To Be Argued By:
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New York Supreme Court

APPELLATE DIVISION — FOURTH DEPARTMENT

Docket No.
OP 21-00853

BRETT B. TRUETT, JOSEPH CERENI
and 418 LAFAYETTE ST. CORP.,

Petitioners-Appellants,

against

ONEIDA COUNTY,

Respondent-Respondent.

BRIEF FOR PETITIONERS-APPELLANTS

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QUESTION PRESENTED

Question 1: Should the Court reject and nullify Respondent's determination to condemn or acquire Petitioners' properties through the power of eminent domain based upon Respondent's failure to comply with mandatory provisions of the Eminent Domain Procedure Law?

Answer Below: This instant proceeding is one of direct review of a condemnation determination by the Appellate Division pursuant to Eminent Domain Procedure Law Section 207. Accordingly, there has been no lower court determination.

PRELIMINARY STATEMENT

On April 14, 2021 at a meeting of the Oneida County Board of Legislators (hereinafter the "Respondent"), the Board passed Resolution No. 083 adopting "Determinations and Findings Pursuant to Section 204 of the Eminent Domain Procedure Law in Connection with Acquisition of Property for the Construction of a Public Parking Facility in the City of Utica" (hereinafter the "Condemnation Determinations"). *AR - 247-252*

The Condemnation Determinations resolved to condemn and acquire lands owned by Brett B. Truett located at 442 Lafayette Street, Utica, New York, and lands owned by Joseph Cereni and/or 418 Lafayette St. Corp. located at 418-430 Lafayette Street, Utica, New York (hereinafter the "Petitioners"). Being aggrieved by Respondent's Condemnation Determinations, Petitioners commenced this proceeding pursuant to Article 2, Section 207, of the Eminent Domain Procedure Law ("EDPL") for review of Respondent's Condemnation Determinations and seek to have them rejected and annulled. Based on the Respondent's failure to strictly comply with the EDPL the Condemnation Determinations should not be affirmed. It is clear from the record that the Condemnation Determinations were in discord with the procedures set forth in Article 2 of the EPDL and Article 8 of the Environmental Conservation Law relating to State Environmental Quality Review

("SEQR"), as well as Constitutional prohibitions against taking private property for predominant private uses.

Glaringly, as the one and only agency involved in this EDPL proceeding, the Respondent is the "Lead Agency" under part 617.6(b)(1) of New York's Compilation of Codes, Rules and Regulations (hereinafter "6NYCRR617 etc") and therefore the Respondent had the legal duty to make a preliminary classification of the action as "Type I or Unlisted." In this case, the Respondent made no such determination. Moreover, as an independent Lead Agency, it is mandated that the Respondent must use either a short form environmental assessment form (EAF) or a full environmental assessment form (EAF) to determine the significance of its actions. 6NYCRR617.6(a)(3). In this case, the Respondent did not provide either a short form or full environmental assessment form as required. Instead it defaulted on this due process of law SEQR obligation and now has attempted to excuse its default by the substitution of a SEQR finding of an unrelated agency for an unrelated private project during an unrelated time frame almost two years before the Condemnation Determinations now before the Court. *AR-251, paragraph 16.*

As a result of Respondent's default in compliance with SEQR, Respondent failed to take a "hard look" at relevant areas of environmental concern and failed to provide a "reasoned elaboration" of its determination that the condemnation of

Petitioners' property (in order to construct a public parking garage for the dominant benefit of a private hospital project) would have no negative environmental impact. Respondent's conclusions listed below are without support in the EDPL record:

1. The condemnations of Petitioners' would further reduce "the already insufficient parking resources in that vicinity (*AR-249, paragraph 1*);

2. Other developments "have demonstrated a need for off street parking in that area of Utica" (*AR-249, paragraph 2*);

3. The "parking garage will also relieve traffic congestion" (*AR-250, paragraph 6*);

4. "There will be positive environmental effects on the surrounding area…" (*AR-250, paragraph 8*);

5. "The general effect of the proposed project on the environment and the residents of the localities in which the project will be located has been comprehensively examined" (*AR-251*).

To be sure, without its own Leading Agency environmental impact statement it would have been impossible for the Respondent to take any "look," not to mention a "hard look," and "no look" could only result in "no reasoned elaborations," mandatory standards and findings in an EDPL proceeding.

It is also clear from the Respondent's Condemnation Determinations that the taking of Petitioners' properties is for a private use, not a public use, that is to say, for the private benefit of the Mohawk Valley Health System ("MVHS"). *AR-249*

["That Mohawk Valley Health System is currently constructing a state-of-the-art Regional Center in Downtown Utica"; "following selection of the site for the Regional Medical Center and the design for the Regional Medical Center"; "to construct a public parking garage within the City of Utica for the benefit of all public visitors to the new Regional Medical Center currently under construction"; Mohawk Valley Health System ("MVHS") Integrated Health Campus (*AR-8-79*)].

STATEMENT OF FACTS

Respondent proposed to take Petitioners' properties located in the City of Utica pursuant to Article 2 of the EDPL and first scheduled the public hearing required by EDPL §201 by using an electronic and video format instead of "at a location reasonably proximate to the property which may be acquired for such project" ["This virtual public hearing is being hosted tonight from the Oneida County Office Building…"]." *AR-131*. Attendees at the public hearings could be "unmuted" to speak by "a popup message" on their computer screens or given a "verbal code" on their phones telling them to "press star 6 to unmute yourself." *AR-131*. Speakers were limited to "approximately five minutes." *AR-132*. Speakers were advised to keep in mind that the hearing "concerns the building of a public parking garage in the City of Utica…" Mark Laramie, the Commissioner of Public works for Oneida County, stated that the garage project "will construct a 1,050 space, 3 level parking garage…" and that the garage would be "immediately

adjacent to Utica Auditorium, the Utica City Courthouse and the new Mohawk Valley Health System Hospital." *AR-133*. Commissioner Laramie further stated that the garage location was selected "primarily due to its joint proximity to the new Mohawk Valley Health System Hospital," among other venues. *AR-133*. Although Commissioner Laramie stated that no other location under consideration could realistically serve" the listed facilities, he did not identify any alternate locations. *AR-133*. Similarly, Commissioner Laramie bypassed any reference to SEQR compliance and concluded that the parking garage would reduce the demand for unsafe on-street parking, reduce traffic congestion, and reduce the need for large surface parking lots. *AR-133*. Although under EDPL §203 Commissioner Laramie or some other official or agent is required to outline alternate locations for the garage public project, Mr. Laramie did not do so.

After technical difficulties relating to the unmuting of callers number 1 and 2 prevented them from speaking, Petitioner herein Brett Truett was caller number 4 and was able to speak. *AR-133-134*. Petitioner Truett pointed out that parking facilities for the private MVHS could be accomplished "on land that the hospital has purchased." *AR-134*. Following his brief public comments, Petitioner Truett submitted comprehensive written comments together with an affidavit proving that Petitioners' properties at Lafayette Street and Carton Avenue are eligible for listing on the National Register and in 2016 was identified as a property to be saved by

the Landmarks Society of Greater Utica. *AR-221-225; AR-236-243; AR-228*. Additionally, Petitioner Truett raised the issue of whether the garage was a public project, or whether it was a ruse for providing a parking garage for a privately-owned hospital system. *AR-217-221*. Disputing Commissioner Laramie, Petitioner Truett also pointed out that other parking facilities and designs were possible and named five options. *AR-227; AR-231*.

Petitioner Joseph Cereni, apparently caller number 7, followed and expressed his thought that the public garage project was really a hospital garage and that "Eminent domain law states that property can't be taken for a private entity or given to a private owner." *AR-135*. Like Petitioner Truett, Petitioner Cereni also stated that there were "other places to put parking" and that other possible places should be looked at. *AR-136; AR-195; AR-197*.

Other speakers at the video hearing also mentioned alternative possibilities for parking:

1. Daniel Walker – "I think they can work out different alternatives" (*AR-137*);

2. Celeste Friend, Utica Common Council, - "It's not at all obvious to me that this additional parking of this new garage is in any way necessary" (*AR-138*);

3. Peter Bionco – "Alternate sites do exist for parking in the downtown location. There are adjacent parcels to the north, east, west and south of the current hospital" (AR-142);

4. Timothy Julian, on behalf of Michael Galime, Utica Common Council President, - "B, the parking garage was removed from the project through SEQR for MVHS. It was justified that surface parking alone was enough parking for the MVHS build out," and that "SEQR has not been conducted for the proposed parking garage that it was segmented from the MVHS hospital SEQR plan." (*AR-143*). The representative for the President of the Common Council went on to say that if a parking garage is wanted it "may be placed in other reasonable locations where other parking garages exist." *AR-144*.

ARGUMENT

POINT I

THE PUBLIC HEARING WAS NOT AUTHORIZED AND DID NOT COMPLY WITH EDPL §§201-203

Instead of a live public hearing where interested parties could show up at a location reasonably proximate to the property to be acquired, the Respondent gave notice that the public hearing would be held virtually via Webex at 6:00 p.m. on the 23rd of December, 2020. *AR-123*. It is noted that the public hearing was scheduled during the dinner hour for many people, a transition time between work and evening activities, possibly the worst time of day for a public hearing for an action aimed at taking private property for any use, public or private. It is also noted that December 23rd is two days before Christmas, a religious holiday celebrated by many in Upstate New York and Utica, a time when families gather, a time of travel, a time of celebration and gifts, but not a time for the harsh reality of eminent domain. Reflecting discontent with the time and method of the public

hearing speaker Julian stated; "I think this whole setup is atrocious. I think it's terrible. I think really limiting the public's input. It was very difficult for me as a County Legislator to find out information about this meeting and I think the public should be allowed to vet proceedings like this a little bit better than what they are at this time." *AR-144*. One would wonder whether the Respondent intentionally scheduled the Public Hearing so close to Christmas, the worst time of year for the public to come out and be heard under ordinary circumstances, not to mention a high tech hearing where many people would not have the skill to engage.

To be sure, speaker Julian had good cause for his complaints, for the EDPL does not and did not allow for virtual public hearings. Evidence of this is found in Governor Cuomo's Executive Order No. 202.94 issued on February 14, 2021, almost two months after the public hearing was held in this case, which provided specific authority to the MTA or subsidiary entities to hold public hearings remotely, but did not give a blanket waiver for ordinary in-person EDPL public hearings across the State. Indeed, no other COVID crisis Executive Order suspended or modified the in-person requirements of EDPL §§201-203. *New York Executive Orders 202-202.111*.

The power of eminent domain is one of the governments ultimate powers – the power to take private property from its rightful owner. To exercise that power, EDPL requires the takers to look the aggrieved property owners in the eye, to hear

their grievances, to listen to their reasoning within eyesight and earsight of those similarly situated, but not to be filtered by the questionable technology of a computer screen or a mute button. In-person public hearings in response to the draconian power of eminent domain are critical to a sense of due process of law. In this case, Respondent failed to comply with EDPL §§201-203 by scheduling a public hearing during the high season of Christmas and then relegating it to virtual cyberspace where it could be minimized to a computer screen or telephone call. The Condemnation Determinations should be vacated for this reason alone.

POINT II

RESPONDENT'S DETERMINATION TO CONDEMN OR ACQUIRE THE SUBJECT PROPERTY THROUGH THE POWER OF EMINENT DOMAIN SHOULD BE ANNULLED DUE TO RESPONDENT'S FAILURE TO COMPLY WITH EDPL §§ 207(C)(3), 204, AND ENVIRONMENTAL CONSERVATION LAW ARTICLE 8.

Condemnation of private property through the power of eminent domain is inappropriate if the condemnation proceeding is not in conformance with the federal and state constitutions and/or if the condemnor's determinations and findings are not made in accordance with procedures set forth in EDPL Article 2 and SEQR, or if a public use, benefit, or purpose will not be served by the proposed acquisition. See EDPL 207 (c); *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, [1986]; *Matter of Rocky Point Realty, LLC v Town of Brookhaven*, 36 AD3d 708 [2nd Dept 2007].) The power to condemn

private property against the will of the owner is a stringent and extraordinary one, based upon public necessity." *Schneider v Rochester*, 160 NY 165, 170 [1899]. Accordingly, the prescribed mode of exercising eminent domain should be strictly followed as well as "inflexibly adhered to and applied." *Socy. of NY Hosp. v Johnson*, 5 NY2d 102, 108 [1958]; *Rochester v Bloss*, 185 NY 42, 51 [1906].)) In essence, failure to strictly comply with the mandated procedures set forth in EDPL Article 2, including proper SEQR review, warrants annulment of a condemnation determination. In the instant case, Respondent inadequately addressed environmental concerns related to the condemnation of the Petitioners' Properties under the SEQR in violation of EDPL § 207(C)(3)

Pursuant to EDPL §207(c)(3), a condmenor's determinations and findings in an eminent domain proceeding must adequately address the environmental concerns of the condemnation by complying with SEQR which mandates strict compliance. See *Matter of King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 347 [1996]. To that end, the condemnor must "identif[y] the relevant areas of environmental concern, [take] a 'hard look' at them, and [make] a 'reasoned elaboration' of the basis for [its] determination." *Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359 [1986]; *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]; *Matter of Hubbard v Town of Sand Lake*, 211 AD2d 1005, 1006 [3rd Dept 1995]; *Bd. of Coop. Educ. Servs. v Town of*

Colonie, 268 AD2d 838, 840 [3rd Dept 2000]. Failure to comply with "hard look" and reasoned elaboration doctrine violates both the EDPL and SEQR requiring annulment of any corresponding condemnation. See *Bd. Of Coop. Educ. Servs v Town of Colonie*, 268 AD2d at 840; *Niagara Mohawk Power Corp. v Green Is. Power Auth.*, 265 AD2d 711, 712 [3rd Dept 1999]; *Matter of Hubbard*, 211 AD2d at 1006.

The concepts of "hard look" and "reasoned elaboration" that present in a judicial review of a SEQR determination or corresponding EDPL proceeding are not explicitly defined; however, bald conclusory statements of "no environmental impact" or a negative declaration of impact with respect to relevant areas of environmental concern without any "analytical detail" or thorough investigation are insufficient to constitute a "hard look" or "reasoned elaboration." See *Niagara Mohawk Power Corp.* 265 AD2d at 712 "[a]ny positive or negative impacts on the environment … [would] occur whether or not [it] acquires the [P]lant"]. Respondent's contention to the contrary notwithstanding, this bald conclusory statement does not satisfy respondent's obligation to fully analyze the environmental consequences of its contemplated action"). *Bd. Of Coop. Educ. Servs v Town of Colonie*, 268 AD2d at 840.

In the instant matter, approximately 10 people including the Petitioners offered comment against the acquisition of the Petitioners' Property by Eminent

domain. Of those 10 individuals, many identified to the Respondent the potential issues caused by the acquisition of the Properties for construction of a parking garage in Utica. For example, Petitioner Brett Truett commented that parking facilities could be accomplished in alternative locations (*AR-134*); provided written comments addressing historical preservation of his property (*AR-209*); asked for alternative designs (*AR-210*); and challenged the nature of the condemnation as not being a public project (*AR-217*). Likewise, Petitioner Joseph Cereni commented that there are other places to put parking. *AR-136*. Daniel Walker, too, thought that there would be other alternatives for the garage. *AR-137*. And Councilman Celeste Friend wanted comparisons for parking lot spaces on the ground that it was not obvious to her that a new garage was necessary. *AR-137-138*. Additionally, Katie Aiello, commented that the building of the parking garage was in an environment "where we don't ever know what facilities we have or don't and the need and the reason for it," and as well, she raised the constitutional issues of *Kelo v the City of New London*. *AR–140*. Speaking for the Utica Common Council President, Timothy Julian read that: SEQR has not been conducted for the proposed parking garage that it was segmented from the proposed MVHS hospital SEQR Plan, thus implying that a SEQR finding for a private project does not constitute a "one size fits all" analysis for a garage project that falls within the due process of law of the EDPL. *AR-143*. There is no doubt but what the comments at

the public hearing raised questions about parking alternatives, historical preservation, parking garage need, traffic, and public use. In all, the comments at the public hearing highlighted the fact that the Respondent did not address the criteria for determining significance as required by 6NYCRR 617.7 and did not satisfy any of the findings requirements of NYCRR 617.11.

There is no dispute but what the Respondent did not prepare or submit an independent environmental analysis in conformity with SEQR with respect to the proposed garage project. As such, Respondent failed to conduct or take a "hard look" as relevant areas of environmental concern and also failed to provide any reasoned elaboration for its default in making an independent negative declaration for the garage project. In this sense, it can be said that the brief words uttered at the public hearing by attorney Robert Pronteau, attorney Peter Rayhill and Commissioner Mark Laramie fall far short of the standards of EDPL §201 ["…the impact on the environment and residents of the locality where such project will be constructed…"], as well as the specific requirement of EDPL §203 ["…condemnor shall outline…alternate locations of the public project…"].

Avoiding its failure to comply with SEQR, the Respondent accepted the findings of the City of Utica Planning Board with respect to a private project issued almost two years before the Condemnation Determinations made in the instant case, yet failed to make its own independent negative declaration as

required by the EDPL and SEQR. *AR-251*. Following such a default, there is no basis whatsoever for finding numbers 2, 6, and 8 contained in the Condemnation Determinations. *AR-250-251*. They are up in the air without any legal support, no matter how hard the Respondent has attempted to cover up its default.

In the absence of a thorough investigation of areas of environmental concern, a hard look, analytical details of a negative declaration, or a "reasoned elaboration" to support such negative declaration, Respondent failed to comply with SEQR and, by extension, EDPL Article 2. See EDPL 207(C)(3)["The scope of review shall be limited to whether…. the condemnor's determination and findings were made in accordance with procedures set forth in this article and with article eight of the environmental conservation law"]; see also *Matter of Hubbard*, 211 AD2d at 1006; *Niagara Mohawk Power Corp.*, 265 AD2d at 712. Indeed, "literal rather than substantial compliance with SEQR is required." *Dawley v. Whitetail 414, LLC*, 130 AD3d 1570 [4th Dept 2015]). Accordingly, Respondent's determination to acquire the Plaintiffs Properties through the power of eminent domain without strictly adhering to the requirements of SEQR renders its condemnation determination arbitrary and capricious. *Chinese Staff & Workers Assn.*, 68 NY2d at 368 ["Since respondents did not consider these potential effects on the environment in their environmental analysis, their determination does not comply with the statutory mandate and therefore is arbitrary and capricious."].

A recent case similar to the one before the Court raised similar SEQR issues. Following the statutory scheme for two public projects that required compliance with SEQR, one public project for the "Lake Placid Main Street Reconstruction Project" resulting in a negative declaration of environmental significance in February 2017, followed by a second and new SEQR process initiated by "a short form EAF (see 6NYCRR617.6[a][3]) specifically with regard to a second public project for a proposed condemnation for a garage, the Lake Placid Village Board was then required to "review the EAF, the criteria contained in [6NYCRR 617.7(c)] and "…thoroughly analyze the identified relevant areas of environmental concern"…etc. *Matter of Adirondack Historical Association v Village of Lake Placid, 161 A.D. 3d 1256, 1257 (3rd Dept 2018) ["Lake Placid"]*; 6 NYCRR 617.7(b)(2)(3)(4). In *Lake Placid*, "[T]he record was bereft of any evidence that the Village Board took the requisite hard look…" and the sum total of the proof was "the wholly conclusory statement in its resolution" *Id. 161 A.D. 3d 1256, 1259* The Court went on to comment on the "wholesale failure on the part of the Village Board to set forth a record-based elaboration for its conclusion…" *Id. 161 A.D. 3d 1256, 1259.*

Here, the SEQR default by the Respondent is even greater. Whereas in the Lake Placid case the Village Board attempted to import and rollover findings from a previous public project, in this case the Respondent is attempting to import and

rollover findings from a previous private project for site plan review that was not before it and did not implicate eminent domain, in addition to which the Respondent made no attempt to comply with SEQR by at least preparing a short form EAF. Based on the Lake Placid case, the penalty for non-compliance in an eminent domain case is severe, that is to say, the Condemnation Determinations made in connection with Plaintiffs' properties must be vacated and annulled.

POINT III

THE CONDEMNATION OF PETITIONERS' PROPERTIES IS NOT FOR A PUBLIC USE

By virtue of the fact that the first itemized Condemnation Determination focuses on the private MVHS project and its regional medical center in Downtown Utica, the "public use" requirement for the use of eminent domain by the Respondent is implicated. Indeed, the public use issue was raised by many speakers who tuned into the virtual public hearing, including the Petitioners and the representative of the Utica Common Council President, who clearly saw that the hospital project was a private project and said "at this juncture the land was taken for the purpose of a private entity." *AR-143*. It is apparent that the Respondent has attempted to justify the use of eminent domain by dressing up the MVHS private project with nearby public properties, but without integrated SEQR findings thoroughly examining all the finding requirements of SEQR the Court is unable to embark on its scope of review under EDPL §207(c), namely, whether the

proceeding was in conformity with the federal and state constitutions. The Court cannot decide such an important issue in a vacuum.

Yet to examine the constitutional issues involved in this case the Court could look to the Supreme Court of the United States and place it in the Context of *Kelo v City of New London*, a 5-4 decision that deeply delves into the public use requirements of eminent domain. *545 U.S. 469 (2005).* The Supreme Court was split in the Kelo case with four justices in the solid majority, one concurring, and four justices in dissent with two dissenting opinions. Like Kelo, whenever eminent domain is used for private purposes, whether for a singular private purpose or one commingled with potential public purposes, like here, serious questions are raised as to whether the use of eminent domain is proper. Without a complete record, however, in this case where there is the absence of full-blown compliance with SEQR, it is difficult to make the call, but from the perspective of the Petitioners the Respondent has violated the public use purpose of the law and the Condemnation Determinations should be annulled and vacated.

CONCLUSION

Given Respondent's failure to strictly comply with the EDPL and SEQR, Respondent's have failed to present a record to the Court sufficient to allow the Court to make the necessary findings under EDPL §207(c). The Respondent's Condemnation Determinations should be annulled and vacated.

Dated: August 16, 2021
Glens Falls, New York

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