No. 04-108

IN THE
SUPREME COURT OF THE UNITED STATES

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP and WILLIAM VON WINKLE,

Petitioners,

-against-

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

Respondents.

=========

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF AMICUS CURIAE OF THE CITY OF NEW YORK IN SUPPORT OF RESPONDENTS

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
100 Church Street,
New York, New York 10007.
(212) 788-1043 or 0835

LEONARD J. KOERNER,*
EDWARD F.X. HART,
JANE L. GORDON,
of Counsel.
**Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Statutes and Constitutions:

Other Authorities:

INTEREST OF THE AMICUS CURIAE

The City of New York has been in the forefront of the urban renewal movement. History has shown time and again that, in a city as densely populated as New York, assembly of parcels suitable for redevelopment – for whatever purpose – is frequently impossible without the public aid of condemnation. Lincoln Center for the Performing Arts was created through the use of condemnation, and it, in turn, not only became the anchor for many of the City's leading cultural arts venues, but it also spurred tremendous private residential development on Manhattan's Upper West Side. With the assistance of condemnation, 13 acres in and around Times Square were reborn as a tourist-friendly destination that, in the 2003-2004 season, drew an estimated 11.6 million people to the Broadway shows in that neighborhood, while the area west of Times Square has since become a new residential neighborhood. A formerly blighted and underutilized area of Brooklyn was, in partnership with a local university, transformed into Metrotech, an urban office park that, in turn, has attracted additional development activity, including Brooklyn's first new hotel since the 1930s. Before its destruction, the World Trade Center, another economic redevelopment project made possible by condemnation, revitalized acres of lower Manhattan and led to the private development of an entirely new mixed-use neighborhood – Battery Park City – built nearby on Hudson River landfill. All those projects (and many others) were accomplished through the use of eminent domain to accomplish the same critical public planning objectives at issue in this appeal.

Thus, pursuant to Supreme Court Rule 37.4, the City of New York submits this brief in support of the respondents in this case in order to illustrate for the Court how, in the quintessential U.S. urban setting, economic

redevelopment is simply the evolutionary heir to traditional urban renewal, why condemnation for this purpose is a "public use" under the Takings Clause of the Fifth Amendment, and finally, why "one size fits all" fails when it comes to what constitutes a public use, so that the issue, as this Court has long recognized, is best left to the States to decide on a case-by-case basis.

SUMMARY OF THE ARGUMENT

With eight million residents, New York City is the quintessential urban environment, and its prosperity has always been inextricably linked to business and industry. New York is a major transportation hub and port that is also home to the United Nations, 2,000 non-profit art and cultural organizations, the financial markets, legendary retailers and sports venues, 17,312 restaurants, Broadway, communications giants, renown universities with more than 600,000 undergraduate and graduate students, 40,000 film and television production shoots a year, cutting-edge research and medical facilities, and burgeoning multi-cultural pockets throughout the City's five boroughs that reflect the richly diverse ethnic mosaic of its residents. Nearly 40 million people visited the City in 2004, and they spent approximately $15.1 billion while here.[1]

In Fiscal 2002, 36 development projects just for cultural institutions were begun in the City, including a new dance performance facility for the Dance Theater Workshop, the development of shared office space for the Alliance of Resident Theaters in New York, and a new 76,000 square foot facility for the renown Alvin Ailey Dance Foundation. Indeed, owing in part to the need for cultural institutions to maximize their land resources, New

[1] The figures in this section are from the website of the New York City Conventions and Visitors Bureau: http://www.nycvisit.com/content/index.cfm?pagePkey=57.

York enacted a law allowing the creation of cultural trusts that can use condemnation for the purpose of building combined-use facilities that financially support both the institution and private enterprise. *Hotel Dorset Company v. Trust for Cultural Resources of the City of New York*, 46 N.Y.2d 358, 1 N.E.2d 153 (1978).

One would be hard pressed to find anywhere in the nation where the need to expand and utilize available land resources to their utmost capacity is greater than in New York City, and this is particularly so as the City continues to recover from the events of September 11, 2001. The site of the former World Trade Center is being substantially reconfigured, but areas adjacent to the site that were either seriously damaged or that suffered economic devastation in the aftermath of the attack are also undergoing transformations as well.

At the same time, the City is committed to observing prudent standards of planning, land use, and construction to insure the growth and development of sound and prosperous communities, with the requisite services, and open space, for the people who live, work, and visit here.

The availability of marketable vacant land is critical to these goals. The acute shortage of usable vacant land makes such land one of the City's most precious resources. Its waste obstructs and impedes vitally important programs to keep and attract business to the City, combat the degradation of neighborhoods, and insure the sound growth and prosperity of the City and its residents.

Although there are 301 square miles in New York City, there are only 22.7 square miles in Manhattan. The percentage of land in the City overall that is zoned for commercial or manufacturing purposes is, moreover, quite limited. While there are more than 4,553.8 million square

feet of residential land area in the City, there are only 251.6 million square feet of commercial land and 731.2 million square feet available for manufacturing purposes.[2]

That is why the urban renewal movement that began in the early 1900s – focusing on "blight" in "slums" – grew into a federally-funded policy embracing and financing economic redevelopment as well, in order to facilitate the proper growth and utilization of unmarketable areas. Those programs recognized that no community, much less the City, can thrive with a single land use. This brief *amicus curiae* will show that a community's economic redevelopment is an entirely appropriate – and, indeed, essential – end, which justifies the prudent and well-reasoned use of the condemnation power, because it serves the public good and constitutes the kind of "public use" contemplated by the Fifth Amendment.

ARGUMENT

I. ECONOMIC REDEVELOPMENT IS CONCEPTUALLY INDISTINGUISHABLE FROM EARLIER URBAN RENEWAL EFFORTS THAT THIS COURT FOUND, IN BERMAN, COULD PROPERLY JUSTIFY THE USE OF THE CONDEMNATION POWER, AND AS PRACTICED IN NEW YORK CITY, IT UNDENIABLY CONSTITUTES A PUBLIC USE UNDER THE FIFTH AMENDMENT.

The economy changes in unpredictable ways, but attracting and keeping a stable and varied base of employers, taxpayers, and commercial and industrial interests in the City is a fundamental obligation of City government and advances the public good. Consequently,

---

[2] Figures reflect 2002 real property data from the City's Department of Finance, as calculated on www.nychanis.com/NYU/NYUCHANIS.

economic redevelopment has become an integral element of sound land use and urban planning. Should this Court broadly decide, as petitioners urge, that the power of condemnation can never be used to advance those goals, because it can never be a "public use," then a crucial tool in the City's ability to meet its future, and create balanced and prosperous neighborhoods, will be lost.

A. Soundly planned economic redevelopment makes the difference between urban decline and healthy municipal growth, because economic dead zones lead to blight, decrease the availability of urgently needed land resources, and force both residents and businesses to move out of the City.

The menace of slums in New York City and other larger cities dates to the mid-1800s, but it soon became apparent to government officials that the police power (in the form of zoning and building codes) and taxing power were inadequate to solve that grave problem. *New York City Housing Auth. v. Muller*, 270 N.Y. 333, 1 N.E.2d 153 (1936). In fact, the power of condemnation was also necessary in order to clear, redesign, and reconstruct unsanitary and substandard housing conditions.

New York's Constitution, however, recognized that replacing slum housing, alone, was inadequate without the clearance and rehabilitation of substandard *areas*, as a means to protect public health and to restore and preserve the financial stability of municipalities, "which suffer indirectly from conditions existing in those blighted districts." *Murray v. La Guardia*, 291 N.Y. 320, 331, 52 N.E.2d 884, 889 (1943), *cert. denied*, 321 U.S. 771 (1944).[3]

---

[3] Article XVIII, § 1 of New York's Constitution grants to the Legislature authority to provide for low-rent housing for persons of low income "*or*" to provide for "the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas."

Moreover, it did not matter that some private developer might benefit from a project, so long as, if upon completion of the project, "the public good is enhanced." *Id.* at 329-330.[4]

New York soon enacted General Municipal Law section 72-n, to authorize the reclamation and redevelopment of vacant "dead" areas and to facilitate assemblages for that purpose. *Cannata v. City of New York*, 11 N.Y.2d 210, 182 N.E.2d 395, *appeal dismissed*, 371 U.S. 4 (1962). In doing so, the Legislature found that reclamation and redevelopment of such areas for residential, commercial, industrial, community, public or other uses, is "necessary to protect health, safety and general welfare, [and] to promote the sound growth of the community." *Id*. at 213, 182 N.E.2d at 396. That standard applied "with or without tangible physical blight," although the area had to be "predominantly vacant." *Id*.

In that law, the Legislature recognized that tangible physical blight was not a prerequisite to condemnation and redevelopment, because the statute was aimed primarily at eliminating physical, sociological, and economic obsolescence which causes social and economic blight as real and as detrimental to the public welfare as any tangible physical blight.[5]

---

[4] This objective became a matter of federal urban planning policy when Congress passed the National Housing Act of 1956 (42 U.S.C. §1460), providing federal aid for, *inter alia*, the acquisition of land that "substantially impairs or arrests the sound growth of the community" and for redevelopment of such land for predominantly non-residential uses where local authorities determine "that such redevelopment is necessary and appropriate to facilitate the proper growth and development of the community . . . and afford maximum opportunity for the redevelopment of the project area by private enterprise."

[5] At any rate, in New York, many factors and interrelationships of factors may be significant to a finding of "blight." *Yonkers Community*

All the foregoing was consistent with this Court's view of the law in *Berman v. Parker*, 348 U.S. 26, 34-35 (1954), where the Court recognized that attacking blight "on an area rather than on a structure-by-structure basis" was an entirely appropriate approach and "plainly relevant" to the long-term goal of building stronger communities. Indeed, Congress had already enacted similar legislation for Washington, D.C., which became the subject in *Berman*. Noting the broad discretion accorded legislative determinations regarding what is in the public interest, this Court recognized that "[w]e do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id*. at 33.

Modern urban planning was born.

In *Cannata*, the property proposed for condemnation was to be redeveloped for new industrial buildings. 11 N.Y.2d at 215, 182 N.E.2d at 397. As New

---

Dev. Agency v. Morris, 37 N.Y.2d 478, 483, 335 N.E.2d 327, 332 (1975). "These may include such diverse matters as irregularity of the plots, inadequacy of the streets, diversity of land ownership making assemblage of property difficult, incompatibility of the existing mixture of residential and industrial property, overcrowding, the incidence of crime, lack of sanitation, the drain an area makes on municipal services, fire hazards, traffic congestion, and pollution. . . . It is 'something more than deteriorated structures. It involves improper land use. Therefore, its causes, originating many years ago, include not only outmoded and deteriorated structures, but unwise planning and zoning, poor regulatory code provisions, and inadequate provisions for the flow of traffic." *Id*. Nor is this susceptible to precise formulas, "since the combination and effects of such things are highly variable. These matters call for the exercise of a considerable degree of practical judgment, common sense and sound discretion." *Id*.

York's Court of Appeals reasoned, "an area does not have to be a 'slum' to make its redevelopment a public use nor is public use negated by a plan to turn a predominantly vacant, poorly developed and organized area into a site for new industrial buildings." *Id*. In New York, the Court noted, condemnation of "substandard" property for development by private corporations has long been recognized as a species of public use." *Id*.

Fifteen years after *Cannata*, New York enacted the Eminent Domain Procedure Law ("EDPL"), a comprehensive statutory scheme providing the exclusive method by which property in the State could be taken by condemnation. The law intended to standardize the means for the exercise of eminent domain throughout the State and the methods to determine just compensation. *East Thirteenth Street Community Assoc. v. New York State Urban Dev. Corp.*, 84 N.Y.2d 287, 293-94, 641 N.E.2d 1368, 1370 (1994). The EDPL recognized other purposes as well, including public participation in the process, and consideration of numerous factors, such as the quality of the environment, the need to take property only for a "public use, benefit or purpose." and the legitimate interests of private property owners and local communities. *Id.*

The EDPL requires public notice and comment about the proposed land acquisition, and a public hearing. Afterwards, an agency is required to publish its determination and findings, which, at the least, must specify (1) the "public use, benefit or purpose" to be served by the proposed public project; (2) the location for the project and the reasons for the selection of that location; and (3) the general effect of the proposed project on the environment and local residents. EDPL § 204(B).[6]

---

[6] This hearing may be one conducted pursuant to EDPL §§ 201-204, or its functional equivalent. EDPL § 206.

The EDPL permits judicial review of four questions as to whether: (1) the proceeding conformed with the Federal and State Constitutions, (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority, (3) the condemnor's determination and findings were made in accordance with procedures set forth in the EDPL; and (4) whether a public use, benefit or purpose will be served by the acquisition. EDPL § 207(C).

Historically, therefore, "urban renewal began as an effort to remove 'substandard and insanitary' conditions which threatened the health and welfare of the public, in other words, 'slums,' whose eradication was in itself found to constitute a public purpose for which the condemnation powers of government might constitutionally be employed." *Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d at 481-82, 335 N.E.2d at. 330. "Gradually, as the complexities of urban conditions became better understood, it has become clear that the areas eligible for such renewal are not limited to 'slums' as that term was formerly applied, and that, among other things, economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose." *Id*.

Government must either plan for redevelopment or watch its cities become more congested, deteriorated, obsolescent, stagnant, inefficient, and costly. *Wilson v. Long Branch*, 27 N.J. 360, 370, 142 A.2d 837, 842-43, *cert. denied*, 358 U.S. 873 (1958). Those purposes are intimately related to the public health, welfare and safety and so are wholly consonant with the federal Constitution. *Id*.

B. Appropriately exercised, condemnation to advance economic redevelopment is not for the use of a private corporation but rather, the corporation is used to accomplish the public purpose.

As this Court recognized in *Berman*, "We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects." 348 U.S. at 34. Indeed, this Court has frequently found a public interest even where the eventual ownership of condemned property will benefit, and title will be held by, a private party. *See e.g., Clark v. Nash*, 198 U.S. 361 (1905)(this Court upholding as a public use Utah statute permitting condemnation by individual of neighbor's property to gain water for his land); *Rindge Co. v. Los Angeles*, 262 U.S.700, 707 (1923)("It is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in any improvement in order to constitute a public use."); *Hawaii Housing Auth. v. Midkiff*, 467 U.S.229, 244 (1984)("The Court long ago rejected any literal requirement that condemned property be put into use for the general public.").

The courts of New York have long recognized that even where a private party enjoys some benefit from a redevelopment project, that still will not diminish a valid "public use" and "public purpose." *Waldo's Inc., v. Village of Johnson City*, 74 N.Y.2d 718, 721, 543 N.E.2d 74, 76 (1989); *Cannata v. City of New York*, 11 N.Y.2d at 215, 182 N.E.2d at 397. *See also Hotel Dorset Co. v. Trust for Cultural Resources*, 46 N.Y.2d 358, 371, 385 N.E.2d 1284, 1290 (1978)(the term incidental "does not mean that the public use . . . must outweigh the private use to which the facility is put."); *In re Glen Cove Community Dev. Agency*, 259 A.D.2d 750, 750-51, 712 N.Y.S.2d 553, 554 (2d Dept. 1999)(proposed condemnation will serve a valid public purpose because record shows "economic stagnation caused by persistent vacancies in the retail stores and

restaurants in the central business district . . . [and the] deteriorating physical condition of the buildings in the area," and proposed redevelopment "would attract other businesses, revitalize the neighborhood and strengthen the City's economic base"); *West 41st Street Realty LLC v. New York State Urban Dev. Corp.*, 298 A.D.2d 1, 7, 744 N.Y.S.2d 121, 126 (1st Dept.), *appeal dismissed*, 98 N.Y.2d 727, 779 N.E.2d 187 (2002), *cert. denied*, 537 U.S. 1191 (2003)("Virtually all of the anticipated outcomes of [the 42nd Street redevelopment] project clearly serve a public purpose by eliminating a pernicious blight which has impaired the economic development of a midtown Manhattan neighborhood. That a private business may obtain substantial benefits does not call into question the use of eminent domain and, under the circumstances, a statutory purpose of the Urban Development Corporation has been furthered); *In re Fisher*, 287 A.D.2d 262, 263, 730 N.Y.S.2d 516, 517 (1st Dept. 2001)(condemnation of 45 Wall Street by Urban Development Corporation to clear space for construction of new New York Stock Exchange facilities is a public use because the departure of Stock Exchange from the City's financial district "would be detrimental to the City and State economy," and retention of the Stock Exchange will "result in substantial public benefits, among them increased tax revenues, economic development and job opportunities as well as preservation and enhancement of New York's prestigious position as a worldwide financial center").

A developer's motives need not be altruistic, because that is of no legal consequence, so long as the public good is enhanced by the effort. *Waldo's v. Village of Johnson City*, 74 N.Y.2d at 721, 543 N.E.2d at 76. In short, profit making does not strip a project of its public utility, because the privately generated revenue helps to finance the public use aspects of the project. *Courtesy Sandwich Shop, Inc. v. Port of New York Auth.* 12 N.Y.2d 379, 389, 190 N.E.2d 402, 405, *appeal dismissed*, 375 U.S.

78 (1963). *See also Rosenthal & Rosenthal, Inc. v. The New York State Urban Dev. Corp.*, 605 F.Supp. 612, 618 (S.D.N.Y.), *aff'd* 771 F.2d 44 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986)("It is not enough that the Project planners were *partially* motivated by the desire to make money for private developers. Such mixed motivations seem politically inevitable and perhaps are necessary to the success of this kind of project. To constitute a purely private taking and thus fit within the narrow exception of *Midkiff*, plaintiffs must demonstrate that no public purpose exists for the Project").

Indeed, there is nothing "malevolent" about private participation, because most private interests are profit motivated, and "unless there is such a reliable projection of profitability, the soundness and stability of the sponsor's project may come into question." *Yonkers Community Development Agency v. Morris*, 37 N.Y.2d at 482, 335 N.E.2d at 331. Moreover, there is nothing "inherently wrong" in combining the City's need for renewal of its substandard land, and its desire to retain or attract business. *Id*. That is because "the "very purpose of urban renewal subsidies is to attract new or existing sponsors to undertake the land clearing, the construction and other commitments the community desires of them, where the cost of acquiring the land privately, on a piece by piece basis, would be sufficiently expensive or difficult to deter private entities." *Id*.

As New York's Court of Appeals reasoned in *Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d at 482, 335 N.E.2d at 331:

> Where, then, land is found to be substandard, its taking for urban renewal is for a public purpose, just as it would be if it were taken for a public park, public school or public street. The fact that the vehicle for

> renewed use of the land, once it is taken, may be a private agency does not in and of itself change the permissible nature of the taking of the substandard property. Of course, if property has not been determined to be substandard in an urban renewal context, it may not be taken in eminent domain unless it is proved that its taking was for another public purpose and, if there was also a private benefit involved, that the public purpose was dominant.

Thus, in New York, if a municipality determines "that a new business may create jobs, provide infrastructure, and stimulate the local economy, those are legitimate public purposes which justify the use of the power of eminent domain." *Vitucci v. New York City School Construction Authority*, 289 A.D.2d 479, 481, 735 N.Y.S.2d 560, 562 (2d Dept. 2001), *appeal denied, motion dismissed*, 98 N.Y.2d 609, 775 N.E.2d 1288 (2d Dept. 2001).

Large-scale redevelopment projects of the type at issue in this appeal are intended to eradicate economic blight and revitalize a community. *Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 605 F.Supp at 617-18 (broad purpose behind 42nd Street redevelopment project is to "eradicate blight in Times Square and to revitalize the area culturally and commercially" and that is "a substantial, legitimate public purpose").

It is immaterial that economic redevelopment may be accomplished with the help of private interests, so long as the public benefit is realized. It is the end, and not the means, which is subject to judicial scrutiny. *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 244 ("it is only the takings purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause").

C. How an economically depressed, under-utilized, and blighted area of downtown Brooklyn was reborn as a successful commercial, academic, and business office complex that spurred additional development in surrounding neighborhoods.

As early as 1969, the City had identified the area in Brooklyn surrounding Polytechnic University as an appropriate site for urban renewal.[7] Polytechnic, one of the nation's largest graduate engineering schools with one of the smallest endowments, had been part of the downtown Brooklyn landscape for more than 100 years, in an area of mixed uses. By the 1980s, however, the university had found local conditions had discouraged student enrollment and had made expansion and modernization impossible. All of Brooklyn had been suffering. According to a 1985 report from the Municipal Research Institute quoted in *The New York Times*, between 1977 and 1984, when Manhattan gained nearly 89,000 jobs in key white-collar industries, Brooklyn lost 4,500 such jobs.[8]

More specifically, the university's immediate neighborhood was developed to only 26 percent of its allowable zoning density, demonstrating significant underutilization. Seventeen percent of the area's buildings were completely vacant, while an additional 22 percent of the area was comprised of parking lots and vacant lots. The number of vacant buildings was twice the area's average.

---

[7] Unless otherwise indicated, the facts in this narrative were taken primarily from Metrotech's Final Environmental Impact Statement, materials in this office's files on the project, and Forest City Ratner Companies' annual reports. Some current information on the project was supplied by the City's Economic Development Corporation and Forest City Ratner.

[8] Kirk Johnson, *Development Activity Advances in Brooklyn*, N.Y. Times, Aug. 11, 1985, §8, at 1.

The area's existing 123 lots were small and irregular, and their ownership was spread among 70 different owners, thereby impeding assemblage and development. Half the buildings in the area were deemed to be in either "poor" or "bad" condition (meaning in an advanced state of disrepair) by the City's Public Development Corporation. Commercial rental rates fell at the lower end for the area. Notwithstanding the availability of vacant lots and buildings, no new buildings had been constructed in the prior 20 years. [9]

The area also did not generate the number of jobs a centrally located downtown district could create. In 1985, there were 65 firms employing 754 people (excluding the 865 employed by Polytechnic). Of that number, 432 jobs were in government and 322 were private sector, primarily manufacturing and retail. U.S. Census figures for 1980 put unemployment in the area at 10.6 percent -- 3.6 percent higher than other areas in downtown Brooklyn. By 1984, the State Department of Labor pegged unemployment in the area at 11.3 percent, one point higher than for all of Brooklyn, and more than two points higher than for the City as a whole. When compared to other local neighborhoods, the number of criminal complaints in the area was between two to five times greater, depending on the particular kind of crime.

In the meantime, in 1983, the Regional Plan Association, an independent, not-for-profit regional planning organization, published a study arguing that the way to reverse the deterioration of the area was to turn it into the City's third central business district, after downtown and midtown Manhattan. Picking up on that idea, Polytechnic, which saw its future viability tied into to

---

[9] For the Court's reference, we are annexing as Appendix A a site map of the Metrotech project area to illustrate the large number of sites that must be assembled to accomplish this kind of project in the City.

a revitalized neighborhood, proposed developing the area as an East Coast Silicon Valley.

That idea eventually became Metrotech, a phased office development project located between Jay Street and Flatbush Avenue, adjacent to Polytechnic and near Brooklyn's civic buildings. Polytechnic's development partner was the Forest City Ratner Companies. In addition to tax and other incentives, components for financing included federal Urban Development Action Grants, $10 million in Municipal Assistant Corporation funds, an interest-free loan to Polytechnic from the Port Authority of New York and New Jersey, and $31.5 million from the City's capital budget, partially reimbursed by the developers, for site acquisition, relocation, demolition, and infrastructure improvements. The project was expected to generate $54 million in annual local tax revenues (in 1985 dollars), much of which is being phased in over a 23-year period.

Just as the City was threatened with the loss of "back office" tenants – companies who felt Manhattan rents were too expensive for operations that could be located anywhere – Metrotech was marketed as an affordable, convenient back-office alternative, accessible by bus, subway, and public highways and within close proximity to Manhattan. Morgan Stanley & Company led the way when, in 1989, it moved into a 19-story office tower called Pierrpont Plaza, the first new office tower to be built in Brooklyn since the 1950s, on a site that was near, but not part of, Metrotech.

Metrotech eventually became a seven million square foot academic and office "urban campus" on a 16-acre, ten-block site adjacent to the university, encompassing eight new and three renovated buildings, ground floor retail space and restaurants, and a three-acre plaza at its center. Its current tenants include Bear Stearns

& Company, KeySpan (formerly the Brooklyn Union Gas Company), Chase Manhattan Bank, Goldman Sachs, Morgan Stanley & Company, and the Securities Industries Automation Corporation, which is the data processing location for every trade on the New York Stock Exchange, NASDAQ, and the American Stock Exchange, as well as the Internal Revenue Service, the New York City Fire Department and its emergency 911 service. According to the developer, Metrotech has been 100 percent leased since 1992.

Metrotech also includes the first commercial office building developed in the City since the events of September 11, 2001, and two years ago, Empire Blue Cross Blue Shield, a former World Trade Center tenant, moved into that building.

Meanwhile, Polytechnic University was able to secure grants for several new and renovated buildings, including a state-of-the-art computerized library for electrical engineering and a second library of science and technology. A new wing was added to the main academic building and an atrium now links the university with Metrotech. Polytechnic also secured grants to establish its Center for Advanced Technology in Telecommunications to perform basic research in the field. At least one Metrotech tenant has commissioned research at the university.

Metrotech also made possible the Renaissance Plaza development, which houses a Marriott hotel with 384 guest rooms and large meeting spaces, as well as a 32-story office tower with a total of 1.4 million square feet of office space. It was the first new hotel in Brooklyn since the 1930s and it is so successful that Marriot just signed a deal to add 200 more rooms.

A project like Metrotech helps to jumpstart the local economy because it represents a compact area with high employment that helps to sustain retail and services businesses in the area. Metrotech drew thousands of jobs to Brooklyn. The Securities Industry Automation Corp. moved 700 employees to Metrotech, while Chase Manhattan Bank chose the City over New Jersey and now has nearly 4,000 employees in Brooklyn. Bear Sterns originally moved 1,500 to the area but now has more than 6,000 employees at Metrotech. The New York Times has called it "easily New York City's leading phased office development project, second in scale only to Olympia & York's World Financial Center at Battery Park City.[10]

Statistics from the City's Economic Development Corporation show that Metrotech has also returned to the City millions of dollars annually in sales taxes, employee income taxes, and real property taxes.

In the end, Metrotech caused displacement for about 200 people living in 100 scattered, one- and two-family and walk-up multiple unit structures, and legal and illegal loft units, approximately 60 businesses, and five government agencies. A relocation plan was devised that included new housing for displaced residents, priority listing for City-owned, subsidized, and public housing. Relocation assistance was also provided to businesses.

Economic redevelopment projects like Metrotech, which involved an assemblage of 123 separately owned sites, would never happen in a city like New York without the assistance of condemnation.

---

[10] Alan S. Oser, *Perspectives: Developing in Brooklyn; Putting the Cleveland Connection in Play*, N.Y. Times, January 12, 1992, §10, at 3.

D. The terms "public use" and "public purpose" have never been defined with precision, nor should they be. Localities, customs, and times change, and with them, the needs of the public may change.

What constitutes a "public use" for Fifth Amendment purposes is a fact-specific inquiry that must take into account the particular time and place of the project. Thus, this Court has expressly recognized that local conditions can justify a public use in one place but perhaps not another. *Clark v. Nash*, 198 U.S. at 370 ("The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous States of the West that they are in the States of the East. These rights have been altered by many of the Western States, by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed, from those that exist in the States of the East, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those States arising from mining and the cultivation of an otherwise valueless soil, by means of irrigation. This court must recognize the difference of climate and soil, which render necessary these different laws in the States so situated."); *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 244 (judicial deference to local findings of public use "is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. . . . Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use").

As a result, states have broad discretion to define public purposes and to formulate plans within the police power to address them. *Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 605 F. Supp. at 618.

That is what works and that is what makes sense, because each community's needs are different.

This Court's decision in *Berman* recognized that any attempt to define or "trace the outer limits" of the police power is "fruitless," because "the definition is essentially the product of legislative determinations addressed to the purposes of government." 467 U.S. at 239. New York's courts understand that as well, and have held that the notion of a public use, as used in connection with the right of eminent domain, is not easily defined. *Pocantico Water-Works Co. v. Bird*, 130 N.Y. 249, 259 , 29 N.E. 246, 248 (1891). Nevertheless, more than 100 years ago, New York's State Court of Appeals reasoned, quite simply, that, where the proposed project would benefit and be used by "many," that would "establish that the use was for the public benefit." *Id.*

To formulate anything "ultimate" to define the term public use, "even if that were possible, would, in an inevitably changing world, be unwise if not futile." *New York City Housing Auth. v. Muller*, 270 N.Y. at 340. Lacking a "controlling precedent," courts can "deal with the question as it presents itself on the facts at the present point of time," because the law of each age is ultimately what that age thinks should be the law (internal citation omitted)." *Id.*

We agree. It is, moreover, a system that has worked remarkably well. The briefs of both the petitioners and their *amici* are replete with instances where state courts, applying their unique knowledge of local conditions, have struck down uses they did not consider to be public.

In this particular appeal, the City of New London is trying to jumpstart its broken-down economy by revitalizing its biggest and most valuable real estate asset – its waterfront – with a well-considered and forward-

thinking multi-use plan. In New York, the conditions and circumstances are entirely different, and, in fact, quite unique. Each community faces its own competing pressures, its own land use challenges, and devises its own best way to accommodate them. In short, "one size fits all" simply does not apply, which is why the "public use" determination has always been, and should continue be made and reviewed, locally.

CONCLUSION

II. THIS COURT SHOULD CONTINUE TO RESPECT THE STATES' ABILITY TO RESOLVE THE PUBLIC USE ISSUE IN LIGHT OF UNIQUELY LOCAL CONDITIONS AND PUBLIC NEEDS, INCLUDING A DETERMINATION THAT ECONOMIC REDEVELOPMENT PROJECTS ARE PUBLIC USES THAT SUBSTANTIALLY CONTIBUTE TO THE PUBLIC GOOD.

Certainly, minds will differ on the wisdom of using condemnation for the purpose of economic redevelopment, but that is, essentially, a political question. Petitioners, moreover, have given this Court no good reason to turn its back on decades of judicial deference to those determinations and have, instead, proposed a "bright-line" rule that will deny localities a fundamental tool in their ability to keep meeting the demands of their changing communities. As their own brief confirms, the system works, because state courts continue to review, and find fault with, individual "public use" determinations under state law.

The Court, instead, should adhere to its long-standing deference to such legislative and municipal determinations, and leave to the State courts the job of reviewing what, under local conditions and needs, is in fact a reasonable and appropriate public use.

Respectfully submitted,

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
100 Church Street,
New York, New York 10007.
(212) 788-1043 or 0835

LEONARD J. KOERNER,*
EDWARD F.X. HART,
JANE L. GORDON,
of Counsel.

**Counsel of Record*