

Court of Appeals
of the
State of New York

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

Petitioners-Appellants,

– against –

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

Respondent-Respondent.

**BRIEF FOR AMICI CURIAE
FIFTH AVENUE COMMITTEE,
PRATT AREA COMMUNITY COUNCIL &
PROSPECT HEIGHTS NEIGHBORHOOD
DEVELOPMENT COUNCIL**

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DISCLOSURE STATEMENT PURSUANT TO § 500.1 (c)

Amici, Fifth Avenue Committee, Pratt Area Community Council, and Prospect Heights Neighborhood Development Council each states that it has no parents, subsidiaries, or affiliates.

PRELIMINARY STATEMENT

This case presents two issues of paramount importance and first impression:

1) Will Article XVIII, § 6 of the New York State Constitution be enforced, as written, to require that “slum clearance” and housing projects that receive state funding be affordable to low-income people; and 2) will the public use clause of the New York State Constitution be interpreted, as intended, to prevent takings with no discernible, much less dominant, public use or benefit. The movants – proposed amici – are engaged in the provision of affordable housing and are concerned with principles of sound urban development that meets the needs of their community. They urge this Court to apply the plain language of Article XVIII, § 6 and find that a “slum clearance” project, justified by questionable but repeated allusions to the provision of affordable housing without occupancy restricted to low income persons, is unconstitutional; and to find that the New York State Constitution does not permit the taking of property by eminent domain when there is no “public use,” questionable public benefit, and apparently overwhelming, but never quantified, benefit to the private “sole source” developer.

INTEREST OF AMICI CURIAE

Fifth Avenue Committee:

Incorporated as a not-for-profit community development corporation in 1978, proposed amicus Fifth Avenue Committee's ("FAC") mission is to advance social and economic justice in South Brooklyn, principally by developing and managing affordable housing and community facilities, creating economic opportunities, organizing residents and workers, providing student-centered adult education opportunities, and combating displacement caused by gentrification.

FAC's work helps to transform the communities and lives of more than 5,000 low and moderate income New Yorkers each year through a range of programs, including affordable housing development and workforce development. FAC currently has an affordable housing pipeline of more than 1,000 units of housing, representing a \$400 million direct investment in South Brooklyn. This pipeline includes an eighty-unit LEED-certified, affordable mixed income homeownership project that is currently in construction directly across the street from Vanderbilt Yards on Atlantic Avenue in Brooklyn.

FAC also trains and places over 800 individuals annually into living wage employment. FAC's sector-based employment training programs

consistently rank among the highest performing of such programs, graduating and placing a higher percentage into living wage employment.

FAC organizes and advocates for affordable housing independently and also as part of a city-wide trade association of non-profit housing developers and organizers known as the Association of Neighborhood and Housing Development.

Pratt Area Community Council:

The Pratt Area Community Council (PACC) was founded in 1964 as a vehicle to empower the residents of the Fort Greene, Clinton Hill, Wallabout, and Bedford Stuyvesant to fight for decent, affordable housing, tenants' rights, and economic renewal.

PACC's Housing Committee develops and implements innovative strategies to save deteriorating housing stock, such as through anti-demolition efforts to seal vacant properties quickly and properly. PACC advocated for a change in city policy away from demolition and towards preservation, and instigated federal policy to arrange for the sale of federally financed abandoned buildings to local residents. Another PACC-led effort encouraged the formation of tenant associations, particularly in buildings where housing conditions had become intolerable. PACC's organizers have worked in conjunction with other city-wide organizations to combat lead poisoning and pass Local Law 1. Last year PACC organized in buildings

owned by predatory equity investors where harassment and poor conditions threatened displacement of long time residents together in coalition with others. PACC's Leadership Group worked to pass the Anti-Harassment Bill in City Council. This year PACC's tenant leaders have been to Albany to fight for change in the vacancy decontrol and 1/40th cost provisions in the rent stabilization laws.

By 1980, with housing abandonment an epidemic, PACC established a full-time, professionally staffed office and concentrated on keeping people in their homes, developing and preserving affordable housing, protecting tenant rights, and helping community residents become first-time homeowners or improve the properties they already owned. In 1988 PACC acquired and renovated its first building at 105 Quincy Street, home to twelve low-income working families. To date, PACC Housing Development has rehabilitated 82 buildings comprising 770 low- and moderate-income residential units and 17 commercial spaces, and facilitated \$130 million of construction. PACC has also sponsored and marketed 406 partnership homes, 28 condominiums, 31 two-to-four family homes and most recently a 34-unit cooperative to provide homeownership opportunities to low and moderate-income families. In 2002, PACC opened the Gibb Mansion, its first supportive housing project to house 71 low-income residents and formerly homeless persons with chronic illness.

PACC has three offices in the Fort Greene, Clinton Hill, and Bedford-Stuyvesant communities, where it continues to offer financial, homeowner and business educational workshops, provide loans and grants to homebuyers, homeowners and small businesses, work to prevent foreclosures, and continue business retention and revitalization activities in its constituent areas. Working with merchants and property owners on 23 blocks of Fulton Street, PACC facilitated the formation of the FAB Alliance BID which will start providing services in October of this year.

Prospect Heights Neighborhood Development Council:

The Prospect Heights Neighborhood Development Council (PHNDC) was formed in February 2004 by a group of community organizations and block associations interested in better understanding and guiding the future of development in Prospect Heights. Member organizations include the Carlton Avenue Association, Dean Street Block Association, Eastern Parkway Cultural Row Neighborhood Association, Friends of Underhill Playground, Park Place/Underhill Avenue Block Association, Prospect Heights Association, Prospect Heights Parents Association, and Vanderbilt Avenue Merchants District.

PHNDC's mission is: (1) to assess the needs and concerns of the Prospect Heights community in terms of housing, economic development, physical environment, safety and security as well as social services; (2) to

prepare or sponsor analyses of potential development in the Prospect Heights community, including the impact of such development on the existing conditions in Prospect Heights; (3) to represent the interests of its member organizations in relations with elected officials, public agencies, and commercial interests; and (4) to coordinate the participation of its member organizations in fulfilling the above purposes. PHNDC has worked to communicate the perceptions and priorities articulated by neighborhood residents to public officials and other organizations active in the community. PHNDC provides Prospect Heights residents with independent, objective information with respect to major development projects proposed for this community. Further PHNDC meets with other community based organizations in adjoining neighborhoods to represent the Prospect Heights community in the larger context of development in central Brooklyn. Specific initiatives of PHNDC have included commissioning studies on neighborhood priorities in respect to development, working with city agencies and officials to address Vanderbilt avenue traffic safety, and working to have Prospect Heights designated as an historic district.

To that effect, PHNDC has worked for greater involvement by the Prospect Heights community in the Atlantic Yards Project's planning, review and construction. PHNDC has also worked with other Brooklyn and citywide organizations to increase public awareness of the impacts of

Atlantic Yards, and to demand accountability from government in addressing them. PHNDC has authored community commentary on the Empire State Development Corporation's draft scope of analysis, Draft Environmental Impact Statement for the Atlantic Yards Redevelopment Project, and Modified General Project Plan and Technical Memorandum.

As a whole, amici are concerned about the misuse of eminent domain to build the proposed Atlantic Yards Redevelopment Project. They are also concerned about the plan's failure to guarantee an affordable housing component, which they believe is required by Article XVIII § 6 of the New York State Constitution. They are further concerned that in the event some affordable housing is built, the plan will not provide truly affordable housing for low income Brooklyn residents. Finally, they question whether the commitment of large amounts of scarce public resources to the proposed development constitutes the most efficient use of such funding.

STATEMENT OF FACTS

The amici adopts the Statement of Facts in the brief filed by Petitioners-Appellants.

ARGUMENT

Section 1 of Article XVIII of the New York State Constitution provides that, "[s]ubject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions

as it may prescribe for low rent housing ... for persons of low income as defined by law, or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes" N.Y. CONST. ART. XVIII, § 1.

Section 6 of the same article further provides that "[n]o loan or subsidy shall be made by the state to aid any project unless such project is in conformity with a plan or undertaking for the clearance, replanning and reconstruction or rehabilitation of a substandard and unsanitary area or areas." Section 6 then continues by restricting "[t]he occupancy of any such project" to persons of low income. N.Y. CONST. ART. XVIII, § 6.

Petitioners argue that the Atlantic Yards Redevelopment Project is bound by a plain reading of this section of the New York State Constitution, and that the housing facilities contemplated in the plan should be restricted for occupancy by low income applicants. In response, Respondent argued below that it is exempt from this constitutional requirement for two reasons: first, that, because the Atlantic Yards Redevelopment Project ("AYRP") is not a public low income housing project, it does not come under the purview of Article XVIII, and second, that a strict interpretation of the clause in the Article relating to "low income persons" would lead to absurd and onerous results. Amici respectfully urge the Court to reject both of Respondent's arguments. Instead, the Court should find that, because the creation of

housing, specifically affordable housing, was a substantial justification for the approval of the AYRP by Respondent, Respondent should not be permitted to exercise eminent domain over the affected areas without an enforceable guarantee that the housing units created, whether for sale or for rent, will be reserved for occupancy at affordable rates by low income persons, as that term is defined by the legislature. The Court should further weigh Respondent's claims about the burden of requiring the developer to create low income housing against the fact that the developer has already received commitments for approximately \$305 million in city and state subsidies for the construction of AYRP.¹ Finally, the Court should view with healthy skepticism the purported public benefit to be gained from the AYRP, specifically that aspect of the alleged public benefit relating to the creation of affordable housing, which, in light of the Modified General Project Plan filed by Respondent on June 23, 2009, seems unlikely to even occur.

Amici also urge the Court to analyze the proposed exercise of eminent domain within the rubric of the New York State Constitution, rather than the federal constitution. Our state constitution provides additional safeguards to private property owners which prohibit the exercise of eminent domain in

¹ See Testimony of George Sweeting, Deputy Director, New York City IBO, May 29, 2009, available at <http://www.ibo.nyc.ny.us/iboreports/52909AtlanticYardsTestimony.pdf> (estimating that New York City's capital contribution to the project has grown from \$100 million to \$205 million between 2005 and 2009). The State has committed \$100 million thus far, making for a combined minimum of \$305 million with no limitation on further direct cash contributions.

this case, particularly because of the illusory nature of the alleged public benefit to be derived from this project.

I. THE CREATION OF AFFORDABLE HOUSING IS AND ALWAYS HAS BEEN A SUBSTANTIAL JUSTIFICATION FOR THE ATLANTIC YARDS REDEVELOPMENT PROJECT.

It is indisputable that a key component of the Atlantic Yards Redevelopment Project since its inception has been the creation of residential units, including “affordable,” housing. In both its original Modified General Project Plan issued on December 8, 2006, and the Modified General Project Plan issued on June 23, 2009, ESDC asserts as second of its eleven goals for AYRP the creation of “thousands of critically needed rental housing units for low-, moderate- and middle-income New Yorkers, as well as market-rate rental and condominium units.”² While the majority of the affordable housing units were scheduled to be created in Phase II of the project, thirty percent of the residential units created in Phase I of the project were to be affordable housing units.

In terms of both the number of affordable housing units contemplated in the original plan, and the consistent attention drawn to this aspect of the plan by the ESDC, the developer, and proponents of the plan, affordable housing creation was to be the crown jewel of the proposed development.

² See Atlantic Yards Land Use Improvement and Civic Project Modified General Project Plan dated December 8, 2006, and Atlantic Yards Land Use Improvement and Civic Project Modified General Project Plan dated June 23, 2009, *available at* <http://www.empire.state.ny.us/AtlanticYards/>.

Although the estimates of affordable housing units to be created have now been decimated, down from the original 2250 by the year 2016 to 200 by the year 2012, the fact remains that in both its original and its current incarnations, the provision of affordable housing units was the lynchpin in the marketing of this enormous project to the public and to elected officials.³

Originally, the Atlantic Yards Redevelopment Project envisaged devoting between sixty-six and eighty percent of the total area developed to residential construction. Through numerous media, including public meetings and mailings, Respondent has consistently touted residential unit creation as a major selling point of its plan. Elected officials and a public audience that might have been otherwise skeptical of the scope of the projected development took heed of this advertising campaign, and at least one grassroots organization has issued confident assertions that the potential negative impact of the project will be more than offset by the enormous boon that the project will be for renters seeking affordable housing in downtown Brooklyn.⁴ For Respondent to argue now that the residential

³ See, e.g., *De Blasio Claims That AY Would Have 3000 Low Income Units*, Atlantic Yards Report, April 26, 2008, <http://atlanticyardsreport.blogspot.com/2008/04/de-blasio-claims-ay-would-have-3000-low.html>; Press Release, New York City Mayor's Office, Mayor Michael R. Bloomberg, Forest City Ratner CEO and President Bruce Ratner and Civic Leaders Sign Community Benefits Agreement (June 27, 2005) (touting 50% affordability figure for residential units at AYRP); The Brooklyn Paper, Meet Comptroller Bill Thompson, September 1, 2009 (quoting mayoral candidate Bill Thompson as saying that he supports the AYRP primarily because of its below market rate housing component); Website of State Senator Marty Golden, <http://www.martygolden.com/news.php> ("Atlantic Yards Project: Although there is still work to be done to define and refine it, Marty Golden supports this plan for three reasons It will create new, affordable housing for Brooklyn.") (last accessed on September 1, 2009).

⁴ See, e.g., Bertha Lewis, *Supporting Atlantic Yards: Simply Not Enough Housing in Brooklyn*

component of its plan is not large enough or important enough to render the development into the kind of ‘project’ contemplated by the drafters of Article XVIII § 6 is revisionist at best, and disingenuous at worst.

Contrary to ESDC’s assertions, the New York State Constitution’s drafters did not intend to limit “project” to some subset of redevelopment projects concerned only with the provision of low-rent public housing. Instead, they intended the term “project” to connote redevelopment projects in their entirety. And, under Article XVIII, § 6, where those projects provide housing and receive state funding, they must be limited to occupancy by low-income people.

It is evident from the wording of Article XVIII, § 6 and the record of the convention that the drafters intended that projects for the elimination of blight and the construction of low-income housing would be done in conformance with a redevelopment plan. *See* New York State Constitutional Convention, 1938: Revised Record, vol. IV, 3005. In the debates, the question was posed: what is meant by the term “project”? A drafter responded: “you have put your finger on a difficulty which I think the committee has succeeded in solving. A project consists of any number of elements that make up the sum total of the project.” *Id.*, vol. II, 1539. It was then explained that the legislature would be free to divide the project into

http://www.citylimits.org/content/articles/viewarticle.cfm?article_id=1953 (last accessed on September 2, 2009).

groups of buildings to determine the “useful life” of its component parts but what was meant by “project” was the overall “plan” which may consist of housing, slum clearance, economic development projects, or any combination of the three. *Id.* at 1539-1542.

The term “project” in § 6, should also be read as referring to the “plan” as a whole and all its component parts. ESDC’s attempt to draw a distinction between a low-income housing project and a slum clearance project has no justification where, as here, the overall plan provides for both “slum clearance” and the development of housing with the use of state subsidies. It is precisely these combined objections that were envisioned by the drafters of Article XVIII, § 6, should therefore be read to require that the occupancy of this “project” be restricted to “persons of low-income as defined by law.” N.Y. CONST. ART. XVIII, § 6.

Furthermore, ESDC’s authority to use eminent domain and grant subsidies for this project is granted by the Urban Development Corporations Act, which requires that “land use improvement projects,” such as the Atlantic Yards Redevelopment Project, be “in accordance with article eighteen of the constitution.” UDCA § 6253(6) (c). Respondent is therefore doubly bound to guarantee that the housing developed in conjunction with the project will be restricted to occupancy by low-income people; bound first

by the command of Article XVIII, § 6, and second by the UDCA's express mandate.

II. ENFORCING THE PLAIN LANGUAGE OF ARTICLE XVIII, § 6 OF THE NEW YORK STATE CONSTITUTION WILL NOT PRODUCE ABSURD RESULTS, NOR WILL IT PLACE UNJUSTIFIED BURDENS ON THE DEVELOPER.

Respondent argued below that a natural construction of the phrase “persons of low income” would render unconstitutional other state housing laws dealing with affordable housing, presumably because such a construction establishes some kind of absolute ceiling on income levels required for participation in such programs. On this issue, Respondent is simply wrong.

When interpreting the “persons of low income” clause of Article XVIII, our courts have traditionally granted the legislature great latitude to determine what precisely constitutes a person of low income under various scenarios. Legislative definitions of “low-income” that are indexed to the unavailability of affordable housing in the free market have repeatedly been upheld as permissible under Article XVIII. In *Chelcy v. Buffalo Municipal Hous. Auth.*, 24 Misc.2d 598, 206 N.Y.S.2d 158 (Sup. Ct. Erie County 1960), the Court noted that “low income” was not synonymous with “lowest income,” and turned back a challenge to a law which required proposed participants in a Mitchell-Lama program to have no more than six times the

rental amount in income. *See also, Minkin v. City of New York*, 24 Misc.2d 818, 198 N.Y.S.2d 744 (S. Ct. N.Y. County 1960), *aff'd* 10 A.D.2d 830, 202 N.Y.S.2d 992 (1st Dep't 1960) (upholding a scheme which limited occupancy of a Mitchell-Lama cooperative to families earning less than \$7,000 a year), *Coalition for Responsible Planning v. Koch*, 142 Misc.2d 1038, 535 N.Y.S.2d 513 (Sup. Ct. NY County 1988) (finding that the City's proposal to use public funds for the creation of housing targeted at persons making 175% of the area's median income did not contravene Article XVIII), *Davidson v. City of Elmira*, 180 Misc. 1052, 1057, 44 N.Y.S.2d 302, 308; *aff'd* 267 A.D. 797, 46 N.Y.S.2d 655 (3d Dep't 1943) (asserting that the terms "persons of low income" and "low-rent housing" are relative terms and matters of judgment). This line of cases clearly establishes that the proper application of Article XVIII, § 6 to the AYRP will not impose a strict limitation on the definition of "low income persons," thus rendering unconstitutional scores of other affordable housing schemes.

Respondent also argued that requiring the developer to reserve the residential units created under the project for low income persons would place an unjustified burden on the developer. Quite apart from the fact that Article XVIII § 6 does not contemplate a weighing of what burden, if any, its mandate places on developers, the Court should note the scale of public subsidies for infrastructure costs that were promised to the developer in

exchange for a guarantee of affordable housing. Infrastructure costs include the cost of developing the rail yards and a platform over the rail yards upon which what is described as the project's "residential community" will be built. It is also anticipated that the Project will be exempt from mortgage recording taxes "as is customary for affordable housing developments."⁵ Finally, the Project Plan approved by ESDC contemplates that further state funding, in the form of tax-exempt bonds will be used to develop the Project's housing in conjunction with city bonds. Specifically, the modified General Project Plan states that the "[a]ffordable housing is expected to be financed through tax-exempt bonds provided under existing and proposed City and State housing programs." In light of the fact that Article XVIII does not contemplate relieving developers of any alleged burdens imposed by strict compliance with its dictates, and because of the substantial commitment of public funds that have already been made to the developer to offset the cost of providing affordable housing for low-, moderate- and middle-income persons, the Court should disregard Respondent's claim that it would be unduly burdened by a strict application of Article XVIII, § 6.

⁵In fact, the "customary" tax exemptions were apparently insufficient for this Project, as the State Legislature approved an amendment to RPTL § 421-a for the explicit benefit of Forest City Ratner. The 421-a program, as it is known, exempts the developers of new developments from local taxes. If the new development is located within an "exclusion zone" it must contain a percentage of affordable units to benefit from tax exemption. The 2007 amendment to RPTL § 421-a explicitly exempts "UDC Large Scale Project[s]" from the affordability requirement. 2008 Sess. Law News of N.Y. ch. 15, § 13 (S. 6446-A) (McKinney's).

III. RESPONDENT’S PROPOSED “AFFORDABLE” HOUSING IS NOT REALLY AFFORDABLE FOR LOW INCOME PERSONS.

Even outside of whether Respondent is bound by the mandate of Article XVIII, amici respectfully further point out that, in this case, Respondent’s proposed “affordable” housing units are of questionable affordability to a majority of the tenants in the affected area who will be seeking housing, thus casting into doubt Respondent’s entire public benefit rationale. In its original plan, Respondent claimed that 6,430 residential units would be constructed on the space by 2016, and that 2,250 of these would be affordable. According to a Memorandum of Environmental Commitments issued by the ESDC in December, 2008, “[t]he Project (including Phase I and Phase II) shall generate at least 2250 units of affordable housing on site for low-, moderate-, and middle-income persons and families. At least 30% of the units built on the Arena block in Phase I shall be affordable to such households.”⁶

A major problem with the construct of affordable housing as it manifests itself throughout the development and selling of the plan has been that ESDC is mandated (as are all the city’s affordable housing programs) to tie indices of affordability to the federal Housing and Urban Development

⁶ See Memorandum of Environmental Commitments for the Atlantic Yards Project (December 8, 2006), http://www.empire.state.ny.us/pdf/AtlanticYards/Mitigation_Commitments.pdf.

department's definition of average median income (AMI). When the developer was making promises about the percentage of affordable housing to be created, the AMI in New York was \$70,900. However, this figure incorporates not only the median incomes of the five boroughs, but also the much wealthier counties of Nassau, Putnam, Rockland, Suffolk, and Westchester. According to the U.S. Census figures from 2000, Brooklyn's AMI was actually \$32,135.⁷ Because the developer's identification of income bands which qualify households for affordable housing is linked to the unrealistic HUD-generated AMI, it is doubtful that any housing created will actually be affordable for low income persons in Brooklyn.

IV. RESPONDENT'S MODIFIED GENERAL PROJECT PLAN ISSUED ON JUNE 23, 2009, REVEALS THAT AFFORDABLE HOUSING MAY NEVER BE BUILT AT THE SITE.

Respondent's Modified General Project Plan issued on June 23, 2009, explicitly acknowledges that only the arena and one other building will be completed by 2012, and that all other buildings, including those slotted in the Phase II part of the plan, may be completed six months after the completion of the second building, or by a date to be agreed upon. In essence, any timeline for the completion of Phase II has been rescinded, leaving only a vague and open-ended sense of when, if at all, Phase II will

⁷ See Atlantic Yards Arena and Redevelopment Project Draft Environmental Impact Statement, ch. 4 at 34 (2006), available at http://www.empire.state.ny.us/pdf/AtlanticYards/DEIS/04_Socioeconomic/04%20Socio.pdf.

commence and completed. Because the bulk of the affordable housing units were scheduled to be completed in Phase II of the plan, this wholesale retreat potentially dooms one of the most significant components and much touted selling points of the AYRP. Furthermore, documents that have come to light in response to a Freedom of Information Law request by the weblog *Atlantic Yards Report* reveal that the funding necessary to build the affordable housing originally promised may not even be available.⁸ In light of these significant changes in the AYRP proposal, the Court should view with doubled concern Respondent's claim that the use of eminent domain is justified here. While the change in the General Project Plan does not invalidate any of Petitioners' arguments that affordable housing creation was and remains a substantial justification of the AYRP, thus bringing the entire project within the purview of Article XVIII of the Constitution, the Court should scrutinize the Modified General Project Plan of June 23, 2009, to discern whether any justification remains for the taking of privately owned property at this time.

Ultimately, the Court should find that the proposed development is a dual-purpose development, incorporating a significant amount of affordable housing as one of its key components. As such, the Court should find that

⁸ See, Erin Durkin, *Weaker Plan to Finance Bruce Ratner's Atlantic Yards Housing Project*, New York Daily News, August 31, 2009.

Respondent is bound by the dictates of Article XVIII, § 6 of the New York State Constitution and is required to set aside all residential units created for occupancy by low income residents as that term has been defined by the legislature. The Court should consider recent developments which show that even those modest public benefits which the developer originally proposed and which Respondent eagerly endorsed are now threatened in Respondent's Modified General Project Plan of 2009. Amici urges the Court to weigh the entire narrative of this case against a backdrop of the real needs of those who are going to be most affected by the proposed development, and to ask itself if Respondent should really be permitted to displace property owners and make such extravagant commitments of tax-payer money in return for such miniscule and uncertain gains.

V. THE ATLANTIC YARDS REDEVELOPMENT PROJECT VIOLATES THE NEW YORK STATE CONSTITUTION

The Project Violates the Public Use Clause of the New York State Constitution

1. Public use means public use.

The "Takings Clause" of the New York State Constitution provides that "[p]rivate property shall not be taken for public use without just compensation." N.Y. CONST. ART. I, § 7(a). Thus, a lawful taking of property by government under the clause requires that property is for "public use," and that "just compensation" is paid for its seizure. A controlling issue

in the instant case is the interpretation of the Public Use clause of article I, § 7. Plainly construed, it is clear that private property may not be taken by the government except for where the public has a right to participate in its use.

In accordance with the intent of the New York Constitution's framers, the public use clause should be construed strictly and plainly. It has long been held that a constitution should be interpreted using the literal meaning of words and the intent of the framers. *See, e.g., People ex rel. Garling v. Van Allen*, 55 N.Y. 31, 25 (1873); *King v. Cuomo*, 81 N.Y.2d 247, 253 (1993). The Court of Appeals powerfully articulated this principle in *Settle v. Van Evrea*, 49 N.Y. 280 (1972). Justice Allen, on behalf of the Court wrote:

A fundamental rule in the interpretation of written laws or instruments of any kind, is to construe them according to the sense of the terms and the intention of the framers of the laws or parties to the instruments. That intention is first to be sought from the words employed, and if the language is unambiguous, the words plain and clear, conveying a distinct idea, there is no occasion to resort to other means of interpretation. Effect must be given to the intent as indicated by the language employed. Especially should this be so in the interpretation of a written Constitution, an instrument framed deliberately and with care, and adopted by the people as the organic law of the State.

Id. at 281.

When the architects of New York's supreme document used the phrase "public use," they meant just that. Early on, New York's jurists expressed the need to maintain the strict and literal meaning of public use.

See, e.g., *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9 (Ct. for Corr. of Errors 1837) (Sen. Tracy concurring). Significantly, in *Bradley v. Degnon Contracting Co.*, 224 N.Y. 60 (1918), this Court held that to “constitute public use, it must be for the benefit of all the public and in which all have a right to share.” *Bradley v. Degnon Contracting Co.*, 224 N.Y. 60, 71 (1918). The Court went on to note that “[i]f a person or corporation holds or possesses the use, the public must have the right to demand and compel access to or the enjoyment of it.” *Id.*

This Court should reaffirm the original interpretation of the Public Use Clause. In the proceedings below, Petitioner argued that the U.S. Supreme Court decision in *Kelo v. City of London*, 545 U.S. 469 (2005), improperly clouded New York jurisprudence. Citing *Matter of New York City Housing. Auth. v. Muller*, 270 N.Y. 333 (1936), the Appellate Division opined that Petitioner’s argument was not valid, because New York had abandoned the intent of the framers and taken on a more expansive view of the Public Use Clause. *Goldstein v. N.Y. State Urban Dev. Corp.*, 879 N.Y.S.2d 524, 532 (2009). However, the lower court’s reliance on *Muller* is misplaced. First, *Muller* limits its analysis to a highly specific time and place: the pestilence and disease filled slums of 1930’s New York. *Muller*, 270 N.Y. at 340. It was in the context of removing those conditions that *Muller* discussed the health and safety of the public welfare as public use.

Second, the court's finding that the traditional notion of public use, or accessibility to all members of the public, had been abandoned was based solely on federal law. *Id.* at 342. *Muller* and its progeny do not lead to the inexorable conclusion that it is constitutional, under the New York State Constitution, to take private property for the enrichment of a private developer when no actual public use is contemplated. Amici urge this Court to examine New York's Public Use Clause in accordance with the intent of the framers and independent of federal case law.

Significantly, other state courts have recognized and stressed the importance of interpreting state constitutions plainly in order to capture the true intent at ratification. Michigan's Supreme Court has addressed whether the condemnation of properties transferred to private entities was consistent with the common understanding of "public use" at the time of the state constitution's ratification in 1963. *See County of Wayne v. Hathcock*, 684 N.W.2d 766, 781 (Mich. 2004). *Hathcock* involved a county government's condemnation of nineteen parcels of land in order to build a large business and technology park with a conference center, hotels, and a recreational facility. *Id.* at 770. The project was expected to create thousands of jobs, generate tens of millions in tax revenue, and contribute to the community's economic development. *Id.* at 770-771. The court determined it was necessary to use pre-ratification case law to define public use, as opposed to

subsequent case law subject to misinterpretation and dilution. In particular, the court relied on three elements of early case law in its analysis of what constitutes public use when transferring land to a private entity: 1) where “public necessity of the extreme sort” requires collective action; 2) where the property remains subject to public oversight, or the public maintains a measure of control; and 3) where the property was selected on basis of facts of independent public significance rather than the interests of the private entity. *Id.* Finding that the project failed all three tests, the court concluded that the constitutional framers could not have understood public use to permit condemnation of private property for the construction of a business and technology park owned by private entities. *Id.* at 784.

Akin to Michigan, the modern Washington Supreme Court emphasized that the state constitution must be read to reflect the intent of the framers. In *Maylon v. Pierce County*, 935 P.2d 1272 (Wash. 1997), the court opined that “appropriate constitutional analysis begins with the text, and for most purposes, should end there as well.” *Id.* at 1281. The court further remarked that its “objective is to define the constitution in accordance with the original understanding of the ratifying public so as to faithfully apply the principle to each situation which might thereafter arise.” *Id.* at 1282.

Also of note is the Supreme Court of Ohio’s refusal to follow the U.S. Supreme Court’s decision in *Kelo v. City of New London*. See *Norwood v.*

Horney, 853 N.E.2d 1115, 1128. In *Norwood*, the city appropriated private property in a “deteriorating” neighborhood for a private developer to construct residential and commercial buildings as well as parking facilities. *Id.* at 1124. The court held that exercising eminent domain solely for the purpose of economic development violated the state constitution’s public use clause. *Id.* at 1141-1142. Although the court in *Norwood* did not base its decision on construing the Ohio constitution plainly, the court did look at the state’s need to protect individual rights as a reason to employ a narrower reading of what constituted public use. The court began its constitutional analysis by acknowledging that the right of private property is an original and fundamental right that is “one of the primary and sacred objects of government to secure and protect.” *Id.* at 1128. Commenting on the significance of government intrusion into the right of private property, the court also remarked that “[f]or the individual property owner, the appropriation is not simply the seizure of a house. It is the taking of a home – the place where ancestors toiled, where families were raised, where memories were made.” *Id.* at 1122.

New York has also acknowledged the need to provide elevated protection for fundamental rights, even beyond those afforded in the United States Constitution. *See People v. P.J. Video, Inc.*, 68 N.Y.2d 296 (1986). In *P.J. Video*, the Court of Appeals examined whether the New York State

Constitution offered greater protection than the U.S. Constitution in the search and seizure of allegedly pornographic material. In holding that the state Constitution did require heightened protection, the Court noted that their decision was based in part on New York's long tradition of interpreting its constitution to protect individual rights. *Id.* at 303. The Court in *P.J. Video* cautioned against following the federal example at the expense of state cultural and legal traditions, and warned that doing so could lead to the erosion of individual rights and freedoms. *Id.* at 305. The Court explained its decision not to follow certain federal search and seizure cases as a "concern that the Fourth Amendment rules governing police conduct have been muddled, and judicial supervision of the warrant process diluted, thus heightening the danger that our citizens' rights against unreasonable police intrusions might be violated." *Id.* Accordingly, the Court overruled the New York Supreme Court's failure to provide more strident protection in issuing warrants, noting that lower court's ruling was a similar dilution of the requirements of judicial supervision and a departure from prior law on the subject. *Id.*

Like it did in *P.J. Video*, we urge this Court to find that the cultural and legal tradition surrounding the New York Constitution requires a specific and increased need to protect the rights of the citizens of this state,

particularly when it comes to a paramount right such as private property ownership.

2. The primary objective of the Atlantic Yards Redevelopment Project is to benefit the private developer and any alleged public benefit is subordinate and a pretext for condemnation.

Even under the public purpose rationale, Forest City Ratner's AYRP is unconstitutional. To be valid under the New York State Constitution, public benefit must be the dominant effect of the project and not merely incidental or subordinate to private benefit. *Denihan Enterprises, Inc. v. O'Dwyer*, 302 NY 451. In *Denihan*, this Court reinforced the mandate that invocation of the extraordinary measure of eminent domain have public benefit as its primary objective. *Id.* at 458. In that case, the city government contracted with a company to condemn two-thirds of a city block for the construction of a public parking lot. *Id.* at 456. The plaintiffs sought to enjoin the city from carrying out the contract and argued that the primary purpose of the project was for private benefit and any public benefit was merely incidental. *Id.* at 456-457. In support of their argument, the plaintiffs pointed out that the project would only result in seventeen additional parking spaces and a park for the community and that many of the specifications would benefit the company privately and exclusively. *Id.* at 459. This Court found that the plaintiffs pled sufficient facts to establish that the use of the

public park was “in large measure subordinate to the private benefit.” *Id.* at 458. Although the Court did not reach the merits of the case, the inference is that a compelling question of constitutionality exists where the private beneficiary enjoys considerably favorable terms and the benefits to the public are incidental and not as proposed.

The instant case presents parallel constitutional concerns. Respondent asserted the removal of blight alone is a sufficient public purpose to exercise eminent domain. *Resp't Letter to the Court*, June 15, 2009. However, simply having a public purpose is not enough. In keeping with the holding in *Denihan*, blight removal, actually “slum clearance” as that term was understood in the 1930s, must be the *primary* purpose of a project in order to legally exercise eminent domain. Here, the ESDC did not make a blight finding until at least two years after the AYRP was announced, and that determination is based on such compelling public health and safety issues as “graffiti,” “weeds” and “underutilization.” It is disingenuous for Respondent to now allege that blight clearance was its primary purpose all along. The arena for a private professional sports team owned by the developer was conceived of years prior to the completion of the blight study upon which the taking now relies. The record strongly indicates that blight removal (whatever that means) – not “slum clearance” – is nothing more than a convenient pretext for an otherwise invalid condemnation.

Furthermore, the private and public benefits must be apparent in order to determine whether the public benefit is in fact the primary purpose of the AYRP. It is impossible to find that a taking passes constitutional muster where the benefits to the parties are unclear because the necessary balancing cannot be done. Although Forest City Ratner has refused to reveal just how much it stands to gain from this deal and Respondent has evinced no interest in the topic, it is difficult to believe that the developer would embark on a project of this enormous scope without knowledge of its expected benefit and profit.

Similarly, concrete benefits to the public are uncertain. The Appellate Division found that along with blight removal, the “public purposes” served by the project were the creation of an arena, publically open space, affordable housing, improvements to public transit, and new job opportunities.” *Goldstein*, 879 N.Y.S.2d at 535. However, many of these alleged benefits have been neither quantified nor confirmed. For example, there is no guarantee that affordable housing will be built. The Appellate Division remarked that Petitioner’s assertion that the public benefit may never materialize is speculative. *Id.* at 535. Petitioner’s argument makes perfect sense, however, as there is currently no viable plan to build

affordable housing.⁹ Nor is there a firm commitment or plan to fill many of the alleged community benefits, as discussed below. Without evidence of its intention or ability, Respondent is essentially asking this Court to approve the deprivation of fundamental rights based on what amounts to speculation and bare assertions.

The EDSC approved a purportedly final project plan on December 8, 2006. However, a Modified General Project Plan (“MGPP”) was submitted on June 23, 2009. The MGPP illustrates that many of the claimed benefits were reduced or eliminated altogether once it seemed eminent domain was imminent. The plan approved by the EDSC in 2006 is markedly different than the modified plan. Community information website *Brooklyn Speaks* recently published a comparison of the changes in design, fiscal impact, and phasing since the plan was approved in 2006.¹⁰ The following changes were reported: 1) a total of 6,430 residential units by were to be built by 2016, but now only 400 units by 2012 are proposed; 2) eight acres of open space was to be completed by 2016, but now the MGPP only provides for one acre of open space until 2014; 3) the initial payment for the MTA rails will be 20 million dollars with further payments spread out over twenty-two years,

⁹ See Norman Oder, *Documents Show Affordable Housing Guarantees Considered but Discarded; No Apparent Effort to Ascertain if Housing Bonds were Sufficient*, August 27, 2009, <http://atlanticyardsreport.blogspot.com/2009/08/documents-show-affordable-housing.html>.

¹⁰ *Atlantic Yards – Then and Now*, June 30, 2009, <http://www.brooklynspeaks.net/atlantic-yards-then-and-now>.

versus the 100 million initially agreed upon; 4) the city will now provide subsidies valued at 205 million dollars instead of 100 million; 5) the arena was only expected to bring in 25 million dollars for the city over a thirty year period and is now expected to result in a negative impact. *Id.*

Additionally, since submission of the original plan, the luxury aesthetics and world class design of the project has been downgraded to an austere, generic look, employing value engineering.

In August 2009, the Council of Brooklyn Neighborhoods (“CBN”) submitted a request to the ESDC to require a supplemental impact analysis for the AYRP due to the many modifications made since 2006.¹¹ Some of the significant changes CBN pointed out were: 1) only the arena and one building will be completed within ten years instead of the promised arena and sixteen buildings by 2016.; 2) a platform over the rail yards, intended to correct one of the major conditions contributing to blight, is no longer planned; 3) site five, originally designated for residential use, is now slated to be used for parking for an indefinite period of time, with no proposed date on when seven acres of parking would and could be converted to open space; 4) there will be a reduction by 25% in the track space in the MTA rail yard; and 5) the green roof that was to help mitigate storm water overflow has been eliminated.

¹¹ The report was prepared by Dr. Tom Angotti, Director of the Hunter College Center for Community Planning and Development.

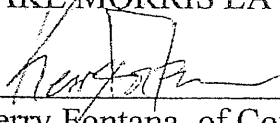
Clearly, the modified plan is significantly different than when first proposed and approved by the ESDC, and such changes are evidence that proposed public benefits were and are illusory. The considerable reduction and lack of confirmation of public space, affordable housing, and other conditions said to benefit the public do not logically suggest that the primary purpose is to benefit the public. Meanwhile the MGPP is full of improved favorable conditions to Forest City Ratner. It is reasonable to conclude that the primary objective of this plan is profit, and not public good. Accordingly, the plan should be adjudged unconstitutional.

CONCLUSION

For all the reasons cited above, this Court should reverse the decision of the Appellate Division below.

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September 3, 2009

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