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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DANIEL GOLDSTEIN, et al.,	:	06 CV 5827 (NGG) (RML)
Plaintiffs,	:	
- against -	:	
GEORGE E. PATAKI, et al.,	:	
Defendants.	:	
AARON PILLER, et ano.,	:	07 CV 152 (NGG) (RML)
Plaintiffs,	:	
- against -	:	
GEORGE E. PATAKI, et al.,	:	
Defendants.	:	

RESPONSE OF FOREST CITY RATNER DEFENDANTS TO PLAINTIFFS' OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION OF FEBRUARY 23, 2007

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Preliminary Statement

The Forest City Ratner defendants respectfully submit this response to plaintiffs' objections to the Report and Recommendation (the "Report") dated February 23, 2007, of Magistrate Judge Levy insofar as the Report recommends that this Court abstain from exercising

jurisdiction over this case on the basis of Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098 (1943), and its progeny.[1] This response does not present a thorough analysis of the Burford doctrine or plaintiffs' objections, and instead merely supplements the ESDC defendants' response with some additional observations. The Forest City Ratner defendants rely upon, and hereby incorporate by reference, the responses of the ESDC defendants and the City defendants to plaintiffs' objections.

Argument

THE MAGISTRATE JUDGE WAS CORRECT IN CONCLUDING THAT THIS CASE IS AN APPROPRIATE ONE FOR APPLICATION OF THE *BURFORD* PRINCIPLES OF FEDERAL ABSTENTION

The test for the application of Burford abstention is as follows:

> "Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

Report at 33-34, quoting New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350, 361, 109 S.Ct. 2506, 2514 (1989) (emphasis added by Report). The Report is correct in concluding that this formulation requires abstention in this case.

A. Timely and Adequate State-Court Review Is Available

There is no question but that "timely and adequate state-court review is available" to plaintiffs pursuant to section 207 of New York's Eminent Domain Procedure Law, which

[1] Unless otherwise indicated, the abbreviations and references used in this response are the same as those set forth in the "Statement and Objections of Forest City Ratner Defendants with Respect to the Magistrate Judge's Report and Recommendation of February 23, 2007," which is dated March 9, 2007.

provides for judicial review of eminent domain determinations in the Appellate Division of the State Supreme Court, followed, potentially, by further review by the New York State Court of Appeals (see EDPL § 207(B)), and a petition for a writ of certiorari to the U.S. Supreme Court. In Brody v. Village of Port Chester, 434 F.3d 121 (2d Cir. 2005) – a decision that, significantly, was rendered after the Supreme Court's decision in Kelo v. City of New London, 545 U.S. 459, 125 S.Ct. 2655 (2005) – the Court of Appeals for the Second Circuit specifically held that "the post-determination review procedure set forth in EDPL § 207 is sufficient" to satisfy the constitutional requirement of due process, which "does not require New York to furnish a procedure to challenge public use beyond that which it already provides." 434 F.3d at 133.

Plaintiffs assert that EDPL § 207 does not provide "adequate" state-court review for purposes of Burford abstention (Pl. Objections at 36-39) solely because the state procedures will not provide them with the discovery and trial that they hope to obtain in federal court. However, plaintiffs conveniently ignore Brody. Plaintiffs nowhere explain why state-court judicial review that the Second Circuit has held to satisfy due process is not "adequate" just because the procedures applicable in state court differ from those that might be available in a federal court if the plaintiffs' claims survive a motion under Fed. R. Civ. P. 12(b)(6) to dismiss for failure to state a claim for which relief can be granted.

In Brody, the Second Circuit unequivocally held that the nature of the judicial review available under EDPL § 207 "is appropriate given the narrow role that the courts play in ensuring that the condemnation is for a public use." 434 F.3d at 134. In reaching this conclusion, the court rejected the proposition that potential condemnees have the right to "a full adversarial hearing (complete with the right to call and cross-examine witnesses) before a neutral arbiter." Id. at 133. The court reasoned that:

> ... [T]he government clearly has a strong interest not only in completing projects necessary for public use, but in completing them in a timely and efficient manner. It is without question that a legal proceeding in which the condemnor's agents would be subject to discovery and cross-examination would be extremely burdensome on the courts and the government.

Id. at 136. The court therefore concluded that there is no right to a "detailed examination of the thought processes of those exercising the legislative prerogative" of eminent domain, and "[t]he wisdom or advisability of a public project is not reasonably subject to the adversarial adjudicative process." Id. Tellingly, plaintiffs do not mention Brody in their objections, much less attempt to dispute its significance.[2]

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[2] To the extent that plaintiffs' objections may be interpreted to suggest that New York's state courts are less prone to adequately address plaintiffs' constitutional claims, the insinuation is unfair and inappropriate. New York's state courts have vigilantly protected the rights of property owners and over the years have rendered several important decisions sustaining property owners' claims that their federal constitutional rights have been violated. See, e.g., Town of Orangetown v. Magee, 88 N.Y.2d 41, 643 N.Y.S.2d 21 (1996) (building inspector's revocation of a building permit violated developer's due process rights); Manocherian v. Lenox Hill Hosp., 84 N.Y.2d 385, 618 N.Y.S.2d 857 (1994), cert. denied, 514 U.S. 1109, 115 S.Ct. 1961 (1995) (amendment to Rent Stabilization Law that applied only to apartments rented by hospitals for nurses' housing did not advance a legitimate state interest and effected an unconstitutional regulatory taking); Seawall Assocs. v. City of New York, 74 N.Y.2d 92, 544 N.Y.S.2d 542, cert. denied, 493 U.S. 976, 110 S.Ct. 500 (1989) (local law establishing a moratorium on conversion of single-room occupancy units to other uses effected a physical and regulatory taking, because the burdens imposed on owners did not substantially advance the stated public aim of alleviating homelessness); Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 385 N.Y.S.2d 5, cert. denied, 429 U.S. 990, 97 S.Ct. 515 (1976) (zoning classification that prohibited all reasonable income productive or other private use of property constituted a deprivation of property without due process of law); Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 359 N.Y.S.2d 7 (1974) (Landmarks Law was unconstitutional as applied, because a building owned by a church was "totally inadequate" for the owner's "legitimate needs" and needed to be replaced for the church to be able to continue to function); Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968) (upholding the constitutionality of a Landmarks Law hardship provision on the ground that, although the provision is inadequate, the courts retain the inherent power to annul a landmark designation that operates as an unconstitutional taking).

B. The Exercise of Federal Jurisdiction Would Disrupt the State's Efforts to Establish Coherent Eminent Domain Policy

The Report also is correct in concluding that the exercise of federal jurisdiction in this case (and similar cases) "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." NOPSI, 491 U.S. at 361, 109 S.Ct. at 2514. As the Report recognizes, "courts have consistently viewed the exercise of eminent domain power as an issue in which the state has an overriding interest," and the Supreme Court "echoed this view" in Kelo. Report at 37-38. See also, e.g., Rosenthal & Rosenthal Inc. v. N.Y.S. Urban Dev. Corp., 771 F.2d 44, 45 (2d Cir. 1985) ("The power of eminent domain is a fundamental and necessary attribute of sovereignty").

New York's Eminent Domain Procedure Law was enacted in 1977 as "the culmination of nearly seven years of effort by the members of the State Commission on Eminent Domain." Memorandum of Gov. Hugh Carey (hereafter, "Governor's Memorandum"), Bill Jacket, L. 1977, ch. 839 (Aug. 11, 1977), at 1.[3] It "involved the identification, repeal, reenactment and amendment of over 150 separate sections of law." Id. at 1. See also Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298, 305 (1986) (the EDPL was enacted "to supplant a mosaic of more than 150 scattered provisions with a uniform procedure").

As part of its comprehensive review of the then existing eminent domain laws, the State Commission on Eminent Domain identified "approximately 3372 local government units with the power of eminent domain," which did not include "state departments and agencies, public authorities, utilities, and even private entities whose addition would swell the number of

[3] The Governor's Bill Jacket for the EDPL is being submitted to the Court as an appendix to this memorandum.

condemnors to more than several thousand above the 3372 figure." Memorandum of State Commission on Eminent Domain (hereafter, "Comm'n Memorandum"), Bill Jacket, L. 1977, ch. 839 (March 1973), at 2. Remarkably, the Commission found that, "[w]hile each of these condemnors does not have its own distinct procedure, there are well over 50 various procedures utilized in New York State today." Id. at 2 (emphasis added). Therefore, "[i]t becomes apparent that the multiplicity of procedures is confusing to the property owner and his representatives, who usually find it difficult to determine whether the proceeding is being properly conducted, and also whether the property owner's rights are being fully protected." Id. at 2.

According to the Governor's Memorandum, the State Commission on Eminent Domain had been established to "eliminate the dissatisfaction caused ... by the variety and complexity of existing laws," and the EDPL was intended to create "a uniform and equitable procedure which assures that the public will be adequately informed through hearings of proposed public projects requiring the acquisition of land ...." Governor's Memorandum, at 1. The EDPL itself specifies that its purposes include "to provide the exclusive procedure by which property shall be acquired by exercise of eminent domain in New York state ...." EDPL § 101. The statute further provides that it "shall be uniformly applied to any and all acquisitions by eminent domain of real property within the state of New York." EDPL § 104.

Although nominally the EDPL is a procedural statute, it is the cornerstone of an effort to establish a unified system for making the substantive policy and legal decisions that underlie a determination to exercise eminent domain. The heart of that system is EDPL Article 2. In the words of New York's highest court, "[t]he main purpose of article 2 of the EDPL is to ensure that an appropriate public purpose underlies any condemnation ...." Matter of City of New York (Third Water Tunnel, Shaft 30B), 6 N.Y.3d 540, 546, 814 N.Y.S.2d 592, 595 (2006).

EDPL Article 2 ensures that the exercise of eminent domain serves a public use or purpose by establishing an integrated and coherent system with two essential components. First, the decision to condemn private property no longer is made by a would-be condemnor in private, but must be considered at a public hearing that is designed to foster meaningful public participation and transparent decision making, and that creates the record that forms the basis for subsequent judicial review.[4] Second, once a determination has been made, it is subject to focused, and expedited, judicial review that starts in the Appellate Division, not in a trial court.

To ensure extensive public participation in the condemnor's consideration of whether to exercise eminent domain, EDPL Article 2 requires that, "prior to acquisition," a condemnor "shall conduct a public hearing ... at a location proximate to the property which may be acquired," for the purpose of "inform[ing] the public" and "review[ing] the public use to be served by a proposed public project and the impact on the environment." EDPL § 201. Notice of the hearing must be published, and also mailed to "each assessment record billing owner" of affected property. EDPL § 202. "At the public hearing the condemnor shall outline the purpose, proposed location or alternate locations of the public project and any other information it considers pertinent," after which "any person in attendance shall be given a reasonable opportunity to present an oral or written statement and to submit other documents concerning the proposed public project." EDPL § 203. "A record of the hearing shall be kept, including written statements submitted," and must be available for inspection and copying. Id. The condemnor "shall make its determination and findings concerning the proposed public project and shall publish a brief synopsis of such determination" within 90 days after the close of the hearing.

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[4] The record that has been certified, served and filed by ESDC for the proceeding under EDPL § 207 that now is pending in the Appellate Division, Second Department (Anderson, et al. v. N.Y.S. Urban Dev. Corp., Index No. 372/07), contains approximately 25,000 pages.

EDPL § 204(A).[5] The condemnor then must notify each owner "whose property may be acquired." EDPL § 204(C).

Under EDPL § 207, "[a]ny person ... aggrieved by the condemnor's determination and findings made pursuant to [EDPL § 204] may seek judicial review thereof by the appellate division of the supreme court, in the judicial department embracing the county wherein the proposed facility is located by the filing of a petition in such court within thirty days after the condemnor's completion of its publication of its determination and findings." EDPL § 207(A). The proceeding is heard on the record of the condemnor's public hearing. Id. "The scope of review shall be limited to whether":

> (1) the proceeding was in conformity with the federal and state constitutions,
>
> (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority,
>
> (3) the condemnor's determination and findings were made in accordance with procedures set forth in [EDPL Article 2] and with article eight of the environmental conservation law [i.e., the State Environmental Quality Review Act], and
>
> (4) a public use, benefit or purpose will be served by the proposed acquisition.

EDPL § 207(C). The jurisdiction of the Appellate Division is "exclusive and its judgment and order shall be final subject to review by the court of appeals ...." EDPL § 207(B). All proceedings arising from the same project "shall be consolidated with that first filed." EDPL § 207(A). The Appellate Division and the Court of Appeals both are charged with considering

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[5] This 90-day period commences at the close of the period for submission of public comments. Wechsler v. N.Y.S. Dep't of Environmental Conservation, 153 A.D.2d 300, 550 N.Y.S.2d 749 (3d Dep't), aff'd, 76 N.Y.2d 923, 563 N.Y.S.2d 50 (1990).

the matter "as expeditiously as possible and with lawful preference over other matters." EDPL § 207(B).

These two components of the statutory scheme – extensive public participation in the decision whether to condemn, followed by focused and expedited judicial review – are intertwined in the design of the statute. The requirement of public hearings prior to a decision to exercise eminent domain was created "[i]n answer to public demand," but was "rather controversial" and engendered opposition from condemnors. Memorandum of New York State Bar Ass'n, Bill Jacket, L. 1977, ch. 839 (July 5, 1977), at 2.[6] As recognized by the Second Circuit in Brody, the provision for accelerated judicial review was added to the bill to offset the delay resulting from the requirement of extensive public participation in a condemnor's decision as to whether to exercise eminent domain:

> Increased public participation – well beyond that which is required by the Due Process Clause – was one of the reasons for the enactment of the EDPL .... The Commission that originally reviewed New York's various eminent domain laws and that eventually recommended the procedures memorialized in the EDPL recognized the charge [of EDPL opponents] that increased public participation could delay or even halt projects, but it believed that ... the narrow scope of review authorized by section 207 would expedite development once the hearing was concluded.

434 F.3d at 134 n. 11. The New York Court of Appeals has recognized the same point. See East Thirteenth Street Community Ass'n v. N.Y.S. Urban Dev. Corp., 84 N.Y.2d 287, 294-95, 617 N.Y.S.2d 706, 708 (1994).[7]

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[6] The Bill Jacket contains written expressions of opposition to or concern about the public hearing requirement by Long Island Lighting Company, the Metropolitan Transportation Authority, the New York State Association of Counties, National Fuel Gas Distribution Corporation, the Monroe County Water Authority, Consolidated Edison Company of New York, Inc. and Rochester Gas and Electric Corporation.

[7] Prior to enactment of the EDPL, "[a]s a general rule the power of eminent domain [was] exercised by petitioning a court for a decree vesting title in the petitioner-condemnor," and "[t]he Court, after a hearing, decide[d] whether or not to grant the petition," although the court

The procedures established by EDPL § 207 are consistent with general New York statutory provisions governing judicial review of governmental action, which are intended to be focused and expeditious. For example, under CPLR Article 78, a proceeding challenging a determination by a "body or officer" must be commenced within four months after the determination becomes final, unless a shorter period is provided by law. See CPLR 217.[8] Once commenced, Article 78 proceedings are designed to proceed summarily and, in fact, typically resemble summary judgment motions. The "only questions that may be raised" are the legal questions that traditionally apply to judicial review of governmental action – i.e., whether the respondent "failed to perform a duty enjoined upon it by law," whether the respondent's actions are "without or in excess of jurisdiction," whether its determination "was made in violation of lawful procedure, was affected by error of law or was arbitrary and capricious or an abuse of discretion," or whether (if a formal hearing was held at which evidence was taken) the determination "is, on the entire record, supported by substantial evidence." CPLR 7803. The

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"limit[ed] its hearing to rather narrow issues." Report of the N.Y.S. Department of Audit and Control, Bill Jacket, L. 1977, ch. 839 (July 12, 1977), at 7. These pre-EDPL procedures thus resembled the procedures in many other states, where the condemnor makes a private determination to exercise eminent domain, after which, if that determination is challenged in court, the record is developed in the course of the litigation. This was the Connecticut procedure that was followed in Kelo. See, e.g., Berne v. Town of Stratford, 23 Conn. App. 554, 583 A.2d 136 (App. Ct. 1990). By contrast, the EDPL more closely resembles Pennsylvania's current system, on the basis of which abstention was found proper in Coles v. City of Philadelphia, 145 F. Supp. 2d 646 (E.D. Pa. 2001), aff'd, 38 Fed. Appx. 829 (3d Cir. 2002).

[8] In the land use context, many statutes establish 30-day limitation periods for judicial review so as to facilitate an owner's ability to rapidly take advantage of a project's approval. See Town Law § 267-c(1) (decision of town zoning board of appeals), § 274-a(11) (site plan review by town planning board, officer or department), § 282 (decision of town planning board concerning change in zoning regulations); Village Law § 7-712-c (decision by village zoning board of appeals), § 7-725-a(11) (site plan review by village planning board, officer or department), § 7-740 (decision by village planning board changing zoning regulations); Gen. City Law § 38 (decision by city planning board changing zoning regulations); see also N.Y.C. Admin. Code § 25-207(a) (decision by City's Board of Standards and Appeals).

respondent "shall file with the answer a certified copy of the record of the proceedings under consideration ...." CPLR 7804(e). "Leave of court [is] required for disclosure," except for notices to admit. CPLR 408. If the papers raise "a triable issue of fact," it "shall be tried forthwith." CPLR 7804(h). Unlike most state-court cases, moreover, non-final orders are "not appealable to the appellate division as of right ...." CPLR 5701(b)(1).

In the present case, plaintiffs fully participated in the public process that was conducted by ESDC, and personally and by counsel made extensive oral and written contributions to the record. But having participated in the part of the process established by EDPL § 207 that they found useful, they have elected not to participate in the second part. By commencing this action in federal court rather than a proceeding in the Appellate Division under EDPL § 207, plaintiffs have made an intentional election to avoid – and thus attempt to subvert – New York's carefully designed statutory scheme. The Report puts its finger on the nub of the problem:

> ... Allowing plaintiffs to do an end-run around the EDPL and instead litigate their claims in federal court would provide incentive for forum shopping and thereby undermine New York's legislative scheme governing the exercise of eminent domain power. No prospective condemnee, given the choice, would opt for narrow, on-the-record (yet constitutionally adequate) review in the Appellate Division if all of the benefits of federal review were freely available.

Report at 39. Neither the present plaintiffs nor those in similar positions in other cases should be permitted to game the system in this way. Indeed, given the enormous sums of money that a major project puts at risk, opponents can view the mere complexity and prolonged pendency of a litigation as a tactic that may strangle a project prior to any final adjudication of the merits.

Finally, contrary to plaintiffs' assertion, the Report's conclusion is not a determination that the provisions for judicial review enacted by New York's legislature in the

EDPL unconstitutionally "strip federal courts of their power to hear state or federal law challenges to eminent domain decisions" (Pl. Objections at 28). It is not that the EDPL purports to foreclose federal court review. Instead, as the Report recognizes, the federal courts, in the interest of federal-state comity, should desist voluntarily from injecting themselves into comprehensive state regulatory schemes that address important state interests, and should leave federal review to the end of the process. See, e.g., Levy v. Lewis, 635 F.2d 960, 964 (2d Cir. 1980) ("We think it best then that the federal questions involved be left in the first instance to the Superintendent with review available in the state courts and ultimately in the United States Supreme Court").

Conclusion

For the foregoing reasons and those set forth in the Report and the papers submitted by the other defendants, the Court should accept the Report's recommendation and dismiss this action under principles of Burford abstention.

Dated: New York, NY
March 23, 2007

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