No. 11-

IN THE

Supreme Court of the United States

RIVER CENTER LLC,

Petitioner,

v.

THE DORMITORY AUTHORITY OF THE STATE OF NEW YORK,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Whether the Fifth Amendment permits a state to deny compensation to an owner for loss of the reasonably probable development potential of a condemned development site taken through eminent domain proceedings, unless the property owner can show that development will come to fruition in the near future.

2. Whether, in awarding just compensation under the Fifth Amendment, a state may exclude damages resulting from deliberate governmental interference with a development project that delays development and suppresses the property's value at the time of the taking over what it would otherwise have been.

3. Whether the Fifth Amendment permits a court in a condemnation proceeding to restrict evidence of value to the testimony of appraisers and to exclude or ignore otherwise competent testimony of property value (a) from the property's owner, and (b) from third parties able to provide market-based evidence of value, such as financing proposals and offers to lease and buy.

PARTIES AND RULE 29.6 STATEMENT

Petitioner River Center LLC is a wholly-owned subsidiary of River Center Holdings LLC, which in turn is wholly owned by Rein LP. Rein LP is privately held.

In addition to River Center LLC, Blackacre Bridge Capital LLC and SWH Funding Corp. were claimants-appellants in the court below and are Respondents in this Court.

The Dormitory Authority of the State of New York, acting at the request of the City University of New York, was condemnor and respondent in the court below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner River Center LLC ("River Center") respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of New York, Appellate Division, First Department ("Appellate Division") in this case.

OPINIONS BELOW

The opinion of the Appellate Division (Pet. App. 1a-5a) is reported at 74 A.D.3d 460, 905 N.Y.S.2d 18. The opinion of the Supreme Court, New York County (Leland DeGrasse, J.) (Pet. App. 6a-21a), is unreported. The Order of the Court of Appeals denying in part and dismissing in part the motion for leave to appeal (*id.* at 39a-41a) is reported at 16 N.Y.3d 889, 948 N.E.2d 925, 924 N.Y.S.2d 318, and the Order of the Court of Appeals denying reargument of the motion for leave to appeal (Pet. App. 42a) is reported at 2011 WL 5041547 (N.Y. Oct. 25, 2011).

JURISDICTION

On May 10, 2011, the Court of Appeals denied in part and dismissed in part River Center's motion for leave to appeal. Pet. App. 39a-41a. On October 25, 2011, the Court of Appeals denied reargument (rehearing) of the motion for leave to appeal. *Id.* at 42a. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "nor shall private property be taken for public use, without just compensation."

STATEMENT

This case concerns one of the largest condemnations of private property in the history of New York City – the unused development rights of an entire city block in the Lincoln Center area of Manhattan, which was being developed by River Center as a multi-use commercial, retail, and residential complex. The case presents three legal questions critical to the continued vitality of the "Just Compensation" guarantee of the Fifth Amendment:

(i) Whether the government's obligation to compensate for the lost development potential of a condemned site (including compensating for the developer's efforts in moving a project forward) applies only where the property owner can demonstrate that the development will come to fruition in the near future.

(ii) Whether the government may avoid paying, as part of a just compensation award, damages resulting from deliberate governmental interference with a development project that suppresses the property's value at the time of the taking, compared to what it would otherwise have been.

(iii) Whether a state court may exclude, or deny any probative value to, otherwise competent market-based evidence of property value, such as testimony by the property's owner, financing proposals, and offers to lease and buy, solely because they are not presented by a real estate appraiser.

These legal issues had a palpable impact on the result in this case, making the state's final award of just compensation in this case genuinely confiscato-

ry. Excluded market-based evidence showed values far higher that the award. Evidence admitted but given no probative value showed that the award was nearly $30 million *less* than the non-recourse mortgages on the property, which themselves predated the substantial rezoning of the property and a significant appreciation in the New York City market. The developer at the time of the condemnation had invested years of work and many millions of dollars above the secured debt. By its legal rulings, the New York court has permitted all of this value and all of this investment in a rising market to be taken without compensation, thereby according mere lip service to the protections of the Fifth Amendment.

The legal questions presented by this case do not depend on any disputed evidentiary matters. Therefore, this case is a particularly suitable vehicle for reinvigorating the Just Compensation requirement, in keeping this Court's reinvigoration of Fifth Amendment property rights generally.[1]

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[1] *See, e.g., Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 130 S.Ct. 2592, 2601-10 (2010) (plurality opinion) (opining that Takings Clause extends to judicial decisions); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999) (upholding a jury finding of a regulatory taking where a series of proposals to develop the property were denied and each time more rigorous demands were imposed); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (holding that interest income generated by funds held in attorney accounts was private property of owner of principal for purposes of Takings Clause); *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (holding that retroactive imposition of unexpected and disproportionate liability violated Fifth Amendment); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (development permit conditioned upon granting flood plain and

1. In 1986, the City University of New York (CUNY), an agency of the State of New York, and the State of New York entered into an agreement affecting the ultimate redevelopment of an approximately 160,000-square-foot city block between 10th Avenue and 11th Avenue/West End Avenue and West 58th and West 59th Street ("Lincoln Center Area Block"). As part of that agreement, the original owners agreed to renovate Haaren High School and build an annex on a footprint of approximately 60,000 square feet as a development project. This phase was finished in 1988, and the 60,000-square-foot parcel (together with the then-completed approximately 350,000-square-foot building) was sold to the State. Excluded from the sale was the additional development potential ("Reserved Rights") from making the parcel part of a block-long single zoning lot under a general large-scale development permit. As a result of these Reserved Rights, the balance of the block could be built to a greater density with more profitable uses than would otherwise have been possible.

Under the 1986 agreement, CUNY and the State agreed with the original owners, River Center's predecessors in interest, to cooperate in rezoning the Lincoln Center Area Block, so that development could be maximized on the remaining approximately 100,000-square-foot parcel (the "River Center Lot"), including adding residential uses to the permitted uses. The Block was then zoned for manufacturing

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public bicycle easement constituted taking for which compensation must be provided where not reasonably proportionate to the impact of proposed development).

users, which permitted office and other development not then in demand but not residential or any meaningful amount of retail.

In 1991-1992, Rein (River Center's owner) acquired control of the site from various fee owners and leaseholders, a process which substantially increased the value of the parcel.[2] In 1994, Rein began the development and rezoning process of what promised to be one of the largest developments in New York City, which would take several years to complete. Rein intended to develop River Center as a multi-use commercial, retail, and residential complex. By July 1994, Rein had assembled a team of architects and designers.

The agreement called for CUNY and the State to cooperate in whatever would be required to rezone the entire city block so that development could be maximized on the River Center Lot, including adding residential uses to the permitted uses. However, beginning in December 1996, Respondent, The Dormitory Authority of the State of New York, ("DASNY"), worked in conjunction with CUNY and the State to interfere with River Center's development efforts. DASNY is an independent state agency that CUNY, a state agency, uses to acquire property that it wishes to condemn. DASNY and CUNY knew

[2] Prior to the assemblage, the River Center Lot was encumbered by a long term lease held by General Motors, which substantially reduced its value. The lease was not long enough to justify any significant improvements by General Motors, but it was too long to make development efforts by the owner fruitful. The value of the whole unrestricted parcel in the assemblage Rein engineered, eliminating General Motors' interest, was thus substantially more than the sum of its parts.

that, the further River Center's development proceeded, the more expensive it would be to take the property by eminent domain. (R.1540a (notes of meeting; "IF [RIVER CENTER] GETS SITE REZONED UPWARD, AFFECTS OUR ACQUISITION") (capitalization in original).

Prior to the taking, DASNY, in conjunction with CUNY and the State, held up the rezoning and development process of the River Center Lot by more than 19 months with material impact. For example, rezoning from manufacturing to the contemplated commercial/retail/residential mixed use was delayed from 1997 until March 1999, and River Center was required to replace its design team at a critical stage. (R.1705-1706, 10676-10690). The court below noted that DASNY's "fingerprints" were all over the plan. (R.2073a.)

In 1997, the New York Supreme Court ruled this interference to be a breach of contract and enjoined CUNY and the State from obstructing River Center's development efforts. (Pet. App. 28a; R.12077-12080, 11342-11345.) But by then the core damage had been done. On River Center's 1996 timetable, the project should have been completed by April 2001. (R.570-572, 1705-1706, 10473.) Instead, on April 11, 2001, after the market value of Manhattan real estate had appreciated significantly, DASNY formally took the River Center property before construction could commence. DASNY's interference and the delay it occasioned thus materially reduced the property's value at taking.

2. The New York Supreme Court set compensation at $97,250,000 for what it acknowledged was an

"unusually large" property in the mid-town west section of Manhattan. (Pet. App. 17a.) In contrast, River Center's expert appraisers had valued the property at $189,000,000, without considering the enhanced value conferred by development. An expert developer calculated that enhanced development value to be an additional $78,000,000.[3]

First, the trial court held that a project must be in "existence" before the site's full development potential could be considered. (Pet. App. 17a.) In the Supreme Court's view, the project was "far from imminent" because (among other things) building plans had not been filed with the New York City Department of Buildings, construction financing and insurance had not been obtained, a construction manager for the full development had not been engaged, tenants at will remained in possession, and there was no agreement for demolition of the existing building. (*Id.* at 15a.) Ironically, the trial court held that River Center's development efforts had not progressed sufficiently to have value by citing some of the very tasks that would have been accomplished but for the State's intentional interference.[4]

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[3] The trial court pointed to a 1997 transfer of the property, but it did not occur at arms' length. (Pet. App. 9a-14a.) A governmental audit letter showed "no tax due" for the transfer, a determination not available for fair market value sales. (R.13016-13018.) The Appellate Division did not consider that a material part of the trial court's reasoning.

[4] Despite governmental efforts to obstruct development, River Center had managed to bring the project to the point where demolition and fast track construction would have moved forward but for the condemnation in April 2001. River Center had arranged for (among other things): (a) architectural

As a result, the trial court expressly refused to consider the entire development potential of the site. Although the trial court found that the site could contain 1,398,906 square feet of development (Pet. App. 14a), the trial court valued only 930,825 square feet. (*Id.* at 19a; R.15506-15557.) The court accorded no value to development enhancement from developer activities and denied probative value to substantially all of the appraisal testimony proffered by River Center's witness.

Second, the trial court held that just compensation does not include interference damages, so that a

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and structural plans through schematic design (R.9330-9352, 9573-9581, 9768-9918); (b) mechanical, electrical, plumbing, façade and vertical transportation engineering (R.9297-9311); (c) the processing of approvals for reduction of railroad right of way easements (R.9628-9716); (d) bids for demolition and clean-up work at the site (R. 560-564, 10294-10297); (e) bids for guaranteed-maximum-price construction contracts (R.9951-9966, 9992-10066); (f) construction financing bids from ULICO (R.12975-80), ARCS (R.12981-12998), GMAC, and others; (g) expressions of interest in joint venture financing with proposed key terms including price (R.1174-1179, 1197-1200, 12939-12952, 12957-12966); (h) interest from prospective buyers and lessees (R.690-695, 717-719, 738-743, 754-757, 10833-10845, 10850-10874, 10887-10888, 10905- 10910); (i) feasibility studies concerning the mix, design details, and fixturing of the residential condominiums and rentals (R.9170-9237); (j) conversion of all occupants of the premises to occupants at will (R.1574, 1612-1619, 12999-13000); (k) bid packages for owner-controlled insurance which were prepared, distributed and negotiated (R.10474-10567); (l) a marketing agreement for residential rental and condominiums (R.9260-9296); and (m) a fast-track construction and permit schedule calling for first temporary certificate of occupancy in 24 months and completion within 30 months, which River Center vetted with construction managers and expediters. (R.10473).

condemnee has absolutely no remedy in eminent domain proceedings when a government agency, in advance of condemnation, deliberately reduces the value a site would have had at condemnation, by taking such steps as delaying its rezoning and otherwise impeding its development. (Pet. App. 25a-29a.) In a separate proceeding, the New York courts expressly found that governmental misconduct interfered with rezoning and development that would have enhanced the value of the property (R.12076-80, 11342-11345). Yet, in setting compensation, the Supreme Court refused to consider either that misconduct or subsequent acts that impeded rezoning and development notwithstanding its determination that DASNY's "fingers" were all over the interference and the fact that DASNY condemned the site at CUNY's request. (R.220, 222, 996-997, 2073a, 9245, 14425, 14430.)

Third, the Supreme Court excluded or denied probative force to broad swaths of River Center's evidence, including virtually all testimony as to value except that of real estate appraisers. (Pet. App. 30a-38a.) That absolute and arbitrary bar on non-appraisal evidence did not relate to relevance, credibility or any similar rationally cognizable factor. Instead, it was based on a state-court rule mechanically governing appraisal reports in eminent domain proceedings, 22 N.Y.C.R.R. § 202.61. The trial court held that this rule precluded any evidence relating to the value of the site except from a real estate appraiser. (Pet. App 35a-36a.)

As a result, among other things, the trial court precluded River Center from introducing or using as evidence of value:

• the testimony of Steven Goodstein, an expert developer responsible for $1 billion in real estate projects in New York City and nationally, regarding the market value of River Center's property and development efforts and why developers prefer Manhattan sites in excess of 500,000 square feet like the River Center Lot (R.2702a-2840a, 2856a-2960a);

• the testimony of William. Adamski, formerly in charge of real estate finance at Credit Suisse, regarding River Center's ability to finance the project and the property's value (R.1486a-1509a); and

• the value-related testimony of River Center's owner, Joseph Korff, who had spent over 30 years in the real estate business and had devoted several years to the River Center project, including assembling the property, having it rezoned, designed, engineered, and made construction-ready, while obtaining offers and indications of interest from users, financiers and others interested in the property based on his development plan. (R.1123, 1212-1216.) Although Mr. Korff had the appropriate knowledge and background (R.1706-1740, 1212-1216, 12813-12814), the trial judge viewed his hands as tied by § 202.61 and refused to apply any of Mr. Korff's evidence to the issue of value in determining just compensation. (Pet. App. 34a-36a.)

The evidence dismissed by the trial court was without doubt highly probative. For example, Mr. Goodstein, from the standpoint of an industry participant, would have opined that a buyer would have been willing to pay for River Center's development efforts, including all of the property's physical development potential. Mr. Goodstein calculated the value

of the development efforts to a buyer at $78,270,000, and property's land value, including its physical development potential, at $196,000,000. (R.2710a-2711a, 2859a-2860a.) He also stated in his reports that he would have picked up and followed through on River Center's plans had DASNY not condemned the property in April 2001. In contrast, the trial court ruled that River Center's full development potential need not be considered because the project was not "existence" at the time of the taking. (Pet. App. 17a.)

Similarly, Mr. Adamski would have testified that Credit Suisse was prepared to finance the River Center project (R.1494a-1495a) and that in his judgment the property was worth at least $120,000,000 at the end of 1997 and the beginning of 1998 (R.1505a-1506a). The trial court held that the Property was worth less than $50,000,000 at that time. (Pet. App. 13a.) Ironically, after excluding Mr. Adamski's evidence, the trial court ruled that River Center's development plan was speculative, in part because "[n]o financing for construction had been obtained." (*Id.* at 15a.)

The court arbitrarily ruled that "an offer is not admissible to show market value" (*id.* at 38a), and that proposals and expressions of interest by potential lessees and commercial partners were not admissible as evidence of value. (*Id.* at 36a-37a). The trial court thus disregarded evidence of market assessments of value from a multitude of well-known public and private sources at more than twice the court's award. These included offers, letters of intent or expressions of interest for a financing, purchase or joint-venture development of the property,

or to lease or buy substantial parts of the development, from Vornado (R.1196-1197), Avalon Bay (R.1165-1166, 1194-1196), Metropolitan Development Group (Lehman Brothers) (R.1197-1200, 12957-12965), Zurich Re (R.1201-1204, 12966-12974), GMAC (R.1737), Forest City Ratner (Forest City Enterprises) (R.1167-1176, 12939-12946), AOL/Time Warner (R.740-741), Euris/NexComm (R.12947-12952, 1177-1179), Stop & Shop (Royal Ahold) (R.690-695, 10850-10855), and others.

The trial court's rulings thus excluded or dismissed a host of the very market-based evidence of value on which the entire modern commercial property market operates.

River Center preserved its federal constitutional objections in the trial court (Pet. App. 43a-49a), expressly citing to the Fifth Amendment (*id.* at 44a, 46a) and decisions of this Court construing the just compensation guarantee. (*Id.* at 43a, 46a, 47a & n.3.) River Center pressed just compensation objections throughout the proceedings. (R.2a-3a, 30a-32a, 101a, 136a, 986a-989a, 1020a-1021a, 1201a-1219a, 1228a-1232a, 1699a-1704a, 1717a-1728a, 2091a-2195a, 2108a, 2134a-2138a, 3039a-3075a, 4103a-4251a, 4403a-4410a, 4736a-4741.)

River Center moved for a new trial pursuant to CPLR 4404(b). That motion was denied by the Supreme Court in an Order entered May 29, 2008, stating that it "decline[d] to revisit" the decision and that "[a]n appeal is the proper remedy for the aggrieved claimant." (Pet. App. 22a.) Notice of entry of the judgment was served on June 5, 2008. (Pet. App. 23a.)

3. On appeal, the Appellate Division modified the judgment, but only to vacate that portion of the award which had awarded an additional $14,800,000 "in enhanced value for the zoning change and permits obtained by River Center." (Pet. App. 2a.) That reduced River Center's compensation to $82,450,000.[5] In all other respects, the Appellate Division affirmed the Supreme Court's orders and judgment.[6]

The Appellate Division held that the Fifth Amendment categorically does not require the government to award compensation for lost development potential unless the property owner can show that development will come "to fruition in the near future." (Pet. App. 2a-3a.)

The Appellate Division next ruled that River Center could not recover damages resulting from the interference and delay as part of the award of just compensation in the condemnation proceeding. The Appellate Division held that "[t]he claim for delay damages as a result of the State's alleged interfe-

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[5] The Appellate Division compounded the Supreme Court's error by deducting $14,800,000 from the trial court's award on the basis that the enhanced value conferred by River Center for obtaining rezoning and special permits was duplicative and had already been factored into the condemnor's appraiser (Pet. App. 5a), when the record unambiguously showed that the zoning special permits obtained by River Center were both very valuable and had not been directly considered by the condemnor's appraiser. (R.4461-4463, 5074, 6306-6307, 8691-8692)

[6] The Appellate Division remanded the matter to the Supreme Court for a ministerial act, the "recalculation of interest" that had already been paid together with the award as reduced. (Pet. App. 2a.)

rence in River Center'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 4a.) The court, again acting categorically, simply barred such recovery as part of the condemnation proceeding without disputing that the interference and delay intentionally impeded River Center's development and made it worth significantly less at the time of taking.

Finally, the Appellate Division opined that "[e]vidence of offers for the property was properly excluded because, among other reasons, offers of such nature are inadmissible on the issue of value." (Pet. App. 3a-4a.) The court's ruling was categorical and did not depend on the reliability or probative impact of the evidence. River Center preserved its just compensation objections in the Appellate Division (Pet. App. 50a-53a) and Court of Appeals (*id.* at 54a-58a).

REASONS FOR GRANTING THE WRIT

New York has played a cruel Catch-22 in this case: the State delayed and hindered River Center's development – and its courts then deprived River Center of compensation because the project was not near fruition at the time of the taking. To add injury to injury, the New York court barred River Center from seeking just compensation for the State's efforts to obstruct the development and barred market-based evidence of value on which the modern commercial real estate industry depends.

In so holding, the New York court eviscerated the Just Compensation Clause by creating conflicts with decisions of other lower courts and with judgments of this Court. Particularly in view of the commercial importance of the New York real estate market, this Court should grant review to address the fundament constitutional questions presented by this case.

A. This Court Should Grant Review To Decide Whether The Fifth Amendment Requires Just Compensation For Development Value Even Where The Property Owner Cannot Show That Development Will Come "To Fruition In The Near Future."

A condemning authority often, as here, takes property while development efforts are ongoing. If the owners are to be afforded just compensation, the enhanced value created by those development efforts and the value of the property's full physical potential must be taken into account. But the New York court created a new obstacle to just compensation by denying constitutional protection for development efforts unless the owner can show that development will come "to fruition in the near future." (Pet. App. 2a-3a.) Further, substantially all of the appraisal testimony proffered by River Center was denied probative value because it was based on a development not near fruition. This novel judicial barrier to just compensation conflicts with precedent of this Court, with decisions by other lower courts, and with the whole purpose of the constitutional requirement of just compensation.

"'[J]ust compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." *Almota Farmers Elevator & Warehouse Co.* v. U.S., 409 U.S. 470, 473-74 (1973) (internal quotation marks and citation omitted). The constitutional floor created by the just compensation requirement is "the full and perfect equivalent in money of the property taken." *United States v. Miller*, 317 U.S. 369, 373 (1943).

This Court has made clear that the calculation of just compensation must include every element and attribute of the subject property that would affect the price a reasonable buyer would be willing to pay. *Almota Farmers Elevator & Warehouse Co.*, 409 U.S. at 474 (citations omitted); *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 635-36 (1961); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16 (1949); *Mitchell v. United States*, 267 U.S. 341, 343 (1925).

In implementing that principle, this Court has recognized that any buyer would consider a property's development potential. Accordingly, the just compensation inquiry "must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted." *Olson v. United States*, 292 U.S. 246, 258 (1934) (internal quotation marks and citation omitted).

The "plainly adapted" standard obviously does not require that a development actually be under-

way, much less that it will come to fruition in the near future, as the New York court held. In *McCandless v. United States*, 298 U.S. 342 (1936), for example, this Court held that the just compensation inquiry was required to consider the possibility that a parcel of land might be used for a cane sugar plantation, so long as water could be obtained from non-adjoining parcels, even if no agreements had actually been reached. This Court specifically rejected the trial court's ruling that "the possibility of bringing water from outside sources was too remote and speculative," *id.* at 345, and explained that "[t]he rule is well settled that, in condemnation cases, the most profitable use to which the land can *probably* be put in the reasonably near future may be shown and considered as bearing upon the market value." *Id.* (emphasis added). *See also U. S. ex rel. and for Use of Tennessee Valley Authority v. Powelson*, 319 U.S. 266, 275 (1943) ("An owner of lands sought to be condemned is entitled to their 'market value fairly determined.' That value may reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted.") (citation omitted); *Boom Co. v. Patterson*, 98 U.S. 403, 408 (1878) ("The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses.").

Thus, the decision below conflicts with judgments of this Court. It also unsurprisingly conflicts with precedent in other lower courts:

• *Board of County Supervisors of Prince William County, VA v. United States*, 276 F.3d 1359, 1366 (Fed. Cir. 2002) ("The owner may introduce evidence of the highest and best prospective use even though he has no plans to sell the property or utilize it for that use.") (quoting 5 J. Sackman, NICHOLS ON EMINENT DOMAIN § 18.05[3] (rev.3d ed.2001));

• *United States v. 8.41 Acres of Land, More or Less, Situated in Orange County, State of Tex.*, 680 F.2d 388, 394 (5th Cir. 1982) ("In determining the market value, this Court must look not only at the present use of the property, but also at the highest and best use for which the property is adaptable and needed.");

• *United States v. 320.0 Acres of Land*, 605 F.2d 762, 781 (5th Cir.1979) ("'[J]ust compensation' is not limited to the value of the property as presently used, but includes any additional market value it may command because of the prospects for developing it to the 'highest and best use' for which it is suitable.");

• *Washington Metropolitan Area Transit Authority v. United States*, 54 Fed.Cl. 20, 32-33 (Fed.Cl. 2002) ("[T]he Supreme Court, in *Olson*, chose to incorporate some flexibility into the notion of what is a property's highest and most profitable use, stating that such use is that 'for which the property is adaptable and needed or likely to be needed in the reasonably near future.' Accordingly, the law is firmly established that the highest and best use for the property need not be an inevitability, nor even an extraordinary likelihood, but only a reasonable prob-

ability-the 'realistic, objective potential uses' of the property control.") (citations omitted).

Other states have not adopted the New York restriction:

• *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 17 P.3d 797, 803 (Colo. 2001) ("In a permanent taking case, valuation evidence may include a probable future change in land use restrictions for purposes of calculating present market value.");

• *City and County of Honolulu v. Market Place*, Ltd., 517 P.2d 7, 19 (Haw. 1973) ("Market value is not limited to the value for the use to which the land is actually devoted, but it may have a potential use value. In determining potential use value, [a]ny competent evidence of matters, not merely speculative, which would be considered by a prospective vendor or purchaser or which tend to enhance or depreciate the value of the property is admissible.") (citation and internal quotation marks omitted; brackets in original);

• *Forest Preserve Dist. of Du Page County v. Brookwood Land Venture*, 557 N.E.2d 980, 984 (Ill. App. 1990) ("To determine the property's highest and best use, the court may consider the reasonable probability of changes which would affect the property's value. Evidence of reasonable probability is allowed to enable the jury to consider the capabilities of the property. The rationale for allowing such evidence is that the jury should have available to it all the facts which private parties would consider in negotiating an open market sale of the property.") (citations omitted);

• *Washington Suburban Sanitary Com'n v. Utilities, Inc. of Maryland*, 775 A.2d 1178, 1203 (Md. 2001) ("To admit evidence of the influence of that factor on present value, a zoning upgrade must be reasonably probable as of the applicable valuation date.");

• *Religious of Sacred Heart of Texas v. City of Houston*, 836 S.W.2d 606, 622 (Tex. 1992) opining as to need to consider "all of the uses to which [property] is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future.") (citation and internal quotation marks omitted).

The issue is an important one that warrants this Court's review. In this case, the property owner spent millions and accomplished major tasks on the road to development. Yet the New York court denied any value for these efforts. The cynical lesson appears to be that, if the government is going to impede development because it plans to condemn the property, it should not take half measures but should instead ensure that its misconduct is effective enough that the developer does not begin physical construction.

This Court should grant review to decide how far a project must proceed before development activity and potential is compensable in an eminent domain proceeding. The question is economically critical to developers and lenders, who bear the risks of such ventures. Often many years pass between acquisition of property and completion of a development. If the New York court's decision is allowed to stand, it will create another risk factor to what is already the

riskiest level of the real estate industry. It will disrupt the commercial real estate market and frustrate the key purposes of the just compensation requirement.

B. This Court Should Grant Review To Decide Whether A Property Owner May Recover Damages Resulting From Governmental Interference With A Development Project As Part Of The Award Of Just Compensation.

This Court should grant review to make clear that government agencies are not free to interfere with development efforts and, through the use of regulatory mechanisms or other deliberate acts, reduce the value at the vesting date of development projects in progress they seek to condemn. The New York court brazenly approved governmental abuse of the condemnation power to lower the just compensation award that a property owner will ultimately receive. Rather than holding that interference damages are part of the "just compensation" guaranteed by the Fifth Amendment, the New York court below opined that they were "not an appropriate element in valuation." Pet. App. 4a.

The New York court's decision squarely conflicts with precedent of this Court. In *United States v. Reynolds*, 397 U.S. 14 (1970), for example, this Court opined that to permit government to lower the value of property by its own acts "would not lead to the 'just compensation' that the Constitution requires." *Id.* at 16; *see also Almota Farmers Elevator*, 409 U.S. at 478 (government "may not take advantage of any depreciation in the property taken that is attributable to the project itself").

Similarly, in *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624 (1961), this Court explained that "[i]t would be manifestly unjust to permit a public authority to depreciate property values by a threat . . . and then to take advantage of this depression in the price which it must pay for the property when eventually condemned." *Id.* at 636 (internal quotation marks and citation omitted); *see also United States v. 1.604 Acres of Land*, 2011 WL 1566015, *3 (E.D.Va. Apr. 25, 2011) ("The Supreme Court of the United States has acknowledged that it would be improper for the government to depreciate property values by the threat of condemnation and then take advantage of the depressed market when the property is actually condemned.") (citing *Virginia Elec. & Power Co*).

The New York court's decision below also conflicts with judgments of a number of lower courts. The California Supreme Court, in *Klopper v. City of Whittier*, 500 P.2d 1345 (Cal. 1972), set out the principle of interference damages followed by many other jurisdictions: "when the condemner acts unreasonably in issuing [pre-condemnation] statements, either by excessively delaying eminent domain action or by other oppressive conduct, our constitutional concern over property rights requires that the owner be compensated." *Id.* at 1355. In *Toso v. City of Santa Barbara*, 101 Cal.App.3d 934 (Cal. App. 1980), the court reiterated that "inequitable zoning actions by a public agency undertaken as a prelude to public acquisition may result in an action for damages." *Id.* at 952. Similarly, in *San Antonio River Authority v. Garrett Brothers*, 528 S.W.2d 266 (Tex. Civ. App. 1975), the court considered "whether prohibitions on

use of property which have as their purpose the prevention of private development that would increase the cost of planned future acquisition of such property by the government is the type of case in which payment of compensation is required." *Id.* at 273. The court held that the just compensation clause of the Fifth Amendment prohibited the government "as a prospective purchaser of land, to give itself such an advantage" by denying a building permit. *Id.* at 274. *See also:*

• *Ehrlander v. State*, 797 P.2d 629 (Alaska 1990) (holding that pre-condemnation publicity which impairs the marketability of property triggers right to compensation);

• *Reichs Ford Road Joint Venture v. State Roads Commission*, 880 A.2d 307, 319-20 (Md. 2005) (holding that a property owner was entitled to seek compensation in inverse condemnation action for damages caused by fourteen-year delay in condemnation proceedings);

• *City of Detroit v. Cassese (In re Elmwood Park Project Section 1, Group B)*, 136 N.W.2d 896, 900 (Mich. 1965) ("If an area has been made a wasteland by the condemning authority, the property owner should not, be obliged to suffer the reduced value of his property.");

• *Johnson v. City of Minneapolis*, 667 N.W.2d 109, 115-116 (Minn. 2003) (concluding city's pre-condemnation activities triggered right to compensation);

• *Washington Market Enterprises, Inc. v. City of Trenton*, 343 A.2d 408, 416-17 (N.J. 1975) (holding

that, if property owner could show that it had been substantially damaged by activities of city in connection with the abandoned renewal project, it was entitled to damages in the amount of the destruction of value of property caused by renewal activities);

• *Conroy–Prugh Glass Co. v. Commonwealth*, 321 A.2d 598, 601-02 (Pa. 1974) (holding that property owner entitled to compensation for injury caused by pre-condemnation publicity);

• *Lincoln Loan Co. v. State*, 545 P.2d 105, 109-10 (Or. 1976) (following *Klopping*);

• *Luber v. Milwaukee County*, 177 N.W.2d 380, 384-86 (Wis. 1970) (allowing compensation for rental income loss for period prior to taking).[7]

Other courts have unfortunately sided with New York. *E.g., DUWA, Inc. v. City of Tempe*, 52 P.3d 213, 217 (Ariz.Ct.App.2002) (no right to compensation because "Tempe committed no official overt acts of dominion over DUWA's property, nor has DUWA demonstrated that it was ever prohibited from exercising dominion and control over its own property"); *Calhoun v. City of Durant*, 970 P.2d 608, 613 (Ok-

[7] It is no answer to say that River Center was free to recover interference damages as part of the Court of Claims action, even if such damages could provide equal or greater remedies. Constitutional protections for condemnation cannot be swapped out for other bases of relief without running the serious risk of denying the just compensation guaranteed by the Fifth Amendment. Requiring a property owner to bring a separate action is an unreasonable impediment because of the added time and expense, the potential preclusive effect that one action might have on the other, and the opportunity for the government to take inconsistent positions.

la.Civ.App.1997) (no right to compensation where state activities did not "amount to an exercise of dominion and control over the property by the condemning authority").

This Court's review is warranted to address the conflict on this fundamental question under the Fifth Amendment.

C. This Court Should Grant Review To Decide Whether The Fifth Amendment Prevents A Court In A Condemnation Proceeding From Arbitrarily Excluding Or Denying Probative Force To Market-Based Evidence Of Property Value, Such As Testimony By The Owner, Financing Proposals, And Offers To Lease.

This Court should grant review to consider the Fifth Amendment constraints on the authority of state courts to order wholesale exclusions of broad categories of market-based evidence of value in condemnation proceedings. As this case illustrates, such exclusions are tantamount to arbitrary refusals to consider constitutionally relevant elements of value. Here, the New York court arbitrarily denied admission or probative value to substantially all of the evidence proffered by the developer and acknowledged experts in their fields, acting in a manner that is indisputably contrary to what the market in the real world would have done. The court flatly precluded material testimony on value from the property's owner (despite the trial court's recognition of his knowledge) and from experts in the real estate and finance industry who constantly evaluated land value in their businesses but were not formally li-

censed as appraisers. The upshot of these evidentiary exclusions was to deprive River Center of the just compensation guaranteed by the Fifth Amendment. This Court's review is warranted to ensure that a state court does not use rules of law on evidence to vitiate a federal constitutional right. *Cf. Holmes v. South Carolina*, 547 U.S. 319, 326 (2006) ("[T]he Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote").

1. This Court should grant review to review the New York court's dismissal of a property owner's testimony as to value. The New York rule conflicts with the approach of other jurisdictions that "the opinion of a landowner as to the value of his land is admissible without further qualification." *United States v. 329.73 Acres of Land*, 666 F.2d 281, 284 (5th Cir. 1981) (affirming verdict based on landowner testimony even though testimony "was not based on any accepted method of valuation"), *modified on reh'g*, 704 F.2d 800 (5th Cir. 1983). "In general, an owner is competent to give his opinion on the value of his property." *King v. Ames*, 179 F.3d 370, 377 (5th Cir. 1999) (quotation marks and citation omitted). The owner's testimony is admissible "because of the presumption of special knowledge that arises out of ownership of the land." *LaCombe v. A–T–O, Inc.*, 679 F.2d 431, 434 (5th Cir. 1982) (reversing district court's exclusion of landowner's testimony) (quotation marks and citation omitted). *See also United States v. 68.94 Acres of Land*, 918 F.2d 389, 398 (3d Cir. 1990) ("[T]he owner of land taken is generally recognized as qualified to express his opinion as to

its value merely by virtue of his ownership. The owner is deemed to have sufficient knowledge of the price paid, the rents or other income received, and the possibilities of the land for use, to render an opinion as to the value of the land.") (quoting Nichols, THE LAW OF EMINENT DOMAIN § 23.03 at 23-30 (1990)); *U.S. v. 10,031.98 Acres, In Las Animas*, 850 F.2d 634, 640-41 (10th Cir. 1988) (holding improper the district court's exclusion of a ranch owner's testimony because owner "may offer such testimony without further qualification. Furthermore, in testifying as to the value of his property the owner is entitled to the privileges of a testifying expert."); *Robinson v. Watts Detective Agency*, 685 F.2d 729, 739 (1st Cir. 1982) (owner allowed to give estimate of property value based in part on hearsay: "An owner of a business is competent to give his opinion as to the value of his property. Whether or not his opinion is accurate goes to the weight of the testimony, not its admissibility."). These holdings are reflected in the Federal Rules of Evidence, which generally permit landowners to give opinion evidence as to the value of their land due to the special knowledge of property which is presumed to arise out of ownership. Fed.R.Evid. 702 advisory committee note ("within the scope of the rule are not only experts in the strictest sense of the word . . . but also the large group sometimes called 'skilled' witnesses, such as . . . landowners testifying to land values").

2. This Court should also grant review to address whether a court may exclude or ignore otherwise competent testimony of property value from third-party witnesses able to provide market-based evidence of value, such as financing proposals or of-

fers to lease. More than a century ago, in *Sharp v. United States*, 191 U.S. 341 (1903), the Court upheld the exclusion of an owner's unilateral testimony that he had received certain offers for land, on the ground that such evidence was "of a nature entirely too uncertain, shadowy, and speculative to form any solid foundation for determining the value of the land which is sought to be taken in condemnation proceedings." *Id.* at 348-49. However, "[i]n virtually every case which has utilized this general rule, the offers came from third parties, frequently unidentified, and were mere hearsay. Further, in most of these cases there was no evidence that the offeror had the type of expert qualifications which would have entitled him to testify as to his opinion on value had he been called at trial." *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 545-46 (5th Cir. 1974). Moreover, *Sharp* involved a jury trial. In an eminent domain case, which is bench-tried rather than jury-tried, the trial court should have no problems processing such evidence and according it appropriate weight. Modern discovery rules allow offers to be probed pretrial and thus check any risk of manipulation or speculation.

Accordingly, this Court should grant review to resolve any lingering doubt about the meaning of *Sharp* and to make clear that otherwise admissible third-party evidence of market value is competent proof in condemnation proceedings. The lower courts are currently divided on the issue. One state court, which ultimately decided to uphold the admission of an offer as evidence, noted "the diversity of court rulings" and observed that "[a]cross the country, appellate courts are divided over the question

whether unaccepted offers to purchase should be admissible." *Evans v. Sawtooth Partners*, 723 P.2d 925, 928 (Idaho App. 1986).

Compare *Levy v. United States*, 402 Fed. Appx. 979, 982 (5th Cir. 2010) (evidence of offer admissible despite *Sharp*); *Sammons v. United States*, 433 F.2d 728, 731 (5th Cir.1970) (same); *Township of Groose Ile v. Cooper*, 1998 WL 1988407, *4 (Mich. App. Dec. 18, 1998) (same); *Tedesco v. Mun. Auth. of Hazle Township*, 799 A.2d 931, 935 (Pa.Commw.Ct.2002) (allowing evidence of an option contract to prove value in a condemnation case), with *U.S. v. 10,031.98 Acres, In Las Animas*, 850 F.2d 634, 637 (10th Cir. 1988) (offer inadmissible); *Realty Loans, Inc. v. McCoy*, 523 P.2d 476, 478-79 (Colo. App. 1974) (same); *McDermott v. New Haven Redevelopment Agency*, 440 A.2d 168, 171 (Conn. 1981) (same); *Dep't of Transp. v. Cochran*, 287 S.E.2d 599, 600 (Ga. App. 1981) (same); *Com. Dept. of Highways v. Turner*, 497 S.W.2d 57, 59 (Ky. 1973) (same); *J. William Costello Profit Sharing Trust v. State Roads Comm'n of the State Highway Admin.*, 556 A.2d 1102, 1104 (Md. 1989) (same); *Grenier v. City of New Bedford,* 344 N.E.2d 215, 217 (Mass. App. 1976) (same); *City of Des Peres v. Persels P'ship*, 831 S.W.2d 778, 781 (Mo.Ct.App. 1992) (same); *N.J. Turnpike Auth. v. Bowley*, 143 A.2d 558, 562 (N.J. 1958) (same); *Oliver-Mercer Elec. Co-op., Inc. v. Davis*, 696 N.W.2d 924, 927 (N.D. 2005) (same); *South Carolina Dept. of Transp. v. Hood*, 672 S.E.2d 595, 597 (S.C. App. 2009) (same).

This Court should grant review to establish that *Sharp* does not bar reliable market-based assessments of value from arms-length third-party com-

mercial sources. The evidence in this case, for example, included letters of intent and expressions of interest for a financing, purchase and joint-venture development of the property, and offers to lease or buy substantial parts of the development, from large and respected public and private companies which dealt directly with the developer. In modern real estate practice such indications of interest are part of the very fabric of setting market prices. (R.1212-1216.) As a matter of everyday practice in the real estate industry, term sheets and offer documents typically contain the key economic terms of a proposed transaction and are used as the road map to communicate value and allow parties to proceed with the complex task of bringing development projects to fruition. (R.700-702.) Where the market has provided multiple indications of value from respected public and private companies, those indications may be the best evidence of the property's value and should be admissible; here, they were well in excess of the judgment below.

This Court has instructed that, "[w]here private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation." *United States v. New River Collieries Co.*, 262 U.S. 341, 344 (1923). "It is difficult to perceive why testimony, which experience has taught is generally found to be safely relied upon by men in their important business affairs outside, should be rejected inside the courthouse." *Cade v. United States*, 213 F.2d 138, 141 (4th Cir. 1954) (citation omitted).

3. To our knowledge, no other court has adopted the New York rule limiting testimony as to value to

that of real estate appraisers. Thus, courts outside New York have held that "[a]ll facts which would influence a person of ordinary prudence, desiring to purchase the property, are admissible"; "any evidence is admissible which might reasonably influence a willing seller and a willing buyer." *United States v. 100 Acres of Land, More or Less, in Marin County, State of Cal.*, 468 F.2d 1261, 1266-67 (9th Cir. 1972)); *see also United States v. 14.38 Acres of Land, More or Less Situated in Leflore County, State of Miss.*, 80 F.3d 1074, 1077 (5th Cir. 1996) (holding that district court abused its discretion in excluding expert witness testimony as to land value, even though the district court found the evidence "lacking in reliability," because "in an eminent domain action, [e]xpert opinion testimony acquires special significance . . . where the sole issue is the value of condemned property") (internal quotation marks and citation omitted; brackets in original); *United States v. 68.94 Acres of Land, More or Less, Situate in Kent County, State of Delaware*, 918 F.2d 389, 393 (3rd Cir. 1990) ("[E]minent domain proceedings commonly pit the Government's valuation experts against those of the landowner. Thus, the exclusion of one or all of either party's proposed experts can influence substantially the amount of compensation set by the factfinder . . . . Recognizing the critical role of expert witnesses in these cases and the strong interest on both sides that compensation be just, trial courts should proceed cautiously before removing from the jury's consideration expert assessments of value which may prove helpful."); *City of Sparks v. Armstrong*, 748 P.2d 7, 9 (Nev. 1987) ("Triers of fact should not be limited in their exposure to such ex-

pert opinion where such opinion may shed light on the true value of the condemned property. . . . [A]ll elements that might affect the fair market value of the property, including such elements that might influence a reasonably prudent person interested in purchasing it, [are] held properly considered.") (citations and internal quotation marks omitted; brackets in original).

The uniqueness of New York's absolute bar on non-appraisal evidence is itself a reason for this Court to review the decision in this case. *Cf. Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) (uniqueness of state rule "raises a presumption that its procedures violate the Due Process Clause"); *see also id.* ("As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis").

D. The Questions Presented Are Important National Issues That Warrant This Court's Review.

The questions presented by this case are issues of substantial public importance. The decision below creates an unacceptable risk of disrupting the nation's most significant commercial real estate market and denying fundamental constitutional rights. Further percolation would be untenable.

"In any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324 (1893). The just compensation guarantee "prevents the public from

loading upon one individual more than his just share of the burdens of government," by ensuring that "when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Id.* at 325. "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Id.* (internal quotation marks and citation omitted).

This Court has a special duty to enforce the guarantee of just compensation, because the lower federal courts do not play a role in state eminent domain proceedings. Accordingly, this Court is the *only* federal court that can safeguard federal constitutional rights in just compensation proceedings. *See Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot.*, 130 S.Ct. 2592, 2609 (2010) (plurality opinion) (citing *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-194 (1985)); *see also id.* at 2618 (2010) (Kennedy, J., joined by Sotomayor, J., concurring in part and concurring in the judgment) (recognizing that "[u]ntil *Williamson County* is reconsidered, litigants will have to press most of their judicial takings claims before state courts"); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 351 (2005) (Rehnquist, C.J., concurring in the judgment) (noting impact of *Williamson County* on ability of lower federal courts to enforce just compensation requirement).

Certiorari is even more necessary where a state's highest court, like the New York Court of Appeals,

has adopted a very limited and discretionary approach even to review of constitutional issues.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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APPENDIX TABLE OF CONTENTS

APPENDIX A

Decision of the Appellate Division, First Department, June 3, 2010

Friedman, J.P., Nardelli, Moskowitz, Freedman, Manzanet-Daniels, JJ.

2962-2962A Index 102934/01

In re John Jay College of Criminal Justice of the City University of New York

River Center LLC et al.,
Claimants-Appellants-Respondents,
v

Dormitory Authority of the State of New York,
Condemnor-Respondent-Appellant.

Pillsbury Winthrop Shaw Pittman LLP, New York (E. Leo Milonas of counsel), for River Center LLC, appellant-respondent.

Kramer Levin Naftalis & Frankel, LLP, New York (James G. Greilsheimer of counsel), for Blackacre Bridge Capital, L.L.C. and SWH Funding Corp., appellants-respondents.

Berger & Webb, LLP, New York (Charles S. Webb III of counsel), for respondent-appellant.

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered June 5, 2008, awarding claimant River Center LLC the principal sum of $15,065,000, based on a decision, same court (Leland

G. DeGrasse, J.), dated April 16, 2008, which, after a nonjury trial, valued River Center's property at $97,250,000 and deducted the condemnor's advance payments of $82,185,000, unanimously modified, on the law and the facts, to vacate that portion of the award which is for $14,800,000 in enhanced value for the zoning change and permits obtained by River Center, the matter remanded for recalculation of the interest, and otherwise affirmed, without costs. Order, same court (Jane S. Solomon, J.), entered May 29, 2008, which denied River Center's motion to reopen the trial for submission of additional evidence or for a new trial, unanimously affirmed, without costs.

The trial court's findings in this condemnation valuation case are based on a fair interpretation of the evidence and we discern no basis to disturb those findings (*see W.T. Grant Co. v Srogi*, 52 NY2d 496, 510 [1981]). While fair market value should be based on the highest and best use of the property even though the owner may not have been utilizing it to its fullest potential at the time of the taking (*see Matter of Town of Islip [Mascioli],* 49 NY2d 354, 360 [1980]), a use must be established as reasonably probable and not a "speculative or hypothetical arrangement in the mind of the claimant" (*see Matter of City of New York [Rudnick]*, 25 NY2d 146, 149 [1969], *remittitur amended*, 26 NY2d 748 [1970]). The speculative nature of the proposed development was shown here by, among other things, the testimony of River Center'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. To the extent that the appraisal rejected by the court was based on capitalization of income, it too was speculative (*see Matter of City of New York [Atl. Improvement Corp.],* 28 NY2d 465, 470 [1971]; *Arlen of Nanuet v State of New York*, 26 NY2d 346, 354-355 [1970]).

Although the trial court cited the rule that "the purchase price set in the course of an arm's length trans-action of recent vintage, if not explained away as abnormal in any fashion, is evidence of the 'highest rank' to determine the true value of the property at that time" (*Plaza Hotel Assoc. v Wellington Assoc.*, 37 NY2d 273, 277 [1975]), and thus considered the price set forth in the 1998 purchase agreement for the property, the court properly recognized that such evidence is not determinative and took into account other factors (*see Matter of Kings Mayflower v Finance Adm'r of City of N.Y.*, 63 AD2d 970 [1978]). Such qualified reliance on the 1998 purchase agreement was shown by the trial court's statements that such evidence was recent enough "to warrant consideration" and that it was the "starting point" of any determination of value. In view of such limited use of the recent sale, any exclusion of the evidence proffered by River Center to show that the sale was not at arm's length would have had a minimal effect on the outcome.

The amount of the mortgage loan, with interest at 18 1/2 %, did not necessarily reflect the value of the property (*see Farash v Smith*, 59 NY2d 952, 955 [1983]; *see also Matter of City of New York*, 222 App Div 554, 559 [1928], *aff'd*, 250 NY 588 [1929]). Evidence of offers for the property was properly excluded because, among other reasons, offers of such

nature are inadmissible on the issue of value (*see Brummer v State of New York*, 25 AD2d 245, 248-249 [1966]). Contrary to River Center's contention, the trial court did not misapply the rule in *Frye v United States* (293 F 1013 [1923]) to the two-grid analysis of its appraiser; the court did not exclude this evidence, and merely drew an apt analogy to the rule in finding that the appraiser's analysis was unreliable because it was not based on a generally accepted methodology. The trial court properly rejected River Center's appraiser's addition of $37.8 million in value for entrepreneurial profit, since any claimed developer enhancements were only at the preliminary stage and there was testimony, found to be credible, that the plans were not compliant with the zoning or the special permits for the property. 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 for the property. 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, properly subject to the jurisdiction of the Court of Claims, and duplicative of a claim already before that court.

The motion court properly exercised its discretion (CPLR 4404 [b]) in denying River Center's motion to reopen the record or for a new trial. There was insufficient explanation for the failure to present at trial the testimony of a union official knowledgeable about River Center's predecessor's 1992 option and the 1998 purchase of the property (*see Fischer v RWSP Realty, LLC*, 63 AD3d 878 [2009]).

Moreover, given that the trial court's discretion to reopen a case after a party has rested should be sparingly exercised (*see Lindenman v Kreitzer*, 7 AD3d 30, 33 [2004]), such discretion should be exercised even more sparingly where, as here, the motion is made after a decision has been rendered. Finally, as noted, it was unlikely that the evidence would have made any difference

We modify the judgment solely on the ground, based on our review of the record, that the amount awarded for enhanced value for obtaining rezoning and special permits was duplicative, since it was already factored into the condemnor's appraisal that was accepted by the court; in addition, the costs were not documented.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: June 3, 2010

/s/ David Spokony
Clerk

APPENDIX B

Decision of the Supreme Court of the State of New York, County of New York, dated April 16, 2008

Supreme Court Of The State Of New York
County Of New York

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In the Matter of the Application of the Dormitory Authority of the State of New York to acquire title in fee to certain real property for use in a project to expand and consolidate

John Jay College of Criminal Justice of the City University of New York

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Index No. 102934/01

DeGrasse, J:

This matter was tried before this court without a jury. Based upon the evidence which I accept and believe, I find and conclude as follows. Title to the subject parcel vested in the Dormitory Authority of the State of New York (DASNY), the condemnor, on April 11, 2001. Claimant, River Center LLC, was the fee owner at the time of the condemnation. The subject is designated as Lots 1, 5 and part of 25 in Block 1087 on the Tax Map of the City of New York, Borough of Manhattan. The street addresses are 854-858 11th Avenue, 521-567 West 58th Street and 520-550 West 59th Street. The subject, rectangular in shape, has a lot area of 100,417 square feet and a

zoning floor area of 883,720 square feet. As of the vesting date, the subject was improved by a three-story warehouse building and rooftop parking garage. The southwest corner of the subject contains an exposed below grade railroad cut which measures 100 by 100.5 feet. Pursuant to a 1973 easement, an Amtrak railroad line traverses the cut, running from southeast to northwest through the 11th Avenue and 58th Street corner of the subject.

As of May 10, 1991, the subject premises were owned in fee by Metropolis Associates II (Metropolis). By agreement of the same date, Metropolis gave Rein L.P., an affiliate of River Center, an option to purchase the premises. The subject had been encumbered by a mortgage held by a labor organization, the Additional Security Benefits Plan of the Electrical Industry (ASBP). This mortgage had been recorded on December 24, 1987. On or about July 30, 1992, Metropolis conveyed the subject to AP&ASBP Holding Co., Inc. (the Union) by way of a deed in lieu of foreclosure. On the same date, the Union gave Rein the option to purchase its interest in the subject by way of an amended and modified purchase option agreement. The transaction is described as an "arms length transfer" in a real property transfer tax return certified by the Union and Rein.

General Motors Corporation (GM) was the lessee of the subject since December 1971. By agreement dated August 23, 1991, Rein was granted the right to acquire GM's interest in the lease. Rein exercised its option and acquired the lease interest in a deal which was also consummated on July 30, 1992. On the same day, Rein assigned the GM lease interest to the Union. Pursuant to an agreement of purchase

and sale dated September 15, 1997, Rein acquired ownership of the subject in fee from the Union. The transaction was consummated by bargain and a sale deed dated January 30, 1998.

By notarized letter dated April 23, 1996, the Union had given Rein written authorization to apply to the New York City Planning Commission for an amendment of the City's Zoning Map and for special permits "to facilitate the development of a mixed-use project consisting of community facility, residential and commercial uses on Block 1087." The letter is attached to a land use review application submitted to the City's Department of City Planning on August 8, 1996 (DASNY's exhibit S). The subject had been in M1-5 and M1-6 zoning districts until River Center caused a change to C4-7, C2-7 and C6-2 commercial zoning to be effected on March 16, 1999. At about the same time, River Center obtained for the site a large scale development special permit and other special permits including one for the use of development rights across district boundaries. The new zoning and special permits were necessary to enable the subject to be used for commercial as well as residential use.

The record includes initial, rebuttal and surreply appraisals by Theresa M. Nygard, River Center's appraiser, and Robert Von Ancken, DASNY's appraiser. Both opined that the highest and best use of the subject would have been as a mixed residential/commercial development. Ms. Nygard gave the subject an appraised value of $227,000,000. Mr. Von Ancken valued the same at $82,185,000. Both appraisers used the sales comparison approach while Ms. Nygard submitted a land residual analysis as

well. "The market value of real property is the amount that one desiring but not compelled to purchase will pay under ordinary conditions to a seller who desires but is not compelled to sell" (*W.T. Grant Co. v. Srorgi*, 52 NY2d 496, 510 [1981]). The best evidence of value is a recent sale of the subject between a seller under no compulsion to sell and a buyer under no compulsion to buy (*Matter of Allied Corp. v. Town of Camillus*, 80 NY2d 351, 356 [1992]). If not explained away as abnormal in any fashion, the purchase price set in the course of a recent arm's length transaction is evidence of the "highest rank" to determine the true value of the property at the time (*Plaza Hotel Assocs. v. Wellington Assocs.*, 37 NY2d 273, 277 [1975]). It is noted in this regard that River Center paid $49,525,712 when it purchased the subject from the Union three years before the vesting date. In *Hardele Realty Corp. v. State* (125 AD2d 543 [1986]), a judgment granting a condemnation award was reversed on the ground that the trial court did not give sufficient weight to purchases of portions of the condemned premises which occurred six and nine years before vesting. Ms. Nygard acknowledged that a sale which occurred three years before condemnation is recent enough to warrant consideration (Transcript at 2755). The court, therefore, finds that River Center's purchase of the subject on January 30, 1998 was sufficiently recent to warrant consideration under the *Allied Corp.* case. The burden of proof remains upon the claimant in a condemnation proceeding (*Heyert v. Orange and Rockland Utils.*, 17 NY2d 352, 364 [1966]). Accordingly, River Center must submit proof to support its

claim that the 1998 contract price of $49,525,712 is unrelated to the subject's fair market value.

River Center asserts that "the Union was under compulsion since July 1992 to transfer title to the property" (River Center's Post Trial Memorandum of Law at 9). That argument finds no support in the record. Moreover, the best evidence of such compulsion would have been the testimony of a Union official. River Center's failure to call such a witness is significant. Joseph Korff, River Center's principal, testified that the contract price was based upon predetermined sums payable under the option agreement. However, section three of the purchase agreement sets forth the purchase price and terms of payment without reference to any formula or the option agreement (River Center's exhibit 149). In addition, section 26 of the purchase agreement provides that the terms of the option agreement are merged into and superseded by the purchase agreement itself. The purchase agreement conclusively establishes that the parties could have but chose not to base the purchase price upon the option agreement formula. The purchase agreement, which was executed at about the time of the transaction, has more probative value than Mr. Korff's testimony to the contrary.

River Center challenges the probative value of the 1998 purchase price based on Mr. Korff's testimony that Rein had acquired beneficial ownership of the subject in 1992. Mr. Korff testified that the beneficial ownership arose out of the transactions between Rein and the Union including the option agreement and a management agreement (Transcript at 92-93). In support of this contention, Mr. Korff further testified that no real property transfer

tax was due by reason of the sale (Transcript at 1666-67). River Center cites the City Register Record and Endorsement Pages which were recorded with the deed and included as parts of River Center's exhibit 200.[1] Administrative Code of the City of New York § 11-2102(a) provides for the imposition of a tax on any conveyance of real property where the consideration exceeds $25,000. Administrative Code § 11-2106 sets forth ten exemptions from the transfer tax. The only example relating to beneficial ownership reads as follows:

> "8. A deed, instrument or transaction conveying or transferring real property or an economic interest therein that effects a mere change of identity or form of ownership or organization to the extent the beneficial ownership of such real property or economic interest therein remains the same . . . ."

The exemption applies, for example, where a corporation is transformed into a limited liability company with no change in its equity interests. It has no application to the conveyance from the Union to Rein because the requisite identity of interest is lacking. Therefore, the conveyance from the Union to Rein, as described by Mr. Korff, does not match the Administrative Code exemption.

River Center's exhibit 201 consists of letters dated May 2, 2000 and June 26, 2000 from the New

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[1] The exhibit does not include the Real Property Transfer Tax Return (RPTTR). Compare DASNY's exhibits H and I which are the RPTTRs filed in connection to the 1992 option agreement and the conveyance from Metropolis to the Union.

York City Department of Finance to the Union. By the May 2, 2000 letter, the Department of Finance informed the Union that its RPTTR did not provide sufficient information for the City to determine whether its calculation of tax liability was correct. The letter also gave the Union the following instructions:

> "Complete Schedule M – Mere change of form transfers. Form enclosed. If no closing statement or contract of sale exists, an affidavit describing the circumstances of the transfer, the amount of consideration involved and the amounts of any mortgages or liens on the property at the time of the delivery of the deed."

The June 26, 2000 letter reads as follows: "An examination of your return made by this office pursuant to the Administrative Code of the City of New York, discloses no additional liability under the Real Property Transfer Tax Law for the transfer made on 02-20-1998." For three reasons the foregoing correspondence from the Department of Finance has no probative value on the question of whether the Union was required to pay a transfer tax on the conveyance. First, there is no evidence of what, if anything, the Union submitted in response to the May 2, 2000 letter. Such evidence would have enabled the court to know the basis for the Department of Finance's determination of no additional tax liability. Second, according to the May 2, 2000 letter, the purchase agreement (River Center's exhibit 149) would have apparently sufficed as the additional documentation required by the City. Nothing on the face of the purchase agreement triggers any of the Administrative

Code exemptions. Third, the June 26, 2000 letter speaks of "no *additional* liability [emphasis added]." That language does not rule out the possibility that the Union, in fact, paid a transfer tax. In addition, River Center's claimed beneficial ownership is not recited in any instrument before this court. As evidenced by the option, management and purchase agreements, Rein and the Union interacted as sophisticated entities represented by counsel. Under these facts, it is almost inconceivable that Rein's beneficial ownership would not have been memorialized if it existed. An option agreement ripens into a fully enforceable bilateral contract once an optionee gives notice of intent to exercise the option (*Jarecki v. Shung Moo Louie*, 95 NY2d 665, 668 [2001]). However, the bilateral contract does not arise where the parties expressly terminate the option agreement. The instruments actually executed by the parties also doom River Center's additional claim that its deal with the Union was a mortgage in the form of a deed. Administrative Code § 11-2106 also provides for an exemption where "[a] deed or instrument given solely as security for, or a transaction the sole purpose of which is to secure, a debt or obligation or a deed or instrument given, or a transaction entered into, solely for the purpose of returning such security;" River Center, however, has made no showing as to whether such an exemption was signed or even sought by the Union.

Pursuant to *Allied Corp.* (80 NY2d at 356), the $49,525,712 purchase price is the best evidence of the subject's value and the starting point of any determination of market value at the time of vesting. Moreover, the Union's aforementioned April 23, 1996

letter of authorization (DASNY's exhibit S) stands as proof that the sale price was agreed upon with the seller's knowledge of the contemplated zoning map amendment and special permits for the construction of a mixed use commercial and residential development. The 1998 sale is not addressed in the initial appraisal of either appraiser. Mr. Von Ancken notes in his rebuttal appraisal that Ms. Nygard's valuation of $227,000,000 is 354% higher than the $49,525,712 purchase price (DASNY's exhibit AT at 1). In her surrebuttal appraisal, Ms. Nygard dismisses the 1992 sale as "a refinancing of the acquisition financing that was out in place six years earlier, in July 1992" (River Center's exhibit 272 at 4). That conclusion, however, is not supported by the evidence before this court. In sum, DASNY's valuation is more reflective of the market value to be derived by using the purchase price as a baseline.

The zoning, as changed, could have accommodated a structure with a gross floor area of 1,398,906 square feet. Architectural renderings prepared for River Center by Costas Kondylis & Associates, P.C. depict a mixed use structure, including residential (both condominium and rental housing), commercial, retail and parking components. The renderings called for a 35-story condominium consisting of twin towers on an 18-story base along Eleventh Avenue. The rentals were to be six and ten story buildings with entrances on the side streets. Utilizing the Costas Kondylis plans, Ms. Nygard's appraisal divides the subject into five components: (1) the condominium towers measuring 573,903 square feet of zoning floor area, (2) the low rise rentals measuring 309,817 square feet of zoning floor area, (3) "Level C" retail

space consisting of 81,832 square feet of non-zoning floor area,[2] (4) 232,554 square feet of non-zoning floor area below grade commercial space and (5) a parking area measuring 55,200 square feet. Ms. Nygard separately valued each of the above components based on the notion that the subject was "a development project in progress" with development plans "well underway" at the time of condemnation (River Center's exhibit 203A at 42 and 47). The court rejects Ms. Nygard's assessment of the project's development for the following reasons. As of the date of condemnation, building plans had not been filed with the New York City Department of Buildings (Transcript at 1562 to 1566). No financing for construction had been obtained (Transcript at 1562). A construction manager had not been engaged (Transcript at 1573). There was no agreement for the demolition of the existing building (Transcript at 1586.) Tenants were still in possession of approximately 80% of the building (Transcript at 1574 and 5636.) No insurance for the project had been obtained (Transcript at 1573). Therefore, the development envisioned by the Costas Kondylis plan was far from imminent. To determine the market value of land appropriated, courts "must look to the situation existing on the day of the taking" (*Arlen of Nanuet v. State*, 26 NY2d 346, 354 [1970]). In *City of New York v. Chestnut Properties Co.* (39 AD2d 573 [1972], *affirmed* 34 NY2d 800 [1974]), it was held error to predicate a condemnation award upon the value of a nonexisting income stream from land as it were im-

[2] Level C would have been created by use of the topographical slope between Tenth and Eleventh Avenues.

proved by buildings which had not been constructed at the time title vested. In this case, it would be similarly inappropriate to base an award upon the valuation of components of a development project that never existed. Mr. Von Ancken, therefore, appropriately appraises the subject as vacant land (DASNY's exhibit AI at 1).

Ms. Nygard correctly states that sales comparison approach

> "involves the collection of market data relating to similar properties, analysis of the sales on a unit basis that permits comparison to the subject property, adjustment of the unit prices to account for differences between the comparables and the subject and, finally, reconciliation of the adjusted prices into a fair conclusion applicable to the subject." (River Center's exhibit 203A at 47)

The sales comparison in Ms. Nygard's initial appraisal consists of a "two-grid analysis" by which 17 comparables are compared to the subject's proposed tower component and 19 others to its proposed low rise component. As noted in Mr. Von Ancken's rebuttal appraisal (DASNY's exhibit AT at 33-34), Ms. Nygard's initial appraisal describes the subject's land and excess development rights as a single entitty. Yet, the two-grid analysis is "untraditional" (Transcript at 6880, 7098 and 8311). Under the *Frye* doctrine (*see Frye v. United States*, 293 F. 1013 [1923]), expert opinion must be based upon a scientific principle or procedure which has been sufficiency established to have gained general acceptance in the particular field in which it belongs (*see People v.*

Wesley, 83 NY2d 417, 423 [1994]). Accordingly, Ms. Nygard's two-grid analysis of a single parcel lacks probative value because it has not gained general acceptance in the field of real estate appraisal.

Ms. Nygard's surrebuttal appraisal sets forth an alternative single grid analysis using her same 36 land sales comparables (River Center's exhibit 272). This single grid analysis adds parking areas and additional non-zoning floor area multiplied by a value ratio (*id.* at 27). Ms. Nygard's single grid analysis also "merges consideration of the subject's low-rise side street element with its tower element, as well as acknowledging the presence of below-grade floors." As stated above, courts "must look to the situation existing on the day of the taking" to determine the market value of land appropriated (*Arlen of Nanuet*, 26 NY2d at 354). Accordingly, Ms. Nygard's single grid analysis lacks probative value because it is based on a development that had no existence on the vesting date. Ms. Nygard's two-grid and single grid analyses assume the adoption of the Costas Kondylis plan by a willing purchaser of the subject. The assumption is unrealistic because, as noted above, the plans had yet to be filed and approved. In this regard, the court credits the testimony of Cornelius Dennis, a civil engineer, who opined that the plans were not consistent with the site's special permit (Transcript at 5678, 5687-5701).

The selection of appropriate comparable sales was not an easy task due to the subject's unusually large lot area of 100,416 and zoning floor area of 883,720. However, the comparables cited in Mr. Von Ancken initial appraisal were more persuasive because they were not unrealistically pegged to the

Costas Kondylis plans. Ms. Nygard opines that large size is commonly considered a superior feature warranting upward adjustment of smaller comparables (River Center's exhibit 257 at 36). Mr. Von Ancken, on the other hand, assigned negative adjustments to sites that were substantially smaller than the subject, reasoning that larger sites with zoning floor areas of over 500,000 square feet sell for less if all else is equal (DASNY's exhibit AI at 34). During cross examination, Mr. Von Ancken was confronted with a February 7, 1995 appraisal of the subject in which he stated that "[l]arger sites typically command somewhat higher unit prices than smaller sites" (Transcript at 4595 and River Center's exhibit 223 at 64). In the same appraisal, however, Mr. Von Ancken noted that "[u]nlike office development, residential development is more suitable on sites affording small plates" (*id.*). In the exercise of discretion, the court adopts Mr. Von Ancken's opinion regarding size adjustments. It is noted parenthetically that in *Matter of Sun Plaza Enterprises Corp. v. Tax Commission of the City of New York* (304 AD2d 763 [2003]) the Court observed that the experts called by both parties testified that dollar value per square foot decreased with a larger parcel (*id.* at767). For market trend purposes, Ms. Nygard adopted a two percent trend per month upward through August 31, 1998 and a one percent per month upward trend thereafter (River Center's exhibit 203A at 73). Mr. Von Ancken opined that there was a decline in land sales activity between August 1998 and January 1999 (DASNY's exhibit AI at 34). He noted an increase in land sales of one percent between January 1999 and December 2000 (*id.*) The court also adopts

Mr. Von Ancken's time trends as more reflective of market conditions. Ms. Nygard and Mr. Von Ancken also differ as to whether the contract date or deed recording date should be used for market trending purposes. As reasoned by Ms. Nygard, the contract date is more relevant inasmuch as it is the date upon which the buyer and the seller agree upon a sale price and bind themselves to the transaction. The contract date, however, is usable only where it can be ascertained on the basis of information from reliable sources such as brokers or parties to the transactions. In most instances, the sources of information regarding the contract dates were not sufficiently reliable in this court's view. The subject's desirable rectangular shape warrants a positive configuration adjustment with respect to most of the comparables.

The adjusted prices per square foot of floor area ratio (FAR) of Mr. Von Ancken's nine comparables ranged from $53.04 to $102.44. Mr. Von Ancken assigned an indicated value of $90.00 per square foot based on 883,000 FAR plus 47,105 square feet of additional floor area created by the slope between Tenth and Eleventh Avenues. The amount of FAR excluding the slope is actually 883,720 square feet. Accordingly, the subject's total FAR with the slope included is 930,825 square feet. With that correction, the subject's gross market value of $83,774,250 is calculated by multiplying the indicated square foot value of $90 by the total FAR.

The market value of condemned property should reflect a claimant's cost in preparing development plans as an increment added to the value of land with respect to its highest and best use (*Specialty*

Foods Corp. v. State, 46 AD2d 989 [1974], *appeal dismissed* 37 NY2d 706 [1975], *appeal dismissed* 37 NY2d 751 [1975]). That does not mean, however, that a claimant's expenditures should simply be added to the value of raw land (*Waxman v. State*, 57 AD2d 244 [1977]). Undoubtedly the zoning change obtained by River Center and borings it conducted on the land added value to the subject. The court credits the testimony of Mr. Dennis, the licensed professional engineer, who, as noted above testified that the Costas Kondylis plans did not comply with the building permit. The court also credits the testimony by Peter Pfeffer, an architect, that the plans varied from the special permit with respect to prohibition of access from the commercial area to the residential area (Transcript at 5773-5774). The court further credits Mr. Pfeffer's testimony that the projections of the proposed building on the Eleventh Avenue side varied from the approved zoning in the special permit (Transcript at 5775). Accordingly, the court concludes that the Costas Kondylis plans could very likely have been impractical and added nothing to the value of the subject. In this court's view, an additional $15 million of enhanced value should be added to gross market value of $83,774,250 set forth above by reason zoning change obtained and the borings and foundation studies conducted by River Center. The court finds Mr. Von Ancken's estimate of $1,525,000 for demolition costs to be supported by the evidence. Upon deduction of the demolition costs from the new gross market value of $98,774,250 the final market value is $97,249,250 rounded to $97,250,000. This sum reflects a market value which

is consistent with the purchase price paid by Rein in 1998 and the enhancements noted above.

Accordingly, claimants are awarded $97,250,000 less the advance payment plus interest. The foregoing is without prejudice to an application for relief under EDPL 701 and/or 702. Settle order.

Dated: April 16, 2008

J.S.C.
Hon. Leland DeGrasse

APPENDIX C

Order of Supreme Court, New York County, entered May 29, 2008, denying motion for a new trial (Hon. Jane S. Solomon, J.S.C.), with notice of entry served on June 2, 2008

Present: Jane S. Solomon

Index No. 102934/2001

JOHN JAY COLLEGE

Upon the foregoing papers, it is ordered that the motion is denied. I decline to revisit Justice DeGrasse's decision in this hotly contested dispute. An appeal is the proper remedy for the aggrieved claimant.

Dated: 5/28/08 /s/

Final Disposition Jane S. Solomon

APPENDIX D

Judgment of the Supreme Court, New York County, dated June 2, 2008 (Hon. Jane S. Solomon, J.S.C.), with notice of entry served on June 5, 2008

At IAS Part 55 of the Supreme Court of the State of New York, held in and for the County of New York, 60 Centre Street, New York, New York 10007, on the 2nd day of June, 2008.

Present: Jane S. Solomon, Justice.

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In the Matter of the Application of the Dormitory Authority of the State of New York to acquire title in fee to certain real property for use in a project to expand and consolidate

JOHN JAY COLLEGE OF CRIMINAL JUSTICE OF THE CITY UNIVERSITY OF NEW YORK

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Index No. 102934/01
IAS Part 55
JUDGMENT

UPON reading and filing all papers herein and upon the Memorandum Decision of Hon. Leland DeGrasse, dated April 16, 2008, after trial of this matter ("Decision"),

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that judgment is entered in favor of River Center LLC ("Claimant"), having an address c/o Goldstein, Goldstein, Rikon & Gottieb, P.C., 80 Pine Street, 32nd floor, New York, New York 10005, to recover from Dormitory Authority of the State of New York ("DASNY"), having its principal place of business at 515 Broadway, Albany, NY 12207, the amount of NINETY SEVEN MILLION TWO HUNDRED FIFTY THOUSAND DOLLARS ($97,250,000), which when taking into account the previous advance payments heretofore made by DASNY to Claimant in the aggregate principal amount of $82,185,000 results in Claimant being entitled to recover from DASNY a final principal payment of FIFTEEN MILLION SIXTY FIVE THOUSAND DOLLARS ($15,065,000) with interest on such amount at a rate of 9% per annum from title vesting date, April 11, 2011, to the date of entry herein in the sum of $9,702,685.48, and making in all the sum of $24,767,685.48 and that Claimant have execution thereof.

Judgment signed this 2nd day of June 2008.

Enter,

/s/
Hon. Jane S. Solomon
Justice of the Supreme Court

Filed

June 5, 2008

New York County Clerk's Office

APPENDIX E

Oral decision by Supreme Court, New York County (Hon. Martin Schoenfeld, J.S.C.), dated August 9, 2006, on motion to dismiss claim for interference damages, R. 2076a-2087a (excerpt)

As everybody in this room knows, market value is what a willing buyer would have paid a willing seller at the time that the property is appropriated. River Center would like this Court to consider both the current enhanced value of the successfully rezoned property at the time of the condemnation, as well as all associated costs connected with the efforts to acquire that enhanced property. In my opinion, this would be a double recovery.

I am going to try to explain as best I can what it is I am trying to say and then, if you will bear with me, and again, it may be very repetitive, but I would like to go through my notes to make some comments. But at the outset, let me try to explain that again, I believe that the Dormitory Authority recognizes and is saying, listen, in the appropriate case, and this maybe is one of those cases, the court has a right to determine the development of a property and can take certain enhanced costs, but we are not talking about those types of enhanced costs when we are talking about a delay damage claim that has already been set forth in another forum. In this respect, River Center has already won on the liability aspect because there has been a determination by the state Supreme Court, that the State and CUNY caused the delay in Mr. Korff's right to go forward with his developmental project, but the time period from that delay to when the property was condemned, there

exists a certain remoteness. In fact, I said and this the third time I am repeating myself, Mr. Korff indicated that once he had the zoning, he was able to go forward with his project, which he believes would have been very successful. What these entities did to him, and I include the Dormitory Authority as part of it, even though there is no separate action against them currently, except for – the only action being the condemnation proceeding, is to make it harder for the appraisers and the court to make a determination of what the value is for this property on the date of taking.

Now, I could say that I believe that Mr. Korff's project would have been highly successful and had he had an opportunity to go forward with it earlier, he would be able to show that, but we could not be certain of that, 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, that he would not have gotten the type of residential occupancy that he expected, that he could have run into other problems and I have see the property and there are problems with it in making the development work, so we don't know.

So then what happens, again, we take the best measure, which is the "comparables" and possibly using the Chinatown example when I say that, there is a Chinatown case, I do believe that a court would have a right, based on that, to make a determination that there should be an enhancement value to the development, again if it can be shown, but that is

still different than what here is a specific delay damage claim and it is also the converse of some of the cases, where due to a city or a municipality's actions, zoning was never accomplished at the time of the taking, and the courts in some of those cases have indicated that the taker cannot use that to its advantage by saying the property is worthless, because of something that somebody else caused. But, we have a very distinct claim here and it is not how in my opinion a reasonable buyer goes about buying a property from a reasonable seller, because there would be – it would not make sense for somebody to want to buy a lawsuit and that is what this is. The liability is there, and if the damages can be proven, the contract issues are resolved, there is a set amount that is going to be established. It really does not have anything to do with what a buyer would pay for the property on the date that it was condemned and that essentially is the bottom line, gentlemen, and ladies, but if you would bear with me, I would like to go through my notes to make sure I didn't skip anything here.

* * *

Mr. Korff does not have the opportunity to show where he would have been in this development stage, and have hopefully, better concrete evidence of the value of his property. But he has his separate damage claim and that has nothing to do with the realities of the taking at a time when the property was properly zoned.

I should point out again, using condemnation terms, that these particular costs that are being asked to be dismissed from this case "do not arise

from the taking," which I believe is the correct wording. Rather, in my opinion, were damages created by the refusal to cooperate with the developer who had certain rights and by the way, I am not just saying that. As a matter of law, that has been determined by Judge Gammerman, that there was interference, but it does not, those damages do not arise from this particular taking and I think it bears worth repeating again that I don't believe that, under the circumstances, that a willing purchaser would be looking to buy a lawsuit.

* * *

These are not the types of issues that should be before a judge in the condemnation proceeding. It would only confuse the case. It is a distinct issue. It has nothing to do with valuation on the date of the taking, except that it makes it a little bit harder to determine what the value should be.

I think it would be best if I stopped at this point.

* * *

So let me say it both ways: I don't believe since there has been the proper rezoning, prior to the taking, that it is an appropriate claim here, and I don't believe if you look at the facts specifically to this case, that such damages apply here and that is the Court's decision.

APPENDIX F

Oral decision by Supreme Court, New York County (Hon. Martin Schoenfeld, J.S.C.), dated August 30, 2006, with notice of entry served on September 5, 2006, R.2088a-2090a

Present: Martin Schoenfeld Part 28

Index No. 102934/01

In re John Jay College

(Dormitory Authority)

Upon the foregoing papers, it is ordered that this motion to dismiss that part of the condemnation proceeding claim for delay or interference damages ("exacerbated costs") is granted as per the Court's decision stated on the record (see hearing transcript dated 8/9/06). Such a 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. This together with the opinion stated on the record constitutes the decision and order of the Court.

Dated: August 30, 2006 /s/

J.S.C.

APPENDIX G

Order and Memorandum Decision by Supreme Court, New York County (Hon. Leland DeGrasse, J.S.C.), on motions to preclude expert reports, entered November 27, 2006, with notice of entry served November 28, 2006, R.3410a-3417a

Supreme Court Of The State Of New York
County Of New York
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In the Matter of the Application of the Dormitory Authority of the State of New York to acquire title in fee to certain real property for use in a project to expand and consolidate
John Jay College of Criminal Justice of the City University of New York
----------X

Index No. 102934/01

DeGrasse, J:

Motion sequences nine and ten are consolidated. Condemnor, the Dormitory Authority of the State of New York (DASNY), moves for orders precluding fee claimant River Center LLC from introducing into evidence a land residual analysis prepared by Jerome Haims Realty, Inc., an entrepreneurial profit and development value report and a supplement thereto prepared by Goodstein Development Corp., two reports by National Economic Research Associates (NERA), a report by accountants Levine and Seltzer

LLP, a report by William Adamski and two reports by Joseph Korff, River Center's principal.

River Center cross-moves for orders precluding DASNY from introducing a December 9, 2002 rebuttal report by Robert Von Ancken in the event of the exclusion of the Haims report; precluding DASNY's introduction of a report by Michael Steinberg and Raymond Savino in the event of the exclusion of the Goodstein report; precluding DASNY's introduction of reports by Drs. Atanu Sahn and Nicholas Crew and Betsy Jacobson in the event of the exclusion of the NERA reports; precluding DASNY from introducing a report by Graf Repetti & Co., LLC in the event of the exclusion of the Levine & Seltzer report; further precluding DASNY's introduction of Jacobson's report and a report by Lawrence Longua in the event of the exclusion of Adamski's report and precluding DASNY's introduction of portions of a report by Peter Pfeffer in the event of the exclusion of related portions of the Korff reports.

The subject premises occupy the entire eastern blockfront of 11th Avenue between West 58th and West 59th Streets. According to Haims's appraisal, the site is partially improved and 100,416.67 in area. DASNY acquired the site on April 6, 2001. As set forth in Haims's report, the land residual approach forecasts the construction of a new development that maximizes the value of the land. The basic analysis relies on the comparison of the value of this alleged highest and best use of the site with the cost of constructing the development. The differential between the capitalized value and the cost estimate, according to Haims, is the "residual" value available to cover land costs. Haims's land residual analysis con-

templates River Center's planned development of a mixed use complex with condominium, rental, commercial, retail and parking components. Citing *Arlen of Nanuet, Inc. v. State of New York* (26 NY2d 346 [1970]) and other cases, DASNY asserts that the Haims residual land analysis is inadmissible because its valuation of the site "is nothing more than an improper hypothetical calculation of unknown revenue from a non-existent development." The question framed by the *Arlen* Court is "whether it is permissible to fix the market value of land, completely bare when condemned *solely* [emphasis added] on the basis of capitalization of income expected to be realized from buildings and other extensive improvements not yet financed, on which no work had even begun on the day of taking" (26 NY2d at 351). As noted in its report, Haims does not use the land residual analysis as a primary valuation tool. Instead, Haims proffers the analysis only "as a check, and additional proof, of the value conclusion we have reached under the Sales Comparison Approach." Moreover, the Appellate Division, Third Department has endorsed the limited use of the land residual analysis on two occasions (*see Benjamin v. State of New York*, 31 AD2d 579 [1968], *appeal denied* 23 NY2d 645 [1968]; *Crimswal Realty Corp. v. State of New York*, 27 AD2d 350 [1967], *appeal denied* 20 NY2d 646 [1967]). Therefore, Haims's land residual analysis is admissible.

The conclusions set forth in Goodstein's entrepreneurial and profit and development value report relate to the value of the site. Those opinions are inadmissible because Goodstein is not a real estate appraiser (*see Town of Webb v. Sisters Realty North*

Corp., 229 AD2d 942, 943 [1996]). River Center concedes that the NERA reports and tab two of the Levine and Seltzer report address damages it attributes to alleged interference by DASNY and City University of New York with River Center's efforts to have the site's zoning changed. River Center's claim for such damages are [sic] being litigated in the Court of Claims. River Center asserts that this court should decide "the factual issue of what costs were 'exacerbated' 'interference' costs, versus the costs, including other development costs, which were incurred in connection with the Claimant's development efforts." The approach suggested by River Center poses the undesirable prospect of two trial courts determining the amount of River Center's alleged interference claim. Evidence relating to such damages should not be part of the record of this proceeding. Therefore, the reports by NERA and Levine and Seltzer should be excluded from evidence.

Adamski had been in charge of real estate finance at Credit Suisse First Boston (CSFB). He states in his report that "[a]bsent the litigation and rezoning risks in December 1997, we would have been in a position to close a bridge loan by January 31, 1998 based on the River Center program." The report further states that Adamski would have been prepared to recommend a CSFB loan to River Center in the amount of $77 million. In his affirmation, River Center's counsel states that "[t]his proposal from one of the most experienced real estate lenders in New York City, *more than three years prior to the taking*, assumes an estimated value for this development far in excess of the mere $82 million valuation proffered by DASNY in this case." Adamski's

notions of the site's value, like those of Goodstein, are inadmissible because he is not an appraiser (*see Town of Webb,* 229 AD2d at 943). Moreover, the site was not a development at the time of vesting. Korff's reports are inadmissible because they constitute impermissible bolstering of his trial testimony (*cf. Hatton v. Gassler*, 219 AD 697 [1995]).

For the foregoing reasons, DASNY's motions are granted to the extent that River Center is precluded from introducing into evidence the reports by Goodstein, NERA, Levine and Seltzer[1], Adamski and Korff. DASNY's motions are denied with respect to Haims's land residual analysis. River Center's cross motions are granted to the extent that DASNY is precluded from introducing into evidence the reports by Steinberg and Savino, Saha and Crew, Jacobson, Graf Repetti, Longua and Pfeffer.

Dated: November 20, 2006 /s/

J.S.C.

Hon. Leland DeGrasse

[1] This is without prejudice to the submission of a new report by Levine and Seltzer omitting references to costs related to River Center's interference claim and DASNY's rebuttal of the new report.

APPENDIX H

Trial Rulings of the Supreme Court, State of New York, New York County

Ruling by Supreme Court, New York County (Hon. Leland DeGrasse, J.S.C.), on November 21, 2006, sustaining objection to testimony of Joseph Korff as to value, R.795

THE COURT: The objection is sustained. For purposes of consistency, I have to treat this the same way I treated the Adamski report and the Goodstein report, evidence of value from someone who's not an appraiser, notwithstanding the claim that it goes to Mr. Korff's state of mind.

Ruling by Supreme Court, New York County (Hon. Leland DeGrasse, J.S.C.), on May 15, 2007, precluding testimony of Joseph Korff as to value, R.1128-1129

I will follow up on a point Mr. Goldstein raised prior to the luncheon recess. And the subject is the admissibility of the evidence of the opinion of an owner of property in an eminent domain proceeding.

I have read your letter and the cases that you cite therein.

It is not by accident that there is only one New York case that you cite.

And this is Benson v. State, 17 miscellaneous 2d, 119.

The other cases from the other jurisdictions did not have one factor that we are compelled to deal with. That is, 202.61 of the Uniform Rules.

Just looking at the first portion of the first sentence, quote, "in all proceedings for the determination of the value of property taken pursuant to eminent domain," end quote.

And then it goes on. And it prescribes the method by which appraisals are exchanged.

I can accept the general proposition that any person, including an owner of real property, if he has sufficient knowledge and background can express his opinion on that.

However, I interpret 202.61 as the exclusive means by which such evidence is to be presented in an eminent domain trial.

The Benson (phonetics) Court apparently did not have – did not address 202.61 much. Because, I would suspect that it was not enacted prior, at that time.

The earliest case I have found in which the rule is cited was in 1991. And Benson was decided in 1959.

So I will adhere to the ruling regarding the opinion by the claimant as to the value of the subject.

Ruling by Supreme Court, New York County (Hon. Leland DeGrasse, J.S.C.), on May 15, 2007, that offer would not be considered as evidence of value, R.1179.

MR. GOLDSTEIN: I offer it into evidence.

MR. WEBB: The same objection, your Honor. It is an offer. And it must be accepted by April 3, 2000, I note.

MR. GOLDSTEIN: Your Honor, I offer it. As I said before, it is the same thing.

THE COURT: With that understanding, it is received. Claimant's exhibit 190.

MR. WEBB: Is it received for the value stated in?

THE COURT: Not at all.

MR. WEBB: Okay. Thank you.

Ruling by Supreme Court, New York County (Hon. Leland DeGrasse, J.S.C.), on May 16, 2007, that proposal would not be considered as evidence of value, R.1193-1194.

Q: Was there a follow up to this proposal by them?

A: Well, I sent a condemnation package to them. And their banker was going to participate in the deal. Lehman Brothers. And the deal did not go forward.

MR. GOLDSTEIN: I offer it into evidence.

MR. WEBB: Same objection, your Honor. The documents contain figures which relate to the particular property. If it is only for the purpose of showing the effort that somebody made and not with the value of the property, then I would object to it only on relevance.

THE COURT: It is received as I did with documents yesterday. Not as evidence of value. Overruled.

Ruling by Supreme Court, New York County (Hon. Leland DeGrasse, J.S.C.), dated June 5, 2007, as to admissibility of offers, R.1645-1646.

THE COURT: There is an outstanding ruling with respect to exhibits 189 and 190.

I was reminded of a ruling I made earlier in the trial, on November 16th, and it has to do with the admissibility of the evidence of an offer to purchase or offer to lease, whatever the case may be, *Brummer v, State of New York* 25, A.D.2d 245, 1966 case stands for the proposition that in general, an offer – an offer is not admissible to show market value.

Back on November 16th, Mr. Goldstein made the argument of the difference between an offer made by just anyone and an offer made by a bona fide entity.

In a different case, matter *Town of Marathon*, 174, Misc. 2d, 800, a 1977 case, the Court in dicta made reference to *Nickles* on eminent domain, in which it stated that an offer by a private party may be admissible where it is made in good faith, within a reasonable time and with the intention and ability to carry out the transaction that the offer is accepted.

The only authority by an Appellate Court or a court higher than the Appellate Division, I should say, would be the *Brummer* case.

I'm more comfortable with that, the analysis set forth under *Nickles* would invite mini-trial on whether the offeror has the ability, whether the offeror made the offer in good faith.

Accordingly, the objection to those two exhibits is sustained. You have an exception.

APPENDIX I

Order of the New York Court of Appeals dated May 10, 2011, denying in part and dismissing in part River Center's Motion for Leave to Appeal

STATE OF NEW YORK
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the tenth day of May, 2011

Present, HON. JONATHAN LIPPMAN, Chief Judge, presiding.

Mo. No. 2011-133
In the Matter of John Jay College of Criminal Justice of the City University of New York.

River Center LLC, et al.,
Appellants,

v.

The · Dormitory Authority of the State of New York,
Respondent.

Motions for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein, papers

having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motions, insofar as they seek leave to appeal from so much of the Appellate Division order as affirmed Supreme Court's order denying River Center LLC's motion to reopen, be and the same hereby are dismissed upon the ground that such portion of the Appellate Division order does not finally determine the proceeding within the meaning of the Constitution; and it is

ORDERED, that the said motions for leave to appeal otherwise be and the same hereby are denied.

Andrew W. Klein
Clerk of the Court

State of New York
Court of Appeals

Decided May 10, 2011

Mo. No. 2011-133

In the Matter of John Jay College
of Criminal Justice of the City
University of New York.

River Center LLC, et al.,
Appellants,

v.

The Dormitory Authority of the
State of New York,
Respondent.

Motions, insofar as they seek leave to appeal from so much of the Appellate Division order as affirmed Supreme Court's order denying River Center LLC's motion to reopen, dismissed upon the ground that such portion of the Appellate Division order does not finally determine the proceeding within the meaning of the Constitution; motions for leave to appeal otherwise denied.

APPENDIX J

Order of the Court of Appeals dated October 25, 2011 denying rehearing

State of New York
Court of Appeals

Mo. No. 2011-672

In the Matter of John Jay College of Criminal Justice of the City University of New York.

River Center LLC, et al.,

Appellants,

v.

The Dormitory Authority of the State of New York,

Respondent.

Motion for reargument of motion for leave to appeal denied.

October 25, 2011

APPENDIX K

Excerpts of River Center's Briefs in the Supreme Court, State of New York, New York County

River Center's Memorandum of Law in Opposition to the Condemnor's Motion to Dismiss, dated May 21, 2001, R. 1719a.

The Constitutional requirement of just compensation mandates that the property owner be indemnified so that he or she may be put in the same monetary position as if a taking had not occurred. *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973); *City of Buffalo v. J.W. Clement Co., Inc.*, 28 N.Y.2d 241, 258, 321 N.Y.S.2d 345, 360 (1971). Compensation should be the full and perfect equivalent in money of the property taken. *United States v. Miller*, 317 U.S. 369, 373 (1943); *United States v. Certain Prop. Located in the Borough of Manhattan*, 388 F.2d 596, 600 (2d Cir. 1968). The owner should be made whole; that is, he or she should be "as well off after the taking as before," and should be paid for its "unique entrepreneurial device." *Franklin Record Ctr. v. City of New York*, 69 A.D.2d 111, 113-14, 112, 417 N.Y.S.2d 702, 703-04, 705 (1st Dept. 1979), *aff'd*, 59 N.Y.2d 57, 463 N.Y.S.2d 168 (1983).

The law is clear that the owner of a parcel condemned while in the midst of development – even before the first spade of earth is turned – is entitled to be paid as part of his just compensation some additional sum above the raw land value. Whether

called "entrepreneurial profit," "entrepreneurial enhancement," or "development enhancement," both the courts and the appraisal texts recognize this additional component of value as a sum that the owner has earned as of the date of the taking for his work in maintaining and furthering the development. This extra component is made up of two parts: the money expended in the effort, and the value added by the work done. *City of New York v. Chestnut Prop. Co.*, 39 A.D. 573, 575, 332 N.Y.S.2d 19, 22-23 (2d Dept. 1972).

River Center's Memorandum of Law in Opposition to the Dormitory Authority's Motion to Preclude, dated October 18, 2002, R. 1230a.

It is well settled that the measure of compensation for property is the owner's loss, *see, e.g.*, *China Plaza* (Goldstein Aff., Exhibit 2 at 22) ("the required constitutional standard [is[to measure loss in terms of the property owner's loss") and that the condemnor may not depress value in contemplation of condemnation.

Claimant's Pre-Trial Memorandum, dated September 15, 2006, R. 2091a-2092a

Both the United States Constitution (5th Amendment) and the New York State Constitution (Article I, Section 7) provide that "nor shall private property be taken for public use without just compensation."

What is "just" in terms of compensation has grown into a large body of law including volumes of texts devoted to the subject. To that end, we point to

Nichols on Eminent Domain and Orgel on Valuation in Eminent Domain as basic texts. If one wishes to go back to early texts, one could go to Lewis on Eminent Domain. While not the exclusive means of achieving just compensation, a judicial determination of "fair market value" at the date of taking is often the measuring rod. *In the Matter of the City of New York (Claton Urban Renewal Project)*, 59 N.Y.2d 57, 61 (1983) (the measure of damage in a condemnation action is the fair market value of the property at its highest and best use as of the date of title vesting). Where, however, the condemnor intentionally takes action to hold down the value of the property ultimately taken, the courts will award the condemnee compensation taking into consideration where the condemnee would have been at the time of the taking, but for such action. *In the Matter of the City of New York [Nelkin]*, 51 N.Y.2d 921 (1980) (where city agency had requested FHA to hold off financing because the city contemplated condemnation and delayed rezoning, the property was valued as if it had been rezoned and all development costs, including finance costs during development added to such value to determine just compensation.) In such cases, the fair market value of the property alone on the date of taking, without reference to a remedy for such actions, is insufficient, for at the end of the day the compensation must be just.

Fair market value is often described as what a willing buyer would pay and what a willing seller would accept, neither being under a compulsion to buy or sell. The owner at the end of the day must be put in the position he would have been but for the condemnation. The Appraisal of Real Estate, 12th

Ed. (2001), at p. 22; *Kentor v. State*, 23 N.Y.2d 337, 339 (1968); *see U.S. v. New River Colleries Co.*, 262 U.S. 341, 343 ("as a general principle, "just compensation' for property taken by the government is compensation sufficient to make good the loss to the owner. [The Owner] is entitled to the full money equivalent of the property taken, and thereby to be put in as good position peculiarly as it would have occupied, if the property had not been taken); *Franklin Record Ctr. v. City of New York*, 69 A.D. 111, 112-114, 417 N.Y.S.2d 702, 703-04, (1st Dep't 1979), *aff'd*, 59 N.Y.2d 57, 463 N.Y.S.2d 168 (1983) (condemnee should be paid for its "unique entrepreneurial device"). In each case, the property taken must be valued at its highest and best use and not its use when taken if such use is different. *In re Town of Islip [Mascioli]*, 49 N.Y.2d 354, 360 (1980).

River Center's Post-Trial Memorandum of Law. dated March 27, 2008, R. 4124a.

I. THE LEGAL FRAMEWORK[2]

Both the United States Constitution (5th Amendment) and the New York State Constitution (Article 1, Section 7) provide that "nor shall private property be taken for public use without just compensation." "The term "just compensation" is intended to ensure that the owner receive, "the full and perfect equivalent of the property taken. It rests on equitable principles and it means substantially that the owner

[2] Additional legal issues are briefed hereafter in the context of the specific treatment of issues in the brief.

shall be put in as good position pecuniarily as he would have been if his property had not been taken." *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923) (citations omitted); *see also City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 258, 321 N.Y.S.2d 75, 78 (2d Dep't 2004) ("It is also well settled that just compensation is measured by what the property owner has lost rather than by what the condemnor has gained.").

The amount of that just compensation is to be determined based on the fair market value of the property in its then state of exploitation.[3] *City of New York v. Chestnut Props. Co.*, 30 A.D.2d 573, 332 N.Y.S.2d 19 (2d Dep't 1972), *aff'd sub nom. In re N. Cent. Brooklyn High Sch.*, 34 N.Y.2d 800, 316 N.E.2d 328, 359 N.Y.S.2d 40 (1974); *Rochester Urban Re-*

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[3] What is "just" in terms of compensation has grown into a large body of law, including volumes of text devoted to the subject. *See, e.g., Nichols on Eminent Domain* (rev. 3d ed.); *Orgel on Valuation in Eminent Domain* (2d ed. 1953); *Lewis on Eminent Domain* (3d ed. 1901). The owner at the end of the day must be put in the position he would have been but for the condemnation. The *Appraisal of Real Estate* 22 (The Appraisal Institute 12th ed. 2001); *Keator v. State*, 23 N.Y.2d 337, 339, 296 N.Y.S.2d 767, 769 (1968); *see United States v. New River Collieries Co.*, 262 U.S. 341, 343 (owner of property taken by government is "entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied, if the property had not been taken); *Franklin Record Ctr. v. City of New York*, 69 A.D. 111, 112-114, 417 N.Y.S.2d 702, 703-04 (1st Dep't 1979), *aff'd*, 59 N.Y.2d 57, 463 N.Y.S.2d 168 (1983) (condemnee should be paid for its "unique entrepreneurial device"). In each case, the property taken must be valued at its highest and best use and not its use when taken if such use is different. *In re Town of Islip [Masciolí]*, 49 N.Y.2d 354, 360 (1980).

newal Agency v. Taddeo, 55 A.D.2d 1042, 391 N.Y.S.2d 254 (4th Dep't 1977); *In re Pelham Parkway Houses*, 197 Misc. 70, 89 N.Y.S.2d 855 (Sup. Ct. Bronx County 1949); *Salamone & Co. v. State*, 40 A.D.2d 916, 337 N.Y.S.2d 846 (3d Dep't 1972); *Rustcon Developers, Inc. v. State*, 33 A.D.2d 582, 304 N.Y.S.2d 287 (3d Dep't 1969). It is equally clear that when a property is taken in the midst of the development process, the condemnee is entitled to receive as part of his just compensation an additional component of value based upon his pre-taking work in developing the parcel and coordinating all of the various components of the development effort. *Ornstein Leyton Realty Inc. v. County of Suffolk*, Index No. 03-312, sub J, (N.Y. Sup. Ct. Suffolk County Dec. 16, 2004) (copy annexed) (90% of land value allowed as additional component of value based on entrepreneurial enhancement by developer's pre-taking work); *see infra* Pt. III.C.3.

Further, the condemnee is entitled to be made whole and put in the place he would have occupied absent the taking and absent any action taken by the condemnor to intentionally hold down the value of the property taken. *In re City of New York (Nelkin)*, 51 N.Y.2d 921, 434 N. Y.S.2d 981 (1980) (where city agency had requested FHA to hold off financing because the city contemplated condemnation and delayed rezoning, the property was valued as if it had been rezoned and all development costs, including finance costs during development added to such value to determine just compensation.). In such cases, the fair market value of the property alone on the date of taking, without reference to a remedy for

such actions, is insufficient, for at the end of the day the compensation must be just.

APPENDIX L

Excerpts from River Center's Briefs in the Appellate Division

Brief for Claimant-Appellant-Cross-Respondent River Center LLC, dated February 22, 2010

p. 3

Finally, the property would have been farther along the development path, except that DASNY, in conjunction with the City University of New York ("CUNY") and the State of New York ("State"), deliberately impeded development. Supreme Court erroneously declined to consider the effect of that conduct in determining just compensation.

p. 5

5. Did the trial court err in denying just compensation for actions by the Condemnor that impeded development of the property and reduced its value upon taking? Supreme Court erred in dismissing Appellant's claim for compensation on that ground holding them too speculative and barred here because a damage claim was pending in the Court of Claims, and refusing to admit evidence bearing on the value impact of such actions, Claimant was Constitutionally entitled to just compensation for the property's full value, and Condemnor should not be permitted to profit from its own wrong.

pp. 51-52

Particularly in eminent domain matters implicating the constitutional principle of just compensation, courts should proceed cautiously before excluding evidence of value. *United States v. 14.38 Acres of Land*, 80 F.3d 1074 (5th Cir.1996); *United States v. 68.94 Acres of Land*, 918 F.2d 389, 393 (3d Cir. 1990).

pp. 65-66

It was immaterial that the Costas plans were not filed with or approved by the building department, or that they may not have matched existing zoning in every detail (R.25a). Other cases have used unapproved plans, *see, e.g., Rochester Urban Renewal Agency v. Taddeo*, 55 A.D.2d 1042 (4th Dept. 1977), and none has imposed such a requirement. Indeed, such a standard would contradict the accepted principle that condemnees are entitled to compensation for all the property's potential.

p. 82 (heading)

Supreme Court Committed Reversible Error In Denying Claimant Just Compensation For The Condemnor's Obstruction Of Development, Which Reduced The Property's Value.

p. 83

Dismissing the claim for reduced value was error. Claimant was entitled to prove the effect of the Condemnor's interference on the Property's value as part of his claim for just compensation under the Constitution.

p. 84

Just compensation includes the property's fair market value in its then-state of exploitation. *Levin v. State*, 13 N.Y.2d 87 (1963) (owner entitled to have lease for building to be built and planning for development taken into account); *Matter of City of Rochester (Casey)*, 234 A.D. 583, 586 (4th Dept. 1932) (fair market value includes anything "which the owner would naturally and properly bring to the attention of a buyer."); *Schwartz v. State*, 95 Misc.2d 525, 532 (Ct. Cl. 1978). It is not necessary that the improvements be "completed." *Levin, supra*; *Sparkill Realty Corp. v. State*, 268 N.Y. 192 (1935) (value for an unfinished plant and the opportunity to run it after completion); *Rustcon Developers v. State*, 33 A.D.2d 582, 582 (3d Dept. 1969) (plans an increment to fair market value compared to site with no plans).

A condemnor's deliberate actions can significantly reduce the value of a condemnee's property. In such cases, the owner should be compensated according to the property's value as if those acts had not occurred.

p. 87

Without authority, Supreme Court ruled that these issues had no place in this proceeding because an action for damages was pending in the Court of Claims. (R.2066a-91a, 3416a). The Constitutional right to just compensation is not at issue in the Court of Claims action.

p. 91

For the reasons set forth above, the judgment rendered by Supreme Court should be reversed. This Court should exercise its power to fashion a remedy and should award Claimant just compensation based on the record before it.

Reply Brief for Claimant-Appellant-Cross-Respondent River Center LLC, dated April 14, 2010

p. 1

Despite the length of the trial below, the result was flawed by fundamental legal errors. Reversal or remand is necessary to protect the property owner's Constitutional right to just compensation.

p. 28 (heading)

Supreme Court Erred In Precluding Claimant From Seeking Just Compensation For Condemnor's Deliberate Obstruction Of Development

APPENDIX M

Excerpts of River Center's Motion for Leave to Appeal in the Court of Appeals

p. 1

This is not an ordinary civil case. This motion seeks review of significant and fundamental issues of law in condemnation proceedings, where the courts are charged with special diligence in ensuring due process and just compensation for citizens whose property is seized by government agencies.

pp. 9-10

Here, the Appellate Division and Supreme Court both ruled that River Center could not recover damages resulting from the interference and delay as part of Claimant's award of just compensation in the condemnation proceeding. They barred such recovery even though the interference and delay intentionally impeded River Center's development and made it worth significantly less at the time of taking. That result was contrary to decisions from this Court and the Fourth Department in which, to award just compensation, the courts placed claimants in eminent domain cases in the position they would have occupied but for the condemnors' deliberate actions that decreased the value of their properties.

The overreaching of government in eminent domain cases is a matter of state and national concern. If the decisions below are allowed to stand, governmental condemnors will be incentivized to abuse

their power in order to reduce the value of properties they seize. This Court should grant review to restore the rights of property owners to full, fair and just compensation in instances where the condemning authorities have deliberately and knowingly acted to reduce the subject properties' value at the vesting date.

p. 12

5. Did the trial court err in holding that the project must be "in existence" before the value of years of development activity and all of the property's physical potential may be taken into account? Did the Appellate Division err in similarly holding that, for such values to be considered in granting just compensation, the development project must be near "fruition"?

A condemning authority may, as here, take property while development efforts are ongoing. To afford the owners just compensation, the enhanced value created by those development efforts and the value of the property's full physical potential must be taken into account. Here, however, the First Department held that no such value existed because the River Center development had not met "any of the requirements that would bring the project to fruition in the near future" (Ex. 1 at 44). In doing so, it affirmed the trial court's ruling that the just compensation sought by River Center for its development activity and the property's full development potential was inappropriate because the project was not in "existence on the vesting date." Ex. 4 at 25a; compare Ex. 4 at 22a (development potential was 1,398,906 square feet) with Ex. 4 at 27a (valuing on-

ly 930,825 square feet); see generally R.8947, 8949 (illustrating the planned development).

The requirement that a project be in "existence" or reach "fruition in the near future" is novel, significantly restricts the ability of claimants to obtain just compensation, and should be reviewed by this Court.

p. 19

Under the trial court's rulings, which were ignored and therefore affirmed by the Appellate Division, the only evidence on matters relating to value in a condemnation proceeding would be from real estate appraisers. That is an extraordinarily restrictive ruling, particularly where the State is seizing private property through eminent domain and the condemnee's rights to just compensation are constitutionally protected. As this Court noted more than a century ago, "when the state compels a man to give up his land for public use, and permits him to recover … its fair market value, he should at least have the right to prove every element that can fairly enter into the question of market value." *In re Blackwell's Island Bridge Approach in City of New York*, 198 N.Y. 84, 88 (1910).

p. 25

The Federal and New York Constitutions protect property owners from governmental takings by requiring the payment of just compensation. U.S. Constitution, 5th Amend.; N.Y. Constitution, Art. I, §7. Such protections are needed particularly when government agencies reduce the value of property they seize so that it may be acquired more cheaply.

That happened here. DASNY knew that, the further River Center's development proceeded, the more expensive it would be to take the property by eminent domain. See R.1540a (notes of meeting; "IF KORF[F] GETS SITE REZONED UPWARD, AFFECTS OUR ACQUISITION") (capitalization in original). Prior to the taking, DASNY, in conjunction with CUNY and the State, held up the rezoning of the Property by as long as 18-19 months, so that rezoning from manufacturing to the contemplated commercial/residential mixed use was ultimately obtained in March 1999 rather than in 1997. R.1705-1706, 10676-10690; see R.2073a (ruling by Justice Schoenfeld as to DASNY's involvement).

pp. 28-29

Third, governmental abuse of the condemnation power should not be allowed. Government agencies should not be free to interfere with development efforts and, through the abuse of regulatory mechanisms or other deliberate acts, reduce the value at the vesting date of properties they seek to condemn.

This case therefore presents a well-defined question for review: As part of awarding just compensation, where the condemnor has acted to impair the value of the property when taken, should the courts place the condemnee in the same position he would have occupied but for the condemnor's actions?

p. 37

In light of the public importance of ensuring just compensation to property owners whose lands are seized by eminent domain, and the risk that the lower courts' approach will discourage development, this

Court should review the significant and novel rulings below.