225 A.D.3d 1254
Supreme Court, Appellate Division, Fourth Department, New York.

In the Matter of HBC VICTOR LLC, Petitioner, v. TOWN OF VICTOR, Respondent.

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OP 23-01347
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Entered: March 22, 2024

Synopsis

Background: Following annulment of town's prior determination authorizing condemnation of vacant commercial real property, 212 A.D.3d 121, 181 N.Y.S.3d 796, owner of property brought action against town under Eminent Domain Procedure Law (EDPL) to annul town's determination authorizing the condemnation of the property.

Holdings: The Supreme Court, Appellate Division, held that:

town established legitimate qualifying public purpose or use of property, and

public purposes articulated by town's comprehensive plan were not merely incidental to private benefits arising from condemnation and were sufficient to support condemnation action.

Determination confirmed; petition dismissed.

Procedural Posture(s): Review of Administrative Decision.

Attorneys and Law Firms

****771** PHILLIPS LYTLE LLP, BUFFALO (CRAIG A. LESLIE OF COUNSEL), FOR PETITIONER.

HARRIS BEACH PLLC, PITTSFORD (KYLE D. GOOCH OF COUNSEL), FOR RESPONDENT.

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, AND GREENWOOD, JJ.

MEMORANDUM AND ORDER

***1254** Proceeding pursuant to EDPL 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul the determination of respondent. The determination authorized condemnation of certain real property owned by petitioner.

It is hereby ORDERED that said determination is confirmed without costs and the petition is unanimously dismissed.

Memorandum: Petitioner commenced this original proceeding pursuant to EDPL 207 seeking to annul the determination of respondent, Town of Victor (Town), authorizing the condemnation of certain real property owned by petitioner in Ontario County. We previously annulled the Town's prior determination authorizing condemnation of the same property (*Matter of HBC Victor LLC v. Town of Victor*, 212 A.D.3d 121, 181 N.Y.S.3d 796 [4th Dept. 2022]). We now confirm the Town's current determination and dismiss the petition.

Contrary to petitioner's contentions, the Town's determination and findings comport with EDPL article 2 and do not violate petitioner's federal and state constitutional rights. As a preliminary matter, we note that this Court's review power is limited by statute (*see* EDPL 207 [C] [1]-[4]; *Matter of Niagara Falls Redevelopment, LLC v. City of Niagara Falls*, 218 A.D.3d 1306, 1307-1308, 194 N.Y.S.3d 381 [4th Dept. 2023], *appeal dismissed* 40 N.Y.3d 1059, 201 N.Y.S.3d 660, 224 N.E.3d 1052 [2023]; ****772** *Matter of Truett v. Oneida County*, 200 A.D.3d 1721, 1721-1722, 155 N.Y.S.3d 913 [4th Dept. 2021], *lv denied* 38 N.Y.3d 907, 2022 WL 1573754 [2022]; *Matter of Syracuse Univ. v. Project Orange Assoc. Servs. Corp.*, 71 A.D.3d 1432, 1433, 897 N.Y.S.2d 335 [4th Dept. 2010], *appeal dismissed & lv denied* 14 N.Y.3d 924, 905 N.Y.S.2d 126, 931 N.E.2d 96 [2010]). Such limited judicial review does not contemplate a de novo consideration of the issues (*see Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 418, 503 N.Y.S.2d 298, 494 N.E.2d 429 [1986]). Rather, this Court must determine whether the condemnor's exercise of its power of eminent domain "is rationally related to a conceivable public purpose" (*id.* at 425, 503 N.Y.S.2d 298, 494 N.E.2d 429 [internal quotation marks omitted]; *see* ***1255** *Matter of Penney Prop. Sub Holdings LLC v. Town of Amherst*, 220 A.D.3d 1169, 1171, 197 N.Y.S.3d 644 [4th Dept. 2023]), whether the condemnor's determination and findings "were predicated upon a rational factual basis"

(*Long Is. R.R. Co. v. Long Is. Light. Co.*, 103 A.D.2d 156, 168, 479 N.Y.S.2d 355 [2d Dept. 1984], *affd* 64 N.Y.2d 1088, 489 N.Y.S.2d 881, 479 N.E.2d 226 [1985]), or whether the property owner has established, on the part of the condemnor, a " 'clear showing of bad faith or conduct which is irrational, baseless or palpably unreasonable' " (*Matter of Dowling Coll. v. Flacke*, 78 A.D.2d 551, 552, 432 N.Y.S.2d 23 [2d Dept. 1980]; *see Matter of Kaur v. New York State Urban Dev. Corp.*, 15 N.Y.3d 235, 254, 907 N.Y.S.2d 122, 933 N.E.2d 721 [2010], *cert denied* 562 U.S. 1108, 131 S.Ct. 822, 178 L.Ed.2d 556 [2010]).

In other words, the party challenging the condemnation has the burden of establishing "that the determination was without foundation and baseless ... Thus, [i]f an adequate basis for a determination is shown and the objector cannot show that the determination was without foundation, the [condemnor's] determination should be confirmed" (*Matter of GM Components Holdings, LLC v. Town of Lockport Indus. Dev. Agency*, 112 A.D.3d 1351, 1352, 977 N.Y.S.2d 836 [4th Dept. 2013], *appeal dismissed* 22 N.Y.3d 1165, 985 N.Y.S.2d 466, 8 N.E.3d 842 [2014], *lv denied* 23 N.Y.3d 905, 2014 WL 2609538 [2014] [internal quotation marks omitted]; *see Matter of United Ref. Co. of Pa. v. Town of Amherst*, 173 A.D.3d 1810, 1810-1811, 105 N.Y.S.3d 235 [4th Dept. 2019], *lv denied* 34 N.Y.3d 913, 2020 WL 1467110 [2020]).

Here, contrary to petitioner's contention, the Town established a qualifying public purpose or use for the property. This Court has previously defined "public use" as "any use which contributes to the health, safety, general welfare, convenience or prosperity of the community" (*Matter of Byrne v. New York State Off. of Parks, Recreation & Historic Preserv.*, 101 A.D.2d 701, 702, 476 N.Y.S.2d 42 [4th Dept. 1984]; *see Matter of PSC, LLC v. City of Albany Indus. Dev. Agency*, 200 A.D.3d 1282, 1285, 158 N.Y.S.3d 379 [3d Dept. 2021], *lv denied* 38 N.Y.3d 909, 2022 WL 2127949 [2022]; *see also Matter of Gabe Realty Corp. v. City of White Plains Urban Renewal Agency*, 195 A.D.3d 1020, 1022, 151 N.Y.S.3d 143 [2d Dept. 2021]). A public use or purpose could therefore include stimulating the local economy, creating jobs, providing infrastructure (*see Matter of City of New York v. Yonkers Indus. Dev. Agency*, 170 A.D.3d 1003, 1004, 97 N.Y.S.3d 123 [2d Dept. 2019]), avoiding the blight of economically underutilized properties (*see PSC, LLC*, 200 A.D.3d at 1284-1285, 158 N.Y.S.3d 379; *see also Matter of Court St. Dev. Project, LLC v. Utica Urban Renewal Agency*, 188 A.D.3d 1601, 1602, 136 N.Y.S.3d 588 [4th Dept. 2020]), or fostering redevelopment and urban renewal (*see* ****773** *Penney Prop. Sub Holdings LLC*, 220 A.D.3d at 1171, 197 N.Y.S.3d 644; *United Ref. Co. of Pa.*, 173 A.D.3d at 1811, 105 N.Y.S.3d 235).

Inasmuch as one of the Town's stated public purposes is to facilitate an economic redevelopment project that would permit the vacant and underutilized property to be turned into space ***1256** appropriate for lease to an international department store and a grocer, both of which have expressed interest in becoming tenants, we conclude that the Town met its burden of establishing a legitimate public purpose for the condemnation (*see Penney Prop. Sub Holdings LLC*, 220 A.D.3d at 1171, 197 N.Y.S.3d 644). We further conclude that the Town's proposed use of a portion of the building for an 11,000-square-foot community and recreation space is a viable public purpose under the EDPL (*see Niagara Falls Redevelopment, LLC*, 218 A.D.3d at 1308, 194 N.Y.S.3d 381; *Matter of Woodfield Equities LLC v. Incorporated Vil. of Patchogue*, 28 A.D.3d 488, 489-490, 813 N.Y.S.2d 184 [2d Dept. 2006]; *Matter of Pfohl v. Village of Sylvan Beach*, 26 A.D.3d 820, 821, 809 N.Y.S.2d 367 [4th Dept. 2006]).

With respect to petitioner's claim that the Town is improperly transferring title to another private developer with no support from an integrated development plan, it is well settled that "the '[t]aking of substandard real estate by a municipality for redevelopment by private corporations has long been recognized as a species of public use' " (*Matter of Huntley Power, LLC v. Town of Tonawanda* [Proceeding No. 1], 217 A.D.3d 1325, 1328, 189 N.Y.S.3d 352 [4th Dept. 2023], *appeal dismissed* 40 N.Y.3d 1058, 201 N.Y.S.3d 659, 658, 224 N.E.3d 1051, 1050 [2023], quoting *Cannata v. City of New York*, 11 N.Y.2d 210, 215, 227 N.Y.S.2d 903, 182 N.E.2d 395 [1962], *appeal dismissed* 371 U.S. 4, 83 S.Ct. 28, 9 L.Ed.2d 48 [1962]; *see Kelo v. City of New London*, 545 U.S. 469, 486, 125 S.Ct. 2655, 162 L.Ed.2d 439 [2005]; *see also Penney Prop. Sub Holdings LLC*, 220 A.D.3d at 1172, 197 N.Y.S.3d 644).

Contrary to petitioner's further contentions, we conclude that the Town's 2015 Comprehensive Plan is sufficient to support the Town's condemnation action (*see generally Kelo*, 545 U.S. at 486, 125 S.Ct. 2655) and that the public purposes articulated by the Town are not merely incidental to the private benefits arising from the condemnation (*see Penney Prop. Sub Holdings LLC*, 220 A.D.3d at 1172, 197 N.Y.S.3d 644; *Matter of Kaufmann's Carousel v. City of Syracuse Indus. Dev. Agency*, 301 A.D.2d 292, 303, 750 N.Y.S.2d 212 [4th Dept. 2002], *lv denied* 99 N.Y.2d 508, 757 N.Y.S.2d 819, 787 N.E.2d 1165 [2003]; *cf. Syracuse Univ.*, 71 A.D.3d at 1434-1435, 897 N.Y.S.2d 335; *Matter of 49 WB, LLC v. Village of Haverstraw*, 44 A.D.3d 226, 839 N.Y.S.2d 127 [2d Dept. 2007], *abrogated on other grounds by Hargett v. Town of Ticonderoga*, 13 N.Y.3d 325, 890 N.Y.S.2d 421, 918 N.E.2d 933 [2009]). We reject petitioner's contention that the public use proposed for the part of the property to be leased by the Town is illusory. Although the Town initially stated at the public hearing

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that it had not yet determined what it would do with that portion of the property, the Town subsequently narrowed its public use in its determination and findings to a "community and recreation center space to provide for and enhance the Town's public services" as part of creating a "vibrant, sought-after retail, community and recreation destination" on the property. Moreover, ***1257** petitioner's "assertion that alternate sites would better serve the [Town's] purposes is not a basis for relief under EDPL 207" (*Matter of Peekskill Hgts., Inc. v. City of Peekskill Common Council*, 110 A.D.3d 1079, 1080, 974 N.Y.S.2d 501 [2d Dept. 2013]; *see* ****774** *Matter of One Point St., Inc. v. City of Yonkers Indus. Dev. Agency*, 170 A.D.3d 851, 853, 93 N.Y.S.3d 887 [2d Dept. 2019]; *see also Village Auto Body Works v. Incorporated Vil. of Westbury*, 90 A.D.2d 502, 502, 454 N.Y.S.2d 741 [2d Dept. 1982]).

Finally, inasmuch as petitioner did not raise any of its SEQRA concerns at the public hearing on April 24, 2023 (*see* EDPL 202 [C] [2]), we conclude that, if petitioner wanted to challenge the subsequent SEQRA determination, it should have done so by commencing a CPLR article 78 proceeding against the Town (*see Matter of County of Tompkins [Perkins]*, 237 A.D.2d 667, 668, 654 N.Y.S.2d 849 [3d Dept. 1997]). We therefore do not address the merits of those contentions.

All Citations

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