

**Matter of City of Long Beach v Sun NLF Ltd.
Partnership**

2006 NY Slip Op 30741(U)

April 4, 2006

Supreme Court, Nassau County

Docket Number: 05-014660

Judge: Edward G. McCabe

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

Present: **HON. EDWARD G. MCCABE**

Justice

TRIAL/PART 2
NASSAU COUNTY

In the Matter of the Application of the

INDEX NO. 05-014660

CITY OF LONG BEACH

MOTION SEQ. NO.: 1,2 &3

Petitioner

To Acquire Real Property Situated between
Broadway and the Boardwalk, Long Beach
Boulevard and Riverside Boulevard

-against-

SUN NLF LIMITED PARTNERSHIP, SINCLAIR
HABERMAN; LOUIS BOMBART, STEVE
SILVERBERG and CHARLES ZARUCKI; LOU
BOMBART; IZAK FREMD; THERESA DURR;
ANN COHEN; FAYE LEWSON; SEYMOUR
ADELMAN and ROBERT GOLDENBERG;
PEARL TEPPERMAN; NEW YORK STATE
DEPARTMENT OF TAXATION & FINANCE;
and NASSAU COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Respondents.

X

The following papers were read on this application:

Notice of Petition.....1

Notice of Motion to Dismiss.....2

Memorandum of Law in Support of Motion to Dismiss....3

Notice of Cross-Motion.....4

Affirmation in Opposition to Motion to Dismiss and
in Support of Cross-Motion for Summary Judgment.....5

Petitioner’s Memorandum of Law in Opposition to
Motion to Dismiss and in Support of Cross-Motion.....6

Reply Affidavit in Further Support of Motion to
Dismiss and in Opposition to Cross-Motion.....7

Reply Memorandum of Law in Further Support
Motion to Dismiss.....8

The Petitioner, City of Long Beach, filed a Verified Petition for an order authorizing it to file an acquisition map in the Office of the County Clerk of the County of Nassau and upon the filing of said map directing that title to the Real Property therein described shall vest in the Petitioner pursuant to the New York State Eminent Domain Procedure Law and for the Court to fix a time for the filing of claims, pursuant to Section 503 of the Eminent Domain Procedure Law.

The City states it seeks to acquire the subject property for purposes of urban renewal and to eliminate blight, pursuant to a comprehensive plan in the City of Long Beach. The Petitioner further advises that on July 21, 2003, the Appellate Division (Second Dept.) completed a judicial review of the proposed acquisition, pursuant to Section 207 of the Eminent Domain Procedure Law, and found the

3.

Petitioner's proposed condemnation for urban renewal served a valid public purpose and that the City Council did not violate the mandates of the NYS Environmental Quality Review Act. An appeal to the Court of Appeals, pursuant to EDPL §207(b), was dismissed on November 24, 2003 and leave to appeal was denied by the Court of Appeals on June 24, 2004. Thereafter, a petition for a writ of certiorari was dismissed by the United States Supreme Court on January 12, 2005. The final order or judgment was duly entered on January 12, 2005.

The Respondents, Steve Silverberg and Louis Bombart, (hereinafter referred to as the Respondent Applicants), submit a motion to dismiss the Petition, to cancel the Notice of Pendency as to the properties they own, or in the alternative, request the issuance of an order allowing for discovery regarding the Petitioner's alleged improper delegation of its' condemnation powers to a private person for an alleged private non-public benefit. The Respondent Applicants further contend the condemnation petition is untimely with respect to them alone, that it violates their constitutional rights under the Fifth and Fourteenth Amendments and that the City seeks to acquire property for a predominantly private purpose. They believe the Petitioner passed the first of many resolutions prohibiting the development of certain property situated in Long Beach informally referred to as the "Superblock". Subsequent to the enactment of such City resolution, Respondents

4.

Bombart, Silverberg and Charles Zarucki acquired title to several parcels of land in the Superblock known as Section 59 Block 115 Lots 41-45 and Section 59 Block 116 Lots 1-10, 14 and 16.

The Respondent Applicants argue at the time they acquired these properties they reasonably expected the Petitioner's prohibition on development to expire shortly and that they would then be permitted to develop the properties in compliance with zoning laws. They believe the Petitioner frustrated their plans by continually imposing building moratoria on the Superblock properties. This practice continued for approximately twenty years.

On or about November 7, 2001, the Petitioner contracted to sell the Superblock properties to a private developer for seven million dollars for purposes of constructing a luxury hotel and condominiums. A copy of the contract of sale is attached to Respondent Applicants' motion as exhibit "C". Said contract was reportedly amended on or about April 15, 2005, to increase the purchase price so that it would equal the cost of acquiring all of the Superblock properties. This action was taken prior to the acquisition of the Superblock properties by condemnation, prior to the City's declaration that the condemnation of such properties was in the public interest and allegedly prior to the approval of an urban renewal plan. Respondent Applicants disagree with the description that the

City of Long Beach is suffering from blight and cite one study which discusses the City's growth, its' desirability and surmises the positive statistics reflect the continued revitalization of the City and the City's ability to attract and retain a diversified and economically-stable population.

The Respondent Applicants maintain the real party in interest in the proposed condemnation is the contract vendor and not the Petitioner City.

In response, the Petitioner submits a cross-motion seeking an order which denies the Respondents' motion to dismiss the subject condemnation petition and grants the City's cross-motion for summary judgment dismissing the Respondent's affirmative defenses and first and second counterclaims, upon the grounds that the City's Petition is clearly timely as it was brought within three years of the original order in the Matter of Sinclair Haberman vs. City of Long Beach Docket No. 2002-08803 dated July 21, 2003 and within three years of the final order dated January 12, 2005, let alone the final order. When addressing the Respondents' arguments regarding whether or not there is a proper public purpose for the City's proposed acquisition and whether the City has authority to fulfill its' plan for urban renewal through private development, the Petitioner contends such issues are all properly considered in the EDPL §207 judicial review proceeding for which the Appellate Division has exclusive jurisdiction. The Court agrees

and finds such issues are not properly raised in the context of this vesting proceeding. While the Respondent Applicants reportedly sought no relief under Article 2 of the EDPL, their neighbor Sinclair Haberman did. The Appellate Division has already decided this issue by finding, as a matter of law, that the City's plan of acquisition, urban renewal and comprehensive aggregation and development of the diverse parcels within the "Superblock" rationally fulfills an articulated public and governmental purpose. The City confirms it fulfilled its obligations under Article 3 of the EDPL to the extent offers to purchase were made and were rejected by these Respondents. The Petitioner further maintains the Respondent Applicants' claim they have been subjected to a "de facto" taking is not ripe, as the taking has not yet occurred. The Petitioner states the Respondents have not established an entitlement to any specific plan of development or any loss of a constitutionally protected property interest and that they have not exhausted the primary jurisdiction of the City's Architectural Review Board and Building Department. The City claims the defenses raised by Respondents, Silverberg and Bombart, are frivolous, without any merit in law or act and that they have been presented to delay or prolong the resolution of the litigation in an attempt to illegitimately impact negotiations and the ultimate determination of the just compensation to be paid for their land.

The Petitioner's Memorandum of Law discusses the Appellate Division's decision with respect to Mr. Haberman's "de facto taking" claim which was asserted in an action commenced after the City failed to issue a building permit for his property in the Superblock. According to the Petitioner, just like Respondent Applicants herein, Haberman argued the City's plan did not rationally further a legitimate public purpose and that he was denied due process and equal protection. The Petitioner's memorandum of law states that "the Appellate Division rejected these arguments holding "[The Plaintiff's] equal protection claim should have been dismissed. The Plaintiffs' claim that when the Defendants last extended the moratorium on development in the Superblock, they lifted it with respect to other properties in the surrounding area. Since the differing treatment for the properties located in the Superblock rationally furthered a legitimate articulated state purpose, i.e. the development of the Superblock properties as a single site, there is no merit to this cause of action (see, Matter of Doe vs. Coughlin, 71 N.Y. 2d 48, 56, 56 N.Y.S. 2d 782 (1987))."

The Petitioner advises the Court that the Respondent Applicants, Silverberg and Bombart; a.) never filed an application for a permit to build anything on their land, b.) never offered a plan of development for the City's consideration,

c.) never sought mandatory Architectural Review Board or Building Department review and approval, d.) never submitted or voiced any opposition to the building moratorium or to the City's well-publicized plan for Urban Renewal and comprehensive development of the Superblock, e.) they never filed a proceeding under EDPL §207 nor did they join in Sinclair Haberman's EDPL §207 proceeding. The City further notes they unsuccessfully moved to dismiss the Haberman EDPL §207 Petition, based upon his failure to join the other smaller property owners and the City's proposed developer of the Superblock, but the Court denied their motion.

The Petitioner's memorandum of law at p. 6-7 reads as follows: "By Order of **July 21, 2003**, the Appellate Division confirmed the City's Determination and dismissed the §207 Petition, holding:

"[A] study commissioned by the City of Long Beach in 1998 determined that the Superblock area was substandard and blighted due to the existence of vacant and under-utilized properties which were insufficiently sized and configured. The study concluded that full development of this prime area would require assemblage of the properties to allow for comprehensive redevelopment as a single site, and that the area was appropriate for urban renewal. The City Council thereafter prepared an Urban Renewal Plan,

which proposed to acquire the Superblock properties and redevelop them for retail, residential, commercial, and recreational uses. Requests for proposals were sent out and a developer was selected. The petitioner's proposals for development of a Superblock, although considered, were rejected. The Petitioner contends that condemnation of his property where he is ready, willing, and able to develop the property in a manner that is fully consistent with the City's urban renewal plan served no valid public purpose, and for this reason, the determination to condemn must be annulled. A municipality's taking of substandard land for urban renewal serves a valid public purpose (see, Yonkers Community Dev. Agency v Morris, 37 N.Y. 2d 478, 482, 373 N.Y.S. 2d 112, 335 N.E. 2d 327; see also Matter of Glen Cove Dev. Agency, 259 A.D. 2d 750, 712 N.Y.S. 2d 553; Sun Co. v. City of Syracuse Indus. Dev. Agency, 209 A.D. 2d 34, 43, 625 N.Y. S. 2d 371; Matter of Horoshko, 90 A.D. 2d 850, 456 N.Y.S. 2d 99). 'Judicial review of a condemnation determination is limited to whether the proceeding was constitutional, whether the proposed acquisition is within the condemnor's statutory jurisdiction, whether the determination and findings were made in accordance with the procedures set forth in EDPL article 2, and whether a

public use, benefit, or purpose will be served' (Matter of Congregation Gates of Prayer of Far Rockaway v. New York City School Constr. Auth., 286 A.D. 2d 439, 730 N.Y.S. 2d 241). In this instance, the respondents made that showing (see, EDPL 209[C]; Matter of East Thirteenth St. Community Assn. v. New York State Urban Dev. Corp., 84 N.Y.S. 2d 287, 295, n.2, 617 N.Y.S. 2d 706, 641 N.E. 2d 1368; Matter of Waldo's Inc. v. Village of Johnson City, 74 N.Y. 2d 718, 720, 544 N.Y.S. 2d 809, 543 N.E. 2d 74; Matter of Gen Cove Urban Renewal Agency, 84 Misc. 2d 186, 375 N.Y. 2d 261)."

The issue of whether economic development constitutes a valid public purpose and sufficient justification to warrant the exercise of eminent domain powers under the Fifth Amendment of the U.S. Constitution was addressed by the U.S. Supreme Court in a case entitled, Kelo vs. City of New London, 125 S. Ct. 2655, rehearing denied 126 S. Ct. 24, 2005 WL 2000 781 (Aug. 22, 2005). In this case, the U.S. Supreme Court found that the City of New London's proposed taking was based upon a carefully formulated development plan designed to reduce blight and spur economic development and that this unquestionably qualifies as a valid public purpose which should be given due deference.

The Respondent Applicants argue the Petitioner's proposed acquisition of the Superblock properties in Long Beach is not for a valid or legitimate public use. They claim the proposed acquisition is primarily designed to bestow a private benefit on a private for-profit developer. Such arguments were previously addressed and rejected by the Appellate Division in the Matter of Sinclair Haberman v. City of Long Beach, 307 A.D. 2d 313, 762 N.Y.S. 2d 425 (July 2003). In this case the Appellate Court held that (1) a municipality's taking of substandard land for urban renewal served a valid public purpose, (2) the record supported the Council's determination that taking the vacant oceanfront land that included the landowner's property would serve a public purpose; and (3) that the City Council's decision to pursue the acquisition of the Superblock properties was made in accordance with the procedures set forth in EDPL Article II.

Furthermore, EDPL Section 207(a) clearly states that "any person or persons jointly or severally, aggrieved by the condemnor's determination and findings....may seek judicial review thereof by the Appellate Division of the Supreme Court...." The EDPL Section 207(b) states "The jurisdiction of the Appellate Division of the Supreme Court shall be exclusive." This statute cannot be circumvented by raising their objections within the context of the vesting

proceeding. See, City of New Rochelle vs. O. Mueller, Inc., 191 A.D. 2d 435, 594, N.Y.S. 2d 301 (Second Dept. 1993).

The Petitioner raises significant legal arguments in response to Respondent Applicants' "de facto taking" counterclaim based upon the City's resolutions implementing moratoria on building on the Superblock properties. The Respondent Applicants' acknowledge the moratorium was in effect when they purchased the subject property, but claim they expected it to be a temporary restraint, rather than one which would continue in excess of twenty years.

Whether or not this expectation was reasonable is a question of fact. The Petitioner argues mere ownership of the land is not enough, the law requires a "final decision by the administrative agencies having jurisdiction to maintain a successful claim for a temporary regulatory taking, citing Williamson Co. Regional Planning Comm., 473 U.S. at 187-188, 150 S. Ct. At 3117. The Respondent Applicants' refer the Court to cases in which Courts have dispensed with this requirement, if the circumstances were indicative such an application would be futile. In Lehigh Portland Cement Company vs. N.Y.S. Dept. Of Environmental Conservation, 87 N.Y. 2d 136, 140 (1995), the Court found "exhaustion of administrative remedies is not required where an agency's action is challenged as beyond its grant of power or when resort to an administrative

remedy would be futile.” The Respondent Applicants maintain that in light of the “chronic moratoria,” any application on their part would have been futile and they note the Petitioner has not refuted this.

As the Court of Appeals held in a case cited by Petitioner, Fred French Investing Co., Inc. vs. City of New York, 39 N.Y. 2d 587, 385 N.Y.S. 205 (1976)

“While the police power of the state to regulate the use of private property by zoning is broad indeed, it is not unlimited. The State may not, under the guise of regulation by zoning, deprive the owner of the reasonable income or other private use of his property and thus destroy all but a bare residue of its economic value.

Such an exercise of police power would be void... The distribution between a compensable regulation is not always susceptible of precise demarcation.” When regulations go too far they can amount to a taking or the resolution’s invalidity, which in this case would be moot as the subject moratorium expired. Damages would entail the destroyed economic value of the property.

However, Petitioner argues the Respondent Applicants’ “de facto taking” claim is barred due to the expiration of the four month statute of limitations applicable to Article 78 proceedings, pursuant to CPLR 217, and the failure to have litigated these issues within the three year statute of limitations period

applicable to an inverse condemnation. See Sarnelli vs. City of New York, 256 A.D. 2d 399, 681 N.Y.S. 2d 578, 580 (Second Dept. 1998). Petitioner also contends the moratorium was a legislative act subject to a six year Statute of Limitations found in CPLR 213 and still time-barred. The Court agrees with the well-established principle set forth in Petitioner's Memorandum of Law on p. 59 that "a claim accrues...when damages are reasonable ascertainable....Under these circumstances....the instant claim accrued at the latest....following the last administrative deprivation of the economically viable use of the property was certainly reasonably ascertainable by this time. Arbor Hill Partners ex rel. F.D. Rich Housing Corp. vs. N.Y.S. Commissioner of Housing & Community Renewal, 267 A.D.2d 675, 699 N.Y.S. 2d 544, 545-546 (Third Dept., 1999), Linzenberg vs. Town of Ramapo, supra. 766 N.Y.S. 2d at 218. In the subject action, the Respondent Applicants' were aware of the first 1975 building moratorium on their property from the date they acquired title to it in 1978 and took no action with respect to their claim for over a period of at least twenty-seven years. This Court finds their Respondent Applicants' second counterclaim for a "de facto taking" is time barred, pursuant to CPLR 214 (4) and CPLR 213.

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the Petitioner's application for an order authorizing it to file an acquisition map in the Office of the Nassau County Clerk and upon the filing of said map directing that title to the real property therein described shall vest in the Petitioner, pursuant to the NYS Eminent Domain Procedure Law, and for the Court to fix a time for the filing of claims, pursuant to Section 503 of the Eminent Domain Procedure Law, is granted, and the Court has signed the proposed Vesting Order herewith; and it is further

ORDERED, that the Respondent Applicants' motion for the dismissal of the subject Petition, the cancellation of the Notice of Pendency as to the properties they own, or in the alternative, the issuance of a discovery order regarding the Petitioner's alleged improper delegation of its' condemnation powers to a private person for an alleged private and non-public benefit, is denied; and it is further

ORDERED, that the Petitioner's cross-motion seeking an order denying Respondent's motion to dismiss the condemnation petition, is granted; and it is further

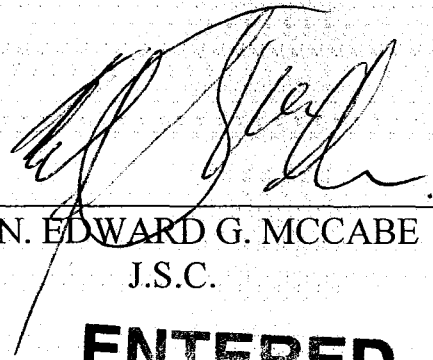
ORDERED, that the portion of the Petitioner's cross-motion which seeks the dismissal of the Respondent Applicants' affirmative defenses and their first and second counterclaims, is granted; and it is further

ORDERED, that the Petitioner's application for sanctions against the Respondent Applicants, is denied.

This constitutes the order and decision of this Court.

ENTER:

Dated: April 4, 2006
Mineola, NY



HON. EDWARD G. MCCABE
J.S.C.

ENTERED

APR 07 2006

COUNTY CLERK'S OFFICE