To be Argued by:
MICHAEL A. FOGEL
(Time Requested: 15 Minutes)

APL No. 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 RESPONSE TO *AMICUS CURIAE* NEW YORK STATE ECONOMIC DEVELOPMENT COUNCIL INC.

MICHAEL A. FOGEL
FOGEL & BROWN, P.C.
Attorneys for Petitioners-Respondents
120 Madison Street
AXA Tower II, Suite 1620
Syracuse, New York 13202
Tel.: (315) 399-4343
Fax: (315) 472-6215
mfogel@fogelbrown.com

CP COUNSEL PRESS (800) 4-APPEAL • (512964)

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* New York State Economic Development Council Inc. ("EDC").

In its brief, EDC does no more than repeat the same misguided arguments advanced by Appellants Oneida County Industrial Development Agency ("OCIDA") and Central Utica Building, LLC ("CUB") in an attempt to shoehorn the proposed CUB hospital and health care facility into the definition of "commercial" in General Municipal Law section 858. EDC's, like OCIDA and CUB's, purported expansive definition of "commercial" flies in the face of the express language in the statute and legislative intent which cannot be cast aside as EDC argues to allow an IDA to have *carte blanche* to use eminent domain whenever it likes under the guise of "economic development." Moreover, EDC is wrong about the scope of review that applies to OCIDA's determination and findings. OCIDA is not entitled to any deference at all and its actions – and any interpretation of General Municipal Law section 858 - must be strictly construed as OCIDA's actions involve the exercise of eminent domain.

The bottom line is that EDC's arguments are to no avail because, 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 EDC) "OCIDA lacked the requisite statutory authority to acquire the subject property" because "[t]he purposes

enumerated in [General Municipal Law section 858] do not include projects related to hospital or healthcare-related facilities." [A. 990][1]

For these reasons, and those set forth in Respondents' principal brief, it is respectfully submitted that this Court 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 York State. While GML § 852 sets forth the general purposes of IDAs, those

[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.

"purposes" are limited by the specific powers conferred to IDAs by GML § 858, entitled "Purposes and Powers," in GML Article 18-A.

EDC ignores this point and purports to rely on the general statement of purpose contained in GML §§ 852 and 858 to support its argument that IDA's have essentially *carte blanche* to approve any project, or use eminent domain for any project, so long as it supports "economic development." If that were true, the legislature would not have specifically listed projects in GML § 858 for which IDAs have authority. Indeed, EDC's contention ignores the limitations on IDA powers set forth in GML § 858, which, among other limitations, provides the current list of projects for which industrial development agencies have authority, which are as follows: "industrial, manufacturing, warehousing, commercial, research, renewable energy and recreation facilities including industrial pollution control facilities, educational or cultural facilities, railroad facilities, horse racing facilities, automobile racing facilities, renewable energy facilities and continuing care retirement communities."

IDA activities, including eminent domain takings, are limited to the projects set forth in GML § 858. In fact, EDC even acknowledges that GML § 858 limits IDA actions to those "powers expressly given in this title." EDC Brief at 4. As held by the Fourth Department, GML § 858 does not include hospitals or other healthcare related facilities. Thus, they are not within OCIDA's eminent domain authority.

Giving effect to the statute's plain language under the acknowledged fact that the project is related to a hospital or healthcare facility, does not mean that the Fourth Department's "decision is at odds" with the GML. EDC Brief at 4. Moreover, EDC misconstrues the Fourth Department's decision. In fact, the Fourth Department properly found that the IDA acted outside of its authority here based on the IDA's record that the project was a hospital and healthcare related facility and not a "commercial" project.

GML § 858 provides a list of *specific projects* for which IDAs have jurisdiction to approve, or exercise other rights granted to it by statute, including the power of eminent domain. The best evidence of this, and one which EDC conveniently ignores in its brief, is the fact that GML § 858 has been amended several times to add additional *specific projects* for which industrial development agencies have authority (*e.g.,* "community care retirement communities" added to GML § 858 in 1997 [1997 Sess. Law News of N.Y. Ch. 659]; "renewable energy projects" added to GML § 858 in 2021 [2021 Sess. Law News of N.Y. Ch. 59]).

EDC, like OCIDA, CUB and the other *amicus curiae* parties, ignores this clear evidence of legislative intent that the terms included in GML § 858 such as "commercial" are not intended to be "broadly defined categories" because the legislature would not have seen the need to add additional project types granting IDA's additional authority over the years if all that was necessary was for an IDA to

determine that a particular project was "commercial" in nature. Significantly, the State Legislature has proposed "hospitals" at least twice to be *specifically* added to GML § 858. *See* 1980 NY Op. Atty. Gen. 139, C.1 ("Assembly Bill 3006 introduced on February 12, 1979, would add hospital facilities"); *see also* 1981 NY Op. Atty. Gen. 56, C.4 ("With specific reference to hospitals, we note that another bill – S 3168/A. 4114 – to add hospital facilities is pending before the Legislature"). This is additional evidence that hospitals and healthcare related facilities were not intended by the legislature to be subsumed into the word "commercial" in GML § 858. In other words, the legislature would not need to consider adding "hospitals" specifically to GML § 858 if such projects were already covered by the definition of "commercial," as EDC contends.

While EDC, like OCIDA and CUB, may want all hospital and health care projects swallowed up in the term "commercial," that contradicts the jurisdiction and authority granted under GML § 858. EDC ignores the fact that this is especially the case where, as here, the IDA action being challenged involves the use of eminent domain, which, as discussed in Respondents' main brief, must be strictly construed against the condemnor and the statute conferring the power of eminent domain to the IDA, in this case GML § 858, must be strictly construed and cannot be extended by inference or implication. *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; *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."]).

EDC's proposed expansive definition of "commercial" to cover all "hospital or health-care related facilities" would constitute exactly the type of "extension by implication or inference" that Courts have said cannot be done when evaluating the authority to use eminent domain (*see, Schulman v. People,* 10 NY2d 249, *supra; 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").

EDC's definition of "commercial" flies in the face of the intent of the legislature which cannot just be cast aside as EDC argues under the guise of "economic development." It is clear that the legislature did not intend that or it would not have listed specific projects for which IDAs have authority in GML § 858. Moreover, as discussed above, if the legislature had intended IDAs to have such broader powers, it would not have included a list of specific projects, and certainly would not have added to that list of specific projects several times over the

years. Clearly, the argument EDC advances is inconsistent with the legislature's intent and express statutory language in GML § 858 and is illogical.

That is also why EDC's reliance on the dictionary definition of "commercial" or citations to how other completely irrelevant statutes have defined "commercial" is of no moment. EDC Brief at 6-7. Similarly, it was not up to Respondents to "advance a viable alternative definition of the term 'commercial'" as EDC argues.

Indeed, the only relevant inquiry is the plain language of the statute and what the legislature intended by the word "commercial" in GML § 858, which as discussed above makes it clear that did not intend for that term to be interpretated so broadly as to include hospital and healthcare related facilities within that term, which the Fourth Department clearly agreed with. As discussed in Respondents' prior briefings, Attorney General Opinions make it clear that the projects listed under GML § 858 for which IDAs are limited to, including powers of eminent domain, does not include hospitals or other health-related facilities (1981 NY Op. Atty. Gen. 55; 1980 NY Op. Atty. Gen. Inf. 139). In fact, the Attorney General Opinions state that "[t]here is no basis for inferring a legislative intent to cover a hospital, nursing home, or any other health-related facility under the umbrella word 'commercial'" (1981 NY Op. Atty. Gen. 55; 1980 NY Op. Atty. Gen. Inf. 139).

Accordingly, the Fourth Department correctly annulled OCIDA's EDPL findings.

B. The Fourth Department applied the correct standard of review in annulling OCIDA's Determination and Findings; OCIDA was not entitled to any deference.

The Fourth Department in annulling OCIDA's determination and findings correctly gave 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 as EDC 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], EDC 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 (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; *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

[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.

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 EDC's attempt to avoid this well-settled standard of review is wholly misplaced. EDC, 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.

Goldstein v. New York State Urb. Dev. Corp., 13 NY3d 511 (2009) also does not help EDC's argument. First, the question addressed in *Goldstein* was whether the mixed-use redevelopment project at issue fell within the Constitutional power of eminent domain for the public purpose or use of removal of urban blight. *Goldstein*

did not present the issue, as in this case, of whether the legislature had granted the power of eminent domain in the first instance and did not apply GML § 858. Even if one assumes *arguendo* that the project before an IDA serves a public purpose, or use, that does not necessitate a ruling that the IDA has eminent domain authority for the project in the first instance (*see generally Schulman,* 10 NY2d 249).

EDC's reliance on *Nearpass v. Seneca Cnty. Indus. Dev. Agency,* 152 AD3d 1192 (4th Dept 2017) is similarly misplaced. The Fourth Department was obviously aware of *Nearpass* and realized that is holding did not apply here and for good reason. First and foremost, *Nearpass* involved an Article 78 proceeding challenging an IDA's grant of financial assistance for a casino project, and did not involve eminent domain which as explained above involves a different standard of review than the typical rational basis test in Article 78 proceedings. Therefore, *Nearpass* does not support EDC's contention that OCIDA had authority to condemn the property here, or that its decision should be subject to a rational basis test and not strictly construed. At most *Nearpass* stands for the proposition that an IDA has the authority to grant financial benefits for a casino and that a casino project falls within the definition of "commercial". Significantly, an IDA's grant of financial benefits for a project versus an IDA's attempt to utilize eminent domain to take a property from one party to give it to another cannot possibly be viewed through the same lens.

As set forth above, a condemnor's exercise of eminent domain must be strictly construed.

The Court's review under EDPL § 207 is not, as EDC 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.

C. The Fourth Department's decision has no significance for IDAs statewide, and the examples of other projects proffered by EDC are irrelevant.

The Fourth Department's decision does not create the "dark cloud" over IDA actions that EDC would lead this Court to believe. The decision merely 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. Again, if EDC, like *amicus curiae* Iroquois Healthcare, wishes to add hospitals and healthcare related facilities to the list of IDA powers, it can lobby the legislature to add hospital and health-care related facilities to GML § 858, as others have done for other types of projects not then within the express authority of the statute.

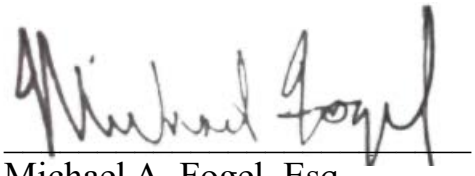
The examples EDC offers of other projects they submit are like the project being advanced here by OCIDA are of no moment. EDC Brief at 11-12. First, it is not clear at all what the record of those matters contains regarding the true nature of those projects and whether they fall within the respective IDA's authority. Second, those two examples apparently did not involve the exercise of eminent domain (at least EDC does not claim they did) and only involved the grant of tax benefits, which as discussed above is viewed through a completely different light then when eminent domain powers are implicated. Third, there was no court review of these actions, so no conclusion can be reached at all that those projects were in the respective IDA's authority. Therefore, no precedential value can be drawn from these projects and they are completely irrelevant to the issue presented in this case.

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: November 2, 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 3,228 words.

Dated: November 2, 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

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 November 2, 2023

deponent served the within: **BRIEF FOR PETITIONERS-RESPONDENTS IN RESPONSE TO *AMICUS CURIAE* NEW YORK STATE ECONOMIC DEVELOPMENT COUNCIL, INC.**

upon:

Kyle D. Gooch, Esq.
HARRIS BEACH PLLC
Attorneys for Amicus Curiae New York State Economic Development Council
99 Garnsey Road
Pittsford, New York 14534
(585) 419-8800

Paul J. Goldman, Esq.
GOLDMAN ATTORNEYS PLLC
Attorneys for Respondent-Appellant Oneida County Industrial Development Agency
255 Washington Avenue Extension
Suite 108
Albany, New York 12205

Laura L. Spring, Esq.
COHEN COMPAGNI BECKMAN APPLER & KNOLL, PLLC
Attorneys for Respondent-Appellant Central Utica Building, LLC
507 Plum Street, Suite 310
Syracuse, New York 13204

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

Andrew M. Dean, Esq.
ONEIDA COUNTY DEPARTMENT OF LAW
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 November 2, 2023

Mariana Braylovskiy

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

Job# 512964