Land Use Law Case Law Update

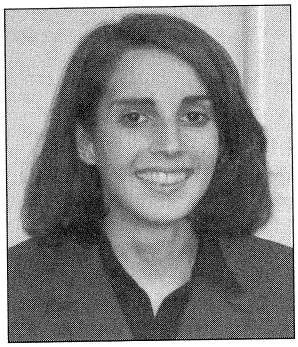
By Henry M. Hocherman and Noelle V. Crisalli

Just as you thought that you had run out of beach reading, we bring you three separate decisions rendered by the Second and Third Departments, each of which sheds light on one of the three main aspects of the standing doctrine in land use cases in New York. Taken together, these three cases are a capsule primer of the standing doctrine. In addition to giving us cases telling us *who* can bring a challenge to a land use determination, the quarter also brings us a Third Department case telling us *when* a land use challenge can be mounted, applying the rule of ripeness stated by the Court of Appeals in *Eadie v. Town Board of the Town of North Greenbush*.[1] The case highlights once again the dangerous no-man's land that lies between the date when an administrative decision becomes ripe for challenge, and the date when the very short statute of limitations expires, when "ripe" turns to "stale." As *Guido v. Town of Ulster Town Board*[2] illustrates, the moment of ripeness (which, of course, also defines the inevitable moment of staleness) is not always easy to identify.

Finally, what had the potential to be a defining case in the realm of takings jurisprudence, in essence ended up being a confirmation by the Court of Appeals of its earlier holding in *Goldstein v. New York State Urban Development Corporation*,[3] which severely limited the role of the courts in reviewing agency determinations underlying the taking of property for a purported public purpose by extending to its logical extreme the degree of deference that a court must accord to an agency determination underlying such a taking.

I. Standing to Challenge Land Use Approvals

Three recent Appellate Division cases highlight the three main aspects of the standing doctrine in land use cases under New York law—namely (1) that the petitioner/plaintiff must have sustained a direct, concrete injury; (2) that such injury is within the zone of interest protected by the law; and (3) that such injury is different than the injury to the public at large. In *Brunswick Smart Growth, Inc. v. Town of Brunswick*,[4] the Third Department held that petitioners did not have standing to challenge the general procedures that the respondent town board uses to review land use projects because the procedures themselves, outside of the context of any specific development application, did not cause



any direct injury to petitioners. In *Riverhead PGC LLC v. Town of Riverhead*,[5] the Second Department denied the petitioner standing since it was alleging only the potential for economic injury from increased business competition, which is not a type of injury that is within the "zone of interest" to be protected by the applicable municipal land use laws. In *Harris v. Town Board of The Town of Riverhead*,[6] which involved the same approvals as *Riverhead PGC, LLC*, the Court held that general traffic concerns and concerns about the impact of an approval on the businesses in the vicinity of the proposed project were not specific to the petitioners, but rather common to the public at large and thus could not confer standing on petitioners.

In *Brunswick Smart Growth, Inc.* the petitioners, a citizens group and two individual Brunswick town residents, brought an Article 78 proceeding challenging the procedures applied by the respondent town board in its review of development applications.[7] Specifically, petitioners' grievance with the system was that the town did not provide for periodic review of its comprehensive plan, did not properly update its zoning regulations, and that the projects approved by respondent were out of step with the town's comprehensive plan and were adopted without adequate consideration of the cumulative environmental impacts of such projects.[8] The decision stressed that the petitioners were not challenging any one specific application or approval, but were challenging the approvals process in general.[9] In its decision, the Third Department first set forth the basic requirements of standing in land use cases. The Court stated that:

> The dual showing typically required for standing includes establishing an injury-in-fact and demonstrating that such injury falls within the zone of interests protected by the pertinent statute or regulation.... In land use cases, the test is framed in terms of "'direct harm,'" which "'is in some way different from that of the public at large.'"... While geographical proximity provides one potential avenue to standing in land use cases, it is not an indispensable element....[10]

Applying the first prong of this standard, the Court held that the harm petitioners were alleging was "tenuous and ephemeral" and thus "insufficient to trigger judicial intervention[,]" because, among other things, the town board could choose not to act in the manner predicted by petitioners, or, if it were to so act and one of the petitioners was harmed by such action, judicial intervention would lie upon actual injury.[11] Accordingly, the Court held that petitioners lacked standing because they did not suffer any concrete injury.

In *Riverhead PGC, LLC*, the petitioner/plaintiff ("petitioner") was the owner of a shopping center in which Wal-Mart was a main anchor tenant on Suffolk County Route 58 in the respondent/defendant town.[12] Wal-Mart, seeking to expand its business, made an application to the respondent Riverhead town board for site plan approval, variances, and related zoning code amendments to permit it to construct a Super Wal-Mart store in another shopping center on Route 58 in the town approximately two miles from the site of petitioner's shopping center. The decision reflects that it was Wal-Mart's intention to close the store in petitioner's center when the Super Wal-Mart in the neighboring center was opened. Wal-Mart's applications and the related rezoning were granted.[13]

Petitioner commenced the instant hybrid Article 78 proceeding/declaratory judgment action to invalidate the approvals and annul the zoning code amendments claiming, among other things, that it will be injured by the proposed development of the Super Wal-Mart in the rival shopping center because the Super Wal-Mart will have a significant impact on traffic and that impact will result in a change in the traffic patterns in the area diverting traffic away from petitioner's center and thus reducing its viability.[14]

Respondents moved to dismiss the petition/complaint arguing that petitioner lacked standing to bring the hybrid action/special proceeding. The Supreme Court, Suffolk County converted respondents' motion to dismiss to one for summary judgment and held in favor of petitioner, invalidating the approvals and associated zoning code amendments.[15] The Appellate Division reversed finding that petitioner lacked standing to bring the challenge, relying primarily on the second prong of the standing test set forth above—that the alleged injury was not within the zone of interest protected by the relevant law.[16] The Appellate Division held that the only injury alleged by petitioner was economic in nature, an injury not within the zone of interest of the applicable local laws and town code provisions pursuant to which the approvals were granted.[17] Accordingly, petitioner did not have standing to challenge the administrative approvals or the related zoning amendments.

In *Harris*, the United Food and Commercial Workers Union Local 1500 ("Local 1500") and six individual town residents who were also members of Local 1500 commenced a challenge to the same approvals at issue in *Riverhead PGC, LLC, supra*.[18] As in *Riverhead PGC, LLC*, this case was decided solely on the issue of standing. The individual petitioners alleged that they will be injured by the subject approvals because they regularly drive on Route 58 and would be adversely impacted by the additional traffic on that road.[19] Local 1500 based its injury on what the Court described generally as "negative environmental and socio-economic impacts on the businesses along the Route 58 corridor which employ its members."[20] The Second Department held that both arguments were insufficient to confer standing on petitioners since the injuries alleged were not specific to the petitioners, but general to the public at large.[21]

II. Challenges to SEQRA Review: Ripeness

In *Guido v. Town of Ulster Town Board*,[22] the Court, applying the rule of ripeness set forth by the Court of Appeals most recently in *Eadie v. Town Board of Town of North Greenbush*,[23] held that the petitioners' challenge to the SEQRA review and findings associated with a development application in the Town was not ripe for judicial review since the substantive approvals had not yet been granted.

In *Guido*, the proponent of a development known as Ulster Manor made an application to the Ulster planning board for a special use permit, site plan approval, and subdivision approval to construct a residential development in the town. The project was the subject of a full environmental impact statement review, which resulted in the planning board, as lead agency under SEQRA, adopting a findings statement. After the findings statement was adopted, but before any of the substantive approvals were granted, petitioners, neighboring property owners, commenced the instant Article 78 proceeding challenging the "adequacy, accuracy and completeness" of the environmental impact statement and the findings.[24]

Respondents moved to dismiss the petition on the grounds that petitioners' claims were not ripe for judicial review and the Supreme Court, Albany County granted the motion and dismissed the petition. The Third Department affirmed.[25]

An administrative decision is ripe for judicial review when the decision is final. Courts have held that "[a]n action is considered to be final when it represents a definitive position on an issue which 'impose[s] an obligation, den[ies] a right or fix[es] some legal relationship,' resulting in actual, concrete injury[.]"[26] Here, the Court held that although the planning board's SEQRA determination did fix a legal relationship between the involved agencies in that all involved agencies are

required to base their findings on the FEIS accepted by the planning board, the board's decisions to accept the environmental impact statement as complete and to issue SEQRA findings were not "final" because none of the substantive approvals had been granted. The Court reasoned that until the substantive approvals are granted, the planning board could still deny the application and thus petitioners' perceived injury could be prevented without resort to judicial intervention.[27] Accordingly, the Court held that petitioners' challenge to the planning board's SEQRA review of the Ulster Manor project was not ripe for judicial review.

III. The *Kaur* Appeal

In the Winter 2010 edition of the *Municipal Lawyer*, we reported on two cases, *Goldstein v. New York State Urban Development Corporation* and *Kaur v. New York State Urban Development Corporation*,[28] both of which are progeny of *Kelo v. City of New London*[29] in that they address the question whether, and under what circumstances, a taking of private property (albeit fully compensated) by the state for use primarily or exclusively by a private entity rather than by the state itself, is permitted under the Federal and New York State Constitutions.

In *Goldstein*, the Court of Appeals affirmed the Second Department, which had upheld the taking of property for development by a private developer of the Atlantic Yards Project, a large mixed-use project in the Borough of Brooklyn.[30] In *Kaur*, the First Department annulled a determination by the Urban Development Corporation ("UDC") approving the acquisition of private property in the vicinity of Columbia University, a private educational institution, for the purpose of substantially expanding its campus.[31]

In reporting on both cases, we were taken by the opposite results on quite similar fact patterns. We ascribed the difference in the outcomes to, among other things, the *Kaur* court's dissatisfaction (bordering on contempt) with the record upon which UDC relied to justify the taking. Although both the *Goldstein* and the *Kaur* courts articulated a standard of review that would give substantial deference to the agency's determination ("if an adequate basis for the agency's determination is shown, and the petitioner cannot show that the determination was corrupt or without foundation, the determination should be confirmed"),[32] the *Kaur* court in fact reviewed *de novo* and rejected the UDC's findings, even though there was no allegation of corruption, and the only way those findings can be said to be "without foundation" is if one accords no credibility to the agency's consultants or the agency's reliance on those consultants.

Although it must be recognized that Justice Catterson's decision, in which he speaks only for himself and Justice Nardelli (Justice Richter filed a concurring opinion and Justices Tom and Renwick dissented) is the voice of a very divided court, the inadequacy of the underlying record as found by the First Department in *Kaur*, caused us to repeat the old saw that bad facts make bad law.

In speculating on what the Court of Appeals would do when it ultimately and inevitably received *Kaur* (an appeal had been commenced by the time we wrote the article), we made the following observation:

> Although at first blush a reversal would seem likely as being consistent with the Court of Appeals' holding requiring extreme deference to the agency's findings except in the most egregious of circumstances, this may be an opportunity for the Court, having defined one end of the deference spectrum with reference to the record in *Goldstein*, to define the other end by rejecting the agency's findings in *Kaur*.[33]

The Court of Appeals has now spoken and it comes as no surprise that the Court has reversed the First Department's decision in *Kaur*, relying in large measure on its holding in *Goldstein*, but also going to some pains to rehabilitate the underlying record—a rehabilitation which is perhaps irrelevant given the Court's extreme level of deference to the underlying agency determinations.[34] There is little point in restating the facts of *Kaur* and *Goldstein*, the facts of both cases having been described at length in the Winter 2010 *Municipal Lawyer* Case Law Update. Indeed, we first discussed *Goldstein* in the Summer 2009 *Municipal Lawyer*[35] and a related case, *Develop Don't Destroy (Brooklyn) v. Urban Development Corporation*, in the Spring 2009 Case Law Update.[36]

Interestingly, the Court of Appeals in *Kaur*, having already addressed the relevant constitutional issues in *Goldstein*, seems less concerned with those issues than it does with establishing even more firmly the proposition that, in cases such as these, the agency's judgment upon which the taking relies is to be given extraordinary deference. Quoting its decision in *Goldstein*, the Court reiterated that in determining whether a taking will serve a proper public use, the "'actual specifications of the uses identified by the Legislature as public has been largely left to quasi-legislative administrative agencies. It 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.'"[37] The Court states these principles as being based on a consistent body of law going back over half a century.

> Thus, given our precedent, the de novo review of the record undertaken by the plurality of the Appellate Division was improper. On the "record upon which the ESDC determination was based and by which we are bound" (citation omitted), it cannot be said that ESDC's finding of blight was irrational or baseless. Indeed, ESDC considered a wide range of factors including the physical, economic, engineering and environmental conditions at the Project site. Its decision was not based on any one of these factors, but on the Project site conditions as a whole. Accordingly, since there is record support—"extensively documented photographically and otherwise on a lot-by-lot basis" (citation omitted)—for ESDC's determination that the Project site was blighted, the Appellate Division plurality erred when it substituted its view for that of the legislatively designated agency.[38]

Having rejected petitioner's arguments that UDC's actions lacked a proper public purpose, and that they had been taken in bad faith, the Court turned to petitioner's challenge to the constitutionality of the term "substandard or insanitary area," referring to what is commonly known as a blighted area, as that term appears in the Urban Development Corporation Act.[39] Petitioners argue that the language is unconstitutionally vague.[40]

In addressing this issue, the Court appears again to lean in the direction of expanding the state's prerogatives:

> In the context of eminent domain cases, we have held that, to guard against discriminatory application of the law, it is not necessary that "the degree of deterioration or precise percentage of obsolescence or mathematical measurement of other factors be arrived at with precision" (citation omitted).
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> Not only has this Court, but the Supreme Court has consistently held that *blight is an elastic* concept that does not call for an inflexible, one-size-fits-all definition (*see, Berman v. Parker*, 348 US 26, 33-34 [1945]). Rather, blights or "substandard or insanitary areas," as we held in *Matter of Goldstein* and *Yonkers Community Dev. Agency*, must be viewed on a case-by-case basis (emphasis added).[41]

If, as we had speculated in our Summer 2010 article on *Goldstein* and *Kaur*, the *Kaur* appeal offered the Court of Appeals the opportunity to circumscribe the state's discretion in taking property for public use, the Court resoundingly rejected that opportunity and, if anything, confirmed the extraordinary extent of deference to be accorded to an agency's determination, not only in finding facts to justify a taking, but in interpreting and applying the statute from which the agency derives its authority. In short, it would appear that in the absence of an entirely one-sided record upon which there is no room whatever for reasonable people to differ, the determination of an agency empowered to take property for a use which the legislature has declared, and very broadly defined, as a public purpose, is, in New York, essentially untrammeled.

Endnotes

1. *Eadie v. Town Board of the Town of North Greenbush*, 7 N.Y.3d 306 (2006).
2. *Guido v. Town of Ulster Town Board*, 74 A.D. 3d 1536, 902 N.Y.S.2d 710 (3d Dep't 2010).
3. *Goldstein v. New York State Urban Development Corp.*, 13 N.Y.3d 511 (2009).
4. *Brunswick Smart Growth, Inc. v. Town of Brunswick*, 73 A.D.3d 1267, 901 N.Y.S.2d 387 (3d Dep't 2010).
5. *Riverhead PGC, LLC v. Town of Riverhead*, 73 A.D.3d 931 (2d Dep't 2010).
6. *Harris v. Town Board of the Town of Riverhead*, 73 A.D.3d 922 (2d Dep't 2010).
7. *Brunswick Smart Growth, Inc.*, 73 A.D.3d at 1268.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Brunswick Smart Growth*, 73 A.D.3d at 1269.
12. *Riverhead PGC, LLC*, 73 A.D.3d at 932.
13. *Id.* at 933.
14. *Id.*
15. *Id.* at 932.
16. *Id.* at 933-934.
17. The Court also held that petitioner did not have "automatic standing" because its property was not in sufficiently close proximity to the site of the future Super Wal-Mart to relieve it of the obligation of demonstrating injury in fact. *See Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of Town of North Hempstead*, 69 N.Y.2d 406 (1987), for a discussion of the issue of automatic standing.
18. *Harris*, 73 A.D.3d at 923.
19. *Id.* at 923-924.
20. *Id.* at 924.
21. As in *Riverhead PGC, LLC*, the Court held that the individual petitioners did not live close enough to the project site to be afforded "automatic standing."

22. *Guido, supra.*
23. *Eadie, supra.*
24. *Guido*, 902 N.Y.S.2d at 712.
25. *Id.*
26. *Id.*
27. *Id.* at 713.
28. Henry M. Hocherman and Noelle V. Crisalli, *Land Use Law Case Law Update*, 24.1 MUNICIPAL LAWYER 5-12 (Winter 2010).
29. *Kelo v. City of New London*, 545 U.S. 469 (2005).
30. *Goldstein, supra.*
31. *Kaur v. New York State Urban Development Corp.*, 72 A.D.3d 1 (1st Dep't 2009).
32. *Id.* at 9; *see also Goldstein*, 13 N.Y.3d at 526 ("It 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 those of the legislatively designated agencies.")
33. Henry M. Hocherman and Noelle V. Crisalli, *Land Use Law Case Law Update*, 24.1 MUNICIPAL LAWYER 8 (Winter 2010).
34. *Kaur v. New York State Urban Development Corp.*, 2010 WL 2517686 (N.Y. June 24, 2010).
35. Henry M. Hocherman and Noelle V. Crisalli, *Land Use Law Case Law Update*, 23.3 MUNICIPAL LAWYER 22-26 (Summer 2009).
36. Henry M. Hocherman and Noelle V. Crisalli, *Land Use Law Case Law Update*, 23.2 MUNICIPAL LAWYER 22-29 (Spring 2009).
37. *Kaur v. New York State Urban Development Corp.*, 2010 WL 2517686 (N.Y. June 24, 2010) (emphasis original; citation omitted).
38. *Kaur v. New York State Urban Development Corp.*, 2010 WL 2517686 (N.Y. June 24, 2010).
39. Unconsol. Laws §§6253[12] and 6260[c][1].
40. *Kaur v. New York State Urban Development Corp.*, 2010 WL 2517686 (N.Y. June 24, 2010).
41. *Id.*

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