provide for the eradication of blight and for the construction of low-

⁵ The Project was also denominated a "civic project" but a "civic project" is "that portion of a multi-purpose project designed and intended for the purpose of providing facilities for ... recreational ... purposes." UDCA § 6253(6)(d). The project as a whole does not fall within that definition.

income housing. Section 6 of Article XVIII, however, ties those goals together where a project is financed by a State subsidy or loan. *See* N.Y. Const. Art. XVIII § 6.

Thus, where, as here, the State pursues a project “for the clearance, replanning and reconstruction or rehabilitation of a sub-standard and unsanitary area,” and where, as here, the State provides “a loan, or subsidy . . . to aid” such a project, Section 6 of Article XVIII mandates that the “project shall be restricted to persons of low income,” with preference given to “persons who live or shall have lived” in the area being cleared and rehabilitated. Respondent’s “slum clearance” project and the condemnation of Petitioner’s properties it requires, violates the plain language of N.Y. Const. Art. XVIII § 6 because it *does not* provide housing for “persons of low income” at all, much less a preference for the persons of low income displaced by the project.

Respondent argues that Article XVIII, Section 6 does not mean what it says. ESDC contends that Section 6 does not apply when the goal of the project is the eradication of blight as opposed to the provision of low-income housing. Respondent’s interpretation conflicts with the amendment’s plain language *and* the intent of the drafters who saw the two goals as inextricably linked.

William Kuczwalski, a delegate to New York’s 1938 Constitutional Convention, who introduced the Amendment which became Article XVIII, Section 6, explained the purpose of the Amendment in his introduction: “We should remove the slum areas and . . . build new, decent homes for the people who cannot afford to live away or in a better habitat.” New York State Constitutional Convention, 1938: Revised Record, vol. IV (1938) at 2999 (attached as Ex. 5 to the Brinck. Aff.). In the words of another drafter: “the purpose is to tie up slum clearance and housing projects.” *Id.* at 3001. The drafters wanted to ensure that, where state subsidies

were provided, housing was not built without the clearance of blighted areas, and conversely, that “for every unit of slum property that has been razed, there shall be an equal number of units built so that the slum dwellers will be housed.” *Id.* at 3003.

ESDC argues that Petitioners’ plain reading of the language of Article XVIII, Section 6 leads to “absurd” results. The results are only absurd in Respondent’s bizarre world where the area condemned for the Project as “blighted” has no actual “blight,” and “affordable housing” is not affordable to low-income people. The drafters of this amendment to the N.Y. Constitution, working during the Depression, took the “absurd” stance that the eradication of blight would lead to the displacement of low-income people and that, therefore, any project funded by the State for slum clearance must provide for them. Thankfully our more enlightened (and prescient) forbears enshrined their “absurd” views in the Constitution.

Respondent notes that Courts have never addressed the applicability of Article XVIII, Section 6, and have never interpreted its meaning. While this appears to be true, it does not justify Respondent’s reliance on cases from irrelevant contexts to make the argument that the ESDC is empowered to approve projects aimed at addressing blight without providing for low-income housing. Respondent simply points to court decisions approving ESDC plans without reference to the New York State Constitution. *See, e.g., Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 503 N.Y.S.2d 298 (1986); *Tribeca Commun. Assoc., Inc. v. New York State Urban Dev. Corp.*, 200 A.D.2d 536, 607 N.Y.S.2d 18 (1st Dep’t 1994). Or, it cites to cases finding projects constitutional without regard to the provisions of Article XVIII. *See e.g., Murphy v. Erie County*, 28 N.Y.2d 80, 320 N.Y.S.2d 29 (1979).

The only case cited by ESDC that is relevant at all is *Murray v. LaGuardia*, 291 N.Y. 320 (1943). In that case, the court considered a challenge to the constitutionality of the Redevelopment Companies Law (“RCL”) and the development of Stuyvesant Town in Manhattan. The plaintiffs in *Murray* argued that the RCL was unconstitutional because “it [was] not confined to slum clearance and to reconstruction for former slum dwellers.” Plaintiffs’ argument was based on the general purpose of Article XVIII, not on Section 6. Indeed, Court expressly noted that the developer would “furnish all funds required to complete the redevelopment project” and was to receive “no loan of funds from the State, nor from any city, town or village.” Section 6, which applies only in the event of a state “loan or subsidy,” was never implicated and was not considered by the Court.

Finally, ESDC states that Petitioner’s interpretation of Article XVIII, Section 6 cannot be correct because, by its own terms, Article XVIII was meant to extend legislative powers and should not be construed as imposing additional limitations. ESDC conveniently omits the Article’s final phrase which restricts the legislature’s expanded powers under Article XVIII to “the building and operation of low rent dwelling houses for persons of low income as defined by law....” N.Y. Const. Art. XVIII, §10. Article XVIII was meant to encourage the development of low-income housing. Respondent ESDC is required by its enabling legislation to comply with the provisions of Article XVIII, including Section 6, where, as here, it provides subsidies for alleged slum clearance and rehabilitation while wielding the power of eminent domain. Respondent’s Project and Determination violate Article XVIII, Section 6.

CONCLUSION

Based on the foregoing, petitioners respectfully request that respondent's motion be denied in its entirety.

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