New York Supreme Court

Appellate Division: Second Judicial Department

Docket No: 2011-05147

In the Matter of the Application of

JANICE SERRONE, THE RALPH PATERNO REVOCABLE TRUST, THE NEW YORK 128 REALTY CORPORATION, MIN JIAN REALTY, LLC, MARCO NEIRA, BROTHER JESUS AUTO BODY COMPANY, SPEED MUFFLER AND TIRE SHOP INC., and GONZALEZ MUFFLER AUTO MECHANIC REPAIR CORP.,

Petitioners,

For a Judgment Pursuant to Article 2 of the Eminent Domain Procedure Law

—against—

THE CITY OF NEW YORK,

Respondent.

BRIEF OF *AMICUS CURIAE*
THE PROPERTY RIGHTS FOUNDATION OF AMERICA, INC.
IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Other Authorities

INTEREST OF AMICUS CURIAE

The Property Rights Foundation of America, Inc. ("PRFA" or "Foundation"), is a New York-based nonprofit organization dedicated to providing information and education, and promoting understanding, about the fundamental constitutional rights of America's citizens, especially the right to own and use private property. PRFA is a volunteer, grassroots organization that assists citizens, policy-makers and members of the media concerned with protecting the rights of property owners against governmental abuse.

PRFA has been recognized for its public events, publications, and outreach programs. The Foundation sponsors the annual National Conference on Private Property Rights, at which experts from across the country speak on topics of prime importance to property rights advocates and policymakers. PRFA held its 15th Annual Conference on October 29, 2011 in Latham, NY, which drew an international group of expert speakers from northern and central New York, Maryland, Tennessee, Washington DC, and British Columbia, as well as local leaders from the Hudson Valley and Willets Point, Queens. The conference focused on the theme "Protect Freedom and A Way of Life: Community Survival and Prosperity in Rural and Urban America," and included a presentation entitled "Eminent Domain: Willets Point—A Unique Community Stands Against the City of New York."

Since 1994, PRFA has published *Positions on Property*, cataloging and exposing the multitude of land-use regulations and controls in New York State. During that time, PRFA has also published the *New York Property Rights Clearinghouse*, a quarterly newsletter of information and analysis about property rights issues in New York State. PRFA also helps other grassroots organizations seeking advice or assistance by providing information and connecting those organizations to members of PRFA's National Advisory Board and other experts.

Reflecting its strong interest and involvement in the development of eminent domain law at both State and federal levels, PRFA submitted *amicus curiae* briefs at the certiorari and merits stages in the Supreme Court of the United States in support of the petitioners in *Kelo v. City of New London*, No. 04-108.[1] PRFA has submitted other *amicus curiae* briefs on property rights issues on numerous occasions.

Between 1994 and 2010, PRFA President Carol W. LaGrasse testified on property-rights issues at eight separate hearings at the invitation of committees of the United States Senate and House of Representatives. Ms. LaGrasse has also testified on eminent domain issues before the New York State Legislature, including at the joint hearing on "Eminent Domain and the Effect of the Recent

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[1] PRFA's merits-stage *amicus curiae* brief in *Kelo* is available at http://www.ij.org/images/pdf_folder/private_property/kelo/property_rights_found26.pdf.

Supreme Court Ruling" by the Senate Committee on Commerce, Economic Development and Small Business and Senate Committee on Local Government (October 18, 2005); the joint hearing on "The Exercise of Eminent Domain in New York State," before the Assembly Committees on the Judiciary; Corporations, Authorities and Commissions; Local Governments; and Governmental Operations (November 4, 2005); and the hearing on "Eminent Domain Reform" before the Senate Judiciary Committee (April 3, 2006).

PRFA has a particular interest in *Serrone v. City of New York* because this case potentially implicates important questions about the protection of private property rights under the United States and New York Constitutions.

Foremost among these questions is whether there is any judicially-enforceable limit on the government's exercise of eminent domain in cases where the government alleges that a property is "blighted" or of sub-standard condition. This question is particularly important in light of past judicial decisions declining to apply searching scrutiny to a State's determination that property is "blighted." Even assuming that line of cases is correctly decided (and in PRFA's view, it emphatically is not), this case presents a distinct legal question, offering this Court an opportunity to articulate and enforce an important and workable limitation on the eminent domain power. In particular, this Court can and should hold that the government may not take property for the asserted public purpose of urban

redevelopment, where there is no specific development plan identified at the time of the taking; where the government's conceded failure to provide infrastructure and ordinary municipal services is a principal contributing factor to alleged "blight"; and where financial, environmental, legal, and practical obstacles make it highly and unreasonably speculative that the purported public purpose will ever be achieved. PRFA's principal contention in this amicus brief is that notwithstanding past decisions by both federal and New York courts by which this Court is constrained, there remains an important role for courts to play in articulating and policing boundaries on the use of eminent domain.

Second, from PRFA's perspective as a clearinghouse for private property rights information, the Willets Point dispute is emblematic of continuing uncertainty about the ability of property owners and tenants to resist attempts to eradicate established business and residential communities for "redevelopment" through eminent domain. This case presents an opportunity for this Court to provide needed clarity about the circumstances in which New York's "'public use' restriction on the Eminent Domain Clause" is something other than "virtually meaningless." *Goldstein v. New York State Urban Development Corp.*, 13 N.Y.3d 511, 921 N.E.2d 164 (2009) (Smith, J., dissenting). Rejecting the City's ill-conceived attempt to eliminate a unique and thriving industrial community in Willets Points would mark a critical inflection point in New York's lamentable

trajectory toward the complete erosion of constitutional "public purpose" protections and completely unchecked government authority to designate private property as "blighted."

QUESTION PRESENTED

Whether the judiciary must recognize an enforceable limitation on the government's eminent domain power for urban redevelopment, where a taking of private property occurs in the absence of any specific development plan or identified developer; where the government's conceded failure to invest in infrastructure and ordinary municipal services is a principal contributing factor to the "blight" on which it relies to justify the taking; and where financial, environmental, legal, and practical obstacles make it highly speculative that the identified public purpose will ever be achieved.

FACTS

The Petitioners' opening brief sets forth in detail the factual background of this dispute. PRFA describes here only those facts essential to its argument.

Willets Point is an approximately 62-acre triangular region in northern Queens between 126th Street and the Van Wyck Expressway. Willets Point is a unique and vibrant district home to more than 100 businesses, including numerous enterprises that have operated in Willets Point for generations. R. 2007. Many of the businesses are in entrepreneurial and automotive trades that rely upon and

compete with each other, drawing their commercial success in large part from the synergies that result from their geographic concentration in Willets Point. Willets Point businesses provide jobs for some 1,400-1,800 workers, many of whom are full-time and live locally in Queens, and most of whom speak Spanish. R. 2083.

Like all other areas in New York, Willets Point needs basic infrastructure an municipal services, such as paved streets, gutters, storm sewers, fire hydrants, snow removal, trash removal, and sanitary sewers. All parties to this litigation agree, however, that such infrastructure and services are sorely deficient or wholly lacking in Willets Point. R. 613-697. Responsibility for that condition lies in significant part with the City, which has long been aware of infrastructure and municipal service deficiencies. Notwithstanding repeated requests to remedy this situation, the City has declined to invest in infrastructure or provide basic services. *See* Complaint ¶¶ 12-15, *Willets Point Industry & Realty Ass'n v. City of New York*, No. 08-cv-1453 (E.D.N.Y. 2008) (Docket 1) (detailing requests). Instead, the City has engaged in a nearly 40-year effort to condemn Willets Point, evict its businesses, and transfer the property to private developers.

This case involves the City's most recent efforts to acquire Willets Point for redevelopment. Despite obtaining initial City Council approval in 2008, the current undertaking has been plagued with delays and uncertainty arising from various environmental, financial, and legal obstacles. As Petitioners have explained, any

redevelopment effort faces immense practical barriers, including the need to construct sanitary and storm sewers, raise the level of the parcel with up to seven feet of fill to prevent flooding in a Federal Emergency Management Agency 100-year floodplain, and perform extensive environmental remediation. See Br. for Petitioners 26-27. Notably, at the time the City initiated the current condemnation proceedings, it had not yet issued a Request for Proposals to private developers, who under the City's approach are responsible for actually developing and proposing a specific redevelopment plan. *See* New York City Economic Development Corporation, *Request for Proposals: Willets Point Development Phase I* (May 9, 2011). After a public hearing, the City published a Determination and Findings in May 2011 to authorize the taking of numerous parcels of private property for "Phase 1" of the proposed redevelopment. R. 1.

Petitioners, a group of Willets Point businesses and landowners, brought the instant challenge under § 207 of the Eminent Domain Procedure Law, raising five statutory and constitutional claims. PRFA submits this brief in the event the Court reaches the second question presented in the Petitioners' brief: whether the City's proposed taking violates the New York or U.S. Constitution because it lacks an adequate Public Use.

SUMMARY OF ARGUMENT

The City's Determination and Findings must be rejected under the New York Constitution because the contemplated taking of private property lacks a public use. Judicial review is appropriate because the purported public benefits from the redevelopment are speculative given the absence of a specific development plan, because the project faces overwhelming practical, financial, environmental, and legal obstacles, and because the City is in large part responsible for creating the conditions it now identifies as blight. No precedent of this Court or the Court of Appeals interpreting the Takings Clause of the New York Constitution precludes this result. Indeed, rejecting the taking under New York law would be consistent with New York's long tradition of providing more robust protection for individual rights and liberties than under the United States Constitution.

ARGUMENT

I. The Judiciary Must Not Abdicate Its Constitutional Responsibility to Enforce Limits on the Government's Use of Eminent Domain.

"[T]he security of Property," Alexander Hamilton long ago observed at the Constitutional Convention in Philadelphia, is one of the "great obj[ects] of Gov[ernment]." 1 *Records of the Federal Convention of 1787*, p. 302 (M. Farrand ed. 1911). Hamilton's view is consistent with the principle at common law that "the law of the land . . . postpone[d] even public necessity to the sacred and inviolable rights of private property." 1 William Blackstone, *Commentaries on the*

Laws of England 134-35 (1765). The Framers codified these precepts in the Takings Clause of the Fifth Amendment to the United States Constitution—echoed in parallel provisions of numerous State constitutions—to "ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will." *Kelo v. City of New London*, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting).

The Fifth Amendment to the U.S. Constitution provides that "private property [shall not] be taken for public use, without just compensation." Article I, Section 7(a) of the New York Constitution independently provides that "[p]rivate property shall not be taken for public use without just compensation." In each constitutional system, the Public Use Clause functions as an express limitation on the government's power of eminent domain, embodying "[t]he concepts of 'fairness and justice' [that] . . . underlie the Takings Clause['s]" restriction on governmental authority. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 336 (2002).

"There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use." *Hawaii Housing Auth. v. Midkiff*, 427 U.S. 229, 240 (1984). To be sure, in the modern era some courts have departed (in

PRFA's view, erroneously) from a historically limited conception of what constitutes a "public use." In many cases those courts have effectively abdicated any responsibility for determining when use of eminent domain is appropriate. Thus, in *Kelo*, a bare majority of the U.S. Supreme Court accepted the proposition that economic development alone qualifies as a public use. 545 U.S. at 484. And in a challenge to the City of New York's determination that a particular area was "blighted," the Court of Appeals observed that such decisions are not "primarily a judicial exercise," except where "it would be irrational and baseless to call [the area] substandard or insanitary." *Goldstein*, 13 N.Y.3d at 527, 921 N.E.2d at 173.

But courts retain a critical role in reviewing the exercise of eminent domain power. Under the U.S. Constitution, judicial deference to a "public use" determination is plainly inappropriate when that use "is shown to involve an impossibility," *Midkiff*, 427 U.S. at 240, or in a "one-to-one transfer of property" from A to B "for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes," *Kelo*, 545 U.S. at 486-67. Indeed, Justice Kennedy—whose fifth vote was necessary to the result in *Kelo*—pointedly rejected the suggestion that review under the Supreme Court's "rational basis" standard "imposes no meaningful judicial limits on the government's power to condemn any

property it likes." 545 U.S. at 492 (Kennedy, J., concurring).[2] Likewise, the New York Court of Appeals has long maintained that courts "are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases." *Yonkers Community Dev't Agency v. Morris*, 37 N.Y.2d 478, 487, 335 N.E.2d 327, 333 (1975).

Reaffirming a substantial role for courts in interpreting and enforcing the Public Use Clause also ensures fidelity to the text of both the U.S. and New York Constitutions. Every term in a Constitution must be given independent meaning, construed where possible to avoid rendering any words superfluous. *See, e.g.*, *Wright v. United States*, 302 U.S. 583, 588 (1938). Indeed, as courts have recognized in a related context, the very act of enumeration of a particular power in a Constitution "presupposes something not enumerated." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting Federalist No. 45). Abdicating the judicial role to decide what constitutes a valid public use would amount to a de facto nullification of that portion of the constitutional texts.

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[2] Justice Kennedy's observation in *Kelo* is consistent with other areas of federal law in which courts have struck down legislative actions even under "rational basis" review. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996) (holding provision of Colorado Constitution invalid under the Equal Protection Clause of the Fourteenth Amendment even under rational-basis review); *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1282 (11th Cir. 2011) (holding that individual mandate in Patient Protection and Affordable Care Act exceeded Congress' authority under the Commerce Clause notwithstanding rational basis standard of review), *cert. granted*, 565 U.S. ___ (2011).

Fidelity to constitutional language is particularly important and appropriate given the intense and ongoing popular, scholarly, and legislative criticism of an exceedingly broad concept of public use. *See, e.g.*, Stephen Ansolabehere, *Field Report: Constitutional Attitudes Survey* at 61 (July 24, 2010) (81% of survey respondents believe local government "should not be able" to "transfer[] someone's property to private developers whose commercial projects could benefit the local economy"), available at http://www.law.columbia.edu/null?&exclusive=filemgr.download&file_id=55737&rtcontentdisposition=filename%3DPersily; Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 Minn. L. Rev. 2100, 2109 (2009); Richard A. Epstein, *Kelo: An American Original: Of Grubby Particulars and Grand Principles*, 8 Green Bag 2d 355, 357 (2005). One important line of legal criticism that applies with direct force to the Willets Point case is the uncertain and speculative nature of the public benefits that are frequently asserted as justification for economic development takings. *See, e.g.*, Ashley J. Fuhrmeister, *In the Name of Economic Development: Reviving "Public Use" as a Limitation on the Eminent Domain Power in the Wake of Kelo v. City of New London*, 54 Drake L. Rev. 171, 207-09 (2005) (economic development takings involve speculative public benefits, such as increased jobs and taxes, that are contingent on the un-accountable future success of the private transferee).

II. A Taking Violates the New York Constitution Where, as Here, the Alleged Public Purpose is Speculative and the Condemning Authority Contributed to the Alleged Blight.

Although both federal and New York courts have declined to apply searching scrutiny to legislative determinations that an area is "blighted," this case involves several distinct considerations that justify a more active judicial role.

The New York Court of Appeals has "frequently applied the State Constitution, in both civil and criminal matters, to define a broader scope of protection than that accorded by the Federal Constitution in cases concerning individual rights and liberties." *People v. P.J. Video*, 68 N.Y.2d 296, 501 N.E.2d 556 (1986); *see also Rivers v Katz*, 67 N.Y.2d 485, 495 N.E.2d 337 (1986) (right of involuntarily committed mental patients to refuse antipsychotic medication); *People v Isaacson*, 44 N.Y.2d 511, 378 N.E.2d 78 (1978) (due process limits on police conduct). The Court of Appeals has not had occasion to consider expressly whether—and in what circumstances—Article I, § 7(a) of the New York Constitution might provide broader protection against government taking of private property than the Fifth Amendment. *See Matter of Aspen Cr. Estates, Ltd. v. Town of Brookhaven*, 12 N.Y.3d 735, 736-37, 904 N.E.2d 816, 817 (2009) (reserving question). In PRFA's view, this case presents an important opportunity for the New York courts to clarify the level of protection the New York Constitution will

provide for private property rights, regardless of the standard that might apply under federal law.

A. Other States Have Recognized and Enforced Judicial Limits on Overly-Speculative Public Use Determinations.

Although PRFA has not identified any New York precedent squarely on point with the facts of this case, courts in several other States have prohibited takings where the purported public purpose was overly speculative.[3] In *City of Phoenix v. McCullough*, 536 P.2d 230, 237 (Ariz. App. Ct. 1975), for instance, an Arizona appellate court held that the City of Phoenix could not condemn land for a proposed airport expansion where the City did not intend to begin construction for some 15 to 46 years from the date of condemnation. The *McCullough* court specifically rejected the City's assertion that the relevant legislative determination (i.e., that the taking was necessary to serve the stated public purpose) fell beyond "judicial scrutiny." *Id.* at 235. Instead, the court held that the City's intended use was "too remote and . . . abstract," pointedly noting that the City attempted to justify the taking based on a "Master Plan" that amounted to little more than a

[3] *Kelo* itself, of course, recognized explicitly that the federal Takings Clause serves as a floor, not a ceiling, for State-law protection of private property rights. 545 U.S. at 489. A number of states have accepted *Kelo*'s invitation to provide more robust protection for private property rights, with some states explicitly rejecting *Kelo*'s core holding that economic development constitutes a public use. *See, e.g.*, Shaun Hoting, *The Kelo Revolution*, 86 U. Det. Mercy L. Rev. 65, 88 (2009) (surveying authorities).

"general concept and guide"; that the City conceded the Plan was simply "a concept of development"; and that both the City and condemnees "kn[e]w that plan is going to change" over time. *Id.* at 236-37. Given that the proposed public use would not occur until several years in the future, and that the City conceded the planned use "may change," the court held that "the future use becomes unreasonable, speculative and remote as a matter of law and defeats the taking." *Id.* at 237.

Similarly, in *Mann v. City of Marshalltown*, 265 N.W.2d 307, 315 (Iowa 1978), the Iowa Supreme Court held that where there was not a "reasonable assurance" that "the intended public use will come to pass," a condemnation could be enjoined. *Id.* (quoting *Falkner v. Northern States Power Co.*, 248 N.W.2d 885, 891-93 (Wis. 1977)). The *Mann* plaintiffs argued that too many contingencies needed to be resolved before the proposed public use of their land (again, relating to an airport expansion) would come to pass, including the need to secure federal funding, the need to obtain approval from the U.S. Environmental Protection Agency, and the need to close a road that was the subject of then-pending litigation. 265 N.W.2d at 308. The Iowa Supreme Court reversed a trial-court judgment dismissing the plaintiffs' complaints and remanded for further proceedings, agreeing that an injunction could issue if the plaintiffs proved the elements of their claims. *See also Comes v. City of Atlantic*, 601 N.W.2d 93, 97 (Iowa 1999) (taking would be impermissible where condemnor "cannot reasonably expect" to use the

plaintiff's property for the purported public use); *see also generally* Thomas J. Posey, *This Land Is My Land: The Need For A Feasibility Test In Evaluation Of Takings For Public Necessity*, 78 Chi.-Kent L. Rev. 1403 (2003).

Other states have achieved similar results through legislation. The Texas Property Code, for instance, provides a condemnee the right of repurchase, if the public use for which his property was acquired is canceled before the property is used, or if no "actual progress" is made toward the public use within 10 years of the taking. Tex. Property Code § 21.101 (2011). In a different approach, Missouri prohibits takings that are not part of a comprehensive "development plan" at the time of the condemnation. *See, e.g.*, Mo. Rev. Stat. § 99.820.1(3) (2011); *Ku v. City of Kansas City*, 282 S.W.3d 23, 25 (Mo. Ct. App. 2009) (noting lower court judgment that "pursuant to Section 99.820.1(3), property may not be condemned through the use of eminent domain unless such property is part of a redevelopment project").

PRFA cites these authorities not as binding precedent, but rather as models for New York courts to consider in drawing a judicially-enforceable limitation on New York City's proposed condemnation of Willets Point. As explained below, the purported public use and benefits the City has identified for the Willets Point condemnation are at least as speculative as the development projects in *Mann* and *McCullough*.

B. The Willets Point Redevelopment Is Speculative Because the City Concedes it Has No Specific Development Plan and the Project Faces Numerous Practical, Financial, Environmental, and Legal Barriers.

For several reasons, and as the Petitioners persuasively argue at greater length, the proposed redevelopment of Willets Point faces numerous burdens and obstacles, rendering the ultimate public use sufficiently speculative to justify judicial review.

First, and as the City has explicitly conceded, despite a generalized conception of creating a "lively, mixed-use, sustainable community and regional destination," *see* Determination and Findings at 1, the City is attempting to take the properties in question without any specific development plan. As the City's brief concedes, "it is not possible at this stage to know the final details of future Plan development." Respondent's Br. at 19 n.15. Indeed, at the time of condemnation (when the purported public use must be evaluated), the City had not yet even requested proposals from developers, not to mention identified or selected a specific plan. *Id.* at 19; *see also* New York City Economic Development Corporation, *Request for Proposals: Willets Point Development Phase I* (May 9, 2011), available at http://www.nycedc.com (inviting developers to develop and propose both a "conceptual plan for the District" and a "detailed Proposal[] for the Phase 1 Site"). The Willets Point condemnation thus bears a rather striking resemblance to the ultimately unsuccessful condemnation in *McCullough*, where Phoenix

attempted to justify a taking based on a generalized "Master Plan" that amounted, as here, to "a concept of development" that was all but certain to change, perhaps significantly, over time. 536 P.2d at 236-37.[4] Relatedly, the City's troubled financial condition has already resulted in a substantial delay of the proposed development schedule, with the schedule for the full project delayed until 2022—even before any specific plan has been adopted.

Beyond the uncertainty that flows necessarily from the lack of any specific development plan (and, given the City's reliance on a private developer to create such a plan, the lack of any identified developer), the Willets Point area presents what all concede are extraordinary logistical, financial, and legal barriers to the City's envisioned development. The City itself concedes that Willets Point has "resisted past attempts at redevelopment," in part due to environmental conditions resulting from the area's historic use as an ash depository. The site lies within the Federal Emergency Management Agency 100-year floodplain, and by the City's own calculations elevations within the district vary from between three and five feet below that floodplain, requiring extensive fill over many dozens of acres before redevelopment efforts can begin. *See* Request for Proposals at 30. The site will

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[4] Conversely, the Willets Point taking is sharply distinguishable from *Berman v. Parker*, 348 U.S. 26, 30 (1954), in which the District of Columbia Redevelopment Land Agency had "prepared and published a comprehensive [redevelopment] plan for the District" prior to initiating the taking.

require extensive environmental remediation. *Id.* at 29-30 (identifying numerous contaminants). And any private developer will be required to construct extensive physical infrastructure, including both storm and sanitary sewers, and a water main distribution system. *Id.* at 21.

The project also faces numerous legal hurdles. The City has previously acknowledged that new access ramps to the Van Wyck Expressway are necessary to offset the significant additional traffic anticipated by the overall redevelopment project. Those ramps have not yet been approved by the federal government. Although the City began the application process in 2009, and public hearings were convened in June 2011, the City tellingly now asserts merely that the process has "substantially progressed." Respondents' Br. 34.

The access ramps' legal significance is anything but hypothetical. On December 6, 2011, Justice Madden of the New York Supreme Court concluded that grounds existed to vacate her prior decision dismissing an Article 78 petition challenging the Willets Point development. The petitioners in that proceeding sought this extraordinary relief on the ground that the City had previously represented to the court that new on-ramps were an "integral part" of the project, and that neither the project nor its exercise of eminent domain would proceed absent the ramp approvals. Justice Madden's December 6 opinion concluded that City's "change[] i[n] position" by "seeking to exercise its powers of eminent

domain without approval of the ramps, in direct contradiction of its prior representations, [affected] the integrity of the decision-making process" and justified vacating her prior judgment dismissing the Article 78 proceeding. Order, *Ardizzone v. Bloomberg*, No. 103406-2009 (N.Y. Sup. Ct. Dec. 6, 2011).

Petitioners' claim would succeed under the legal standard of either *McCullough*, 536 P.2d at 237, or *Mann*, 265 N.W.2d at 315. The City's current financial condition, extensive practical and environmental barriers to completion, well-documented delays that have occurred even before a specific proposal has been developed, and serious pending legal challenges demonstrate that the purported public benefits are "remote and . . . abstract," *McCullough*, 536 P.2d at 237. Moreover, because the proposed public use will not occur until many years in the future, and the City has conceded the details of a development plan are currently unknowable, the proposed public use "becomes unreasonable, speculative and remote as a matter of law and defeats the taking." *Id.* at 237. For similar reasons, the City cannot provide a "reasonable assurance" that "the intended public use will come to pass." *Mann*, 265 N.W.2d at 315.

The Court therefore need not decide among these or other potential legal standards, as the result is the same under any test. The Court could simply leave to future—and more difficult—cases the task of drawing a clear line of demarcation. To the extent the Court chooses to adopt a legal standard (and to the extent the

McCullough and *Mann* standards materially differ), PRFA believes it is essential to capture *McCullough*'s focus on whether the purported public use is "speculative," "remote," or "abstract," as those terms more appropriately constrain government abuses of eminent domain than a potentially-malleable reasonableness standard.

C. Judicial Enforcement of Limits on Eminent Domain Authority is Particularly Important Where, as Here, the Condemning Authority Contributed to the Allegedly Blighted Conditions, and Where There Are Concerns About Adequate Notice.

Even if the highly speculative nature of the development project would alone be insufficient to justify judicial intervention, enforcing limits on the government's use of eminent domain is particularly important because the City bears significant responsibility for the allegedly "blighted" conditions in Willets Point. Indeed, in related litigation a U.S. District Court recently characterized as "conceded fact" that "the City of New York has invested little money in the infrastructure of th[e] [Willets Point] neighborhood." *Willets Point Industry & Realty Ass'n v. City of New York*, No. 08-cv-1453, 2009 WL 4282017, at *1 (E.D.N.Y. Nov. 25, 2009) (Korman, J.).

As has been extensively documented, the Willets Point network of storm sewers are largely in disrepair; the neighborhood entirely lacks a sanitary sewer system; streets in the neighborhood are not well-maintained and often are unpaved or severely potholed; most curbs and sidewalks in the neighborhood were either never constructed or have worn away entirely; and the neighborhood lacks

functional fire hydrants or regular trash removal. *See* Record 590-1564. Although the City has known of these conditions for decades (if not longer), it has chosen not to invest in even basic infrastructure or provide essential municipal services. As far back as 1991, for instance, the New York City Public Development Corporation (a predecessor to the New York City Economic Development Corporation) commissioned a study that reported, among other things, that Willets Point lacked "an adequate sewer and street system," "has no sanitary sewers and the few storm sewers that exist are collapsed or perpetually clogged," and "[m]any Willets Point streets are in such poor condition it is difficult to determine if they were ever paved." New York City Public Development Corporation, *Willets Point Planning Study* at 1, 39, 41 (1991), available at http://wpira.com/1991%20EDC%20-%20Willest%20Point%20Study%20Part%201.pdf. In short, the Study concluded, Willets Point "desperately needs a renewed infrastructure." *Id.* 1.

Notwithstanding repeated requests by Willets Point landowners and tenants for improved services, *see* Complaint ¶¶ 12-15, *Willets Point Industry & Realty Ass'n v. City of New York*, No. 08-cv-1453 (E.D.N.Y. 2008) (Docket 1) (detailing requests), the City has done little either to remedy the deficiencies or to arrest further deterioration. In 2005, New York City Council Member Hiram Monserrate sponsored another study of Willets Point. *See* Tom Angotti & Steve Romalewski, Hunter College Center for Community Planning & Development, *Willets Point*

Land Use Study (2005), available at http://www.hunter.cuny.edu/ccpd/repository/files/willetspoint.pdf. That report observed the continuing "lack of sewers, paved streets and sidewalks," and documented health risks resulting from dust from unpaved roads, stagnant water, and the lack of sewers. *Id.* at 3, 9.

To be sure, Judge Korman's observation about the City's lack of investment in Willets Point occurred in the context of his order dismissing Equal Protection and Due Process claims brought by a group of Willets Point business owners who sought an injunction directing the City to provide municipal services. However, that holding does not render the City's neglect of Willets Point irrelevant for purposes of a quite different constitutional claim under the Takings Clause. For one, the plaintiffs in *Willets Point Industry & Realty* did not raise, and the District Court did not have occasion to consider, the relevance of the City's actions under a Takings Clause analysis. Moreover, Judge Korman found dismissal of the Equal Protection and Due Process claims supported by the fact that under New York law, "[an] aggrieved property owner has a remedy where it would suffer severely diminished compensation because of acts by the condemning authority decreasing the value of the property." 2009 WL 4282017, at *5 (quoting *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 269 N.E.2d 895, 905 (1971)). Thus, even under

existing law, allegations of the City's neglect are relevant to a Takings Clause analysis.

Under New York's doctrine of "condemnation blight," a property owner facing the acquisition of his property by eminent domain may introduce evidence of the property's value prior to the condemning authority's "value-depressing acts." *J.W. Clement*, 28 N.Y.2d at 257-58, 269 N.E.2d at 903. In other words, the property owner may prove the diminished value of the property because of the threat of condemnation that "blighted" the property. *See Long Island Lighting Co. v. Assessor for Brookhaven*, 246 A.D.2d 156, 164 (2nd Dep't 1998).

But even assuming the Willets Point Petitioners would have a similar opportunity to prove their properties lost value because of the City's failure to provide infrastructure or services, enhanced valuation should not be the exclusive remedy under the Takings Clause. Indeed, imposing on a plaintiff the burden of proving a counterfactual adjustment to Willets Point property values is particularly inadequate where, as here, the condemning authority has neglected the property for decades, making the plaintiff's burden of proof in establishing greater valuation uniquely heavy. In such a case, the City's actions in contributing to the alleged blight are directly relevant to the validity of the proposed public purpose.[5]

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[5] To the extent this Court is concerned that prohibiting a taking could perpetuate the "blighted" conditions if the property owners lacked resources to develop the

Finally, judicial review of the exercise of eminent domain is also appropriate where, as here, there are concerns about the adequacy of notice provided by the City. *See* Br. for Petitioners 14-20; Br. for *Amicus Curiae* Institute for Justice 8-17. One substantial basis for a doctrine of judicial deference to legislative eminent domain judgments is that "the primary mechanism for enforcing the public-use requirement has been the accountability of political officials to the electorate." *Goldstein v. Pataki*, 516 F.3d 50, 57 (2d Cir. 2009); accord *Kelo*, 545 U.S. at 482 (courts owe respect to legislatures in "discerning local public needs"). This proposition is, however, inapplicable if the legislature is unable to serve as an effective check on abuses of the takings power because the affected parties (or general public) are unaware of critical details about the taking. Where there are substantial questions about whether the subjects of the taking received adequate notice, there is a corresponding reason to doubt that condemnees can defend their interests through the legislative process.

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land themselves, Florida's approach is instructive. Florida courts recognize a cause of action for compensation under the Florida Constitution where government action damages a property value "even though there is no physical appropriation of the property itself." *Rubano v. Dep't of Transportation*, 656 So. 2d 1264, 1266-67 (Fla. 1995) (discussing compensation for harm to property value due to loss of access when the government constructed a retaining wall). Such a remedy would help ensure that the private landowner had resources to remedy the condition created by the government action.

D. No Controlling Precedent Precludes This Court from Enforcing a Limitation on Speculative Takings Where the Government Has Contributed to the Alleged Blight.

So far as PRFA is aware, no precedent of this Court or the Court of Appeals would preclude this Court from rejecting the City's Determination and Findings on the basis that the proposed public use is overly speculative and the City's own actions gave rise to the allegedly blighted conditions.

From the time of early urban renewal efforts addressing slums, New York law has recognized the removal of "substandard and insanitary" conditions as a valid public purpose. *Yonkers Community Dev't Agency*, 37 N.Y.2d at 481, 335 N.E.2d at 330 (discussing N.Y. Const. art. XVIII § 1). Over time, that concept has expanded to include "economic underdevelopment and stagnation," which New York courts have identified as "threats to the public sufficient to make their removal cognizable as a public purpose." *Id.* (citing *Cannata v. City of New York*, 11 N.Y.2d 210, 182 N.E.2d 395 (1962)). Judicial challenges to takings under New York's Public Use Clause have typically focused on the validity of determinations that particular property is substandard, or whether property acquired by eminent domain may validly be transferred to another private party. 37 N.Y.2d at 481.

In its two most recent statements on the scope of the Public Use Clause, the Court of Appeals has considered representative claims. In *Goldstein v. New York State Urban Development Corp.*, 13 N.Y.3d 511, 524, 921 N.E.2d 164, 170 (2009),

the Court considered a claim that condemnation for the Atlantic Yards project was unconstitutional because the taking's purpose was actually to enable a private commercial entity to use the properties for private economic gain. The Court of Appeals held that "the removal of urban blight is a proper . . . predicate for the exercise of the power of eminent domain," and that "only where there is no room for reasonable difference of opinion *as to whether an area is blighted*" may judges "substitute their views" about public purpose for those of the legislature. *Id.* at 524-26, 921 N.E.2d at 171-72 (emphasis added). And in *Kaur v. New York State Urban Development Corp.*, 15 N.Y.3d 235, 933 N.E.2d 721 (2010), the Court considered a claim that a blight finding was made "in bad faith," where the City's condemning authority engaged the same firm to conduct a neighborhood conditions survey as was previously engaged by the private beneficiary of the condemnation (there, Columbia University). The Court of Appeals reiterated the "limited" role of courts "in reviewing *findings of blight* in eminent domain proceedings." 15 N.Y.2d at 253, 933 N.E.2d at 730 (emphasis added).

In neither case did the Court of Appeals address an argument that courts may review public use determinations where the benefits from the taking are speculative, where the condemning authority attempts to take property without a specific development plan, and where the City itself contributed to the blighted conditions. To the contrary, the Court of Appeals decision in *Kaur* suggests the opposite. The

Appellate Division had rejected the taking in part based on its view that there had been no findings of blight prior to Columbia University, the private beneficiary, acquiring property in the area. 15 N.Y.3d at 256, 933 N.E.2d at 134. Rather than rejecting the proposition that responsibility for blight was irrelevant to the constitutional analysis, the Court of Appeals concluded that record evidence in that case showed the area was "blighted before Columbia began to acquire property." *Id.*

Tellingly, none of the cases on which the City relies in opposing the Petitioners' Public Use claim foreclose this reasoned distinction for speculative cases in which the Government has contributed to blight. In *Cannata*, 11 N.Y.2d at 214 (as to which the City cites from a dissenting opinion), the "real basis of the complaint" was that the condemned area did not rise to the level of a "slum"; the Court held that public use was not negated where "a predominantly vacant, poorly developed and organized area" would be turned into "new industrial buildings." *Id.* at 215. And *East 13th Street Community Ass'n v. New York State Housing Finance Agency*, 218 A.D.2d 512 (1st Dep't 1995), primarily involved *statutory* claims under the New York State Urban Development Corporation Act. *See id.* (adopting conclusions from prior decision at 189 A.D.2d 352 (1st Dep't 1993)).[6]

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[6] *Nixbot Realty Associates v. New York State Urban Development Corp.*, 193 A.D.2d 381 (1st Dep't 1993) is also inapposite, addressing whether the State

CONCLUSION

For the foregoing reasons, this Court should vacate the City's Determination and Findings; enjoin the City's contemplated condemnation of Petitioners' property; and grant Petitioners such other and further relief as the Court may deem just and proper.

Dated: December 14, 2011

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Environmental Quality Review Act and parallel New York City procedures required an "economic impact" analysis in addition to environmental impact analysis. The other authorities on which the City relies in resisting the Petitioners' Public Use claim involve only *federal* law. *See Kelo*, 545 U.S. at 489; *Midkiff*, 467 U.S. at 231; *Berman*, 348 U.S. at 31; *Goldstein v. Pataki*, 516 F.3d 50, 52 (2d Cir. 2009).

CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR § 670.10.3(f)

The foregoing brief was prepared on a computer using Microsoft Word 2003. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 6,698.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of the Application of JANICE SERRONE, THE RALPH PATERNO REVOCABLE TRUST, THE NEW YORK 128 REALTY CORPORATION, MIN JIAN REALTY, LLC, MARCO NEIRA, BROTHER JESUS AUTO BODY COMPANY, SPEED MUFFLER AND TIRE SHOP INC., and GONZALEZ MUFFLER AUTO MECHANIC REPAIR CORP. Petitioners, For a Judgment Pursuant to Article 2 of the Eminent Domain Procedure Law —against— THE CITY OF NEW YORK, Respondent.	**AFFIDAVIT OF SERVICE** **Appellate Division** **No. 2011-05147**

Washington, District of Columbia)

~~County of~~ City of Washington) ss.:

Jeremy C. Marwell, being duly sworn, deposes and says that:

1. The deponent is not a party to the action, is 18 years of age or older, and resides at:

3930 Connecticut Avenue, NW, Apt. 304
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2. On the 14th day of December, 2011, the deponent served the following described paper upon the person or persons listed in paragraph 5 hereof:

Notice of Motion for Leave to Appear as *Amicus Curiae*; Affirmation of Jeremy C. Marwell in Support of Motion for Leave to Appear as *Amicus Curiae*, with Exhibit A to Affirmation (Determination and Findings of the City of New York Pursuant to EDPL Section 204 To Acquire Certain Property For Phase 1 of the Willets Point Development Plan); Exhibit B to Affirmation (Verified Petition of Petitioners Janice Serrone, The Ralph Paterno Revocable Trust, the New York 128 Realty Corporation, Min Jian Realty, LLC, Marco Neira, Brother Jesus Auto Body Company, Speed Muffler and Tire Shop Inc., and Gonzalez Muffler Auto Mechanic Repair Corp., dated June 1, 2011); and

Exhibit C (Proposed Amicus Curiae Brief of the Property Rights Foundation of America, Inc., dated December 14, 2011).

3. The number of copies served on each of said persons was one (1).

4. The method of service on each of said persons was:

By dispatching the paper to the person by overnight delivery service at the address designated by the person for that purpose, pursuant to CPLR 2103(b)(6).

5. The name of the person or names of the persons served and the address or addresses at which service was made are as follows:

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Dated: Washington, DC
December 14, 2011

Jeremy C. Marwell

Sworn to before me this 14th
day of December, 20 11

Rhonda M McDonald
Notary Public

RHONDA M. McDONALD
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires July 14, 2012