*To be Argued by:*
Paul J. Goldman, Esq.
*(Time Requested: 15 Minutes)*

# Court of Appeals
*of the*
# State of New York

**BOWERS DEVELOPMENT, LLC** and
**ROME PLUMBING & HEATING SUPPLY CO. INC.,**

Petitioners-Respondents,

-against-

**APL-2023-00052**

**ONEIDA COUNTY INDUSTRIAL DEVELOPMENT AGENCY** and **CENTRAL UTICA BUILDING, LLC,**

Respondents-Appellants.

Appellate Division, Fourth Department Case No. OP 22-00744

## JOINT BRIEF OF RESPONDENTS-APPELLANTS

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Date Completed: May 15, 2023

**CORPORATE DISCLOSURE STATEMENT**
**PURSUANT TO RULE 500.1(f)**

The Oneida County Industrial Development Agency hereby discloses that it is a public benefit corporation formed under Section 901 of the General Municipal Law and is not a corporation or business entity exempt from the requirements of Rule 500.1(f) of the Court of Appeals of the State of New York.

The Central Utica Building, LLC ("CUB") hereby discloses that it is a Limited Liability Company organized under Section 203 of the Limited Liability Company Law. The members of CUB are four limited liability companies: 5DOCS, LLC; CNYC Realty LLC; DRW Capital Ventures, LLC and Saifi Properties LLC.

The members of 5DOCS, LLC and CNYC Realty LLC are Michael Kelberman, Ashok Patel, Peter Hotvedt, Hugh McIssaac, Gerry Love, Darius Marhamati, Daniel Berg, Thor Markwood and Michael Sassower. The member of DRW Capital Ventures, LLC is Daniel Welchons. The member of Saifi Properties, LLC is Nicholas Qandah.

## RELATED LITIGATION STATEMENT

The Petitioners and an affiliate have filed combined Article 78/Declaratory Judgment proceedings challenging the provision of financial assistance for the CUB Project which are pending in Oneida County Supreme Court as Index Nos. EFCA2023-000906 and EFCA2022-002152. These matters have been adjourned pending the outcome of this Appeal.

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## QUESTIONS PRESENTED

1) Is the Memorandum and Order dated December 23, 2022 (the "Order") of the Supreme Court, Appellate Division, Fourth Department properly made? (A.1064-1071[1]).

**Answer**: No. The Appellate Division improperly imposed its subjective judgment that the condemnation of real property for a parking facility appurtenant to a privately owned medical office building did not serve a commercial purpose thereby improperly replacing the rational determination made by the Oneida County Industrial Development Agency ("OCIDA") that such acquisition served a commercial purpose (R[2].5892, ¶1(d), R.5880).

2) Is the installation of a parking facility for a medical office building a "commercial" project within OCIDA's corporate purposes such that it may utilize its power of eminent domain?

**Answer**: Yes. OCIDA set forth a rational basis for concluding that a parking facility for an adjacent medical office building, even if located on hospital owned property, is a commercial project under General Municipal Law ("GML") §858(4) and §854(4) (R.5879-5881)[3].

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1 "A" refers to Appendix of Respondents-Appellants (the "Respondents") followed by the page.

2 "R" refers to refers to the Administrative Record on Review filed with the Appellate Division Fourth Department in Case No. OP-22-00744 followed by the page.

3 These questions were preserved within Points I and II of the Joint Brief of the Respondents to the Fourth Department (A.855-866).

## STANDARD OF REVIEW

Judicial review of the determinations and findings made by a condemnor in an eminent domain proceeding are limited such that a court may only substitute its judgment where that legislative determination is irrational or baseless. *See* Matter of Kaur v. New York State Urban Dev. Corp., 15 N.Y.3d 235, 254-255 (2010) *citing* Matter of Goldstein v. New York State Urban Dev. Corp, 13 N.Y.3d 511, 527 (2009). If the condemnor sets forth an adequate basis for its eminent domain determination, and the objector cannot demonstrate that such determination is without foundation, it should be confirmed. Matter of Waldo's, Inc. v. Village of Johnson City, 74 N.Y.2d 718, 720 (1989). Indeed, appellate review of the Determination and Findings made by OCIDA (the "EDPL Findings")[4] under the Eminent Domain Procedure Law ("EDPL") is quite limited to whether: (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) the determination complied with the State Environmental Quality Review Act ("SEQRA") and EDPL Article 2 and (4) the acquisition will serve a public use, benefit or purpose. *See* EDPL §207(C).

## PRELIMINARY STATEMENT

Appellants, OCIDA and Central Utica Building, LLC ("CUB"), respectfully submit this joint brief in support of their appeal of the Order which annulled the EDPL Findings.

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[4] *See* R.5875-6000.

This case is about the definition of "commercial" and the legislative authority of OCIDA to determine what constitutes a "commercial" project within its corporate purposes. OCIDA determined that the condemnation of 411 Columbia Street (the "O'Brien Property") in the City of Utica (the "City") served a public purpose of a parking facility appurtenant to the adjoining commercial medical office building that would be publicly available after business hours (R.5282-5284, R.5476). But the Appellate Division accorded no deference to OCIDA's interpretation of its statutory purposes and disregarded that determination opting to substitute its subjective opinion that the parking facility was "a necessary component of larger hospital and healthcare facility project", and therefore "was not a commercial purpose" (A.1018). Critically, the Order adversely impacts an important medical office building project that is a component of the economic revitalization of a longstanding blighted area of the City. (R.5217-5218, R.5245-5246, R.5891, ¶¶34-37, R.5893, ¶3(b)-(c)). It further drapes a cloud of uncertainty over the exercise by any Industrial Development Agency ("IDA") of its corporate power to define "commercial projects" that further economic development.

## STATEMENT OF THE CASE

### 1. Statement of Facts

#### A. The Integrated Health Campus Project

In 2014, the two aging hospital systems in the City, Faxton St. Luke's Healthcare ("FSLH") and St. Elizabeth Medical Center ("SEMC"), affiliated as the Mohawk Valley Health System ("MVHS") (R.6, ¶4(a)). Thereafter, MVHS initiated plans for an integrated health campus project within a blighted area of the City's downtown (R.7, ¶6(a)). This integrated health campus consisted of a new hospital of approximately 670,000 square feet, a central utility plant, a potential future medical office building owned by a private developer, various parking facilities including a parking garage and multiple surface parking lots available to the community for non-hospital events, and an urban park setting of 25 acres (the "IHC") (R.46-48). The siting of the IHC was intentionally placed proximate to other community event facilities such as The Nexus Center and Utica Memorial Auditorium (R.7, R.5245). The hospital component of the IHC will replace FSLH and SEMC and provide state of the art healthcare services to rival large cities (R.46).

The area chosen for the IHC was afflicted with deteriorated buildings and vacant or under used properties recognized as a long-standing blighted area (R.5217-5218, R.697). The blighted conditions in the IHC are confirmed by its designation within an Empire Zone, a Historically Underutilized Business zone and within an

Urban Renewal Plan Utica Downtown Development Project Area (R.5217, R.5245). The downtown revitalization effort of the City has been successful with new housing opportunities to serve the infusion of approximately 3,500 employees and a plethora of new commercial, food, retail, education and entertainment venues (R.7, R.5566, Lines 12-21, R.5245, R.5249).

The environmental review for the IHC under SEQRA was conducted by the Planning Board of the City as the lead agency (the "Planning Board"). The project was identified as a Type I action under SEQRA, and the Planning Board issued a Positive Declaration requiring the preparation of an environmental impact statement ("EIS") to assess the environmental impacts and to identify possible mitigation (R.92-153). The Planning Board went through the entire draft EIS, scoping, public hearing and comment resolution and mitigation evaluation process which culminated in the acceptance of the final EIS (A.843-847). The EIS addressed all mitigation to minimize the potential negative environmental impacts of the IHC, including the privately owned medical office building component (R.5216, R.4243-5213). On April 30, 2019, the Planning Board issued its Findings Statement and certified that the environmental review was complete (R.6402-6452) (the "SEQRA Findings Statement").

The SEQRA Findings Statement provides in pertinent part:

- "Parking Mitigation -- This potential impact will be minimized by the construction of one municipal parking garage and multiple surface lots. The TIS [traffic impact study] included a parking supply demand analysis based on similar facilities in urban settings. The two current facilities provide approximately 2,800 spaces. The Project will provide approximately 2,330 spaces broken down as follows: 1,455 spaces for the hospital component, 375 spaces for the Medical Office Building ("MOB") and 500 spaces for the City/public" (R.6427);

- "The Planning Board finds that the mitigation measures will minimize Project's potential impacts on transportation (traffic, parking, pedestrians) to the maximum extent practicable (R.6429).

- According to the FEIS, although the hospital and parking garage would be tax exempt, the medical office building would be fully taxable….This amounts to approximately $100,000 to $200,000 more annually in real property taxes and between $106,667 and $191,625 more annually in sales taxes following the construction of the IHC." (R.6410-6411).

The parking use of the O'Brien Property is a part of the City's parking co-utilization plan for the IHC, the Nexus Center and Utica Memorial Auditorium event centers (R.5249). Rome Plumbing & Heating Supply Co. Inc., formerly J.P. O'Brien Plumbing and Heating Supply, Inc. ("O'Brien"), as the owner of O'Brien Property and others challenged the SEQRA Findings Statement, and Supreme Court dismissed that action (A.890-942).

### B. The Medical Office Building Project

The principal tenant of the medical office building component of the IHC has always been Central New York Cardiology, P.C. ("CNY Cardiology"). CNY Cardiology operates from leased space in the City nearby the soon to be closed SEMC (R.5369). That space is fragmented and spread over four floors and does not meet the current or anticipated requirements of CNY Cardiology (R.5369). CNY Cardiology's existing lease expires in May 2023 (R.5369). As a result, CNY Cardiology determined to relocate into a single floor of the medical office building component of the IHC (R.5531). The shareholders CNY Cardiology wanted an ownership interest in that building, and formed CUB for that interest. This proprietary limited liability company thereafter became the developer of the privately owned medical office building component of the IHC (R.5324, ¶¶2(a)-(b), R.5368).

### C. Bowers Development, LLC

Bowers Development, LLC ("Bowers") (Bowers and O'Brien are hereinafter collectively called the "Petitioners") proposed developing the medical office building component of the IHC, with CNY Cardiology as the principal tenant. However, the relationship between Bowers, CNY Cardiology and MVHS soured to the point that neither CNY Cardiology nor MVHS wanted an association with

Bowers (R.5575-5576, R.5891, ¶34). The EDPL Findings confirm that disassociation:

> Bowers indicated on the record that a medical office building in the immediate area of the Wynn Hospital is a public purpose. Mr. Licata confirmed that Bowers had a full and fair opportunity to endeavor to have MVHS and the other physician group enter into a business relationship that would have allowed its proposal to move forward. That did not occur and MVHS and a large physician practice group have elected to reject the proposal from Bowers as is their right. The fact that MVHS and a large physician practice group elected to not affiliate with or occupy the facility contemplated to be developed by Bowers is significant as that certainly gives rise to substantive concerns of the OCIDA as to the feasibility of that conceptual development actually occurring. Further, Bowers did not present any detail to the OCIDA about its proposed medical office building and if any part of it were committed for occupancy that would enable the OCIDA to conclude that its conceptual development was feasible and had a possibility of actual occurring. (R.5886, §VII, ¶19).

After rejection of its proposal, Bowers, with full knowledge of the importance that proximate parking would be for the medical office building component of the IHC, sidestepped CNY Cardiology and MVHS and entered into a contract to acquire the O'Brien Property, which was the only parcel for the private medical office building component of the IHC and related surface parking areas that MVHS did not control (R.5522). Without any support offered into the record, Bowers asserted that it was going to build a larger and completely separate medical office building on only the O'Brien Property and without any parking or construction support from the

adjoining parcels (R.5302). However, Bowers failed to provide critical details on its conceptual development including: (a) committed tenants under binding leases; and (b) proof of financing (R.5886, ¶17). In reality, the Bowers concept was premised on forcing CUB and its tenants to relocate into its building or imposing Bowers as the developer of the medical office building (R.5575, Lines 2-20, R.5886, §VII, ¶19).

**D. The CUB Project.**

CUB, with the support of MVHS, moved forward with a medical office building at 601 State Street at the southeastern corner of State and Columbia Streets (the "Building Parcel") which is immediately adjacent to the mid-block O'Brien Property (R.5511-5512). The CUB Project is ninety percent (90%) leased with financing in place (R.5886, ¶17, R.5890, ¶32). After receiving no information on the financial feasibility of the Bowers concept, OCIDA concluded, that the CUB Project was real and the Bowers concept was not (R.5891, ¶34, R.5893-5894, ¶4).

CUB proposed to construct an approximately 94,000 square foot medical office building on the Building Parcel (the "CUB Building"). Throughout the entire EIS process, the parking for the medical office building component was to be provided from the adjoining parcels to the Building Parcel, including the O'Brien Property and the other two parcels proximate to the southwest corner of Columbia

and Cornelia Streets[5] (collectively the "Parking Parcels") (the CUB Building, the CUB Parcel and the Parking Parcels are hereinafter collectively called the "CUB Project") (R.5511-5512). During the EIS process, the O'Brien Property was at all times shown as a surface parking facility for the private medical office building component of the IHC (R.861-862, R.4251-Figure 3, R.5512 *compare* R.5511, R5906). CUB confirmed that its entire parking facility, including the O'Brien Property, would be publicly available during off hours, consistent with the community commitment for non-hospital events embodied as the co-parking utilization concept in the EIS (R.5992, R.5512, R.5236-5237, R.5249).

The CUB Project was structured as a ground lease of the Building Parcel and the Parking Parcels and would include the O'Brien Property when acquired. These parcels would be acquired by MVHS and leased to CUB for ninety-nine (99) years[6] (R.5368). CUB would obtain the tenants, the financing for the construction of the CUB Project and be responsible for its construction.

CUB applied to OCIDA for financial assistance for the CUB Project. *See* GML §854(14) (R.5321-5475, R.6337-6347). The CUB Project was categorized by OCIDA as a commercial project since it is a taxable medical office building (R.5879-

[5] The Parking Parcels are 409 and 401-407 Columbia Street (SBL Nos. 318.41-2-39 and 318.41-2-40) (R.5511).

[6] Under Tax Law §1401(e)(i), a conveyance of real property is deemed to occur upon the entry of a lease with a term, inclusive of renewal options, which exceeds 49 years. Here, the ground lease is 99 years which means that CUB, not MVHS, is the owner of that property for transfer tax and real property tax purposes.

5881, ¶1, R.6390, sec. 1(a), R.6494, Sec. 1(b)). After it became clear that Bowers would not relinquish its contract for the O'Brien Property, CUB requested that OCIDA initiate eminent domain proceedings to acquire that property (R.5282-5285).

**E. The SEQRA Review by OCIDA of the CUB Project**

OCIDA, as an involved agency bound by the Planning Board's coordinated review of the IHC, undertook the environmental review of the CUB Project under SEQRA (R.126, R.6397-6452). OCIDA determined that the Planning Board's coordinated environmental review of the IHC included the medical office building and related surface lots such that the SEQRA Findings Statement was applicable to the CUB Project (R.6397-6400). OCIDA affirmed that the CUB Project, including the acquisition of the O'Brien Property as a public parking lot, resulted in no material change to the medical office building component of the IHC and consequently determined that no additional SEQRA review was required (R.6397-6452) (the "SEQRA Resolution").

**F. The GML §862(2) Findings and the Final Lease Resolution**

Since the CUB Project is a rental medical office building whose tenants provide services to patients that visit that facility, OCIDA analyzed the CUB Project as both a commercial project under GML §854(4) and a retail project under GML §862(2)(a)(ii) (R.6453-6454). The CUB Project is a permitted retail project under the Act, because it is in a highly distressed area (R.6453-6454, R.6489-6490). *See*

GML §854(18)(c). On March 2, 2022, OCIDA approved the financial assistance for the CUB Project with detailed findings (R.6491-6498).

### G. OCIDA's Article 2 Review for the Acquisition of the O'Brien Property

At its January 21, 2022 meeting, OCIDA approved a resolution to commence the EDPL Article 2 review of eminent domain of only the O'Brien Property as a parking facility. Thereafter, OCIDA properly noticed a Public Hearing for February 23, 2022 (the "Public Hearing") (R.5286-5300). On February 3, 2022, OCIDA provided notice of the Public Hearing to O'Brien, as owner, and Bowers, as contract vendee, as required by EDPL §201 and §202. (R.5914, R.5916, R.5291, R.5297).

The Public Hearing was held on the published date (R.5927-5964, R.5547), and representatives of CUB (R.5565-5574, R.5578-5581, R.5480-5488), MVHS (R.5576-5578), Counsel for Bowers (R.5560-5565), and a principal of Bowers spoke (R.5574-5576, R.5878, ¶30, R.5547). The Petitioners submitted multiple written comments (R.5301-5475, R.5587-5846, R.5850-5874). Members of the public provided written comments (R.5489-5496, R.5502-5503, R.5477, R.5504-5505, R.5500-5501, R.6334, R.6331, R.6333, R.5480-5488, R.5878, ¶31). The transcript of the Public Hearing, along with all comments, were available for public inspection at OCIDA and the County Clerk (R.5966-5969).

At the April 7, 2022 meeting of OCIDA, the members discussed the record of the Public Hearing and all comments, the EDPL Findings and the Vice Chairman of

OCIDA read a detailed statement as to why the CUB Project was real and the Bowers concept was not (R.6041-6045, R.5879-5891). The EDPL Findings were then approved by OCIDA since the condemnation served a public purpose, created job opportunities, fostered prosperity, and would "reduce burdens on public parking facilities in the area and also alleviate traffic" (R.5875-6000, R.5880, R.5892-5896). The EDPL Findings addressed all comments (R5879-5891). OCIDA also approved: (a) the EDPL Findings and synopsis thereof (the "Synopsis") (R.6001-6003; 6036-6038); (b) the publication of the Synopsis in The Observer Dispatch pursuant to EDPL §204(A) (R.6039-6040); and (c) service of the notice of Synopsis on the record owner and the contract vendee pursuant to EDPL §204(C) (R.6031-6038). Thereafter, the publication and service of the Synopsis was timely completed by OCIDA (R.6001-6028).

**2. Course of Proceedings**

On May 10, 2022, the Petitioners commenced an original proceeding in the Appellate Division Fourth Department pursuant to EDPL §207 (A.2-578). In its Petition, the Petitioners asserted that OCIDA lacked authority to condemn the O'Brien Property by eminent domain to provide parking for the CUB Project by mischaracterizing the CUB Project from its actual use as a medical office building into a "Hospital" or "Health-related Facility" (A.17-18, ¶¶66-71, A.77-78).

On December 23, 2022, the Appellate Division, with Justice Curran dissenting, issued the Order granting the Petition and annulled the EDPL Findings. In the Order, the majority erred by failing to address the rationality of the EDPL Findings and according no deference to OCIDA's determinations. The Appellate Division majority did not apply the rational basis standard of review and instead, improperly substituted their subjective judgment that the acquisition of the O'Brien Property for a parking facility was not for a commercial purpose (A.1065), and that such property was a necessary component of a "larger hospital and healthcare facility project." (A.1065).

Justice Curran dissented, stating:

> The majority grounds that conclusion on its determination that OCIDA's "'corporate purposes'" do not include "projects related to hospital or healthcare-related facilities." It further concludes, in summary fashion and without any elaboration, that OCIDA's use of eminent domain here "was not [for] a commercial purpose." The majority's conclusion on that latter issue, however, gives no deference to OCIDA's express determination that it was exercising its lawful eminent domain power in furtherance of its express corporate purpose to "promote, develop, encourage and assist in the acquiring, constructing, reconstructing, improving, maintaining, equipping and furnishing," inter alia, "commercial" facilities, and "thereby advance the job opportunities, health, general prosperity and economic welfare of the people of the [S]tate of New York" (General Municipal Law §858). Nowhere does the majority conclude that OCIDA's determination was irrational or that it lacked any

> foundation or basis (see *Kaur*, 15 N.Y.3d at 254, 907 N.Y.S.2d 122, 933 N.E.2d 721; *Waldo's, Inc.*, 74 N.Y.2d at 720-721, 544 N.Y.S.2d 809, 543 N.E.2d 74; *Butler*, 39 A.D.3d at 1271-1272, 833 N.Y.S.2d 829). Thus, by failing to address OCIDA's expressly stated basis for concluding that it had the statutory authority to exercise its eminent domain power-i.e., that it was done in furtherance of a commercial purpose-the majority has not only failed to afford OCIDA any deference with respect to its legislative determination (*see Goldstein*, 13 N.Y.3d at 526, 893 N.Y.S.2d 472, 921 N.E.2d 164), it has entirely supplanted OCIDA by improperly making its own de novo determination of that question as a matter of law (*see Kaur*, 15 N.Y.3d at 254, 907 N.Y.S.2d 122, 933 N.E.2d 721; *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 418, 503 N.Y.S.2d 298, 494 N.E.2d 429 [1986]). In essence, the majority's conclusion makes it appear as though a legislative body-here, OCIDA-played no role at all in the exercise of the State's eminent domain power (A.1065-1071).

**3. Jurisdiction of the Court of Appeals**

The Order finally determined the proceeding by granting the Petition and annulling the EDPL Findings. OCIDA and CUB moved in the Appellate Division for reargument, or in the alternative for leave to appeal to the Court of Appeals (A.998-1035). On March 17, 2023, the Appellate Division denied reargument, but granted leave to appeal to the Court of Appeals, and certified the question: "Was the order of this Court entered December 23, 2022, properly made?" (A.1080) (the "Certified Question").

## POINT I

## A PARKING FACILITY IS A COMMERCIAL PROJECT WITHIN THE CORPORATE PURPOSES OF OCIDA

The crux of this appeal is whether OCIDA's exercise of the statutory power of eminent domain to create a parking facility is within its corporate purposes as a commercial project under GML §858. The Legislature authorized the creation of IDAs through the enactment of Article 18-a of the GML (the "Act"). Under GML §852 and §858, IDAs were formed with broad statutory powers to undertake projects (as defined in GML §854(4)) and to condemn property for its corporate purposes.

GML §858 establishes that IDAs may assist with the following types of projects: "industrial, manufacturing, warehousing, *commercial*, research, renewable energy and recreation facilities including industrial pollution control facilities, educational or cultural facilities, railroad facilities, horse racing facilities, automobile racing facilities, renewable energy projects and continuing care retirement communities." (*emphasis in italics*). The Legislature also authorized IDAs to financially support projects through various tax exemptions (*see* GML §854(14)). Due to the lack of statutory definition for the word "commercial" in the Act, the Appellate Division previously found such term to be ambiguous so that an IDA's interpretation thereof should be accorded great deference and upheld as long as reasonable. Matter of Nearpass v. Seneca County Indus. Dev. Agency, 152 A.D.3d 1192, 1193 (4th Dept. 2017).

Condemnation is a legislative power. Matter of West 41st St. Realty v. New York State Urban Dev. Corp., 298 A.D.2d 1 (1st Dept. 2002). Goldstein v. New York State Urban Dev. Corp., 13 N.Y.3d 511, 526 (2009). Consequently, courts must defer to the condemnation determinations of the condemning authority and review them pursuant to the rational basis standard. Kaur v. New York State Urban Dev. Corp., 15 N.Y.3d 235, 253 (2010) *compare* Matter of 2-4 Kieffer Lane LLC v. County of Ulster, 172 A.D.3d 1597, 1599-1601 (3d Dept. 2019). Lawrence Union Free Sch. Dist. v. Town of Hempstead Indus. Dev. Agency, 196 A.D.3d 486, 487 (2d Dept. 2021) (Judicial review of the IDA's determination is limited to whether there is a rational basis for it or whether it is arbitrary and capricious).

Here, OCIDA reasonably determined that the acquisition of the O'Brien Property for a surface parking facility was a commercial purpose and therefore within its corporate purposes because, among other things, it would create job opportunities, foster prosperity and "reduce burdens on public parking facilities in the area and also alleviate traffic …" (R.5880). This determination is well supported in the record (R.7, R.697, R.5568). Clearly an investment of approximately $42,000,000 in taxable rental real property in a blighted and highly distressed area of the City is a "commercial" development for which OCIDA is able to provide financial assistance as well as eminent domain.

Notwithstanding the significance of that investment as part of the regionally important IHC and its importance to the overall revitalization of the City, the Appellate Division majority supplanted OCIDA's legislative determination opting to undertake their own *de novo* review and then improperly substituting their subjective determination that a parking facility for a commercial building is not a commercial project (A.1065). That difference of opinion and the abject lack of deference to OCIDA is erroneous, as Justice Curran so forcefully argued in his dissent (A.1065-1071).

Before the Appellate Division, Petitioners asserted that there is a stricter standard of review for eminent domain matters (A.780, A.955, A.1038-1039, ¶11). However, that notion in the law is incorrect, because no strict standard of review was codified into either EDPL §207 or GML §858(4). Waldo's, Inc. v. Village of Johnson City, 74 N.Y.2d 718, 720 (1989). Rather, the main purpose behind the limited appellate review under EDPL §207 is to determine if "an appropriate public purpose underlies any condemnation." Matter of City of New York (Grand Lafayette Props. LLC), 6 N.Y.3d 540, 546 (2006) *citing* Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 417-418 (1986). Accordingly, the limited review of the EDPL Findings under EDPL §207, including the four enumerated factors therein, is to evaluate the overall rationality of such findings. Kaur v. New York State Urban Dev. Corp., Id. at p.254 *citing* *Matter of Goldstein,* 13 N.Y.3d at 527. If, after according

deference to the prerogative of the condemning authority, the determination and findings are rational they must be confirmed. Id. It is only if the EDPL Findings are determined to be irrational or baseless are they to be rejected. Id.[7].

**(IDA Precedent Holds that a Parking Facility is a Commercial Project)**

The acquisition by eminent domain of parking facilities is within the corporate purposes of an IDA since an IDA can acquire parking lots by eminent domain, it may therefore, by extension, acquire real property to create a parking lot or as part of a larger commercial project. PSC, LLC v. City of Albany Indus. Dev. Agency, 200 A.D.3d 1282 (3d Dept. 2021), *lv. denied*, 38 N.Y.3d 909 (2022) ("The remaining 0.88 acre consisted of 11 parcels of petitioner's property…that are used for parking…").

**(A Parking Facility Owned by Not-for-Profit Entity is a Commercial Use)**

The commercial nature of a parking facility on the O'Brien Property is confirmed by the precedent of this Court which holds that a community parking facility, even if owned by a not-for-profit organization, is a "commercial" facility under RPTL. *See* Greater Jamaica Dev. Corp. v. New York City Tax Comm., 25 N.Y.3d 614, 630 (2015) ("They are commercial lots that exist to promote economic

[7] The majority's citation in the Order to *Schulman v. People, 10 N.Y.2d 249, 255-256 (1961)* and *Peasley v. Reid, 57 A.D.2d 998, 999 (3d Dept. 1977)* does not support the stricter standard of review since those cases predate the enactment of EDPL §207. *Peasley* was issued on May 12, 1977 whereas the EDPL became law on August 11, 1977.

development in downtown Jamaica, providing easy access to local retail stores and government buildings".).

Long-standing appellate division precedent for hospital owned parking facilities appurtenant to privately owned taxable medical office buildings on hospital campuses holds that such hospital owned parking facilities (or the portion thereof) reserved for the use of a privately owned medical office building is a "commercial" use not entitled to the RPTL §420-a(1)(a) hospital exemption. Ellis Hosp. v. Assessor of City of Schenectady, 288 A.D.2d 581, 583 (3d Dept. 2001) ("The leased portion is reserved for the exclusive year-round use of people associated with the taxable medical office building".). *See also* Matter of St. Francis Hosp. v. Taber, 76 A.D.3d 635, 639-640 (2d Dept. 2010) ("Taber met her burden by demonstrating that a portion of the parking garage parcel was used to supply parking for the private physician subtenants of the Atrium".); *See also* Matter of Vassar Bros. Hosp. v. City of Poughkeepsie, 97 A.D.3d 756, 759 (2d Dept. 2012) ("The City met its prima facie burden by demonstrating that a portion of the parking garage parcel was used by the private physician subtenants of the medical office building, a use of the parking garage that is not reasonably incidental to or in furtherance of the purpose of the hospital".). *See also* Crouse Health Sys., Inc. v. City of Syracuse, 126 A.D.3d 1336, 1337 (4th Dept. 2015) (Inasmuch "[a]s the private practice of medicine by a hospital's attending physicians is primarily a commercial enterprise,

and such physicians' offices are not entitled to a tax exemption under RPTL 420-a..., the parking spaces subleased to those offices cannot be said to so further the hospital's purposes as to create an entitlement to an exemption").

Petitioner's attempt to distinguish these hospital parking precedents as limited to only RPTL matters is erroneous (A.1047, ¶44). When the Legislature enacted the Act, it simultaneously amended the RPTL by adding RPTL §412-a to effectuate the exemption from real property taxation of IDA property. The Bill Jacket for the Act at p.3 (C.9) confirms the intent of the Legislature to link these statutes as follows:

> The Real Property Tax Law is a necessary companion amendment and adds a new section thereto, Section 412-A, which provides that real property owned by an industrial development agency as enumerated in the General Municipal Law shall be entitled to such exemption may be provided therein. Section 874 of Article 18-A of the General Municipal Law recites that the carrying out of the corporate purposes of the agency is a public purpose, and shall be regarded as preforming a governmental function in the exercise of the powers conferred upon it and shall not be required to taxes or assessments on any of the property acquired by it or under its jurisdiction or control or supervision or upon its activities.

As a result of this legislative linkage of the Act and RPTL, the statutory term of commercial in GML §858(4) and GML §854(4) must be interpreted consistently with its use in the RPTL pursuant to "in pari materia" doctrine. *See* McKinney's Cons. Laws of NY, Book 1, Statutes §221(b) ("In accordance with general rules of construction, statutes which are *in pari materia* are to be construed together as

though forming part of the same statute"). City of New York v. Every, 231 A.D. 581, 585 (3d Dept. 1931) (they should be construed together). City Bank Farmers Trust Co. v. Ardlea Incorporation, 267 N.Y. 224, 228 (1935) ("The sections must be read together, having in mind the purpose of the emergency legislation and the object which it was enacted to accomplish"). General principles of statutory construction dictate that where a word is used in one statute with a distinct meaning and that same word is used in another statute dealing with the same subject matter, "it is understood as having been used in the same sense". Riley v. County of Broome, 95 N.Y.2d 455, 466 (2000). McKinney's Cons. Laws of NY, Book 1, Statutes §236.

**(A Parking Facility is a Commercial Use)**

Relevant to this appeal is the meaning of the broad and undefined statutory term "commercial" used in both GML §854(4) and GML §858. The generally accepted definition of a "parking facility" confirms its commercial status:

> **parking facility.** A commercial facility where automobiles can be parked; either public or private. *The Dictionary of Real Estate Appraisal*, 6th ed. (Chicago: Appraisal Institute, 2015), s.v. "parking facility" (C[8].62).

In matters involving statutory interpretation, the court should effectuate the intent of the Legislature and give effect to the plain meaning of the words used. Patrolmen's Benevolent Assn. of City of N.Y. v. City of New York, 41 N.Y.2d 205,

[8] "C" refers to the Compendium of Authorities Citied in Respondents-Appellants Brief followed by the page.

208 (1976). Town of Southampton v. New York State Dept. of Envtl. Conservation, 39 N.Y.3d 201, 209 (2023). Since the word "commercial" in the Act is susceptible to different meanings, the findings made by OCIDA that the CUB Project was a commercial project is entitled to "great deference" and must be upheld as long as reasonable. Nearpass v. Seneca County Indus. Dev. Agency, 152 A.D.3d at 1193 *citing* Golf v. New York State Dept. of Social Servs., 91 N.Y.2d 656, 667 (1998). OCIDA determined that a surface parking facility on the O'Brien Property was a commercial use within the meaning of the Act since it was found to promote and maintain job opportunities, health, general prosperity and economic welfare and improve the standard of living (R.5880). The EDPL Findings are neither irrational or unreasonable given the magnitude of the investment in the CUB Project in an area of the City that has long been recognized as afflicted with blight and underused property (R.5217-5218).

## POINT II

## A PRIVATELY OWNED AND TAXABLE MEDICAL OFFICE BUILDING IS A COMMERCIAL PROJECT WITHIN THE CORPORATE PURPOSES OF OCIDA

**(Court of Appeals Precedent)**

The rationality of OCIDA's commercial project conclusion is supported by the precedent from this Court (R.5880-5881). Matter of Genesee Hosp. v. Wagner, 47 A.D.2d 37 (4th Dept. 1975), *aff'd* 39 N.Y.2d 863 (1976). The holding in *Genesee Hosp.* is that a medical office building built and owned by a hospital which is operated for the private practice of medicine is a "commercial enterprise". Id. *Genesee Hosp.* involved a medical office building devoted to the private practice of medicine for the hospital physicians. The issue in *Genesee Hosp.* was whether the medical office building devoted to private practice of medicine was eligible for the RPTL §420-a hospital exemption. In *Genesee Hosp.*, this Court stated:

> Here, however, there is a commercialization and profit-making which goes well beyond the hospital's traditionally non-profit functions. The private practice of medicine by the attending physicians in the hospital's professional office building is clearly the kind of profit-making activity intended to be excluded by the Legislature when it created the statutory exemption under RPTL § 421. The clear distinction between the instant case and other cases dealing with commercial, corporate activity is that here **we have third parties receiving pecuniary profit from their own private practice of medicine which is integrally related to the operation of the real property**.

47 A.D.2d at 44-45 (emphasis added).

The Court continued:

> The private practice of medicine by a hospital's attending physicians is **primarily a commercial enterprise** only incidentally related to the hospital's function of providing health care to the community. The concept and development of a professional office building adjoining a hospital facility is an admirable addition to the community and doubtless will improve the teaching and health functions of the hospital. However, it is also a facility which is in direct competition with privately developed professional buildings in an area which serves the identical function as far as the private practice of medicine is concerned. As it presently exists the Doctors Office Building, insofar as the attending physicians are concerned, is primarily the place where they earn their living with the additional convenience of proximity to the hospital.

47 A.D.2d at 46 (emphasis added). *Genesee Hosp.* controls the commercial status of the CUB Project since its medical suites are leased to generate income (R.5370). Here, unlike *Genesee Hosp.* where the medical office building was hospital owned, the CUB Project is privately owned disqualifying it for the RPTL §420-a exemption compelling its commercial status. A RPTL commercial property is a commercial project under the Act since the RPTL categorizes property as either: taxable-commercial; or exempt-charitable/hospital[9].

[9] The CUB Project was always taxable commercial property (R.5218-5219). If the majority are correct as to their hospital and healthcare facility project conclusion (A.1065), then the entirety of the CUB Project could be eligible for the RPTL §420-a exemption resulting in the erosion of City's tax base and potentially adversely affecting other municipal assessment rolls.

**(IDA Precedent on Commercial Project Status for Medical Office Buildings)**

The medical office building in *St. Francis* was an IDA commercial project. Matter of St. Francis Hosp. v. Taber, 76 A.D.3d 635, 637 (3d Dept. 2010) (with respect to the Atrium[10], Columbia makes certain "Payments in Lieu of Taxes"… with the Dutchess County Industrial Development Agency). A qualifying commercial project under the Act exists "for the replacement of an unproductive, unoccupied industrial building with a new mercantile building of considerable size, which would ultimately create about 100 jobs". Matter of Grossman v. Herkimer County Indus. Dev. Agency, 60 A.D.2d 172, 179 (4th Dept. 1977). Analogous to *Grossman*, the CUB Project will have 160 new or retained jobs (R.5335-5336).

**(RPTL §485-b – Business Investment Exemption)**

Similarly instructive on the rationality of OCIDA's commercial conclusions is the "[B]usiness investment exemption" in RPTL §485-b applicable to real property used in a "commercial, business or industrial activity". RPTL §485-b(1). *See* 10 Op. Counsel SBEA No. 125. RPTL §485-b encourages business development by temporarily foregoing tax revenues to attract commercial development. Long Is. Light. Co. v. Bd. of Assessors of County of Nassau, 81 N.Y.2d 1029, 1031 (1993). OCIDA relied on this statute and determined that the CUB Project had no overnight accommodations and thus qualified for the RPTL §485-b exemption for commercial

[10] The Atrium is described in *St. Francis* as a "medical office building". Id.

property (R.5880-5881, R.5974-5976). *See* RPTL §485-b(5). Matter of Glengariff Corp. v. Bd. of Assessors of County of Nassau, 128 A.D.2d 872, 873 (2d Dept. 1987).

**(Definition of a Commercial Building)**

The CUB Building is a rental commercial office building that leases space to produce rental income (R.5655, R.5480). Commercial property is "[I]ncome-producing property such as office buildings, retail buildings, hotels, banks, restaurants, service outlets …". *The Dictionary of Real Estate Appraisal*, 6th ed. (Chicago: Appraisal Institute, 2015), s.v. "commercial property" (C.61). *The Appraisal of Real Estate*, 15th ed. (Chicago: Appraisal Institute, 2020), 236 (C.59). *See* Merrick Holding Corp. v. Bd. of Assessors of County of Nassau, 45 N.Y.2d 538, 542 (1978). Since the CUB Project is an income producing asset, OCIDA rationally concluded that it is a commercial project (R.5879-5881, R.5892, ¶1(d)). Noteworthy is that the respective medical office buildings in *Ellis*, *Vassar* and *Crouse* were taxable commercial properties. Ellis Hosp. v. Assessor of City of Schenectady, Id. at 581 (a three-story medical office building which is not exempt from taxation). Matter of Vassar Bros. Hosp. v. City of Poughkeepsie, Id. at 405 (the medical office building parcel was assessed taxes). Crouse Health Sys., Inc. v. City of Syracuse, Id. (nonexempt uses such as the adjacent private physicians' offices.).

## POINT III

## NO COMPONENT OF THE CUB PROJECT IS A HOSPITAL OR HEALTH RELATED FACILITY

The CUB Project is not a "Hospital or Health-related Facility" contrary to Petitioners' mischaracterization:

> The proposed CUB Project is a hospital or health-related project. Therefore, the CUB Project is not a type of project which OCIDA has jurisdiction or authority.
>
> CUB has described its MOB Project to OCIDA as a physician-hospital ambulatory surgery center joint venture with 6 operating rooms, medical clinics, a cardiology medical group and health-related tenants all within the footprint of the hospital development and MVHS campus (R.5303-5304, *see also* R.5562, Lines 10-12).

The sole support for their mischaracterization are two old and inapposite 1980s era opinions of the Attorney General. *See* 1981 NY Op. Atty. Gen. 55 (C.3-4) and 1980 NY Op. Atty. Gen. Inf. (C.1-2) (A.782-783) (collectively, the "1980 AG Opinions"). In the first, the Attorney General opined that an IDA could not assist "hospitals" as defined in Public Health Law ("PHL") §2801(1) and the second involved whether an IDA could assist nursing homes or other "health-related facilities".

Petitioners' reliance on the 1980 AG Opinions is erroneous since a medical office building is neither a Hospital nor a "Health-related Facility" under the applicable statutory and regulatory definitions. *See* PHL §2801(1) and (4)(a) and 10

NYCRR 700.2(a)(4) & (5). Unlike the medical office building component of the CUB Project, a "Health-related Facility" is a specific type of residential facility having the following essential components: lodging, board and physical care to the residents (R.5531-5532, R.5370-Business). *See* Glengariff Corp. v. Bd. of Assessors of County of Nassau, 128 A.D.2d 872 (2d Dept. 1987). Gardner v. Axelrod, 104 A.D.2d 633 (2d Dept. 1984). Cabrini Med. Ctr. v. Axelrod, 116 A.D.2d 834 (3d Dept. 1986).

The obvious differences between the medical office building facility here and the facilities defined in the 1980 AG Opinions were ignored by the Appellate Division majority who improperly characterized the CUB Project as "healthcare related facilities" and "healthcare facility project", neither of which are defined terms in the PHL or its regulations or the Act (A.1065). The 1980 AG Opinions do not control since they do not involve a medical office building or a parking lot for a medical office building. As a result, OCIDA appropriately determined that the primary use of the CUB Project was a commercial medical office building which rational determined was required to be confirmed by the Appellate Division (R.5879-5881).

## POINT IV

## OCIDA SATISFIED THE OTHER ELEMENTS OF EDPL §207

## (Public Purpose)

The primary purpose of EDPL Article 2 is to insure that a condemnor does not acquire property without having made a reasoned determination that the condemnation will serve a valid public purpose. Waldo's, Inc. v. Village of Johnson City, 141 A.D.2d 194, 198 (3d Dept. 1988) *citing* Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 417-418 (1986). The standard of review of a public purpose determination of any condemnor is whether it is conceivably related to a public purpose. Matter of Kaufmann's Carousel v. City of Syracuse Indus. Dev. Agency, 301 A.D.2d 292, 303 (4th Dept. 2002) *lv. denied* 99 N.Y.2d 508 (2003). The OCIDA has broad discretion in determining what constitutes a public purpose. Rafferty v. Town of Colonie, 300 A.D.2d 719, 723 (3d Dept. 2002). What constitutes a "public purpose" under the EDPL is defined broadly and encompasses any use which contributes to the health, safety, general welfare, convenience or prosperity of the community. Matter of 225 Front St., Ltd. v. City of Binghamton, 61 A.D.3d 1155, 1157 (3d Dept. 2009). Moreover, eminent domain to create a parking facility for the IHC was determined by the Appellate Division to be a public purpose under EDPL Article 2 which precedent was expressly relied upon by the OCIDA (R.5881-5882). Truett v. Oneida County, 200 A.D.3d 1721 (4th Dept. 2021) *lv. denied* 38

NY3d 907 (2022). The acquisition of land for parking is a public purpose even when the majority of users of such parking facility are patients of a hospital. Matter of Incorporated Vil. of Garden City (Lorentzen), 15 A.D.2d 513 (2d Dept. 1961). Redevelopment of the type occurring with the IHC is a valid public purpose for the exercise of eminent domain. Court St. Dev. Project, LLC v. Utica Urban Renewal Agency, 188 A.D.3d 1601, 1603 (4th Dept. 2020). The elimination of blight is also valid public purpose. Goldstein v. New York State Urban Dev. Corp., 13 N.Y.3d 511, 517-518 (2009) (that the proposed land use improvement project will, by removing blight and creating in its place the above-described mixed-use development, serve a "public use, benefit or purpose" in accordance with the requirement of EDPL §204(B)(1)); Matter of United Ref. Co. of Pa. v. Town of Amherst, 173 A.D.3d 1810, 1811 (4th Dept 2019) *lv. denied* 34 N.Y.3d 913 (2020) ("Here, respondent's condemnation of the vacant property serves the public use of redevelopment and urban renewal")[11].

**(Conformity with Federal and State Constitutions)**

Petitioners and their counsel attended the public hearing and provided extensive written statements such that they had more than ample opportunity to comment on the acquisition of the O'Brien Property. The record confirms that the

[11] The blight findings for the IHC made by both the Planning Board and OCIDA were not disputed by the Petitioners (R.697, R.4254, R.4255-4257, R.5215, R.5217, R.5232, R.5236, R.5245, R.5882, ¶4, R.5885, ¶15, R.5893, ¶3(b)).

process followed by OCIDA in noticing and conducting the Public Hearing, considering all comments and ultimately approving the EDPL Findings is constitutionally sound in that the right to notice and due process were strictly adhered to by OCIDA. Goldstein v. New York State Urban Dev. Corp., 64 A.D.3d 168, 185-186 (2d Dept. 2009) (the procedures outlined in the EDPL have been held to satisfy the due process requirements of the Federal and State Constitutions) (A.847-853). Yonkers Cmty. Dev. Agency v. Morris, 37 N.Y.2d 478, 482 (1975).

**(SEQRA Review and Mootness)**

OCIDA complied with SEQRA. The SEQRA Findings Statement included the entire IHC, the privately owned medical office building component and related parking facilities (R.6397). The final EIS and the SEQRA Finding Statement thoroughly examined the environmental impacts of the entire IHC, including the medical office building component (R.5899). The CUB Project, with its 94,000SF, is not a Type I action (*See* 6 NYCRR 617.4(b)(6)(v) such that it is an Unlisted action under SEQRA that does not carry the presumption of significant adverse impact. 6 NYCRR 617.4(a)(1). As an Involved Agency, OCIDA incorporated the SEQRA Findings Statement into its SEQRA Resolution (R.6397-6452). Thereafter, OCIDA reasonably concluded that there was no material difference between the medical office building component of the IHC and the CUB Project (R.6397-6398). Finally, the Planning Board approved the site plan and special use

permit ("SUP") for the CUB Building and determined that no further review under SEQRA was required (A.983-984). No litigation challenging the site plan or SUP approvals was commenced, and the CUB Building is presently under construction so that any SEQRA claims are moot.

**(Statutory Authority of the OCIDA)**

OCIDA has the requisite statutory authority to condemn the O'Brien Property by eminent domain for the reasons set forth in Points I through III of this Brief. The Appellate Division majority citation to Syracuse Univ. v. Project Orange Assoc. Servs. Corp., 71 A.D.3d 1432 (4th Dept. 2010) as support for the lack of authority is dicta and inapposite, because an "electric corporation" is defined in Transportation Corporation Law §10 while "commercial" is not defined in the Act. The Appellate Division majority further erred by ignoring that "sufficient statutory authority" is the standard for a condemnor. Waldo's, Inc. v. Village of Johnson City, Id. at 721-722. GML §858(4) clearly provides OCIDA with the power of eminent domain which satisfies the "sufficient statutory authority" standard since the term commercial is ambiguous and undefined under *Nearpass*. OCIDA established a rational basis for concluding that it had "sufficient statutory authority" to approve the eminent domain of the O'Brien Property for a $42,000,000 fully taxable medical office building in a blighted area of the City that will have 160 jobs (R.5338, R.5336, R.6495-6496, §2, R.5879-5881, ¶¶1-2).

## CONCLUSION

The Certified Question should be answered in the negative, and the Petition should be dismissed with costs on the dissenting opinion of the Honorable John M. Curran.

Dated: May 15, 2023

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Dated: May 15, 2023

# New York State Court of Appeals

**BOWERS DEVELOPMENT, LLC** and
**ROME PLUMBING & HEATING SUPPLY CO. INC.,**

Petitioners-Respondents,

-against-

**ONEIDA COUNTY INDUSTRIAL DEVELOPMENT AGENCY** and **CENTRAL UTICA BUILDING, LLC,**

Respondents-Appellants.

**AFFIDAVIT OF SERVICE VIA FEDERAL EXPRESS**

**APL-2023-00052**

STATE OF NEW YORK )
COUNTY OF ALBANY ) ss.:

Audrey Michasiow, being duly sworn, says: I am not a party to the action, am over 18 years of age and reside in Albany County, State of New York.

On the 15th day of May, 2023, deponent served three (3) copies of the annexed Joint Brief of Respondents-Appellants, the Compendium of Authorities City in Respondents-Appellants Joint Brief and the Appendix of Respondents-Appellants by depositing or causing to be deposited a true and correct copy of the same enclosed in a post-paid wrapper by Federal Express, before the latest time designated by overnight delivery service for overnight delivery to the following at their last known addresses set forth below:

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by depositing a true copy of same enclosed in an envelope, properly addressed, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Audrey Michasiow

Sworn to before me this
15th day of May, 2023.

Notary Public

PAUL J. GOLDMAN
Notary Public, State of New York
Qualified in Albany County
ID No. 02GO4864023
Commission Expires: June 9, 20 26