SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT

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

Petitioners,

-against-

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

Respondents.

**AFFIRMATION OF MICHAEL A. FOGEL, ESQ. IN OPPOSITION TO THE MOTIONS FOR LEAVE TO REARGUE OR TO APPEAL TO THE COURT OF APPEALS**

Case No. OP 22-00744

Michael A. Fogel, Esq., an attorney duly admitted to practice before the courts of the State of New York, affirms the following under penalty of perjury:

1. I am a partner in the law firm of Fogel & Brown, P.C., attorneys for Bowers Development, LLC ("Bowers") and Rome Plumbing & Heating Supply Co. Inc. ("Rome Plumbing") (collectively "Petitioners") in the above-captioned matter. As such, I am fully familiar with the facts stated herein.

2. I submit this affirmation in opposition to the joint motion of Oneida County Industrial Development Agency ("OCIDA") and Central Utica Building, LLC ("CUB") (collectively "Respondents"), filed January 24, 2023, and January 25, 2023 (Dkt. 35 & 36), for an order granting leave to reargue and/or leave to appeal to the Court of Appeals from this Court's Memorandum and Order dated December 23, 2022 (the "Decision").[1]

3. OCIDA and CUB seek reargument of the Decision based on erroneous grounds that the Court "overlooked" *Nearpass v Seneca Cnty. Indus. Dev. Agency*, 152 AD3d 1192 (4th Dept 2017) or other purported "binding precedent". As discussed below, the Court did not overlook

[1] References to "Dkt." are to documents filed in this proceeding on the New York State Courts Electronic Filing ("NYSCEF") system. References to "R." refer to the Record filed by OCIDA (Dkt. 9 to 17).

*Nearpass*, especially since *Nearpass* was discussed extensively in the briefs and at oral argument. The purported "binding precedent" proffered by OCIDA are not precedent as to OCIDA's authority to exercise eminent domain. OCIDA and CUB have thus failed to meet their burden of demonstrating they are entitled to reargument.

4. OCIDA and CUB also seek leave to appeal to the Court of Appeals on erroneous grounds that there is a purported novel issue here of public importance worthy of appeal to the Court of Appeals and that there is a purported conflict with Court of Appeals precedent or a purported conflict between the Appellate Division Departments. As discussed in the following, there is no such novel issue worthy of leave to appeal to the Court of Appeals, and there is no conflict between the Appellate Division Departments or with Court of Appeals precedent. As set forth below, OCIDA and CUB have failed to meet the standards to be granted leave to appeal to the Court of Appeals.

5. For all the reasons discussed herein, OCIDA's and CUB's motions should be denied in their entirety.

## POINT I

## THE MOTIONS OF OCIDA AND CUB FOR LEAVE TO REARGUE SHOULD BE DENIED

### *A. The Standard for Leave to Reargue*

6. A motion to reargue must be based upon relevant matters of fact or law allegedly overlooked or misapprehended by the Court in rendering a decision (CPLR 2221[d][2]; 22 NYCRR 1250.16[d][2]; *HSBC Bank, USA v Infinity Auto Glass Distributors, Inc*., 27 AD3d 1094, 1095 [4th Dept 2006]; *Foley v Roche,* 68 AD2d 558, 567-568 [1st Dept 1979]). A motion to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue

the same issues that the Court previously decided or to present arguments different from those originally presented (*Foley,* 68 AD2d at 567-568).

7. Respondents have failed to meet the standard for their joint motion for leave to reargue. Respondents are attempting to do no more than reargue the same "facts" and arguments that they previously raised and which this Court already rejected.

***B. The Court Did Not Overlook Nearpass***

8. The parties extensively briefed and argued *Nearpass v Seneca Cnty. Indus. Dev. Agency*, 152 AD3d 1192 (4th Dept 2017). *Nearpass* was discussed multiple times in the record and briefs, including in Respondents' Answer (Dkt. 6, pdf pg. 44), in Petitioners' brief (Dkt. 26, pg. 17), in Respondents' joint brief (Dkt. 28, pgs. 24, 26, 30), in Petitioners' reply brief (Dkt. 30, pgs. 9-10) and in the record (R. 5879) as well as at oral argument (Fourth Department Oral Argument Archives, October 17, 2022, Calendar Case No. 764 at 1:44:47).

9. The Court did not overlook *Nearpass*. The Court simply disagreed with OCIDA and CUB as to the applicability of *Nearpass*.

10. As discussed in Petitioners' brief (Dkt. 26, pg. 17) and Petitioners' reply brief (Dkt. 30, pg. 9), *Nearpass* is not applicable here. That case does not hold that OCIDA has authority to condemn the property under the facts here. *Nearpass* is not an eminent domain case. It is a CPLR Article 78 proceeding regarding whether an industrial development agency ("IDA") had the authority to grant financial tax benefits for a resort and casino development as a commercial and recreational project as those terms are used in General Municipal Law ("GML") § 854(4).

11. Further, as discussed in Petitioners' prior papers (Dkt. 26, pg. 15, 18; Dkt. 30, pg. 5) and at oral argument (Calendar Case No. 764 at 1:49:00), it is axiomatic that a condemnor's exercise of eminent domain power must be strictly construed against the condemnor (*see Syracuse*

*Univ. v Project Orange Assocs. Servs. Corp.*, 71 AD3d 1432, 1435 [4th Dept 2010], *appeal dismissed and lv denied* 14 NY3d 924 [2010], citing *Schulman v People*, 10 NY2d 249, 255-256 [1961] ["Statutes conferring the power of eminent domain are not extended by inference or implication"], and citing *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."]).

12. In the Decision, the Court recognized this by citing *Syracuse Univ.*, *Schulman* and *Peasley*.

13. For all the reasons stated herein, the Court's Decision was correct, and the Court did not overlook or misapprehend any facts or law, including but not limited to *Nearpass*.

### *C. The Court Did Not Overlook Binding Precedent*

14. Contrary to OCIDA's and CUB's assertions, the following cases are not precedent germane to this Court's holding in this case: *Greater Jamaica Dev. Corp. v New York City Tax Comm'n*, 25 NY3d 614, 619 (2015); *Crouse Health Sys., Inc. v City of Syracuse*, 126 AD3d 1336, 1337 (4th Dept 2015); *Vassar Bros. Hosp. v City of Poughkeepsie*, 97 AD3d 756, 757 (2d Dept 2012); *Matter of St. Francis Hosp. v Taber*, 76 AD3d 635, 638 (2d Dept 2010); *Ellis Hosp. v Assessor of City of Schenectady*, 288 AD2d 581, 582 (3d Dept 2001); *Matter of Genesee Hosp. v Wagner*, 47 AD2d 37 (4th Dept 1975), *affd* 39 NY2d 863 (1976).

15. These cases all deal with whether an Assessor is required to grant real property tax exemption under the requirements in Real Property Tax Law ("RPTL") § 420-a. These cases are not about an IDA's authority under GML § 858 in an eminent domain proceeding.

16. As the Court is aware, OCIDA and CUB made these same arguments in their joint brief as to RPTL § 420-a cases (Dkt. 28, pg. 30) and at oral argument. In their brief, Respondents

cited *Viahealth of Wayne v Vanpatten*, 90 AD3d 1700, 1701-1702 (4th Dept 2011), also an RPTL § 420-a case. *Genesee Hosp.* is cited multiple times by *Viahealth of Wayne* (90 AD3d at 1701-1702). These cases were also already cited by OCIDA's attorney at oral argument (Calendar Case No. 764 at 2:02:00).

17. As set forth in Petitioners' reply brief in response to these same arguments (Dkt. 30, pgs. 11-12), the authority of an Assessor to grant or deny real property tax exemptions pursuant to RPTL § 420-a is not at issue here. The issue here is the authority of an IDA under GML § 858 in an eminent domain proceeding.

18. Similarly, RPTL § 412-a is not relevant here and does not provide authority for an IDA to condemn property for a hospital or healthcare facility project. RPTL § 412-a simply authorizes an Assessor to grant real property tax exemption to property owned or controlled by an IDA. GML § 874 similarly only serves to allow property owned or controlled by an IDA to be tax exempt. Contrary to OCIDA's rehashed arguments, prior precedent on the construction of RPTL § 420-a as to the extent of charitable tax exemption does not bind the Court's interpretation of the extent of an IDA's eminent domain authority under GML § 858.

19. Respondents' reliance on *Regeneron Pharms., Inc. v McCarthy*, 77 AD3d 1246 (3d Dept 2010) and 3 Op. Counsel SBEA No. 76 is equally misplaced. That decision and opinion pertain to RPTL § 412-a and GML § 874, respectively, and are not precedent for whether an IDA has authority to condemn property for a hospital or healthcare facility project.

20. Similarly, as stated in Petitioners' reply brief (Dkt. 30, pgs. 7-8), RPTL § 485-b is not at issue here. RPTL § 485-b specifies the factors that must be met for an Assessor to grant real property tax exemption under that RPTL section. Again, the opinion Respondents cite – 10 Op.

Counsel SBEA No. 125 – pertains to RPTL § 485-b and the factors that must be met for an Assessor to grant real property tax exemption under that section of the RPTL.

21. Contrary to OCIDA's and CUB's assertions, *Lawrence Union Free Sch. Dist. v Town of Hempstead IDA*, 196 AD3d 486 (2d Dept 2021), is not binding precedent nor does it create a conflict between the Fourth Department and the Second Department. That case is a CPLR Article 78 case that considered whether an IDA's determination, including its valuation of the property, in the granting of tax benefits in connection with Raymour & Flanigan and the other respondents purchasing a warehouse was arbitrary and capricious or an abuse of discretion under the standard in CPLR 7803(3). The *Lawrence* case (like *Nearpass*) does not address the authority of an IDA to condemn property for a hospital or healthcare facility project. The fact that *Lawrence* cites *Nearpass* is of no consequence since *Nearpass* and *Lawrence* are similarly inapplicable, and the Court obviously did not overlook *Nearpass*.

22. Contrary to OCIDA's and CUB's assertions, *Goldstein v New York State Urb. Dev. Corp*., 13 NY3d 511, 520 (2009), *rearg denied* 14 NY3d 756 (2010), is also not relevant, let alone binding precedent. *Goldstein* was discussed in OCIDA's and CUB's joint brief (Dkt. 28, pgs. 7, 33, 44), and *Goldstein* was not overlooked. *Goldstein* (like *Nearpass*) is not applicable. 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. It 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). In fact, authority and public purpose are listed as separate items for review under EDPL § 207 (*see* EDPL § 207[C][2] and [C][4]).

23. *PSC, LLC v City of Albany IDA*, 200 AD3d 1282 (3d Dept 2021), *lv denied* 38 NY3d 909 (2022), also holds no precedential value for this case, nor does it create a conflict between the Fourth Department and the Third Department. *PSC* was discussed in OCIDA's and CUB's joint brief (*see e.g.* Dkt. 28, pgs. 7, 24, 32) and at oral argument (Calendar Case No. 764 at 1:57:16). *PSC* (like *Goldstein* and *Nearpass*) is not applicable. As in *Goldstein*, the issue presented was whether the condemnation at issue was for the public purpose of addressing urban blight, and the authority of the condemnor was not at issue or addressed. *PSC* is not about the authority of an IDA to condemn property for a hospital or healthcare facility project under GML § 858.

24. As the Court in the current case correctly held, "While OCIDA's determination and findings indicate that the subject property was to be acquired for use as a surface parking lot, the record establishes that, contrary to respondents' assertion, the primary purpose of the acquisition was not a commercial purpose. Rather, the property was to be acquired because it was a necessary component of a larger hospital and healthcare facility project" (Dkt. 34, Decision pg. 2).

25. For all the foregoing reasons, Respondents have failed to show that matters of fact or law were overlooked or misapprehended by the Court. Therefore, Respondents' joint motion for leave to reargue should be denied in its entirety.[2]

[2] It should be noted that the Court in the December 23, 2022 Decision did not address Petitioners' other contentions. The Court stated, "In light or our determination, petitioners' remaining contentions are academic . . . " (Dkt. 34, Decision pg. 2). If the Court were to grant reargument and then change its holding, Petitioners remaining contentions would need to be determined. However, as stated herein, the Court was correct to annul OCIDA's determination and grant the petition.

## POINT II

## THE MOTIONS OF OCIDA AND CUB FOR LEAVE TO APPEAL TO THE COURT OF APPEALS SHOULD BE DENIED

### *A. The Standard for Leave to Appeal*

26. A motion for leave to appeal to the Court of Appeals must include a concise statement of the questions presented for review and why the questions presented merit review by the Court of Appeals, such as that the issues are (i) novel or of public importance, (ii) present a conflict with prior decisions of the Court of Appeals, or (iii) involve a conflict among the Departments of the Appellate Division (22 NYCRR 500.22[b][4]; 22 NYCRR 1250.16[d][3][i]). The movant must identify the particular portions of the record where the questions sought to be reviewed are raised and preserved (*id.*).

27. Respondents have failed to meet the standard for their joint motion for leave to appeal to the Court of Appeals.

### *B. No Novel Issue of Public Importance Worthy of Appeal to the Court of Appeals*

28. The Court's decision that a condemnor must have the requisite authority is not novel (*see e.g*. *Matter of Hargett v Town of Ticonderoga*, 35 AD3d 1122, 1124 [3d Dept 2006] *lv denied* 8 NY3d 810 [2007] [Town Highway Superintendent exceeded his authority under Highway Law § 173 in condemning property for purposes not related to his position]). It is expressly part of this Court's review under EDPL § 207(C). The Court's decision here is similar to this Court's decision in *Syracuse Univ.*, 71 AD3d at 1435 (4th Dept 2010), where the Court found that the condemnor lacked the statutory authority to condemn the subject property and cited to *Schulman*, 10 NY2d at 255-256, and *Peasley*, 57 AD2d at 999. Here, the motion for leave "presents no questions the fundamental underlying principles of which have not already been declared by [the

courts of this state]" (*see Matter of Gannett Co., Inc. v Doran*, 74 AD3d 1788, 1789 [4th Dept 2010]) and thus does not present a novel issue.

29. Contrary to OCIDA's assertion nothing about the Decision creates a "dark cloud" over future IDA actions in New York State. The Decision simply confirms that an IDA, when exercising eminent domain authority, must act within the jurisdiction and authority granted in GML § 858. 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 very basic concept and certainly not a novel issue of public importance worthy of examination by the Court of Appeals.

30. If OCIDA believes that its jurisdiction and authority should be expanded to allow for "hospital or healthcare-related facilities" or any other type of project that is not expressly provided for in GML § 858, then the proper venue is for them to go to the legislature as others have to amend GML § 858, not the Court of Appeals (e.g., "continuing 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]).

31. OCIDA's allegation that the Court's Decision derailed a larger project does not create a basis to get to the Court of Appeals. Regardless of how laudable a particular project may be or how it fits into a larger community project does not give an IDA, such as OCIDA, the right to act outside of its statutory authority and jurisdiction. Again, that is black letter law and is not a novel issue of public importance.

32. OCIDA has failed to show that it should be granted leave to appeal to the Court of Appeals.

### *C. No Conflict with Court of Appeals Precedent*

33. The cases cited by OCIDA and CUB do not conflict with the Court's Decision in this case.

34. *Greater Jamaica Dev. Corp.*, 25 NY3d 614, and *Genesee Hosp.*, 47 AD2d 37, are not germane and do not conflict with the Court's Decision. As discussed above, those are RPTL § 420-a cases addressing the issue of whether an Assessor is required to grant real property tax exemptions under the requirements in RPTL § 420-a. Those cases are not about what authority an IDA has under GML § 858 in an eminent domain proceeding.

35. Contrary to OCIDA's assertions, the following cases are also not binding precedent and do not conflict with the Court's Decision: *Goldstein*, 13 NY3d 511; *Matter of Kaur v New York State Urb. Dev. Corp.*, 15 NY3d 235 (2010); *Waldo's Inc. v Vill. of Johnson City*, 74 NY2d 718 (1989); *Matter of Jackson v New York State Urb. Dev. Corp.*, 67 NY2d 400 (1986).

36. *Goldstein* is not in conflict with this Court's Decision. As discussed above, it is not precedent for this case. It pertained to an urban development corporation's public use determination and a different statutory authority. It did not concern the authority of an IDA under GML § 858 to condemn property for a hospital or healthcare facility project.

37. *Waldo's Inc.*, 74 NY2d 718, is similarly not precedent here. *Waldo's Inc.* predominantly concerned a road widening by a Wegmans and whether a public purpose was being served as well as whether a Village had statutory authority to condemn property for the road widening. The Court found that plainly the Village had statutory authority for road widening (*Waldo's Inc.*, 74 NY2d at 722).

38. Respondents' reliance on *Kaur*, 15 NY3d 235, and *Jackson*, 67 NY2d 400, are also misplaced. *Kaur* was an appeal as of right with the petitioner's main 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 (15 NY3d 235). In that case, the Court held that the statutory language of Unconsolidated Law § 6260 does not limit educational projects to public educational institutions (15 NY3d at 258).

39. Similarly, *Jackson* has no application. It also involved the UDC and was a combined appeal of four proceedings, one as of right, largely addressed to the State Environmental Quality Review Act review of the UDC's condemnation to address blight in Times Square. Like *Kaur,* it has no bearing on the authority of an IDA to condemn property for a hospital or healthcare facility project.

40. To the extent OCIDA is arguing that those cases hold that OCIDA should be given deference in this case, they ignore the fact that the Court based its Decision on its review of OCIDA's record and determined based on that review that OCIDA lacked the authority to exercise eminent domain given the facts developed in the record. The Court's review under EDPL §207(C)(2) is not, as OCIDA appears to posit, simply to "rubber stamp" OCIDA's claimed condemnor authority regardless of the facts in the record.

41. The Court correctly concluded based on the facts and law in this case that OCIDA's determination should be annulled. OCIDA and CUB have not presented any cases that require the Court to reach a different conclusion, or that justifies this Court granting leave to appeal to the Court of Appeals.

### *D. No Conflict Among the Departments*

42. There is no conflict with this Court's Decision and the decisions of other Departments cited by OCIDA and CUB. There is no split among the Departments here that needs to be resolved by the Court of Appeals.

43. OCIDA and CUB assert the following cases create a conflict: *Crouse Health Sys., Inc.*, 126 AD3d 1336; *Vassar Bros. Hosp.*, 97 AD3d 756; *St. Francis Hosp.*, 76 AD3d 635; *Ellis Hosp.*, 288 AD2d 581.

44. However, as described above, these cases all deal with whether an Assessor is required to grant real property tax exemption under the requirements in RPTL § 420-a. These cases are not about what authority an industrial development agency has under GML § 858 in an eminent domain proceeding.

45. Respondents also erroneously assert that *PSC, LLC*, 200 AD3d 1282, creates a conflict between the Third Department in that case and the Fourth Department in this case. As set forth above, the fact that *PSC* involves a parking lot does not make PSC applicable to this case. *PSC* is not about the authority of an IDA to condemn property for a hospital or healthcare facility project.

46. Again, as stated above, *Lawrence Union Free Sch. Dist.*, 196 AD3d 486, does not create a conflict between the Second Department in that case and the Fourth Department in this case. That case is a CPLR Article 78 case that considered whether an IDA's determination, including its valuation of the property, in the granting of tax benefits in connection with Raymour & Flanigan purchasing a warehouse was arbitrary and capricious or an abuse of discretion under the standard in Article 78 cases in CPLR 7803(3). The *Lawrence* case does not deal with the authority of an IDA to condemn property for a hospital or healthcare facility project. The fact that

*Lawrence* cites *Nearpass* is of no consequence since *Nearpass* and *Lawrence* are similarly inapplicable, and the Fourth Department is certainly aware of its own decision in *Nearpass*.

47. OCIDA and CUB have not presented a conflict between the Departments that supports their motion for leave to the Court of Appeals.

48. For all the foregoing reasons, Respondents' joint motion for leave to appeal to the Court of Appeals should be denied in its entirety.

**WHEREFORE**, Petitioners respectfully request that the Court deny the motions of OCIDA and CUB and grant Petitioners such other and further relief as is just and proper.

Dated: February 7, 2023
Syracuse, New York

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