No. 11-922

IN THE

Supreme Court of the United States

RIVER CENTER LLC,

Petitioner,

v.

DORMITORY AUTHORITY
OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction over Petitioner's Fifth Amendment claims where such claims were not presented to or addressed by the state courts below?

2. Does the Fifth Amendment require a court to value a property as if it were fully developed where the trial court, after weighing the evidence, determines that a condemnee's particular development efforts as of the date of condemnation added little value to the property?

3. Does the Fifth Amendment require that a claim by a condemnee for increased damages as a result of a delay in the property's rezoning be heard in a condemnation proceeding where the value achieved by the rezoning was credited by the appraisals and the claim is pending in another proceeding?

4. Should the trial court's evidentiary rulings concerning evidence of the property's value be reviewed by this Court where the court properly applied state law, which conformed with the Fifth Amendment?

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INTRODUCTION

This case concerns the valuation of a parcel of New York City property by the New York courts applying New York law. There are no federal issues, and none were raised below. Petitioner asserts now for the first time that, in alleged violation of the Just Compensation Clause of the Fifth Amendment, the courts below improperly disregarded Petitioner's development efforts and alleged damages it incurred when in 1996 the State of New York ("State") and the City University of New York ("CUNY") delayed the rezoning of the property, and precluded certain evidence concerning value. In truth, this case does not concern the Fifth Amendment at all, and there is no compelling reason for this Court to grant a writ of certiorari.

After a protracted 81-day trial encompassing more than 600 exhibits, and 16 witnesses, including testimony by Petitioner's principal Joseph Korff for a total of 20 days, the trial court weighed all the evidence and decided, in its discretion, to value the property under its highest and best use as vacant land for a mixed-use development in accordance with the analysis in the appraisal of Respondent Dormitory Authority of the State of New York ("DASNY"). The trial court did not disregard Petitioner's development efforts, but rather weighed whether such efforts would add value in the eyes of a willing buyer. The court determined that, except for the zoning change, which, as the Appellate Division recognized, was already taken into account in DASNY's appraisal adopted by the trial court, and borings and foundation studies, Petitioner's other efforts did not add value, *i.e.,* would not increase the price a willing buyer

would pay. In this regard, the trial court pointed out that Petitioner's preliminary plans for the development did not comply with the New York City Planning Commission's special permit governing development on the property; no financing for the project had been obtained; no building plans had been filed; a construction manager had not been hired; no insurance had been procured; no demolition agreement for the existing building on the property had been entered; and tenants were still in possession of 80% of the existing building. (R.23a-28a.)[1] The Appellate Division agreed with this factual finding by characterizing the proposed development as speculative and lacking the requirements that would bring it to fruition in the near term. The courts' factual finding concerning the value of specific development efforts made after a consideration of voluminous evidence certainly do not violate the Fifth Amendment even had Petitioner raised the issue below.

Similarly, the courts' dismissal from the condemnation proceeding of Petitioner's delay damages claim, which is currently pending as a breach of contract claim in New York's Court of Claims, does not implicate the Fifth Amendment. Petitioner mischaracterizes certain conduct in 1996 by the State and CUNY whereby they failed to cooperate with Petitioner in its effort to rezone the property, causing an approximate one-year delay, as suppressing the value of the property akin to condemnation blight. As the courts below properly held, however, this claim is inappropriate in a condemnation proceeding because the rezoning was in fact achieved and taken into account in the valuation of the property. To the extent that Petitioner incurred any damages from

1. Citations to "R.__" are to the record on appeal.

the delay in achieving the rezoning in a rising real estate market, that issue will be determined in the Court of Claims on Petitioner's breach of contract claim.

Finally, Petitioner tries to manufacture a constitutional issue out of certain evidentiary rulings made by the trial court in conformity with state law, which limited Mr. Korff's testimony concerning statements he made to potential investors about the value of the property prior to the vesting date and precluded the admission of offers and expert testimony, except by the appraisers, to show the property's value. These evidentiary issues do not involve the Fifth Amendment, and Petitioner fails to provide any authority that they do. Petitioner merely refers to cases from other jurisdictions that may decide some of these issues differently in the context of the jurisdiction's particular rules of evidence. No authority or compelling reason is provided why the Fifth Amendment requires uniform evidentiary rules nationwide on these issues.

In sum, there is no reason for this Court to grant the Petition even had Petitioner properly raised Fifth Amendment issues below. At its essence, the appeal involves valuation and evidentiary determinations, made after due consideration by the trial court in its role as fact finder under the unique facts of this case, and, as such, do not involve the Fifth Amendment.

STATEMENT OF THE CASE

This case is a condemnation valuation proceeding decided on well-settled principles of New York State law, which are consistent with the Fifth Amendment.

By order of acquisition entered April 11, 2001 ("Vesting Date"), DASNY, at the behest of CUNY, acquired the property located at 520-550 West 59th Street and 521-551 West 58th Street (a/k/a New York County Block 1087, Lots 1 and 5) (the "Property") to expand CUNY's John Jay College of Criminal Justice.[2] John Jay College is the only college of its kind in the country dedicated to education and research in the fields of criminal justice, fire science and public service. On the Vesting Date, a three-story parking garage and warehouse was located on the Property.

The Delay Damages Claim

Immediately prior to the condemnation, Petitioner was the owner of the Property, having purchased it for $49.5 million in 1998. In April 1996, the prior owner of the Property, The AP & ASBP Holding Company, Inc., authorized Petitioner's affiliate, Rein, L.P. ("Rein"), to file an application under the Uniform Land Use Review Procedure with the New York City Department of City Planning for a rezoning of the Property and special permit to allow a mixed use development, including residential, with over 1.2 million of zoning floor area. (R.15782, 15789-90, 15801.)

The proposed development would make use of development rights over the parcel adjacent to the Property known as Haaren Hall, which was, and continues to be, occupied by CUNY's John Jay College. In that

2. DASNY, unlike CUNY, has the power of eminent domain and, pursuant to New York Public Authorities Law §1680.2.f, is authorized to provide facilities for CUNY.

regard, pursuant to an agreement entitled Restated and Amended Capital Lease – Acquisition Agreement, dated as of June 30, 1986, between CUNY and certain developers who owned that property (the "Developers") (R.201a), the Developers agreed to construct a turnkey development of Haaren Hall for John Jay College. (R.833.) As part of that agreement, the Developers secured CUNY's agreement to transfer the development rights over the college for use in development of the Property. (R.274a-275a.)

Because the deeds transferring Haaren Hall to CUNY did not reserve the development rights over Haaren Hall for the Property, CUNY and the State believed they had no obligation to transfer the development rights and did not cooperate with Rein in its application for the rezoning. (R.1444a.) This led Rein to commence an action in April 1997 for breach of contract against CUNY and the State. (R.177a, 179a.)

Rein alleged that under the terms of the 1986 Agreement (of which Rein was the assignee), CUNY and the State had breached their obligation to transfer the development rights associated with Haaren Hall to the Property and to cooperate with Rein's efforts to rezone the Property in preparation for development, thereby delaying the rezoning. Rein sought injunctive relief and consequential money damages for the approximately one-year delay caused by the breach. (R.190a-199a.)

By Order dated December 18, 1997, the New York County Supreme Court directed CUNY and the State to transfer the Haaren Hall development rights to Rein. (R.314a.) On motion by the State and CUNY, the Supreme Court transferred Rein's remaining breach of contract

claim for delay damages to the Court of Claims, where it is now pending.[3] (R.319a.)

On January 28, 1999, the New York City Planning Commission approved the Property's rezoning from manufacturing to commercial, which was approved by the City Council in March 1999. (R.220, 613, 10605, 10618.) The Property's rezoning was subject to special permits and a restrictive declaration. Among other things, these specified the Property's 883,720 sq.ft. zoning floor area, restricted the retail to 125,000 sq.ft., prohibited "big box" store retail, and specified certain design guidelines requirements. (R.4235-38, 10618-75, 15949-72, 16110, 16185-200.)

During the condemnation proceeding, Petitioner attempted to introduce into evidence two reports by the National Economic Research Associates, which purport to estimate the increased costs allegedly caused by the delay in the rezoning. (R.706a, 1867a.) Upon DASNY's motion to dismiss the claim for increased costs, the trial court (Schoenfeld, J.) granted the motion in an August 9, 2006 decision stated on the record (R.2066a) and in a written order, dated August 30, 2006 (R.2090a), because the increased costs do not impact on the fair market value of the Property as determined by what a willing purchaser would pay a willing seller, and consequently such increased costs are irrelevant to the determination of just compensation. As the court explained: "It really does not have anything to do with what a buyer would pay

3. That lawsuit is styled *Rein, L.P. v. The State of New York and The City University of New York,* Claim No. 118353 (Sweitzer, J.).

for the property on the date that it was condemned and that essentially is the bottom line." (R.2079a.)

The Condemnation Valuation Trial

The valuation trial before the Supreme Court, New York County (DeGrasse, J.), lasted 81 days from November 1, 2006 through March 27, 2008. More than 600 exhibits were introduced, including Petitioner's appraisal as well as its rebuttal and sur-rebuttal reports totaling over 500 pages. Ten witnesses testified on behalf of Petitioner including Petitioner's principal, Mr. Korff, for 20 days, and its appraiser, for 24 days, and land use, geotechnical and construction experts. DASNY called six witnesses.

DASNY's appraiser valued the Property at $82,185,000 as of the Vesting Date. Petitioner's appraiser claimed that the Property's value was $227 million. (R.16a, 18a.) Both appraisers agreed that the building then on the Property, a three-story parking garage and warehouse, was not the highest and best use and should be demolished. (R.13051, 13062-63, 16103, 16130.) Both appraisers also agreed that the Property was a potential development site for a mixed-use commercial and residential development.

In a pre-trial decision, the trial court excluded Petitioner from introducing reports from developer Steven Goodstein and banker William Adamski (R.3414a-17a) because they were opinions by non-appraisers of the Property's value. DASNY's reports which rebutted Petitioner's reports were also excluded.

During the trial, the court limited Mr. Korff's testimony concerning documents containing Mr. Korff's

statements to potential investors of the value of the Property prior to the Vesting Date. (R.788-96, 1113-18.) The trial court did not preclude Mr. Korff from testifying about his opinion of the value of the Property as of the Vesting Date as he was not asked that question. The court also precluded from evidence non-binding offers or letters of intent to participate in the development made to, but not countersigned by, Petitioner. (R.1646.)

At trial, Petitioner claimed that it should be compensated for its efforts to develop the Property, even though these efforts resulted in little, if any, value enhancement to the Property. Mr. Korff testified about his attempts to market the development to various retailers, institutions, and companies, but the fact is that none of them ever signed a lease. He described his attempts to obtain construction financing, which he never received. He said he interviewed construction companies, but none were ever retained.

As of the Vesting Date:

i. Petitioner's building plans were preliminary schematics that did not comply with the Building Code or the special permit governing development on the Property (R.5723, 5687-88, 5691-5702, 7444, 7461-62, 7468, 7475-76);

ii. the parking garage and warehouse then on the Property was 80% to 85% occupied by tenants, preventing the issuance of demolition and construction permits (R.5636-37, 5718, 7464);

iii. there was no project financing (R.1281);

iv. there were no leases or agreements of sale for the proposed commercial and retail spaces (R.1554-55);

v. there was no demolition contract (R.1586);

vi. there was no construction financing (R.1562);

vii. there was no construction manager (R.1573);

viii. there was no construction guarantee (R.1573);

ix. there was no project-related insurance (R.1573-74); and

x. the Property was in bankruptcy (R.3295-97, 8364, 8690).

In a decision dated April 16, 2008, the trial court held that the Property's value was $97,250,000. (R.28a.) The trial court weighed the voluminous evidence before it and adopted the analysis in DASNY's appraisal, finding that the Property's unit value on the Vesting Date was $90 per sq. ft. (R.27a.) The trial court found that the analyses of Petitioner's appraiser "lacks probative value." (R.25a).

The trial court fully analyzed Petitioner's development efforts and added an additional $15 million of "enhanced value" as compensation for a "zoning change obtained and the borings and foundation studies conducted by [Petitioner]". (R.27a, 28a.) The trial court did not find that Petitioner's other development efforts would create value in the eyes of the willing buyer. The trial court pointed out:

> As of the date of development, building plans had not been filed with the New York City Department of Buildings. No financing for construction had been obtained. A construction manager had not been engaged. There was no agreement for the demolition of the existing building. Tenants were still in possession of approximately 80% of the building. No insurance for the project had been obtained. (R.23a) (citations to transcript omitted.)

The trial court further explained that based on the testimony of two of DASNY's witnesses, Petitioner's development plans did not comply with the special permit and "could very likely have been impractical and added nothing to the value of the subject." (R.28a.)

Appeal to the Appellate Division

Petitioner filed a notice of appeal, and DASNY cross-appealed on the ground that its appraisal value considered the rezoning and that the additional amount awarded for such rezoning, approximately $14.8 million, was duplicative and should not have been awarded. The Appellate Division, First Department, issued a Decision and Order, which unanimously denied Petitioner's appeal and granted DASNY's cross-appeal. *See In re John Jay College of Criminal Justice of the City Univ. of New York*, 74 A.D.3d 460 (1st Dep't 2010) (hereinafter the "Decision").

The Appellate Division agreed with the trial court that the proposed development was speculative and little value had been created over and above the Property's unit

land value as a result of Petitioner's efforts. *Id.,* at 460-61 ("The speculative nature of the proposed development was shown here by, among other things, the testimony of [Petitioner's] principal admitting that at the time of the taking he had yet to obtain any financing commitment or any signed leases for the proposed development or, in fact, any of the requirements that would bring the project to fruition in the near future").

The Appellate Division also agreed with the dismissal of the delay damages claim: "The claim for delay damages as a result of the State's alleged interference in [Petitioner's] eventually successful efforts to obtain rezoning was properly dismissed as not an appropriate element in valuation, properly subject to the jurisdiction of the Court of Claims, and duplicative of a claim already before that court." *Id.* at 462.

On July 6, 2010, Petitioner moved in the Appellate Division for reargument and alternatively for leave to appeal to the New York Court of Appeals. The Appellate Division unanimously denied both motions by Order entered on December 16, 2010.

Petitioner then moved for leave to appeal in the Court of Appeals. The Court of Appeals denied the motion in part and dismissed it in part. 16 N.Y.3d 889 (2011). Petitioner then moved to reargue the Order of the Court of Appeals, and the Court of Appeals denied the motion to reargue. 17 N.Y.3d 899 (2011).

THE PETITION SHOULD BE DENIED

A. This Court Lacks Jurisdiction Because No Substantial Federal Question Was Raised in the State Courts

Petitioner poses three Fifth Amendment challenges to the Decision. Petition For Writ of Certiorari ("Pet."), at i. However, neither the Decision nor the trial court decision addressed any Fifth Amendment issues or even mentioned the Fifth Amendment at all. Petitioner's statement that "The Appellate Division held that the Fifth Amendment categorically does not require the government to award compensation for lost development potential", Pet. at 13, is disingenuous as the Decision makes no reference to the Fifth Amendment. Accordingly, Petitioner must overcome the presumption that those arguments were not properly presented below, which it has not done and indeed cannot. *See, e.g., Adams v. Robertson,* 520 U.S. 83, 86 (1997) ("When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented"); *Fuller v. Oregon,* 417 U.S. 40, 50 n.11 (1974) ("Since these contentions appear not to have been raised in the state courts, and were not discussed by the Oregon Court of Appeals, we need not reach them here"); *Street v. New York,* 394 U.S. 576, 582 (1969) ("when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts"); *see also Board of Directors of Rotary Intern. v. Rotary Club of Duarte,* 481 U.S. 537, 550 (1987); *Exxon Corp. v. Eagerton,* 462 U.S. 176, 181 n.3 (1983).

All Petitioner points to in support of its position that it properly raised and preserved the federal constitutional

issues for review are a few sparing references to the Fifth Amendment in briefs it submitted during the course of this protracted litigation. Pet. at 12, 14. However, Petitioner never attempted to raise in the trial court or Appellate Division the Fifth Amendment challenges it would like this Court to review. For example, Petitioner never argued to the trial court or Appellate Division that the Fifth Amendment and the case law interpreting it required the courts to give a greater value to Petitioner's development efforts or that the Fifth Amendment and the case law thereunder required the courts to award damages in the condemnation proceeding for a breach of contract claim pending in the Court of Claims. The questions presented to this Court now were never presented to the courts below, and that is why the courts did not address them.

Further, since briefs are not part of the record of New York state court proceedings, they cannot satisfy Petitioner's requirement under Supreme Court Rule 14.1(g)(i) to demonstrate that the federal questions were raised "with specific reference to the places in the record where the matter appears." *See Lynch v. People of New York ex rel. Pierson,* 293 U.S. 52, 54 (1934) ("Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record."); *Live Oak Wate Users' Ass'n v. Railroad Commission of State of California*, 269 U.S. 354, 358-59 (1926).

Petitioner's assertion that "it pressed just compensation objections throughout the proceedings," Pet. at 12, is insufficient even assuming it were true, as Petitioner did not present to the state courts the Fifth Amendment claims it raises now. The citations Petitioner references consist mainly of pages of its own briefs and affirmations where the words "just compensation" are mentioned.

The Fifth Amendment questions and federal case law Petitioner raises for this Court's review are not found. *See Howell v. Mississippi,* 543 U.S. 440, 443 (2005) (dismissing writ of certiorari as improvidently granted where petitioner "did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases").

Indeed, because New York State's Constitution provides that "Private property shall not be taken for public use without just compensation", N.Y. Const. Article 1, Section 7, a reference to the words "just compensation" can be interpreted as referring to the New York State Constitution and does not even sufficiently identify the Fifth Amendment, let alone constitute raising the specific Fifth Amendment challenges Petitioner raises here. *See Adams,* 520 U.S. at 89 n.3 ("passing invocations of 'due process' we found therein … fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment, but could have just as easily referred to the due process guarantee of the Alabama Constitution … and thus they did not meet our minimal requirement that it must be clear that a *federal* claim was presented") (emphasis in original); *New York Central & Hudson River Railroad Co. v. City of New York,* 186 U.S. 269, 273 (1902) ("it is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth").

Because Petitioner failed to raise its Fifth Amendment claims below, it is not permitted to raise them for the first time in a petition for writ of certiorari, and, accordingly, the Petition should be denied. *See, e.g., Cardinale v.*

Louisiana, 394 U.S. 437 (1969) (petition for writ of certiorari dismissed for failure to raise federal claim below); *Univ. of California Regents v. Bakke,* 438 U.S. 265, 282 (1978); *Moore v. Illinois,* 408 U.S. 786, 799 (1972); *Hill v. California*, 401 U.S. 797, 805-06 (1971); *Bailey v. Anderson,* 326 U.S. 203, 207 (1945).

B. The Decision Is Based Upon Independent and Adequate State Grounds and Involves Factual Issues

This Court unwaveringly adheres to the principle that it will not review state court decisions that rest on adequate and independent state grounds. *Michigan v. Long,* 463 U.S. 1032, 1040-41 (1983) . "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide" such cases. *Id.,* at 1040.

Here, the New York courts below determined the value of the Property solely on the basis of well-settled principles of state eminent domain law. The courts below did not rely on federal law in determining the value of the Property. As such, the Petition should be denied because the Decision is based upon independent and adequate state grounds. *Zacchini v. Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 566 (1977) ("If the judgment rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted").

The Petition should also be denied because the valuation of an individual parcel of property in its unique

development stage as of a specific valuation date is a factual question. *See CSX Transp., Inc. v. Georgia State Bd. of Equalization,* 552 U.S. 9, 19 (2007) ("Valuation of property, though admittedly complex, is at bottom just 'an issue of fact about possible market prices'") *quoting Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 741 (1997). It is thus not appropriate for this Court's review. *See* Sup. Ct. R. 10; *Tacon v. Arizona,* 410 U.S. 351, 352 (1973) ("Since this is primarily a factual issue which does not, by itself, justify the exercise of our certiorari jurisdiction, the writ of certiorari is dismissed as improvidently granted"); *Aetna Life Ins. Co. v. Dunken,* 266 U.S. 389, 394 (1924) ("The rule is settled that the decision of a state court upon a question of fact ordinarily cannot be made the subject of inquiry here").

C. The Decision Does Not Conflict With Decisions of this Court or Other Courts

Based on a mischaracterization of the Decision and other case law, Petitioner seeks to manufacture a conflict between the Decision and decisions of this Court and other courts with respect to the value awarded by the courts below for Petitioner's development efforts and the dismissal of Petitioner's delay claim from the condemnation proceeding. There is no conflict.

1. The Decision's Valuation of Petitioner's Development Efforts Does Not Conflict With this Court's or Other Courts' Decisions

The state courts applied the correct standard and determined the fair market value of the Property in its particular development stage as of the Vesting Date

based on the amount the willing buyer would have paid a willing seller for the Property under its highest and best use. In this regard, the courts valued the property based not on its then-current use as a three-story parking garage and warehouse, but as land for development of a mixed-use commercial and residential development. This is in accord with this Court's decisions and New York law. *See U.S. v. 564.54 Acres of Land,* 441 U.S. 506, 511 (1979) ("The Court therefore has employed the concept of fair market value to determine the condemnee's loss … what a willing buyer would pay in cash to a willing seller at the time of the taking") (internal quotation marks omitted); *Olson v. U.S.,* 292 U.S. 246, 255 (1934) ("The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered"); *In re City of New York (Franklin Record Center)*, 59 N.Y.2d 57, 61 (1983) ("The measure of damages in condemnation is the fair market value of the condemned property in its highest and best use on the date of the taking").

Consequently, the cases cited in the Petition that recite this settled principle, namely, that in eminent domain proceedings property is to be valued based on its highest and best use, Pet. at 16-20, do not conflict at all with the Decision, as it is indisputable that the Property was valued as a mixed-use commercial and residential development site, which was the highest and best use of both Petitioner's and DASNY's respective appraisers.

Petitioner's argument, although erroneously couched in terms of highest and best use, is not about highest and best use at all but rather takes issue with the value the courts below attributed to the specific development

efforts Petitioner had made toward creating a mixed-use development as of the Vesting Date. That is a factual determination as to how much a willing buyer would have paid the willing seller for such efforts and is not reviewable by this Court. That was the standard applied in the Decision's finding that the development was speculative and was far from fruition and therefore there was little property enhancement to a prospective purchaser. *See* Decision, 74 A.D.3d at 462 ("Thus, while the plans might have been useful as a marketing tool, the court reasonably found that no purchaser would have paid for them as an added element of the purchase price of the property"). However, the Decision did not disturb the trial court's finding that Petitioner was entitled to be paid for the enhanced value to a purchaser of its boring and foundation studies, and DASNY subsequently paid Petitioner for that value.

2. The Decision's Dismissal of the Delay Claim Does Not Conflict With this Court's or Other Courts' Decisions

The state courts' dismissal in the condemnation proceeding of Petitioner's delay claim, which is currently pending in the Court of Claims as a breach of contract claim, was proper and does not conflict with this Court's or other courts' decisions. Petitioner's claim is based on the increased costs it incurred due a delay in achieving a rezoning of the Property as set out in two expert reports. (R.2066a, 2090a, 3414a.) The courts below dismissed that claim because the increase in costs to achieve the rezoning, as opposed to the value to the Property of the rezoning itself which was taken into account by the parties' respective appraisals and the Decision, does not relate to the fair market value of the Property as determined by what a

willing purchaser would pay a willing seller. Consequently such increased costs are irrelevant to the determination of just compensation in a condemnation proceeding, as the Decision recognized: "The claim for delay damages as a result of the State's alleged interference in River Center's eventually successful efforts to obtain rezoning was properly dismissed as not an appropriate element in valuation." Decision, 74 A.D.3d at 462.

The Decision does not conflict with the cases cited in the Petition, Pet. at 21-24, as those cases involve entirely different issues. The language in the three decisions of this Court cited by Petitioner, Pet. at 21-22, involve the "scope of the project rule," *i.e.*, the rule enunciated in *United States v. Miller*, 317 U.S. 369, 376-77 (1943), which precludes a court from considering any enhanced or depressed value to the condemned property as a result of the development of the project itself for which the property was condemned. *See U.S. v. Reynolds*, 397 U.S. 14, 18 (1970) ("The issue between the parties is simply whether the 'scope-of-the-project' question is to be determined by the trial judge or by the jury"); *Almota Farmers Elevator & Warehouse Co. v. U.S.*, 409 U.S. 470, 477-78 (1973) ("The Government must pay just compensation for those interests 'probably within the scope of the project from the time the Government was committed to it'"), *quoting Miller,* 317 U.S. at 377; *U.S. v. Virginia Elec. & Power Co.*, 365 U.S. 624 (1961) ("The court must exclude any depreciation in value caused by the prospective taking once the Government 'was committed' to the project") *quoting Miller,* 317 U.S. at 376-77. The scope of the project rule is not relevant here as Petitioner did not claim below that development of John Jay College caused a depression in the Property's value.

Petitioner's delay claim also has nothing to do with condemnation blight. In condemnation blight cases, the affirmative acts of government depressed the value of the properties as of the date of condemnation. Here, in contrast, the rezoning had been achieved in March 1999 over two years before the condemnation in April 2001 and was taken into account in the parties' appraisals, as the trial court made clear:

> Such claim is duplicative of a separate action in the Court of Claims, and more significantly, is inappropriate in determining fair market value where the needed rezoning had already been obtained, and the ultimate development project had commenced, several years prior to the taking. (R. 2090a.)

Petitioner also never raised a claim of condemnation blight below. *See City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 254 (1971) ("There is in fact a marked distinction between those cases which by reason of the cloud of condemnation, resulting in so-called condemnation blight, permit the claimant to establish his true value at the time of the taking but as if it had not been subject to the debilitating effect of the threat of condemnation"); NICHOLS ON EMINENT DOMAIN, Ch. 8A, §G18.01 (3rd ed.). In this regard, Petitioner never placed before the trial court any valuation of its development in the hypothetical state it might have been in had no delay occurred in the rezoning. Petitioner's appraisal did not contain any such analysis. Thus, there is no basis in the record for any additional value attributable to a hypothetical development in whatever stage it might have been in had no delay occurred.

Moreover, such a claim would amount to sheer speculation, as the trial court recognized. (R. 2077a-78a ("we would only be speculating and it could prove just the opposite, because if we had the facts at a different developmental stage, we might see that certain commercial entities, such as Home Depot, who were interested in renting space would no longer have been interested for other reasons, other than delays.").) Indeed, had there been no delay and resultant litigation, DASNY may well have condemned the Property earlier.

Finally, the numerous state law cases Petitioners cite, Pet. 22-24, do not conflict with the dismissal of the delay claim as those cases involve claims of inverse condemnation. Inverse condemnation is a claim by a property owner that a governmental authority has caused a de facto taking of its property without commencing formal condemnation proceedings. *See U.S. v. Clarke,* 445 U.S. 253, 257 (1980) ("The phrase 'inverse condemnation' appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted"); Nichols On Eminent Domain, Ch. 7A, §14.02[1] (3rd ed.). Petitioner never raised an inverse condemnation claim in this proceeding; it never argued in this proceeding that a de facto taking of the Property occurred when the rezoning was delayed in 1996 and that an earlier valuation date should be used in determining the value of the Property. It merely sought to interpose a claim for increased costs in achieving the rezoning that was valued in the Decision. That claim for increased costs is presently before the Court of Claims as a breach of contract claim and is not appropriately pursued in the condemnation

proceeding as a willing buyer does not pay more to the willing seller merely because the seller incurred increased costs in achieving the rezoning.

D. The Decision Does Not Have Nationwide Significance

At its core, this application is about a former property owner's dissatisfaction with the amount of a condemnation award. This case is a factual dispute involving a unique set of facts, not a legal one. Simply put, after an 81 day trial, the trial court concluded that DASNY's appraiser was more credible than Petitioner's appraiser. Because this dispute is specific to this particular case (*i.e.,* the Property's value on the Vesting Date), this case does not raise any national issues. Petitioner asserts that the decision below "creates an unacceptable risk of disrupting the nation's most significant commercial real estate market," Pet. at 32. In other words, a decision by a New York court about the value of a particular New York property could affect the New York real estate market. Even if this were possible, Petitioner does not assert that the decision will have ramifications outside of New York City. Indeed, the fact that the dispute is so specific to New York City – *i.e.,* the Manhattan real estate market, New York City air rights, conditions at this specific Hell's Kitchen/Clinton location – demonstrates that this dispute serves no national interests. This case is therefore not appropriate for this Court's review.

E. The Evidentiary Issues Were Correctly Decided

As discussed *supra* (Point C 1 & 2), the Decision applied the correct standards in considering the value

of Petitioner's development efforts and in dismissing the delay claim. With respect to Petitioner's final issue regarding certain evidentiary rulings made by the trial court, the Decision was also correct. Petitioner argues that the Fifth Amendment requires a court in a condemnation proceeding to admit an owner's testimony and expert testimony as to value as well as offers and mortgages regardless of state law. Petitioner, however, cites to no cases that hold as such. The cited cases address only the rules of evidence in effect in those jurisdictions (*i.e.*, the Federal Rules of Evidence in the federal cases or the individual state rules of evidence in the state cases referenced), which may require the admission of some of this evidence under certain circumstances. They do not address the Fifth Amendment.

With respect to the testimony of the property owner, each of the cases cited by Petitioner relies on the Federal Rules of Evidence, not the Fifth Amendment. *See*, *e.g.*, *United States v. 68.94 Acres of Land*, 918 F.2d 389, 397 (3d Cir. 1990) ("The Federal Rules of Evidence generally permit landowners to give opinion evidence as to the value of their land") (*citing* Fed. R. Evid. 702). There is no doubt that under Federal Rule of Evidence 702 a landowner's testimony is presumptively admissible in a federal condemnation case, but such a rule does not bind a state court, nor is it as absolute as the Petitioner argues. As the Court in *68.94 Acres of Land* recognized, the testimony in only *generally* admissible. For instance, and as acknowledged in another case cited by Petitioner, an owner may not testify to "establish value based entirely on speculation." *United States v. 10,031.98 Acres of Land*, 850 F.2d 634, 637 (10th Cir. 1988) (citing *United States v. Sowards*, 370 F.3d 87, 92 (10th Cir. 1966)).

Furthermore, the trial court did not apply a categorical rule barring Mr. Korff's testimony as to value. Rather, the trial court held that, while "I can accept the general proposition that any person, including an owner of real property, if he has sufficient knowledge and background can express an opinion", in this case, and in accordance with Section 202.61 of New York's Uniform Rules for Trial Courts, the owner, Mr. Korff, would not be permitted to testify concerning marketing documents that placed a value on the Property *not* as of the Vesting Date. (R.1128-29.) This ruling was made on the eleventh day of the trial, which had consisted almost exclusively of Mr. Korff's direct testimony.

Nor was the trial court's ruling as broad as Petitioner has represented. The ruling did not pertain to Mr. Korff's opinion of the value of the Property as of the Vesting Date because Mr. Korff was never asked that question. The ruling only related to the admissibility of documents containing Mr. Korff's statements to potential investors of the value of the Property prior to the Vesting Date. (R.788-96, 1113-18). This puffery was an attempt by Mr. Korff to attract investors in his project and not an accurate reflection of the value of the Property at that time or, more importantly, as of the Vesting Date. Petitioner's counsel recognized this during the trial. (R.793 ("We are not putting it in for value.")) Ultimately, Mr. Korff would testify for a total of 20 days, accounting for approximately 1,900 pages of the 8,936 pages of transcript and the admission of 305 exhibits by Petitioner.

Moreover, Petitioner's appraiser submitted a three-volume appraisal as well as rebuttal and sur-rebuttal reports totaling over 500 pages and testified for 24 days.

Accordingly, it was well within the trial court's discretion to preclude the owner's statements of value contained in marketing materials that did not pertain to the Vesting Date, particularly in light of the huge amount of valuation evidence placed before it by Petitioner's appraiser.

Finally, the trial court's ruling did not preclude the appraisers from relying upon these documents in rendering their opinions on value. (R.705.) As a result, even if the trial court's ruling is considered erroneous, any error in this regard was harmless when viewed in the context of the entire record. *United States v. Rouse*, 111 F.3d 561, 572 (8th Cir. 1997) (holding "in light of the voluminous trial record, a majority of the panel has concluded that exclusion of this additional expert testimony was, in any event, harmless error"). In this case, any evidence of value offered by the owner would have been accorded little weight due to the owner's clear self-interest in inflating the value and general lack of credibility, as evidenced by the trial court's decision (R.19a), and would have been cumulative of the copious evidence presented by Petitioner's appraiser and the other witnesses. This is especially true in a bench trial where the court that excluded the testimony was also the fact finder charged with making credibility determinations.

Turning to the expert testimony, Petitioner sought to offer the testimony of Steven Goodstein, a developer, and his report, which was not an appraisal, on its direct case as affirmative proof of the Property's value. Mr. Goodstein's report clearly contained opinions about the Property's value, as the trial court held. (R.3416a.) Under the relevant New York case law, *Town of Webb v. Sisters Realty North Corp.*, 229 A.D.2d 942 (4th Dep't

1996), and court rules, Section 202.61, expert testimony regarding the value of property is limited to the testimony of appraisers. Accordingly, the trial court was correct in precluding the report and related testimony about value. The Fifth Amendment does not require otherwise. As in the case of an owner's testimony, the cases cited by Petitioner address the application of rules of evidence, not the Fifth Amendment. *See*, *e.g.*, *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1077-79 (5th Cir. 1996) (discussing the admissibility of expert testimony under the Federal Rules of Evidence).

The Goodstein report was in any event inadmissible under New York law because it was a land residual analysis. The land value was calculated in the report by projecting hypothetical income and subtracting hypothetical costs. New York law does not permit this type of analysis for valuing land because it is too speculative. *See, e.g., Pickerell v. Town of Huntington*, 272 A.D.2d 331, 332 (2d Dep't 2000); *see also Rosen v. State of New York*, 59 Misc. 2d 905, 911 (Ct. Cl. 1969) ("[h]ypothetical profits estimated upon a non-existent business may not be considered as a foundation for capitalizing income"). This is an additional adequate and independent state law reason for precluding Mr. Goodstein's report and related testimony. *See* Point B *supra*.

Like Goodstein, William Adamski's report and testimony as to value were properly excluded for the same reasons. Moreover, Petitioner did not raise the preclusion of Mr. Adamski's testimony in its appeal to the Appellate Division. Accordingly, the issue was abandoned below. *See e.g., Gregory v. Board of Appeals of Town of Cambria*, 57 N.Y.2d 865, 867 (1982); *Andre v. City of New York*, 47

A.D.3d 605, 606 (2d Dep't 2008); *Isabell v. U.W. Marx, Inc.*, 299 A.D.2d 701, 701-02 (3d Dep't 2002). Where an issue has not been properly pursued on appeal to a state's appellate courts, it may not be presented to this Court. *See Beck v. Washington*, 369 U.S. 541, 550-54 (1962) (holding that equal protection question was not properly before the Court where Petitioner failed to present the constitutional question to the state appellate court).

The Decision was also correct in precluding the admissibility of offers on the basis of case law. Decision, 74 A.D.3d at 461 (citing *Brummer v. State of New York*, 25 A.D.2d 245 (4th Dep't 1966)). This is in accord with the law in most states and with this Court's decision in *Sharp v. United States*, 191 U.S. 341 (1903). In *Sharp*, the trial court excluded from evidence testimony of the plaintiff related to offers he had received for the property. The Third Circuit affirmed the trial court and this Court, in turn, affirmed the Third Circuit, holding "oral and not binding offers are so easily made and refused in a mere passing conversation, and under circumstances involving no responsibility on either side, as to cast no light upon the question of value." *Id.* at 349. This is as true today as it was over 100 years ago.

In addition to citing to *Sharp*, Petitioner tries to manufacture a conflict by citing to four cases that allowed evidence of offers and eleven cases which stated that offers were inadmissible to prove value. However, none of the cases address the Just Compensation Clause of the Fifth Amendment. The two federal cases cited in support of the admissibility of offers, *Levy v. United States*, 402 Fed. Appx. 979, 982 (5th Cir. 2010) and *Sammons v. United States*, 433 F.2d 728, 731 (5th Cir. 1970), are tax cases,

not eminent domain cases. The two state cases cited in support of the admissibility of offers did not address the Fifth Amendment. *See Township of Groose Ile v. Cooper*, 1998 WL 1988407, *4 (Mich. App. Dec. 18, 1998); *Tedesco v. Mun. Auth. of Hazle Township*, 799 A.2d 931, 935 (Pa. Commw. Ct. 2002).

Moreover, the trial court was well within its right as the trier of fact to preclude the offers in light of the abundance of more credible evidence placed before it by way of the appraisal reports.

Finally, with respect to the issue of the relevance of the amount of mortgages on the Property to its value, the Appellate Division correctly ruled that the amount of the mortgage (at a rate of 18.5%) did not necessarily reflect the value of the Property.[4] The Decision relied on long-established precedent such as *Matter of City of New York [Esam Holding Corp.]*, 222 A.D. 554 (1st Dep't 1928), *aff'd*, 250 N.Y. 588 (1929), and *Farash v. Smith*, 59 N.Y.2d 952 (1983), which noted the unreliability of mortgages to prove value. *See* Decision, 74 A.D.3d at 461. In *Esam Holding Corp.*, a condemnation case, the Appellate Division specifically noted: "It is well-known that many mortgages are for more than the value of the property, as is evidenced every day by foreclosure sales and deficiency judgments." 222 A.D. at 559. *See also In re Long Island Water-Supply Co.*, 26 N.Y.S. 198, 200 (2d Dep't 1893), *aff'd*, 143 N.Y. 596 (1894), *aff'd*, 166 U.S. 685 (1897) ("It is not obligatory upon a commission to appraise

4. Although the issue was not raised by Petitioner, it has been raised in the amicus brief of The Real Estate Board of New York, Inc. et. al.

lands taken for public use that an award shall be made, greater than the mortgage on the property. The value only is to be assessed, and the money will go where justice requires it to go, and no further; otherwise, an excessive mortgage will prevent condemnation for public use."). Indeed, Petitioner's counsel acknowledged during the trial that "[t]he debt in and of itself has nothing to do with the fair market value." (R. 945.)[5]

5. That the amount of a mortgage is not a fair indicator of a property's value is particularly applicable here because the second mortgage on the property cannot be considered a conventional mortgage. The loan advanced by the second mortgagee was for only two years with a basic interest rate of 18.5%. (R.15825, 15836.) Significantly, of the approximately $55.2 million face amount of the loan, less than $31 million was actually disbursed to Petitioner in 1998, as $17.3 million was held back by the second mortgagee in an account for interest accrual and another $7.1 million was set aside in an account for pre-development costs that Petitioner could not directly access. (R.1476, 15923-24.) Petitioner's attorneys acknowledged that the loan was not conventional. (R.8910 ("Since that forecloses conventional financing, he is compelled to go to what is euphemistically called an opportunity lender and a high interest rate"); R.2695 ("conventional financing was not allowed, he was forced to take higher financing")). In addition, the loan was not a non-recourse loan, as Mr. Korff was personally liable on the second mortgage (R. 155), and thus the lender could look beyond the Property's value to recoup the loan.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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