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

Appellate Division–Second Department Docket No. 2008-07064

Court of Appeals
of the
State of New York

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

Petitioners-Appellants,

– against –

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

Respondent-Respondent.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

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I. THE NEW YORK CONSTITUTION MUST BE INTERPRETED BASED ON ITS TEXT AND PLAIN MEANING, AS INFORMED BY THE HISTORICAL CONTEXT AT THE TIME OF ITS ENACTMENT BY THE PEOPLE

Because this case turns, at every juncture, on the meaning of the New York Constitution, it is important, at the outset, to recognize the unique interpretive challenge this case presents.

As set forth in Appellants' opening brief, Appellants' Br. ("App. Br.") at 34-35, 37-38, the New York Constitution "is the voice of the people, speaking in their sovereign capacity." *In re New York Elev. Ry. Co.*, 70 N.Y. 327, 342 (1877). It is the "most solemn and deliberate of all human writings," ordaining "the fundamental law of states." *Newell v. People*, 7 N.Y. 9, 97 (1852).

Having been "adopted by the people, the intent" of the New York Constitution "is to be ascertained, not from speculating upon the subject, but from the words in which the will of the People has been expressed. To hold otherwise would be dangerous to our political institutions." *People v. Rathbone*, 145 N.Y. 434, 438 (1895). Indeed, in *People v. Purdy*, 4 Hill 384 (Ct. for Corr. of Errors 1842) (*en banc*), Senator Paige, concurring in the judgment, explained why he voted to strictly construe the plain meaning of the provision of the New York

Constitution that required a vote of two-thirds of the members of the Legislature to every bill "'creating, continuing, altering or renewing any body politic or corporate,'" as applying to a municipal corporation:

> For one, I cannot consent to "palter in a double sense" with any part of the constitution . . . Through no agency of mine shall it be made to "keep the word of promise to the ear, and break it to the hope." I trust that, in reference to the present case, this court will not hesitate to array itself in favor of the old and revered doctrine of strict construction – the only sound and safe doctrine for the governance of either judges or legislators. If courts are allowed to depart from it, and venture upon the perilous experiment of substituting, for the clear language of the instrument, their own notions of what it ought to have been or what its framers intended, there will be an end of written constitutions, and of all attempts to fix limits to legislative and judicial power.

While the plain language of any text is always the interpretive starting (and ending) point wherever possible, "the rule rises to a very high degree of significance" when interpreting the New York Constitution. *Newell*, 7 N.Y. at 97. "It must be very plain, nay, absolutely certain that the people did not intend what the language they have employed, in its natural signification, imports, before a court will feel itself at liberty to depart from the plain reading of a constitutional provision." *Id.*

Accordingly, as this Court has long recognized, the New York Constitution is unique, and its interpretation is not analogous to interpreting a

statute (or even the federal Constitution). Unlike a statute, every word in the New York Constitution has been considered and enacted by vote of the People. Indeed, the New York Constitution, *in toto*, has been adopted or re-adopted five times (in 1777, 1821, 1846, 1894 and 1938) and amended in part by vote of the People on numerous other occasions throughout its 232-year history. It is imperative to account for this in interpreting its meaning.

First and foremost, this means that the primary interpretive task is to discern what the People of New York most naturally understood any given provision or term to mean at the time they affirmatively adopted it, or depending on the circumstances and historical context, re-adopted it. This, in turn, means that the plain and common meaning of the text is far and away the most authoritative, indeed arguably the only, method of divining that meaning.

Interpreting a statute is materially different. A statute is created indirectly by the People's representatives, rather than directly by the People. As a result, the interpretive task of the courts is to discern the intent of the drafters, *not* the intent of the People themselves. Thus, while plain text is still the primary method of statutory interpretation, many courts turn to the drafting or legislative history to interpret provisions that are ambiguous.

Interestingly, although drafting history is arguably relevant when interpreting the federal Constitution, its probative value turns on the fact that, except when initially adopted by the States, the People do not directly ratify the federal constitution or the limited number of amendments that have been adopted.

For obvious reasons then, drafting history has almost no relevance in interpreting the New York Constitution, unless a case can be made that the debates themselves, or the underlying issues discussed, were widely known by the People at large.

II. THE SEIZURE OF APPELLANTS' PROPERTIES VIOLATES THE NEW YORK CONSTITUTION'S PUBLIC USE CLAUSE AND ARTICLE XVIII'S EMINENT DOMAIN PROVISION

Before detailing the flaws in Respondent's eminent domain arguments, it is useful to recognize the parties' points of agreement.

The parties agree that New York's Public Use Clause was enacted by the People in 1821, and was interpreted by the courts without regard to its federal counterpart from 1821 to at least 1897. *See Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897) (incorporating Takings Clause of the Fifth Amendment), *abrogating Barron v. Mayor*, 32 U.S. 243, 250-251 (1833) (holding the Takings Clause inapplicable to the States of its own force).

Both sides agree that the People of New York have considered four changes to the Public Use Clause since it was first enacted and, as a result, that the People adopted exceptions to the public use restriction (1) for private roads in 1846, (2) for swamp drainage in 1894, and (3) for slum clearance and the building of low income housing in 1938, but (4) *rejected* the proposal to allow the use of eminent domain in service of a public *purpose* in 1967.

The parties agree that, prior to this case, no court *ever* considered the proposition that, given the unique history of the amendments to New York's Constitution and the courts' consistently strict interpretation of it until the turn of the last century, the New York Public Use Clause should not be interpreted in lock-step with the Supreme Court's interpretation of the Fifth Amendment. Indeed, prior to the filing of this case in 2008 and this Court's decision in *Aspen Creek Estates, Ltd. v. Brookhaven*, 12 N.Y.3d 735 (2009), no court or litigant had ever so much as hinted at the wide interpretive divide between the two.

Both sides agree that the New York Constitution is unique because its every word has been presented to and adopted by the People; that it was "framed deliberately and with care, and adopted by the people as the organic law of the State," and that full "effect should be given to" the "plain and unambiguous"

language of each "constitutional provision." *King v. Cuomo*, 81 N.Y.2d 247, 253 (1993) (citing *Settle v. Van Evrea*, 49 N.Y. 280, 281 (1872)).

We further agree (or at least Respondent does not deny) that, as a textual matter, the natural meaning of the term "public use" does not include "public benefit" or "public purpose."

A. "Public Use" Does Not Include the Subjective Desire For Aesthetic Improvement or Economic Development

Aside from denigrating Appellants' public use arguments as "utterly frivolous," Respondent's Brief ("Resp. Br.") at 3, 59, Respondent defends the constitutionality of its decision to accede to Ratner's request to seize Appellants' homes and businesses by: (1) arguing, in the face of overwhelming evidence to the contrary, that "[a]lmost as soon as the [public use] clause was adopted [in 1821], the courts of this State adopted a flexible understanding of 'public use,'" Resp. Br. at 65; (2) invoking Article XVIII's express constitutional grant of authority to wield the power of eminent domain in service of slum clearance, enacted by the people in 1938 (but otherwise eschewing the applicability of that Article), Resp. Br. at at 58; and (3) invoking the doctrine of *stare decisis*, *id.* at 60-63. None of these arguments succeeds.

1. Early Cases Did Not Adopt a "Flexible Understanding" of Public Use

Respondent attempts to counter the mountain of authority discussed in Appellants' Brief detailing the interpretive history of the Public Use Clause from its enactment in 1821 to its incorporation in 1897 and beyond. The best Respondent can muster are citations to three early cases recognizing that the Legislature may authorize the taking of private property in service of privately operated canals and railroads – with passage open to all – without running afoul of the Public Use Clause. Resp. Br. at 64-67 (citing *Rogers v. Bradshaw*, 20 John. 735 (Sup. Ct. of Judicature 1823) (sitting as an appellate court), *rev'g*, *Bradshaw v. Rodgers*, 20 Johns. 103 (Sup. Ct. of Judicature 1822); *Beekman v. Saratoga & Schenectady R.R. Co.*, 3 Paige Ch. 45 (Ct. of Chancery 1831); and *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9 (Ct. for Corr. of Errors 1837) (*en banc*)).[1]

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[1] Respondent, like Justice Eng below, misapprehends the nature of the opinions of the Court for the Correction of Errors (the predecessor to this Court) in *Bloodgood*. Resp. Br. at 66 n.15 (referring to "Justice Tracy's opinion" as the "lone dissenting opinion"); *Goldstein v. Urban Develop. Corp.*, 879 N.Y.S.2d 524, 532 (2d Dep't 2009) (stating that "petitioners quote the language of a dissenting Justice"). As we have explained (App. Br. at 41 n.16; *id.* at 46 n.17), there were four *concurring* opinions in *Bloodgood*, one by Chancellor Kent, one by Senator (not Justice) Edwards, one by Senator (not Justice) Maison, and one by Senator (not Justice) Tracy. This undeniable fact is readily confirmed by the last page of the opinion in *Bloodgood* (the opinion available on Westlaw has no page numbers), which lists each member of the Court voting with the majority for reversal of the judgment, including all four of the opinion writers. (The four members voting against reversal, *i.e.*, dissenting, were Senators Beardsley, Johnson,

(continued...)

It has never been in doubt that the courts allowed the taking of private property for the building of railroads and canals operated by common carriers and open to the public after (and even before) the enactment of the Public Use Clause in 1821.[2] Appellants have never made a contrary claim. Nor do *Rogers, Beekman* or *Bloodgood* in anyway undermine Appellants' core thesis that the courts of this State, when faced with "pure" Public Use Clause questions, uniformly interpreted the Clause strictly until well into the twentieth century, when this Court began to consider claims brought under the Fifth Amendment (or claims under both Constitutions) and adopted without analysis the Supreme Court's substantially relaxed, "flexible" approach. Respondent does not even attempt to reconcile its

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[1](...continued)
Jones and Livingston.) The last page of the opinion in *Bloodgood* also lists the names of each member of the Court who voted in favor of a resolution declaring the constitutionality of the condemnation of private property for the purpose of making railroads. All four of the opinion writers voted in favor of the resolution. The three members of the Court who voted against the resolution, *i.e.*, dissented, were Senators Lacy, Loomis and Works. Senator Tracy's opinion in *Bloodgood* is a *concurring* opinion, not a dissent.

[2] Respondent's citation to *Rogers v. Bradshaw*, 20 John. 735 (Sup. Ct. of Judicature 1823) (sitting as an appellate court), is misplaced because, although the opinion was rendered in 1823, the newly enacted Public Use Clause is not even mentioned in the opinion. Indeed, *Rogers v. Bradshaw* reversed the decision of the same court on *certiorari* of a Justice's judgment that did address the newly enacted Public Use Clause, but explained that it did not apply to the case at bar. *See Bradshaw v. Rodgers*, 20 Johns. 103 (Sup. Ct. of Judicature 1822).

assertion of "flexibility" with the scores of controlling and never repudiated cases cited in Appellants' Brief.[3]

Two cases – *In re Niagara Falls & W. R. Co.*, 108 N.Y. 375 (1888), and *Bradley v. Degnon Contracting Co.*, 224 N.Y. 60 (1918) – illustrate the point.

In *Niagara Falls*, as in *Rogers, Beekman* and *Bloodgood*, this Court acknowledged that a private railroad company could lawfully wield the power of eminent domain to take private property in service of "an ordinary railroad enterprise" when the rail line was open to all for transporting freight. But when this Court looked "beyond the formal documents, and the actual business proposed to be conducted [wa]s considered," it found that the railroad would "enable the

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[3] App. Br. at 40-54 (citing *In re Deansville Cemetery Assoc.*, 66 N.Y. 569, 21 Sickels 569 (1876); *In re Eureka Basin Warehouse & Manufacturing Co.*, 96 N.Y. 42, 48 (1884); *In re Niagara Falls & W. R. Co.*, 108 N.Y. 375, 385 (1888) ("expressions 'public interest' and 'public use' are not synonymous," the "establishment of furnaces, mills, and manufactures, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote, in a general sense, the public welfare," but "they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings"); *In re Mayor of City of New York*, 135 N.Y. 253, 259 (1892) ("There is . . .unquestionably a distinction between the use which is public and an interest which is public; and where" only an interest and not a use is presented, then "the right to take property *ad invitum* [without consent] does not exist"); *In re Split Rock Cable Road Co.*, 128 N.Y. 408, 416 (1898) (the "possible limited use by a few, and not then as a right but by way of permission or favor, is not sufficient to authorize the taking of private property against the will of the owner"); *Bradley v. Degnon Contracting Co.*, 224 N.Y. 60, 71 (1918) (holding that in order to "constitute a public use, it must be for the benefit and advantage of all the public and in which all have a right to share"); and *Holmes Elec. Protective Co. v. Williams*, 228 N.Y. 407, 424 (1920) (Andrews J., concurring) ("eminent domain [can]not be conferred upon one desiring to build an inn" because the "object for which the grant [of eminent domain] is made must have public utility, [and] must be one in which the public has a right to share impartially")).

corporation" to charge tourists to better see Niagara Falls. 224 N.Y. at 384-85. This Court held that profiting from tourism was "not a public purpose which justifies the exercise of the high prerogative of sovereignty invoked in aid of this enterprise." *Id.*

In *Bradley*, this Court held that in order to "constitute a public use, it must be for the benefit and advantage of all the public and in which all have a right to share," because public "use necessarily implies the right to use by the public." 224 N.Y. at 71 (citing exclusively New York precedents).

The only other case Respondent cites in ostensible support of its "flexibility" proposition is *In re Ryers*, 172 N.Y. 1 (1878). In *Ryers*, this Court considered a challenge to the constitutionality of the General Drainage Act of 1869 and held that, unlike other drainage acts previously declared unconstitutional under the Public Use Clause, the Act of 1869 did not suffer the same fate because "the object for which drainage may be had by its provisions is solely for the public health." 27 N.Y. at 7. This Court explained that there "is scarcely any one object that has been the subject of more enactments" than "the promotion and preservation of the public health," or "as to which more power is given to officials over the citizen and his property." *Id.* "Indeed, it is a recognized constitutional power of legislation, to provide for removing or abating that which, though at first

lawful, proper and unobjectionable, has afterwards become a public nuisance endangering the public health." *Id.*

As it did later in *New York City Hous. Auth. v. Muller*, 270 N.Y. 333 (1936), the *Ryers* Court carefully and forcefully limited the scope and applicability of its holding: "But we wish to be distinctly understood, that we sustain this act as constitutional *solely*" for "the preservation and promotion of public health," and "[w]e will be jealous of any attempt to swerve the powers given by it to the advantage of individuals." *Ryers*, 27 N.Y. at 8 (emphasis added).

The express limitation on this Court's holding in *Ryers* was enforced. Indeed, that is why courts after *Ryers* continued to strike down – on Public Use grounds – drainage legislation aimed at allowing individual property owners to drain land for agricultural purposes until an express provision for such legislation was added to the Constitution and adopted by the People in 1894. App. Br. at 53-53 (citing *Pulman v. Henion*, 64 Hun. 471, 19 N.Y.S. 488, 490 (5th Dep't 1892) (striking down the condemnation of private land in service of digging ditches to drain swamps, thus increasing the amount of arable agricultural land, as a violation of the Public Use Clause), *abrogated by Constitutional Amendment*, N.Y. Const. art. I, § 7 (1894)).

Properly understood, *Ryers*, like *Muller*, is a case about the government's power to respond to extraordinary threats to public health and safety – an inherent sovereign power that exists irrespective of eminent domain – and not, as Respondent would have it, as bestowing *carte blanche* for the forcible transfer of private property from one citizen to another.

2. True Slum Clearance Is a Public Use, But Addressing Blight Is Not

Respondent makes no effort to explain how the alleged "blighted conditions" it cites as its justification for the seizure of Appellants' homes and businesses is in any way analogous to the extreme conditions faced by this Court and the People of this State in 1936 and 1938 when *Muller* was decided and the Constitution was amended to permit the use of eminent domain for slum clearance. The authorization of the use of eminent domain in both *Muller* and Article XVIII was driven by a uniquely urgent need to rid the State of as pernicious and intractable a menace to public health, safety and welfare as has ever been confronted in the 400 years since Henry Hudson entered New York harbor.

a. Slum Clearance in *Muller*

As we have explained, App. Br. at 61-65, *Muller* was animated by the urgent need to address a profound and insidious threat to public health and welfare that had defied every ameliorative effort for over fifty years.

In *Muller,* decided in 1936, this Court declared that the "fundamental purpose of government is to protect the health, safety, and general welfare of the public." 270 N.Y. at 340. It found that there existed in New York "unsanitary or substandard housing conditions" that "cause an increase and spread of disease and crime and constitute a menace to the health, safety, morals, welfare, and comfort of the citizens of the state, and impair economic values"; that slums "are the breeding place of disease"; and that the "public evils, social and economic, of such conditions, are unquestioned and unquestionable." *Id.* at 338-339. Based on those findings, this Court held that slum clearance and rehabilitation "is a public benefit, and, therefore, *at least as far as this case is concerned*, a public use." *Muller* 270 N.Y. at 343 (emphasis added). This Court did not, as Respondent would have it, announce a new "flexible" rule that public use and public benefit would henceforth be constitutionally synonymous.

The Court in *Muller never* would have countenanced the taking of Appellants' homes and businesses based on "graffiti," "weeds" and

"underutilization." Instead, were the *Muller* Court faced with this case, it would declare that the purpose of the Project is "not a public purpose which justifies the exercise of the high prerogative of sovereignty invoked in aid of this enterprise." *Niagara Falls*, 108 N.Y. at 384-385. This Court should do the same.

b. Slum Clearance Under Article XVIII

Respondent asserts that the seizure of Appellants' homes and businesses for transfer to a wealthy and politically powerful real estate developer is justified by the express authorization of the use of eminent domain for slum clearance and low income housing contained in Article XVIII of the Constitution. In doing so, Respondent seems to be aware of the marked tension between its invocation of Article XVIII to justify the taking of Appellants' homes on the one hand, and its simultaneously contention that Section 6 of Article XVIII has nothing to do with this case.

Respondent cannot have it both ways. Respondent could claim, notwithstanding all evidence to the contrary, that the Project is truly aimed at eliminating slum conditions of the sort that drove the decision in *Muller* and the adoption of Article XVIII, which would, if true, justify the use of eminent domain. But that would trigger the requirements of Section 6 of Article XVIII, thus dooming the Project as currently configured. Alternatively, Respondent could

assert that Section 6 does not apply by acknowledging that the Project is not truly aimed at slum clearance of the sort that drove the decision in *Muller* and the adoption of Article XVIII, in which case Section 6 would not be triggered, but the use of eminent domain would not be justified.

The one thing that Respondent cannot plausibly claim – and that this Court should not hold – is that the taking of Appellants' homes and businesses is authorized by Section 2 of Article XVIII, but that Section 6 somehow does not apply.

That said, Respondent is correct that Article XVIII authorizes the use of eminent domain for the purpose of clearing slums. It does not follow, however, that Article XVIII authorizes the use of eminent domain for the purpose of "eliminating blighting conditions" as Respondent uses that term in this case. Indeed, like the members of the Court in *Muller* who would no doubt blanch at the thought that slum clearance, as they understood the term, could be equated with Respondent's "modern" notion of "blight," the People of this State who ratified Article XVIII would certainly be shocked to learn that they allegedly authorized the use of eminent domain in the circumstances of this case.

More importantly, however, there can be no doubt that the People of this State who ultimately adopted the specific language of Article XVIII vividly

understood the nature of the slum and housing issues that Article XVIII addresses. This point is driven home by the public information compiled in preparation for the 1938 Constitutional Convention and the record of the Convention itself, which reflects the open and notorious nature of the slum problem.

On July 8, 1937, the New York State Constitutional Convention Committee was created by the Governor and charged with preparing and publishing "accurate, thorough, and above all, impartial factual studies on the important phases of government, certain to be considered at the Constitutional Convention." *See* Constitutional Convention Committee, Reports and Studies ("Poletti Report"), Vol. I at v.[4] The Constitutional Convention Committee, chaired by Charles Poletti, produced a twelve-volume set of Reports and Studies that has become known as the Poletti Report.[5] Volume 6 of the Poletti Report was devoted to "Problems Relating to Bill of Rights and General Welfare." *See* 6 Poletti Report.[6]

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[4] *Available at* http://nysl.nysed.gov/uhtbin/cgisirsi/W9aCQWGHgU/NYSL/75160009/503/71222.

[5] *Available at* http://nysl.nysed.gov/uhtbin/cgisirsi/TtdWE27pFc/NYSL/186960007/503/70890.

[6] *Available at* http://nysl.nysed.gov/uhtbin/cgisirsi/jo04TTYjcF/NYSL/186960007/503/71240.

Consistent with its mandate, the Poletti Report compiled public facts that conveyed the scope and nature of the problem confronting the People of New York and the Convention delegates in 1938:

> Housing conditions are nowhere in the State as bad as in the city of New York. There, seventeen square miles of slums are counted. There, at least 2,000,000 persons are found residing in 64,000 old-law tenements which were classified by law as substandard thirty-seven years ago. And because of the cessation of dwelling construction by private enterprise for families of low income, the old-law tenement has come almost to be recognized as the permanent home of the city's lowest income group.

Id. at 636. The Poletti Report further detailed the effect of slums upon public health and welfare:

> In New York City between 1929 and 1931, 55 infants out of every 1,000 born die before reaching the first year. However, in . . . one of the city's worst slums, this figure was nearly doubled. In the matter of tuberculosis, the facts are equally deplorable. The city-wide rate is 71 new cases per 100,000 population; but in (the same slum area) there are more than 200 cases per 100,000 or nearly three times the city average. . . . [R]ickets, which is the result of two causes – lack of certain necessary elements in the diet and inadequate sunlight – is definitely a disease resulting from poor housing conditions. [A 5-year study of the New York A.I.C.P. reported that 3 out of 4 babies in the tenements have rickets.] . . . [L]owered resistence to disease is one of the dangerous results of life in the slums.

Id. at 637 (citing publication of New York City Housing Authority called *Wages, Slums and Housing*) (internal quotation marks omitted, brackets in original). The

slums had dramatically higher mortality rates as compared to non-slum areas that were attributable to "the preponderance of communicable diseases" and "fire":

> The death rates from all causes was 93 per cent higher in old-law tenements than in new-law tenements. From 1919 to 1934, inclusive, the death rate from tuberculosis was 129 per cent higher in old-law tenements; the death rate from diphtheria was 97 per cent higher; the death rate from typhoid fever was 55 per cent higher; from spinal meningitis it was 119 per cent higher. . . . From 1911 to December 15, 1936, the total number of deaths resulting from fire in old-law tenements was 1,138 deaths as against 271 deaths from fire in new-law tenements. These figures are particularly striking in view of the decline in the number of old-law tenements during the same period, from 603,379 to 513,407, while the number of apartments in new-law tenements increased from 235,715 to 907,554.

Id. at 638 (citing to Report from the New York City Housing Authority, dated Jan. 25, 1937) (internal quotation marks omitted).

The correlation between slums and crime was also well documented in the Poletti Report.

> A graphic picture of crime prevalence in the slum areas of New York City may be seen in the spot maps contained the survey, *The Slum and Crime* (1934), made for the New York City Housing Authority. The dots, each representing an arrest, are glaringly clustered in substandard areas – Harlem, East Side, Hell's Kitchen, Red Hook – while in the non-slum areas the dots are relatively few and scattered. The most common offenses reflected include disorderly conduct, gambling, intoxication, larceny, burglary, prostitution, assault, stealing, begging, peddling, juvenile truancy and home desertion, possession of narcotics and dangerous weapons.

Id. at 639. Finally, the Poletti Report documented the "Public Cost of Bad Housing" by quantifying the "economic burden of providing slum areas with fire and police protection, health and social charity services" that are "borne by taxpayers in local communities through the State." *Id.* at 640.

Given the confounding and intractable nature of the slum problem and the grave harm it caused in human and economic terms, it is not surprising that the delegates to the convention frequently adverted to the nature of the problem throughout the discussion of Article XVIII. Revised Record of the Constitutional Convention of the State of New York, 1938 ("Revised Record") at 1501, 1515, 1520, 1532-33 (disease, mortality, crime), 1543 (same), 1559, 1562-64, 1624 ("families are sleeping in shifts, three families to an apartment").[7]

Joseph Clark Baldwin, the Chair of the Housing Committee, explained the nature of the slum situation confronting the State when he introduced the article that became Article XVIII: "this a health proposition that effects the whole State." Revised Record at 1501.

Shortly after the proposed article was introduced, Baldwin responded to a question from Robert Moses concerning eminent domain.

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[7] *Available at* http://nysl.nysed.gov/uhtbin/cgisirsi/R2WYA08MRg/NYSL/322250008/503/87201.

> I know there has been a lot of land condemned; I know there have been splendid parks built by the gentlemen, and splendid highways and nobody pays more tribute to him than I do on that score. Of course, there has not been much land condemned for housing. There are 17[.5] square miles of slums in New York City right now that we are hoping to get the power to take over and re-erect, so that the people can live in houses which won't be damaging to the health of the community and won't require the expenditure of 70 percent of our budget on three-eighths per cent of our people.

Id. at 1515. During the same session, Baldwin implored his fellow delegates not to ignore the slum problem:

> I am pleading for 500,000 families who are living in stink pots, and it is all very well to say, "Let them go to the country. Let the city do something about it." The City can't do anything about it unless in the Constitution you make a provision which makes it possible, and give us a chance to do something about it. I am pleading for several million people, hundreds of thousands of children, and in spite of the splendid work done by Bob Moses, many of them still have to play in the streets, and the only playground that the city can provide for them is a sign, "This is a play street." I can take you through those places and show you buildings tumbling down, buildings in which people live where there is such a stench that you and I wouldn't even want to spend enough time to go through it and look around, and I can show you buildings where there are gangs of children going in and out, particularly boys going in and out of these vacant buildings, breeding the gang spirit, and I can take you and show you unhappy, desperate families.

Id. at 1520.

Later, another member of the Housing Committee, Harold Riegelman, comprehensively but concisely defined "Slum clearance" as "the redemption of areas where the physical condition of the housing and the neighborhood is so squalid, so demoralized, so lacking in light, ventilation, fire protection and sanitation, so overcrowded with buildings and people that the existence of such areas endangers the health, safety and morals of those living there and impairs the welfare of the entire community where such areas exist." *Id.* at 1531.

Riegelman's definition accurately captures the meaning of the phrase "clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas" – *i.e.*, slum clearance – as it was universally understood at the time Article XVIII was enacted by the people in 1938. It is also fully consistent with this Court's opinion in *Muller*.

The Reigelman definition, or something approximating it, should be adopted by the Court in this case. Any cases authorizing the use of eminent domain for slum clearance in a manner that conflicts with such a definition should be disavowed. *See*, *e.g.*, *Cannata v. City of New York*, 11 N.Y.2d 210 (1962) (sustaining the use of eminent domain to clear vacant underutilized land). Such cases are nothing more than unreasoned capitulations to the Supreme Court's

interpretation of a federal constitutional provision that is entirely independent of New York's Public Use Clause and Article XVIII.

Given the unique history of New York's Public Use Clause and the weight of 100 years of this Court's precedents interpreting it, this Court should reject Respondent's attempt to justify the taking of Appellants' homes and businesses as necessary merely to remove the "blighting influence" of an aesthetically displeasing, yet fully functioning, below-grade rail yard. Even if this Court were to accept every word in the "blight study" that Respondent purchased from AKRF, *see Develop Don't Destroy (Brooklyn) v. Urban Develop. Corp.*, 59 A.D.3d 312, 326-333 (1st Dep't 2009) (Catterson J. concurring), nothing contained in it bears the slightest resemblance to the Reigelman definition of slum clearance. Respondent's blight study makes no attempt to demonstrate that the physical condition of the housing and the neighborhood contained within the Project site "is so squalid, so demoralized, so lacking in light, ventilation, fire protection and sanitation, so overcrowded with buildings and people that" its very existence "endangers the health, safety and morals of those living there and impairs the welfare of the entire community." Revised Record at 1531. That is not even close to the case here.

B. The Doctrine of *Stare Decisis* Supports Appellants, Not Respondent

Respondent relies on the doctrine of *stare decisis*. Resp. Br. at 60-64. For several reasons, however, *stare decisis* poses no bar to the result Appellants urge.

To begin with, this Court has repeatedly observed that *stare decisis* is "not a mechanical formula of adherence to the latest decision, however recent and questionable." *People v. Bing*, 76 N.Y.2d 331, 338 (1990) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)); *see also People v. Damiano*, 87 N.Y.2d 477, 489 (1996) (Simons, J., concurring) (*stare decisis* "is not an inflexible doctrine" and "rules long settled but not recently revisited are always open to reexamination if there is some evidence that the policy concerns underlying them are outdated or if they have proved unworkable"). The doctrine provides no basis for reaffirming a prior decision when a court is "persuaded by the 'lessons of experience and the force of better reasoning.'" *Bing*, 76 N.Y.2d at 338 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-08 (1932)).

Moreover, this Court has made clear that the appropriateness of resting a decision on *stare decisis* is at its nadir where, as here, the Court is called upon to interpret the Constitution. This is so because when the Constitution has

been interpreted incorrectly, "legislative change is practically impossible." *Id.*; *see also People v. Hobson*, 39 N.Y.2d 479, 488-89 (1976) ("[T]he principle is well established that in cases interpreting the Constitution courts will, nevertheless, if convinced of a prior error, correct the error.").

Of particular importance to this case, this Court has squarely held that *stare decisis* has no applicability where, as here, the doctrine is invoked to protect a line of cases that themselves were not faithful to previously established authority. In *Hobson*, the Court held that a criminal defendant may not validly waive his right to counsel in the absence of the lawyer who has appeared on his behalf. This rule had initially been established in 1968 and reaffirmed on several occasions, but three cases from the early 1970s had disavowed it. The *Hobson* Court did not hesitate to overturn these subsequent cases, and to restore the original rule, notwithstanding the assertion of *stare decisis*, because the subsequent cases were not as thoroughly reasoned as the cases establishing the original rule. The Court framed the question this way: "Which is the *stare decisis*: The odd cases or the line of development never fully criticized or rejected?" 29 N.Y.3d at 487. Borrowing from Justice Frankfurter's opinion in *Helvering v. Hallock*, the Court answered the question as follows:

> Frankfurter, a stalwart for stability and systemic values in a jurisprudence, and no evanescent impulsive innovator, answered the question rather succinctly. In *Helvering v Hallock* (309 US 106, 119) he said: "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

39 N.Y.2d at 487. The Court continued:

> *Stare decisis*, if it is to be more than shibboleth, requires more subtle analysis. Indeed, the true doctrine by its own vitality should not, perversely, give to its violation strength and stability. That would be like the parricide receiving mercy because he is an orphan. The odd cases rode roughshod over *stare decisis* and now would be accorded *stare decisis* as their legitimate right, whether or not they express sound, good, or acceptable doctrine.

Id.; *see also id.* at 488 ("The nub of the matter is that *stare decisis* does not spring full-grown from a 'precedent' but from precedents which reflect principle and doctrine rationally evolved.").

The holding in *Hobson* could hardly be more applicable here. In the name of *stare decisis*, Respondent asks this Court to "respect" cases that themselves *sub silentio* overruled dozens of Public Use Clause cases decided between 1821 and the turn of the last century. Just as in *Hobson*, the more recent

cases are not nearly as "deliberately elaborated" as the long line of considerably more thoughtful Public Use Clause cases that the more recent cases effectively overruled without even saying so. It is the pre-incorporation Public Use Clause cases – those that rested solely on the well-established original meaning of the New York Constitution, before the strict doctrine became infected by the "flexible" approached espoused in federal cases such as *Fallbrook* – that constitute, as *Hobson* put it, "a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." 39 N.Y.2d at 487; *accord County of Wayne v. Hathcock*, 471 Mich. 445, 483 (2004) (overturning 1981 decision regarding the scope of Michigan's Public Use Clause, and restoring prior precedents interpreting the original meaning of the Clause, because the 1981 decision "itself was such a radical departure from fundamental constitutional principles").[8]

Respondent suggests that *stare decisis* is nonetheless appropriate because it has "relied on the law as it exists today" by "expend[ing] most of the $100 million appropriated by the Legislature" for the Project. Resp. Br. at 63-64.

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[8] In addition, *stare decisis* is even more inapplicable in this case given the Supreme Court's express suggestion in *Kelo v. City of New London* that States consider whether their Constitutions "plac[e] further restrictions on [their] exercise of the takings power" than the Fifth Amendment does. 545 U.S. 469, 489 (2005).

Respondent's invocation of "reliance" is both ironic and perverse. The reliance that drives the equities of this case is *Appellants'* reliance on their eminently reasonable belief that their longtime homes and businesses would not be forcibly condemned as "blighted" to enable a wealthy developer to erect a basketball arena. Surely any "disrupt[ion]" about which Respondent complains, *id.* at 64, pales in comparison to the disruptive effect the unconstitutional use of eminent domain will have on Appellants' lives.

C. This Case Squarely Presents the Question of Whether Economic Development Can Justify a Taking Under the State Constitution

Respondent argues that this case "does not require any consideration of whether 'economic development' is a constitutionally sufficient rationale for the use of eminent domain" under the New York Constitution, as the Supreme Court held in *Kelo v. City of New London*, 545 U.S. 469 (2005). Resp. Br. at 68. Respondent is wrong.

There is no question that Respondent has justified the taking of Appellants' homes and businesses on the ground that the Project will generate economic benefits. *See* A-69 (Determination and Findings) ("the Project will also provide . . . economic benefits," including job creation, and "net tax revenues"). On that basis alone, this case presents the question of whether Respondent's

attempt to forcibly appropriate Appellants' homes in order to obtain "economic benefits" can qualify as a public use under the New York Constitution.

Moreover, the *Kelo* question is squarely presented because, although Respondent claims that the amelioration of blight is the primary justification for seizing Appellants' homes, Appellants have demonstrated that the amelioration of "blight" cannot, on the facts of this case, justify the use of eminent domain under the either the Public Use Clause or Article XVIII.

Finally, even if this Court were to hold that the amelioration of minor "blight" can justify the taking of property under the New York Constitution, the question of whether this Court should adopt *Kelo*'s holding about economic development as a justification for the condemnation of property would still be presented because Appellants have demonstrated that Respondent's "blight" justification is pretextual.

D. There Is No Record From Which to "Compare" the Private Benefit to Ratner With the Alleged Public Benefit

Notwithstanding that the *Kelo* issue is squarely presented, this Court could defer for another day the resolution of the deep conflict between the Fifth Amendment, as interpreted by the Supreme Court, and the singular interpretive history of New York's Public Use Clause.

As we have demonstrated, App. Br. at 65-67, even this Court's "modern" cases squarely hold that the Public Use Clause precludes the use of eminent domain absent a finding that the public benefits of a contemplated taking outweigh the benefits bestowed upon private parties. *See Aspen Creek Estates, Ltd. v. Brookhaven*, 12 N.Y.3d 735, 736 (2009) (public benefit "not incidental or pretextual *in comparison with* benefits to particular, favored private entities") (emphasis added); *Waldo's, Inc. v. Village of Johnson City*, 74 N.Y.2d 718, 721 (1989) (agency determination should be upheld "so long as the public purpose is dominant" compared to the private benefit); *Denihan Enterprises, Inc. v. O'Dwyer*, 302 N.Y. 451, 458-59 (1951) (sustaining Public Use Clause challenge because "the public use" was "only incidental and in large measure subordinate to the private benefit conferred").

Thus, in order to reverse the decision below, this Court need not look any farther than Respondent's admission that it made *no attempt at all* – none – to compare the private benefit that will accrue to Ratner as a result of the taking of Appellants' properties to the public benefits it alleges. On remand, Respondent would be permitted to compile the necessary record, provide it to the public for comment, and then, armed with that information, assess the relative benefits as it

was required to do in the first instance. A remand for this purpose would be fully consistent with this Court's existing precedents.

Respondent admits that it did not perform a relative benefit analysis. Nevertheless, without any record from which to gauge the benefits that Ratner will receive, the Appellate Division purported to make the factual finding required by this Court's precedents – a finding that Respondent itself concededly could not have made. The Appellate Division found, in entirely conclusory fashion, that "it cannot be said that the public benefits which the Atlantic Yards project is expected to yield are incidental or pretextual *in comparison* to the benefits that will be bestowed upon the project's private developer." *Goldstein v. Urban Develop. Corp.*, 879 N.Y.S.2d 524, 526 (2d Dep't 2009) (emphasis added); *see also id.* at 535-36 (citing *Aspen Creek Estates, Ltd. v. Brookhaven*, 12 N.Y.3d 735, 736 (2009)). It is difficult to understand how the Appellate Division compared the relative benefits, and made this finding, when, as Respondent concedes, there is not a shred of information in the record that sheds any light on the nature or quantity of the "benefits that will be bestowed on the project's private developer."

Attempting to avoid the obvious application of *Denihan* and *Aspen Creek*, Respondent presents two basic arguments. First, Respondent contends that the constitutional requirement that relative benefits be compared does not apply

when a "project will serve manifest public uses such as the amelioration of blight." Resp. Br. at 69 (relying on *Yonkers Comm. Develop. Agcy v. Morris*, 37 N.Y.2d 478, 480 (1975)). Second, Respondent complains that the comparative benefit analysis imposed by *Denihan* and *Aspen Creek* is "totally unworkable" because it would require "a study to estimate the private developer's economic return," and "it is not easy to monetize the intangible benefits associated with a . . . project such as Atlantic Yards." *Id.* at 71. Both arguments fail.

First, there is no principled basis for exempting takings justified by blight from the constitutional requirement to weigh and compare benefits. Respondent's proposed rule – that no relative benefit analysis is necessary when a taking is justified by a "manifest public use," but *is* required when a lesser, "non-manifest" public use is invoked – enjoys no support in *Yonkers*. Moreover, Respondent offers no justification for distinguishing between manifest and non-manifest public uses, let alone does Respondent offer any guidance to assist courts, condemning authorities, or persons threatened by eminent domain in determining exactly what makes the "amelioration of blight" a "manifest public use."

So, for example, would the breaking up of a land oligopoly, *see Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984), be a "manifest public use,"

and thus exempt from the relative benefit rule, or just a regular public use, and thus governed by the rule? What rule applies when the "amelioration of blight" is determined to be a pretext?

Second, there is nothing particularly difficult or "unworkable" about analyzing the benefits that accrue to a private party and comparing them to the anticipated public benefits. Mathematical precision is not required. Nor could it be. Obviously, either or both sides of the analysis may accrue some benefits that are easily quantified and others that are not, and the condemning authority's analysis will be entitled to considerable deference. That, however, does not preclude any attempt at comparison, and it is no reason not to condone the wholesale failure to conduct any analysis at all.

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

As Appellants argued in their opening brief and to the court below, the Project challenged in this case runs afoul of the low income occupancy restrictions of N.Y. Const. art. XVIII, § 6 ("Section 6") because it is a self-proclaimed "slum clearance project" that "is state subsidized" and "contains a housing component." App. Br. at 74; *see also id.* at 3. Absent any one or more of those three characteristics, Section 6 would not apply.

Respondent's argument in response is three-fold. First, Respondent contends that the term "project" in Section 6 cannot include a slum clearance project, but rather encompasses only "low income housing projects." Second, Respondent claims that a project is not a "low income housing project" governed by Section 6 unless Respondent elects to define the Project as a housing project and its occupancy is restricted *exclusively* to persons of low income. Third, Respondent argues, for the first time, that the strictures of Section 6 do not apply to the Project because the hundreds of millions of dollars in cash and other benefits provided by the State do not constitute a "loan or subsidy" under Section 6. Respondent's argument fails on all three counts.

A. The Term "Project" In Article XVIII, Section 6 Includes Slum Clearance Projects

Appellants offered three basic observations in support of their argument that the plain language and structure of Article XVIII militate toward reading the word "project" in Section 6 to encompass slum clearance projects. Each of Respondent's counterarguments is wide of the mark.

First, Appellants argued that, given the clarity in Sections 1 and 2 that Article XVIII applies to slum clearance projects, it would make little sense to read the word "project" in Section 6 to apply narrowly to exclude one of the declared

purposes of Article XVIII. Respondent's only retort is that there is a conceptual difference between the grant of authority in Sections 1 and 2 and the limitation on that authority in Section 6. Resp. Br. at 92-93. That is true, but it hardly follows that this Court should ignore Sections 1 and 2 altogether in interpreting Section 6. Appellants never argued that the language of Sections 1 and 2 automatically *compels* the conclusion that the word "project" encompasses slum clearance projects. Appellants merely argued that the clarity of the slum clearance language in Sections 1 and 2, coupled with the lack of express definition in Section 6, make it significantly more likely that the word "project" in Section 6 includes slum clearance than that it means something else entirely.[9]

Second, Appellants argued that it would make little sense to read the word "project" to apply only to low rent housing projects, but not slum clearance projects, because Section 6 requires all "projects" to proceed according to a slum clearance plan, and housing projects – even low rent housing projects – do not necessarily require slum clearance. Respondent cites Public Housing Law § 3[14], Resp. Br. at 88, but that section only bolsters Appellants' reading because it

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[9] Respondent attempts to distance itself from the language of Sections 1 and 2 by emphasizing the conceptual differences between those Sections and Section 6, but those differences fatally undermine its argument that Section 1 "links" low rent housing to persons of low income but that the "the separate and distinct power to eliminate blight is open-ended." Resp. Br. at 83. Section 1 generally empowers the State to clear slums in an "open-ended" manner, but when the State *funds* or *subsidizes* such projects, the limitations expressly prescribed in Section 6 are triggered.

defines the word "project" to include not just low income housing but also all "stores, offices and other non-housing facilities as well as social, recreational or communal facilities."

Third, Appellants argued that the fact that the word "project" in Sections 3, 4 and 5 of Article XVIII undoubtedly includes slum clearance projects strongly supports reading the same word the same way in Section 6. Respondent concedes, as it must, that the word "project" in Sections 3, 4 and 5 includes slum clearance projects, but insists that the Court should nonetheless read the same word markedly differently in Section 6. Resp. Br. at 93-95. It has long been settled, however, that the same word cannot mean two entirely different things in the very same Article of the Constitution. *See Mangam v. City of Brooklyn*, 98 N.Y. 585 (1885) ("But where the same words are used in different parts of the same act, in connection with the same subject matter, it is contrary to settled rules of construction to give them different meaning, in the several places where they occur."); *see also*, *e.g.*, *Riley v. County of Broome*, 95 N.Y.2d 455, 466 (2000); *People v. Bolden*, 81 N.Y.2d 146, 147 (1993).[10]

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[10] Unable to cite a single New York case in which the same word has been interpreted two different ways in the same statute or Article of the Constitution, Respondent relies on a 1932 federal case, *Atlantic Cleaners & Dyers, Inc. v. United States*, 268 U.S. 427 (1932), which interpreted the government's jurisdiction to regulate "trade or commerce" differently in Sections 1 and 3 of the Sherman Act. To the extent this Court is inclined to follow federal rules of

(continued...)

Undoubtedly aware of the weakness of its position in this regard, Respondent adds that "Section 6 was added to Article XVIII as a separate amendment," Resp. Br. at 95, but this only underscores Appellants' point: When the drafters added Section 6 as an amendment and used the word "project," they were well aware that they had already used that word numerous times in Article XVIII to include slum clearance. Moreover, regardless of what the drafters believed, when *the People* ratified Article XVIII, they plainly had no basis to believe that the word "project" would be read to include slum clearance in Sections 3, 4 and 5 but to exclude slum clearance in Section 6.

Respondent also asserts that reading "project" in Section 6 to include slum clearance projects would "devolve[] into a tautology" because "any slum clearance by definition would involve a plan for slum clearance." Resp. Br. at 90. That is not true. When the State decides to fund or subsidize a project on the ground that a blighted area needs improving, it does not automatically follow that the mere decision to do so constitutes a full-fledged "plan or undertaking for the clearance, replanning and reconstruction or rehabilitation of a substandard and

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[10](...continued)
construction rather than its own, more recent federal cases confirm that the exception to the general rule recognized in *Atlantic Cleaners* is narrow and seldom invoked. *See Sullivan v. Stroop*, 496 U.S. 478, 484 (1990); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986).

unsanitary area or areas." This Court has never been called upon to decide – and this case does not require it to decide – how robust that requirement is and what exactly it entails, but the requirement that there be a specific plan or undertaking is not coextensive with the mere decision to clear a slum. Thus, the existence of the "plan or undertaking" requirement does not in any way imply that the word "project" refers to something other than slum clearance.

It bears repeating that the fact that the word "project" in Section 6 includes slum clearance projects does not in any way lead to the parade of horribles that Respondent conjures. The only reason why Respondent is in this mess is because it acquiesced in Ratner's eleventh-hour insistence that the Project be deemed a slum clearance project (a "land use improvement project") rather than a "residential project" (which it obviously is). Ratner had understandable reasons for deciding to call it a slum clearance project, relating to both the political hurdles of obtaining approval from numerous government agencies and the legal hurdles relating to the use of eminent domain. But Article XVIII makes clear that the decision to cite blight as the primary justification for taking Appellants' homes and businesses – coupled with the decision to solicit and accept huge State subsidies for the Project – has consequences for the ability to build market-rate housing.

B. The Project In This Case Is a "Project" Subject to The Occupancy Restrictions of Article XVIII, Section 6

Assuming for the sake of argument that the term "project" in Section 6 does not encompass slum clearance projects, the occupancy restrictions contained in Section 6 still apply, thus rendering the Project unconstitutional, because: (1) notwithstanding all evidence to the contrary, Respondent defines the Project as a slum clearance project; (2) the Project includes, at minimum, $100 million in loans or subsidies from the State; and (3) the Project, at least as sold to the public, contains a significant housing component generally, a substantial portion of which is "restricted to persons of low income as defined by law." N.Y. Const. art. XVIII, § 6. These three elements trigger Section 6.

If the strictures of Section 6 do not apply to this Project, they can apply to nothing. For if Section 6 means anything, it means that when the State subsidizes a Project that is self-defined (however inaccurately and for whatever ulterior motives) as a slum clearance project designed to create thousands of units of new housing, the occupancy of that housing "shall be restricted to person of low income." *Id.*

Respondent's only real response, aside from its new claim that the $100 million in State funding is not a "subsidy," *see* Point III(C), *infra*, is that (1)

"project" under Section 6 means *only* "low income housing project" and (2) a low income housing project is a project devoted *solely* to low income housing. This argument cannot be reconciled with the plain language of section 6, which unquestionably – and reasonably – imposed a low income occupancy restriction on all state-funded housing developments that are associated with slum clearance.

1. Respondent's Argument that "Project" Includes Only "Low Income Housing Projects" Must Be Rejected

Respondent's argument is easy to follow but difficult to defend. By Respondent's lights, the low income occupancy restriction provision of Article XVIII, Section 6 – the *raison d'etre* of the entire section – would apply *only* to "low income housing projects," which Respondent defines as projects that are devoted *exclusively* to low income housing. Thus, so the argument goes, because the Project here is not devoted exclusively to low income housing, it cannot be subject to the command of Section 6 that the "occupancy of any such project shall be restricted to persons of low income as defined by law." This substantial narrowing of section 6 would render the low income occupancy restriction superfluous and thus void.

Section 6 is plainly intended to limit the otherwise broad spending power granted to the Legislature when it is spending the public's money "for low

rent housing" "or for the replanning, reconstruction and rehabilitation of substandard and insanitary areas," "or for both." N.Y. Const. art. XVIII, § 1. To have any meaning whatsoever, the low income occupancy restriction found in Section 6 must apply not only to low rent housing (for what is low rent housing other than housing for low income occupants?) but also to any public spending on slum clearance projects where housing units are developed. Were the Court to adopt Respondent's view – that the low income occupancy restriction applies only to projects that are exclusively low income housing – it would violate a basic tenet of constitutional and statutory interpretation: that a law should never be interpreted in a manner that renders the plain text duplicative or meaningless. *See Sisters of St. Joseph v. City of New York*, 49 N.Y.2d 429, 440 (1980) (declining to interpret statute that would "render meaningless" the balance of the provision).

It is not surprising that Respondent is forced to adhere to such an untenable position – that "project" in Section 6 means an exclusively low income housing project. It is the only way Respondent can avoid Section 6 because:

- if "project" in Section 6 means "slum clearance project," Respondent loses because it has applied that label itself. *See* Point III(A), *supra*;
- if "project" in Section 6 means "housing project," Respondent loses because it cannot deny that housing is a substantial component and professed attribute of the Project that boasts its desire to create

between 5,325 and 6,430 units of housing. *See* Point III(B)(2), *infra*; and

- even if "project" in Section 6 means low income housing project, Respondent loses because it cannot deny that the Project claims it will provide a significant number of low income housing rentals – 2,250 out of 4,500. *See* Point III(B)(3), *infra*.

By necessity then, Respondent is left defending the indefensible – an interpretation that nullifies an entire section of the New York Constitution.

2. Because the Project Provides Housing, It Is a "Project" Within the Meaning of Section 6

Insofar as "project" in Section 6 means something other than "slum clearance project," a plausible, albeit imperfect, alternative consistent with the text and plain meaning of the text is not "low income housing project" as Respondent urges, but rather a project with a housing component. This flows from the word "occupancy" in the third and final sentence of Section 6.

Recall that the first sentence of Section 6 provides that no "loan or subsidy shall be made by the state to aid a project unless" it "is in conformity with a plan or undertaking for the clearance, replanning and reconstruction or rehabilitation" of a slum area. N.Y. Const. art. XVIII, § 6. If nothing else, the first sentence establishes that Section 6 applies where (1) the State provides loans or subsidies to a project that (2) is aimed at slum clearance.

The third and final sentence – the occupancy restriction – provides that the "occupancy of any such project shall be restricted to persons of low income as defined by law and preference shall be given to persons who live or shall have lived in such area or areas." *Id.* The natural meaning of the term "occupancy" implies habitation of a dwelling by a natural person. The fact that the term is employed in a constitutional article devoted to addressing the scourge of slums by removing the slum occupants and providing alternative, non-slum dwellings confirms that natural understanding. Indeed, it is difficult to imagine that the persons responsible for enacting Article XVIII – the People – could have possibly understood "occupancy" to mean anything other than habitation of a dwelling by a natural person.

Respondent's attempt to argue that "occupancy" really means "commercial occupancy, manufacturing occupancy and other forms of non-residential occupancy" by citing to landlord-tenant cases from the 1930s and 1940s, Resp. Br. at 98 n.23, is wholly unpersuasive. It also ignores the rather obvious fact that the overwhelming majority of the people who ratified Article XVIII were ordinary citizens, and not landlord-tenant lawyers.

Because "occupancy" unquestionably adverts to habitation of dwellings by natural persons, the "occupancy" restrictions can only apply where residential housing is combined with slum clearance and subsidized by the State.

Despite the fact that the Modified General Project Plan, as approved by Respondent in December 2006 (superseded on September 17, 2009), contemplated the development of between 5,325 and 6,430 units of housing, including 2,250 units of affordable housing, Respondent argues that the Project is not a housing project at all, much less one for the creation of low income housing. The sole basis for this argument appears to be that Respondent chose to describe the Project as a slum clearance project, which means that is what it is, irrespective of whether the creation of housing is also a purpose, indeed the dominant purpose, of the Project. That election, Respondent argues, absolves it from any obligation that might attach to a project for the creation of housing, no matter how much housing it includes. This argument appears to flow, at least in part, from a misreading of *Murray v. LaGuardia,* 291 N.Y. 320 (1943), Resp. Br. at 93, and the belief that the strictures of Section 6 can be avoided by a simple label even though a project combines State funds, slum clearance and housing and would thus otherwise be subject to Section 6. *See also* Point III(4) below.

The ESDC approved two alternate plans for the development of the Project, a "residential plan," and a "commercial plan." Under the "residential plan," 80% of the total area developed would be for housing. Under the "commercial plan," 66% of the area developed would be for housing. (A-639). Under either plan, housing is the most significant component of the Project, between two-thirds and four-fifths.

Nonetheless, Respondent chose to describe the Project not as a housing or "residential project" but as a "mixed use project" with a "civic" component (the arena) and a "land use improvement" component (slum clearance and economic development). This was no doubt done because, under Respondent's own enabling legislation, a "residential project," in accordance with Article XVIII, is defined as one which is "designed and intended for the purpose of providing housing accommodations for persons and families of low income."

In an attempt to avoid its statutory and constitutional constraints, Respondent applied a label that does not fit. Respondent cannot avoid the command of the Constitution by disingenuous nomenclature. Whether Respondent chooses to label the Project something other than what it is does not change the fact that the Project is unquestionably and substantially aimed at providing housing.

3. The Project Is a Low Rent Housing Project

Assuming, *arguendo*, that the term project under Section 6 does not mean slum clearance project, *but see* Point III(A) above, or if not a slum clearance project, a project that provides housing, *but see* Point III(B)(2) above, and only means low income housing project, as Respondent contends, the occupancy restrictions of Section 6 still apply here because the Project *is* a low income housing project.

As explained in Point III(B)(1) above, for purposes of Section 6, "project" cannot mean a project devoted exclusively to low income housing because that would render Section 6 utterly meaningless. Accordingly, insofar as Section 6 applies only to low income projects, that term must, at minimum, include a project that provides some housing for low income persons, as the Project at issue here most certainly does.

The Project, as approved before that approval was superseded on September 17, 2009, contemplates the construction of 4,500 rental units. Of those, half were to be "affordable to low-, moderate- and middle-income families." (A 951-2). The "affordable" units were to be made available to families earning between 30% and 160% of the Area Median Income (between $21,270 and

$113,440 per year at the time of approval). The rents were to be based on income. (A-640).

Housing catering to a range of incomes has repeatedly been upheld as falling under the definition of "low rent housing" as that term is used in Article XVIII. Mitchell-Lama developments for people in middle income ranges have been deemed to satisfy Article XVIII. Low rent housing is acceptably defined as housing for those who cannot "pay enough to cause private enterprise in their municipality to build a sufficient supply of adequate, safe and sanitary dwellings." *Minkin v. City of New York,* 24 Misc.2d 818 (Sup. Ct. N.Y. Co. 1960), *aff'd* 10 A.D.2d 830 (1st Dep't 1960). *See also Davidson v. City of Elmira,* 180 Misc. 1052, 1057, *aff'd* 267 A.D. 797 (3d Dep't 1943) (the terms "'persons of low income' and 'low-rent housing' are relative terms and matters of judgment").

Fifty percent of the Project's rental housing component meets the definition of "low rent housing." Yet Respondent argues that this is not a "low rent housing project." Again, this is based solely on ESDC's own decision to label this project as a slum clearance project, a decision that it is not empowered to make without violating Article XVIII.

4. *Murray v. LaGuardia* Does Not Support Respondent's Interpretation of Section 6

Respondent suggests that *Murray* "supports the Appellate Division's conclusion" in this case. Resp. Br. at 93. No fair reading of *Murray* supports this conclusion. In *Murray*, this Court rejected an Article XVIII, Section 1 challenge to the Redevelopment Companies Law brought by a slum owner who resisted the condemnation of his property on the ground that Article XVIII did not permit the City to clear slums unless it built low income housing. The slum owner argued that the Law could not permit the City to use eminent domain to clear and redevelop slums without also requiring the erection of low income housing in place of the cleared slum dwellings. The project at issue in the *Murray* was Stuyvesant Town – a market-rate housing development to be built by a private developer using private funds on a vast slum cleared by the City in accordance with the express grant of eminent domain power contained in Article XVIII.

In upholding the Law, this Court noted that Article XVIII, Section 1 authorizes legislation aimed at either slum clearance, low rent housing, or both, but that both objectives need not be present in order to satisfy Article XVIII. *Murray*, however, did not involve state funds or subsidies of any kind. As this Court noted in a later case, sustaining the owner's policy of excluding tenants

based on race: "Stuyvesant Town is a private corporation, all of its stock and debentures being owned and all of its working capital having been provided by Metropolitan [Life Insurance Company]. The entire cost of acquisition of the land in the project area and of the construction project has been advanced by Metropolitan." *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 521 (1949).

Because no State funding was involved in *Murray*, Article XVIII, Section 6, which expressly applies only when State loans or subsidies are involved, was not implicated or even mentioned by the parties or this Court. This Court did not consider whether the occupancy restrictions of Section 6 could be avoided, simply by calling a housing project a "slum clearance project" when housing is its main benefit. It is this issue of first impression that now squarely confronts this Court.

C. The Project Has Received and Is Slated to Receive Substantial State Loans or Subsidies

The Modified General Project Plan approved by Respondent describes three forms of State funding for the Project: a legislative appropriation of $100 million for infrastructure costs (including the creation of a platform used to support the "residential village"), state tax exemptions for the development of affordable housing, and the potential use of state affordable housing bonds. (A.

932, 939, 942, 944-945, 946). Respondent nonetheless argues that the funds that have been or may be used to finance the Project are not state "subsidies" within the meaning of Article XVIII, Section 6. Thus, they argue, the occupancy restrictions are not triggered.

This argument can be parsed into two separate but equally unavailing sub-arguments. The first is that because the Legislature allegedly has the inherent power to appropriate funds for a wide variety of public uses, Article XVIII can be ignored altogether. The second is that the word "subsidy" in Section 6 neither includes cash appropriations nor, by implication, tax exemptions or state housing bonds. Both arguments lack merit.

1. The Funds Appropriated for the Project Were Authorized By Article XVIII

The Project is an Urban Development Corporation project governed by the terms of the Urban Development Corporation Act ("UDC Act") which provides that projects for the purported elimination of blight are undertaken "pursuant to and in accordance with Article XVIII of the Constitution." UDC Act § 6253(6)(c). Respondent chose to justify this project as a slum clearance project and it is constrained by its enabling legislation to adhere to the provisions of Article XVIII.

Even if Respondent's own enabling legislation did not clearly invoke Article XVIII, an examination of the history of Article XVIII and its original purpose reveals why funding for slum clearance projects is "pursuant to" Article XVIII. Contrary to Respondent's assertions, the New York State Legislature does not have *carte blanche* to fund any project that is arguably for the public good. Rather, it is constrained by the Gift Clause contained in Article 7, Section 8 of the New York State Constitution.

The Constitution's Gift Clause prohibits the State from giving funds "to or in aid of any private corporation or association, or private undertaking." N.Y. Const., art. 7, § 8. Article XVIII was promulgated in order to resolve any constitutional ambiguity around state funding for public-private partnerships for low rent housing and slum clearance projects. It was enacted to ensure that the State could fund those projects without running afoul of the Gift Clause. *See generally* STATE OF NEW YORK, TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION, HOUSING, LABOR, NATURAL RESOURCES, NO. 9 (1967), at 27. So, far from having the inherent authority to fund any project, the state is explicitly empowered by Article XVIII to fund legitimate slum clearance projects that might be construed as being in aid of a private corporation notwithstanding the limitations imposed by the Gift Clause.

It is particularly ironic that Respondent makes reference to the Erie Canal in support of its argument that the State has unlimited authority to fund "public facilities." Resp. Br. at 100. For it is the State's accumulation of vast debts in connection with financing the construction of the Erie Canal that was the main impetus for fiscal reform at the Constitutional Convention of 1846, including the adoption of the original Gift Clause prohibiting state loans in aid of private enterprise. *See* CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 721 (1905) at 45-46, 165-182;[11] *see also Wein v. State*, 39 N.Y.2d 136 (1976) ("the prohibition against giving or lending the state's credit was prompted largely by the extensive and highly speculative subsidizing in the first half of the nineteenth century of private railroad and canal companies").

In short, since 1846, the State's ability to fund projects "in aid of" private enterprise has been limited. *See People v. Ohrenstein* 77 N.Y.2d 38, 50-51 (1990). Article XVIII provides a justification for funding that may otherwise be prohibited and is invoked in the UDC's enabling legislation by necessity. Respondent's argument that the State's appropriation of $100 million is made "pursuant to constitutional authority unrelated to Article 18" is just plain wrong.

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[11] *Available at* http://purl.org/net/nysl/nysdocs /1337955.

2. The Funds Contemplated for the Project are "Subsidies" Within the Meaning of Article XVIII

The State appropriation for infrastructure costs associated with the Project must be made pursuant to Article XVIII by the terms of Respondent's enabling legislation and the constraints imposed by the Gift Clause. Respondent's arguments that they are not "subsidies" within the meaning of Article XVIII are therefore inapplicable.

Moreover, Respondent neglects to address the other contemplated forms of state funding, most notably, the potential for state housing subsidies. (A. 932) ("The affordable units are expected to be . . . financed through tax-exempt bonds provided under existing City and State housing programs.") This ambiguity, in and of itself, should be sufficient to declare that the Project Plan, as approved, violates Article XVIII, Section 6. The Plan implicitly approves the provision of State housing funds for an Article XVIII project that does not comply with Section 6.

D. Section 10 Does Not Undermine Appellants' Argument

Respondent repeatedly points to the following language in Article XVIII, Section 10 in ostensible support of its argument that Article XVIII, Section 6 does not apply to the Project: "[t]his article shall be construed as extending

powers which otherwise might be limited by other articles of this constitution." In pointing to this section, they misinterpret its original meaning and conveniently omit a qualifying clause that renders their argument null.

The main reason why Article XVIII was promulgated was to ensure that the State had the power to issue grants and loans in furtherance of housing and slum clearance projects, even if those projects were "in aid of a private undertaking." It was an attempt to enshrine an exception to the Gift Clause in the Constitution, but only for the purposes of providing low rent housing for low income people. The "other articles" alluded to in Section 10 are the City and State Gift Clauses.

This explanation for the language that appears in Section 10 is further bolstered by the language that Respondent purposefully omits. Section 10 states: "nothing in this article contained shall be deemed to authorize or empower the state, or any city, town, village or public corporation to engage in any private business or enterprise other than the building or operation of low rent dwelling houses for persons of low income as defined by law." N.Y. Const. art. XVIII, § 10. Accordingly, Section 10 simply carves out an exception to the general prohibition against public funding for private benefit. It does not create a loophole for Respondent to escape the Constitution's directive in Section 6.

IV. APPELLANTS' CLAIMS ARE NOT TIME BARRED, NOR ARE THEY BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL

A. Appellants Properly and Timely Asserted State Law Claims in Federal Court Pursuant to 28 U.S.C. § 1367

On December 8, 2006, during the pendency of the federal proceeding, Respondent issued its Final Determination. On January 5, 2007 – less than 30 days after the issuance of the Final Determination – Appellants amended their federal complaint to assert a state law claim, as a supplemental claim pursuant to 28 U.S.C. § 1367, challenging the Final Determination pursuant to EDPL § 207(A). *See* 2007 WL 575830 (E.D.N.Y.) (Appellants' amended complaint). Because the EDPL claim was asserted less than 30 days after the issuance of the Final Determination, it complied with the 30-day time limit prescribed in EDPL § 207(A).

There is no question that Appellants were entitled to assert their EDPL claim as a supplemental claim in federal court, and were not required to assert it in a parallel state court proceeding. Congress provided in 28 U.S.C. § 1367 that where a federal court has original jurisdiction over a federal claim (such as Appellants' federal Public Use Clause claim), the federal court likewise has supplemental jurisdiction over:

> *all other claims* that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a) (emphasis added). This language confirms that the scope of a federal court's supplemental jurisdiction over related state claims is broad. Once there is federal jurisdiction over a federal claim, there also is federal jurisdiction over "all other" claims that are sufficiently "related to" the federal claim that they "form part of the same case or controversy."

Lest there be any confusion about whether section 1367(a) means what it says, the United States Supreme Court squarely so held in *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156 (1997). *City of Chicago* involved a decision by the Chicago Landmarks Commission prohibiting a developer from demolishing two landmarked mansions. The developer sued the Commission in state court, claiming that the Commission's decision violated both the Takings Clause of the federal Constitution and the Illinois Administrative Review Law, which provides for so-called "on-the-record" judicial review of state administrative agency decisions. The Commission removed the entire case to federal court, contending that the federal court has supplemental jurisdiction under section 1367(a) over the state claim for administrative review of the Commission's

determination. The Seventh Circuit held that the case should be remanded back to state court for lack of subject matter jurisdiction, but the Supreme Court reversed. Relying on the plain language of section 1367, the Supreme Court concluded that the developer's unsuccessful efforts to obtain demolition permits – the focus of its state claim for administrative review – did "form part of the same case or controversy" as its federal Takings Clause claim. *Id.* at 164-65. As the Court stressed, "[t]hat is all the statute requires to establish supplemental jurisdiction." *Id.* at 165.

The Court then went a significant step further, considering and expressly rejecting the argument that, for policy reasons, section 1367 should be read to exclude claims for so-called "on-the-record review" (*i.e.*, deferential review without additional court factfinding) of a state administrative agency's action. Focusing once again on the plain language of the supplemental jurisdiction statute, the Court held that the statutory language precluded any such exception:

> There is nothing in the text of § 1367(a) that indicates an exception to supplemental jurisdiction for claims that require on-the-record review of a state or local administrative determination. Instead, the statute generally confers supplemental jurisdiction over "all other claims" in the same case or controversy as a federal question, without reference to the nature of review.

Id. at 169; *see also id.* at 171 (noting the "absence of indication in § 1367(a) that the nature of review bears on whether a claim is within a district court's supplemental jurisdiction"). The Court then went on to hold that although Congress is free to decree otherwise, courts are not free to craft a jurisdictional exception that does not appear in the statute:

> Congress could of course establish an exception to supplemental jurisdiction for claims requiring deferential review of state administrative decisions, but the statute, as written, bears no such construction.

Id. at 169.

Although EDPL § 207(B) states that the "jurisdiction of the appellate division" over EDPL claims "shall be exclusive," that language could not have been intended to, and did not, strip federal courts of their supplemental jurisdiction over EDPL claims pursuant to 28 U.S.C. § 1367. As the United States Court of Appeals for the Second Circuit observed in *TBK Partners v. Western Union Corp.*, 675 F.2d 456 (2d Cir. 1982), the United States Supreme Court has long recognized that a state is powerless to dictate the limits of federal court jurisdiction, even over claims that the state itself created:

> Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties

> is a matter of course, and the jurisdiction of the court, in such case, is not subject to State limitation.

Id. at 460 n.3 (quoting *Railway Co. v. Whitton's Administrator*, 80 U.S. (13 Wall.) 270, 286 (1872)). Indeed, the Supreme Court recently (and unanimously) reaffirmed this bedrock principal of federal Supremacy Clause jurisprudence in *Marshall v. Marshall*, 547 U.S. 293, 298-99, 313 (2006) (observing that courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given," and holding that federal jurisdiction "is determined by the law of the court's creation and cannot by defeated by the extraterritorial operation of a state statute") (quotations omitted). Accordingly, whatever the Legislature intended by the "exclusive" jurisdiction language in section 207(B), there is no doubt that Appellants' EDPL claim was timely and properly asserted in federal court pursuant to 28 U.S.C. § 1367.[12]

[12] The best reading of the "exclusive" jurisdiction language in section 207(B) is that it merely makes clear that EDPL challenges must be brought "exclusive[ly]" in the Appellate Division, as opposed to in the Supreme Court, *to the extent that they are brought in state court. See Brown v. City of Memphis*, 440 F. Supp. 2d 868, 878 n.5 (W.D. Tenn. 2006) (reading similar exclusive jurisdiction language in a Tennessee statute "to pertain to the relationship between the state circuit courts and the general session courts," which has "no bearing on federal court jurisdiction"). In any event, assuming *arguendo* that the Legislature intended to strip the federal courts of jurisdiction to exercise supplemental jurisdiction over EDPL claims, *Marshall v. Marshall* and the long line of cases on which it was based confirm that the Legislature could not constitutionally do so.

B. The Federal Court's Dismissal of Appellants' State Law Claims "Without Prejudice" Does Not Give Rise to Collateral Estoppel

Throughout its brief, Respondent repeatedly suggests that Appellants' claims herein are precluded by the doctrine of "collateral estoppel." Respondent's preclusion argument is frivolous.

Once the federal court concluded that Appellants' federal claims should be dismissed on their merits, the federal court exercised its discretion to decline to adjudicate Appellants' state claim pursuant to 28 U.S.C. § 1367(c)(3) (empowering federal courts to decline to exercise jurisdiction over state law claims where all of the federal claims have been dismissed). In doing so, the federal court expressly dismissed Appellants' EDPL claim "*without prejudice to its being re-filed in state court*." *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 291 (E.D.N.Y. 2007), *aff'd*, 516 F.3d 50, 56 (2d Cir. 2008) (affirming "the judgment of the district court dismissing the federal claims with prejudice and *the state claim without prejudice*"), *cert. denied*, 128 S. Ct. 2964 (June 23, 2008) (emphasis added).

This Court has repeatedly reaffirmed that the dismissal of a claim "without prejudice" does not give rise to *res judicata* or collateral estoppel in a subsequent action. *See*, *e.g.*, *Landau, P.C. v. LaRossa, Mitchell & Ross*, 11

N.Y.3d 8, 13 (2008) (holding that "a dismissal 'without prejudice' lacks a necessary element of *res judicata* – by its terms such a judgment is not a final determination on the merits"); *Parker v. Blauvelt Vol. Fire Co.*, 93 N.Y.2d 343, 349 (1999) (holding that "it would be inequitable to preclude a party from asserting a claim under the principle of *res judicata*" where the claim was previously dismissed "without prejudice"); *City of New York v. Caristo Constr. Corp.*, 62 N.Y.2d 819, 820-21 (1984) (holding that "[t]he explicit 'without prejudice' provision" in "the Federal action" "save[s] the claim from [claim] preclusion"); *Miller Manuf. Co. v. Zeiler*, 45 N.Y.2d 956, 958 (1978) (holding that the defendant's collateral estoppel argument was "belied" by the fact that the prior judgment dismissed the claim "without prejudice"). Because Appellants' EDPL claim was not adjudicated on the merits, Appellants are not precluded from asserting their state law claims here.

C. Appellants Timely Reasserted Their State Law Claims in the Appellate Division Pursuant to CPLR 205(a)

Once the federal court dismissed Appellants' EDPL claim without prejudice, CPLR 205(a) afforded Appellants six months in which to re-commence their state law claims in state court. Section 205(a) provides that where a claim is "timely commenced" but subsequently is "terminated in any other manner than by

a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits," the plaintiff may "commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination."

Section 205(a) rests upon the "sound premise" that a plaintiff "is entitled to have one adjudication of the substance or merit of his cause where he has initiated a suit in time." *Carrick v. Central General Hosp.*, 51 N.Y.2d 242, 252 (1980). As Justice Cardozo wrote nearly a century ago in *Gaines v. City of New York*, 215 N.Y. 533 (1915), section 205(a) has "roots in the distant past" traceable to the English Limitation Act of 1623, and its "broad and liberal purpose is not to be frittered away by any narrow construction." *Id.* at 537-39; *see also Morris Investors, Inc. v. City of New York*, 69 N.Y.2d 933, 935-36 (1987) (reaffirming that section 205(a) "is to be liberally construed"); *Hakala v. Deutsche Bank AG*, 343 F.3d 111, 115 (2d Cir. 2003) (CPLR 205(a) "serves a vitally important remedial function").

Appellants plainly have satisfied all of the elements of section 205(a)'s tolling provision. Appellants timely commenced their EDPL claim in federal court pursuant to 28 U.S.C. § 1367(a). The federal court dismissed

Appellants' EDPL claim "without prejudice," which did not constitute "a final judgment upon the merits" or implicate any of the other exceptions to CPLR 205(a). Less than six months after the federal court dismissal became final, Appellants recommenced in this proceeding state law claims based upon "the same transaction or occurrence." *See*, *e.g.*, *Stylianou v. Incorporated Village of Old Field*, 23 A.D.3d 454, 457 (2d Dep't 2005) ("Where a federal court, upon dismissing all federal law causes of action against a defendant, also dismisses pendent state law claims against that defendant for want of subject matter jurisdiction, a plaintiff is not barred from commencing, within six months of the dismissal, an action in state court based on the same set of transactions or occurrences.") (collecting cases).

Notwithstanding that Appellants have satisfied each of the requirements of CPLR 205(a), and notwithstanding the case law confirming that section 205(a) "is not to be frittered away by narrow construction," Respondent asserts that section 205(a) should not apply, and that Appellants' claims should be dismissed as untimely. Respondent's arguments have no merit.

1. CPLR 205(a) Is Not Superceded by EDPL §§ 703 or 705

Respondent first argues that CPLR 205(a) is superceded, and is wholly inapplicable in EDPL proceedings, by virtue of EDPL §§ 703 and 705. Resp. Br. at 46-48. That is false.

By its terms, EDPL § 703 expressly confirms that the CPLR *does* apply "to practice and procedure in proceedings under [the EDPL]." The only caveat to this rule is that the CPLR does not apply to the extent that there are "other procedure[s] specifically provided by [the EDPL]." The question, therefore, is whether the EDPL prescribes a specific tolling rule when a timely-filed EDPL claim is dismissed without prejudice. Because the EDPL prescribes no such procedure, CPLR 205(a) applies. *See New York State Urban Dev. Corp. v. Nawam Entertainment Corp.*, 57 A.D.3d 249, 251 (1st Dep't 2008) ("Absent a provision in the Eminent Domain Procedure Law on the subject of costs, CPLR 8101 governs.").

The same flaw is fatal to Respondent's invocation of EDPL § 705, which merely makes clear that the specific provisions of the EDPL trump "any inconsistent provisions of law." Thus, if the CPLR conflicted with a provision of the EDPL prescribing a tolling provision for timely-filed claims that are dismissed without prejudice, then section 705 would require that the EDPL procedure trump

the inconsistent CPLR procedure. *See Boyajian v. State of New York*, 293 A.D.2d 560, 561 (2d Dep't 2002) ("To the extent that is a *conflict* between two statutes, the EDPL provisions control.") (emphasis added). Where there is no such inconsistency or conflict, however, neither section 703 nor 705 applies.[13]

Notably, Respondent's argument that CPLR 205(a) does not apply to EDPL proceedings would lead to the untenable result that a plaintiff challenging a condemnation would have *no remedy whatsoever* if his or her petition were dismissed on technical grounds without prejudice to refiling. Given the dearth of evidence that the Legislature intended such a harsh result, and given the liberal construction that section 205(a) warrants, Respondent's argument should be rejected.

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[13] Respondent relies on *Brody v. Village of Port Chester*, 345 F.3d 103 (2d Cir. 2003), but that case is inapposite because there was a *direct conflict* between the EDPL (which requires that constitutional claims must be raised in an EDPL Article 2 proceeding and may not be raised in an EDPL Article 4 proceeding) and section 103(c) of the CPLR (which generally permits courts to refrain from dismissing claims that are "not brought in the proper form"). *Id.* at 115-16. Similarly, *Biz-Biz Corp. v. State*, 29 A.D.3d 720 (2d Dep't 2006), merely held that the service provisions in the EDPL trump the conflicting (and more restrictive) service provisions in the Court of Claims Act. Because the CPLR 205(a) does not conflict with any specific EDPL provision governing the refiling of a claim that has been dismissed without prejudice, *Brody* and *Biz-Biz Corp*. are irrelevant.

2. Appellants' Federal Court EDPL Claim Was Not Based Solely on Federal Law

Attempting to manufacture a collateral estoppel argument where none exists, Respondent argues that the federal courts' dismissal of Appellants' EDPL claim was not really "without prejudice" because, according to Respondent, Appellants' federal court EDPL claim arose solely under federal law (and thus effectively was dismissed with prejudice along with Appellants' federal claims). Resp. Br. at 48-49. Once again, Respondent is wrong.

Appellants' federal court amended complaint is clear that their EDPL claim was not based solely on federal law, but rather included an underlying state claim. Indeed, Paragraph 177 of the amended complaint recited the language of EDPL § 207(C)(4) *verbatim*: "No public use, benefit or purpose will be served by the property acquisition set forth in the Determination and Findings." 2007 WL 575830 (E.D.N.Y.). Appellants pled this state claim against Respondent only – and not against any of the individual defendants named in the federal claims – consistent with the requirement that EDPL claims may only be pled against the ESDC. In paragraph E of the prayer for relief, Appellants specifically asked the federal court to reject the Determination and Findings – a remedy that is available only with respect to state claims, not federal claims. And at oral argument before

the federal District Court, Appellants' counsel specifically asserted, in response to a query from the bench, that Appellants' EDPL claims had "two components" – a federal Public Use Clause claim, and a "separate" claim under EDPL § 207(C)(4), which counsel urged is "broader than the Fifth Amendment." The District Court and the Court of Appeals obviously accepted that Appellants' federal court complaint asserted a freestanding claim sounding in state law, for if they did not, there would have been no reason for them to dismiss Appellants' EDPL claim "*without prejudice to its being re-filed in state court*." *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 291 (E.D.N.Y. 2007), *aff'd*, 516 F.3d 50, 56 (2d Cir. 2008) (affirming "the judgment of the district court dismissing the federal claims with prejudice and *the state claim without prejudice*"), *cert. denied*, 128 S. Ct. 2964 (June 23, 2008) (emphases added). Surely the federal courts' reading of Appellants' federal complaint is entitled to deference.[14]

To be sure, the state law claims that Appellants are pursuing in this proceeding are broader than the section 207(B)(4) claim that was pled and dismissed without prejudice in federal court. But CPLR 205(a) expressly permits

[14] Respondent's reliance on *Barlow v. Sun Chemical Co.*, 15 Misc. 3d 953 (Sup. Ct. Westchester Co. 2007), is entirely misplaced. In *Barlow*, the plaintiffs plainly were not entitled to recommence their action in state court because they had *voluntarily discontinued their federal court action* – an express exception to the applicability of CPLR 205(a).

Appellants to pursue not only their dismissed section 207(B)(4) claim, but also any additional claim that arises from "the same transaction or occurrence." Because it is undisputed that all of the claims that Appellants have asserted herein arise from the same transaction or occurrence as the claim that the federal court dismissed without prejudice, CPLR 205(a) permits Appellants to pursue them in this forum.

3. The 30-Day Filing Deadline Under EDPL § 207(A) Is a Statute of Limitations, Not a Condition Precedent

Respondent also urges this Court to ignore the tolling provision prescribed in CPLR 205(a) on the ground that the 30-day statute of limitations set forth in EDPL § 207(A) is not really a statute of limitations but rather a "condition precedent" to challenging a condemnation. Resp. Br. at 49-54. The Appellate Division correctly rejected this argument.

Respondent's argument is premised on this Court's decision in *Yonkers Contracting Co. v. Port Authority Trans-Hudson Corp.*, 93 N.Y.2d 375 (1999) – a case that Respondent curiously does not cite. *Yonkers Contracting* involved a construction dispute between a contractor and the Port Authority. The plaintiff initially sued the Port Authority within the time constraints imposed by Unconsolidated Laws § 7107, but the suit was dismissed because the plaintiff had

not complied with an alternative dispute resolution provision in the parties' contract. The plaintiff subsequently complied with this procedural requirement and recommenced the action within six months of its dismissal, but not within the time constraints imposed by section 7107. This Court held that the tolling provision in CPLR 205(a) applies only to statutes of limitation and not to "conditions precedent" to the commencement of a lawsuit. 93 N.Y.2d at 378. The Court concluded that section 7107 was a condition precedent, and not a statute of limitations to which CPLR 205(a) could apply, for two reasons: (1) because section 7107 created an entirely new cause of action, simultaneously waiving the State's sovereign immunity and imposing a strict time limitation in a single statute; and (2) because the language of section 7107 expressly stated that compliance with the time limits was a "condition" of the State's waiver of its sovereign immunity. 93 N.Y.2d at 378-79.[15]

More recently, this Court revisited its holding in *Yonkers Contracting* in *Campbell v. City of New York*, 4 N.Y.3d 200 (2005) – another case that Respondent fails to cite. Like *Yonkers Contracting*, *Campbell* involved the interplay of CPLR 205(a) and a statutory time limit for commencing suit – this

[15] The Court also held that CPLR 205(a) would not apply in any event because, unlike in the instant case, the initial lawsuit in *Yonkers Contracting* had been dismissed *with* prejudice. *Id.* at 379-80.

time, the requirement in General Municipal Law § 50-i that suits against municipalities must be commenced within one year and ninety days. The Court held that the time constraint imposed by section 50-i is a statute of limitations, not a condition precedent, and that the tolling provision in CPLR 205(a) therefore applied. In doing so, the Court emphasized that both of the requirements for ignoring CPLR 205(a) identified in *Yonkers Contracting* were absent. Section 50-i is not "a single enactment consenting to suit and incorporating a time limitation as an integral part of a waiver of sovereign immunity," nor does it expressly use the word "condition." 4 N.Y.3d at 204-05. *Accord Hakala v. Deutsche Bank AG*, 343 F.3d 111, 116 (2d Cir. 2003) (holding that CPLR 205(a) applies to petitions to vacate arbitration awards pursuant to CPLR 7511(a) and that *Yonkers Contracting* does not apply unless that provision at issue both waives sovereign immunity and expresses a clear intention to require absolutely strict conformance).

As the Appellate Division correctly held, Respondent has not met its burden of establishing that the two requirements for invoking *Yonkers Contracting* have been met. Unlike Unconsolidated Laws § 7107, the time constraint imposed by EDPL § 207(A) was not enacted simultaneously with the waiver of the State's sovereign immunity from condemnation challenges. To the contrary, the EDPL is

an entirely procedural scheme that "did not create a cause of action or any new substantive rights." *Goldstein v. New York State Urban Development Corp.*, 64 A.D.3d 168, 177 (2d Dep't 2009). Indeed, condemnation challenges were authorized by the Legislature long before the EDPL was enacted in 1977. *See*, *e.g.*, *Hallock v. State*, 32 N.Y.2d 599 (1973) (adjudicating claim for a judgment declaring that proposed condemnation violates New York Constitution); *see also Kaskel v. Impellitteri*, 306 N.Y. 73 (1953). Nor does EDPL § 207(A) expressly "condition" the right to challenge condemnations on absolute and literal compliance with the 30-day statute of limitations. Because neither of the *Yonkers Contracting* requirements is present, the Appellate Division correctly held that EDPL § 207(A) is a statute of limitations, not a condition precedent, and that CPLR 205(a) therefore applies.

Rather than adhering to the analytical rubric established by *Yonkers Contracting*, *Campbell*, and *Hakala*, Respondent emphasizes "the short time period allowed for commencing a § 207 challenge." Resp. Br. at 53. This argument is foreclosed by *Morris Investors, Inc. v. City of New York*, 69 N.Y.2d 933 (1987), in which this Court held that the ameliorative six-month tolling provision in CPLR 205(a) applies to the four-month statute of limitations prescribed in Article 78. *Id.* at 935. The dissent in *Morris Investors* protested that

the additional six months afforded under the statute could allow for an extension of over 10 months, *id.* at 941 n.5 (Alexander, J., dissenting), but a majority of this Court rejected that concern. As the Appellate Division explained in *Winston v. Freshwater Wetlands Appeals Bd.*, 224 A.D.2d 160, 165 (2d Dep't 1996), "[a] six month extension may seem asymmetrical when tacked on to a four month (or, as here, a one month) limitations bar, but the purpose of this ameliorative statute is to blunt the fatal effects of time-bars when a defendant or respondent has had timely notice of the case to begin with."

None of the cases cited by Respondent rescues its strained claim that EDPL § 207(A) imposes a "condition precedent" that renders CPLR 205(a) inapplicable. *Romano v. Romano*, 19 N.Y.2d 444 (1967), did not involve CPLR 205(a) at all, and merely established the general rule – later amplified in the CPLR 205(a) context in *Yonkers Contracting* and *Campbell* – that a temporal limit will be considered a condition precedent, and not a statute of limitations, where the state both "creates a cause of action and attaches a time limit to its commencement." *Id.* at 447. *Tanges v. Heidelberg North America, Inc.*, 93 N.Y.2d 48 (1999), likewise did not involve CPLR 205(a), and merely held that a Connecticut statute of limitations was sufficiently "substantive" to preclude application of the "resident" exception of the statute of limitations "borrowing"

provision in CPLR 202. And *Village of Pelham v. City of Mount Vernon*, 302 A.D.2d 397 (2d Dep't 2003), held that CPLR 205(a) does not apply to a municipality's challenge to zoning changes in an adjacent municipality because the very county provision imposing the time restriction (Westchester Code § 277.71) also created a cause of action that did not otherwise exist and that provided far more substantive rights than previously existed under Article 78. These cases certainly do not displace the controlling analytical rubric developed in *Yonkers Contracting*, *Campbell*, and *Hakala*.

4. Respondent's Policy Argument Is Unavailing

Finally, Respondent accuses Appellants of engaging in improper "manipulation" by making the "calculated decision not to pursue their challenge in State court," thereby resulting in a delay of "more than 18 months." Resp. Br. at 45. Respondent urges that applying CPLR 205(a) "will create precedent for all future challengers of public projects to first file in federal court, and then, if unsuccessful, to bring the challenge in the Appellate Division six months later," resulting in "[p]ublic projects . . . routinely [being] delayed for years." *Id.* at 46. This policy argument is unavailing for three reasons.

First, Respondent's suggestion that the sky is falling is, at best, greatly exaggerated. As discussed above (*see* Point III.A, *supra*), it cannot

seriously be questioned that *all* condemnation challengers are entitled to assert their state law EDPL claims as supplemental claims in federal court if they so choose, and that the State of New York has no constitutional authority to evade Congress's decision to allow plaintiffs to do so. Notably, if a plaintiff avails himself of this entirely legitimate option, and if the federal court declines to exercise supplemental jurisdiction over his state claim and dismisses it without prejudice under 28 U.S.C. § 1367(c), then federal law affords him a grace period of at least 30 days in which to refile the state claim in state court – *without regard to the applicability of CPLR 205(a)*. *See* 28 U.S.C. § 1367(d) ("The period of limitations for any claim asserted under subsection (a) . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."); *see also Jinks v. Richland County*, 538 U.S. 456 (2003) (upholding the constitutionality of section 1367(d) against a claim that it impermissibly intruded on state sovereignty). Given the fact that Congress afforded condemnation plaintiffs an *independent federal tolling period* of at least 30 days in which to refile in state court state claims that have been dismissed without prejudice, the stakes are far less dramatic than Respondent would have this Court believe.

In this case, for example, 28 U.S.C. § 1367(d) afforded Appellants the federal right to reassert their state claims in state court until March 3, 2008 (30 days after the Second Circuit affirmed the dismissal of Appellants' state law claims without prejudice), which was 15 months after Respondent issued its Final Determination. CPLR 205(a), which goes beyond the bare minimum tolling period required by federal law, afforded Appellants the right to reassert their state law claims until August 1, 2008, 20 months after Respondent issued its Final Determination. The difference between the "delay" caused by the minimum federal tolling period (15 months) and the "delay" caused by the tolling period provided for in CPLR 205(a) (20 months) hardly shocks the conscience.

Second, and perhaps more importantly, any "delay" in adjudicating Appellants' state law claims *is entirely Respondent's fault*. Respondent strenuously resisted Appellants' effort to have the federal court adjudicate *all* of their claims, and successfully moved to dismiss Appellants' state law claim. If, rather than moving to dismiss Appellants' EDPL claim, Respondent had simply urged the federal court to resolve the state law issues once and for all, then this entirely controversy likely would have been resolved well over a year ago. Having successfully argued that the federal court should not hear Appellants' state

law claims, Respondent cannot credibly contend that Appellants' state law claims now should not be heard at all.

Finally, whatever one thinks about Respondent's policy argument, it is not a proper basis for holding that CPLR 205(a) does not apply. As this Court held in *Morris Investors*, it is the province of the Legislature, not the courts, to establish that the ameliorative tolling provision in CPLR 205(a) does not apply. 69 N.Y.2d at 936 ("If indeed the Legislature fears the dire consequences foreseen by the dissent from application of CPLR 205(a) to this situation, then it lies wholly within the legislative province to make explicit an intention and requirement that [steps be taken] within a specified time as a condition precedent to suit.").

V. THIS COURT MAY TAKE JUDICIAL NOTICE OF FACTS IN THE PUBLIC RECORD, INCLUDING FACTS THAT HAVE DEVELOPED SINCE APPELLANTS FILED THEIR OPENING BRIEF

A. This Court Has Broad Discretion to Take Judicial Notice of Public Documents

Respondent argues that this Court should not consider government records and/or newspaper articles that were not part of the record that Respondent had compiled when it issued its supposedly "final" Determination and Findings on December 8, 2006. Resp. Br. at 36-39. While newspaper articles present a closer question, there is no doubt that this Court "may properly take judicial notice of

facts appearing in the public records of this State." *People v. Sanchez*, 98 N.Y.2d 373, 401 n.13 (2002) (overruled on other grounds) (citing *People ex. rel. Nichols v. Bd. of Canvassers*, 129 N.Y. 395, 420 (1891)); *Affronti v. Crosson*, 95 N.Y.2d 713, 720 (2001); *Siwek v. Mahoney*, 39 N.Y.2d 159, 163 n.2 (1976).

This is especially true with respect to (1) records reflecting Respondent's decision (adopted on June 23, 2009 and affirmed on September 17, 2009 by three members of the eight-member ESDC Board) to substantially amend the Modified General Project Plan ("MGPP") *at issue in this case*; (2) records of the Metropolitan Transportation Authority ("MTA") concerning changes to its original September 2005 agreement with Forest City effectuated on June 24, 2009 that were then considered by Respondent and incorporated into Respondent's recently amended MGPP; and (3) records of the New York City Independent Budget Office ("IBO"), a publicly funded entity that provides nonpartisan information about New York City's budget to the public and their elected officials, substantially modifying its earlier fiscal analysis that was an important component of the "official" record created by Respondent.

Surely Respondent cannot condemn Petitioners' homes and business based on one version of the MGPP; make major revisions to the MGPP nearly three years later; decline to issue modified EDPL findings about those revisions

(thereby arguably precluding Petitioners from obtaining judicial review of the revisions under the EDPL); and prevent this Court from even *considering* whether Respondent's supposedly "minor" changes to the Project are material to Petitioners' claims.

B. Factual Developments Since July 30, 2009

In the nearly two months that have passed since Appellants filed their initial brief, Respondent and other governmental bodies have continued to conduct official proceedings and publish official documents that are material to this case.

1. Amended Modified General Project Plan

On September 17, 2009, four members of the ESDC's eight-member Board met, and three of them (with one recusal) voted to affirm an amended Modified General Project Plan for the Project. *See* ESDC Webcast of September 17, 2009 Meeting, *available at* http://www.empire.state.ny.us/webcasts/default.asp.; *see also* September 17, 2009 Memorandum from Dennis Mullen to Directors of the Board, *available at* http://www.scribd.com/doc/19857899/Ay-Mgpp-Board-Memo62309 ("Board Memo").

Among other things, it was revealed during the meeting, and/or via the Board Memo that:

(a) the ESDC will amend its funding agreement with Ratner to accelerate the State's last cash payment to Ratner of $25 million (for a total of $100 million) for purposes (such as soft costs and demolition) previously disallowed in earlier funding agreements signed in 2007;

(b) the City will amend its funding agreement with Ratner to accelerate its scheduled payment to Ratner of $15 million (for a total of $205 million plus unquantifiable past and future payments for "extraordinary infrastructure costs");

(c) although the Technical Memorandum issued by the ESDC in June anticipated that the Project (under the residential plan) would total 7,961,000 square feet, the Project has now been modified to include only 5,145,000 square feet, a reduction of approximately 35%;

(d) although the amended MGPP anticipates the *possibility* that as many as 2,250 affordable housing units will be built over the next 30 years, the development agreement between ESDC and Ratner now provides that every unit of affordable housing is *contingent* upon "governmental authorities making available to [Ratner] affordable housing subsidies," *see* Board Memo Ex. D;

(e) Respondent is still adhering to its assumption that the Project will be completed within ten years (an assumption that it says "is not unreasonable") even though Ratner has stated publicly that it may take as many as 25 years as the agreements allow; and

(f) Respondent will not undertake a cost-benefit analysis of the Project, and its consultants' report on the development model and the potential absorption of the residential component of the

project during the development period will be kept confidential.

2. IBO Report

On September 10, 2009, the IBO updated its 2005 report entitled "The Proposed Arena at Atlantic Yards: An Analysis of City Fiscal Gains and Losses," *available at* http://www.ibo.nyc.ny.us/iboreports/AtlanticYards091009.pdf. The Report concluded that, over a thirty year period:

> (a) the Project will *cost* the City a minimum of $39.5 million (a figure that balloons to $220 million when opportunity costs are considered);
>
> (b) the State will gain $25 million in new tax revenues (only $9 million when opportunity costs are considered);
>
> (c) the MTA will gain $6 million (but will lose $16 million when opportunity costs are considered); and
>
> (d) Ratner will receive $726 million in government subsidies and benefits for the arena alone.

CONCLUSION

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

Dated: September 25, 2009
New York, New York

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