Appellate Division – Second Department Docket No. 2008-07074

COURT OF APPEALS
of the
STATE OF NEW YORK

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

Petitioners-Appellants,

-against-

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

Respondent-Respondent.

BRIEF FOR AMICUS CURIAE WILLETS POINT UNITED, INC.

GOLDSTEIN, GOLDSTEIN, RIKON& GOTTLIEB, P.C.
Attorneys for Amicus Curiae, Willets Point United, Inc.
80 Pine Street, 32nd Floor
New York, New York 10005
(212) 422-4000

Of Counsel:
Michael Rikon

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PRELIMINARY STATEMENT

Willets Point United, Inc. respectfully submits this brief as amicus curiae to urge the court to reverse the Appellate Division's decision which dismissed the Petition filed pursuant to Section 207 of the Eminent Domain Procedure Law and urges that this court hold that under the constitution of the State of New York private property may not be condemned except for a public use.

INTEREST OF THE AMICUS CURIAE

The Willets Point United, Inc. is a corporation consisting of owners and tenants located in the Willets Point area of Queens, New York City.

Willets Point is a neighborhood in northern Queens, New York City, comprising approximately 61 acres in a triangle bounded by Northern Boulevard in the north, 126th Street on the west and the Van Wyck Expressway on the east. Willets Point is a unique and vibrant community that is home to approximately 225 businesses including the members of Willets Point United, Inc.

The Willets Point businesses are viable and vital, and many have operated in Willets Point for generations. Upon information and belief, these businesses employ approximately 1,400-1,800 workers, with Petitioners employing approximately 200 of the workers and providing commercial spaces for over 14 commercial tenants. Approximately 75% of the 1,400-1,800 workers live locally in Queens, more than 90% are full-time, and many speak only Spanish. For many, these jobs are their first introduction to the New York City workforce and/or auto industry.

For decades, New York City has been engaged in a quest to condemn Willets Point, destroy its businesses and deliver it to developers. As part of this quest, New York City has systematically deprived Willets Point of the vital infrastructure that every neighborhood needs and to which each is entitled. For example, Willets Point now has no functioning storm sewers, sanitary sewers, paved and maintained streets, gutters or fire hydrants, and Willets Point has little or no snow removal or municipal trash removal.

In the 1960s, 1980s and again in the early 1990s, various proposals were developed to deliver Willets Point to developers. Those proposals, like that of Robert Moses, were unsuccessful.

New York City now has turned its attention to Willets Point once again. This time, New York City is proposing a development plan that would rezone Willets Point, evict the existing businesses, and replace them with unspecified residential, commercial and community uses. There is no developer prepared to go forward with this speculative development.

On September 24, 2008, the City Planning Commission approved resolutions C080221MMQ, C080381ZMQ, N080382ZRQ, N080383HGQ, C080384HUQ, and C080385HDQ, which granted, respectively, the application for the development plan including an amendment to the City Map, an amendment to the Zoning Map, the establishment of a special district in Community District 7, the designation of the Willets Point Urban Renewal Area, the acquisition of properties in the Willets Point Area and the disposition of city-owned property.

On November 13, 2008, the City Council approved resolutions 1687-1692, which granted the applications referred by the City Planning Commission. Resolution 1687 granted an amendment to the City Map. Resolution 1688 granted an amendment to the Zoning Map. Resolution

1689 established a special district in Community District 7, in Queens. Resolution 1690 designated certain properties as the Willets Point Urban Renewal Area. Resolution 1691 approved the acquisition of properties in Willets Point. Resolution 1692 provided for the disposition of city-owned property located in Willets Point.

The resolutions adopted by the City Planning Commission and City Council provide authority to seize the property of Petitioners using the power of eminent domain.

The Amicus has a very strong interest in a correct interpretation of New York's constitutional limitation that private property not be taken except for public use.

STATEMENT OF FACTS

The Willets Point United Against Eminent Domain abuse adopts the Statement of Facts in the brief filed by Petitioners – Appellants.

ARGUMENT

THIS COURT SHOULD HOLD THAT PRIVATE PROPERTY MAY NOT BE TAKEN EXCEPT FOR A PUBLIC USE

Eminent Domain is the right of the sovereign to take your property. It is an inherent power of government that is necessary for the fulfillment of sovereign functions. Indeed, one will find nothing in the Constitution creating the power, only limitation on its exercise. That limitation is found within the Fifth Amendment to the United States Constitution. "…nor shall private property be taken for public use, without just compensation." These limitations are made applicable to the States by the Fourteenth Amendment. The Fifth Amendment to the United States Constitution was adopted on December 15, 1781. The Fifth Amendment did not apply to the states prior to 1897 when it was decided it applied by the 14th Amendment Due Process Clause. *Chicago B&Q Rail Road v Chicago*, 166 U.S. 226, 239.

In *Kelo v City of New London*, 465 U.S. 469 (2005), the Supreme Court eviscerated the U.S. Constitution's public use clause by holding that a property owner's land can be taken for economic development. Under this interpretation, the U.S. Constitution no longer places any meaningful check

on the state's powers, a result that was certainly not intended by the framers. This Court now has the opportunity to distinguish the New York Constitution by finding that its takings clause does not permit a taking for economic development and it should do so.

As Justice O'Connor noted in her dissenting opinion in *Kelo v City of New London*, 545 U.S. 469, at page 496 (2005), the Fifth Amendment imposes two distinct conditions on the exercise of eminent domain: "The taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v Legal Foundation of Wash*., 538 U.S. 216, 231-232 (2003).

We are not now concerned with 'just compensation.' It is the public use requirement which imposes a more basic limitation, circumscribing the very scope of the eminent domain power. "Government may compel an individual to forfeit her property for the public's use, but not for the benefit of another person." 545 U.S. 469.

Kelo v City of New London, supra, created a great public outcry when people learned that their homes could be condemned to give to a private

developer to build a Costco warehouse store, something that actually occurred in Port Chester, New York, a condemnation proceeding that was fraught with abuse. See *Didden v Village of Port Chester*, 173 Fed App 931 (2d Cir 2006), cert den 549 U.S. 1166 (2007).

The majority decision in *Kelo v City of New London* written by Justice Stevens was wrong, wrong in its holding and wrong on its facts. At the outset, the Supreme Court noted that it would no doubt be forbidden from taking privately owned land for the purposes of conferring a private benefit on a particular private party, citing *Hawaii Housing Authority v Midkiff*, 467 U.S. 229, 245 (1984). The *Kelo* court then stated, "[t]he taking before us; however, would be executed pursuant to a carefully considered development plan." 545 U.S. 469, 478.

This statement which became the predicate for sustaining an eminent domain proceeding that outraged most of America was absolutely and totally wrong.

Not only was there never a finding of blight in the Fort Trumbull area of New London, but there never was an agreement with any developer,

sponsor or agency to do anything with the land. There was no development plan, let alone a development plan which was "carefully considered."

Five years after the Supreme Court's decision and the demolition of the property owners' homes, the land lies vacant and barren. According to the published reports, the City of New London has had no success in finding a developer to build a hotel, the proposed use, or for that matter, any use at all. "A few weeks ago, I visited the neighborhood, ground zero in the famous battle between the city and homeowners. Here's what I saw: a sea of brown dirt littered with old rusty nails, broken bricks and slivers of glass – the only signs that people once lived there. Every home has vanished. Nothing has been built in their place. The neighborhood is a ghost town, a scarlet letter on the City's forehead." Hartford Courant, Editorial, Jeff Benedict, Jan. 24, 2009.

The *Kelo* decision was simply wrong in its failure to respect the fundamental constitutional right to own property. As Justice O'Connor wrote, Alexander Hamilton described "the security of property" to the Philadelphia Convention as one of the "great obj(etcs) of Gov(ernment)." 1 Records of the Federal Convention of 1787, P. 302 (M. Farrand ed 1934).

The Supreme Court, when previously presented with an opportunity to uphold traditional notions of property rights stated, "[t]he dictomy between personal liberties and property rights is a false one. Property does not have rights, people have rights. The right to enjoy property without lawful deprivation, no less than the right to speak or the right to travel is in truth a 'personal' right whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and personal right in property. Neither could have meaning without the other. That right in property is basic civil rights has long been recognized." *Lynch v Household Finance Corp.,* 405 U.S. 538, 552 (1972). If one has basic civil rights in property, the threshold for losing ownership to one's property for an alleged public use should not be the lowly standard of being merely related to any conceivable public purpose.

NEW YORK'S CONSTITUTION ONLY ALLOWS EMINENT DOMAIN FOR A PUBLIC USE

New York's constitution precludes the exercise of the power of eminent domain for economic development. The language of the limitation is a model of simplicity:

> "Private property shall not be taken for public use without just compensation." N.Y. Const. Art I, Sec. 7 (a)."

When interpreting the language of the Constitution, there is a presumption that every word in the document has independent meaning, "that no word was unnecessarily used or needlessly added." *Wright v United States*, 302 U.S. 583, 588 (1938).

But over the years, by judicial decision, "public use" became corrupted to also mean "public purpose" or "public benefit." As was noted in Petitioners- Appellants brief:

> In *Matter of New York City Housing Authority v Muller,* 270 N.Y.333 (1936) the Court of Appeals said, in a "slum clearance" of a blighted area: "use of a proposed structure, facility of service by everybody and anybody is one of the

> abandoned universal tests of public use." The court then said: "over many years and in a multitude of cases, the courts have vainly attempted to define comprehensively the concept of a public use and to formulate a universal test. They have found here, as elsewhere, that to formulate anything ultimate, even though it was possible, would in an inevitably changing world be unwise, if not futile. Lacking a controlling precedent, we deal with the question as it presents itself on the facts at the present point of time. The law of each age is ultimately what that age thinks should be law." The court noted that elimination of slums is a matter of state concern and that elimination of the conditions found in slums "is a public purpose." The court spoke not of "public use," but of "public purpose."

Not only did the clear limitations language change, but it was also decreed, with woeful future effect, that the judiciary would not look behind the statement of purpose by the legislative body. *Kaskel v Impelliteri*, 306 N.Y. 73 (1953).

The adulteration of the constitutional limitation that "private property shall not be taken for public use without just compensation" reached its Zenith in *Courtesy Sandwich Shop, Inc. v Port of New York and New Jersey Authority*, 12 NY2d 379 (1963) where this court approved the condemnation of some thirteen city blocks for the commercial venture known as the World Trade Center as a "facility of commerce" and therefore, a public purpose.

Judge Van Voorhis' dissenting opinion contained a more accurate and prophetic constitutional warning,

> Disregard of the constitutional protection of private property and stigmatization of the small or not so small entrepreneur as standing in the way of progress has everywhere characterized the advance of collectivism. To hold a purpose to be public merely for the reason that is invoked by a public body to serve its ideas of the public good, it seems to me, can be done only on the assumption that we have passed the point of no return, that the trade, commerce and manufacture of our principal cities can be conducted by private enterprise only on a diminishing scale and that private capital should progressively be displaced by public capital which should increasingly take over. The economic and geographical advantages of the City of New York have withstood a great deal of attrition and can probably withstand more, but there is a limited beyond which socialization cannot be carried without destruction of the constitutional bases of private ownership and enterprise. It seems to me to be the part of courts to enforce the constitutional rights of property which are involved here. 12 NY2d 379, 399.

In 1975, the Court of Appeals decided *Yonkers Community Development Agency v Morris*, 37 NY2d 478 which allowed the condemnation of private property placed in an urban renewal plan for the removal of "substandard" conditions. In fact, the properties were not substandard but were taken for the expansion of Otis Elevator Compan*y*, a leading industrial employer in the City of Yonkers. The court applied the liberal rather than literal definition of a "blighted" area and permitted the

taking. If one thinks that this was outrageous, consider that even after receiving such municipal largess, Otis quit Yonkers in 1982. Yonkers then sued Otis in the United State District Court for the Southern District of New York only to have its suit for breach of contract, unjust enrichment and fraud dismissed with the imposition of sanctions since there was no colorable factual basis for filing a fraud claim. It seems that Yonkers failed to obtain any written specific commitment by Otis to continue production at its Yonkers facility. *City of Yonkers v Otis Elevator Company*, 844 F2d 42 (2d Cir 1988). The same thing happened not too long ago in the Bronx when the Farberware convinced the New York State Urban Development Corporation to condemn its landlord's building for its own. Not too long after, Farberware quit the Bronx.

If one were to fast forward on this corruption of a constitutional limitation, one's research would indicate *Matter of Fisher*, the Appellate Division, First Department, dismissed a petition brought under EDPL Sec. 207 challenging the proposed condemnation of 45 Wall Street, Manhattan, a luxury building, for the construction of a proposed new New York Stock Exchange. The court stated,

> Given the breadth with which public use is defined in the condemnation context (see, *Greenwich Assocs v Metropolitan Transp Auth*, 152 AD2d 216, 221, appeal dismissed sub nom. *Matter of Regency-Lexington Partners v Metropolitan Transp Auth*, 75 NY2d 865) and the very restricted scope of our review of respondent's findings in support of condemnation (see, *Matter of Jackson v New York State Urban Dev Corp*, 67 NY2d 400, 425), we perceive no ground upon which we might reject respondent's finding that the condemnation of 45 Wall Street as part of respondent's New York Stock Exchange project will result in substantial public benefit. 287 AD2d 262, 264 (1st Dept 2001).

This self-imposed restrictive review criterion proved very expensive for the taxpayers of New York. The project which was poorly conceived never happened and was abandoned. At the end of the day, there was an estimated loss of $109 million dollars. Charles v Bagli, "45 Wall St is Renting Again Where Tower Deal Failed," New York Times, Feb 8, 2003, at B3.

In refusing to review whether something is a public use, the courts have hid beyond their self-imposed limitation of review. In a matter related to this case which reviewed the Environmental Impact Study, Justice Catterson wrote in his concurring opinion that he believed that the New York Urban Development Corporation "is ultimately being used as a tool of the developer to displace and destroy neighborhoods that are 'underutilized.'

He further wrote, "I recognize that long-standing and substantial precedent requires a high level of deference to the Empire State Development Corporation's (***) finding of blight. Reluctantly, therefore I am compelled to accept the majority's conclusion that there is sufficient evidence of 'blight' in the record under this standard of review. However, I reject the majority's core reasoning, that a perfunctory 'blight study' performed years after the conception of a vast development project should serve as the rational basis for a determination that a neighborhood is indeed blighted." 59 AD3d 312, 326 (1st Dept 2009).[1]

This amounts to a total abandonment of the responsibility of the judiciary. An independent judiciary should not be limited to a rubber stamp of approval. It is incorrect that the First Department would find that it was bound by a determination that luxury condominiums were "blighted." By precluding its review, a court does violence to the fundamental separation of powers doctrine which represents the constitutional check on power in our form of government.

[1] According to a report published on February 2, 2008, "only 19% of the taking area blocks and tax lots could be considered 'blighted,' and that 19% is owned entirely by FCRC (the developer). None of the 'blighted' properties is owned by the Plaintiffs." Atlantic Yards Report, blog, Norman Oder, www.atlanticyardsreport.blogspot.com

Furthermore, the decisions made to condemn are not legislative determinations. The determinations are not made by any elected officials, but by a hand full of appointees who are responsible to no one. It is simply incredible that these decisions have been held unreviewable. The decision making process to condemn private property is not made by a representative deliberate assembly.

Professor Gideon Kanner, the editor of "Just Compensation" and a columnist to the National Law Journal has long decried the hypocrisy of the "Public Use" Law. The problem, according to Prof Kanner is "…Judges (that) have abdicated their responsibility and are falling down on their job of safeguarding citizens' constitutional rights in this field of law. Instead of enforcing the 'public use' clause, they allow these new robber barons to wreak havoc on the lives of innocent people, and to raid municipal treasuries for subsidies in pursuit of private gain." The New Robber Barons, Kanner, Nat. L.J. May 21, 2001.

This court has the opportunity, at a minimum, to restore the right of a reviewing court to determine whether in any particular case there has been abuse in the exercise of the power of eminent domain. It also has the ability

to correct the eminent domain abuse which has been the hallmark of New York State, "New York is perhaps the worst state in the country for eminent domain abuse." Public Power, Private Gain," Berliner, Institute for Justice, April 2003, P. 144.

Other State Courts have reviewed and changed their holdings which allowed takings for private benefit concluding that the power of eminent domain should be exercised with restraint, not abandon. *Southwestern Illinois Development Authority v National City Environmental, LLC*, 199 Ill.2d 225, 768 NE 2d 1 (April 4, 2002).

In *Poletown Neighborhood Council v City of Detroit*, 304 NW2d 455 (1981), the Michigan Supreme Court allowed the condemnation of some 465 acres, 1,176 buildings including 144 businesses, three schools, a 278 bed hospital, 16 churches and one cemetery so that General Motors could build a Cadillac factory. The project cost Detroit over $200 million. General Motors paid $8 million and also received a 12 year 50% tax abatement. There was very little evidence of "blight," but the argument was that the economic benefit to General Motors would, eventually, trickle down to the public. Perhaps, "blight" is in the eyes of the beholder. Who is to say what

is "blight?" If a government earmarks a portion of a block for condemnation for many years, does it not itself create "blight?" However, the Michigan Supreme Court acknowledged that its decision in *Poletown* was wrong.

On July 30, 2004, the Michigan Supreme Court reversed its earlier Poletown decision in *County of Wayne v Hathcock*, 471 Mich. 445, 684 NW2d 765, holding that Poletown was wrongly decided and did so retroactively. While the Michigan Supreme Court stated that the case did not "require that this Court cobble together a single comprehensive definition of 'public use,'" relating to its decision to the discrete facts in the case before it, nonetheless, relying on pre-1963 decisions, the Court described the exercise of the power as being limited to an actual public use such as roads, schools and parks except when it possessed one of three characteristics. The land could be transferred to a private entity generating public benefits "whose very existence depends on the use of land that can be assembled only by the coordination central government is alone capable of achieving." The examples given were "highways, railroads, canals and other instrumentalities of commerce," deeming such enterprises as "vital instrumentalities of commerce."

The second exception is, "When the private entity remains accountable to the public in its use of that property." An example given was when the receiving entity was "subject to direction from the Public Service Commission" in that in such a way, "The public retained a measure of control over the property."

The third exception is, "When the selection of the land to be condemned is itself based on public concern," – "meaning that the underlying purpose for resorting to condemnation rather than the subsequent use of the condemned land, must satisfy the Constitution's public use requirement." The example given was the clearance of "blight," where the subsequent resale of the land cleared of the blight was "incidental" to this goal. Since the proposed business and technology park proposed by the County of Wayne fit none of the exceptions, the Court struck down the attempted condemnation.

In a case that garnered a great deal of interest in Connecticut, Curley's Diner objected to the proposed condemnation of its property based on a 1963 redevelopment plan which never included their parcel, which they had acquired in 1977. On appeal, the trial court was reversed and the matter

remanded with an Order to enter a permanent injunction barring the condemnation. The Appellate Court stated that while a redevelopment agency need not redetermine the level of blight at each stage, it may not rely on its initial finding indefinitely, particularly where the subject property was not targeted for acquisition when the plan was adopted. The Court noted the new hearings might disclose that there was no longer any blight justifying condemnation of the subject property. *Aspospornos v Urban Redevelopment Comm*., 790 A2d 1167 (Conn., 2002).

The Supreme Court of Ohio recently struck down the taking by a municipality of an individual's property and transferring the property to a private entity for redevelopment in *City of Norwood v Horne*, 110 Ohio St. 3d 353 (2006). The Ohio Supreme Court held that the lower courts were mistaken when they felt constrained by its interpretation of prior cases, stating that judicial review is limited in reviewing a designation of a neighborhood as a "deteriorating area." Just as the First Department in the instant matter believed itself limited in its review, the Ohio Court held that "inherent in many decision affirming pronouncements that economic development alone is sufficient to satisfy the public-use clause is an artificial deference to the State's determination that there was sufficient public use."

(P.26). The *City of Norwood* Court held that, "given the individual's fundamental property rights in Ohio, the court's rule in reviewing eminent domain appropriations, though limited, is important in all cases. Judicial review is even more imperative in cases in which the taking involves an ensuing transfer of the property to a private entity, where a novel theory of public use is asserted, and in cases in which there is a showing of discrimination, bad faith, impermissible financial gain, or other improper purpose." (at P. 34). The court held that an economic or financial benefit alone is insufficient to satisfy the public-use requirement.

New York should provide for proper and appropriate review of any alleged blight determination. It should now re-enforce fundamental property rights and prevent the condemnation of private property for purely economic or financial benefit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the court should reverse the judgment of the Appellate Division, Second Department dismissing a petition filed pursuant to EDPL Sec. 207 and grant the petition.

Dated: August 21, 2009
New York, New York

Michael Rikon
Goldstein, Goldstein, Rikon & Gottlieb, P.C.
Attorneys for Amicus Curiae
Willets Point United, Inc.
80 Pine Street
New York, New York 10005
(212) 422-4000