To be argued by:
Michael A. Fogel, Esq.
(Time requested: 15 minutes)

APL No. APL-2023-00052
Appellate Division, Fourth Department Docket No. OP-00744

Court of Appeals

of the

State of New York

BOWERS DEVELOPMENT, LLC and
ROME PLUMBING & HEATING SUPPLY CO., INC.,

Petitioners-Respondents,

– against –

ONEIDA COUNTY INDUSTRIAL DEVELOPMENT AGENCY
and CENTRAL UTICA BUILDING, LLC,

Respondents-Appellants.

BRIEF FOR PETITIONERS-RESPONDENTS IN OPPOSITION TO COUNTY OF ONEIDA'S AMICUS CURIAE BRIEF

FOGEL & BROWN, P.C.
Michael A. Fogel, Esq.
Attorneys for Petitioners-Respondents
120 Madison Street, Suite 1620
Syracuse, New York 13202
(315) 399-4343
mfogel@fogelbrown.com

October 4, 2023

CP COUNSEL PRESS
(800) 4-APPEAL • (512889)

Rule 500.1(f) Corporate Disclosure Statement

Petitioners-Respondents are not publicly held corporations or business entities. They have no subsidiaries or affiliates that are publicly traded.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Other Authorities:

PRELIMINARY STATEMENT

Petitioners-Respondents ("Respondents") respectfully submit this Brief in opposition to the brief of *amicus curiae* the County of Oneida ("County").

Despite acknowledging that the project of Appellant Central Utica Building, LLC ("CUB") is a hospital and healthcare related facility that is part of the overall Wynn Hospital Campus and that healthcare is a "non-statutorily enumerated purpose" under General Municipal Law section 858 (*see* County Brief, pp. 3, 6, 7 and 14), the County nonetheless urges the Court to simply "rubber stamp" Appellant Industrial Development Agency's ("OCIDA") determination and findings to take the property. The County even argues that OCIDA's actions should have been entirely immune from judicial review, going so far as to contend that Respondents' "improperly enlisted the judiciary" in commencing this challenge to the taking of their property (*see* County Brief, p. 13). Given the serious nature of any condemnation action, it is disturbing that the County would take this position.

By CUB, Mohawk Valley Health System ("MVHS"), OCIDA, and now the County's admissions, the property is undeniably for CUB's hospital and health care related facility and is part of the overall Wynn Hospital Campus. As held by the Fourth Department, based on its review of the record developed before OCIDA (it was not a *de novo* review as alleged by Appellants and the County), OCIDA did not

have the statutory authority to condemn the property for the hospital or healthcare related facilities (*see* GML § 858). [A. 990][1]

For these reasons, and those set forth in Respondents' principal brief, it is respectfully submitted that this Court should affirm the Fourth Department's decision annulling OCIDA's determination and findings purporting to condemn the property.

STATEMENT OF FACTS

Respondents respectfully refer the Court to the counterstatement of the case and facts set forth in Respondents' principal brief.

ARGUMENT

POINT ONE

THE PROPOSED ACQUISITION IS NOT WITHIN OCIDA'S STATUTORY JURISDICTION AND AUTHORITY, AND THE FOURTH DEPARTMENT WAS CORRECT TO ANNUL ITS EDPL ARTICLE 2 FINDINGS

A. CUB's Project is a Hospital or Healthcare Related Facility, not a "Commercial" Project under GML § 858.

Industrial development agencies are creatures of statute and are limited to the specific powers provided to them under their enabling statutes set forth in General Municipal Law Article 18-A. GML Article 18-A contains the provisions of law governing the authority and powers of industrial development agencies within New

[1] References to "R ___" are to the Record on Appeal. References to "C ___" are to Appellants' Compendium. References to "A ___" are to the Appendix of Appellants.

York State. While GML § 852 sets forth the general purposes of IDAs, those "purposes" are limited by the specific powers conferred to IDAs by GML § 858, entitled "Purposes and Powers," in GML Article 18-A.

IDA activities, including eminent domain takings, are limited to the projects set forth in GML § 858. As held by the Fourth Department, GML § 858 does not include hospitals or other healthcare related facilities. Even the County admits that "healthcare" is "a non-statutorily enumerated purpose." *See* County Brief at 14. Thus, hospitals or other healthcare related facilities are not within OCIDA's statutory authority under GML § 858, and as such, it cannot utilize its eminent domain authority for such projects.

All the Fourth Department did in annulling OCIDA's determination and findings was correctly give effect to the statute's plain language under the acknowledged fact that the project is related to a hospital or healthcare facility. [R. 5285, 5287, 5325, 5368-5371, 5477, 5480-5482, 5565-5570, 5571, 5572, 5573] In doing so, the Fourth Department did not conduct a *de novo* review or pick "winners and losers" as the County contends, instead the Fourth Department engaged in the required review pursuant to EDPL § 207 and determined pursuant to EDPL § 207(C)(2) that OCIDA acted outside of its statutory jurisdiction and authority based on its review of OCIDA's *record* which unequivocally demonstrates that the project

was a hospital and healthcare related facility and not a "commercial" project. [A. 990]

As set forth fully in Respondents' principal brief, the EDPL Article 2 hearing record makes it crystal clear that the true nature of the project is a hospital and healthcare related facility: OCIDA, CUB, and MVHS admitted throughout the record that the "centerpiece" of the project is a physician-hospital surgery center joint venture with six operating room ambulatory surgery center suites requiring a Certificate of Need from the Department of Health pursuant to Article 28 (significantly entitled "Hospitals") of the New York Health Law. [R. 5285, 5287, 5325, 5368-5371, 5477, 5480-5482, 5565-5570, 5571, 5572, 5573]

Despite this clear record evidence that the project was for anything but a "commercial" use, office building or parking lot[2], the County contends that the Fourth Department should have merely deferred to OCIDA's determination and findings. But no deference is owed here. It is well settled that "where the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent . . . courts are free to ascertain the proper interpretation from the statutory language and legislative intent." *See Seittelman v. Sabol,* 91 NY3d 618

[2] Any perceived overall parking "problem" caused by the hospital campus project, even if one exists, was caused by the lack of planning by the County and has nothing to do with the question on this appeal of whether OCIDA acted outside of its statutory authority in purporting to utilize its eminent domain powers in this matter.

(1998). Therefore, in reviewing the question of the scope of the term "commercial" in GML § 858 as it relates to OCIDA's eminent domain authority, OCIDA is not to be afforded any deference at all in how it may have interpreted or applied the term "commercial" in its Determination and Findings.

This is especially the case in matters of eminent domain where statutes conferring the powers of eminent domain to a condemnor, must be strictly construed against them. *See* Respondents' Principal Brief, Point I.A; *see, e.g., Syracuse Univ. v. Project Orange Assocs. Servs. Corp.,* 71 AD3d 1432, 1435 (4th Dept 2010), citing *Schulman v. People,* 10 NY2d 249, 255-256 (1961); *Peasley v. Reid,* 57 AD2d 998, 999 (3d Dept 1977) ("It is axiomatic that a statute which gives the State a right to deprive a person of his property against his will must be strictly construed."); *see also,* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 293 ("A delegation of the sovereign power of condemnation is strictly construed") and McKinney's Cons. Laws of N.Y., Book 1, Statutes § 312 ("Generally, a statute which take the property of one person without his consent for the benefit of another is in derogation of common right and should be strictly construed").

This is precisely why the County's attempt to avoid this well-settled standard of review is wholly misplaced. The County, like Appellants, purports to rely on *Kaur v. New York State Urban Dev. Corp.,* 15 NY3d 235 (2010) for a "rational basis" standard of review of OCIDA's actions. But *Kaur* is easily distinguished from this

matter. *Kaur* was an appeal as of right with the petitioner's primary argument addressed to the constitutionality of the New York State Urban Development Corporation's ("UDC") condemnation under Unconsolidated Law 6260 based on a determination of blight for a Columbia University urban campus development as a public use. *Kaur* has no bearing on the authority of an IDA to condemn property for a hospital or healthcare related project. The other cases the County relies on in its brief can be rejected out of hand. *Peckham v. Calogero,* 12 NY3d 424 (2009) involved an Article 78 proceeding against the New York Division of Housing and Community Renewal, which is inapplicable to a proceeding challenging an IDA's authority to exercise eminent domain. The County's reliance on *Howard v. Wyman,* 28 NY2d 434 (1971) is similarly misplaced as it related to an Article 78 proceeding against the New York City Social Services Department and had nothing at all to do with IDA authority under GML § 858.

The Court's review under EDPL § 207 is not, as the County posits, simply a "rubber stamp" of OCIDA's claimed eminent domain authority regardless of the facts in the record. OCIDA's determination and findings are owed no deference, and the scope of OCIDA's eminent domain authority must be strictly construed against them as the condemnor and not extended by inference or implication.

The bottom line is that based on Appellants' admissions in the record of this matter, and as correctly held by the Fourth Department, the project is a hospital or

healthcare related facility, not a "commercial parking lot" as Appellants' claim and is therefore outside of OCIDA's statutory authority and jurisdiction to use eminent domain.

B. OCIDA's incorrect statements about Respondents are irrelevant to the question of OCIDA's statutory authority or jurisdiction to utilize eminent domain in this matter.

Throughout its brief, the County needlessly maligns Respondent Bowers Development with statements and references to documents outside of the record in a blatant attempt to cast it in a bad light with the Court. As stated in the record of this appeal, Bowers Development is one of the most active developers in the City of Utica and has invested a significant amount of time, effort and money into development and restoration of buildings in Utica. [A. 1, ¶ 2, 6, ¶¶ 28-29, ¶ 169; R. 5302, 5561] Besides being untrue, such statements by the County are completely irrelevant to the question of whether OCIDA acted within its jurisdiction and authority in utilizing eminent domain in this matter.

While Bowers Development does intend to build a medical office building on the property purported to be taken by OCIDA (a fact, which the record clearly establishes, OCIDA knew long before it contemplated using eminent domain to take the property), that does not mean Bowers Development is any less entitled to the protections and limitations in place to ensure that its property is not taken by eminent

domain through actions well outside a condemnor's authority as OCIDA purports to do here. [R. 5302, 5315]

C. The purported public use, benefit or purpose of OCIDA's taking is entirely irrelevant to the question of OCIDA's statutory authority and jurisdiction.

The County spends most of its brief discussing the purported public use, benefit and purpose of the acquisition and how it fits in with the overall hospital campus project. Other than being admissions by the County that OCIDA's purported taking is indeed for a hospital and healthcare facility project, the discussion is simply irrelevant to the question on this appeal whether OCIDA had the statutory jurisdiction and authority to take the property through eminent domain, which is a completely different factor for judicial review under EDPL § 207. *See* EDPL § 207(C)(2) *compare* EDPL § 207(C)(4). Therefore, regardless of whether the overall project serves a public use, benefit or purpose (without admitting that is the case), that does not give OCIDA the right to act outside of its statutory authority and jurisdiction to take property.

D. The Fourth Department's decision has no significance for IDAs statewide.

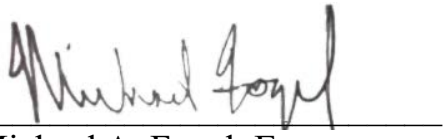
The County does not even attempt to demonstrate that it offers a unique perspective on the purported impacts of the Fourth Department decision on IDAs statewide. Nonetheless, the County is wrong. The decision confirms that an IDA must act within the jurisdiction and authority granted in GML § 858 when exercising

eminent domain authority. If, upon Court review, the record demonstrates that an IDA failed to act within their jurisdiction and authority, as was the case here, that IDA's determination will be annulled. That is a fundamental concept and certainly not a novel issue that will impact IDAs statewide.

CONCLUSION

For all the foregoing reasons, and those set forth in Respondents' principal brief, Respondents respectfully request that the Court affirm the Fourth Department's Order annulling OCIDA's Determination and Findings to condemn the property by eminent domain and grant Respondents such other and further relief as is just and proper.

Dated: October 4, 2023
Syracuse, New York



Michael A. Fogel, Esq.
FOGEL & BROWN, P.C.
Attorneys for Petitioners-Respondents
120 Madison Street, Suite 1620
Syracuse, New York 13202
Tel: (315) 399-4343
mfogel@fogelbrown.com

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

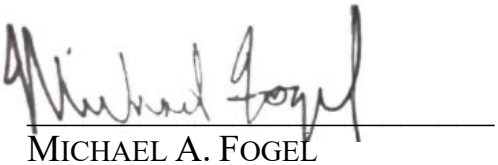
I hereby certify pursuant to 22 NYCRR PART 500.13 that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14
Line spacing: Single

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service certificate of compliance, corporate disclosure statement, questions presented, statement of related cases, or any authorized addendum containing statutes, rules, regulations, etc. is 1,992 words.

Dated: October 4, 2023



MICHAEL A. FOGEL
FOGEL & BROWN, P.C.
Attorneys for Petitioners-Respondents
120 Madison Street, Suite 1620
Syracuse, New York 13202
(315) 399-4343
mfogel@fogelbrown.com

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On October 4, 2023

deponent served the within: **BRIEF FOR PETITIONERS-RESPONDENTS IN OPPOSITION TO COUNTY OF ONEIDA'S AMICUS CURIAE BRIEF**

upon:

Goldman Attorneys PLLC
Attn: Erika C. Browne, Esq.
255 Washington Avenue Extension
Suite 108
Albany, New York 12205

Cohen Compagni Beckman Appler & Knoll, PLLC
Attn: Laura L. Spring, Esq.
507 Plum Street, Suite 310
Syracuse, New York 13204

Lippes Mathias LLP
James A. Shannon, Esq.
Frank J. Fanshawe, Esq.
54 State Street, Suite 1001
Albany, New York 12207

Oneida County Department of Law
Andrew M. Dean, Esq.
800 Park Avenue
Utica, New York 13501

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on October 4, 2023

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

T. Heath

Job# 512889