To be Argued by:
MATTHEW D. BRINCKERHOFF
(Time Requested: 30 Minutes)

Appellate Division–Second Department Docket No. 2008-07064

Court of Appeals
of the
State of New York

DANIEL GOLDSTEIN, PETER WILLIAMS ENTERPRISES, INC., 535 CARLTON AVE. REALTY CORP., PACIFIC CARLTON DEVELOPMENT CORP., THE GELIN GROUP, LLC, CHADDERTON'S BAR AND GRILL INC. d/b/a FREDDY'S BAR AND BACKROOM, MARIA GONZALEZ, JACKIE GONZALEZ, YESENIA GONZALEZ and DAVID SHEETS,

Petitioners-Appellants,

– against –

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent-Respondent.

BRIEF FOR PETITIONERS-APPELLANTS

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DISCLOSURE STATEMENT PURSUANT TO § 500.1(c)

Appellants, Peter Williams Enterprises, Inc., 535 Carleton Ave. Realty Corp., Pacific Carlton Development Corp, Gelin Group, LLC, and Chadderton's Bar and Grill Inc., d/b/a Freddy's Bar and Backroom, each states that it has no parents, subsidiaries or affiliates.

PRELIMINARY STATEMENT

This appeal arises from a New York Constitutional challenge to the Determination of Respondent New York State Urban Development Corporation, d/b/a Empire State Development Corporation ("ESDC") to approve the Atlantic Yards Land Use Improvement and Civic Project (the "Project"), and the forcible taking of Appellants' homes and businesses it requires for the enrichment of Bruce Ratner, operating through various real estate development companies ("Ratner"). The Project, and the takings it requires, is unconstitutional for at least two fundamental and independent reasons.

First, the Project violates the public use clause set forth in Article I, Section 7 of the New York Constitution. That clause, which provides that "[p]rivate property shall not be taken for public use without just compensation," must be read restrictively to allow the State to exercise its eminent domain power only where the targeted property is to be held open for use by all members of the public. This interpretation of the phrase "public use" is compelled by the plain meaning of the term, the intent of the New York citizens who first enacted the provision in 1821, and by a raft of decisions from this Court during the 19th and early 20th centuries – a time considerably closer to its enactment than more modern cases that have been infected by the U.S. Supreme Court's aggressive

attempts to render meaningless the comparable provision in the Fifth Amendment. Those earlier cases have never been overruled or repudiated. They leave no room for doubt. The term "public use" was long understood by this Court to apply narrowly to circumstances where a taking is "for the benefit and advantage of all the public and in which all have a right to share [and] to freely enter upon under terms common to all." *E.g.*, *Bradley v. Degnon Contr. Co.*, 224 N.Y. 60, 71 (1918).

The threatened seizure of Appellants' homes and businesses violates the public use clause for an additional reason as well. Even this Court's modern cases have made it plain that the momentous decision to condemn someone's home and give it to someone else, requires the condemnor to weigh the public benefit that will be realized by the seizure against the benefit that will accrue to the recipient of property. If the private benefit outweighs the public, the taking violates the public use clause. *See, e.g., Aspen Creek Estates, Ltd. v. Brookhaven*, 12 N.Y. 735, 736 (2009) (public benefit "not incidental or pretextual *in comparison* with benefits to particular, favored private entities") (emphasis supplied). Under *Aspen Creek*, Respondent's public use findings fail because it made no attempt to determine the benefit that will flow to Ratner from the Project and the forcible transfer of Appellants' properties. Without knowing whether

Ratner stood to make $1 billion or $500 billion at the time it issued its Determination, there is no way that the ESDC could have performed the relative benefit analysis that this Court commands.

Second, the Project violates Article XVIII, section 6 of the New York Constitution, which requires that the occupancy of any state-funded housing project designed to eliminate blight must be restricted to displaced low-income residents. The occupancy requirement set forth in Article XVIII, section 6 is notably narrow, and is only triggered in this case because Ratner (1) urged the ESDC to conclude that the use of eminent domain was necessary in order to eliminate alleged blight; (2) chose to include a substantial housing component in the Project; *and* (3) lobbied for and accepted hundreds of millions of dollars in government subsidies. If Ratner had opted to rely on a justification for taking Appellants' properties other than the elimination of alleged blight, or had proposed to build an arena but not housing, or had financed the Project privately without government subsidies, then Article XVIII would not apply. It is only because Ratner chose to check *all three* of these boxes – without adhering to the low-income occupancy restriction set forth in Article XVIII, section 6 – that the Project is unconstitutional.

FACTS

In or about 2002, Ratner conceived a plan to develop a large, 22-acre swath of central Brooklyn, New York. (A. 32-33).[1] The Project, as originally conceived and presented to the public, included 16 high-rise office and apartment towers ranging from 18 to 60 stories and totaling about 8.8 million square feet of office, residential, and commercial space; a 180-room hotel; and an arena for a professional basketball team. (A. 26 n.1, 31).

Ratner's vision "of an urban utopia" designed by "the eminent American architect Frank Gehry," and "complete with professional basketball for the masses,"[2] faced a number of significant hurdles: (1) nearly all of the tax lots and over half of the 22 acres on the targeted site (68 separate parcels and 123 tax lots) were privately owned and located in a prosperous community where property values were increasing rapidly (the "Takings Area")[3] (A. 32-34); (2) the other half

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[1] Citations to "A." are to the Appendix filed pursuant to § 500.14(b) of the Rules of the Court of Appeals.

[2] *Develop Don't Destroy (Brooklyn) v. Urban Develop. Corp.*, 59 A.D.3d 312, 314 (1st Dep't 2009); *id.* at 332 (Catterson, J. concurring).

[3] The Takings Area consists primarily of two large, non-contiguous, rectangularly shaped parcels situated directly south of the rail yards. These two parcels, containing Appellants' homes and businesses, are separated by an equally large rectangular parcel owned in substantial part by a developer who, early on, cut a deal with Ratner to spare his property from condemnation. Appellants were less fortunate. *See* Matthew Schuerman, *Ratner Rules: Brooklyn Nets Plan Spares Developer Shaya Boymelgreen's Project*, VILL. VOICE, Apr. 5, 2004, *available at* http://www.villagevoice.com/2004-03-30/news/ratner-rules/.

of the site was primarily a below-grade open rail yard owned by the state Metropolitan Transportation Authority ("MTA"), a public authority controlled by Mayor Bloomberg and then-Governor Pataki (*id.*); (3) the massive scope of the Project violated scores of local zoning laws, including a variety of density, height, and use restrictions (A. 33); and (4) the selection of private developers for projects that receive billions of dollars in tax breaks and direct subsidies are typically subject to competitive selection (*id*.).

Ratner's plan to overcome these daunting hurdles was simple: secure the support and assistance of Governor Pataki and Mayor Bloomberg. Only the Governor and the Mayor could: (1) wield the power of eminent domain to seize the 68 parcels of private property and transfer them to Ratner; (2) direct the MTA to sell the rail yard to Ratner without competitive bidding; (3) award the entire Project to Ratner, including billions in tax breaks and direct subsidies, without a competitive selection process of any kind; (4) bypass all local zoning laws; and (5) bypass local law mandating approval by the 51-member legislative body, the New York City Council. (*Id*).

By 2003, Ratner, a top political contributor to Governor Pataki (who was known to have presidential aspirations at the time), secured the unqualified

support of his old law school friend.[4] From that point onward, the Project, and the billions in profit it would generate for Ratner and his companies, was a *fait accompli.* (A. 30-32).

The vehicle employed to clear the obstacles to the Project was Respondent ESDC. The ESDC was created in 1968. It is a quasi-governmental corporation wholly controlled by the Governor. It has the power to condemn private property and to bypass local zoning laws and legislative review procedures. (A. 30). In connection with a case challenging, among other things, an ESDC blight determination, a justice of the Appellate Division recently criticized the ESDC for "ultimately being used as a tool for [Ratner] to displace and destroy neighborhoods that are 'underutilized.'" *Develop Don't Destroy (Brooklyn) v. Urban Develop. Corp.*, 51 A.D.3d 312, 326 (1st Dep't 2009) (Catterson, J. concurring).

1. The Rail Yards

The Project was so wired that the chief spokesperson for the MTA initially told reporters, on two separate occasions in 2004, that the rail yards,

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[4] *See* "*For Brooklyn, a Celebration or a Curse*?", WASHINGTON POST, Jan. 26, 2004, at A1 ("Ratner is [a] top political contributor and law school friend of Pataki."); *see also id.* (describing the Takings Area as "the crossroad of three handsome neighborhoods where brownstones routinely sell for $1.5 million").

which accounted for about 40% of the Project site, had already been conveyed to Ratner in a private deal. (A. 36). To facilitate the deal, "and without first issuing a request for proposals, the MTA entered into an agreement with [one of Ratner's companies] giving [Ratner] the right to develop" the rail yards. *Develop Don't Destroy*, 51 A.D.3d at 327 (Catterson J., concurring). In the agreement, dated February 24, 2005, the MTA pledged its cooperation with Ratner, subject to eighteen conditions, including, among other things, the payment of "fair market value" and the construction of a nine track replacement storage yard. *See* Letter Agreement date Feb. 24, 2005, *available at* http://dddb.net/documents/mou/MOUMTA.pdf.

The MTA subsequently changed its tune, announcing in May 2005 that the development of the rail yards would be subject to a "competitive" selection process after all. But the MTA's request for proposals ("RFP") to purchase and develop the rail yards was a sham. The time allotted for responses was a mere 42 days. *See* Vanderbilt Yard RFP, *available at* http://www.mta.info/mta/vanderbilt.htm. This was a significant advantage for Ratner, who, unlike others, had devised his mammoth Project years earlier. (A. 37).

Even though the deadline was short, a well-respected developer, Extell, submitted a proposal to purchase the rail yards for $150 million. The

Extell proposal was limited to the rail yards themselves. It did not contemplate condemning nearby homes and businesses. It was a lower density project that did not require wholesale zoning overrides, was subject to City Council approval, and was expected to create jobs, affordable housing, open space, a school, and tax revenues. Extell's proposal fully complied with the RFP, including the requirement that all submissions include a twenty-year profit and loss projection. (A. 37-38).

Ratner offered $50 million for the rail yards. The appraised value of the rail yards was $214.5 million. Ratner's offer was contingent upon condemning Appellants' properties and bypassing local zoning and City Council review laws. Ratner refused to provide the required profit projection. (*Id.*).

Ratner's non-compliant, non-responsive proposal for $50 million was selected by the MTA, and later negotiated to $100 million. Extell's compliant proposal for $150 million was rejected.[5] (*Id*).

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[5] The MTA's July 2007 request for proposals to develop the Hudson rail yards in Manhattan ("Hudson RFP") stands in sharp contrast to the MTA's May 2005 RFP for Ratner's Project ("Ratner RFP"). The Hudson RFP was subjected to an extensive planning process, including input from the MTA, the City Council, and local community boards, culminating in a comprehensive development plan for the area before soliciting bids from developers. The Hudson RFP was 1,369 pages long and contained hundreds of pages of design guidelines, thus ensuring that the needs of the public, as determined during the extensive pre-RFP public planning process, would be met. Bidders were given 92 days to respond. The Ratner RFP, in contrast, was only 42 pages long, provided little guidance to bidders, and did not present a

(continued...)

2. Blight

The Project was officially announced in December 2003. The public benefit touted at that time was economic development, including the alleged creation of jobs and the specter of a professional basketball team moving from New Jersey to Brooklyn. Neither the alleged existence of blight nor its remediation was ever mentioned. (A.39-40).

Ratner signed a series of Memoranda of Understandings ("MOUs") with the ESDC concerning the Project in 2004 and 2005. *See* MOUs, *available at* http://dddb.net/documents/mou/MOU1.pdf and http://dddb.net/documents/mou/MOU2.PDF. The MOUs describe the Project and its anticipated benefits. They do not mention the existence or remediation of blight. (A. 34-36).

"It is undisputed that . . . redevelopment . . . in the [Takings] area [was] occurr[ing] prior to the announcement of the Project." *Develop Don't Destroy*, 59 A.D.3d at 332 (Catterson, J. concurring) (citing three developments in 2002 and 2003 totaling nearly 200 new condominiums, 52 of which are in the Takings Area now slated for demolition, and 137 of which are in the area carved

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[5](...continued)
comprehensive or detailed vision for the future of the site. Bidders were given 42 days to respond. (A. 37-38). *Compare* Hudson RFP, *available at* http://www.mtawsy.com/en-US/, *with* Ratner RFP, *available at* http://www.mta.info/mta/vanderbilt.htm.

out for preferential treatment as part of a deal between Ratner and another developer). Indeed, the "rapid, private residential redevelopment of the area was commonly known and publicly reported in newspapers and periodicals." *Id.* at 333. Following the Project's announcement in December 2003, Ratner, using the threat of eminent domain and money supplied by the City of New York, aggressively purchased property in the Takings Area, cleared out buildings, and left them empty.

Ratner conditioned his purchases on sellers agreeing: (1) to remove all "signs, banners, placards, flags or writings that evidence in any respect opposition to the project;" (2) to testify "in favor of the project at hearings . . . with statements to the effect that everyone has been treated fairly, honorably and decently;" (3) to withdraw "and remain withdrawn, from any organized or ad hoc group or association whose sole purpose, primary purpose or one of whose purposes . . . is to oppose the project;" (4) to tell the media that they "have been 'treated fairly, honorably and decently;'" (5) to use their best efforts to persuade others to sell; and (6) to refuse "to sign petitions, march rally, testify or demonstrate against the project." *See* Excerpts from Sales Contract, *available at* http://dddb.net/public/ gag/gag.pdf; *see also* Patrick Gallahue, *Tout of Bounds:*

Ratner Forces Apt. Sellers to Hype Nets Arena, N.Y. POST, June 16, 2004, *available at* http://dddb.net/public/gag/.

Years after Ratner purchased scores of properties subject to these conditions, it was disclosed for the first time that the City of New York had funded some or all of the purchases, thus raising serious concerns that Ratner and the City had engaged in a campaign to restrain and compel core political speech in violation of the First Amendment and the Free Speech Clause of the New York State Constitution.

Appellants, whose homes and businesses occupy more than 20% of the Takings Area, did not succumb to pressure and refused to sell. (A. 32-34).

The first mention of blight as a justification for the Project did not occur until late 2005, two years *after* the Project was first announced, *after* Ratner had acquired numerous properties in the Takings Area and let them lie fallow, and *after* the Supreme Court of the United States granted certiorari in *Kelo v. City of New London*, 545 U.S. 469 (2005), to consider whether economic development could justify a taking under the Public Use Clause of the Fifth Amendment, thus posing a direct threat to the Project.

In late 2005, the ESDC retained AKRF, "its perennial environmental consultant," *Develop Don't Destroy*, 59 A.D.3d at 327 (Catterson J., concurring),

to conduct a "blight study." (A. 39-40). The sole objective of the study was to justify Ratner's property selection. (*Id.*). Rather than reviewing Ratner's site *and its environs*, the study focused exclusively on the properties Ratner had selected for acquisition years before. Not a speck of land bordering the irregularly shaped Project site, or even the portion "carved out" for Ratner's preferred developers, was evaluated for blight. (*Id.*).

AKRF was paid by Ratner. Without exception, every study ever conducted by AKRF has been pro-development. *Id.*; *see also Tuck-It-Away Assoc. v. Empire State Dev. Corp.*, 54 A.D.3d 154 (1st Dep't 2008); *Develop Don't Destroy,* 59 A.D.3d at 327 & n.1 (Catterson, J. concurring). AKRF did not disappoint. In a report issued almost three years after the Project was publicly unveiled, AKRF concluded that about 50% of the Takings Area was characterized by blight. For many of the properties included in the "blighted" 50% of the Takings Area, the sole blighting condition was "underutilization," meaning the owners of those properties had elected not to build to more than 60% of the maximum square footage allowed by law. Others had "weeds" and "graffiti." (*Id.*).

Although AKRF was retained to analyze "trends" in the preselected area, it did not do so. *See Develop Don't Destroy*, 59 A.D.3d at 330-32

(Catterson, J. concurring). Indeed, "the blight study failed to comport with the majority of the specific criteria set out in AKRF's contract." *Id.* at 332 (characterizing ESDC's position that it could not look at trends as "ludicrous on several levels"); *see also id.* at 331 (criticizing AKRF's "less than admirable sleight of hand" in summarizing its study); *id.* at 333 ("deplor[ing] the destruction of the neighborhood").

Appellants' homes and businesses are not blighted. The Takings Area is not blighted. (A. 33, 39-40, 46).

3. Other Pretexts

Rather than acknowledging the true purpose served by the seizure of Appellants' homes and businesses, Respondent has proffered a number of alleged public benefit justifications, all of which are false. (A. 26, 46).

The arena for Ratner's professional basketball team is no more a public benefit than the planned hotel. Both, like countless other consumer oriented businesses, will be accessible to the public – for a price.[6] When first announced, the City of New York agreed to contribute $100 million in direct cash.

[6] Sports arenas do not benefit the economy. *See* MARK S. ROSENTRAUB, MAJOR LEAGUE LOSERS: THE REAL COST OF SPORTS AND WHO'S PAYING FOR IT (1999). Claims to social benefits have also been debunked. *See* KEVIN J. DELANEY AND RICK ECKSTEIN, PUBLIC DOLLARS, PRIVATE STADIUMS: THE BATTLE OVER BUILDING SPORTS STADIUMS (2003).

Based on that figure, the New York City Independent Budget Office ("IBO") initially concluded that the professional basketball arena would generate, at best, less than $1 million per year in net positive revenue for the City over thirty years. (A. 41). After the IBO study, the City committed an additional $105 million to Ratner for, among other things, land acquisition costs.[7] Thus, under the best case, the arena will be a $70 million loss to the City.[8]

The Project will not create affordable housing. In 2008, well before the Appellate Division decision now on appeal, Ratner conceded that, while he was confident about starting construction on the arena for his basketball team, the residential construction "could be put off for years." *Slow Economy Likely to Stall Atlantic Yards*, N.Y. TIMES, Mar. 21, 2008, at A1. The availability of affordable housing funds are questionable, and there is no established timeline for the phase of the Project that includes the bulk of the pledged affordable housing.

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[7] Eliot Brown, *Bloomberg Budget Doubles Subsidy for Atlantic Yards*, N.Y. SUN, Jan. 30, 2007, *available at* http://www.nysun.com/new-york/bloombergs-budget-doubles-subsidy-for-atlantic/47664/.

[8] After the Petition was filed and the court below ruled, the IBO revised its analysis based on the additional $105 million direct cash payment and concluded that overall public cost of just the arena will be $200 million. *See infra* at 23-24.

Id.[9] The promise of affordable housing may well never be realized. It is a stalking horse for luxury condominiums and an arena for Ratner's basketball team.

ESDC's own study concluded that the Project could indirectly eliminate 2,929 at-risk households (defined as "privately held units that are unprotected by rent regulations, whose incomes or poverty status indicates that they could not pay substantial rent increases"). (A. 41-42, 753). Thus, nearly 3000 low-income households will be displaced in exchange for the ever-dwindling possibility that it might create 2,250 affordable units, a net affordable housing loss. (A. 41-42).

4. The "Process"

"AKRF's 'Blight Study' was completed . . . and published with the General Project Plan . . . on July 18, 2006." *Develop Don't Destroy*, 59 A.D.3d at 328 (Catterson, J. concurring). One month later, on August 23, 2006, a public hearing was held. It "drew a crowd of hundreds of local residents," but "many were denied access due to overcrowding." *Id.* Thereafter, "two community forums were held on September 12 and 18, 2006." *Id.*

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[9] After the Petition was filed and the court below ruled, Respondent ESDC announced a host of changes to the previously approved plan that openly acknowledge, for the first time, that the Project may well be delayed substantially past the ten year best case scenario. *See infra* at 21-33.

"Despite substantial adverse public response" to the Project, the final plan "was accepted by the ESDC's Board of Directors on November 15, 2006." *Id.* A few days later, however, ESDC realized that, in its zeal to approve the Project before the end of the Pataki Administration, it had "omitted . . . written comments submitted by members of the community." *Id.* Accordingly, a new set of materials "was prepared and accepted by the ESDC Board on November 27, 2006," the Monday after the Thanksgiving Holiday. *Id.*

"On December 8, 2006, AKRF provided the ESDC with a memorandum addressing the written comments received" from the public concerning the Blight Study. *Id.* "Sparing not a minute for reflection, the ESDC . . . approved . . . the Plan that same day." *Id.*

In a press release announcing the approval, the ESDC touted the "almost $4 billion Atlantic Yards project designed by world-class architect Frank Gehry" that "will transform an area that is currently blighted and largely underutilized" and will reconfigure and improve the "Vanderbilt train yard . . . for storage, cleaning and inspection of [LIRR] trains." *ESDC Approves Atlantic Yards Project in Brooklyn*, Dec. 8, 2006, *available at* http://www.empire.state.ny.us/press/press_display.asp?id=786. As explained below, both of these justifications have proven to be chimerical.

This action challenges the December 8, 2006 approval of that plan, officially captioned as the "Determination and Findings by the New York State Urban Development Corporation Pursuant to EDPL, Section 204 with Respect to the Atlantic Yards Land Use Improvement and Civic Project" (the "Determination"). (A. 64-87).

The Determination declares that the "principal public use, benefit and purpose of the Project is to eliminate the blighted conditions on the Project Site." (A. 67). It also alleges a number of secondary public use justifications, including: (1) a "state-of-the-art arena"; (2) a "state-of-the-art rail storage, cleaning and inspection facility for the LIRR that would enable it to better accommodate simultaneously its new fleet of multiple-unit series of [sic] electric propulsion cars operated by LIRR which are compliant with the American [sic] with Disabilities Act and other transit improvements"; and (3) a host of claimed economic development benefits. (A. 69).

5. Benefit To Ratner

Notwithstanding an express requirement in its own RFP, the MTA ignored Ratner's refusal to provide profit projections. Apparently, the ESDC, like the MTA, thought it best not to analyze or project the enormous benefits that will accrue to Ratner as a direct result of the Project and the seizure of Appellants'

homes and businesses. Nowhere in the 23,000 page record compiled by ESDC is there the merest mention of Ratner's windfall. Indeed, during argument before the Appellate Division, the ESDC conceded this point and argued instead that the benefit to Ratner was not relevant to determining whether the taking of Appellants' properties is justified under the New York State Constitution's Public Use Clause.

Without a record of any kind, it is, of course, impossible to meaningfully gauge the benefit to Ratner. But we do know that Ratner will receive a variety of special discretionary perks, including a minimum of $305 million in capital contributions from the City and State, zoning overrides, a government blank check eliminating the risk of "extraordinary infrastructure costs," low-cost financing for the arena and housing, property and mortgage tax exemptions, City land conveyed for one dollar, and the guaranteed transfer of Appellants' properties. (A. 42).[10] The Project also allows Ratner to add to his other substantial land and commercial holdings directly adjacent to the Project site.

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[10] Ratner refused to disclose his profit projections even to the ESDC. Eliot Brown, *State Never Saw Business Plan For Atlantic Yards Project*, N.Y. SUN, Mar. 28, 2007, *available at* http://www.nysun.com/new-york/state-never-saw-business-plan-for-atlantic-yards/51354/.

6. Procedural Background

On January 5, 2007, less than thirty days after the Determination was issued, Appellants filed a timely challenge pursuant to EDPL § 207 as a supplemental state law claim, pursuant to 28 U.S.C. § 1367, in *Goldstein v. Pataki*, No. 06-CV-5827 (E.D.N.Y.).

On January 19, 2007, ESDC moved to dismiss Appellants' supplemental EDPL claim. On June 6, 2007, the federal district court dismissed the first three counts of Appellants' amended complaint – the federal constitutional claims – with prejudice. At the same time, the federal district explained that "Count Four of the Amended Complaint is dismissed *without prejudice to its being re-filed in state court*." *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 291 (E.D.N.Y. 2007) (emphasis supplied). Count Four was Appellants' claim seeking an order rejecting ESDC's Determination pursuant to EDPL § 207. *See* Amended Complaint (Answer Ex. A).

On February 1, 2008, the Second Circuit Court of Appeals affirmed "the judgment of the district court dismissing the federal claims with prejudice *and the state claim without prejudice*." *Goldstein v. Pataki*, 516 F.3d 50, 65 (2d Cir. 2008) (emphasis supplied).

On June 23, 2008, Appellants' petition for writ of certiorari was denied by the Supreme Court of the United States over the objection of Justice Alito.

On August 1, 2008, within six months after Appellants' EDPL § 207 claim was terminated without prejudice in federal court, the Petition in this action was filed. The Petition seeks an order rejecting ESDC's determination pursuant to EDPL § 207. It arises from the same transaction or occurrence as the supplemental state law EDPL § 207 claim that challenged the same Determination and was expressly dismissed without prejudice in federal court.

The Petition (A. 25-49) asserts that ESDC's Determination should be rejected because it violates: the public use clause contained in the Bill of Rights of the New York Constitution (art. 1, § 7(a)); the due process clause contained in the Bill of Rights of the New York Constitution (art. 1, § 6); the equal protection clause contained in the Bill of Rights of the New York Constitution (art. 1, § 11); the low-income and current resident requirements of the New York Constitution (art. 18, § 6); and the "public use, benefit or purpose" requirement contained in EDPL § 207(c)(4).

7. Opinion Below

On May 15, 2009, the Appellate Division, Second Department denied Appellants' EDPL § 207 Petition. (A. 6-22); *see also Goldstein v. N.Y. State Urban Develop. Corp.*, 879 N.Y.S.2d 524 (2d Dep't 2009) (Eng, J.).

Before reaching the merits of Appellants' constitutional claims, the court rejected Respondent's argument that the Petition was untimely or barred by the doctrine of collateral estoppel.

Turning to the merits, the court rejected Appellants' claim that the public use clause contained in the New York State Constitution, N.Y. Const., art. 1, § 7(a), "imposes a more stringent restrictive standard for the taking of private property than that imposed by the United States Constitution." (A. 7).

8. Subsequent Events

Believing that the Appellate Division's decision meant that he had cleared the "last hurdle" to building the Project,[11] Ratner announced a series of substantial changes to the Project, including:

> (1) the decision to jettison Frank Gehry's highly touted designs in favor of a "value-engineering" firm;

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[11] *See Ruling Could Put Ratner's Atlantic Yards Project Back On Track*, N.Y. DAILY NEWS, May 16, 2009 ("'We're very, very happy,' Ratner told the Daily News Friday, hours after the court victory. 'This is really the last hurdle that we have'"), *available at* http://www.nydailynews.com/ny_local/brooklyn/2009/05/16/2009-05-16_ruling_could_put_ratners_atlantic_yards_projects_back_on_track.html.

(2) the sole source "renegotiation" of Ratner's winning "competitive" proposal to purchase the MTA's railyard by:

> (a) reducing the upfront payment from $100 million to $20 million with the remaining $80 million paid over a period from 2010 to 2031 (21 years) with unusually low interest at 6.5 percent;
>
> (b) scaling back on the new "state-of-the-art" railyard from nine tracks with a capacity of 76 cars, to seven tracks and 56 cars (the capacity of the current railyard is 72 cars);
>
> (c) dividing the land into parcels (one for the arena and six others for the western half of the yard slated for the bulk of housing development) and delaying the timing for the conveyance, thus allowing Ratner the flexibility to abandon the Project after the arena is built; and
>
> (d) granting Ratner the right to rename the subway station to include the name "Barclays Center" for $200,000 per year because Ratner has already sold the arena naming rights to Barclays Bank for $400 million ($20 million a year for twenty years); and

(3) announcing that the General Project Plan would be amended:

> (a) so that the ESDC can stage EDPL Article 4 condemnation proceedings seeking to transfer title to Appellants' properties and obtaining orders directing the Sheriff to commence evictions, which will in turn make it easier for Ratner to abandon the Project after building only the arena, and will reduce costs by delaying payment of just compensation, if any, for as long as ten years;

(b) to reflect new arena and project designs by a "value-engineering" firm;

(c) to increase cost estimates, even though construction costs generally have been reduced due to the economic downturn;

(d) to allow that the Project could take as long as 25 years to complete;

(e) to indicate that the "Urban Room" public space will not be built for an indefinite period, if ever; and

(f) to jettison the prior site plan and renderings by Frank Gehry and replace them with nothing other than arena drawings.

A. State Senate Hearing, May 29, 2009

On May 29, 2009, just two weeks after the decision now on appeal, and nearly six years after the deal was first announced, the New York State Senate Standing Committee on Corporations, Authorities and Commissions held the *first ever* legislative hearings concerning the Project.

During the hearings, the IBO, a publicly funded entity that provides nonpartisan information about New York City's budget to the public and their elected officials, updated its original 2005 analysis of the public costs of the arena. In 2005, the IBO had concluded that the arena would "generate a modest net positive fiscal impact for the city of about $25 million net present value over 30

years." *See* Testimony of George Sweeting, Deputy Director, New York City IBO, May 29, 2009, *available at* http://www.ibo.nyc.ny.us/iboreports/52909 AtlanticYardsTestimony.pdf.

Since its initial analysis in 2005, however, some of the key assumptions changed. For example, the City's capital contribution grew from $100 million to $205 million. Accordingly, the IBO's "estimate of the present value of the cost to the city to finance this contribution has nearly doubled from $101 million to $191 million." *Id.* This "change alone therefore eclipses the $25 million net positive benefit to the city that we previously estimated for the arena." *Id.*

Moreover, "the cost of the arena has reportedly grown to nearly $1 billion." *Id.* At the time of the initial study in 2005, the IBO's estimate was $555 million. "With the increased cost of the arena, the cost to the public sector of allowing [Ratner] to use tax-exempt bonds to finance construction has also increased." *Id.* Assuming that Ratner is able to save $150 million in costs for the arena by using the new "value-engineered," non-Gehry design, the final cost of the arena would be $850 million. "At that price and the current interest rate environment, IBO estimates that the public-sector cost in foregone tax revenue from the bondholders would be $200 million, with $193 million of that borne by

federal taxpayers. The city cost would be about $1.5 million. [Ratner's] savings would amount to $191 million." *Id.*

Finally, "the higher arena cost also results in larger city and state costs for the exemptions from the mortgage recording tax and the sales tax that were granted by [the ESDC] for this project. For the city the combined cost is now $24 million, roughly double our original estimate." *Id.*

The IBO testimony also noted that, in 2008, "the city and state succeeded in persuading the federal government to allow the use of an aggressive interpretation of Internal Revenue Service regulations that will make it possible to use tax exempt bonds for most, if not all, of the construction costs of the arena." Although this aggressive interpretation "has been prohibited going forward . . . its use at Atlantic Yards was 'grandfathered' – provid[ed that] construction starts by the end of [2009]." *Id.*

B. Gehry Design Jettisoned

On or about June 4, 2009, Ratner publicly acknowledged that Frank Gehry's designs for the arena and the Project had been abandoned in favor of a "value-engineering" architectural firm. The announcement, combined with the renderings later released by Respondent ESDC, was not well received. *See* Renderings, *available at* http://nylovesbiz.com/pdf/AtlanticYards/figures1-9.pdf.

The New York Times architectural critic called the switch "a shameful betrayal of the public trust . . . that should enrage all those who care about this City." Nicolai Ouroussoff, *Battle Between Budget and Beauty, Which Budget Won*, N.Y. TIMES, June 9, 2009, *available at* http://www.nytimes.com/2009/06/09/arts/design/09arena.html. The critic observed:

> In a stunning bait-and-switch, Forest City Ratner (which was the development partner for The New York Times Company's headquarters in Midtown) has now decided that it can't afford an architect of Mr. Gehry's stature. Neglecting to tell the public, the firm went out months ago and hired Ellerbe Becket, corporate architects known for producing generic, unimaginative buildings.

Id. The new arena was described as a "colossal, spiritless box" with a "low-budget, no-frills design" that "embodies the crass, bottom-line mentality that puts personal profit above the public good." *Id.* The critique ended by warning that if "it is ever built, it will create a black hole in the heart of a vital neighborhood." *Id.*

C. MTA Sweetens The Deal

On June 22, 2009, the MTA Finance Committee held an informational meeting during which MTA staff presented, for the first time, proposed amendments to the deal originally struck with Ratner in exchange for the railyards. The staff summary of the proposed changes presented during the meeting is available at http://www.mta.info/mta/pdf/ay_summary.pdf. A complete

webcast of the meeting is available at http://www.mta.info/mta/webcasts/archive.htm.

During the meeting, MTA Board Member Doreen Frasca inquired:

> I guess just an observation, and I know staff has worked very long and hard on this, including into this weekend, but I note that it's one month shy of four years since the board accepted the Forest City Ratner proposal, and this committee and this board is being given less than 48 hours to understand the complexities and vote intelligently. . . I think that's pretty outrageous. Why do we have to vote on Wednesday?

Gary Dellaverson, the Chief Financial Officer for the MTA, responded that, although the board could, of course, accept, reject or decide not to vote on the proposal:

> I think that, the way that I would describe the timing to you – I think that the feeling cramped – there's not much I can do about it. That is what it is. . . . I think that, in terms of why must it be now in the summer versus in the fall, I think that really relates to Forest City's desire to market their bonds as a tax-exempt issuance [by a December 31 deadline]. If the structure . . . is not such that allows for the marketability of the bonds, then the financial aspect of the transaction, as it relates to arena construction expenses that Forest City Ratner would incur, become less viable and perhaps not viable. That's not something that I'm prepared to say from my own knowledge . . . but I would be remiss if I suggested anything other – that's the principal driver of the timing.

"The arena?" Ms. Frasca followed up. "Sure," responded Mr. Dellaverson.

Board Member Frasca then inquired as to whether the new reduced initial payment of "$20 million had anything to do with an appraisal of that particular [arena] part of the parcel, versus the other parts?" Mr. Dellaverson responded that the original appraisal [of $214.5 million] covered the entire site and that whether the arena parcel square footage was "one-fifth of the total square footage, you know, I don't actually know the answer."

Board Member Lee Albert asked what would happen if one of the losing bidders from the 2005 RFP objected. Mr. Dellaverson responded that the Board had no obligation, but offered that "it would be interesting" if "Extell Development [the losing, but higher, bidder in 2005] were to make an unsolicited proposal . . . I don't know what we would do."

Board Member Albert asked whether Ratner had "committed to [build] a platform" over the railyards. Dellaverson ducked the question, responding that Ratner's "obligation is to perform pursuant to calendar obligations." Ratner plainly is not irrevocably obligated to build the platform over the yards.

Finally, Board Member Frasca asked whether "Forest City Enterprises, the parent," has a public credit rating. Dellaverson said that it did, but that he did not know what the rating was. On July 29, 2009 – just two days ago –

Forest City Enterprises' ("FCE") public credit rating as published by Moody's was lowered from B1 to B3 with a negative outlook. *See Moody's Downgrades Forest City to B3; Outlook Negative*, Reuters Wire Service, Jul. 29, 2009, *available at* http://www.nolandgrab.org/archives/forest_city_ratner_company/. Obligations rated in the "B" category (whether B1, B2, or B3) are considered "junk" – *i.e.*, subject to high credit risk with generally poor credit quality.

On June 23, 2009, the *New York Post* Editorial Board urged the MTA Board to vote "no" on the new proposal.[12] The same day, a columnist in the *New York Post* aptly summarized the situation:

> Back in 2005, Ratner's Forest City offered to pay the MTA $100 million up front for the MTA's portion of the Atlantic Yards site – an extremely valuable tract of urban land. Now Forest City wants to pay the MTA only $20 million this year – and *only* if it can find buyers for its tax-exempt bonds for the multibillion-dollar project. It says it'll pay the MTA the rest later – a lot later, over 20 years starting in 2012. Ratner's original proposal to build a stadium and an apartment and office complex came with promises of great jobs for minorities, affordable housing *and* a truckload of trendy architecture. That won the project the political support to get hundreds of millions of dollars' worth of tax breaks (plus other subsidies). But lots of those "public benefits" have vanished in recent months: The stadium lost its "starchitecture" features; the affordable housing *and* the office tower have disappeared. And now the MTA is going to let Ratner get away with not even paying for the site for *decades*. This is crazy. . . .

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[12] *The Original Deal or None*, N.Y. POST, June 23, 2009, *available at* http://www.nypost.com/seven/06242009/postopinion/editorials/the_original_deal_or_none_175759.htm.

> Remember the MTA is so cash strapped that it had to beg the state for a *permanent* $2 billion-a year bailout a couple of months back. Yet now, in effect, it's proposing to *lend* money to a speculative developer at a 6.5 percent interest rate for decades. That rate is laughable – market rate financing is unavailable at even twice that. . . . Ratner is breaking another important promise: He also undertook to build the MTA better rail yards that could increase ridership capacity. Now Forest City proposes a scale back of more than 25 percent from what was first offered. That translates to tens of millions of dollars, at least, in lost value for public transit.

Nicole Gelinas, *An Outrageous Giveaway: MTA Gift to Developer Ratner*, N.Y. POST, Jun. 23, 2009, *available at* http://www.nypost.com/seven/06232009/postopinion/opedcolumnists/an_outrageous_giveaway_175633.htm.

On June 24, 2009, the full MTA Board formally considered the proposal and adopted a resolution approving the new deal. The MTA Resolution is available at http://www.mta.info/mta/pdf/ay_resolution.pdf. A webcast of the Board Meeting is available at http://www.mta.info/mta/webcasts/archive.htm.

During the meeting, Develop Don't Destroy Brooklyn, a New York not for profit corporation devoted to developing the MTA's railyards without a basketball arena or the forcible taking of homes or business, bid $120 million for the site. The bid was ignored.

Before the vote, two board members expressed opposition to the proposal and voted against it. Board Member Mitchell Pally explained that it was

not inconsistent to support the Project generally but to oppose the deal that was presented to the MTA "because I believe the only issue facing me as a board member is whether or not I believe . . . whether MTA was getting fair market value for its property. I did not believe that four years ago . . . And I believe the same to be true today." Board Member Allen Cappelli explained that: "Our jobs as fiduciary is to ensure that the MTA gets maximum value. . . and, at least as of this moment, I am not convinced . . . . I'm very troubled by the idea that the state of the art railyard . . . which was a nine-track facility several weeks ago, is now sufficient with seven. Once we build that out, we're locked into that forever."

The MTA Resolution approving the new deal was adopted by a vote of 10-2. Interestingly, the MTA Resolution, which in places tracks virtually verbatim the Modified General Project Plan ("MGPP") approved by the ESDC on Dec. 8, 2006, omitted all references to blight, a state-of-the-art arena, and a state-of-the-art rail storage and inspection facility. Below are excerpts from the MGPP, which is virtually identical to the MTA Resolution[13] – except that the italicized portions have been omitted from the MTA Resolution:

> The principal goal of the . . . Project is to transform an area *that is blighted and underutilized* into a vibrant, mixed-use, mixed-

[13] The MTA Resolution is available at http://www.mta.info/mta/pdf/ay_resolution.pdf.

> income community that capitalizes on the tremendous mass transit service available at this unique location. *In addition to eliminating the blighting influence of the below-grade Yard and the blighted conditions of the area*, the Project aims, *through this comprehensive and cohesive plan*, to provide for the following public uses and purposes:
>
> - a publicly owned *state-of-the-art* arena to accommodate the return of a major-league sports franchise to Brooklyn . . .
> - a *state-of-the-art* rail storage, cleaning and inspection facility for the LIRR that would enable it to *better accommodate simultaneously its new fleet of multiple-unit series of electric propulsion cars operated by LIRR* which are compliant with the American with Disabilities Act (the "MU Series Trains") and other transit improvements.

Apparently, the MTA employee responsible for editing the passage from the MGPP understood that it can no longer credibly be claimed that the Project will eliminate blight when there is no longer any guarantee that the open, below-grade railyard will be covered; that the arena or replacement railyard will be "state-of-the-art"; when Frank Gehry has been fired; and when the railyard will now be *reduced* from its current capacity.

D. ESDC Board Meeting, June 23, 2009

On June 23, 2009, the ESDC approved the process for further amending the MGPP. The details of the new Modified General Project Plan, with exhibits, including renderings of the new arena, a Technical Memorandum, and

the State funding agreement are available generally at http://www.empire.state.ny.us/AtlanticYards/. The new documents acknowledge that the increased risk of significant Project delays in the construction of anything more than the arena and one tower (currently slated for completion in 2012), and a rise in projected costs, have led the ESDC to commence the 60-day process of adopting a new MGPP that is scheduled to culminate in September 2009, after a public hearing and comment period through the end of August. A webcast of ESDC June 23, 2009 meeting is available at http://streaming.expeditevcs.com/starbak/view/eventListing.jhtml?eventid=3596&c=369. The new documents do not contain a site plan, renderings, cost-benefit-analysis, or affordable housing income level tables. Notwithstanding these omissions, Respondent ESDC thus far maintains that the Project has not changed since its initial approval in December 2006.

ARGUMENT

I. THE SEIZURE OF APPELLANTS' HOMES AND BUSINESSES VIOLATES THE NEW YORK CONSTITUTION'S PUBLIC USE CLAUSE

This case is about whether the New York Constitution means what it says (and what the founders intended it mean), or whether the "law of each age is ultimately what the age thinks should be the law." A. 15 (opinion on appeal, quotation marks and citations omitted).

The New York Constitution "is the voice of the people, speaking in their sovereign capacity." *In re New York Elev. Ry. Co.*, 70 N.Y. 327, 342 (1877). It is the "most solemn and deliberate of all human writings," ordaining "the fundamental law of states." *Newell v. People*, 7 N.Y. 9, 97 (1852).

"[C]onstitutional provisions are not leveled solely at the evils most current at the times in which they are adopted, but, while embracing these, they look to the history of the abuses of political society in times past, and in other countries, and endeavor to form a system which shall protect the members of the State against those acts of oppression and misgovernment which unrestrained political or judicial power are always and everywhere most apt to fall into."

People ex rel. Hackley v. Kelly, 24 N.Y. 74, 81-82 (1861), *abrogated on other grounds*, *People ex rel. Lewisohn v. O'Brien*, 176 N.Y. 253 (1903).

Almost two centuries ago, in 1821, the people of this State enacted a constitutional provision prohibiting the government from taking private property unless it was for "public use." N.Y. Const. art. VII, § 7 (1821), *now appearing at* N.Y. Const. art. I, § 7(a).

For the first time in its history, this Court is now asked to interpret the New York Constitution's public use provision more strictly than more modern interpretations of its federal counterpart, and to enforce the plain command of Article XVIII, § 6. The court below should be reversed. Appellants' Petition should be granted. Respondent's Determination should be rejected.

Article I, section 7(a) of the New York State Constitution (the "Takings Clause") directs that: "Private property shall not be taken for public use without just compensation." N.Y. Const. art. I, § 7(a). The plain language of that command – as understood upon its enactment in 1821 and for nearly a century thereafter – controls this case.

The Takings Clause restricts the taking of private property in two ways. First, it prohibits the government from commandeering private property for

anything other than "public use." *Matter of Albany Street*, 11 Wend. 149 (Sup. Ct. of Judicature 1834) ("authorizing the appropriation of private property to public use, impliedly declares, that for any other use, private property shall not be taken from one and applied to the use of another"). Second, it requires that government pay "just compensation" to the person whose property is taken. This case concerns the "public use" requirement (the "Pubic Use Clause").

A. The Language of the Public Use Clause Has Not Changed Materially Since It Was First Enacted In 1821

When it was first enacted by the people following the Constitutional Convention of 1821, the Public Use Clause was identical to its federal Fifth Amendment counterpart. *Compare* N.Y. Const. art. VII, § 7 (1821) ("nor shall private property be taken for public use, without just compensation"), *with* U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation").

In 1846, the people enacted changes recommended by the Constitutional Convention of that same year, which included moving the Public Use Clause from the Seventh Article to the First Article – the Bill of Rights. The language, however, remained the same. *Compare* N.Y. Const. art. VII, § 7 (1821)

("nor shall private property be taken for public use, without just compensation"), *with* N.Y. Const. art. I, § 6 (1846) ("nor shall private property be taken for public use, without just compensation").

In 1938, the Public Use Clause and related provisions that had been split between two sections in the Bill of Rights – Section 6 (concerning the "Rights of the accused in criminal cases" and "taking private property for public use") and Section 7 (concerning "Compensation for private property, how ascertained" and "private roads") – were combined in Section 7 and separately enumerated with letter designations. Because the clause was moved from the end of a series of prohibitions in Section 6 to the first sentence in Section 7, the language was modified from "nor shall private property be taken" to "Private property shall not be taken." The meaning did not change.

B. Plain Language Controls

Having been "adopted by the people, the intent" of the New York Constitution "is to be ascertained, not from speculating upon the subject, but from the words in which the will of the people has been expressed. To hold otherwise would be dangerous to our political institutions." *People v. Rathbone*, 145 N.Y. 434, 438 (1895); *see also People ex rel. Garling v. Van Allen*, 55 N.Y. 31, 35

(1873) (holding that it "is not the province of courts to speculate upon what might be intended" by the people).

"The language of a constitution is presumed to be selected with more care and exactness than that of a statute." *Garling,* 55 N.Y. at 35; *see also King v. Cuomo*, 81 N.Y.2d 247, 253 (1993) (the Constitution is "framed deliberately and with care, and adopted by the people as the organic law of the State") (citing *Settle v. Van Evrea*, 49 N.Y. 280, 281 (1872)). "It must be presumed that the framers understood the force of the language used and as well the people who adopted it." *Rathbone*, 145 N.Y. at 438.

Full "effect should be given to" the "plain and unambiguous" language "of a constitutional provision." *King v. Cuomo*, 81 N.Y.2d at 253 (citation omitted). The Public Use Clause is straightforward, clear, and unambiguous. "Private property shall not be taken" unless "for public use." It

does not say "public purpose."[14] It does not say "public benefit."[15] It does not say "better use," *e.g.*, "higher tax revenues" or "better utilization."

As explained by a dissenting Justice in *Kelo v. City of New London*, 545 U.S. 469, 508-09 (2005) (Thomas, J. dissenting), the "most natural reading of the Clause," and the interpretation most consistent with the plain meaning of the word "use" – whether as revealed by dictionaries from the time of enactment or even now – "is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever."

As this Court has recognized, the natural reading of a provision of the New York Constitution should ultimately control. "The operation and effect" of a constitutional provision should "not be extended by construction beyond the fair scope of the terms employed, merely because the more restricted and literal

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[14] Although the Constitutional Convention of 1967 recommended to the people precisely such a change, it was voted down. *See infra* at 55-56.

[15] To be sure, as the court below recognized, in addition to authorizing parties aggrieved by proposed condemnations to sue for state and federal constitutional violations, *see* EDPL § 207(C)(1), the EDPL also authorizes challenges to condemnations that do not serve "a public use, benefit or purpose," *see* EDPL § 207(C)(4). Needless to say, however – and contrary to the court's intimation – insofar as the Public Use Clause "is wholly at odds with . . . statutory authority," it is the Public Use Clause that controls, not the other way around. A. 16. "Courts do not have the leeway to construe their way around a self-evident constitutional provision by validating an inconsistent practice and usage of those charged with implementing the laws." *King v. Cuomo*, 81 N.Y.2d at 253 (citations and internal quotation marks omitted).

interpretation might be inconvenient or impolitic, or because a case may be supposed to be, to some extent, within the reasons which led to the introduction of some particular provision, plain and precise in its terms." *King v. Cuomo*, 81 N.Y.2d at 253 (citing *Settle v. Van Evrea*, 49 N.Y. 280, 281 (1872)).

While the plain language of the Public Use Clause alone supports Appellants' interpretation of the Clause, and thus reversal and rejection of Respondent's Determination, the history of the Public Use Clause and a long line of cases authoritatively interpreting its meaning leaves little room for doubt.

C. The Public Use Clause Should Be Interpreted As It Was Understood Upon Enactment

"The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time, when a court has occasion to pass upon it. The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it." *Browne v. City of New York*, 213 A.D. 206, 234 (1st Dep't 1925) (citation omitted).

The central importance of property rights for New Yorkers can be traced at least as far back as 1683, when the New York colonists passed "The Charter of Liberties and Privileges" in the first Colonial Assembly. The Charter provided: "THAT Noe man of what Estate or Condicon soever *shall be putt out of*

his lands or Tenements, nor taken, nor imprisoned, nor disherited, nor banished *nor any wayes* destroyed without being brought to Answere by due Course of Law." 1 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 721 (1905) (emphasis supplied), *available at* http://purl.org/net/nysl/nysdocs/1337955.

New York's first Constitution was adopted in 1777. Like the first federal Constitution, it contained no bill of rights. As with the federal Constitution, this was because a number of the founders thought that enumerating accepted individual rights was "unnecessary, and tend[ed] to weaken, if not endanger those unnoticed." *People v. Morris*, 13 Wend. 325, 328 (Sup. Ct. of Judicature 1835).[16]

In 1787, the legislature passed "An Act Concerning the Rights of the Citizens of this State," which became known as the Bill of Rights, and which was the first enumeration of individual rights in the State of New York. It too

[16] The Court of Appeals, of course, was not created until the Constitution of 1846, when it replaced the Court of Chancery and the Court for the Correction of Errors, which were created by the New York State Constitution of 1777, and operated from 1777 to 1846. The Court of Chancery had jurisdiction over cases in equity and served as an intermediate court of appeal from cases at law originating in the Supreme Court of Judicature (the predecessor to the New York Supreme Court, which also had both trial and appellate jurisdiction). The Court for the Correction of Errors was an *en banc* court of last resort. It consisted of the Lieutenant Governor, the Chancellor of the Court of Chancery, the justices of the Supreme Court of Judicature, and the members of the New York State Senate.

recognized the fundamental importance of property rights by providing (in the "Second" article) that: "no citizen of this state shall be taken or imprisoned or *be disseised of his or her freehold* or liberties or free customs, or outlawed or exiled or condemned or otherwise destroyed, but by lawful judgment of his or her peers, or by due process of law"; and (in the "Fifth" article) that "no person, of what estate or condition soever, shall be . . . *put out of his or her franchise or freehold* . . . unless he or she be duly brought to answer and be forejudged of the same by due course of law; and if anything be done contrary to the same it shall be void in law, and holden for none." 1 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 728-29 (emphasis supplied), *available at* http://purl.org/net/nysl/ nysdocs/1337955.

No less an authoritative source than Blackstone also stressed the paramount importance of the right to private property:

> So great is the regard of the law for private property, that it will not authorize the least violation of it, no, *not even for the general good of the whole community*. If a new road, for instance, were to be made through the grounds of a private person, it might, perhaps, be extensively beneficial to the public, but the law permits no man, or set of men, to do this without the consent of the owner of the land. In vain may it be urged that the good of the individual ought to yield to that of the community, for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. *Besides, the public*

> *good is in nothing more essentially interested, than in the protection of every individual's private rights, as modeled by the municipal law.*"

1 BLACKSTONE'S COMMENTARIES 139, *quoted in Wynehamer v. People*, 13 N.Y. 378, 386 (1856) (emphasis in original).

In 1821, the right to property in general, and the express protection that property shall not be taken unless for "public use," was enshrined in the New York Constitution. N.Y. Const. art. VII, § 7 (1821). The Public Use Clause "was borrowed from the fifth article of the amendments of the United States Constitution" and "was merely declaratory of existing law." *Polly v. Saratoga etc. R.R. Co.*, 9 Barbour 449, 459 (Sup. Ct. N.Y. Co. 1852) (three-judge panel).

D. Interpretive History of the Public Use Clause

1. 1821-1846

Shortly after its enactment in 1821, one of the first courts to consider the Public Use Clause observed that:

> the fifth article of the amendments of the Constitution of the United States, which forbids the taking of private property for public use . . . is [also now] contained in the late amendments to the Constitution of this State. I do not rely upon either, as having a binding force upon the act under consideration. The former related to the power of the national government and the latter is not yet operative. But they are both declaratory of a great and fundamental principle of government;

> and any law violating that principle must be deemed a nullity, as it is against natural right and justice.

Bradshaw v. Rodgers, 20 John. 102, 104 (Sup. Ct. of Judicature 1822) (sitting as an appellate court).

Within twenty years of enactment, several courts had invalidated legislative acts that authorized the transfer of one man's property to another without consent of the owner, although compensation was paid. *See Taylor v. Porter*, 4 Hill. 140 (Sup. Ct. of Judicature 1843) (three-judge panel) (citing *Matter of Albany Street*, 11 Wend. 149 (Sup. Ct. of Judicature 1834), and *In re John & Cherry Streets*, 19 Wend. 659 (Sup. Ct. of Judicature 1839)). Moreover, as explained in *Taylor v. Porter*, 4 Hill. 140 (Sup. Ct. of Judicature 1843), "the same doctrine" prohibiting the Legislature from transferring property from one private owner to another "was held by the chancellor in *Varick v. Smith*, [5 Paige 137 (Ct. of Chancery 1835)] and it was admitted by all members of the court of errors who delivered opinions in *Bloodgood v. Mohawk & Hudson R.R. Co.*, [18 Wend. 9 (Ct. for Corr. of Errors 1837) (*en banc*)]."

In 1837, New York's then-highest court, the Court for Correction of Errors, sitting as always *en banc*, held that "the legislature of this state has the constitutional power and right to authorize the taking of private property for the

purpose of making railroads or other public improvements of the like nature . . . whether those improvements are made by the state itself or through the medium of a corporation" but reversed the taking, thus restoring the "plaintiff . . . to all things which he has lost," because just compensation was not paid *before* the plaintiff's property was taken as required by statute. *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9 (Ct. for Corr. of Errors 1837) (*en banc*) (quote from judgment of the Court contained in the last full paragraph of the opinion).

Unlike today, the power of the Legislature to take property for a privately owned common carrier, such as a railroad, even though carriage on the railway would be open to the public at large, was very much in doubt in 1837. Accordingly, four of the twenty-three members of the Court wrote lengthy concurrences in *Bloodgood* detailing their analysis. One of those concurrences, by Senator Tracy, explained in detail why the taking of private property, even for an unquestioned public use such as a railroad, comes within a hair's breath of violating the Public Use Clause when the railroad itself is privately owned. Senator Tracy presciently warned:

> When we depart from the natural import of the term "public use," and substitute for the simple idea of a public possession and occupation, that of public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term public improvement, is there any limitation which can be set to the exertion

> of legislative will in the appropriation of private property. The moment the mode of its use is disregarded, and we permit ourselves to be governed by speculations, upon the benefits that may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat without any certain principle to guide us.

Bloodgood v. Mohawk & Hudson R. Co., 18 Wend. 9 (1837) (Sen. Tracy, concurring).[17]

Senator Tracy also presaged later decisions by this Court holding that the Public Use Clause prohibits takings where the public benefit is subordinate to a private benefit[18]:

> Can the constitutional expression, public use, be made synonymous with public improvement, or general convenience and advantage, without involving consequences inconsistent with the reasonable security of private property; much more with that security which the constitution guarantees. If an incidental benefit, resulting to the public from the mode in which individuals in pursuit of their own interest use their property, will constitute a public use of it, within the intention of the constitution, it will be found very difficult to set limits to the power of appropriating private property. It is hardly

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[17] The court below mistakenly chastised Appellants for quoting this language "from a dissenting Justice." (A. 14). A careful reading of the case, and an understanding of the constitutional structure of New York's court system from 1777 to 1846, reveals otherwise.

[18] *See also Aspen Creek Estates, Ltd. v. Brookhaven*, 12 N.Y.735, 736 (2009) (public benefit "not incidental or pretextual *in comparison* with benefits to particular, favored private entities") (emphasis supplied); *Waldo's, Inc. v. Village of Johnson City*, 74 N.Y.2d 718, 721 (1989) (agency determination should be upheld "so long as the public purpose is dominant" *as compared* to private benefit); *Denihan Enterprises, Inc. v. O'Dwyer*, 302 N.Y. 451, 458-59 (1951) (sustaining public use challenge because "the public use" was "only incidental and in large measure subordinate to the private benefit conferred").

> necessary to illustrate by supposed cases the extent to which such a doctrine could be legitimately carried.

Id.

In an important decision, the Court in *Taylor v. Porter*, 4 Hill. 140 (Sup. Ct. of Judicature 1843), invalidated a statute for violating the Public Use Clause. "It is enough that some interest – some portion of [plaintiff's] estate, no matter how small – has been taken from him without his consent," *i.e.*, the "property of A. is taken, without permission, and transferred to B." The statute in question authorized landowners to apply for, and pay the government to, construct a private road from their property to a nearby public way by going over and through adjacent private properties. The statute provided that, because any private road thus built would be paid for by the applicant, the road would thereafter "be for the use of such applicant, his heirs and assigns." *Id.* "Even the owner of the land over which the road passes . . . has no right to use the road for his own purposes." *Id.* Notwithstanding the arguable public benefit gained by allowing property owners ready entry and egress from their lands, the court declared that the statute violated the Public Use Clause.

2. The Constitutional Convention of 1846 – *Taylor v. Porter* Overruled

As a result of the Constitutional Convention of 1846, the people of New York enacted a new Constitution. Although the Public Use Clause itself remained unchanged, a provision was added expressly permitting the use of eminent domain for private roads: "Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road, and the amount of all damage to be sustained by the opening thereof, shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefitted." N.Y. Const. art. I, § 7 (1846). The provision was intended to overrule *Taylor v. Porter*, and did. *See* 4 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 139-140 (1905), *available at* http://purl.org/net/nysl/nysdocs/1337955.

While this was the first occasion where the people amended, or rejected a proposed amendment to, the New York Constitution to permit the use of eminent domain in circumstances that were otherwise proscribed by the Public Use Clause, it was not the last.

3. 1846-1897

About fifty years passed between the Constitutional Conventions of 1846 and the advent of the U.S. Supreme Court's application of the strictures of the Fifth Amendment's Public Use Clause against the states pursuant to the Fourteenth Amendment through the doctrine of incorporation. *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897) (incorporating Takings Clause of the Fifth Amendment), *abrogating Barron v. Mayor*, 32 U.S. 243, 250-251 (1833) (holding the Takings Clause inapplicable to the States of its own force).

From 1846 to 1897, New York courts continued to interpret the Public Use Clause strictly – as they had for the first twenty-five years after its enactment – rejecting the notion that the clause could be satisfied by a mere public "benefit" or "purpose."

In 1876, this Court explained that "the question whether the use for which the property was taken was public or private" can "only be determined by a judicial inquiry." *In re Deansville Cemetery Assoc.*, 66 N.Y. 569, 21 Sickels 569 (1876). The question turns on "the nature of the use for which the land in question is sought to be taken." *Id.* In *Deansville*, the property was intended to be transferred to a cemetery association which would then "divide it into lots and sell

these lots to individual owners." *Id.* In holding that the proposed taking violated the Public Use Clause, the Court explained:

> It is difficult to see what interest the public will have in the lands or in their use. No right on the part of the public to buy lots or bury their dead there is secured. The prices at which the lots are to be sold are to be fixed by private agreement; the corporation is to be managed by trustees elected by the lot owners . . . . The substantial right of enjoyment of the property is vested in the individual lot-owners; and the whole effect of the incorporation of these cemetery associations is to enable a number of private individuals to unite in purchasing property for their own use and that of their descendants as a place of burial . . . with the privilege, when they cease to use their lots as a place of burial, to sell them and receive the proceeds for their own benefit. It is argued that the property is to be used as a place of burial and that the burial of the dead is a public benefit, and therefore, the use is public. But the answer to this argument is, that the right of burial in these grounds is not vested in the public or in the public authorities, or subject to their control, but only in the individual lot-owners. If the fact that it is a benefit to the public that the dead should be buried is sufficient to make a cemetery a public use, the legislature might authorize A to take the land of B for a private burial place of A and his family. The fact that this land is taken for the benefit of a number of individuals for division among themselves or their grantees for their own use as a cemetery, makes the case no stronger than if taken for the benefit of a single individual.

Id.

In 1884, this Court considered whether an act of the Legislature that permitted a private company to condemn land along Bushwick Creek in Brooklyn in order to construct wharves violated the Public Use Clause, and concluded that it

did. *In re Eureka Basin Warehouse & Manufacturing Co.*, 96 N.Y. 42, 48 (1884). The Court in *Eureka Basin* explained that:

> The taking of private property for private purposes cannot be authorized even by legislative act, and the fact that the use to which the property is intended to be put . . . will tend incidentally to benefit the public by affording additional accommodations for business, commerce or manufactures is not sufficient to bring the case within the operation of the right of eminent domain, so long as the structures are to remain under private ownership and control, and no right to their use or to direct their management is conferred upon the public.

96 N.Y. at 48-49. This Court concluded that, notwithstanding the fact that the company would improve the entire basin area by, among other things, erecting wharves, piers, and warehouses that might benefit the public, "the enterprise is, in substance, a private one, and the pretense that it is for a public purpose is merely colorable and illusory." *Id.* at 49.

In 1888, this Court again expounded on the importance of strictly construing the term public use and conducting a searching and thorough inquiry before concluding that a proposed condemnation is for public use. *In re Niagara Falls & W. R. Co.*, 108 N.Y. 375, 385 (1888). The Court considered whether the proposed condemnation of private land by a railroad company in order to build a rail spur to Niagara Falls withstood scrutiny under the Public Use Clause. *Id.* at 384. The Court explained that the "papers on their face, show that the corporation

has undertaken an ordinary railroad enterprise . . . in aid of which the power of eminent domain may be appropriately exercised." *Id.* But, when the Court looked "beyond the formal documents, and the actual business proposed to be conducted [wa]s considered," it found that the railroad would not be used for transporting freight, but instead would "enable the corporation" to charge tourists to better see Niagara Falls. The Court held that this was "not a public purpose which justifies the exercise of the high prerogative of sovereignty invoked in aid of this enterprise." *Id.*

As in *Bloodgood*, the Court in *Niagara Falls* understood that the "expressions 'public interest' and 'public use' are not synonymous. The establishment of furnaces, mills, and manufactures, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote, in a general sense, the public welfare. But they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings." *Id.* at 385. *See also In re Mayor of City of New York*, 135 N.Y. 253, 259 (1892) ("There is . . . unquestionably a distinction between the use which is public and an interest which is public; and where" only an interest and not a use is presented, then "the right to take property *ad invitum* [without consent] does not exist"); *In re Split Rock Cable Road Co.,* 128 N.Y. 408, 416

(1898) (the "possible limited use by a few, and not then as a right but by way of permission or favor, is not sufficient to authorize the taking of private property against the will of the owner").

In *Pulman v. Henion*, 64 Hun. 471, 19 N.Y.S. 488, 490 (5th Dep't 1892), the Court considered whether the condemnation of private land in service of digging ditches to drain swamps, thus increasing the amount of arable agricultural land, constituted a public use. Adverting to the fundamental principle of law "that private property cannot be taken for private use without the consent of the owner," the court found the law to be indistinguishable from the opening of private roads that were held to violate the Public Use Clause in *Taylor v. Porter*, 4 Hill. 140 (Sup. Ct. of Judicature 1843), *abrogated by Constitutional Amendment*, N.Y. Const. art. I, § 7 (1846). Indeed, the court in *Pulman* found that "the framers of this constitution have not extended the right to take private property for private use beyond the case of opening private roads, and, from the very fact that they have not . . . the inference is irresistible that they did not intend it should be." 19 N.Y.S. at 490 (citation omitted).

4. The Constitutional Convention of 1894 – *Pulman v. Henion* Overruled

After the Constitutional Convention of 1894, and in response to the court's ruling in *Pulman v. Henion,* the people of New York enacted a land drainage exception to the Public Use Clause by adding the following provision to N.Y. Const. art. I, § 7:

> General laws maybe passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dikes upon the lands of others, under proper restrictions and with just compensation, but no special laws shall be enacted for such purpose.[19]

The people of New York, once again, had demonstrated their willingness to relax the requirements of the Public Use Clause through the only viable method – Constitutional amendment.

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[19] Today, as further amended, the N.Y. Const. art. I, § 7(d) provides:

> The use of property for the drainage of swamp or agricultural lands is declared to be a public use, and general laws may be passed permitting the owners or occupants of swamp or agricultural lands to construct and maintain for the drainage thereof, necessary drains ditches and dykes upon the lands of others, under proper restrictions, on making just compensation, and such compensation together with the cost of such drainage may be assessed, wholly or partly, against any property benefitted thereby; but no special laws shall be enacted for such purposes.

5. The Constitutional Convention of 1967 – "Public Purpose" Rejected

The last Constitutional Convention was held in 1967. As a result of the convention, a new constitution was proposed and submitted to the people for enactment. The proposed constitution included a revised Public Use Clause which provided, in pertinent part, that "Private property shall not be taken or damaged, as such term is defined by law, for public use *or purpose* without just and timely compensation" (emphasis supplied). *See* 12 PROCEEDINGS OF THE 1967 CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 4-5, available at: http://purl.org/net/nysl/nysdocs/17455467 (last visited Jul. 31, 2009). During the convention, the meaning of the additional phrase "or purpose" was discussed as follows:

> MR. HESSON: This is in effect, with some additions, Section 7, subdivision A of Article I of the present Constitution, which reads that private property shall not be taken for public use without just compensation. You will notice in the amended form it adds the words "or purpose." *Those words are added to make it certain that lands can be condemned for public purpose as well as for public use.* A good example would be a condemnation for purposes of urban renewal where the condemnor would not have any intention of using the property but would merely want to condemn it for the public purpose.

3 PROCEEDINGS OF THE 1967 CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 263 (emphasis supplied), available at: http://purl.org/net/nysl/nysdocs/17455467 (last visited Jul. 31, 2009). Thus, as recently as 1967, the Constitutional Convention delegates understood that the Public Use Clause was an impediment to the use of eminent domain unless the seized property was opened for use by the public.

The proposed constitution – including the attempt to allow for the forcible appropriation of private property as long as it was deemed to promote a public "purpose" – was submitted to the people on November 7, 1967. *It was rejected.* As it has since 1821, the Takings Clause – to this day – still prohibits the seizure of private homes and businesses absent a qualifying public *use*. Vague notions of benefit or purpose will not do.

E. Post-incorporation of the Fifth Amendment – The Supreme Court Loses the Plot

New York's Public Use Clause was taken verbatim from the Fifth Amendment to the United States Constitution. Where "a clause of a constitution[,] which has received a settled and judicial construction[,] is adopted in the same words by the framers of another constitution, it will be presumed that the construction was likewise adopted." *People ex rel. Smith Board of Supervisors of*

St. Lawrence County, 90 Hun. 568, 36 N.Y.S. 40, 42 (3d Dep't 1895) (citation omitted), *rev'd on other grounds*, 148 N.Y. 187 (1896).

At the time New York copied the public use requirement of the Fifth Amendment, the only extant Supreme Court opinion concerning the subject was *Calder v. Bull,* 3 Dall. 386, 388, 1 L.Ed. 648 (1798). In *Calder*, Justice Chase pronounced that an "act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority . . . . A few instances will suffice to explain what I mean . . . . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it." *Id*. This understanding of the Public Use Clause was thus adopted upon enactment in 1821.

From 1821 to 1897, the Fifth Amendment and federal precedents interpreting it, had no application in the New York Courts. *Barron v. Mayor*, 32 U.S. 243, 250-251 (1833) (holding the Takings Clause inapplicable to the States of its own force). Beginning in 1897, however, this changed. *See Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897) (incorporating Takings Clause of the Fifth Amendment). The change was not wholly uniform. Slowly, New York courts began addressing Fifth Amendment claims concerning the scope of

that Amendment's public use requirement. Coincidently, at the same time, that New York courts began grappling with Fifth Amendment claims and Supreme Court jurisprudence, the Supreme Court lost its way.

In *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161-162 (1896), the Supreme Court considered whether private property could be taken without consent to enable irrigation ditches to open up arid land. In an opinion by Justice Peckham,[20] the Supreme Court declared that: "To irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to landowners, or even to any one section of the State." *Id.*

The results in almost all "modern" public use cases can be traced to *Fallbrook*. *See Kelo v. City of New London*, 545 U.S. 469, 515-516 (2005) (Thomas J. dissenting) (criticizing *Fallbrook*).

Interestingly, just five years prior to *Fallbrook*, the New York court in *Pulman v. Henion*, 19 N.Y.S. at 490 reached the opposite result on somewhat

[20] Justice Peckham was also the author of the infamous opinion in *Lochner v. New York,* 198 U.S. 45 (1905) (holding that "liberty of contract" was implicit in the due process clause of the Fourteenth Amendment), *overruled by, West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

similar facts, which, in turn, prompted the drainage amendment to the New York Constitution.

Even more illuminating, however, is this Court's opinion in *Bradley v. Degnon Contracting Co.*, 224 N.Y. 60, 71 (1918) which held that in order to "constitute a public use, it must be for the benefit and advantage of all the public and in which all have a right to share." *Bradley v. Degnon Contracting Co.*, 224 N.Y. 60, 71 (1918) (invalidating on public use grounds putative taking for construction of a tramway). "Public use necessarily implies the right to use by the public." *Id. Bradley v. Degnon* is especially instructive because this Court relied exclusively on precedents from New York courts in reaching this conclusion.

Two years later, the Court of Appeals explained that "eminent domain could not be conferred upon one desiring to build an inn" because the "object for which the grant [of eminent domain] is made must have public utility, [and] must be one in which the public has a right to share impartially." *Holmes Elec. Protective Co. v. Williams*, 228 N.Y. 407, 424 (1920) (Andrews J., concurring).

With few exceptions, *e.g., Bradley v. Degnon*, none of the "modern" public use cases decided by New York courts so much as consider New York precedents interpreting New York's Public Use Clause from the period between

enactment in 1821 and incorporation in 1896. Indeed, the vast majority of "modern" New York cases consider claims solely under the Fifth Amendment; references to the New York Public Use Clause are nowhere to be found. Certainly, *no case has ever* considered whether the New York Public Use Clause ought to be interpreted differently than its federal counterpart – *until now*. Moreover, the few cases that do reference the New York Public Use Clause, never distinguished it from the Fifth Amendment and usually interpret it by citation to post-*Fallbrook* Supreme Court cases.

Fallbrook set off an unbroken string of Supreme Court cases that have slowly sucked all meaning from the Fifth Amendment's public use requirement. *See, e.g., Clark v. Nash*, 198 U.S. 361, 369-370 (1905) (Peckham, J.) (holding that irrigation ditch provides public benefit); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906) (holding that aerial right-of-way for a bucket line operated by a mining company does not violate public use); *see also O'Neill v. Leamer*, 239 U.S. 244, 253 (1915); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32 (1916); *Block v. Hirsh*, 256 U.S. 135, 155 (1921) *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707 (1923).

The trend culminated in the Supreme Court's decisions in *Berman v. Parker,* 348 U.S. 26 (1954) (slum clearance is a public use), *Hawaii Hous. Auth. v. Midkiff,* 467 U.S. 229 (1984) (breaking up land oligopoly is public use) and *Kelo v. City of New London*, 545 U.S. 469, (2005) (promoting economic development is public use).

F. Slum Clearance

Relying on *Fallbrook* and its progeny, this Court held in *New York City Hous. Auth. v. Muller*, 270 N.Y. 333 (1936), that slums, at least as they existed in New York in the 1930s, were such a menace to the overall health and welfare of all of society, that the use of eminent domain could be justified in aid of addressing such deplorable and hazardous conditions. The Court noted that there existed in New York at that time:

> unsanitary or substandard housing conditions owing to over-crowding and concentration of population, improper planning, excessive land coverage, lack of proper light, air and space, unsanitary design and arrangement, or lack of proper sanitary facilities; that there is not an adequate supply of decent, safe, and sanitary dwelling accommodations for persons of low income; that these conditions cause an increase and spread of disease and crime and constitute a menace to the health, safety, morals, welfare, and comfort of the citizens of the state, and impair economic values; that these conditions cannot be remedied by the ordinary operation of private enterprise.

Id. at 338-339. "The public evils, social and economic, of such conditions, are unquestioned and unquestionable." *Id.* at 339. "Slum areas are the breeding places of disease." *Id.*

By any account, the slums of New York during this period, were truly wretched in ways the are difficult to imagine or fully comprehend in 2009. "A 1927 report to [mayor Jimmy] Walker found 'A third of the city's population—over two million people [live]. . . in unsatisfactory conditions, many under stressful conditions, some under disgraceful conditions.' Intolerable during much of the year, in the summer the tenements where many of New York's working-class families lived became 'an inferno of torture to little children, the sick, and the weak.'" THOMAS KESSNER, FIORELLO H. LA GUARDIA (1989) ("LA GUARDIA").

> By 1934, the slum was in its rawest form – no privacy, shared bathrooms, shared water sources, shared firetraps. In the 1880s Jacob Riis had warned New Yorkers of the terrifying price of the slums, of the half-crazed "man with the knife," who would leap from the shadows in anarchic rage at a society tolerant of the daily abuse of his loved ones. Almost fifty years after Riis's work, New York's slums remained the most conspicuous hellholes in the world, repeatedly condemned as a menace to health, safety, and morals.

LA GUARDIA at 208. Indeed, before "the turn of the century some ninety thousand tenements – flammable, dark, ill ventilated, and unsanitary, with no central heat or

water, and shared toilets either outside the premises or in the hallway – had been put up in New York City." LA GUARDIA at 321-333. These were the tenements that led Jacob Riis to write:

> "The most pitiful victim of city life is not the slum child who dies, but the slum child who lives. Every time a child dies, the nation loses a prospective citizen, but in every slum child who lives the nation has a probably consumptive and possible criminal. You cannot let people live like pigs and expect them to be good citizens."

Id. Reporting on an investigation of City's slum conditions in 1900, an upstate commissioner remarked: "New York should be abolished." *Id.* When La Guardia was sworn in as Mayor in 1934, there were more than 350,000 "old-law" tenements. Of these:

> 1300 tenements still had outhouses in the yard, 23,000 still had toilets in the hall, and 30,000 had no bathing facilities. Between 1918 and 1929 there were four times as many fires and eight times as many deaths in these old-law tenements as the ones built after 1901. The incidence of diseases such as tuberculosis was similarly disproportionate. And crime festered here.

Id. Even before La Guardia could put his slum clearance plan into effect, a rash of fatal fires dramatized the dangers of substandard housing.

> The story was almost always the same: A winding spit of flame suddenly swept up the open stair way shaft, spreading to the tinder of the banisters and walls. Again and again screaming headlines described the dead and the crippled, sacrificed to the disgrace of New York's firetrap housing. The tragedies lent the crusade against the

> slums an urgency that only the scorched bodies of perished children being carried from burned tenements could generate. After one of these fires killed three children, five adults, and a dog, the Tenement House commissioner said, "When I went down to that fire this morning I thought of the appalling fact that 75 per cent of the multiple dwellings on Manhattan Island are old-law tenements, built just as that building was built." How that building was built was without any protection against fire, with few openings to the outside for egress in emergency, and with materials that fed the flames hurrying the fire along its deadly course.

Id.

Faced with an intractable public crisis of the magnitude described above, it is little wonder that the Court in *Muller* opined that the "fundamental purpose of government is to protect the health, safety, and general welfare of the public," 270 N.Y. at 340, and held that slum clearance and rehabilitation "is a public benefit, and, therefore, *at least as far as this case is concerned*, a public use." *Muller* 270 N.Y. at 343 (emphasis supplied).

Properly understood then, this Court's holding in *Muller* is *sui generis*. Indeed, it is expressly limited to the extraordinary facts presented. *Id.* ("at least as far as this case is concerned"). Respondent cannot credibly claim that Ratner's *post hoc* blight designation bears any relation to the clearance and rehabilitation of slums in *Muller*. Needless to say, families and children dying from rampant fires and pestilence is not analogous to "graffiti," "weeds," and

"underutilization" in an area around a below ground railyard that itself was created and left open by the government.

G. Shorn of its Fanciful and Pretextual Blight Designation, All That Remains Is an Economic Development Project

As explained by Justice O'Connor in her dissenting opinion in *Kelo,* 545 U.S. at 494, the Supreme Court has now, abandoned the Public Use Clause "under the banner of economic development." Under *Kelo*, "all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded – *i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public – in the process." *Id.* This Court should not make the same mistake.

H. Any Public Benefit Associated With the Project Is at Best Incidental to the Benefit That Will Accrue to Ratner

In its rush to approve the Project before Governor Pataki left office at the end of 2006, the ESDC failed to give any consideration to the enormous benefit that the Project will bestow on Ratner relative to the supposed benefit to the public at large. To this day, no one – not even the ESDC – has any idea how much money Ratner stands to make from the Project.

This Court has long recognized that a putative taking violates the Public Use Clause if the claimed benefit to the public is subordinate or incidental to the private benefit.[21]

In *Denihan Enterprises, Inc. v. O'Dwyer*, 302 N.Y. 451 (1951), the private beneficiary of the taking made a deal that provided that the City of New York would condemn two-thirds of a block and then lease it to the New York Life Insurance Company so that it could, after the City rezoned the area to New York Life's specifications, operate a public parking garage, including commercial stores. *Id.* at 456-57. In consideration for the City's commitment to condemn and rezone, New York Life agreed that a "public sitting park" would be created on the roof of the new building and that it would "pave, landscape and construct a mall

[21] State courts outside of New York have endorsed similar tests. *See City of Springfield v. Dreison Ivestments, Inc.*, Nos. 19991318, 991230, and 000014, 2000 WL 782971, at *40-48 (Mass. Super. Feb. 5, 2000) (post-trial finding invalidating proposed taking to build professional sports stadium because the "dominant reason" for the taking was to benefit a private interest and the "primary beneficiary . . . was not the public"); *Borough of Essex Fells v. Kessler Inst. for Rehabilitation, Inc.*, 673 A.2d 856 (N.J. Super. 1995) (dismissing condemnation complaint because the stated public use was a pretext to exclude a non-profit rehabilitation institute from the community); *Pheasant Ridge Assoc. v. Burlington Town*, 506 N.E.2d 1152 (Mass. 1987); *Carroll County v. City of Bremen*, 347 S.E.2d 598 (Ga. 1986); *Earth Management, Inc. v. Heard County*, 283 S.E.2d 455 (Ga. 1981); *Redevelopment Auth. v. Owners or Parties in Int.*, 274 A.2d 244 (Pa. 1977); *City of Miami v. Wolfe*, 150 So.2d 489 (Fla. 1963).

and improve East 65th Street and relocate the facilities therein." *Id.* New York Life even agreed to pay the City nearly $1 million dollars. *Id.* at 456.[22]

Notwithstanding the claimed public benefits, this Court sustained the public use challenge in *Denihan* because the "public use" was "only incidental and in large measure subordinate to the private benefit conferred" on New York Life. *Id.* at 458-59. "Of course an incidental private benefit, such as a reasonable proportion of commercial space, is not enough to invalidate a project which has for its primary object a public purpose, but the use is not public where the public benefit is only incidental to the private." *Id.* (citations omitted).

The same is true here, only more so. The record contains no analysis or quantification whatsoever of the benefit that will accrue to Ratner. Under *Denihan*, the fact that the ESDC never so much as considered the relative benefits to Ratner versus the purported benefit to the "public" itself provides a more than sufficient basis for reversal. This is especially the case given the clear statement in the record acknowledging that the Project could indirectly eliminate 2,929 at-risk households (A. 753) while creating, at most, 2,250 "affordable" housing units.

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[22] By contrast, in this case the money is flowing the other direction. The City has paid $205 million thus far, and the State has committed $100 million, not including contemplated tax-free bonds and other benefits for Ratner.

II. THE PROJECT VIOLATES ARTICLE XVIII, SECTION 6 OF THE NEW YORK STATE CONSTITUTION

Article XVIII, section 6 of the New York Constitution requires that the occupancy of any "project" aided by a state loan or subsidy must be "restricted to persons of low income," with a preference afforded "to persons who live or shall have lived in such area." The question presented in this case boils down to whether the Project is a "project" within the meaning of Article XVIII, section 6. It is undisputed that the Project is receiving state funds but does not restrict occupancy of its housing to persons of low income, let alone afford a preference to persons who live in the area. Accordingly, if the Project is a "project" within the meaning of Article XVIII, section 6, then it is unconstitutional.

The ESDC argued below, and the Appellate Division held, that the word "project" in Article XVIII, section 6 applies only to "low-income housing projects" and excludes projects for the clearance and rehabilitation of substandard areas. 879 N.Y.S.2d at 536-37. That artificially narrow reading of section 6 is belied by the language and structure of Article XVIII.

It is axiomatic that the "guiding principle" of constitutional interpretation is strict adherence to the plain language of the text. *King v. Cuomo*, 81 N.Y.2d 247, 253 (1993). Indeed, this Court has cautioned that "it would be

dangerous in the extreme to extend the operation and effect of a written Constitution by construction beyond the fair scope of its terms, merely because a restricted and more literal interpretation might be inconvenient or impolitic." *Id.* (quoting *Settle v. Van Evrea*, 49 N.Y. 280, 281 (1872)).

Article XVIII was proposed at the Constitutional Convention of 1938 and adopted by the citizens of this State to serve two distinct purposes: the provision of low-income housing, and the clearance and rehabilitation of substandard areas. As the Appellate Division recognized, these twin and separate purposes are articulated clearly in the first section of Article XVIII. Entitled "Housing . . . for persons of low income; slum clearance," Section 1 empowers the Legislature to fund and subsidize projects that provide low-income housing, slum clearance, or both:

> Subject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe [1] for low rent housing . . . for persons of low income as defined by law, or [2] for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, *or for both such purposes* . . . .

N.Y. CONST. art. XVIII, § 1 (emphasis supplied).

Heeding the plain language of section 1, this Court has squarely held that Article XVIII has two "distinct" purposes: providing for low-income housing,

and providing for slum clearance. *Murray v. LaGuardia*, 291 N.Y. 320, 331-32 (1943) (finding "significan[ce]" in the "use of the word 'or' in article XVIII, section 1").

Section 6 in turn forbids the State from funding or subsidizing a "project" unless its occupancy is restricted to displaced low-income persons. Entitled "Loans and subsidies; restrictions on and preference in occupancy of projects," section 6 provides:

> No loan or subsidy shall be made by the state to aid any project unless such project is in conformity with a plan or undertaking for the clearance, replanning and reconstruction or rehabilitation of a substandard and unsanitary area or areas. The legislature may provide additional conditions to the making of such loans or subsidies consistent with the purposes of this article. The occupancy of any such project shall be restricted to persons of low income as defined by law and preference shall be given to persons who live or shall have lived in such area or areas.

N.Y. CONST. art. XVIII, § 6. For three fundamental reasons, the language and structure of Article XVIII militate toward reading the word "project" in section 6 to encompass *both* low-income housing projects *and* slum clearance projects.

First, as discussed above, the plain language of section 1 and this Court's decision in *Murray* confirm beyond dispute that Article XVIII applies to low-income housing projects *and* to slum clearance projects (or to both, as these

twin goals often are pursued simultaneously). Section 2 of Article XVIII, which authorizes the Legislature to make capital contributions or loans in the furtherance of these goals, picks up on the plain language of section 1 by beginning with the words "For and in aid of such purposes . . . ." Especially given that the language of section 2 is directly tied to the language of section 1, it would make no sense to read the word "project" in section 6 to apply narrowly to one of the declared purposes of Article XVIII (low-income housing) but not to the other (slum clearance).

Second, reading the word "project" to be limited to low-income housing projects – but not slum clearance projects – cannot readily be squared with the language of the first sentence of section 6. That sentence makes clear that a "project" shall not be funded or subsidized unless it is accompanied by and complies with a slum clearance plan (a "plan or undertaking for the clearance, replanning and reconstruction or rehabilitation of a substandard and unsanitary area or areas"). The Appellate Division's conclusion that "project" means low-income housing project is difficult to reconcile with the slum clearance plan requirement set forth in the first sentence of section 6 because low-income housing projects do not necessarily anticipate or require slum clearance. *See* 2 NEW YORK STATE CONSTITUTIONAL CONVENTION, 1938: REVISED RECORD, at

1532 (statement by 1938 convention delegate that low-income housing "may or may not be within reclaimed slum areas"). For example, the State certainly could decide to fund or subsidize the conversion of open park land or an underutilized (but not blighted) office building to low-income housing. It is difficult to conclude that such a project must proceed according to a slum clearance plan *when slum clearance has nothing to do with the project*. Accordingly, the presence of the slum clearance plan requirement strongly suggests that section 6 is not limited exclusively to low-income housing projects.

Third, the word "project" in section 6 must be read consistently with the use of the very same word in sections 3, 4, and 5 of Article XVIII. Sections 3, 4, and 5 prohibit the Legislature and local governments from contracting for loans or subsidies for low-income housing or slum clearance projects "for a period longer than the life of the projects assisted thereby" or from using state money to avoid an impending default on an obligation relating to a prior "project." These important limitations plainly apply to "projects" relating to *either* of the twin purposes of Article XVIII. There certainly is no basis in the text or purposes of sections 3, 4, or 5 to limit their restrictions to low-income housing projects to the exclusion of slum clearance projects. Because the word "projects" in section 3, 4, and 5 refers to slum clearance projects in addition to low-income housing projects,

it would make little sense to read the very same word so markedly different in section 6.

For these three reasons, the best way to read "project" consistently with the language and structure of Article XVIII (and with this Court's decision in *Murray*) is to hold that "project" means a low-income housing project *or* a slum clearance project (or both). If the State chooses to fund or subsidize a slum clearance project, it must proceed according to a slum clearance plan. And if a state-funded or state-subsidized project has a low-income housing component, then such housing must be restricted to displaced low-income residents.

It is debatable whether Ratner's Project is a low-income housing project.[23] But it is beyond dispute that the Project is, at a minimum, a slum clearance project. The ESDC describes the Atlantic Yards Redevelopment Project as a "land use improvement project" and "civic project" as those terms are defined in the Urban Development Corporation Act ("UDCA"). (A. 48). According to that statute, a "land use improvement project" is a "plan or undertaking for the clearance, replanning, reconstruction, and rehabilitation . . . of a substandard and insanitary area . . . pursuant to and in accordance with article XVIII of the

[23] The Project, after all, is consistently described by the ESDC as "contributing to the City's effort to meet the demand for affordable and market-rate housing by providing up to 6,430 housing units."

Constitution." UDCA § 6253(6)(c). Because the Project is a slum clearance project, and because it is state-subsidized,[24] and because it contains a housing component, and because the housing component is not restricted to displaced low-income persons, it is unconstitutional.

It bears emphasis that the Project's constitutional infirmity was eminently avoidable, and flows directly from three decisions made unilaterally by Ratner: (1) the belated decision, obviously made in reaction to the Supreme Court's grant of certiorari in *Kelo*, to justify the Project on "blight" grounds rather than solely on economic development grounds; (2) the decision to pursue housing development as a substantial component of the Project; and (3) the decision to lobby for and accept state subsidies. If any one of these three elements were absent from the Project, Article XVIII, § 6 would not apply.

With respect to the first decision, nobody forced Ratner to cite blight as a justification for the use of eminent domain. Indeed, no such argument was advanced when the Project was first announced in December 2003. If Ratner had not subsequently injected the blight justification into the mix (in a thinly veiled attempt to insulate the Project from the reach of any decision by the Supreme

[24] There is no doubt that the Project is state-funded. The ESDC is providing $100 million for infrastructure costs. And "[a]ffordable housing is expected to be financed through tax-exempt bonds provided under existing and proposed City and State housing programs."

Court in *Kelo*), then Article XVIII, section 6 would not be triggered unless this Court concluded that the Project is sufficiently focused on low-income housing to constitute a low-income housing project. That question is not presented in this case, however, because Ratner's decision to cite the elimination of blight as a primary justification for the Project triggered the requirements of Article XVIII, section 6 regardless of whether the Project *also* constitutes a low-income housing project.

With respect to the second decision, if the Project were limited to transportation improvements, open spaces, and a sports arena – but not housing – then Ratner could have argued that Article XVIII would be inapplicable. It arguably would not make sense, after all, to apply the low-income housing "occupancy" restriction set forth in the last sentence of section 6 to a project that has no housing component at all. Indeed, this Court's holding in *Murray* suggests that, because some state-funded projects lack a housing component, it would be unreasonable to restrict occupancy of such projects to low-income persons. Once again, this issue is not presented in this case because there is no question that the Project is a slum clearance project, and because state-supported slum clearance projects plainly trigger the requirements of Article XVIII, section 6. But it is important to observe that if the Project were not a slum clearance Project, then

Ratner may well have been able to insulate it from the low-income housing requirements of section 6 by limiting the Project to non-housing elements, including the centerpiece arena.

Finally, and most fundamentally, nobody forced Ratner to solicit and accept state subsidies for the Project. There is no question that section 6 applies only to projects that receive government loans or subsidies, and that section 6 would be irrelevant if the Project were wholly funded by private sources. By lobbying for and accepting hundreds of millions of dollars in infrastructure funding and tax-exempt financing, Ratner affirmatively triggered the requirements of section 6.

Putting all of these pieces together, it becomes clear that Article XVIII, section 6 is quite narrow. It applies only because blight was cited as a justification for the Project, because housing is a substantial component of the Project, *and* because the State is subsidizing the project. Ratner could have had any two of these three elements without triggering the requirements of section 6. Because Ratner opted for all three, and because the Project does not comply with the requirements of section 6, it is unconstitutional.

III. APPELLANTS ARE ENTITLED TO APPEAL TO THIS COURT AS OF RIGHT BECAUSE THIS CASE IMPLICATES SUBSTANTIAL CONSTITUTIONAL QUESTIONS

In its June 25, 2009 Order setting this case for argument, the Court directed the parties, pursuant to Rule 500.10 of the Rules of this Court, to address its subject matter jurisdiction. Appellants respectfully submit that this Court has jurisdiction over this appeal pursuant to CPLR 5601(b)(1) because it arises from an order of the Appellate Division that "directly involved the construction of the constitution of the state." This case involves two independent and substantial constitutional questions: whether the Project violates the Public Use Clause set forth in Article I, section 7 of the New York Constitution, and whether the Project violates the low-income occupancy restriction requirement of Article XVIII, section 6 of the New York Constitution. The Appellate Division agreed that the case necessarily required it to pass upon these substantial constitutional issues, and did not rest its decision on any independent non-constitutional grounds.

CONCLUSION

Petitioners respectfully request that the Court vacate the judgment of the Supreme Court, Appellate Division, grant the Petition and reject Respondent's Determination.

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New York, New York

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