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

DANIEL GOLDSTEIN, PETER WILLIAMS ENTERPRISES, INC., 535 CARLTON AVENUE REALTY CORP., PACIFIC CARLTON DEVELOPMENT CORP., THE GELIN GROUP, LLC, CHADDERTON'S BAR AND GRILL, INC., d/b/a FREDDY'S BAR AND BACKROOM, MARIA GONZALEZ, JACKIE GONZALEZ, YESENIA GONZALEZ, and DAVID SHEETS,

Petitioners,

- against –

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

Respondent.

Docket No. 2008-7064

REPLY MEMORANDUM OF LAW OF RESPONDENT NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION IN FURTHER SUPPORT OF ITS MOTION TO DISMISS EDPL § 207 PROCEEDING

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INTRODUCTION

ESDC[1] respectfully submits this reply memorandum of law in further support of its motion to dismiss this EDPL § 207 proceeding.

PRELIMINARY STATEMENT

Petitioners have not put forth any valid ground for denying ESDC's motion to dismiss this proceeding. Petitioners' primary argument that a motion to dismiss is not permitted in an EDPL § 207 proceeding under the Second Department Rules is not only incorrect but it exposes their strategy of seeking to prolong litigation for as long as possible in the hope of thwarting this project. As explained below, there is no question that motions to dismiss are allowed in an EDPL § 207 proceeding. The Second Department Rules provide for motions (22 NYCRR § 670.5) without limiting them only to appeals, as opposed to special proceedings, and CPLR 404(a) expressly allows a respondent in a special proceeding to "raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition." Furthermore, because the motion raises only threshold issues of law that can be decided without review of the administrative record, there is no reason why the Court should not dispose of these issues by way of motion, thus saving judicial resources and time.

Unquestionably, Petitioners' EDPL § 207 challenge is not timely and CPLR 205(a) cannot save Petitioners from the consequences of their own deliberate strategy of asserting an EDPL § 207 challenge in federal court raising federal constitutional claims only, while saving their EDPL § 207 state law claims for a later filing in this Court in the event the federal EDPL § 207 claim was dismissed. Petitioners virtually concede that CPLR 205(a) is

[1] Capitalized terms not defined herein are as defined in ESDC's opening memorandum of law in support of its motion to dismiss EDPL § 207 Proceeding ("ESDC Mem. of Law").

inapplicable by failing to address important points made by ESDC in the ESDC Mem. of Law on this issue, and by making specious arguments on those points they attempt to respond to. And if this proceeding is untimely, it is subject to immediate dismissal in its entirety without regard to the resolution of the other threshold issues of law raised by ESDC in its motion.

With regard to those other issues of law, namely, collateral estoppel and Petitioners' failure to state a claim for relief under Art. XVIII, Section 6 of the State Constitution, Petitioners fare no better. As explained below, in arguing against the application of collateral estoppel to the issues decided by the federal court in Petitioners' prior action, Petitioners erroneously conflate the doctrines of *res judicata* and collateral estoppel and further err by maintaining that application of the latter is only proper with regard to factual findings made after trial. In truth, collateral estoppel equally applies to issues resolved by a court on a motion to dismiss. Finally, Petitioners are unable to state a claim under Art. XVIII, Section 6 of the State Constitution because the requirements of that section apply only to low rent housing projects, not civic and land use improvement projects, such as the Atlantic Yards Project. Petitioners' attempt to shoehorn the Atlantic Yards Project into that section by providing an implausible reading of the word "project" leads to absurd results, and conflicts with the purposes and intent of the drafters of Article XVIII.

ARGUMENT

POINT I

THE ISSUES HEREIN ARE PROPERLY RAISED BY A MOTION TO DISMISS

Petitioners argue that ESDC's motion to dismiss is not proper under the Second Department Rules. See Petitioners' Mem., pp. 6-7. Petitioners' argument, distilled to its essence, is that the only papers permitted in an EDPL § 207 proceeding are those set out in 22 NYCRR § 670.18. And, under Petitioners' reading, because section 670.18 does not mention motions to dismiss, none can be brought. Petitioners then modify this self-proclaimed categorical rule and concede that motions for preference or to expedite and motions to enlarge the size of a brief are permitted. Petitioners cite nothing in support of their self-serving and artificial interpretation of the rules. Contrary to Petitioners' position, a motion to dismiss is a proper method for disposing of a proceeding on timeliness or other threshold grounds.

Petitioners misunderstand the meaning of section 670.18. This section exists because the special proceedings enumerated in section 670.18 are not appeals, but proceedings initiated in the Appellate Division.[2] As such, this section defines what papers are necessary in such proceedings, including an EDPL § 207 proceeding. For instance, section 670.18(a) indicates that a petition with notice needs to be filed and section 670.18(b) indicates that an answer needs to be filed; both of these papers are unique to special proceedings initiated in the Appellate Division and are not used to bring appeals to the Appellate Division. In addition, section 670.18, as a whole, implements the Legislature's requirement that the proceeding be heard expeditiously. *See* EDPL § 207(B) ("All such proceedings shall be heard and determined . . . as expeditiously as possible and with lawful preference over other matters.") However,

[2] Similar rules exist for each of the three other departments of the Appellate Division. *See* 22 NYCRR §§ 600.2(b), 800.2(b), 1000.9.

section 670.18(e) clearly provides that all other sections of the Appellate Division rules also apply, including section 670.5.

Section 670.5 provides that motions can be made as long as they are on notice. There is no limitation as to what type of motions may be brought. Section 670.5(c) provides without limitation that "every notice . . . instituting a motion . . . must state, *inter alia*:

> (1) the nature of the motion or proceeding
>
> (2) the specific relief sought;
>
> (3) the return date; and
>
> (4) the names, addresses, and telephone numbers of the attorneys and counsel for all parties in support of and in opposition to the motion or proceeding." 22 NYCRR § 670.5(c).

As is plain from the Second Department Rules, no limitation is made with respect to which motions may be brought.

Moreover as the EDPL indicates, the rules for special proceedings apply to an EDPL § 207 action. *See* EDPL § 207(B). These rules expressly permit motions to dismiss in a special proceeding. *See* CPLR 404 ("The respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition"); *see* Siegel, N.Y. Prac. § 554 (4th ed.) (noting that motions to dismiss special proceedings are appropriate where the grounds are separable from the merits).

In fact, EDPL § 207 itself envisions motions beyond those related to expediting or enlarging briefs. Section 207(A) provides that, if a public project "is located in more than one judicial department such proceeding may be brought in any one, but only one of such departments and all such proceedings with relation to any single project shall be *consolidated* with the first filed." (Emphasis added.) Under Petitioners' strained reading of the Second Department Rules, this language would be rendered ineffectual in the Second Department

because, under their interpretation, no motion could be brought to consolidate multiple proceedings.

In short, motions to dismiss are warranted where, as here, the issues are threshold and legal in nature and do not require the Court to examine the full administrative record. Here, ESDC moves to dismiss on the grounds that the action is not timely, is barred by collateral estoppel and fails to state a cause of action upon which relief can be granted. These issues do not need a full record in order to be decided. Even within the last six months, at least one other appellate division has dismissed an EDPL action upon a respondent's motion to dismiss. *See 342 East 72nd St. Corp. v. Metropolitan Transp. Authority*, 51 A.D.3d 555 (1st Dep't 2008) (granting respondent's motion to dismiss EDPL § 207 proceeding).

Accordingly, ESDC's motion is proper and should be decided by this Court.

POINT II

PETITIONERS' ACTION IS UNTIMELY

CPLR 205(a) does not apply to this case. Petitioners' opposition papers do not even attempt to address some of the points made in the ESDC Mem. of Law on this issue, and as to those points that Petitioners try to address, their arguments are specious.

A. EDPL §§ 703 and 705 Preclude the Application of CPLR 205(a)

With respect to ESDC's argument that EDPL §§ 703 and 705 preclude the application of CPLR 205(a) to enlarge EDPL § 207's 30-day time limitation into an open ended, indefinite period (ESDC Mem. of Law, pp. 11-12), Petitioners' only response is to refer to *Winston v. Fresh Water Wetlands Appeal Bd.*, 224 A.D.2d 160, 646 N.Y.S.2d 565 (2d Dep't 1996) (Petitioners' Mem., pp. 9-10). *Winston* is entirely distinguishable.

Winston involved the 30-day statute of limitations set out in Section 24-1105(2) of the Freshwater Wetlands Act.[3] The issue in that case was whether a petitioner who had failed to file proof of service of the notice of petition and petition within 15 days of the expiration of the 30-day period, causing automatic dismissal of the action, had only 15 days from the dismissal to recommence the action in the same court under CPLR 306-b(b) (in effect at that time) or had six months under CPLR 205(a). *Id.,* 224 A.D.2d at 163, 646 N.Y.S.2d at 567. *Winston* had nothing to do with whether any extension or tolling statutes, such as CPLR 205(a), should apply at all to the limitation period in ECL § 24-1105(2), but rather which of two such statutes, CPLR 205(a) or the former CPLR 306-b(b), governed. In *Winston*, the second action was brought in the same court as the prior action, and there was no claim of forum shopping.

In contrast, the issue here is whether CPLR 205(a), or any such tolling or extension statute, should apply at all to the 30-day time limitation in EDPL § 207 in view of the fact that: (i) EDPL §§ 703 and 705 mandate that the CPLR does not apply where it is inconsistent with the provisions of the EDPL, and (ii) the express provisions of EDPL § 207 ("All such proceedings shall be heard and determined . . . as expeditiously as possible and with lawful preference over other matters"), the procedures for review set out therein (*i.e.,* challenge brought directly in the Appellate Division, all challenges consolidated with the first one filed, no requirement to reproduce the record, and limited scope of review) and its legislative history all demonstrate the Legislature's intent that the proceeding be expedited and not delayed by the application of tolling and extension statutes. There are no such provisions in the Freshwater Wetlands Act.

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[3] That section provides in relevant part: "Any determination, decision or order of the [freshwater wetlands appeals] board pursuant to this title may be judicially reviewed pursuant to article seventy-eight of the civil practice law and rules in the supreme court for the county in which the freshwater wetlands affected are located, within thirty days after the date of the filing of the determination, decision or order of such board with the clerk of the county in which such wetland is located." ECL § 24-1105(2).

In this regard, Petitioners wholly fail to address the cases cited in the ESDC Mem. of Law, which indicate that, pursuant to EDPL §§ 703 and 705, EDPL provisions govern over inconsistent provisions of the CPLR or other law. *See Brody v. Village of Port Chester,* 345 F.3d 103, 115-6 (2d Cir. 2003) (EDPL §§ 703 and 705 preclude application of CPLR 103(c) and therefore that CPLR provision could not vest supreme court presiding over EDPL Article 4 proceeding with jurisdiction over claimant's constitutional claims); *Biz-Biz Corp. v. State,* 29 A.D.3d 720, 721, 815 N.Y.S.2d 252, 252-3 (2d Dep't 2006) (based on EDPL § 705, service provisions under EDPL for notice of acquisition supersede service provisions of Court of Claims Act).

Accordingly, *Winston* is of no help to Petitioners.

B. <u>EDPL § 207's 30-Day Time Limitation Is a Condition Precedent Not Subject to CPLR 205(a)</u>

Petitioners have not demonstrated that the 30-day statutory time period for commencing an EDPL § 207 proceeding is a statute of limitations subject to CPLR 205(a) rather than a condition precedent.

Petitioners ignore the fact that the provisions of EDPL § 207 itself and its legislative history clearly evince the Legislature's intent that EDPL § 207 proceedings be heard expeditiously so that the benefits of public projects are not withheld from the public. Allowing the application of tolling statutes defeats that legislative intent, particularly in the context of blatant forum shopping. It is the legislative intent that should govern the analysis as to whether the 30-day time period should be considered a condition precedent, rather than a statute of limitations, as indicated in *Kahn v. TWA,* 82 A.D.2d 696, 443 N.Y.S.2d 79 (2d Dep't 1981), a case cited in the ESDC Mem. of Law (p. 15) but ignored by Petitioners.

Indeed, the case relied on by Petitioners, *Hakala v. Deutsche Bank AG,* 343 F.3d 111 (2d Cir. 2003), undercuts their argument because it too makes clear that the primary consideration in determining whether CPLR 205(a) should apply is the legislative intent behind the time limitation at issue. As the *Hakala* Court stated: "The question before us is one of legislative intent specifically whether in passing [CPLR] § 7511(a), which provides for actions to vacate arbitration awards brought within ninety days of the award, the New York legislature intended that the remedial provision of § 205(a) should not apply." *Id.,* at 115; *see also id.*, at 116 ("We do not believe the New York Court of Appeals intended this general principle to be followed as an absolute rule, regardless whether it would produce results compatible with the probable intent of the legislature."). In that case, the Court could not find any language in CPLR 7511, regarding vacating or modifying an arbitration award, which indicated a legislative intent that general tolling statutes should not apply. *Id.,* at 115-16. In stark contrast, the structure and scope of review established by EDPL § 207, its express language ("All such proceedings shall be heard and determined . . . as expeditiously as possible and with lawful preference over other matters") and legislative history demonstrate a clear legislative intent that there be a short, defined time period to challenge public projects, not an open-ended period depending on if and when a federal court dismisses an EDPL § 207 claim brought in a federal action, as Petitioners would prefer.

Petitioners erroneously seek to support their position on this issue from *Winston.* As discussed above, *Winston* has no relevance here; it did not involve or discuss the issue as to whether or not a time period in a statute for commencing suit is considered a condition precedent not subject to CPLR 205(a) or a statute of limitations subject to CPLR 205(a).

In short, EDPL § 207's 30-day period should not be subject to CPLR 205(a) tolling. The 30-day period is a condition precedent as it was established together with the claim itself and is thus an ingredient of the cause. See ESDC Mem. of Law, pp. 12-15. More significantly, the legislative intent behind EDPL § 207 for expedited judicial review of challenges to public projects would be defeated if CPLR 205(a) would apply to allow such challenges to proceed well after—here 1½ years after—the statutory deadline.

C. <u>Petitioners Fail to Address Two of ESDC's Arguments as to Why CPLR 205(a) Should Not Apply Here</u>

Petitioners fail to address two of the arguments made in the ESDC Mem. of Law. In Point I.B.iii. of its memorandum (pp. 16-17), ESDC argued that CPLR 205(a) should not apply because the federal court's dismissal of Petitioners' federal constitutional claims on the merits constituted a dismissal *on the merits* of their EDPL § 207 claim inasmuch as the claims overlapped completely and raised identical issues. Consequently, CPLR 205(a) could not apply because, by its terms, it only applies to actions "terminated in any other manner than by . . . a final judgment upon the merits." Petitioners did not address this argument in their opposition papers, thereby conceding the point. This concession by itself necessitates dismissal of this proceeding.

Similarly, in Point I.B.iv. (pp. 17-19) of the ESDC Mem. of Law, ESDC contended that Petitioners' fourth claim, asserted under New York State Constitution Art. 18 § 6, could not have been tolled under CPLR 205(a) because, in addition to the other reasons discussed in the memorandum, it does not arise from the same transaction and occurrence as any claim that was dismissed in the federal action, because it arises from ESDC's financial contribution to the Project, not ESDC's use of its condemnation power. Petitioners did not

address this argument in their opposition papers, thereby conceding the point. This concession itself necessitates dismissal of the fourth claim.

POINT III

PETITIONERS ARE COLLATERALLY ESTOPPED FROM ASSERTING THEIR CLAIMS

Petitioners all but fail to respond to the substantial collateral estoppel arguments made in ESDC's motion. The doctrine of collateral estoppel bars relitigation of any issue that was finally determined, after a full and fair hearing, in a prior proceeding. *See, e.g., Ryan v. N.Y. Tel. Co.*, 62 N.Y.2d 494, 500, 478 N.Y.S.2d 823 (1984); *accord Purdy v. Zeldes*, 337 F.3d 353, 358 (2d Cir. 2003). As ESDC showed in its moving papers, the issues raised by the Petition's public use, due process, and equal protection claims were all fully litigated and resolved against Petitioners in the federal district court action that preceded this one – an action that unquestionably afforded Petitioners the requisite "full and fair opportunity" to defend their claims. *Ryan*, 62 N.Y.2d at 500.

In particular, the federal district court concluded – and the federal appeals court agreed – that the Atlantic Yards Project would serve a slew of public purposes: generation of tax revenues, job creation, blight removal, provision of affordable housing, the "[n]on-quantifiable" public benefits associated with a sports team and transportation improvements, and the creation of a sports arena. (See ESDC Mem. of Law, pp. 24-25 and citations therein.) The federal district court also concluded that that "the takings at issue are rationally related to a legitimate governmental purpose," *Goldstein v. Pataki*, 488 F. Supp.2d 254, 290 (E.D.N.Y. 2007), not based on any irrational classification, *id.*, and not infected by procedural irregularity, *id.*

Petitioners here are not just trying to relitigate these already-resolved issues, but are also seeking to capitalize on their own gamesmanship before the federal courts. As ESDC

explained in its moving papers, Petitioners, by filing their "supplemental" (and unprecedented) EDPL § 207 "claim" in federal court just a few days before the EDPL-mandated deadline for seeking review of the Determination and Findings *in this Court*, sought to bypass New York procedure entirely in the first instance. Only when their federal-court action failed on the merits – over a *year* after the EDPL-mandated deadline – did Petitioners then seek to avail themselves of state procedure and file a petition in this Court (which the EDPL, of course, identifies as the "exclusive" venue for their challenge, *see* EDPL § 207(B)). If Petitioners are permitted a second bite at the apple under these circumstances, they must at the very least be bound by the adverse determinations the federal court (Petitioners' own preferred adjudicative body) made on issues dispositive to their constitutional claims – claims which, even as recrafted under the New York Constitution, are materially identical to those presented in the prior federal litigation.

Petitioners' only arguments against application of the collateral estoppel doctrine here are that (1) their EDPL § 207 claim was dismissed without prejudice from the federal action; (2) there was no "fact-finding" – meaning discovery and trial, presumably – in the federal action, and (3) "the New York Constitution is more protective of property rights than its federal counterpart." (Petitioners Mem., p. 13.) The first two of these objections are simply irrelevant to the analysis, and the third lacks foundation.

First, although invocation of the doctrine of *res judicata* (otherwise known as "claim preclusion") requires a demonstration that the *claim* sought to be precluded was finally adjudicated on the merits in the prior action, the doctrine of collateral estoppel (otherwise known as "issue preclusion") does not. For collateral estoppel to apply, all that needs to be shown is that an *issue* necessary for the success of the plaintiff's current claim was adjudicated against that plaintiff in the prior proceeding. *See Ryan*, 62 N.Y.2d at 500 ("We have recently reaffirmed

that collateral estoppel allows 'the determination of an issue of fact or law raised in a subsequent action by reference to a previous judgment *on a different cause of action* in which the same issue was necessarily raised and decided.'") (emphasis added). That clearly is the case here: The federal court determined that, based on Petitioners' own pleadings (which, in relevant part, are exactly the same here as they were in the federal action), the Project was supported by several public purposes, was not tainted by procedural irregularity, and was not premised upon any irrational classification. Petitioners' state constitutional claims cannot succeed in face of those determinations.

Second, that Petitioners' constitutional claims were dismissed at the pleading stage in the federal action only underscores their weakness; it certainly does not counsel against application of the collateral estoppel doctrine. The doctrine's requirement that the party seeking relitigation have had a "full and fair opportunity" to air its claims is fully satisfied if that party had a full and fair opportunity to oppose a motion to dismiss on the pleadings. *See, e.g.*, *Bank v. Brooklyn Law Sch.*, 297 A.D.2d 770, 800-01, 747 N.Y.S.2d 800 (2d Dep't 2002); *accord Cameron v. Church*, 253 F. Supp. 2d 611, 619 (S.D.N.Y. 2003) (explaining that issue litigated on a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) was "actually litigated" for collateral estoppel purposes). Petitioners do not deny that they had such opportunity.

Finally, the protections afforded by the New York Constitution's public use clause are at most coextensive with those of the federal Constitution. (*See* ESDC Mem., pp 20-23.) Indeed, if anything, the federal Constitution affords *greater* protection than does the State Constitution. (*See id.* p. 21 n.8.) In either event, Petitioners cannot succeed on their state public use claim in the face of an adverse adjudication on their federal public use claim. The only

support Petitioners offer to the contrary is the "argument" supposedly presented by their own Petition (Petitioners Mem., p. 13), which in relevant part does no more than parrot Petitioners' federal public use claim word for word. They present no case law or other authority contradicting ESDC's position, and offer no explanation for how they might succeed in this action after having failed in the federal action.

The doctrine of collateral estoppel plainly bars Petitioners' claims. Petitioners' argument to the contrary amounts to no more than an erroneous conflation of the doctrines of *res judicata* and collateral estoppel and the legally untenable assertion that the latter doctrine applies only in the wake of a trial.

POINT IV

PETITIONERS' CAUSE OF ACTION UNDER ARTICLE XVIII § 6 OF THE STATE CONSTITUTION FAILS TO STATE A CLAIM FOR RELIEF

A. Petitioners' Interpretation of Article XVIII § 6 Does Not Accord with the Section's Plain Meaning

Petitioners' contention that the Atlantic Yards Project violates section 6 of Article XVIII of the New York State Constitution turns on an incorrect and wholly implausible interpretation of the word "project" in section 6. Petitioners *assume*, without argument, that the term refers to any type of development undertaken to effectuate either of the distinct purposes of Article XVIII. But as explained in the ESDC Mem. of Law, the word "project" in section 6 clearly means a "low rent housing project," and does not include other types of development – whether a highway, LIRR yard, an arena, a courthouse, or a mixed-use development such as Atlantic Yards – in blighted areas. Accordingly, section 6 has no bearing on the Atlantic Yards development, since that development is not a low rent housing project.

Article XVIII § 6 provides:

> No loan, or subsidy shall be made by the state to aid any *project* unless such *project* is in conformity with a plan or undertaking for the clearance, replanning and reconstruction or rehabilitation of a sub-standard and unsanitary area or areas and for recreational and other facilities incidental or appurtenant thereto. The Legislature may provide additional conditions to the making of such loans or subsidies consistent with the purposes of this article. The occupancy of any such *project* shall be restricted to persons of low-income as defined by law and preference shall be given to persons who live or shall have lived in such area or areas.

Art. XVIII § 6 (emphasis added).

Because the term "project" is not defined, its meaning must reflect the structure and purpose of Article XVIII. *See Ginsberg v. Purcell*, 51 N.Y.2d 272, 276 (1980) (noting that general purposes must guide constitutional interpretation and that the interpretation placed on a particular section of an article should accord with the other sections of that article); *Ass'n For The Protection Of The Adirondacks v. MacDonald*, 253 N.Y. 234, 238 (1930) ("The words of the Constitution ... must receive a reasonable interpretation, considering the purpose and the object in view."); *In re Dowling*, 219 N.Y. 44, 56 (1916) (noting that interpretations that defeat the purpose and intent of a provision are to be avoided); *People v. Metz*, 193 N.Y. 148, 157 (1908) ("In construing a constitution all its provisions relating directly or indirectly to the same subject must be read together...."). Additionally, the interpretation of a constitutional provision should give that provision practical effect and avoid making the provision absurd. *See Ginsberg*, 51 N.Y.2d at 276; *In re Dowling*, 219 N.Y. at 56.

ESDC established in the ESDC Mem. of Law that there are two purposes of Article XVIII, and that those purposes are separate and distinct. Thus, the Legislature may "prescribe [1] for *low rent housing ... for persons of low income*, or [2] for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas...." Art. XVIII

§ 1 (emphasis added). The purposes of Article XVIII, as expressed in section 1, are structurally different: the provision of low rent housing is linked specifically to providing housing for persons of low income; by contrast, the eradication of blight serves its own purpose under the plain words of section 1 and is not tied in any way to the provision of housing for persons of low income. *Murray v. LaGuardia*, 291 N.Y. 320, 331-32 (1943) (holding that blight eradication can be pursued without providing for low rent housing for persons of low income).

The term "project" in section 6 must be read with an eye towards the distinction established by Section 1 between construction of low rent housing projects and efforts to eradicate blight. In particular, the language in the third sentence of that provision – requiring that the occupancy of a project receiving state aid "shall be restricted to persons of low income as defined by law" – must be interpreted to effectuate the purpose of providing low rent housing to serve persons of low income, and not to impede the effectuation of the separate purpose of eliminating blight. Thus, it is clear that the word "project" as used to define the scope of the restrictions created by section 6 can only mean a low rent housing project. Therefore, the State may make a loan or subsidy for a plan to eliminate blight regardless of whether the new buildings constructed in the blighted area are to be occupied wholly or even partially by persons of low income.

Petitioners do not seek to rebut ESDC's statutory construction argument with any argument of their own, and simply proceed from the assumption that the meaning of "project" for purposes of the restrictions set forth in section 6 is much broader and includes any kind of development. By reading section 6 without regard to any other provision in Article XVIII, Petitioners have come up with an interpretation that effectuates one purpose (the provision of housing for persons of low income) while frustrating the other (the eradication of blight). Under

Petitioners' interpretation, efforts to eradicate blight that use state funds cannot be geared towards civic projects such as schools, libraries, parks, public arenas or infrastructure; rather they can be pursued solely to provide housing for "persons of low income." In conjuring up this restrictive interpretation, Petitioners ignore the plain language of section 1 of Article XVIII, which links "persons of low income" only to the provision of "low rent housing" – not blight eradication.

The hobbling effect of Petitioners' interpretation on the State's efforts to address blighted conditions is well illustrated by this case. Only 146 residents live on the 22-acre site of the Atlantic Yards development, and some of whom (including lead petitioner Daniel Goldstein) are not persons of low income. *Anderson v. New York State Urban Dev. Corp.*, 45 A.D.3d 583, 585 (1st Dep't 2007). Yet, according to petitioners, all seven thousand residential units in the Atlantic Yards development would have to be set aside for persons of low income – and all the other components of the project, such as the arena, the LIRR rail yard and the commercial office building – would be unlawful, since they are not designed to accommodate low rent housing. This straight jacket on the State's sovereign power to eradicate blight is not only at odds with the plain meaning and purpose of Article XVIII, as expressed in section 1. Petitioners' interpretation is also plainly contrary to section 10 of Article XVIII, which expressly states that it "shall be construed as *extending powers* which otherwise might be limited by other articles of this constitution and *shall not be construed as imposing additional limitations*." Art. XVIII § 10 (emphasis added).

B. Petitioners' Interpretation of Article XVIII § 6 Results in Absurd Consequences

In the ESDC Mem. of Law (pp. 30-34), ESDC established that Petitioners' interpretation of the term "project" in section 6 would result in absurd consequences that could

not have been intended by the Constitutional Convention that drafted this provision. The State routinely funds a wide variety of public projects of all sorts. Yet, according to Petitioners, Article XVIII strips the State of its sovereign power to fund such projects if they are located on blighted property. Such a result is absurd because there is no conceivable rationale for allowing the State to support public projects of all kinds outside of blighted areas, but hamstringing those efforts within those areas.

Instead of offering some rationale to support the extraordinary result of their interpretation, Petitioners suggest that such a state of affairs would have been no surprise to the drafters of Article XVIII, who "took the 'absurd' stance that the eradication of blight would lead to the displacement of low-income people and that, therefore, any project funded by the State for slum clearance must provide for them." Petitioners' Mem., p. 16. Petitioners ignore the fact that affected residents can be protected without transforming all state-funded projects within blighted areas into low-rent housing projects. In fact, the Atlantic Yards development fully provides for the suitable relocation of all persons living within the development footprint. *See* Webb Aff., Ex. A. (General Project Plan, pp. 18-20). This is the precise issue previously litigated in this Court in *Anderson*. 45 A.D.3d at 585 ("Contrary to petitioners' argument, the respondent did find . . . that a feasible method for relocation existed."). Petitioners would go far beyond caring for the 146 affected residents on the Project site. Under their interpretation of Article XVIII, ESDC must devote the entire Atlantic Yards development to low rent housing. This interpretation has absolutely no basis in the language of Article XVIII, when read in its entirety, and would impede the achievement of one of its primary purposes.

C. The Intent of the Drafters of Article XVIII Support ESDC's Interpretation of Article XVIII § 6

Having no textual support for their interpretation of Article XVIII § 6 and facing absurd consequences, Petitioners resort to cherry picking quotes from the New York State Constitutional Convention, 1938: Revised Record, vol. IV (1938) ("Revised Record"). Petitioners present three quotes which indicate that delegates to the Constitutional Convention wanted to "tie up" slum clearance and housing projects by razing "slums" and building new housing projects for "slum dwellers." Petitioners' Mem., pp. 15-16. But Petitioners' quotes from the Revised Record fail to establish that the word "project" in section 6 means anything other than "low rent housing project." Under ESDC's interpretation of Article XVIII § 6, its first sentence requires that any State-subsidized low rent housing project be in conformity with a plan for blight remediation, which is entirely consistent with Petitioners' cherry picked quotations.

Contrary to Petitioners' contentions, the Revised Record indicates conclusively that "project" means nothing more than a "low rent housing" project. In explaining the meaning of the Amendment that would become Article XVIII § 6, Mr. Moffat, a delegate who played a role in drafting the Amendment, explained it as follows:

> What this language is intended to do is to prevent just going out and putting up a new *housing project* without any relation to anything else. It does not require that the new project be in an area to be replanned. It does require that before you put up a project you shall have a plan for the reconstruction or rehabilitation of an area.

Revised Record, at 3005 (emphasis added).[4] Mr. Moffat clearly indicated that the term "project" in section 6 refers to a low rent housing project.

[4] Excerpts from the Revised Record cited herein are attached as Exhibit A to the Reply Affirmation of Charles S. Webb III in Further Support of Motion to Dismiss EDPL § 207 Proceeding.

Soon after Mr. Moffat made this remark, William Kuczwalski, the delegate who introduced this Amendment, made clear that he accepted Mr. Moffat's characterization of the Amendment. "I will accept that definition of my proposal by Mr. Moffat. So that the record will be clear, in the event anybody has to refer to this debate for interpretation of this section, I accept Mr. Moffat's definition." *Id.*, at 3006. A third delegate, Senator Wagner, then asked the following question:

> So that I may be very clear, you now agree that your amendment simply provides that slum clearance must be part of the entire plan, but that *the project itself, that is the building or the housing of the slum dweller* must not necessarily be upon the property where these slums formerly existed?

Id. (emphasis added). This characterization of the Amendment also indicated that "project" referred only to low rent housing for the (former) "slum dweller." In response, Mr. Kuczwalski answered "Yes." *Id.* This colloquy about the meaning of the Amendment confirms that the word "project," as used in Article XVIII § 6, refers only to a new "building" or new "housing" that is for a "slum dweller" – *i.e.,* "low rent housing."

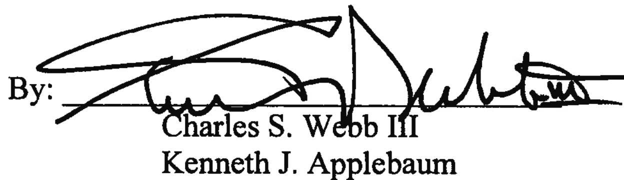
This exchange by three delegates to the 1938 Constitutional Convention who were instrumental in the drafting of and deliberations over the Amendment, two of whom played a role in drafting the Amendment which became section 6 of Article XVIII, indicates that the authors of this Amendment understood the word "project" in section 6 to mean solely "low rent housing project." Petitioners' effort to expand the word "project" to include any development in a blighted area is thus inconsistent with the record of the Constitutional Convention, in addition to being inconsistent with the plain language and the purposes of Article XVIII.

CONCLUSION

For all of the foregoing reasons set forth herein and in the ESDC Mem. of Law, ESDC's motion to dismiss this EDPL § 207 proceeding should be granted in its entirety.

Dated: New York, NY
September 18, 2008

BERGER & WEBB, LLP



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