Land Use Law Case Law Update

By Henry M. Hocherman and Noelle V. Crisalli

Once again we have had a relatively quiet quarter in the land use biz, but the courts have, among other things, examined the relationship between the New York State Constitution and the U.S. Constitution with respect to the exercise of the power of eminent domain, shedding some useful light on the public-use clause in the former.

In another case, the Third Department reminded us once again that the devil is in the details, annulling a variance on the grounds that notice of the hearing on the variance application was defective in spite of the fact that one of the petitioners had actual notice of, and appeared at, the hearing. This case is a bit of a cautionary tale to those of us who have long assumed that an appearance is always tantamount to a waiver of a defective notice. Although the decision may at first appear to exalt form over substance, it clearly reached the right (that is to say, just) result.

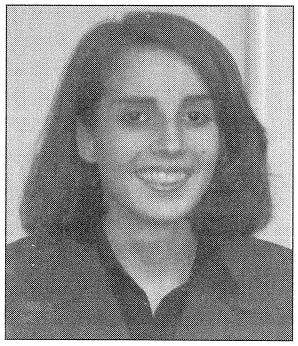
Staying on the topic of public hearings, the Second Department shed some light on when a new public hearing on a proposed ordinance is required when the ordinance as ultimately adopted differs in some degree from the ordinance as originally proposed.

None of this quarter's cases is likely to be made into a Hollywood movie, but the cases are instructive nonetheless.

I. Takings Law Under the New York State Constitution: *Goldstein v. New York State Urban Development Corporation*

In *Goldstein v. New York State Urban Development Corporation (Goldstein II)*,[1] the Appellate Division, Second Department, held, among other things, that the public use clause of the New York State Constitution[2] does not impose a more restrictive standard for the taking of private property than the Fifth Amendment to the U.S. Constitution, and that the taking of private property for the purposes of Forest City Ratner's Atlantic Yards project (which project was also the subject of the case *Develop Don't Destroy (Brooklyn) v. Urban Development Corporation*[3] discussed in our Spring 2009 column) did not violate the public use clause of the New York State Constitution.

By way of background, the Atlantic Yards project is a 22-acre redevelopment site that "proposes to bring to



Brooklyn a professional basketball team, thousands of new residential units (many of which are proposed to be affordable to low- and middle-income families), and millions of square feet of office space"[4] along with public open space and rail station improvements. A portion of the property for the proposed project is located in the Atlantic Terminal Urban Renewal Area (ATURA). Another portion of the proposed project area is in an area adjacent to the ATURA. The development of the Atlantic Yards project is a joint effort between Forest City Ratner Companies and the New York State Urban Development Corporation doing business as the Empire State Development Corporation (ESDC).[5] Before becoming involved in the project, ESDC conducted an extensive blight study of the 22-acre project site. The blight study showed, among other things, that a portion of the proposed project area that was not a part of ATURA was blighted. Based on this blight finding and the anticipated public benefits of the Atlantic Yards project, the ESDC concluded that it should exercise its power of eminent domain over certain of the non-ATURA properties in the project area in order to help implement the project.[6]

The petitioners in this case were business owners and residents of the non-ATURA properties within the Atlantic Yards project area slated to be taken by eminent domain in connection with the project.[7] Initially, petitioners brought a lawsuit in federal court challenging the taking of their property under, among other things, the Fifth Amendment to the U.S. Constitution.[8] In the federal case, captioned *Goldstein v. Pataki (Goldstein I)*,[9] the U.S. District Court and the U.S. Court of Appeals for the Second Circuit upheld the blight finding of the non-ATURA project area and any associated condemnations. After receiving an unfavorable decision in *Goldstein I*, the petitioners brought this state court proceeding pursuant to Section 207 of the New York Eminent Domain Procedure Law (EDPL) to annul the ESDC's decision to take their properties, urging the Second Department to find that in order to satisfy the public use clause of the New York State Constitution the property subject to the taking must be held open for use by all members of the public, a more stringent standard than the standard under the takings clause of the U.S. Constitution, and that this elevated standard was not met here.[10]

In support of their position, petitioners argued that this more restrictive standard was the intent of the framers of the New York Constitution. Further, the petitioners argued that case law from the late 19th and early 20th centuries is more authoritative on the interpretation of the public use clause of the State Constitution than more recent case law and that it supports their position. The Second Department disagreed, holding that the public use clause of the New York State Constitution should not be read more restrictively than the public use clause of the Fifth Amendment to the U.S. Constitution. Like petitioners, the Court also focused on case law from the late 19th and early 20th centuries to support its holding.[11] Most notably, the Court relied on the 1936 decision of *New York Housing Authority v. Muller*,[12] which held that the New York City Housing Authority could take private property by eminent domain for the construction of a public housing project. In that case the Court expressly rejected the notion that in order to satisfy the "public use" standard the property subject to the condemnation must be open to use by "anyone and everyone" and held that slum clearance is a valid public purpose under the New York State Constitution's public use clause.[13] In further support of its conclusion, the Court explained that the EDPL, which was adopted in the 1970s, authorizes the Court, when reviewing a taking by eminent domain, to consider whether "'a public use, benefit or purpose would be served by the proposed acquisition,'"[14] contemplating a broader definition of public use than simply holding property open to all members of the public in common.[15]

Finding that the New York State Constitution does not impose a more stringent requirement than the U.S. Constitution on the taking of private property for public use, the Court went on to address whether that standard was satisfied here.[16] Petitioners argued that even under this standard, the taking here violated the public use clause of the New York State Constitution because their properties are not blighted, and the public benefit from the Atlantic Yards project, including new jobs and affordable housing, may never be achieved.

Before addressing the substance of petitioners' claims, the Court explained the heavy burden that petitioners are required to overcome in order to overturn a decision by a public body to take property by condemnation. A court must uphold a decision of a public body to take property by eminent domain unless the challenger can show that the "condemnor's findings that a proposed acquisition will further a public use . . . does not rationally relate to any conceivable public purpose."[17] Turning to the substance, the Court held that petitioners had not met their burden since the blight study clearly demonstrated that the area subject to condemnation was substandard and the taking of property in substandard areas in furtherance of urban renewal is a valid public purpose.[18] The Court also cited some of the additional public benefits that will result from the Atlantic Yards project, including the production of new jobs, affordable housing, public open space, a new sports arena and public transit improvements, in further support of its holding. The Court dismissed petitioners' claims that these benefits may never be realized as speculative and conclusory.[19]

The petitioners then argued that even if the project conveyed some public benefit, such benefit was merely incidental to the private benefit that would be conveyed to the project developer. The Court dismissed this argument as well since the petitioners offered no evidence that the anticipated public benefit of the project would be illusory or that equal or greater benefit to the public would accrue without the condemnation. The Court further recognized that a taking that produces a benefit to the public will not be declared invalid simply because it also furthers a private interest.[20]

Petitioners also alleged that the Atlantic Yards project violates Article XVIII (Housing) § 6 of the New York State Constitution, which provides, among other things, that no state funds may be used to aid in any project unless the housing provided is restricted to persons of low income. Petitioners claimed that the Atlantic Yards project violated this provision since state funds were to be used to finance infrastructure improvements in connection with the project which will benefit the housing component of the project and not all of the housing included in the project will be restricted to use by low-income persons.[21] The Court rejected this argument, finding that the limitations contained in Article XVIII § 6 should be limited to projects in which eminent domain is used specifically to implement a plan to provide low-income housing. In support of its findings, the Court explained that the clearing and rehabilitation of underdeveloped and blighted land is an objective recognized in the New York State Constitution separate and distinct from the provisions of the Constitution pertaining to housing, and that courts have repeatedly upheld the use of eminent domain to enable the use of the underlying property for a variety of purposes. Since the Court had found a valid public purpose for the Atlantic Yards project beyond the development of low-income housing, the taking of property for such purposes and the use of state funds to pay for certain infrastructure improvements associated with the development of the Atlantic Yards project do not violate Article XVIII § 6 of the New York State Constitution.[22]

II. Notice of a Public Hearing

A. Adequacy of Notice

In *Benson Point Realty Corporation v. Town of East Hampton*,[23] the Second Department upheld a determination by the town board of the Town of East Hampton

to adopt an amendment to its zoning ordinance without holding a new public hearing notwithstanding certain changes to the proposed zoning amendments from those originally proposed and noticed.

In *Benson Point Realty Corporation*, the petitioner-respondent owned a 13-acre parcel of property in the Town of East Hampton which was zoned Residence District A (one-acre minimum lot size). In 2003, petitioner-respondent had an application pending before the East Hampton planning board to subdivide its property into nine residential lots. While its application was pending, the Town was considering amendments to its zoning ordinance which would rezone petitioner-respondent's property from the Residence District A to the Residence District A5 (five-acre minimum lot size). The Town provided notice of and held a public hearing on the draft rezoning on November 4, 2004. The petitioner-respondent made written submissions opposing the rezoning of its property from the Residence District A to the Residence District A5 and advocated the rezoning of its property into the Residence District A2 (two-acre minimum lot size).[24]

The Town reviewed the public input on the rezoning and the comments made on the draft generic environmental impact statement (DGEIS) prepared in connection with the rezoning and adopted a final generic environmental impact statement (FGEIS) on April 14, 2005. In response to petitioner-respondent's comments on the proposed rezoning and the DGEIS, the Town decided to rezone petitioner-respondent's property to the Residential District A3 (three-acre minimum lot size). In May of 2005, without holding a new public hearing, the Town rezoned petitioner-respondent's property into the Residence District A3. Petitioner-respondent challenged the rezoning on the ground, among others, that the Town failed to comply with the notice requirements of the Town Law, the General Municipal Law and the East Hampton Code by failing to hold a public hearing on the revised zoning amendments.[25] The Supreme Court agreed and annulled the rezoning. The Second Department reversed, holding that a new hearing on the revised zoning amendments was not required.[26]

After describing the relevant provisions of the Town Law and the General Municipal Law with regard to notice of a public hearing on a rezoning,[27] the Court described when a new notice is required.

> Where changes are made to a proposed zoning amendment following the conclusion of a properly-noticed public hearing, new notice and another public hearing are not required if the "amendment as adopted is embraced within the public notice" . . . or if the amendment as adopted is not substantially different from the amendment as noticed.[28]

Here, the Court held, the actual rezoning of petitioner-respondent's property was embraced within the notice of the initial public hearing on the rezoning and DGEIS, and, even if it was not included in such notice, the amendment as adopted was not substantially different from the proposed rezoning (increasing the zoning from a one-acre minimum lot size district to a three-acre minimum lot size district rather than a five-acre minimum lot size district as originally proposed) to require a new notice and public hearing. The Court further held that the Town's zoning code's notice provision did not require a new public hearing with notice due to the change to the proposed amendment, finding that the intent of the Town Code was to provide notice of a zoning amendment so that the public would have ample opportunity to understand and comment on the proposed changes. Here, the petitioner-respondent had such an opportunity and commented on the proposed amendments, and, as a result of petitioner-respondent's comments, its property was zoned into a three-acre minimum lot size district rather than a five-acre minimum lot size district. Because petitioner-respondent had an opportunity to comment on the zoning amendments and because such comments influenced the rezoning of petitioner-respondent's property, the Court held that no purpose would be served by requiring the Town to go through the time and expense of re-noticing and holding a public hearing on the revised zoning amendments.[29]

B. Accuracy of Notice

In *Jones v. Zoning Board of Appeals of the Town of Oneonta*,[30] the Third Department held that the public notice and individual notice to neighboring property owners of a public hearing on a use variance application were defective and thus annulled the grant of the variance.

In *Jones*, the applicant, Larry Place, owned a parcel of property in the Town of Oneonta that was an inactive sand and gravel mine. After an unsuccessful attempt to obtain a special use permit to reactivate the mining operations on the property, Mr. Place made an application to the Town's zoning board of appeals to allow a mining operation on the property. The zoning board of appeals granted the variance. Its determination was challenged by an adjacent property owner on the grounds that the notice of the public hearing on the use variance application both to the public in general and to the petitioners specifically was defective.[31]

The petitioners, Rodney and Bonnie Jones, claimed that the public notice of the public hearing was inadequate because it listed an incorrect street address for the property (although the public notice did include

the correct tax map parcel number for the property). The petitioners also claimed that the notice to them personally was defective because it failed to comply with the relevant provisions of the Oneonta Code, which, in connection with an application for a use variance, requires service of public hearing notices on owners of properties within 200 feet of the subject property at least 10 days before the hearing at the surrounding property owners' last known address based on the Town's tax records. Here, the notice was sent to petitioners' former address, notwithstanding the fact that their current address was listed on the Town's tax records (the applicant had apparently failed to keep up with the Joneses).[32] Although petitioner Rodney Jones appeared at the public hearing and objected to the application and the notice, he learned of the public hearing only two hours before it was commenced. Petitioner Bonnie Jones did not become aware of the public hearing until after it was completed.[33]

Finding that the notice was adequate and that the grant of the variance was supported by substantial evidence, the Supreme Court dismissed the petition and the petitioners appealed. The Third Department reversed the Supreme Court's determination and annulled the variance on the grounds that the notice was defective. With regard to the public notice, the Court held that the inclusion of an incorrect property address in the public notice rendered the notice ambiguous and thus defective because it could "'misl[ead] interested parties into foregoing attendance at the public hearing.'"[34] The Court further held that the failure to provide notice to the petitioners at the address shown on the tax role was fatal to the notice attempt because the notice was not sent in accordance with the Town's procedures. Further, the Court held that petitioner Rodney Jones's appearance at the hearing did not cure the improper notice because petitioner Jones objected to the notice at the hearing and the two hours notice that he was given did not afford him sufficient time to prepare to meaningfully participate in the hearing. Although the Court recognized that in certain situations a challenger's appearance at and participation in a public hearing could cure a defective notice, in this case the prejudice to petitioners was not obviated by petitioner Rodney Jones's appearance and participation in the hearing.[35]

The apparent lesson from these two cases is that in the context of public hearing notices, the law is not black and white; the context in which the notice is sent and received and the level of participation of the challenging members of the public are all factors that contribute to a decision challenging a land use approval on public hearing notice grounds. An appearance at a public hearing by a challenger may, but will not always, cure a defective notice of a public hearing.[36] Therefore, practitioners representing applicants and municipalities alike should ensure that the content of a public hearing notice is accurate and that the notice is given in accordance with New York State and local law.

C. Case Notes

In *Lagin v. Village of Kings Point Committee of Architectural Review*,[37] the Second Department held that the Village of Kings Point's Committee of Architectural Review's (the "ARC") decision to approve the architectural plans for a residence proposed to be developed in the Village was a final decision subject to challenge pursuant to CPLR Article 78 by a neighboring property owner since "the ARC had exclusive authority to issue architectural approval of the plans for a proposed building, and no avenue of appeal was provided for aggrieved persons other than the applicant to review a determination of the ARC."[38] Because the challengers were precluded from any other form of review and no agency of the Village could change the determination of the ARC, "the ARC determination was final for the purposes of CPLR Article 78 Review and established the point from which the applicable four-month statute of limitations began to run."[39]

In *Hartford/North Bailey Homeowners Association v. Zoning Board of Appeals of the Town of Amherst*,[40] the Fourth Department upheld the issuance of negative declarations by the Town's zoning board of appeals and planning board in connection with the issuance of an area variance and site plan approval for a Wal-Mart store in the Town. In this case, petitioner, an opponent of the proposed Wal-Mart store, argued that the SEQRA determinations of the boards should be annulled because, among other things, the action was improperly classified as an Unlisted action under SEQRA rather than a Type I action and because the boards failed to complete parts 2 and 3 of the full environmental assessment form (EAF). The Court, although it agreed with petitioner that the project was not properly classified under SEQRA, held that the boards' failure to properly classify the action was "of no moment" since the record demonstrated that the boards followed the proper procedural and substantive requirements for Type I actions notwithstanding the Unlisted action designation. Similarly, the Court held that the boards' failure to complete parts 2 and 3 of the EAF did not mandate the nullification of the negative declarations since the record established that the factors to be considered in parts 2 and 3 of the EAF were in fact considered as a part of the review of the proposed project.[41]

Endnotes

1. *Goldstein v. N.Y. S. Urban Dev. Corp.*, 879 N.Y.S.2d 524 (1st Dep't 2009).
2. New York Constitution article I, § 7.

3. *Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp.*, 59 A.D.3d 312, 874 N.Y.S.2d 414 (1st Dep't 2009).
4. *Goldstein*, 879 N.Y.S.2d at 526.
5. *Goldstein*, 879 N.Y.S.2d at 527.
6. *Goldstein*, 879 N.Y.S.2d at 527–528.
7. *Goldstein*, 879 N.Y.S.2d at 528.
8. *Id.*
9. *Goldstein v. Pataki*, 516 F.3d 50 (2nd Cir. 2008), *cert. denied*, 128 S. Ct. 2964 (2008).
10. *Goldstein*, 879 N.Y.S.2d at 529, 531.
11. *Goldstein*, 879 N.Y.S.2d at 531–532.
12. *N.Y. Housing Authority v. Muller*, 270 N.Y. 333 (1936).
13. *Goldstein*, 879 N.Y.S.2d at 532–533.
14. *Goldstein*, 879 N.Y.S.2d at 533 (1st Dep't 2009) (quoting EDPL § 207[C][4].
15. *Goldstein*, 879 N.Y.S.2d at 533.
16. *Goldstein*, 879 N.Y.S.2d at 533 ("What qualifies as a 'public purpose' or 'public use' is broadly defined as encompassing virtually any project that may confer upon the public a benefit, utility or advantage."(citation omitted)).
17. *Goldstein*, 879 N.Y.S.2d at 534.
18. *Id.*
19. *Goldstein*, 879 N.Y.S.2d at 535.
20. *Goldstein*, 879 N.Y.S.2d at 535–536.
21. *Goldstein*, 879 N.Y.S.2d at 536. The petitioners also alleged that the taking of their properties violated their rights to due process and equal protection. The Court dismissed these claims, finding that the ESDC complied with the procedural requirements of the EDPL, and that no equal protection claim could succeed because the petitioners could not show that they were intentionally being treated differently from others with whom they are similarly situated without a rational basis. *Id.*
22. *Goldstein*, 879 N.Y.S.2d at 536–537.
23. *Benson Point Realty Corp. v. Town of East Hampton*, 62 A.D.3d 989, 880 N.Y.S.2d 144 (2d Dep't 2009).
24. *Id.*
25. *Id.*
26. *Id.*
27. Town Law §§ 264, 265; Gen. Mun. Law § 239-m.
28. *Benson Point Realty Corp. v. Town of East Hampton, supra* note 23.
29. *Id.*
30. *Jones v. Zoning Bd. of Appeals of Town of Oneonta*, 61 A.D.3d 1299, 879 N.Y.S.2d 592 (3d Dep't 2009).
31. *Id.* at 1300–1301.
32. *Id.* at 1301. Furthermore, there was evidence in the record that the notice mailed to neighboring property owners did not include the date or time of the public hearing. *See id.* at fn.3.
33. *Id.* at 1302.
34. *Id.* at 1301.
35. *Id.* at 1302.
36. *Compare Jones*, 61 A.D.3d at 1302 ("Nor was the failure [to properly notice the public hearing] cured by petitioner Rodney Jones' appearance at and participation in the hearing. Approximately two hours before it was to commence, Rodney Jones discovered that the hearing was due to be held. He appeared at the hearing, raised the issue of notice and voiced objections to the application before the Board voted to grant the use variance.") *with John P. Krupski & Bros., Inc. v. Town Bd. of Town of Southold*, 54 A.D.3d 899, 901, 864 N.Y.S.2d 149, 151 (2d Dep't 2008) ("In any event, the plaintiff's receipt of actual notice of, and its appearance at, the public hearing constituted a waiver of the requirement that notice be given in strict accordance with the Southold Town Code.").
37. *Lagin v. Village of Kings Point Comm. of Architectural Review*, 2009 WL 1238467 (2d Dep't May 5, 2009).
38. *Id.*
39. *Id.*
40. *Hartford/North Bailey Homeowners Ass'n v. Zoning Bd. of Appeals of the Town of Amherst*, 2009 WL 1652970 (4th Dep't June 12, 2009).
41. *Id.*

Henry M. Hocherman is Secretary of the Municipal Law Section of the New York State Bar Association and Chair of that Section's Land Use Committee. He is a partner in the law firm Hocherman Tortorella & Wekstein, LLP of White Plains, New York. Mr. Hocherman is a 1968 graduate of The Johns Hopkins University and a 1971 graduate of Columbia Law School, where he was a Forsythe Wickes Fellow and a Harlan Fiske Stone Scholar.

Noelle V. Crisalli is a member of the Land Use Committee of the Municipal Law Section of the New York State Bar Association and is an associate in the law firm Hocherman Tortorella & Wekstein, LLP. She is a 2001 graduate of Siena College and a 2006 graduate of Pace University School of Law, where she was a Research and Writing Editor of the Pace *Environmental Law Review* and an Honors Fellow with the Land Use Law Center.