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 REPLY BRIEF OF RESPONDENTS-APPELLANTS

GOLDMAN ATTORNEYS PLLC
Paul J. Goldman, Esq.
Attorneys for Respondent-Appellant Oneida County Industrial Development Agency
255 Washington Avenue Extension, Suite 108
Albany, New York 12205
Tel: (518) 431-0941

COHEN COMPAGNI BECKMAN APPLER & KNOLL, PLLC
Laura L. Spring, Esq.
Attorneys for Respondent-Appellant Central Utica Building, LLC
507 Plum Street, Suite 310
Syracuse, New York 13204
Tel: (315) 671-6000

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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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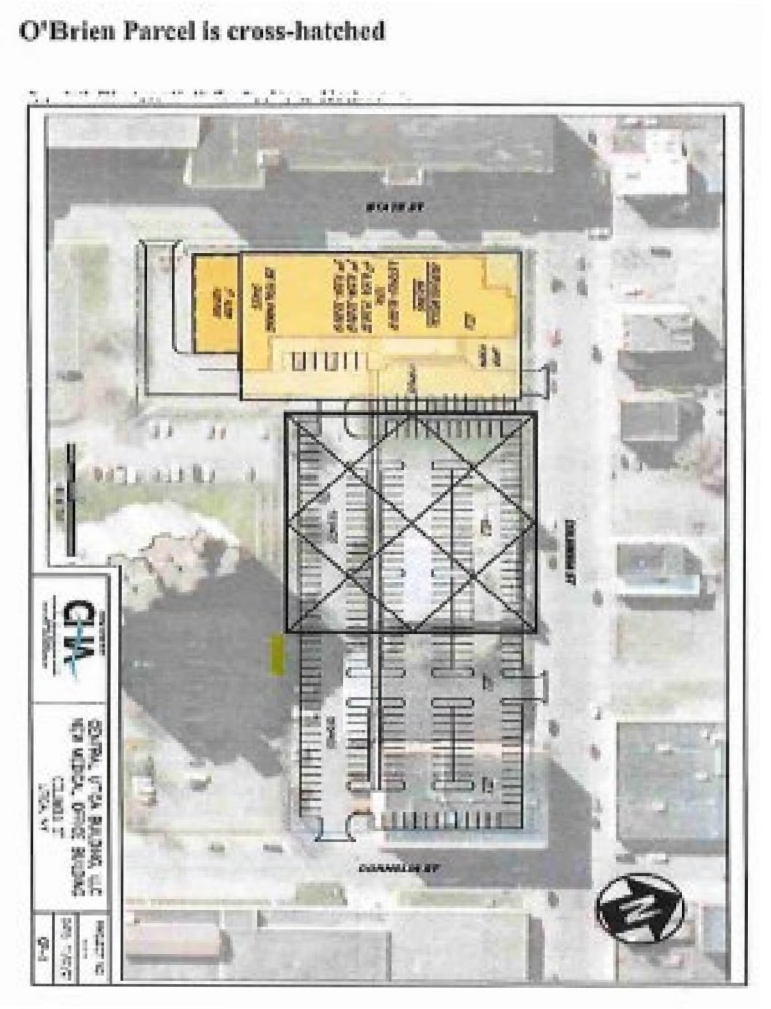
REPLY PRELIMINARY STATEMENT

Contrary to the repeated assertions in Petitioners-Respondents brief dated June 29, 2023 (the "Petitioners' Brief"), OCIDA[1] rationally found that the O'Brien Property should be taken for a commercial purpose as a publicly available surface parking facility adjacent to a commercial medical office building (R.5512, R.5892, ¶1). The record fully supported this finding, and the Appellate Division had no authority to undertake a *de novo* review of such record and substitute its own judgment that OCIDA lacked the authority to condemn this parcel, because of the Court's conclusion that it was a component of a larger hospital and healthcare facility project (A.990). To be clear, OCIDA did not condemn the O'Brien Property for either the Wynn Hospital or to acquire the land underneath the CUB Building; rather, those respective properties were long ago acquired. Instead, OCIDA approved the condemnation of the O'Brien Property as a surface parking lot that will serve the adjoining CUB Building during business hours and reduce the documented parking shortage in the downtown area on weekends and evenings (R.5512. R.5282-5284, R.5892, ¶1(a), R.5880-5881).

[1] The defined terms used in this joint reply brief are defined in the Joint Brief of Respondent-Appellants dated May 15, 2023 (the "Joint Brief") unless otherwise defined herein.

O'Brien Parcel is cross-hatched



However, even if the use of such property is analyzed as an appurtenance to the CUB Building, that use is clearly commercial since it is a for-rent medical office building. The record before OCIDA irrefutably demonstrates that the CUB Building is a privately owned commercial rental medical office building with 19% of the space leased to a privately owned day surgery center. The above map of the entire CUB Project (i.e. 4 tax parcels) demonstrates the need for adjacent parking (R.5880. R.5892, ¶1(a), R.5511-5512). The fact that the record has references to the role of the CUB Building as the privately developed medical office building component of

the integrated health campus does not change that the parking use of the O'Brien Property is the basis for the eminent domain decision of OCIDA (R.5880-5881).

In opposing the condemnation, Petitioners relied almost exclusively on the 1980 AG Opinions for their erroneous contention that OCIDA lacked the authority to condemn the O'Brien Property based on their contortion that a parking lot is a Hospital or health care related facility under such opinions (A.961)[2]. Simply stated, a surface parking facility is not a Hospital or Residential health care facility under the 1980 AG Opinions (C.1-4).

Petitioners also seek to greatly crimp the authority of IDAs with their argument that their exercise of eminent domain must be strictly construed by reviewing courts. This assertion is not supported by the plain language of EDPL §207(B) since the Legislature did not incorporate the "strict construction" standard in the EDPL for the judicial review of the findings of the condemnor. Instead, the Legislature mandated that judicial review be "in the same manner and form and with the same effect as provided in appeals in a special proceeding". That language invokes the rational basis standard of review and represents a rejection of the strict construction standard. Importantly, EDPL §207 does not contain any reference that

[2] The correct definition is a Residential health care facility (PHL §2801(3)) which encompasses a nursing home (PHL §2801(2)) and Health-related facility (PHL §2801(4)(b)). 65A NY Jur 2d §8. As correctly stated by the dissent, there is no statutory or regulatory definition of a "healthcare related facility" or "health care related facility" (A.1023).

a reviewing court may conduct a *de novo* review and reach its own findings and substitute those findings for those of the condemnor. OCIDA's statutory interpretation on this point has been repeatedly endorsed by the Courts, which hold that judicial review of an agency condemnation determination is very limited and highly deferential (*see e.g.* Jackson v New York State Urban Dev. Corp., 67 N.Y.2d 400 [1986]).

Stripped of Petitioners' rhetoric, the issues before the Court are simple: (1) may an IDA condemn property for use as a public surface parking facility adjacent to a privately-owned commercial medical office building to further the commercial and/or economic revitalization corporate purposes of IDAs under the GML Article 18-a, and (2) does the record support OCIDA's determination that the condemnation was for a surface parking facility. Properly stated, the issues clearly require reversal with the Certified Question answered in the negative.

ARGUMENT

REPLY POINT I

OCIDA HAS THE JURISDICTION AND AUTHORITY TO ACQUIRE THE O'BRIEN PROPERTY BY EMINENT DOMAIN

Petitioners' Brief ignores the central issue of this appeal, which is "who decides?". Petitioners' Brief rests on the erroneous premise that the purpose of the acquisition of the O'Brien Property was not for the commercial use of a parking lot, but rather, was a component of a larger hospital or healthcare related facility project. However, that conclusion misses the core issue, which is that OCIDA determined that such acquisition served a commercial purpose and also served to prevent economic deterioration in downtown area of Utica, both of which are squarely within the corporate purposes of GML Article 18-a, and these determinations are clearly supported in the record and EDPL Findings (R.5879-5881, R.5892, ¶1, R.5893, ¶3(b)). In other words, this was OCIDA's call to make. The EDPL Findings deserved deference since they were rationally made. But the majority of the Appellate Division gave them none and its Order should be reversed.

The CUB Building was at all times referenced in the record by OCIDA and CUB as a commercial medical office building in need of parking and was not admitted or considered to be either a hospital or health care related facility contrary to the erroneous contentions at Point I(B) of Petitioners' Brief (*see* R.6397, R.5874, R.5876, R.5881, ¶1, R.5885-5886, R.5904, R.5909, R.5971, R.5979, R.6453,

R.6489). Petitioners' contentions about the use of the CUB Building are wrong since it is, at its core, a commercial rental building. The acquisition of the O'Brien Property is needed to provide proximate parking for the CUB Project and is also a constituent part of the parking co-utilization plan for the downtown revitalization initiative (R.5287, R.5581, Lines 9-14, R.5218, R.5249). Both uses were analyzed in the EDPL Findings (R.5512, R.5880-5881). Beyond Petitioners' incorrect factual contortions, their "strict construction" theory is meritless and, as discussed herein, fails to recognize that in enacting the EDPL, the Legislature replaced that standard of review with the rational basis standard of review effective July 1, 1978.

(Enactment of the Eminent Domain Procedure Law)

The EDPL repealed the prior Condemnation Law and established a comprehensive and exclusive procedure governing the acquisition of real property by eminent domain for all New York public entities or governments. Laws of 1977 Chapter 839, p.1, pp. 9-14. *See* Matter of Goldstein v. New York State Urban Dev. Corp., 13 N.Y.3d 511, 531-540 (2009). In *Matter of Kaur v. New York State Urban Dev. Corp., 15 N.Y.3d 235 (2010)*, this Court reiterated that judicial review of condemnation findings under EDPL §207 is to be limited, and that such findings of the condemnor must be confirmed if rational. Kaur, 15 N.Y.3d at 254 ("Thus, a court may only substitute its own judgment for that of the legislative body authorizing the project when such judgment is irrational or baseless.").

The Legislature did not incorporate within the reviewable enumerated factors in EDPL §207(C) that the power of eminent domain was to be "strictly construed". Rather, the Legislature directed that judicial review was to be "in the same manner and form and with the same effect as provided for appeals in a special proceeding.". EDPL §207(B). After the Legislature enacted the EDPL with its limited judicial review provision for condemnations in EDPL §207, this Court decided *Goldstein* and *Kaur*, and clearly held that the Legislature intended only limited judicial review of condemnation findings, and that the findings of the legislative body (here OCIDA) must be afforded deference and may be disturbed only if "irrational or baseless." Goldstein, 13 N.Y.3d at 527; Kaur, 15 N.Y.3d at 254. Petitioners' "strict construction" arguments cannot survive the clear enactment of the Legislature and the interpretations of that enactment by this Court in two separate cases.

Finally, EDPL §705 confirms that the provisions of the EDPL control over any inconsistent provisions of law. Goldstein, 13 N.Y.3d at 521.

(The Acquisition of the O'Brien Property is a Commercial Project within General Municipal Law ("GML") §858(4) Corporate Purposes)

OCIDA has the statutory power to acquire property by eminent domain provided that it is used for a corporate purpose. *See* GML §858(4). Importantly, OCIDA has two sources of corporate purposes: GML §858 (Purposes and powers of the agency) and GML §852 (Policy and purposes of article). GML §858 enumerates IDA corporate purposes, including commercial projects that advance job

opportunities, health, general prosperity and the economic welfare[3]. GML §858 does not have any language of limitation. GML §852 starts with a policy statement on the desirability of "economically sound commerce and industry", and thereafter establishes the additional corporate purposes of "preventing unemployment and economic deterioration". The legislative history of the Act indicates that the power of eminent domain conferred upon IDAs was referenced as unlimited (C.18, C.28, C.29). As noted in the Joint Brief, parking facilities appurtenant to a medical office building used for the private practice of medicine, even if located on a hospital campus, is a commercial use of property[4].

Petitioners attempt to sidestep certain cases cited in the Joint Brief on the basis that they are RPTL precedent, but their efforts are unavailing (*see* Point I(C) of Petitioners' Brief). Here, the use of the O'Brien Property is identical to the commercial and fully taxable use found in *Ellis Hosp.*, *St. Francis Hosp.*, *Vassar Bros.* and *Crouse Health Sys.*. Even more problematic is that Petitioners ignored that *St. Francis* concerned a Dutchess County IDA commercial project having the required property interest for the supervision, jurisdiction and control requirement for a payment in lieu of tax agreement. Regeneron Pharms., Inc. v. McCarthy, 77

[3] The broad statutory term "commercial" used in GML §854(4) and GML §858 is not defined in GML Article 18-a. Nearpass v. Seneca County Indus. Dev. Agency, 152 A.D.3d 1192, 1193 (4th Dept. 2017).

[4] See *supra* Joint Brief, Point I at 19-23.

A.D.3d 1246, 1247 (3d Dept. 2010). *St. Francis* shows that IDAs routinely acquire property interests in medical office buildings as commercial projects, including those with ambulatory surgery centers. The Authorities Budget Office ("ABO") highlighted a medical ambulatory surgery project of the Onondaga County IDA in the IDA 2018 New Projects Report. *See* https://www.abo.ny.gov/reports/compliancereviews/IDANewProjectsAnalysisFinalReport.pdf at p. 5[5]. Certainly, if the ABO believed that an ambulatory surgery center was not a permitted project for an IDA, it would have sanctioned the Onondaga County IDA rather than highlighting the importance of that surgery center.

Petitioners fail in their attempt to distinguish *Kaur*, which directly contradicts their claim that Courts owe no deference to OCIDA's use of its statutory power of eminent domain (*see* Petitioners' Brief, pp. 15-16). In *Kaur*, this Court held that an agency deserved deference in determining whether a project serves a "public use," which is a pre-requisite to the exercise of eminent domain (15 N.Y.3d at 252). Here, OCIDA determined that the acquisition of the O'Brien Property served such a use within its corporate purposes (*see* GML §858[4]) (R.5880-5881). In deciding whether something is "commercial"-in the first instance-IDAs deserve deference,

[5] This was cited by OCIDA in the 2022 Article 78 proceeding challenging the financial assistance for the CUB Project referenced in the Related Litigation Statement (EFCA2022-002152, NYSCEF Doc. No. 51, ¶233).

lest their decisions, which are legislative, be subject to second-guessing by the judiciary (precisely what occurred here) (*see* Kaur, 15 N.Y.3d at 252-253).

Nowhere in the answering brief do the Petitioners define what constitutes a "commercial" property, and Petitioners instead fall back upon their erroneous mantra that the CUB Building is a hospital or healthcare related facility[6]. The reason for this failure is obvious, because a parking lot and office building-even one rented by doctors-satisfies any definition of commercial property[7].

The presence of the ambulatory surgery center in 19% of the CUB Building does not convert the entire building into a hospital since the primary use of the CUB Building is rental commercial real estate (R.5369)[8]. *See* Matter of Adult Home at Erie Sta., Inc. v. Assessor & Bd. of Assessment Review of City of Middletown, 10

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[6] Petitioners improperly expanded the scope of facilities prescribed in the 1980 AG Opinions by changing the defined term of "health-related facility" into a "health care related facility" (A.961). The majority of the Appellate Division failed to recognize this nuanced, but material, change when they utilized "healthcare-related facilities" or "healthcare facility project" in the Order (A.1018). Undeterred, Petitioners deploy the undefined terms of "healthcare related facility", "healthcare-related facilities" and "healthcare facility" a total of 25 times in the Petitioners' Brief. Critically, "health-related facility" is the actual defined term which is a reference to an adult home or assisted living facility (C.1-4). The "health-related facility" defined term is cited in Westlaw in 412 cases. The insertion of a hyphen between "health" and "related facility" is a direct reference to a "Health-related facility" which is not a parking lot or medical office building.

[7] *The Appraisal of Real Estate* has been cited with favor by this Court. *See* Matter of Bd. of Mgrs. of French Oaks Condo. v. Town of Amherst, 23 N.Y.3d 168, 176 (2014). Saratoga Harness Racing v. Williams, 91 N.Y.2d 639, 641 (1998). *The Dictionary of Real Estate Appraisal* is a companion treatise published by The Appraisal Institute. The Joint Brief cites both sources as authoritative on the meaning of the word "commercial" under GML §858.

[8] The ambulatory surgery center is ±18,000SF (R.6495) which is approximately 19.15% of the entire 94,000SF CUB Building (R.6492).

N.Y.3d 205, 214 (2008) (the word 'exclusive' has been held to connote 'principal' or 'primary'). Further, that the ambulatory surgery service is described within the hospital code of the PHL regulations is irrelevant to the issue of whether parking on the O'Brien Property is a commercial use within the corporate purposes of OCIDA. In fact, ambulatory surgery service is not a hospital use since that service prohibits stays of more than 24 hours while hospital service requires 24-hour care and inpatients. *See* 10 NYCRR 755.1 *compare to* 10 NYCRR 700.2(a)(5)(vi).

Contrary to the contention at p. 27 of the Petitioners' Brief, GML Article 18-a and RPTL §412-a are companion statutes enacted simultaneously that relate to same subject, "commercial" projects, such that pursuant to the "in pari materia" doctrine they must be construed consistently (C-5). The bright line established in *Genesee Hosp.*, as well as the hospital parking lot precedents of *Ellis Hosp.*, *St. Francis Hosp.*, *Vassar Bros.* and *Crouse Health Sys.*, should remain the applicable rule of law such that the acquisition of the O'Brien Property for surface parking is a commercial use of property within the GML §858 corporate purposes of OCIDA.

(The Acquisition of the O'Brien Property Prevents Economic Deterioration under the GML §852 Corporate Purposes)

The use of the O'Brien Property as a parking facility is a constituent part of the downtown revitalization effort under the parking co-utilization plan for this entire area (R.5218, R.5249). Further, it is part of the elimination of long-standing blighted conditions in the downtown area (R.5882, ¶4, R.5885, ¶15, R.5893, ¶3,

R.5215, R.5217-5218, R.5232, R.5236, R.5245 (Chronically underused and blighted conditions), R.5250, R.5256-5257, R.5259). The CUB Project will create and retain 160.9 full time jobs and is important to the health of the residents (R.5336). OCIDA found that the acquisition of the O'Brien Property as surface parking eliminated blight and was part of the economic revitalization of the downtown area of the City (R.5882, ¶4, R.5885, ¶15, R.5893, ¶3(b)). Petitioners do not dispute these findings in the record or Petitioners' Brief. GML §852 provides that OCIDA can utilize all of the powers set forth in GML Article 18-a, including eminent domain, in furtherance of the prevention of economic deterioration corporate purposes. As a result, the acquisition of the O'Brien Property for a surface parking facility is within the economic revitalization prong of the GML §852 corporate purposes.

(EDPL §207(C)(2) Statutory Jurisdiction or Authority)

The precedent of this Court confirms that the statutory jurisdiction or authority prong of EDPL §207(C)(2) should be resolved using the sufficient statutory authority standard of whether the use of property to be acquired is within the corporate purposes of the condemnor. Waldo's, Inc. v. Vil. of Johnson City, 74 N.Y.2d 718, 721-722 (1989). Petitioners' Brief completely ignored that sufficient statutory standard referenced at p.33 of the Joint Brief. Petitioners compound that omission by distinguishing *Goldstein* as a blight case (Petitioners' Brief, p. 25). But the record before OCIDA evinced blighted conditions proximate to the O'Brien

Property, and OCIDA expressly found that the acquisition of the O'Brien Property was part of the downtown revitalization and cure of the long-standing blighted conditions (R.5882, ¶4, R.5885, ¶15, R.5893, ¶3(b)). Further that contention is erroneous because all exercise of the condemnation power-to combat blight or to promote some other public purpose, such as promoting redevelopment-reflects a delegation of sovereign power to which judicial deference is warranted (*see* N.Y. Const. Art. 18, §2. Goldstein, 13 N.Y.3d at 524. People v. Adirondack Ry. Co., 160 N.Y. 225, 236 (1899), *aff'd* Adirondack Ry. Co. v. New York, 176 U.S. 335 (1900). Moreover, *Goldstein* holds that for the EDPL §207 judicial review, a court may only substitute its view for the legislative determination of the condemnor when there is "no room for reasonable difference of opinion as to whether an area is blighted". Goldstein, 13 N.Y.3d at 526. Here there is no dispute of the existence of long-standing blighted conditions proximate to the O'Brien Property (R.5882, ¶4). Just as in *Goldstein*, this Court has also held that a reasonable difference of opinion is an insufficient predicate to overturn the legislative determination. Kaur, 15 N.Y.3d at 253-254. Considering that the CUB Project is a $43,000,000 investment in a long-blighted area and parking is needed in the downtown area, the majority of the Appellate Division committed error by substituting their judgment for that of OCIDA.

(Strict Construction is Not the Correct Standard of Judicial Review under EDPL §207)

Petitioners principally rely upon *Schulman v. People, 10 N.Y.2d 249 (1961)* for their contention that eminent domain statutes are required to be strictly construed. The majority of the Appellate Division cited *Schulman* in the Order (A.990). However, the Appellate Division and the Petitioners ignore that *Schulman* was decided seventeen years prior to the July 1, 1978 effective date of the EDPL which nowhere calls for strict construction. To bolster their strict construction argument, Petitioners now cite McKinney's Statutes §293 and §312. However, that citation does not cure their misguided principal legal contention since Statutes is a McKinney's treatise and is not part of the Consolidated Laws of New York State. The Explanation section of Statutes, not found on Westlaw, confirms that Statutes is a "textual treatise on the construction and legal interpretation of the statutes enacted by the Legislature and contained in the Consolidated Laws and other laws of New York.". McKinney's Cons. Laws of NY, Book 1, Explanation, p. III.

In other eminent domain proceedings, this Court has confirmed that Statutes §293 and §312 are not acts of the Legislature but are merely tools to assist in ascertaining legislative intent. *See* Bath & Hammondsport R.R. Co. v. New York State Dept. of Envtl. Conservation, 73 N.Y.2d 434 (1989). The rationale in *Bath* directly contradicts the erroneous statement at p. 15 of Petitioners' Brief that "a statute conferring eminent domain power should be construed against the

condemnor". There is no statute containing the strict construction requirement. Further, the strict construction notion in Statutes §293 and §312 was clearly replaced in EDPL §207. Goldstein, 13 N.Y.3d at 533.

Petitioners' reliance upon Statutes §293 and §312 as support for the strict construction theory is flawed wishful thinking since their respective annotations lack any updates for cases subsequent to the February 1971 publication date of Statutes. Further, Statutes §293 and §312 lacks any reference to the EDPL which was enacted to repeal the Condemnation Law. See Laws of 1977 Chapter 839, p.1. McKinney's Statutes has no reference to the EDPL §207 precedents of this Court such as *Jackson, Goldstein, Kaur, Bath* and *Wechsler*. As a result, the strict construction standard cited by the Petitioners relates only to the Condemnation Law that was repealed by the EDPL so that the strict construction theory was superseded by the rational basis standard of review. As a result, strict construction cannot belatedly be resuscitated from its moribund status to frustrate the intention of the Legislature which granted IDAs the right to utilize eminent domain for their corporate purposes.

In any event, Petitioners' reliance upon *Schulman* is misplaced. In *Schulman*, this Court held that the State of New York could not use Highway Law §30 - which gives the State the power to condemn property to build highways - to control outdoor advertising by condemning negative easements along State highways (*see Schulman*, 10 N.Y.2d at 254). This Court determined that the State could not use a

statute meant to allow one thing contemplated by the Legislature - condemnation of land to build roads - to accomplish something far different, the regulation of billboards along roads.[9] Here, OCIDA took no similar leap in expanding its authority - it did not try to do something in excess of what is allowed under GML §858 and §852. Rather, OCIDA properly concluded that, contrary to Petitioners' contentions, the acquisition of the O'Brien Property served a commercial purpose and prevented economic deterioration and was thus within its corporate purposes (R.5879-5881, R.5882, ¶4, R.5893, ¶3). In other words, the fact that Petitioners disagrees with OCIDA concerning whether the acquisition is within the corporate purpose is insufficient, by itself, to invoke *Schulman*. Indeed, such disagreements occur all the time in agency decision-making and are no basis to overturn a condemnation (*see* Kaur, 15 N.Y.3d at 253-254).

The language of the grant of eminent domain to IDAs in GML §858 is similarly as broad as the Legislature's grant of eminent domain to the Department of Environmental Conservation ("DEC") as found in *Bath*, in which this Court upheld the DEC's use of eminent domain for fish and wildlife management purposes, even though the relevant statute did not expressly authorize the use of eminent domain for

[9] *Schulman* is based upon the principal of *ejusdem generis*, the canon that holds that statutes of specific import cannot be broadened in their application simply because they contain generic catchalls. Schulman, 10 N.Y.2d at 256. Here, there is no basis to invoke *ejusdem generis* because GML §858 does not contain a catchall and OCIDA did not purport to act pursuant to a catchall grant of authority. Rather, OCIDA merely made the decision-as it does for all projects-that the condemnation for the parking facility was within its *enumerated powers and purposes.*

such purposes. Bath & Hammondsport R.R. Co., 73 N.Y.2d at 436. GML §858(4) requires that the use of property so acquired be for the corporate purposes of an IDA while ECL §3-0305 requires that the acquisition be "necessary for any of the purposes or functions of the department". *See* Id. at 440-441. Wechsler v. New York State Dept. of Envtl. Conservation, 76 N.Y.2d 923, 926 (1990). There is no mention in *Bath* or subsequent eminent domain precedent from this Court of the type of strict construction advocated by the Petitioners as the basis to eliminate the power of eminent domain conferred upon IDAs.

The majority of the Appellate Division erred by failing to defer to the EDPL Findings, opting instead to improperly substitute their judgment for the clearly rational determination of OCIDA. Adoption of a strict construction theory as espoused by Petitioners emasculates the commercial and prevention of economic deterioration corporate purposes of OCIDA and all other IDAs. The CUB Project is clearly within those corporate purposes of OCIDA considering its $43,000,000 investment in taxable commercial rental real estate in a long-blighted area of the City that will create 160.9 jobs and will positively affect the health and prosperity of the entire County of Oneida.

(Rational Basis Standard of Review of the EDPL Findings)

The use by the Legislature of the words "special proceeding" is not an idle directive that can be ignored. The legislative history of the EDPL confirms that the judicial review of the EDPL Findings is governed by CPLR Article 78 applicable law which invokes the rational basis standard of review. Goldstein, 13 N.Y.3d at 536-539. Kaur, 15 N.Y.3d 235. When the Legislature enacted the EDPL, they did not incorporate the strict construction standard into EDPL §207 opting to only require the limited review applicable to a special proceeding (i.e. CPLR Article 78) thereby invoking the rational basis standard of review. *See* Goldstein, 13 N.Y.3d at 521. The approval of the EDPL Findings by OCIDA is a legislative determination that is entitled to deference for the EDPL §207 judicial review. Kaur, 15 N.Y.3d 235. Nowhere in the record nor within the Petitioners' Brief are the EDPL Findings challenged as irrational, without foundation or baseless. The opposite is true, since the EDPL Findings are rational (R.5875-6000).

(The Order is Erroneous Since the EDPL Limits the Analysis to the Use of the Tax Parcels to be Acquired)

The defined terms of "Acquisition", "Assessment record billing owner" and "Public Project" of EDPL §103(A), (B-1) and (G) confine the EDPL Article 2 process and review to the use of the property proposed to be acquired. By considering the O'Brien Property as part of the larger hospital project, the majority of the Appellate Division committed error by improperly expanding the limited

analysis to offsite properties that were not noticed for acquisition (R.5288). The above EDPL definitions confirm that the judicial review of the EDPL Findings is limited to the O'Brien Property and the parking use thereof and may not be expanded to the use of property on tax parcels that were not part of the EDPL Article 2 condemnation process (R.5466, R.5282).

REPLY POINT II

THE EDPL FINDINGS SHOULD BE CONFIRMED AND THE PETITION DISMISSED SINCE OCIDA SATISFIED THE REMAINING PRONGS OF EDPL §207(C)(7)

(OCIDA Complied With SEQR)

The record confirms that both the O'Brien Property and the medical office building by private developer that became the CUB Project were included within the environmental impact statement ("EIS") and the SEQR Findings for the entire integrated health campus (R.112, R.5214). OCIDA was an involved agency in that EIS process (R.81, R.149). For the entire CUB Project, including the three (3) parking lot parcels, OCIDA took the required hard look and approved a SEQR Resolution for the entirety of the CUB Project, including the related parking parcels (R.6397-6452, R.5368-Location). Contrary to the contentions at p. 33 of Petitioners' Brief, there was no segmentation of the environmental review since the environmental impacts of the entire CUB Project were specifically reviewed by OCIDA, including the 94,000SF CUB Building and all associated parking lots

(R.6397). *See* GM Components Holdings, LLC v. Town of Lockport Indus. Dev. Agency, 112 A.D.3d 1351, 1351-1352 (4th Dept. 2010). Petitioners do not dispute that they did not initiate litigation challenging the approved site plan and special use permit for the CUB Project which waived all of their SEQR contentions (A.981-984). Finally, all such SEQR claims were dismissed in the 2020 challenge to the SEQR Findings Statement brought by Petitioner O'Brien (A.890-942).

(Public Purpose)

The use of eminent domain by OCIDA is statutorily deemed to be a public purpose essential to the public interest. *See* GML §852. Petitioners' Brief does not take issue with the case precedent cited at pp. 30-31 of the Joint Brief on the public purpose prong of EDPL §207(C)(4). *Syracuse Univ.* does not control as it is an eminent domain proceeding initiated by a private electric corporation to eliminate an unfavorable steam contract for which the provision of steam was found not to be within the corporate purposes of an electric corporation (A.1005-1006, ¶13). Matter of Syracuse Univ. v. Project Orange Assoc. Servs. Corp., 71 A.D.3d 1432, 1434-1435 (4th Dept. 2010) (free Project Orange Association Services Corporation from an unfavorable contractual arrangement with SU). Similarly, *Steel Los III* was initiated to eliminate an unfavorable lease. Steel Los III, LP v. Power Auth. of State of N.Y., 21 Misc.3d 707, 717 (Nassau Cty. Sup. Ct. 2008). Here the parking facility use of the O'Brien Property is part of the downtown revitalization effort that will

eliminate long-standing blight, create jobs, improve the tax base, provide public parking consistent with the co-utilization parking plan and provide access to health care services for the entire community such that the public purpose of the acquisition is dominant (R.5476, R.5218, R.5249). *See* Matter of Court St. Dev. Project, LLC v. Utica Urban Renewal Agency, 188 A.D.3d 1601, 1603 (4th Dept. 2020) (Redevelopment is a valid public purpose). Therefore, OCIDA's exercise of eminent domain for the O'Brien Property is rationally related to a conceivable public purpose. Jackson v New York State Urban Dev. Corp., Id. at 425.

(Federal and State Constitutions; EDPL Article 2)

The record establishes that OCIDA complied with every procedural requirement of EDPL Article 2. Petitioners gave extensive comments on the acquisition which were addressed in the EDPL Findings (R.5938-5943, R.5952-5954, R.5302-5475, R.5301, R.5478-5479, R.5587-5846, R.5850-5874, R.5875-6000). The maps of the O'Brien Property, that were part of the public hearing, show the parking use of the O'Brien Property and it was that use that was analyzed by OCIDA in the EDPL Findings (R.5512, R.5884, ¶12, R.5880-5881, R.5892-5893). Petitioners' Brief does not dispute the applicable precedent cited in the Joint Brief which is an admission that OCIDA satisfied all notice and procedural requirements of EDPL Article 2 and the Federal and New York State Constitutions.

(Excess Taking)

The excess taking contention was fully addressed because the O'Brien Property is only ±1.09 acres and has less developable area as it is bisected by an access easement such that there is insufficient land to build a parking garage on only part of that property (R.5883, ¶8, R.5892, ¶2(a), R.5511). The wisdom of the condemnor's selection of lands to acquire is not cognizable within the EDPL §207 judicial review. Wechsler, Id. . Matter of Eisenhauer v. County of Jefferson, 122 A.D.3d 1312, 1313 (4th Dept. 2014).

(Bad Faith)

Neither the Petition nor Petitioners' Brief credibly allege that OCIDA and CUB acted in bad faith. In fact, the opposite is true. At pp. 5 & 13 of Petitioners' Brief, which refers to materials outside the record, Bowers asserts that an affiliate, Utica Med. Building, LLC ("UticaMed") acquired the O'Brien Property[10]. However, there is no recorded deed evidencing that conveyance approximately four months after the purported acquisition[11]. Moreover, that public record search at the Oneida County Clerk for Bowers shows substantial unresolved financial liabilities which

[10] Page 5 of Petitioners' Brief establishes that Petitioners failed to make the disclosure required by Rule 500.1(f) for its admitted affiliate UticaMed.

[11] If the Court takes judicial notice of filings for both Bowers and UticaMed in the Search IQS System for Oneida County Clerk (https://searchiqs.com/NYONE/) such search confirms that as of the date of this Joint Reply Brief there is no filed vesting deed for the O'Brien Property into UticaMed or an assignment of the purchase contract from Bowers to UticaMed. However, that public record search of Bowers reveals a substantial unsatisfied judgment that predates the purported March 31, 2023 acquisition of the O'Brien Property and two open mechanics liens.

support CUB's rejection of the entreaties of Bowers and OCIDA's determination that the Bowers medical office building concept was speculative (R.5893, ¶4(c), R.5886, ¶17). In the EDPL Findings, OCIDA determined that the CUB Project was real since CUB established the financial viability of the CUB Project as 90% leased with financing in place while Bowers did not demonstrate any financial capacity or minimum leasing required for construction financing (R.6044-6045, R.5488, R.5480, R.5878, ¶37 *compare* R.5878, ¶¶40-41). Further, the Bowers concept shows a building constructed over a record access easement benefitting the adjoining parcels and its reliance upon the adjoining parcels for construction staging and parking without any right of use and occupancy over such adjoining parcels (R.5318, R.5511). In sum, Bowers was deemed not to be a credible developer (R.5886, ¶19, R.5887, ¶21, R.5888, ¶24, R.5894, ¶4(f)). These facts highlight the importance of deference to the legislative determination of the condemnor for the rational basis review under EDPL §207.

CONCLUSION

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

Dated: July 17, 2023

GOLDMAN ATTORNEYS PLLC

Paul J. Goldman, Esq.
Attorneys for Defendant-Respondent
Oneida County Industrial Development Agency
255 Washington Avenue Extension,
Suite 108
Albany, New York 12205
(518) 431-0941
pgoldman@goldmanpllc.com

COHEN COMPAGNI BECKMAN
APPLER KNOLL PLLC

Laura L. Spring, Esq.
Attorneys for Central Utica Building, LLC
507 Plum Street, Suite 310
Syracuse, New York 13204
(315) 477-6293
lspring@ccblaw.com

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Dated: July 17, 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 17th day of July, 2023, deponent served three (3) copies of the annexed **Joint Reply Brief 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:

Michael A. Fogel, Esq.
Fogel & Brown, P.C.
Attorneys for Petitioners-Respondents Bowers Development, LLC and Rome Plumbing & Heating Supply Co. Inc.
120 Madison Street
AXA Tower II, Suite 1620
Syracuse, New York 13202

Laura L. Spring, Esq.
Cohen Compagni Beckman Appler & Knoll, PLLC
Attorneys for Respondent-Appellant Central Utica Building, LLC
507 Plum Street, Suite 310
Syracuse, New York 13204

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
Audrey Michasiow

Sworn to before me this
17th day of July, 2023.

Notary Public

PAUL J. GOLDMAN
Notary Public, State of New York
Qualified in Albany County
ID No. 02GO4864023
Commission Expires: June 9, 2026