

REPORT FROM COUNSEL

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SAHN WARD & BAKER is a full service law firm concentrating in the areas of zoning and land use planning; real estate law and transactions; civil litigation in state and federal trial and appellate courts; municipal law and legislative practice; environmental law; corporate/business law and commercial transactions; telecommunications law; labor and employment law; real estate tax certiorari and condemnation; estate planning and administration. The Firm is committed to providing its clients with the highest quality legal representation, counsel and advice, and to using our expertise to achieve our clients' goals. The Firm has an extensive client base that includes Fortune 500 companies, prominent regional businesses, municipalities, government agencies and authorities, and individuals. Our offices are centrally located to serve our clients on Long Island and in New York City.

Welcome to the Winter/Spring 2010 edition of “*Report from Counsel*,” a Newsletter for the Firm’s clients and the other professionals who consult with the Firm, updating them on our practice as well as important new developments in the law.

NEW DEVELOPMENTS AT THE FIRM

We are distinctly honored to report that former Nassau County Supreme Court Justice and Administrative Judge of Nassau County, Hon. Edward G. McCabe, has joined the Firm as Special Counsel. Justice McCabe’s distinguished career in public service spans over three decades. He is one of the most respected judges and public servants in the history of Nassau County. Prior to serving as a member of the judiciary, Justice McCabe served as the Town Attorney for North Hempstead and as the Nassau County Attorney. He also served as Presiding Justice of the Appellate Term of the New York State Supreme Court for the Second Judicial Department, Ninth and Tenth Judicial Districts. Justice McCabe’s depth of experience and knowledge is a tremendous asset benefitting our clients and our entire Firm. To learn more about Justice McCabe’s background and career, please visit our website. We also invite you to consult with Justice McCabe on any matters of interest or concern.

The Home Page of our website is updated frequently, with news about the Firm, matters of importance, and updates on our attorneys. We encourage you to visit the site often.

NEW DEVELOPMENTS IN THE LAW:

The Unsettled Law Of Eminent Domain

By John P. Christopher, Esq.

Eminent domain is the sovereign power of a governmental authority to acquire privately owned property for a “public use.” This power is limited by the Fifth Amendment of the United States Constitution, which provides that no person shall be deprived of property without due process of law, “nor shall private property be taken for public use without just compensation.” What constitutes a “public use” has been a subject of great debate in recent years in the judiciary and in legislative branches of state and federal governments, spurred on by the United States Supreme Court decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). In *Kelo*, the Court held that the government’s use of eminent domain to transfer private property from one private owner to another in furtherance of an economic development plan was a valid “public use” under the United States Constitution. For an in-depth analysis of the Court’s decision in *Kelo*, please see Sahn Ward & Baker Newsletters Spring 2005 and Fall 2005, at www.sahnwardbaker.com/Newsletters.

Since the *Kelo* decision, many states have enacted legislation to provide private property owners with greater protection than that afforded to them under the United States Constitution. New York, however, is not one of those states. In New York, the use of eminent domain is also governed by Article XVIII of the State Constitution, and the Eminent Domain Procedure Law (EDPL), as well as the United States Constitution. Further, pursuant to the State Constitution, New York courts have held that the “[t]aking of substandard real estate by a municipality for redevelopment by private

corporations has long been recognized as a species of public use [citations omitted].” *Cannata v. City of New York*, 11 N.Y.2d 210, 215 (1962). “Substandard” property is often referred to as “blighted” property.

At the end of 2009, the New York Court of Appeals and the Appellate Division, First Department, issued conflicting decisions in two highly publicized cases involving the use of eminent domain. Both of these decisions reflected different views on the role of the judiciary in reviewing government use of eminent domain when the public purpose justifying its use is the eradication of “blight.”

The first of the two decisions was issued by the Court of Appeals in *Matter of Goldstein, et al. v. New York State Urban Development Corporation, d/b/a Empire State Development Corporation*, 2009 N.Y. Slip Op. 08677 (Nov. 24, 2009). This case involved a challenge by property owners to the Empire State Development Corporation’s (ESDC) use of eminent domain to transfer private property to developer Bruce Ratner (or companies he owns or controls) for the Atlantic Yards project. ESCD is New York State’s primary agent for economic development. The Atlantic Yards project consists of the redevelopment of a 22-acre parcel of land in Brooklyn for, among other things, a sports arena for the Nets basketball franchise, and office and residential buildings. In challenging the ESDC’s use of eminent domain for this project, owners of property located within the project area argued that the property taken by the ESDC was not “blighted,” and that “mild dilapidation and inutility of property cannot support a finding that it is substandard and insanitary within the meaning of Article XVIII [of the New York State Constitution].” *Goldstein* at 8. The Court, though, refused to disturb the ESDC’s findings of “blight,” stating that “all that is at issue is a reasonable difference of opinion as to whether the area in question is in fact substandard and insanitary.” *Id.* at 9. The Court thus held that the ESDC’s use of the eminent domain power did not violate the property owner’s constitutional rights. The Court applied a standard of review that was deferential to the ESDC’s findings, stating that “[i]t is only where there is no room for reasonable difference of opinion as to whether an area is blighted, that judges may substitute their views as to the adequacy with which the public purpose of blight removal has been made out for that of the legislatively designated agencies. . . .” *Id.*

Nine days later, and based upon facts and claims strikingly similar to those presented in *Goldstein*, the Appellate Division, First Department, issued a decision in *Kaur v. New York State Urban Development Corporation*, 2009 N.Y. Slip Op. 08976 (Dec. 3, 2009), in which the Court held that the ESDC’s use of the eminent domain power to acquire and transfer privately owned property in West Harlem to Columbia University for a proposed campus expansion project was unconstitutional. In reaching its holding, the Court in *Kaur* conducted its own independent analysis of the ESDC’s finding that the project area was “blighted.” Unlike the Court of Appeals in *Goldstein*, the First Department did not afford the ESDC’s determination deference and, in fact, was extremely critical of the determination. In its analysis, the Court determined that the project area was only found to be “blighted” after Columbia had acquired 71% of the properties in the project area through private transfers and had allowed those properties to become run down and dilapidated. *Kaur* at 12 - 13. Accordingly, the Court stated that Columbia could not create the very conditions that support its own finding of “blight” that justify the use of the power eminent domain. *Id.* at 13.

The ESDC has appealed the First Department’s decision in *Kaur* to the Court of Appeals. In light of the First Department’s decision in *Kaur*, the petitioners in *Goldstein* have moved to reargue their appeal to the Court of Appeals, and have requested that it be reheard with the *Kaur* appeal.

The legal controversy caused by the “Atlantic Yards” and “Columbia” projects has not gone unnoticed in the State Legislature. There are approximately thirty bills currently under consideration in the State Senate and Assembly that propose amendments to the EDPL, or that otherwise relate to the law of eminent domain. Many of these proposed bills, if enacted, would provide private property owners with greater protections than those currently afforded to them under existing law. One such example of this is Bill No.: S01653, which proposes to limit the use of eminent domain to traditional public projects, such as government buildings, roads, and public utilities.

Due to the unresolved litigation and number of proposed bills currently before the State Legislature, the law of eminent domain appears to be poised for significant change. We shall continue to monitor and report on this area of the law as new developments arise.

Standing To Commence A Lawsuit Under SEQRA

By Thomas McKeivitt, Esq.

A party seeking to overturn a determination regarding an environmental review of a particular project under the State Environmental Quality Review Act (SEQRA) has two significant hurdles to overcome. One is commencing an action within the required statute of limitations. The second is demonstrating that the party has standing to contest the action. Standing is the legal right to initiate a lawsuit. To do that, a party must have suffered an “injury in fact,” that is in some way different from that of the public at large. There also must be a case or controversy that can be resolved by legal action.

For the past two decades, the leading case on standing has been *Society of the Plastics Industry v. County of Suffolk*, 77 N.Y.2d 761 (1991). In that case, Suffolk County enacted a local law that banned the use of certain plastics by retail food establishments. A national trade organization of the plastics industry with one local member commenced an action to overturn the law. The Court of Appeals ruled that the plaintiff lacked standing, because the organization was unable to demonstrate that its injury would be in “some way different from that of the public at large.”

The Court of Appeals recently revisited the standing issue in *Save the Pine Bush v. Common Council of the City of Albany*, 13 N.Y.3d 297 (2009). The Pine Bush is a preserve that is administered by the Pine Bush Preserve Commission in the City of Albany. A developer sought permission to erect a hotel on a parcel that was an existing parking lot and not within the boundaries of the preserve. A rezoning was required. As a result, the City required an Environmental Impact Statement (EIS) and circulated a “Draft Scoping Checklist” to interested parties, including the New York State Department of Environmental Conservation (DEC). This checklist listed a number of environmental aspects of the project that it planned to examine, including terrestrial and aquatic ecology and the Pine Bush. The Pine Bush is home to the endangered Karner Blue butterfly and the checklist stated that the project’s impact on the butterfly would be analyzed.

The DEC responded in a letter that the impact on four other species should also be analyzed: the Frosted Elfin butterfly, the Hognose Snake, the Worm Snake, and the Eastern Spadefoot Toad. A Draft Environmental Impact Statement (DEIS) was prepared by the developer and accepted by the City. A report by a biologist stated that the site was not a resource for the Karner Blue butterfly. Nothing was stated in the DEIS about the other species identified by the DEC. The City accepted the final EIS and soon after, approved the rezoning.

Petitioners commenced a proceeding challenging the City’s action under SEQRA. The individual petitioners alleged that they “live near the site of the hotel project” and that they “use the Pine Bush for recreation and to study and enjoy the unique habitat found there.” They alleged that the EIS was deficient in that it failed to address threats to the Frosted Elfin Butterfly and the other species that the DEC had identified.

The Supreme Court denied a motion to dismiss the suit for lack of standing, vacated the SEQRA determination, and annulled the rezoning, finding that the EIS was flawed because it did not take a “hard look” at the potential impact of the action on rare plants and animals other than the Karner Blue butterfly. The Appellate Division, Third Department, affirmed in a split decision with two judges dissenting, thus triggering an “as of right” appeal to the Court of Appeals.

In reversing the Supreme Court and the Appellate Division, the Court of Appeals first analyzed the issue of standing. The Court found that the petitioners participated in repeated use of the area; it was not rare or isolated use. On that basis, the Court concluded that the harm would affect the petitioners differently than “the public at large,” even though they lived some distance away from the development.

Ironically, even though the environmental group succeeded in passing the standing threshold, they nevertheless failed to prevail on the merits. The lower courts operated under the assumption that the City of Albany was required to examine all environmental problems that were brought to its attention. The Court of Appeals made clear that this assumption was incorrect, and that “an agency complying with SEQRA need not investigate every conceivable environmental problem; it may within reasonable limits, use its discretion in selecting which ones are relevant.”

Here, the City focused on the issue of most importance, the Karner Blue butterfly. The FEIS contained an adequate evaluation of the Frosted Elfin butterfly. Although there was no investigation of the Hognose Snake, the Worm Snake or the Eastern Spadefoot Toad as per the DEC’s comments, the Court found that there was no reason to believe that the project would threaten them, and no other commenter in the SEQRA process had mentioned them at all. On that basis, the Court determined that the City had identified the relevant environmental concerns, took the required “hard look,” and explained in a detailed report the result of its investigations. Accordingly, the Court of Appeals held that a reversal of the decision of the lower courts was required.

MATTERS OF INTEREST AT THE FIRM

Under Jon Ward’s leadership, the Firm has won a \$1 million damages verdict on behalf of a commercial property owner whose property was contaminated by gasoline constituents that originated from an adjacent gas station. After a lengthy trial in the Suffolk County Supreme Court, the Court ordered the gas station owner to pay damages to the Firm’s client for cleanup costs, environmental consulting fees, and legal fees incurred by our client.

With Michael Sahn as lead counsel, the Firm served as Special Counsel to the City of Glen Cove, providing legal guidance and counsel concerning land use and zoning issues as the City developed its first Master Plan in more than 50 years. The Master Plan lays the groundwork for future development of the City, including multiple redevelopment projects from the waterfront to the downtown area. Mayor Ralph Suozzi was presented with a 2009 Smart Growth Award from Vision Long Island for the adoption of the Master Plan.

The adoption of the Master Plan was followed by the City of Glen Cove’s adoption of a new ordinance, written by Tom McKevitt, which mandates the use of visual simulation submissions to accompany applications for large scale development projects. Glen Cove has become the first municipality in the country to require the submission of such visual simulations. This innovative ordinance will be essential to fulfilling the goals of the Master Plan. We congratulate Mayor Ralph Suozzi and the City Council for their progressive and forward-thinking approach to planning the City’s future.

Ken Auerbach is defending the Village of Old Westbury in a lawsuit brought by the Roman Catholic Diocese, which seeks permits to build a major cemetery on land that is located in one of two groundwater protection areas in Nassau County. The Diocese’s application concerns a portion of a 97 acre parcel of land in the Village.

With Jon Ward as lead counsel, the Firm’s litigation team is representing an investor who became unwittingly involved in a Ponzi-style real estate investment scheme. Our client had invested with a group of other individuals who were purportedly using the funds to purchase out-of-state properties. Instead, the investment monies were being recycled to pay fake returns to the investors and gains to the perpetrators of the Ponzi scheme, until the scheme ultimately collapsed with the collapse of the real estate market. The case involves an extremely complex business structure for the investments and vanishing business records. The Firm’s efforts have resulted in a court decision that has imposed liability on the organizer of the scheme. A hearing on damages is scheduled for the spring.

The litigation practice area is representing an investor in a federal court matter that turns on the issue of ownership rights to exploit a patent. The investor provided capital to assist in bringing a patented product to market. When the product company closed its doors, the investor sought to recover its losses, including the right to use the patent.

With Michael Sahn as lead counsel, the Firm has successfully represented our client, AVR Realty Co., in obtaining all approvals and permits for a new Homewood Suites Hotel, situated on a three-acre parcel of land in Westbury. The four-story hotel will feature 150 rooms. The project required zoning and land use approvals from the Town and a waiver of subdivision approval from Nassau County.

In the Labor and Employment practice area, the Firm is defending a regional restaurant chain in a potential class action lawsuit commenced under federal and state labor laws by present and former employees to collect alleged unpaid wages. The class has not yet been certified by the Court. Also, only the state law violations can become a proper Rule 23 class. The Federal violations can only become a “collective action,” which has not been certified yet.

Designated as a historic structure and property in 2005, the summer home of Booker T. Washington sits on a bluff overlooking Long Island Sound, dangerously close to an eroding 60 foot cliff. With the guidance of Michael Sahn, the owner has formulated plans to move the historic house to another location on the 1.4 acre site and then build a new home elsewhere on the site, once water and erosion issues are resolved. This solution will allow the historic home to be preserved, while allowing the owner the use of the property for a new home.

Michael Sahn served as co-counsel to our longstanding client, The Beechwood Organization, the major partner in a real estate development company designated by Suffolk County to build an important new development in Yaphank. The development will include 1,000 units of affordable housing, a destination sports and entertainment venue, and a research park powered by solar energy. The project also includes a hotel, restaurants, office and retail space, and a variety of housing choices.

The Firm is serving as Special Counsel to the Villages of Rockville Centre and Port Washington North in various development and litigation matters. Michael Sahn, Ken Auerbach, Tom McKevitt and Miriam Villani are all involved in these matters.

Under the guidance of Daniel Baker, the Firm has successfully obtained all necessary approvals for a proposed redevelopment on behalf of Westfield Sunrise Shopping Mall for all variances, special use permits, and site plans from the Town of Oyster Bay Department of Planning and Development, the Department of Environmental Resources, the Zoning Board of Appeals, and the Town Board. Westfield will now embark on a dramatic transformation that will add a lifestyle center, including outward facing restaurants and a fitness center, as well as improved site circulation, landscaping, and parking areas.

The Firm has obtained all necessary variances and approvals to replace existing underground storage tanks from the Town of Babylon Zoning Board of Appeals for our client, Leon Petroleum, for the first phase of a two-phase project as it begins improvements on an existing gasoline service station in Deer Park. Dan Baker, who represents clients in zoning matters throughout Nassau and Suffolk, is now representing our client in Phase 2 of the project, which includes obtaining approvals from the Zoning Board of Appeals and Planning Board for a station remodeling that will feature new canopies, landscaping, gasoline dispensers, and a modern convenience store to replace the old service bays.

OUT AND ABOUT

Michael Sahn was featured, with other prominent attorneys, in *Long Island Business News*' special supplement, Who's Who in Commercial/Residential Real Estate Law. He discussed the questions that potential buyers should ask when considering the purchase of a commercial property.

Justice McCabe was honored by Irish Americans in Government for his three-decade-long career as one of the most distinguished public servants in government and the judiciary in Nassau County. Justice McCabe has promoted Irish history and culture during his career and has supported and advised the Board of Directors of the Irish Americans in Government organization for many years.

Thomas McKeivitt was presented with the 49th Annual George M. Estabrook Distinguished Service Award during an awards dinner held in early December. This important award was presented to him in recognition of his dedication and support of the Hofstra Alumni Association. Mr. McKeivitt was among a group of eight distinguished alumni who were honored at the dinner.

Michael Sahn lectured on advanced SEQRA legal issues for various professionals attending the Suffolk County Planning Commission's Autumn Planning Conference this past October. The session, with distinguished panelists from various disciplines, addressed recent SEQRA case law. This advanced course was part of an annual training conference that was attended by planning and zoning board members, town and village board members, planners, architects, environmental specialists, and other land use professionals.

The Firm was featured in *Smart Talk*, the weekly e-newsletter of Vision Long Island, highlighting Glen Cove's adoption of the first ordinance to require visual simulation submissions for large scale development projects. The article notes that the law is likely to be duplicated throughout the county. To read the article, visit our website, or call the office for a reprint.

Miriam Villani is serving as Editor-in-Chief of the New York State Bar Association Environmental Law Section's prestigious quarterly publication, *The New York State Environmental Lawyer*. Under her leadership, the journal will feature substantive articles on important issues in environmental law.

All of us at Sahn Ward & Baker greatly enjoyed participating in last summer's 2009 Marcum Workplace Challenge, which brought more than 6,000 participants from 196 professional practices and companies together for a spirited event. Our men's team had an outstanding performance, ranking 29th out of a total field of 103 men's teams and our overall men's and women's team came in at 32nd place. Congratulations to all who participated!

UP CLOSE AND PERSONAL

We are pleased to highlight Christine Raffa-Seip, who joined the Firm in 2009. Christine is a paralegal and also holds a J.D. degree from Hofstra Law School. She is responsible for coordinating all of the Firm's residential and commercial real estate closings. She also assists our attorneys with various other matters, including the preparation of litigation related documents. Christine's dynamic and energetic personality and her work ethic greatly benefit the office. Away from the office, Christine devotes her full efforts to her children. Her family enjoys traveling, and she often vacations with her parents and sister. Christine and her husband have two young children, ages 3 and nearly 2.

Congratulations to Madeline Zuckerman on her appointment as Editor-in-Chief of the Touro Law School Law Review. Maddy was a summer associate with the Firm last summer, and is an intern with the Firm this semester under a program sponsored by the Touro Law School. We are pleased to continue to have the benefit of Maddy's excellent work as she completes her law school courses.