To be argued by:
Michael A. Fogel, Esq.
(Time requested: 15 minutes)

APL No. APL-2023-00052
Appellate Division, Fourth Department Docket No. OP-00744

Court of Appeals

of the

State of New York

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.

BRIEF FOR PETITIONERS-RESPONDENTS

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Rule 500.1(f) Corporate Disclosure Statement

Petitioners-Respondents are not publicly held corporations or business entities. They have no subsidiaries or affiliates that are publicly traded.

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COUNTER QUESTIONS PRESENTED

1. Did the Fourth Department correctly annul Appellant Oneida County Industrial Development Agency's ("OCIDA") determination and findings to condemn property where the record developed before OCIDA demonstrated based on Appellants' own admissions that the property to be condemned was a "critical" component of a larger hospital or healthcare related facility project not a "surface parking lot" and, therefore, outside of OCIDA's statutory authority under General Municipal Law section 858?

Yes.

PRELIMINARY STATEMENT

Petitioners-Respondents ("Respondents") respectfully submit this Brief in opposition to Appellants' appeal of the Fourth Department's memorandum and order entered in this matter on December 23, 2022 ("Order"). [A. 989-990][1] The Order annulled Appellant OCIDA's Determination and Findings to condemn private property to be used as an allegedly "critical" component of a larger hospital or healthcare facility project. In so holding, the Fourth Department determined that "OCIDA lacked the requisite statutory authority to acquire the subject property" because "[t]he purposes enumerated in [General Municipal Law section 858] do not

[1] References to "R ___" are to the Record on Appeal. References to "C ___" are to Appellants' Compendium. References to "A ___" are to the Appendix of Appellants.

include projects related to hospital or healthcare-related facilities." As a result, the Fourth Department held:

> While OCIDA's determination and findings indicate that the subject property was to be acquired for use as a surface parking lot, the record establishes that, contrary to respondents' assertion, the primary purpose of the acquisition was not a commercial purpose. Rather the property was to be acquired because it was a necessary component of a larger hospital and healthcare facility project. We therefore annul the determination and grant the petition.[2] [A. 990]

In reaching its decision, the Fourth Department saw through the smoke screen that OCIDA has attempted to create to avoid the limits on its statutory authority to condemn the property. However, OCIDA cannot avoid the record that was developed before it during the EDPL Article 2 hearing.

During the EDPL Article 2 hearing before OCIDA, CUB and MVHS admitted that the "centerpiece" of the project is a physician-hospital surgery center joint venture with 6 operating room ambulatory surgery center suites requiring a Certificate of Need from the Department of Health pursuant to Article 28 (significantly entitled "Hospitals") of the New York Health Law. [R. 5285, 5287, 5325, 5368-5371, 5477, 5480-5482, 5565-5570, 5571, 5572, 5573] OCIDA itself referred to the property as "Additional Project Land" for the CUB project in its

[2] The Fourth Department did not reach any of the additional arguments raised by Petitioners in its Petition and Brief holding that "[i]n light of our determinations, petitioners' remaining contentions are academic." [A. 990]

public notice of the EDPL Article 2 public hearing. [R. 5294] These are critical points that Appellants omit as they continue to mischaracterize their actions to evade the statutory limits of OCIDA's power to condemn property.

By CUB, MVHS and OCIDA's own admissions in the record of the eminent domain public hearing, the property is undeniably for CUB's project and CUB's project is a hospital or healthcare related facility. As held by the Fourth Department, based on its review of the record (it was not a *de novo* review as alleged by Appellants), because OCIDA does not have statutory authority to undertake projects related to hospital or healthcare related facilities (*see* GML § 858) it did not have authority to condemn the property. [A. 990]

In their appeal, OCIDA and CUB are trying to have it both ways. To justify its exercise of eminent domain authority OCIDA relied on CUB's statements that the property was "critical" to its ambulatory surgery center/medical office building and that the project could not be built without the property, but in a *post hoc* attempt to avoid any limits on its statutory authority attempts to carve the property out of the CUB project and characterize it solely as a "surface parking lot" for general use even though the OCIDA public notice referred to the property as "Additional Project Land." Reviewing the record, the Fourth Department saw plainly that OCIDA's *post-hoc* characterization for litigation was directly contrary to OCIDA's own record that was developed during the eminent domain hearing. That is what properly led the

Fourth Department to conclude that OCIDA's claimed exercise of eminent domain was outside of its statutory authority because by CUB and MVHS's own admissions the project was a hospital or healthcare related facility with its "centerpiece" being a physician-hospital surgery center joint venture with 6 operating room ambulatory surgery center suites requiring a Certificate of Need from the Department of Health pursuant to Article 28, and not a mere "medical office building" or "surface parking lot." [R. 5285, 5287, 5325, 5368-5371, 5477, 5480-5482, 5565-5570, 5571, 5572, 5573, 5904, 5971-5973, 6467-6474]

Given the serious nature of any condemnation action and given the strict construction to be applied to statutory grants of eminent domain, it is disturbing that OCIDA would continue to engage in this shell-game to support this condemnation of private property.

The bottom line is that as acknowledged by the Fourth Department, OCIDA's own record, and CUB's own statements during the Article 2 EDPL hearing, leave no doubt that this taking is part of a larger hospital and healthcare related facility, and as such is outside of OCIDA's eminent domain authority.

For these reasons, and those set forth below, it is respectfully submitted that this Court should affirm the Fourth Department's decision annulling OCIDA's determination and findings purporting to condemn the property.

COUNTERSTATEMENT OF THE CASE AND FACTS

Respondent Bowers is one of the largest and most active developers in the City of Utica and has invested a significant amount of time, effort and money into developing and restoring buildings in Utica. [A. 1, ¶ 2, 6, ¶¶ 28-29, 26, ¶ 169; R. 5302, 5561] At all times relevant to this action, Bowers had a contract with the owner of the Property, Rome Plumbing, to purchase the Property, and Bowers intends to construct a brand-new state-of-the-art medical office building at the Property. [A. 4-5, ¶ 2, A. 8, ¶ 21, A. 9, ¶¶ 30-31; R. 5302] On March 31, 2023, a Bowers related entity Utica Med. Building, LLC purchased the Property from Rome Plumbing.

The subject property that Appellant CUB requested Appellant OCIDA acquire by eminent domain for its MOB project is 411 Columbia Street in the City of Utica, Oneida County, New York (SBL 318.41-2-38), referred to herein as the Property. [A. 1, ¶ 2, A. 7, ¶ 17, A. 9, ¶¶ 30-31; R. 5302, 5611] The Property is usually referred to by CUB and OCIDA as the "O'Brien Parcel" because the Property was owned at the time by J.P. O'Brien Plumbing and Heating Supply, Inc., which merged into Rome Plumbing. [A. 7, ¶ 18; R. 5611]

OCIDA and CUB have been aware since at least September 2021 that Bowers has a contract to purchase the Property and plans to develop the Property into a MOB. [R. 5302, 5315]

On or about November 12, 2021, CUB submitted an Application for Financial Assistance to OCIDA. CUB's application sought financial assistance from OCIDA for the development of an ambulatory surgery center/medical office building (referred to herein as CUB's MOB project or CUB's project) on parcels of property that include the Property. [R. 5606, 5611] CUB's application also included a request that OCIDA acquire the Property by eminent domain and then give the Property to CUB for its project. [R. 5611] The application stated, "Without this property it will be impractical if not impossible to construct the MOB as proposed. If CUB is unable to acquire [the Property] from the property owner, CUB will request that [OCIDA] acquire the property through eminent domain." [R. 5611]

In its application to OCIDA, CUB described its project as a medical office building with its "centerpiece" being a physician-hospital ambulatory surgery center joint venture with 6 operating rooms or 6 ambulatory surgery center suites, medical clinics, a cardiology medical group and health-related tenants all within the footprint of the Wynn Hospital development that is being built at that location and that the project is within the Mohawk Valley Health System ("MVHS") campus. [R. 5282, 5287, 5567, 5604, 5610] MVHS is a private entity that operates hospitals. [R. 5610]

"The project consists of the construction and operation of an IHC [Integrated Health Campus], in downtown" "encompass[ing] approximately 25-acres". [R. 764] The new IHC will replace the St. Luke and St. Elizabeth campuses, reduce the

number of beds in the community, and consolidate patient services to one campus." [R. 764] "Most services currently provided at the St. Luke's and SEMC campuses will be transitioned to the MVHS IHC including 373+ inpatient beds". [R. 786] Tables list how the "New Hospital Campus" will replace the current hospital services provided by the St. Elizabeth and St. Luke hospital campuses, including ambulatory surgery services. [R. 944-950] CUB's MOB is "part of the Integrated Health Campus and was included in the MVHS's Certificate of Need application approved by the Department of Health" [R. 5285]

On November 19, 2021, OCIDA held a meeting to discuss the CUB project. OCIDA then scheduled a public hearing as to whether to grant the requested financial benefit. [R. 5738, 5754, 5778, 5787]

On December 10, 2021, OCIDA held the public hearing, and Bowers submitted a letter objecting to CUB's application and OCIDA's consideration of issuance of financial benefits for the CUB project because, among other things, it included the Property as part of the project even though CUB did not own, lease, or otherwise have the Property under its control and Bowers has a contract to purchase the Property and intends to build an MOB. [A. 10-11, ¶¶ 37-38; R. 5738, 5754, 5760, 5778, 5787]

On January 18, 2022, OCIDA held a further public hearing as to whether to grant the financial benefit in the full amount requested by CUB. [R. 5752, 5787,

5793, 5828, 5790] At the public hearing held on January 18, 2022, Bowers submitted comments to OCIDA objecting to approval of the financial assistance again based on, among other things, that CUB does not own, lease or otherwise control the Property, which by CUB's own admission was a necessary part of its project. [R. 5790, 5985, 6373, 6378]

On January 21, 2022, OCIDA sent a letter to the Oneida County Executive asking for a determination as to whether CUB's MOB project, including the Property, met the requirements for financing as a "retail" facility pursuant to General Municipal Law § 862(2)(c). The letter stated:

> Central Utica Building, LLC, on behalf of itself and/or the principals of Central Utica Building, LLC and/or an entity formed or to be formed on behalf of any of the foregoing (collectively, the "Company") has applied to the Agency to enter into a transaction in which the Agency will assist in the construction of a 94,000± square foot state-of-the-art medical office building and appurtenant facilities including parking areas and all infrastructure, utilities and amenities to support the same (collectively, the "Improvements") situated on parcels of land measuring 2.90± acres in the aggregate adjacent to the new Wynn Hospital . . . and acquisition and installation of equipment in the Improvements (the "Equipment"), all for the purpose of providing a seamless and integrated health care delivery system together with the Wynn Hospital, and to enhance and expand the delivery of health care services to the community (the Land, the Improvements and the Equipment are referred to collectively as the "Facility" and the construction and equipping of the Improvements is referred to as the "Project"). The Agency is providing financial assistance in the form of exemptions from sales and use taxes and exemptions from mortgage recording taxes . . . The Facility will be "primarily used in making retail sales to customers who personally visit" such Facility, as such phrase is used in

connection with Section 862 of the General Municipal Law . . .[A. 63]

Prior to the January 18th public hearing, unbeknownst to Respondents, on January 14, 2022, CUB submitted a letter to OCIDA requesting that OCIDA take the Property by eminent domain. CUB's letter states, "ownership of the O'Brien Parcel is essential to the MOB development . . . [w]ithout the O'Brien Parcel there will not be adequate parking to support the MOB and CUB will be unable to develop the MOB at that location" and "the location of the MOB and its ambulatory surgery center within the footprint of the Wynn Hospital is critical to MVHS". [R. 5282]

OCIDA subsequently scheduled a public hearing for February 23, 2022, as to whether to take the Property by eminent domain and set a deadline of March 2, 2022, for all written comments. [R. 5286-5288]

The Notice of Public Hearing for the eminent domain hearing stated, in pertinent part:

PLEASE TAKE NOTICE that a public hearing, ... by the Oneida County Industrial Development Agency ("OCIDA"), pursuant to Sections 201-203 of the New York State Eminent Domain Procedure Law ("EDPL") to consider the proposed acquisition by condemnation of 411 Columbia Street (SBL No.: 318.41-2-38) in the City of Utica (the "Additional Project Land") in connection with the undertaking and development of a certain approximately 94,000 SF medical office building and a fully licensed six (6) suite ambulatory surgery center in the footprint of the Wynn Hospital located at 601 State Street (corner of State and Columbia) (the "Project") by Central Utica Building, LLC, on behalf of itself and/or an entity formed or to be formed on its behalf (collectively, the "Company"), which acquisition of the Additional Project Land has been represented by the Company to facilitate the delivery of healthcare services to the residents of Oneida County,. The Company has

represented that the acquisition of the Additional Project Land is necessary for the development of the Project. [R. 5287]

On February 22, 2022, prior to the public hearing, Respondents submitted comment letters to OCIDA objecting to taking the Property by eminent domain and provided comments at the public hearing which, including among other objections, that OCIDA lacked the statutory authority to use eminent domain to take the Property, and placed these comments and objections on the record of the public hearing. [R. 5301, 5302]

At the February 23, 2022, public hearing on the condemnation, CUB and MVHS offered the following comments, among others:

- MVHS, "Statement for OCIDA Public Hearing on Wednesday, February 23, 2022": "Acquiring the 411 Columbia Street property is critical to moving forward with construction of the Central Utica Building (CUB) group's medical office building/ambulatory surgery center (MOB/ASC) . . . "the development of a MOB/ASC adjacent to The Wynn Hospital is crucial to the overall project because the services housed in this building complement the work being done in the hospital and work collaboratively to support each other. The MOB/ASC is planned to house multiple physician practices that will support MVHS by providing ambulatory surgery, outpatient radiology and a laboratory services". [R. 5546]

- Hugh MacIssac, M.D., member of Central Utica Building, LLC: "The centerpiece of the medical office building is the six-OR, Article 28, Medicare-certified ambulatory surgery center. The surgery center will be owned for a for-profit proprietary entity in conjunction with the hospital . . . unless we can secure ownership of this property for parking, we do not feel that it is feasible to proceed with building the medical office building." [R. 5570, 5573]

On March 1, 2022, CUB submitted a letter to OCIDA providing additional details on its project again emphasizing that "[t]he ambulatory surgery center is the centerpiece of the medical office building" and stating that "MVHS is preparing and plans to submit a certificate of need (CON) application for the construction and operation of the ASC to the Department of Health." [R. 5971] The CUB letter goes on to emphasize that CUB "cannot solicit and evaluate funding commitments until it knows that it has a project to finance – which will require the acquisition of the O'Brien Parcel." [R. 5971-5973]

On March 1, 2022, and March 2, 2022, Respondents submitted additional comments to OCIDA reiterating its objections to OCIDA's use of eminent domain. [R. 5587]

On or about February 28, 2022, OCIDA posted an agenda on its website stating the following item for the OCIDA meeting on March 3, 2022:

> Consider a final authorizing resolution relating to the Central Utica Building, LLC Facility, approving financial assistance in the form of exemptions from mortgage recording taxes (valued at $128,138) and exemptions from sales tax (valued at $1,820,000), which financial assistance is consistent with the Agency's Uniform Tax Exemption Policy, and authorizing the form and execution of related documents, subject to changes approved by counsel and conditioned upon (a) CUB acquiring an interest in the O'Brien Parcel, either through fee ownership or a land lease for a minimum term of twenty years; (b) CUB and CNYC executing a sublease for a minimum term of ten (10) years and minimum 20,000 square feet; and (c) CUB and MVASC executing a sublease for a minimum term of ten (10) years and minimum 18,000 square feet. [A. 519]

On March 3, 2022, at the regular OCIDA meeting, OCIDA adopted a Final Authorizing Resolution purporting to grant CUB financial assistance for its MOB project in the form of exemptions from mortgage recording taxes (valued at $128,138) and exemptions from sales tax (valued at $1,820,000) subject to certain conditions. [R. 6491][3]

On March 30, 2022, Bowers submitted an additional comment letter to OCIDA continuing to provide objections to the taking by eminent domain. [R. 5850]

On April 7, 2022, despite the objections of Bowers, OCIDA voted to take the Property by eminent domain and then issued the subject determinations and findings. OCIDA completed the publication of its determinations and findings on April 15, 2022. [R. 5875, 6004]

On May 11, 2022, Respondents commenced this EDPL Article 2 proceeding as an original proceeding in the Appellate Division, Fourth Department challenging OCIDA's determinations and findings. [A. 2 – 571] After briefing and oral argument, on December 23, 2023, the Appellate Division, Fourth Department issued its decision annulling the Determination and Findings of Appellant OCIDA. [A. 989-990] OCIDA and CUB moved for reargument in the Appellate Division, or in the

[3] This is being challenged by a separate Article 78 proceeding in New York State Court. *Bowers Development, LLC et al v. Oneida County Industrial Development Agency, et al.,* EFCA2022-002152 (Oneida County Supreme Court). The action is currently stayed pending a decision on this appeal.

alternative for leave to appeal to the Court of Appeals. [A. 1028 – 1075] On March 17, 2023, the Appellate Division denied reargument, but granted leave to appeal to the Court of Appeals. [A. 1080]

On March 31, 2023, a related Bowers entity Utica Med Building, LLC acquired the Property from Petitioner-Respondent Rome Plumbing & Heating Supply Co., Inc.

ARGUMENT

POINT I

THE PROPOSED ACQUISITION IS NOT WITHIN OCIDA'S STATUTORY JURISDICTION AND AUTHORITY BECAUSE THE RECORD DEVELOPED BEFORE OCIDA DEMONSTRATES CONCLUSIVELY THAT CUB'S PROJECT IS A HOSPITAL OR HEALTHCARE RELATED FACILITY

A. OCIDA's use of eminent domain must be strictly construed against it and not extended or enlarged by inference or implication.

Industrial development agencies are creatures of statute and are limited to the specific powers provided to them under the statute, including the power to exercise eminent domain, in connection with the specific projects set forth in GML § 858.

It is well settled that because the power of eminent domain is exercised in derogation of the rights of citizens, statutes that purport to delegate the power must be strictly construed against the condemnor (*see, e.g., Syracuse Univ. v. Project Orange Assocs. Servs. Corp.,* 71 AD3d 1432, 1435 [4th Dept 2010], citing *Schulman v. People,* 10 NY2d 249, 255-256; *Peasley v. Reid,* 57 AD2d 998, 999 [3d Dept

1977] ["It is axiomatic that a statute which gives the State a right to deprive a person of his property against his will must be strictly construed."]). It is equally well settled that the statutory grant of eminent domain power will not be extended or enlarged by inference or implication (*see, Schulman v. People,* 10 NY2d 249, *supra; see also,* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 293 ["A delegation of the sovereign power of condemnation is strictly construed"] and McKinney's Cons. Laws of N.Y., Book 1, Statutes § 312 ["Generally, a statute which take the property of one person without his consent for the benefit of another is in derogation of common right and should be strictly construed").

While Appellants admit that OCIDA's use of eminent domain can only be utilized for the specific projects in GML § 858, they incorrectly state how its use of eminent domain should be construed. Appellants, with no case law or other authority, would have this Court abandon the well settled rule that eminent domain statutes must be "strictly construed" against a condemnor for a mere "rational basis" standard. Appellants' argument that the "strict construction" standard is no longer the rule of law because it was not codified into EDPL § 207 or GML § 858 is without merit. McKinney's Cons. Laws of N.Y., Book 1, Statutes § 293 ["A delegation of the sovereign power of condemnation is strictly construed"]. While EDPL § 207 provides for court review and the factors which the court should consider in determining whether a condemnation should be upheld, it does not change the well-

established rule that statutes *conferring* eminent domain powers to agencies, such as IDAs, in the first instance should be strictly construed against the condemnor, and not extended or enlarged by inference or implication. Despite Appellants' meritless attempt to conflate the two, how a statute conferring eminent domain power should be construed against the condemnor versus the scope of judicial review under EDPL § 207 of a condemnor's determination are two entirely different issues.

In trying to avoid the well-settled strict construction test, Appellants try to boot-strap a few holdings from entirely unrelated non-eminent domain Article 78 challenges to IDA actions on tax exemption issues in an attempt to lead this Court down the path that a "rational basis" test applies to Appellants' condemnation action here. But, again, they miss the point. The question being raised in this case is whether under EDPL § 207(C)(2) the Appellants have the authority under the eminent domain power conferred to them by statute to use that power here for a project that is not within its statutory jurisdiction. It is that question and statutory interpretation that must be strictly construed against them.

For this reason, the cases Appellants rely on for their purported "rational basis" test can be easily distinguished from the question raised here (*Kaur v. New York State Urban Dev. Corp.,* 15 NY3d 235 [2010]; *2-4 Kieffer Lane LLC v. County of Ulster,* 172 AD2d 1597 [3d Dept 2019]; *Lawrence Union Free Sch. Dist. v. Town of Hempstead Indus. Dev. Agency,* 196 AD3d 486 (2d Dept 2021); *City of New York*

(Grand Lafayette Props. LLC), 6 NY3d 540 [2006]; *Jackson v. New York State Urban Dev. Corp.,* 67 NY2d 400 [1986]).

Kaur was an appeal as of right with the petitioner's main argument addressed to the constitutionality of the New York State Urban Development Corporation's ("UDC") condemnation under Unconsolidated Law 6260 based on a determination of blight for a Columbia University urban campus development as a public use. *Kaur* has no bearing on the authority of an IDA to condemn property for a hospital or healthcare facility project. *2-4 Kieffer* did not involve issues of eminent domain at all, but instead involved an Article 78 proceeding challenging an IDA's denial of sales and use tax exemptions. Clearly, *2-4 Kieffer* and the standard of review of an Article 78 proceeding, does not apply to the test to be applied here involving the scope of an IDA's powers of eminent domain.

Appellants' reliance on *Lawrence Union* is similarly misplaced. *Lawrence Union* involved an Article 78 proceeding reviewing an IDA's determination to grant tax benefits and does not address any issues relating to an IDA's eminent domain authority. *City of New York* was an EDPL Article 4 case and dealt with the applicable statute of limitations with *dicta* discussing the general "public purpose" inquiry to be conducted for any EDPL case. No part of *City of New York* is germane to the issue of an IDA's authority under the EDPL. *Jackson* has no application here. It also involved the UDC and was a combined appeal of four proceedings, one as of

right, largely addressed to the SEQRA review of the UDC's condemnation to address blight in Times Square. It had no bearing on the authority of an IDA to condemn property for a hospital or healthcare facility project or the standard of review for the scope of an IDA's eminent domain powers.

Appellants' reliance on *Nearpass v. Seneca Cnty. Indus. Dev. Agency,* 152 AD3d 1192 (4th Dept 2017) is similarly misplaced. First and foremost, *Nearpass* involved an Article 78 proceeding challenging an IDA's grant of financial assistance for a casino project, and did not involve eminent domain which as explained above involves a different standard of review than the typical rational basis test in Article 78 proceedings. Therefore, *Nearpass* does not support Appellants' contention that it has authority to condemn the property here, or that its decision should be subject to a rational basis test and not strictly construed. At most *Nearpass* stands for the proposition that an IDA has the authority to grant financial benefits for a casino and that a casino project falls within the definition of "commercial". That holding does not help Appellants. Significantly, an IDA's grant of financial benefits for a project versus an IDA's attempt to utilize eminent domain to take a property from one party to give it to another cannot possibly be viewed through the same lens. As set forth above, a condemnor's exercise of eminent domain must be strictly construed. Applying this standard here further dictates that *Nearpass* does not support Appellants' actions.

The bottom line is that Appellants cite to no authority in support of their conclusion that "it is only if the EDPL findings are determined to be irrational or baseless are they to be rejected." Appellants Brief, p. 19. It is well settled that the scope of OCIDA's eminent domain authority must be strictly construed against them as the condemnor and not extended by inference or implication. It is respectfully submitted that it is through that lens that OCIDA's actions in this proceeding are to be reviewed.

B. Through Appellants' own admissions in the record of this matter the Project is a Hospital or Healthcare Related Facility, not a "Surface Parking Lot" as Appellants' claim, and is therefore outside of their authority and jurisdiction.

Industrial development agencies are creatures of statute and are limited to the specific powers provided to them under their enabling statutes set forth in General Municipal Law Article 18-A. GML Article 18-A contains the provisions of law governing the authority and powers of industrial development agencies within New York State. GML § 858, in Article 18-A, provides the current list of projects for which industrial development agencies have authority, which are as follows: "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."

GML § 858 has been amended several times to add additional specific projects for which industrial development agencies have authority (*e.g.,* "community care retirement communities" added to GML § 858 in 1997 [1997 Sess. Law News Of N.Y. Ch. 659]; "renewable energy projects"] added to GML § 858 in 2021 [2021 Sess. Law News of N.Y. Ch. 59]). This is clear evidence of legislative intent that the general terms included in GML § 858 such as "commercial" are not intended to be as broadly interpreted as Appellants contend because the legislature would not have seen the need to add additional project types granting IDA's additional authority over the years if all that was necessary was for the IDA to determine that a particular project was "commercial" in nature. *See Madison Cnty. Indus. Dev. Agency v. State Authorities Budget Off.,* 151 AD3d 1532, 1535-36 [3d Dept 2017] [industrial development agency exceeded its statutory authority under GML § 858 by forming a subsidiary; the court stated the rules of interpretation that "All parts of a statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof . . . Consistent therewith, we should avoid "constru[ing] one portion of [a] statute in a manner as to render another portion thereof meaningless."]).

Moreover, it is well settled that "where the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent

. . . courts are free to ascertain the proper interpretation from the statutory language and legislative intent." *See Seittelman v. Sabol,* 91 NY2d 618 (1998). Therefore, in reviewing the question of the scope of the term "commercial" in GML § 858 as it relates to OCIDA's eminent domain authority, OCIDA is not to be afforded any deference at all in how it may have interpreted or applied the term "commercial" in its Determination and Findings.

Industrial development agencies activities, including eminent domain takings, are limited to the projects set forth in GML § 858. GML § 858 does not include hospitals or other health-related facilities. Thus, such projects, as recognized by the Fourth Department, are not within OCIDA's jurisdiction and therefore outside of its eminent domain authority. [A. 990] As set forth below, the Fourth Department did not conduct a *de novo* review as OCIDA alleges, rather it is clear from the Order that the Fourth Department based its decision on its review of the record developed before OCIDA: "the record establishes that, contrary to respondents' assertion, the primary purpose of the acquisition was not a commercial purpose. Rather, the property was to be acquired because it was a necessary component of a larger hospital and healthcare facility project." [A. 990]

In addition, Attorney General Opinions make it clear that the projects listed under GML § 858 for which IDAs are limited to, including powers of eminent domain, does not include hospitals or other health-related facilities (1981 NY Op.

Atty. Gen. 55; 1980 NY Op. Atty. Gen. Inf. 139). In fact, the Attorney General Opinions cited above go on to state that "There is no basis for inferring a legislative intent to cover a hospital, nursing home, or any other health-related facility under the umbrella word 'commercial'" (1981 NY Op. Atty. Gen. 55; 1980 NY Op. Atty. Gen. Inf. 139).

OCIDA argues that the Attorney General Opinions are "old" so should be ignored. But they cite to no precedent as to why these Attorney General Opinions which are directly on point should be ignored. Similarly, they attempt to avoid these Attorney General Opinions by again attempting to mislead this court into believing that the CUB project is a "medical office building," or that the taking is just for a "surface parking lot" and not a hospital or healthcare related facility. As discussed above, however, and as held by the Fourth Department, based on the record developed before OCIDA based on CUB's and MVHS's own statements in their application and at various times during the EDPL Article 2 public hearing this project is clearly a hospital or healthcare related facility. For this reason, Appellants' argument that the Fourth Department improperly conducted a "*de novo"* review can be rejected. The Fourth Department clearly stated that its determination was based on its review of the record.

CUB stated that the "centerpiece" of the project is the ambulatory surgery center, which requires a certificate of need pursuant to Article 28 of the Public Health

Law (which is entitled "Hospitals") and that the Property was "critical" for the success of the project – in fact they said in the application that it could not operate the project without it. [R. 5285, 5287, 5325, 5368-5371, 5477, 5480-5482, 5565-5570, 5571, 5572, 5573, 5904, 5971-5973, 6467-6474] By their own admission, the CUB project is clearly a hospital and/or healthcare related facility, and as such OCIDA lacked authority to use eminent domain to acquire the Property.

OCIDA and CUB obviously want all projects swallowed up in the term "commercial", but that is contrary to the jurisdiction and authority granted under GML § 858. This is especially the case where the IDA action being challenged involves the use of eminent domain which, as discussed above, must be strictly construed against the condemnor. OCIDA's attempt to broadly interpret the word "commercial" to justify its use of eminent domain here is exactly the type of "extension by implication or inference" that Courts have said cannot be done when evaluating a condemnors authority to use eminent domain. *See Schulman v. People,* 10 NY2d 249.

Again, as set forth throughout the record, CUB and OCIDA described the project as a hospital or other healthcare related facility. CUB and OCIDA have described CUB's project as a physician-hospital ambulatory surgery center joint venture including 6 operating rooms and healthcare related tenants as part of and essential to the hospital development. [R. 5282, 5287, 5567, 5604, 5610, 5616] In

fact, OCIDA stated in the Notice of Public Hearing for the condemnation proceeding that the acquisition of the Property identified as "Additional Project Land", "has been represented by [CUB] to facilitate the delivery of healthcare services" and that the Property is "essential" to "the six (6) suite ambulatory surgery center." [R. 5909] In fact, the OCIDA Final Authorizing Resolution for the CUB Project states that "Wynn Hospital's proposal to deliver first-rate healthcare at the new campus is dependent upon . . . these 6 operating rooms to supplement the 14 operating rooms at the Wynn Hospital." [R. 5987]

MVHS has stated that the acquisition of the Property is "critical" to the "ambulatory surgery center." [R. 5570-5571, 5546, 5616, 5981] CUB has stated, the "centerpiece" of the project is "the six-OR, Article 28, Medicare-certified ambulatory surgery center. The surgery center will be owned for a for-profit proprietary entity in conjunction with the hospital." [R. 5570, 5971-5973] MVHS also stated during the public hearing on the condemnation that "because the Wynn Hospital will essentially be an inpatient facility, the outpatient surgery center will be required to handle a current volume of surgery being performed at St. Elizabeth and St. Luke's Hospital to move to this ambulatory surgery center" and "this new six-OR ambulatory surgery center is absolutely a vital addition to the area's healthcare community, as well as the hospital's complete package of services offered." [R. 5570-5571]

Furthermore, by CUB's and MVHS's own admissions, the project requires a certificate of need approval from the New York State Department of Health pursuant to Public Health Law Article 28, which is titled "Hospitals." [R. 5616, 5570-5571, 5970-5973] This is a fact which Appellants conveniently leave out of their brief when referring to CUB's project as a "medical office building." It strains credulity that a project that requires a certificate of need as a hospital from the Department of Health is not a hospital or healthcare related facility, and instead a mere "medical office building" as OCIDA and CUB claim.

OCIDA based the entire "need" for the condemnation on CUB's and MVHS's representations that the property is "critical" to its project and that it is necessary, essential and critical to the hospital development and surgery needs of the hospital. In fact, OCIDA in the eminent domain public notice itself defined the property as "Additional Project Land." [R. 5287] Yet now to avoid the limits of its authority, Appellants' attempt to characterize it as a "surface parking lot" somehow separate from the CUB project. But, as discussed above, and as held by the Fourth Department, this argument is belied by the record developed before OCIDA.

Therefore, Appellants' general arguments regarding the dictionary definition of "parking lot" are irrelevant here because by Appellants' own admissions in the record the project is a hospital or healthcare related facility and not a mere "parking lot."

For these same reasons, cases relied on by Appellants such as *Goldstein v. New York State Urb. Dev. Corp.,* 13 NY3d 511 (2009) and *PSC, LLC v. City of Albany IDA,* 200 AD3d 1282 (3d Dept 2021) simply do not apply here. First, the question addressed in *Goldstein* was whether the mixed-use redevelopment project at issue fell within the Constitutional power of eminent domain for the public purpose or use of removal of urban blight. *Goldstein* did not present the issue, as in this case, of whether the legislature had granted the power of eminent domain in the first instance and did not apply GML § 858. Even if one assumes *arguendo* that the project before an IDA serves a public purpose, or use, that does not necessitate a ruling that the IDA has eminent domain authority for the project in the first instance (*see generally Schulman,* 10 NY2d 249). Similarly, *PSC* holds no precedential value for this case because as in *Goldstein* the issue presented was whether the condemnation at issue was for the public purpose of addressing urban blight, and the authority of the condemnor was not at issue or addressed. *PSC* is not about the authority of an IDA to condemn property for a hospital or healthcare facility project under GML § 858. In fact, authority and public purpose raise entirely different issues and, in fact, are listed as separate items for review under § EDPL 207 (*see* EDPL § 207[C][2] and [C][4]).

For this reason, Appellants' arguments and cited legal authority as to jurisdiction or authority to take property for a "public parking lot" are irrelevant

since as discussed above OCIDA itself refers to the property as "Additional Project Land" which according to CUB and MVHS is "critical" to CUB's ambulatory surgery center project.

Therefore, through Appellants' own admissions in the record of this matter, and as correctly held by the Fourth Department, the project is a hospital or healthcare related facility, not a "commercial parking lot" as Appellants' claim and is therefore outside of OCIDA's statutory authority and jurisdiction to use eminent domain.

C. Contrary to Appellants' Argument, the Real Property Tax Status of the CUB Project is Entirely Irrelevant as to the question of whether OCIDA had the authority to condemn the Property.

The real property tax status of the project has no bearing at all on the question of whether OCIDA had authority to exercise eminent domain in this case. Whether Appellants like it or not, GML § 858 setting forth the authority of OCIDA is the relevant statute here not RPTL § 485-b. RPTL § 485-b and an assessor's authority to grant real property tax exemptions is not at issue here. The issue here is an industrial development agency's authority to exercise eminent domain. An assessor and an IDA are different types of entities with different powers, and as stated above, an IDA's power to exercise eminent domain must be strictly construed against it. The standards as to whether an assessor can grant real property tax exemptions to a commercial project under RPTL § 485-b are not at issue here. Therefore, Appellants' long discussion of RPTL § 485-b and citation to cases and legal authority such as

Matter of Genesee Hospital v. Wagner, 47 AD2d 37 (4th Dept. 1975) are simply not applicable. RPTL § 485-b and case law regarding the real property tax treatment of a hospital simply does not provide a basis for OCIDA to condemn the Property for CUB's project.

For these same reasons, RPTL § 412-a is not relevant here and does not provide authority for an IDA to condemn property for a hospital or healthcare facility project. RPTL § 412-a simply authorizes an assessor to grant real property tax exemption to property owned or controlled by an IDA. GML § 874 similarly only serves to allow property owned or controlled by an IDA to be tax exempt. RPTL § 412-a has nothing to do with an IDA's authority to use eminent domain. There is no such "legislative linkage" between the RPTL and GML that would provide authority for OCIDA to utilize eminent domain authority for a hospital or healthcare related facility. For this reason, Appellants "*in pari materia*" argument is misplaced and does not apply here.

For these reasons, as held by the Fourth Department, OCIDA lacked the authority to use eminent domain here.

POINT II

OCIDA'S DETERMINATION AND FINDINGS WERE OTHERWISE IMPROPER FOR REASONS NOT ADDRESSED BY THE FOURTH DEPARTMENT AS ACADEMIC

The Court need not address other infirmities in OCIDA's exercise of eminent domain because, as the Fourth Department held, they are academic considering OCIDA's exercise of that authority is in excess of its statutory authorization. [A. 990] As such, on their appeal it was improper for Appellants to address these issues in its brief. However, should the Court address these issues, they demonstrate that the determination and findings should be annulled for additional reasons.

A. OCIDA Did Not Comply With SEQRA

OCIDA attempts to avoid the infirmity of its SEQRA determination by asserting the issue is moot. It does so by pointing to a determination made in September 2022 by the Utica Planning Board that is outside the record of what OCIDA considered when making its determination five months earlier in April 2022 and does not moot Respondents' SEQRA claims. OCIDA was required to comply with SEQRA *prior to* issuing its EDPL Article 2 determination and findings issued on April 7, 2022. EDPL § 207(C)(3) specifically states the Court shall review whether "the *condemnor's* determination and findings were made in accordance with [SEQRA]" (emphasis added).

Therefore, any subsequent action by the Utica Planning Board (even assuming it was valid which we certainly do not admit) made more than five months after OCIDA issued its determination and findings obviously cannot cure OCIDA's failure to comply with SEQRA when the condemnation determination was made (*see e.g. Munash v Town Bd. of Town of E. Hampton*, 297 AD 2d 345, 347-348 [2d Dept 2002]; *Di Veronica v Arsenault*, 124 AD2d 442, 444 [3d Dept 1986] ["compliance with SEQRA must occur before the agency acts; after-the-fact compliance is of no avail"]; *Bender v Bd. of Trustees of Vill. of Fayetteville*, 91 AD2d 1171, [4th Dept 1983] ["after the fact SEQRA review is not appropriate to accomplish the purposes of the statute"]; *Corrini v Village of Scarsdale*, 1 Misc 3d 907[A], *8 [Sup Ct, Westchester County 2003] ["compliance with SEQRA must occur before the agency acts; after-the-fact compliance is of no avail."]).

Thus, the Resolution by the Utica Planning Board does not moot OCIDA's obligation to comply with SEQRA by taking a "hard look" at the issues raised during the EDPL Article 2 proceeding and provide a reasoned elaboration for its determination as to those issues. As set forth below, OCIDA failed to do so. Contrary to OCIDA's assertions, the challenge here is not to the City of Utica Planning Board's SEQRA review in 2018/2019 or any subsequent review. The challenge is to OCIDA's SEQRA review for its condemnation for CUB's project, in which OCIDA failed to take a hard look at the environmental impacts related to the

changed location and larger size of CUB's project compared to what was reviewed by the Planning Board and to OCIDA's impermissible segmentation of the SEQRA review.

1. OCIDA Failed to Take the Required "Hard Look".

Pursuant to SEQRA, OCIDA was required to take a "hard look" at the issues raised in the public comments as to the changed location and larger size of CUB's project then what was reviewed previously by the Planning Board and make a reasoned elaboration of the basis of its determinations (*see e.g. Munash v Town Bd. of Town of E. Hampton*, 297 AD 2d 345, 347-348 [2d Dept 2002] [board which sought to obtain property through condemnation for proposed a project failed to take "hard look" at environmental concerns; board did not wait for a report from its consultant on environmental concerns raised during the public comment period]; *Corrini v Village of Scarsdale*, 1 Misc 3d 907[A], *5-7 [Sup Ct, Westchester County 2003] [although the proposed use was located just 100 yards away from its prior use, a traffic study should have been done; petitioners requested at the public hearing that a traffic study be done; instead of performing a traffic analysis, the board simply applied their knowledge of the area and decided that because the proposed facility was located within 100 yards of the existing facility there would not be any impact; the board did not present any data to support their conclusion that there would be no

traffic impact from the change in location; thus the board failed to take a "hard look"]).

Here, CUB's MOB location has been moved by more than 100 yards with the MOB being larger and on a different street corner, and it is this project with this MOB location with this parking configuration that CUB and OCIDA have asserted necessitates the condemnation. [R. 5282, 5284, 5287, 5512] CUB's MOB is larger and in a different location than the MOB considered in the SEQRA review by the Utica Planning Board in 2018/2019. [R. 4710, 6343] There is no reference in OCIDA's determination and findings to any review by a traffic expert regarding the changed location of CUB's project. At a bare minimum, a traffic expert should have been consulted as to the different location and to provide analysis as to whether any potential traffic impacts would result (as requested by Petitioners during the public comment period). [R. 5852] There is no reference in OCIDA's determination and findings to any expert review regarding the issues of increased water and sewer demand due to the increased size of CUB's project. There is no reference to any expert review regarding the increased demand on electrical and other utilities due to the increased size of CUB's project. OCIDA ignored the concerns of adverse impacts associated with the change in location and sized raised by public comments. [R. 51, 5282, 5284, 5287]

Similarly, CUB's MOB is located closer to the proposed helicopter landing pad of the hospital than the MOB proposal examined by the Utica Planning Board in 2018/2019. [R. 51, 5284). The different location raises issues unaddressed by OCIDA. see e.g. R. 436 ["Electromagnetic effects"], 477 ["obstacle clearance"], 586 ["Magnetic Resonance Imagery (MRI) Systems"], 4480-4483 ["reduced approach/departure path", "ventilation systems", "exhaust fumes"], 5852, 5861-5871). The different location puts CUB's MOB potentially in the flight path of helicopters landing at the hospital. [R. 4480-4483] The medical imaging and similar equipment proposed to be used in the CUB project in this different location may have significant interference with helicopter instruments, compasses and navigational equipment. [R. 385, 436, 481, 559, 586, 5866] Helicopter exhaust can affect building air quality if the heliport passes too close to fresh air vents on top of a building. [R. 558-557; R. 4482-4483]

The bottom line is that OCIDA failed to comply with SEQRA because it failed to evaluate the potential environmental impacts associated with the eminent domain proceeding. CUB's project must be examined under SEQRA in its proposed larger size and changed location (*see Corrini*, 1 Misc 3d 907[A] [board failed to take "hard look" at impacts from changing the location within 100 yards from prior location]). Therefore, even if OCIDA had acted within its statutory authority in the first

instance, its determination and findings would need to be rejected and annulled pursuant to EDPL § 207(C)(3).

2. OCIDA Engaged in Impermissible Segmentation of the SEQRA Review

OCIDA, by its own admission [A. 595, 620], only looked, purportedly, at environmental impacts as to part of CUB's MOB project, i.e., the O'Brien Parcel, and not as to CUB's project as a whole, including among other issues the different location and size of this project that is the reason for taking the O'Brien Parcel. Impermissible segmentation occurs when the environmental review under SEQRA of a single project is impermissibly broken down into smaller stages or actions, as though they are independent or unrelated. Impermissible segmentation is contrary to the letter and spirit of SEQRA and requires the agencies determination to be annulled (*see e.g. Matter of Riverso v. Rockland Cty. Solid Waste Management Authority,* 96 AD3d 764, 765-766 [2d Dept. 2012]).

In *J. Owens Bldg. Co. v Town of Clarkstown*, 128 AD3d 1067, 1069 (2d Dept 2015), the Town sought to acquire through eminent domain the petitioners' property for the purpose of, among other things, drainage and storm water management improvements in connection with a larger revitalization project for the Town. It was stated in documents in the record that the drainage plan "is a key component to the overall" revitalization project. Even though the drainage plan was part of the larger revitalization project, the Town Board studied only the potential impact of the

drainage plan during its SEQRA review for the acquisition. However, under SEQRA, the Town Board was obligated to consider the environmental concerns raised by the entire project. Since the Town Board failed to properly comply with SEQRA, its determination and findings had to be rejected under EDPL § 207.

In this case, OCIDA similarly engaged in impermissible segmentation in violation of SEQRA (*see Owens Bldg. Co.*, 128 AD3d at 1069). OCIDA and CUB cannot have it both ways and say that the Property is an "essential" and "necessary" part of CUB's project so that it needs to be taken by eminent domain for CUB's project but then that CUB's project and the Property can be examined separately under SEQRA as separate projects so that it does not matter what changes have been made between the previously examined MOB project and CUB's project. Failure to examine CUB's project as a whole is impermissible segmentation in violation of both the letter and spirit of SEQRA.

For all the foregoing reasons, the Court should reject and annul OCIDA's determination and findings pursuant to EDPL § 207(C)(3) for failure to comply with SEQRA.

B. THE CONDEMNATION DOES NOT MEET PUBLIC PURPOSE REQUIREMENTS

Pursuant to the federal and state constitutions and the EDPL, private property rights cannot be taken without a legitimate public purpose. There may be an

incidental private benefit to a private company so long as there is a dominant public purpose. It logically follows then that an incidental public benefit coupled with a dominant private purpose will invalidate a condemnors determination under the EDPL (*Syracuse Univ.*, 71 AD3d at 1433). "If the public use is contingent and prospective and the private use or benefit is actual and present, the public use is incidental to the private use, and in such a case, the power of eminent domain clearly cannot lawfully be exercised" (26 Am. Jur. 2d Eminent Domain § 49, citing *Syracuse Univ.*, 71 AD3d 1432). The public purpose may not be pretextual or illusory (*see Syracuse Univ.*, 71 AD3d at 1433; *Steel Los III, LP v Power Auth. of State*, 21 Misc 3d 707, 715 [Sup Ct, Nassau County 2008]). An ostensible public purpose that is a pretext for a private benefit is insufficient and unlawful (*see Syracuse Univ.*, 71 AD3d at 1433; *Steel Los III, LP*, 21 Misc 3d at 715). Condemnation efforts resting on a desire to achieve a transfer of property from one private entity to another private entity for essentially the same use is unlawful (*see Syracuse Univ.*, 71 AD3d at 1433; *Steel Los III, LP*, 21 Misc 3d at 715; *99 Cents Only Stores v Lancaster Redevelopment Agency*, 237 F Supp 2d 1123, 1125 [C.D. Cal. 2001] [Redevelopment Agency was not allowed to replace commercial retailer 99 cent store with Costco by eminent domain; ostensible public purpose was pretextual]).

Here, the private use is dominant, and OCIDA and CUB have asserted an ostensible public purpose that is a pretext for the dominant private benefit of the

private entity CUB who wants to take the Property, for purposes of developing an MOB, from a developer, Bowers, who is already planning to build an MOB on the Property.

The Court should reject and annul OCIDA's determination and findings as OCIDA and CUB have failed to meet the public purposes requirements of the federal and state constitutions and EDPL § 207.

C. OCIDA FAILED TO COMPLY WITH EDPL ARTICLE 2

EDPL § 207(C)(1) requires the condemnor to act in conformity with the federal and state constitutions. Under the Fifth Amendment to the Constitution of the United States, no person shall be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Section 6 of Article 1 of the New York Constitution provides that "no person shall be deprived of life, liberty or property without due process." Section 7 of Article 1 of the New York Constitution provides that "Private property shall not be taken for public use without just compensation." The federal and state constitutions allow the use of the power of eminent domain only for a good-faith public purpose, and a condemnor's powers must be applied in good faith and according to due process of law (*see e.g. Zutt v State*, 99 AD3d 85 [2d Dept 2012]; *Vill. of Haverstraw v Ray River Co.*, 62 AD3d 1016, 1017 [2d Dept 2009]).

OCIDA has not acted in conformity with the federal and state constitutions and EDPL and in good faith and according to due process of law.

1. EDPL Article 2 Procedural Failures, Constitutional Violations and Lack of Due Process

EDPL Article 2 provides specific, stringent notice and hearing requirements as to the public at large and those with an interest in the property. Not only is strict compliance required, a condemnor should scrupulously comply with these requirements in its exercise of its very serious power to seize private property by eminent domain. 17B Carmody-Wait 2d § 108:8 states (citations omitted), "Statutes delegating the power of eminent domain call into active operation a power which, however essential to the existence of government, is in derogation of the ordinary rights of private ownership, including the right of control which an owner usually has over his or her property. Accordingly, strict compliance with the conditions and requirements of such statutes is necessary."

If OCIDA's taking of the Property is for just a commercial public parking lot to provide parking to the general public as OCIDA now tries to assert (to try to get around the restriction on its statutory authority discussed above), then OCIDA has not complied with the EDPL Article 2 notice requirements and must provide a new Notice of Public Hearing and a public hearing on that public parking lot "Project". The current Notice of Public Hearing states the "Project" is "a certain approximately 94,000 SF medical office building and a fully licensed six (6) suite ambulatory

surgery center in the footprint of the Wynn Hospital located at 601 State Street (corner of State and Columbia) (the "Project") by Central Utica Building, LLC . . ." [R. 5287] OCIDA is thus either being misleading and trying to get around the limits of its statutory authority or it has failed to strictly comply with EDPL § 202. Either way its Determination and Findings should be annulled.

2. OCIDA's Delegation of Payment to a Private Company Is Not "Sure and Certain" Just Compensation

Pursuant to the federal and state constitutions and the EDPL, OCIDA is required to pay "just compensation" for property it condemns based on the property's value in its "highest and best use". "Just compensation" has been interpreted to mean "sure and certain" compensation (*see e.g. Keystone Assocs. v Moerdler*, 19 NY2d 78, 89 [1966]). That is, a mechanism is in place to guarantee there is a source of funds from which to pay the ultimate judicially determined just compensation damages. A condemnor should not move forward with condemnation proceedings if it cannot provide "sure and certain" compensation.

Upon information and belief, there is an agreement between CUB and OCIDA regarding taking the Property by eminent domain and payment by CUB of the just compensation. Based on this, CUB may argue that it will pay the just compensation. However, first, there has been insufficient showing that CUB has the resources to pay the value of the Property in its highest and best use.

Second, there has been insufficient showing much less "sure and certain" guarantee that CUB will pay the required amount and not ultimately seek to evade paying or dissolve as a limited liability company, i.e., LLC leaving insufficient funds for the damages resulting from the taking by eminent domain (*see Keystone Assocs.*, 19 NY2d at 89 ["the property owner cannot be relegated to the doubtful responsibility or solvency of a private corporation or of an individual"]). There has been no posting of a bond or deposit of an amount in escrow reasonably anticipated to cover the anticipated eminent domain damages based on appraisal analysis of the value of the Property in its highest and best use. Similar arguments apply to any extent that an MVHS entity has entered into the agreement between CUB and OCIDA to pay the just compensation. In addition, the above indicates there has been an impermissible delegation of eminent domain powers to a private, non-government entity, i.e., CUB and MVHS.

Accordingly, the condemnation is in violation of the federal and state constitutions and the EDPL and should be annulled.

3. Excess Taking

Pursuant to the EDPL and SEQRA, OCIDA was required to give notice of alternate locations and consider all reasonable alternatives to the taking and take no more than is necessary (*see e.g.* EDPL §§ 202, 203; 6 NYCRR §§ 617.9, 617.11). Taking more property than is required constitutes excessive taking and is a violation

of constitutional limitations (*see e.g. Feeney v Town/Vill. of Harrison*, 4 AD3d 428, 428 [2d Dept 2004] ["Town did not show on this record that condemnation of the petitioner's entire parcel is necessary"]).

Here, alternatives were not examined and addressed, and it was not shown that taking the entire Property is necessary. CUB has not demonstrated that the entire Property is needed for the CUB project and that this is not an excessive taking. CUB proposes to use the Property for a single level of parking as part of CUB's MOB project but has not shown why a parking garage on only a part of the Property would not be reasonable or why a parking garage on CUB's property would not be reasonable.

Therefore, OCIDA's determination and findings should be annulled.

4. Bad Faith

A condemnor acting without a public purpose or pretextually to benefit a private entity constitutes acting in bad faith and requires annulment of a decision to take property by eminent domain, as set forth above. Given the serious nature of any condemnation action and given the strict construction to be applied to statutory grants of eminent domain, it is disturbing that OCIDA would continue to engage in this shell-game to avoid the limits of its statutory authority to condemn of private property. All this shows bad faith on the part of CUB and OCIDA and demonstrates

OCIDA is willing to continue to brazenly proceed regardless of whether or not such actions are legal or within its authority.

For all these reasons, the determination to take the Property by eminent domain was in bad faith and unlawful, and pursuant to EDPL § 207, the Court should reject and annul OCIDA's determination and findings.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that the Court affirm the Fourth Department's Order annulling OCIDA's Determination and Findings to condemn the Property by eminent domain and grant Respondents such other and further relief as is just and proper.

Dated: June 29, 2023
Syracuse, New York

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NEW YORK STATE COURT OF APPEALS
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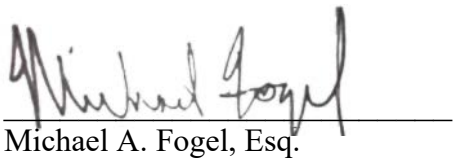

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