APL No. 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 *AMICUS CURIAE* NEW YORK STATE ECONOMIC DEVELOPMENT COUNCIL

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## DISCLOSURE STATEMENT

Pursuant to Rule 500.1 (f) of this Court's Rules of Practice, New York State Economic Development Council Inc. states that it has no parent, affiliate, or subsidiary entities or organizations.

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## INTEREST OF AMICUS CURIAE

New York State Economic Development Council Inc. (the "Council") is the state's principal organization representing economic development professionals.[1] Its more than 1,000 members include the leadership of industrial development agencies ("IDAs"), local development corporations, commercial and investment banks, underwriters, bond counsel, utilities, chambers of commerce, and businesses. The purpose of the Council is to promote the economic development of the state and its communities, encourage sound practices in the conduct of regional and statewide development programs, and to develop education programs that enhance the professional development skills of Council members. The Council has been serving New York's development industry for more than 30 years. In that time, the Council has become one of the most respected voices in the industry.

The Council performs many functions, including: (i) lobbying the state and federal government on issues affecting New York's business climate and economic development programs; (ii) conducting educational and professional development programs for Council members to enhance their effectiveness as local, regional, and

[1] Pursuant to section 500.23 (a) (4) (iii) of the Rules of Practice, no party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner. Further, no party or party's counsel contributed money that was intended to fund preparation or submission of the brief. No other person or entity contributed money that was intended to fund preparation or submission of the brief.

statewide economic developers; (iii) organizing business marketing programs to promote New York as a world-class business location, and (iv) providing opportunities for its members to market their regions of New York to potential investors. As part of these efforts, the Council continuously researches, surveys, and analyzes economic development practices and trends in the state and will often issue white papers, reports, and other commentary on the issues.

The importance of IDAs to New York's economic development efforts cannot be overstated. In 2021, New York's 107 IDAs were involved in 4,324 active projects with an aggregate value of $126 billion (Office of the New York State Comptroller, Performance of Industrial Development Agencies in New York State, 2023 Annual Report at 3).[2] These projects will be responsible for creating or retaining an estimated 460,000 jobs (*id.* at 10). In addition to fueling job growth, IDA-supported projects are promoting clean and renewable energy, downtown revitalization, workforce development, affordable housing, entrepreneurship, and innovation. In total, IDAs contribute hundreds of billions of dollars in direct and indirect economic impact each

[2] https://www.osc.state.ny.us/files/local-government/publications/pdf/ida-performance-report-2023.pdf.

year (Camoin Associates, The Impact of Industrial Development Agencies on New York State at 21).[3]

Given the enormous positive impact that IDAs have on the state's economy, the Council has an interest in ensuring that IDAs are able to use the full range of statutory authority granted by the Legislature, including, where appropriate, the power of eminent domain where necessary and appropriate to further IDAs' goals of promoting job growth and economic development.

## ARGUMENT

## POINT I

## THE APPELLATE DIVISION ERRED BY NARROWLY CONSTRUING THE SCOPE OF THE AGENCY'S EMINENT DOMAIN AUTHORITY.

Below, the Fourth Department narrowly construed the statutory authority afforded to the Oneida County Industrial Development Agency (the "Agency") under GML article 18-A, holding that the Agency was barred from exercising the power of eminent domain to facilitate a project "related to hospital or healthcare-related facilities" (A.990). The logic behind the court's holding is that if a public project is related to a larger healthcare facility, it cannot also be commercial in nature because the two categories are mutually exclusive. Yet, nothing in the statute

[3] https://www.nysedc.org/docs/NYSEDC_IDA_Impact_Analysis_FINAL.pdf.

compels such a result. Indeed, as explained below, the decision is at odds with the text and purpose of GML article 18-A. If this Court were to adopt the same construction, it would unduly limit the ability of IDAs statewide to fulfill their statutory mission of promoting economic development projects. Instead, this Court should instead construe GML article 18-A to allow IDAs to use their eminent domain authority to support commercial projects that enhance job growth and economic development (and prevent economic deterioration), regardless of whether the project is also related to a healthcare facility.

The parties' dispute here concerns an interpretation of the New York State Industrial Development Agency Act (L 1969, ch 1030). The Act provides that each IDA has the power to acquire real property by eminent domain "for its corporate purposes" (GML § 858 [4]) as well as to "[t]o do all things necessary or convenient to carry out its purposes and exercise the powers expressly given in this title" (*id.* § 858 [17]). The Act specifies the corporate purposes of an IDA in two places. First, section 858 provides "[t]he purposes of the agency shall be to promote, develop, encourage and assist in the acquiring, constructing, reconstructing, improving, maintaining, equipping and furnishing" certain types of facilities, including

"commercial" facilities (GML § 858).[4] Second, section 852 provides that IDAs were created to further the "policy of this state to promote the economic welfare, recreation opportunities and prosperity of its inhabitants and to actively promote, attract, encourage and develop … economically sound commerce and industry … through governmental action for the purpose of preventing unemployment and economic deterioration" (GML § 852). These provisions demonstrate the Legislature's intent that IDAs promote commercial projects that will increase employment and build economic growth.

In interpreting a statute, the "primary consideration 'is to ascertain and give effect to the intention of the Legislature'" (*DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006], quoting *Riley v County of Broome*, 95 NY2d 455, 463 [2000]). "The language of a statute is generally construed according to its natural and most obvious sense ... in accordance with its ordinary and accepted meaning, unless the Legislature by definition or from the rest of the context of the statute provides a special meaning" (*Samiento v World Yacht Inc.*, 10 NY3d 70, 78 [2008], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 94, at 191–194 [1971 ed]).

[4] The full list of facilities is 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).

This Court should construe the term "commercial" in accordance with its plain meaning to encompass any for-profit business involving the exchange of goods or services. Such an interpretation is supported by the ordinary meaning of the word "commercial." A leading law dictionary, for example, defines "commercial" to mean, among other things, "[e]mployed in trade; engaged in commerce" or "[o]f relating to, or involving the ability of a product or business to make a profit" (BLACK'S LAW DICTIONARY 335–336 [11th ed 2019]; *see also* BALLENTINE'S LAW DICTIONARY [3d ed 1969] ["in a broad sense, embracing every phase of commercial and business activity and intercourse"]). Commerce, in turn, is defined broadly as "[t]he exchange of goods and services" (BLACK'S LAW DICTIONARY 335–336; *see also* 1985 Ops St Comp No. 87-51 at 3–4 [in deciding whether a project is "commercial" under GML article 18-A, IDAs should consider whether the project "promotes employment opportunities and prevents economic deterioration"]).

Applying a plain-meaning definition of "commercial" is also consistent with the legislative purpose of GML article 18-A, which was "to promote the economic welfare, recreation opportunities and prosperity of [the state's] inhabitants and to actively promote, attract, encourage and develop recreation [and] economically sound commerce and industry" (GML § 852).

Such a broad, plain-meaning interpretation is consistent with how the Legislature has defined the word "commercial" in other contexts. For example, in the Real Property Tax Law, the Legislature defined "[c]ommercial property" in relevant part as "nonresidential property … on which will exist … a building … used for the buying, selling or otherwise providing of goods or services … or for other lawful business, commercial or manufacturing activities" (RPTL § 489-aaaa [6]). A similarly broad definition of "commercial" is found in the Human Rights Law, which defines the term "commercial space" to include "any space which is used or occupied, or is intended, arranged or designed to be used or occupied as a separate business or professional unit or office in any building, structure or portion thereof" (Executive Law § 292 [13]).

The approach to statutory construction taken by Respondents fails to account for the "ordinary and accepted meaning" of the statutory language (*Samiento*, 10 NY 3d at 78). In their brief, Respondents offer no affirmative definition of the term "commercial." Instead, they argue that the term, however it might be defined, does not extend to "hospitals or other healthcare-related facilities" (Resp. Br. at 19). As support for this exclusion, Respondents cite primarily to an opinion from the state attorney general, which concluded that IDAs lacked the statutory authority under section 858 to "assist in financing hospitals as defined in section 2801 (1) of the

Public Health Law" (1981 NY Op Atty Gen 55 at 5). Like Respondents here, the attorney general's opinion lacks any affirmative definition of the term "commercial" that is supported by ordinary tools of statutory construction. The opinion simply notes a lack of evidence in the legislative history for construing "commercial" as encompassing hospitals or health-related facilities (*i.e.*, nursing homes and assisted living facilities). The opinion does not appear to extend to the type of facility at issue here, namely, a medical office building. Instead of mining the legislative history to determine the Legislature's intent, this Court should instead look to the language chosen by the Legislature and apply the ordinary and accepted meaning of statutory text.

Even if Respondents had advanced a viable alternative definition of the term "commercial," this Court should nonetheless afford great deference to the Agency's interpretation. As this Court has noted, "[w]hile as a general rule courts will not defer to administrative agencies in matters of pure statutory interpretation, deference is appropriate where the question is one of specific application of a broad statutory term" (*Matter of O'Brien v Spitzer*, 7 NY3d 239, 242 [2006] [cleaned up]). That is the case here, where the question is whether a particular project falls within the broad statutory term of "commercial" in GML article 18-A. As agencies charged with promoting economic development and job growth, IDAs have the subject-

matter expertise that makes them well-suited to determine what types of projects constitute "commercial" projects within the meaning of GML article 18-A.

The Appellate Division previously applied this principle in *Matter of Nearpass v Seneca County Industrial Development Agency* (152 AD3d 1192 [4th Dept 2017]), holding that "the broad statutory terms 'commercial' and 'recreation' within the definition of 'project' in [GML] section 854 (4) are ambiguous insofar as they are susceptible to conflicting interpretations" and that the condemning agency's interpretation was "entitled to great deference, and must be upheld as long as it is reasonable" (*id.* at 1193). Here, too, such deference is appropriate and militates in favor of a broad, plain-meaning construction of the term "commercial."

## POINT II

## THE APPELLATE DIVISION ERRED BY FAILING TO APPLY THE CORRECT STANDARD OF REVIEW TO THE AGENCY'S DETERMINATION UNDER EDPL ARTICLE 2.

In its determinations and findings, the Agency determined that the project was within the scope of its authority under the Act. Specifically, the Agency concluded that the proposed surface parking lot constituted "a 'commercial facility' within the meaning of the Act" (A.638). In annulling the Agency's determination, the Fourth Department effectively substituted its own judgment for that of the Agency. This Court should reverse and should defer to the Agency's rational determination.

This Court has repeatedly emphasized the limited scope of judicial review of a condemnor's exercise of the power of eminent domain. For example, in *Matter of Goldstein v New York State Urban Development Corp.* (13 NY3d 511 [2009]), this Court noted that the determination of whether a particular property was blighted "has not been, and may not be, primarily a judicial exercise" but was rather a "legislative prerogative" the implementation of which "has been largely left to quasi-legislative administrative agencies" (*id.* at 526). Likewise, in *Matter of Kaur v New York State Urban Development Corp.* (15 NY3d 235 [2010]), this Court observed the long history of judicial restraint in examining the exercise of eminent domain, with courts being limited to examining whether the determination of the "the legislative body authorizing the project … is irrational or baseless" (*id.* at 254).

The record before the Agency showed that the real property being acquired would be used for a parking facility adjacent to an office building (R.5284). The owner of the office building (Central Utica Building, LLC) intends to lease space to physician practices, an ambulatory surgery center, and "other commercial and/or retail tenants to provide complementary services" (A.457; *see* A.454–456). The Agency found that the proposed project would "promote and maintain the job opportunities, health, general prosperity and economic welfare of the citizens of Oneida County and the State of New York" and that the project "constitutes a

'commercial facility' within the meaning of" GML article 18-A (A. 638). It was neither irrational nor baseless for the Agency to conclude that an office building in which professional services are being offered in exchange for payment is "commercial" in nature—just as it would be if the building were leased to firms offering architectural, engineering, or legal services rather than medical services.

The Agency is not the only IDA to have similarly determined that it had the statutory authority to support the development of a commercial office building having independent medical practice groups, hospital services and physician practice groups as tenants. For example, in 2014, the City of Albany Industry Development Agency approved of $32 million in tax incentives as part of a $110 million redevelopment project that included a five-story medical office building and a six-story parking garage (*see* Jordan Carleo-Evangelist, *Albany IDA approves $32M in tax breaks*, TIMES UNION [Sept. 18, 2014]).[5] The project was spearheaded by Albany Medical Center, which had acquired land adjacent to its New Scotland Avenue campus for use in the redevelopment project (*id.*).

Similarly, in February 2020, the Suffolk County Industrial Development Agency approved $1.8 million in tax incentives for a combined sports and medical

[5] https://www.timesunion.com/local/article/Albany-IDA-approves-tax-breaks-for-South-Park-5764572.php.

complex in Kings Park that included a 50,000 square-foot medical office building (*see* James T. Madore, *Long-delayed $47M Kings Park sports, medical complex to get tax breaks*, NEWSDAY [Feb. 13, 2020]).[6]

If the Fourth Department's decision were affirmed by this Court, IDAs might be unable to support these types of projects—that is, projects that are commercial in nature but that also involve healthcare tenants. Moreover, allowing appellate courts to make their own *de novo* determinations about whether a particular project is sufficiently "commercial" in nature to fall within the statutory definition would lead to more uncertainty, more litigation, higher costs for IDAs, and ultimately less economic development.

[6] https://www.newsday.com/business/sports-medical-complex-kings-park-tax-break-f11120.

## CONCLUSION

For the foregoing reasons, this Court should reverse the order of the Appellate Division, Fourth Department, dated December 23, 2022; hold that the Agency acted within the scope of its authority under GML article 18-A; and dismiss the petition.

Dated: Pittsford, New York
October 3, 2023

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR part 500, counsel for New York State Economic Development Council Inc. as amicus curiae hereby certify that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: October 3, 2023