To be Argued by:
JOHN G. HORN
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

NIAGARA FALLS REDEVELOPMENT, LLC
and BLUE APPLE PROPERTIES, INC.,

Docket No.:
OP 23-00057

Petitioners,

– against –

THE CITY OF NIAGARA FALLS,

Respondent.

BRIEF FOR PETITIONERS

HARTER SECREST & EMERY LLP
John G. Horn, Esq.
Ryan C. Altieri, Esq.
Attorneys for Petitioners
50 Fountain Plaza, Suite 1000
Buffalo, New York 14202
(716) 853-1616
jhorn @hselaw.com
raltieri@hselaw.com

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QUESTIONS PRESENTED

1. Did the City of Niagara Falls demonstrate that there is a public use, benefit, or purpose to the property it intends to acquire through eminent domain?

   Response: No.

2. Is the City of Niagara Falls' proposed taking in excess of what is necessary for the purported public purposes of the project in violation of the United States and New York Constitutions?

   Response: Yes.

3. Did the City establish, through adequate evidence, that the Property is in substandard and insanitary conditions?

   Response: No.

4. Did the City of Niagara Falls violate Eminent Domain Procedure Law § 202(A) by failing to adequately describe the size and scope of its intended taking requiring annulment and rejection of the determination and findings?

   Response: Yes.

5. Does the City of Niagara Falls' failure to publish the synopsis of its determination and findings within 90 days of the closing of its public hearing in accordance with Eminent Domain Procedure Law § 204(A) require annulment and rejection of the determination and findings?

   Response: Yes.

PRELIMINARY STATEMENT

Respondents' proposed taking of Petitioners' property is unconstitutional because the City of Niagara Falls (the "City") has not—and cannot—articulate a credible public use for the private property it proposes to condemn. Apparently resigned to this inescapable reality, the City has sought to create a public benefit rationale by bolting a post hoc blight finding onto its fanciful development concept. To preserve the integrity of New York's eminent domain process, the Court must reject the City's Centennial Park contrivance and allow Niagara Falls Redevelopment, LLC ("NFR") to develop its property in the manner and on the timeline the City itself ordained in its 2009 Comprehensive Plan.

The New York Eminent Domain Procedure Law ("EDPL"), New York State Constitution, and United States Constitution protect private tax-paying citizens, such as Petitioners Niagara Falls Redevelopment, LLC and Blue Apple Properties, Inc., from the very sort of overreach the City is committing through its ill-conceived land grab. For example, the EDPL codifies the core due process protections enshrined in the federal and state constitutions in the form of unambiguous requirements that affected landowners be given ample notice and opportunity to be heard before they are stripped of their property. Whether through indifference or malintent, the City has failed to stay between these basic procedural EDPL guardrails. Emblematic of the City's approach is the fact that, days after

Petitioners commenced this action to annul the EDPL Determination and Findings, the City announced plans for yet another public hearing, this one apparently to try to more accurately identify the size of the private property it would someday like to do something with.

When it commenced eminent domain in June 2022, the City put the public and Petitioners on notice that it intended to take 12 acres of property from Petitioners because it was "considering undertaking a project," consisting of:

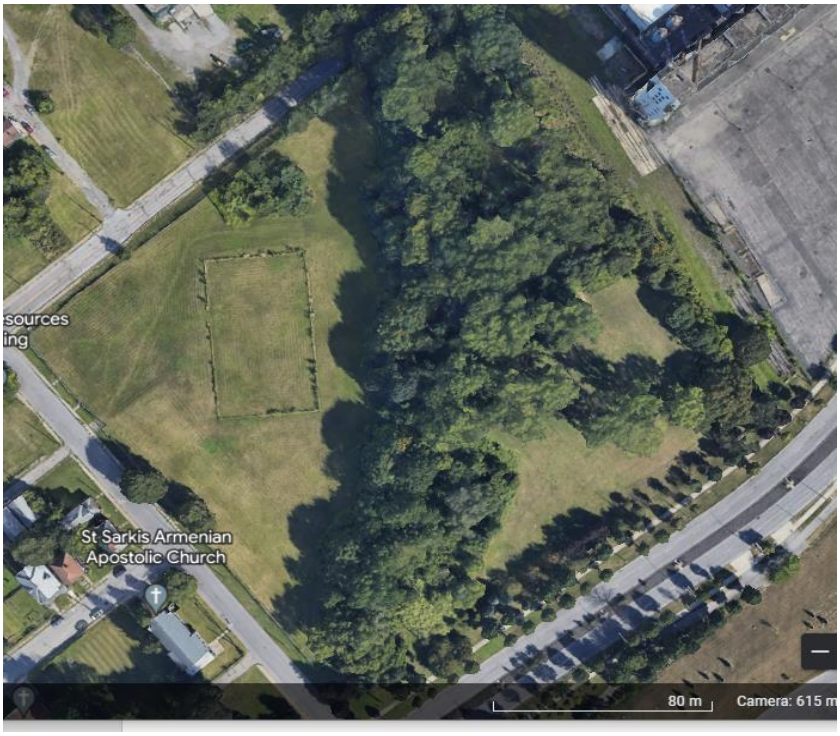
> (1) The acquisition of approximately 12 acres of land located in the City of Niagara Falls, Niagara County, New York (the "Property");
>
> (2) The construction of a park and related recreational facilities, which will be host to a multitude of events and activities, including but not limited to sporting events, concerts, indoor and outdoor gatherings, and youth-centered activities, with potential facilities including an indoor arena and outdoor Amphitheatre, a water feature ice skating rink, a multilevel surface parking deck, and/or wall-climbing adventure course.

(R. 5.)

After being challenged over the course of two public hearings about just what this project would entail and exactly where it would be located—and perhaps after dusting off the 2009 Comprehensive Plan and various predecessor and follow-on planning documents on which the City now purports to rely (*see* R. 788)—the City pivoted in its December 2022 Determination and Findings to wanting only 9.8 acres for a brand new public purpose: "the City finds that the Subject Property is economically underutilized, underdeveloped, blighted, and

stagnant, and that its acquisition in support of redevelopment, reuse, and revitalization plans proposed through the Centennial Park project is undoubtedly a public use, benefit and purpose." (R. 788.)

"Undoubtedly," except that the City also acknowledges in its Determination and Findings that Petitioners have never been delinquent on property taxes and that Petitioners' property, which consists of undeveloped greenspace on John B. Daly Boulevard and Falls Street, features a regularly cut lawn and trees and shrubberies fronting the Boulevard that are "reasonably maintained." (R. 786-787.) The Google Earth aerial shot below gives the lie to the City's newly minted blight story.[1]



[1] Petitioners respectfully request that the Court exercise its discretion to take judicial notice of this Google Earth image pursuant to CPLR 4532-b.

By failing to give Petitioners and the public notice of the blight-remediation rationale for the taking and an opportunity to be heard and present evidence on same, the City has robbed Petitioners of fundamental due process protections on the march to relieve them of their land.

As to the public use, benefit, or purpose—which, as this Court reminded recently, is the "sine qua non to the government's ability to exercise its powers to take private property through eminent domain" (*Matter of HBC Victor LLC v. Town of Victor*, NY Slip Op 07313, *2 (2022))—there simply is no there there.

By the City's own admission, it has no money for Centennial Park. Not a penny. Just hope for a "pot of money" (R. 40), which might materialize after the City leverages federal community development block grants to come up with what almost certainly would be just a portion of the money necessary to acquire Petitioners' property. (NYSCEF Doc. No. 19, ¶ 40, Exhibit H[2]). As for a statement of what the City intends to build on Petitioners' property, other than stock photographs and PowerPoint clipart (R. 123-146), the City has come forward with nothing even approximating plans for the construction, maintenance, and economic viability of Centennial Park. This despite the fact that City and regional leaders

[2] *See also* Notice of Proposed Substantial Amendment to 2020-2024 Consolidated Plan, Public Comment Period, and Public Hearing, whereby the City announces its intent to borrow up to $9.9 million to purchase Petitioners' property, with an estimated interest cost to the City's residents of $957,044.76. Petitioners respectfully request that the Court exercise its discretion to take judicial notice of this document as it was obtained from the City of Niagara Falls' Official Government Website whose accuracy cannot reasonably be questioned.

stipulated in the City's 2009 Comprehensive Plan that any development on the Property "must be clearly justified by a market study fully assessing economic impacts associated with any proposed development," lest scarce resources critical economic development in other parts of the City—e.g., immediately adjacent to the State park, as well as the Falls and Cultural Districts—be squandered. (*See* R. 788, fn. 6, p. 88.)

The City leaders behind Centennial Park, led by current Mayor Robert Restaino, could not be less interested in questions of economic viability. For example, at the first public hearing last June, an attorney for the City acknowledged that the City would not be able to perform any meaningful economic analysis on Centennial Park until "the mayor and city council decide what we want this plan to look like." (R. 165.) Pressed further at that same hearing by Councilmember Myles on the "financial aspect" of whatever it was that was being proposed, Council Chair John Spanbauer snapped that talk of economic viability was premature: "And again, I want to -- and it's been said three times. You can't talk about finances until we get the property and build the facility. And that's the first step. And I think that has to be understood." (R. 186.) Take First, Plan Later quite clearly was the playbook for the Centennial Park team.

But perhaps most telling on this score was the answer Mayor Restaino gave to a reporter questioning why he would borrow federal block grant money to

finance the acquisition of Petitioners' land if he was not certain he would have enough—or any—money for his Centennial Park. The Mayor's response? "If you have the site and you don't get the money, you still have the site and then you are looking at development…the first step is getting the property. With the property, we now control a critical corner in the downtown." (*See* NYSCEF Doc. No. 19, ¶ 40, Exhibit H.)

In other words, wrest control of the site from NFR and its New York City-based owner, Howard Milstein. Indeed, the amount of time spent at the public hearings and space devoted to this not so thinly veiled motivation on the part of the City is notable.

From the hearing:

> …again taking advantage of this space, it's your asset. It's privately owned, that's why there's an eminent domain proceeding, but this is an asset that's not being used by the City and it needs to be used for the City. (R. 25.)
>
> …is there a better classic example in Western New York of underutilization of property than what's gone on in downtown Niagara Falls? So that is one of the reasons that we're asking you to look at this site through the EDPL process, is because you have a right to say that private capital has failed to meet the public's need and the public needs to step in. (R. 27-28.)
>
> …we have a long history with this company, nothing that needs to be said about that, although we certainly can if you have questions about it. (R. 32.)

> …which investment should we make? Should we continue along with a company that owns a hundred forty acres and hasn't contributed diddly to this community or should we basically say no, we want to move in a different direction, working with you preferably but we're going to move in a different direction? Is this the proper investment to make in our community? (R. 39-40.)

And from the Determination and Findings:

> "Milstein and NFR obtained the property from the city as much as 25 years ago, but there's never been an ironclad requirement for them to develop it. So aside from fencing and initial footers, the land has mostly sat vacant, although NFR says it tried repeatedly to market the site and find development partners. 'They keep the grass cut and pay the taxes,' Tompkins said.' I imagine they could sit on it forever.'" (Buffalo News, Niagara Falls mayor, Howard Milstein clash over future park versus data center, June 30, 2022);
>
> "Milstein, one of the most prominent property owners in the city, has been the target of complaints for years about assembling vast local holdings but failing to do anything with them." (Buffalo News, Cuomo pushes to redevelop prime Niagara Falls Properties, Jan. 15, 2017); and
>
> "I don't think anyone ever thought that here we are halfway through 2022 and that land would still be sitting there empty and undeveloped,' former Niagara Falls Mayor Paul Dyster said. 'With each passing day, people are becoming more disenchanted and skeptical.' . . . . 'NFR's land is a critical piece of our city,' Restaino said, 'but right now it is like a millstone around our necks.'" (Buffalo Business First, Niagara Falls Redevelopment, Niagara Falls at odds over 142 acres of undeveloped land, Sept. 16, 2022).

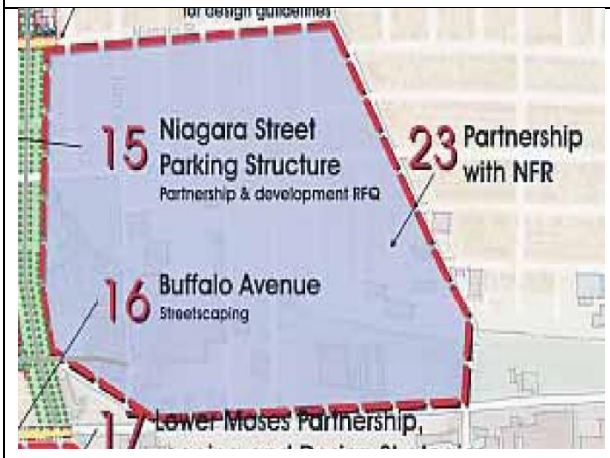
(R. 785-786.)

From NFR's frustrating—and oft times City-frustrated—decades-long assembling of parcels in the East Falls Redevelopment Area of Niagara Falls, the City would have this Court believe that "[t]he Subject Property is undisputedly in a state of blight, disrepair, nuisance, underutilization, and underdevelopment" (R. 786), and that "[t]he Centennial Park project has the potential for turning the Subject Property, a prime example of blight and urban decay in the City, into a regional attraction and true community benefit." (R. 787.)

The City is wrong on a number of levels. First, as demonstrated above, there is nothing remotely blighted about Petitioners' property. Second, in the absence of "a market study fully assessing economic impacts associated with any proposed development," as required by the Comprehensive Plan, Centennial Park's vaunted "potential" is just happy talk. But what is fatal to the City's condemnation proceeding is that no "public use" justification for Centennial Park—whether it be "parks are good" or "blight is bad" or whatever the City comes up with next—can be squared with the Comprehensive Plan or any of the other impressive planning documents on which the City purports to rely.[3] Indeed, Centennial Park runs afoul of every single one of them.

[3] The other strategic planning documents cited in the Determination and Findings are the 2004 City of Niagara Falls Strategic Master Plan, the 2011 Niagara Falls Core City Urban Renewal Area, and the July 2021 Niagara Global Tourism Institute study. (R. 788.)

In the 2009 Comprehensive Plan, scores of City and regional leaders articulated a clear public use for Petitioners' property: not a park and event center, but project development in the City's East Falls Redevelopment Area through a "partnership with NFR." A comparison of two City-prepared images of Petitioners' property separated by 13 years paints the picture well.

East Falls Redevelopment Area Long-term Projects (5-15 years)	2022 Centennial Park Project Location as per EDPL Determination and Findings
	

On the left is a depiction of the East Falls Redevelopment Area from figure 20 of the City's 2009 Comprehensive Plan, which included among its "Long-term Projects" commercial development in "partnership with NFR" within "5-15 years." (R. 788, fn. 6, pp. 88, 95, Figure 20[4].) On the right is an excerpt from figure 1 of the City's 559-page EDPL Traffic Impact Study (R. 231; *see also* R. 789), which locates Centennial Park squarely within the East Falls Redevelopment

[4] A link to the Comprehensive Plan is provided in footnote 6 of the EDPL Determination and Findings (R. 788.) Any citation to the Comprehensive Plan will, therefore, cite to the page in the record the link appears, followed by the page of the Comprehensive Plan, e.g., (R. 788, fn. 6, p. 88.)

Area. This side-by-side snapshot serves as a graphic illustration that the City's proposed taking of Petitioners' property constitutes a radical departure from the intended public use, benefit, and purpose of that very same property as established by the City in its 2009 Comprehensive Plan.

Only today's City officials know why it is they keep lurching from rationalization to rationalization to justify their seizure of Petitioners' land, particularly when they have no idea whether anything they might do with it will be economically viable. Similarly, only those same City officials know why it is they imposed a Commercial Data Center Moratorium and then announced their plans to take Petitioners' property by eminent domain within months of expressing enthusiasm for NFR's plans to develop a $1.48 billion commercial data center and even going so far as to offer suggestions on zoning and land use paths. (NYSCEF Doc. No. 19, ¶¶ 9-12, Exhibit A.)

But when the largely vacuous Determination and Findings are read alongside the City's derisive (and wholly inaccurate) comments at the June 2022 Public Hearing about "a company that owns a hundred forty acres and hasn't contributed diddly to this community" (R. 40), the only reasonable inference to be drawn is that one or more City officials have settled upon an end game and are content to wield whatever power is necessary to achieve their goal. (*See also* R. 785.)

Far from benefitting in a manner consistent with the 2009 Comprehensive Plan, let alone sound economic development and urban planning principles, the public will be gravely harmed if the Court countenances the City's strongarm tactics and abuse of legal process.

STATEMENT OF FACTS

1. Petitioners' property in the heart of the East Falls Redevelopment Area

Petitioners own approximately 12 acres of well-manicured vacant land at 907 Falls Street and John Daly Memorial Parkway in Niagara Falls, New York (the "Property"). (R. 5.) The Property is located within a once sprawling industrial area of downtown Niagara Falls named by the City in its 2009 Comprehensive Plan as the East Falls Redevelopment Area.

The City initiated this eminent domain proceeding in June 2022 to condemn all 12 acres of the Property for a project concept they call Centennial Park. (R. 4-5.) Only when the City served its Determination and Findings in December 2022 did Petitioners learn that the City apparently only wants 9.8 of the 12 acres. (R. 811.) Which 9.8 acres the City might be interested in using for what purpose was not disclosed in the June (R. 5) or August 2022 (R. 148) public hearing notices and certainly was not discussed with Petitioners or members of the public during the hearings. Petitioners and the public were left similarly uninformed as to what the City has in mind for the 2.2 acres of the Property it apparently is intending to

allow Petitioners to keep. It is possible that the City intends to enlighten Petitioners and the public at a third public hearing, which the City has now scheduled for March 13, 2023.[5]

2. *Niagara Digital Campus: unveiled, embraced, and torpedoed*

In September 2021, after years spent assembling property in the East Falls Redevelopment Area of Niagara Falls with the intention of helping unlock the economic potential of the Cataract City, NFR representatives met with the City (including its Mayor, Corporation Counsel, and planning officials) and various regional leaders to discuss NFR's partnership with Urbacon Data Centre Solutions ("Urbacon"), one of the premier developers of commercial and industrial properties in Canada and the northern United States. (NYSCEF Doc. No. 19, ¶ 7.) At that meeting, NFR and Urbacon laid out their plans to construct one of the largest private developments in the history of Niagara Falls at the Property—a $1.48 billion technology and data hub to be called the Niagara Digital Campus. (*See id*. ¶ 8.) City representatives, including Mayor Robert Restaino, were enthusiastically supportive of NFR's[6] plans.

[5] A copy of the Public Hearing Notice for the March 13, 2023 Public Hearing may be found on City of Niagara Falls' Official Government Website whose accuracy cannot reasonably be questioned.

[6] While both Petitioners are adversely affected by the City's proposed taking because both own the parcels the City aims to condemn, it is NFR that is collaborating with Urbacon toward the development of the Niagara Digital Campus.

On October 4, 2021, the City's Director of Planning wrote to NFR "[r]egarding the prospective development of a Data Center within the City of Niagara Falls at the corner of Falls Street and John B. Daly and south to Rainbow Blvd" to set forth "the potential process for review of this development." (*See id.* ¶ 9, Exhibit A.) Mayor Restaino was copied on the Planning Director's letter. (*See id*.)

Following an October 26, 2021 meeting with the City's Planning Director and Corporation Counsel, NFR undertook to draft a proposed amendment to the City's Zoning Ordinance to allow for the construction of commercial data centers, which they submitted to City representatives for review and comment in early November.

Although City officials had requested the proposed zoning amendment at the October 26 meeting, they did not respond to NFR's request for comment. Instead, on December 21, 2021, at Mayor Restaino's urging, the Niagara Falls City Council imposed a Commercial Data Center Moratorium[7], which initially was to run through June 15, 2022, but was subsequently extended.

[7] The Commercial Data Center Moratorium is hosted on the City of Niagara Falls' Official Government Website whose accuracy cannot reasonably be questioned.

3. *An unlawful taking to build a park. Or remediate blight. Or perhaps for no reason at all.*

On January 6, 2022, Mayor Restaino participated in a Zoom meeting with eager NFR representatives, during which he announced to NFR for the first time that the venue for his Centennial Park concept was none other than the Property, and added that he was prepared to take the Property by eminent domain if Petitioners did not agree to donate it. (*See* NYSCEF Doc. No. 19, ¶ 14.)

A. No plan, No funding, No Market Study

The City presented its Centennial Park plans, such as they were, at the June 29, 2022 Public Hearing. Notably, the City's project headline was this: "a multi-faceted year-round event campus downtown capable of hosting a multitude of events, including but not limited to sporting events, concerts, indoor/outdoor gatherings, multiple youth-centered activities for visitors and local residents alike." (R. 20.) The City's presentation was supported by a PowerPoint chock-full of generic stock photographs and basic artist renderings. (R. 123-146.)

No dimensions. No blueprints. No economic development studies. No mention of the Comprehensive Plan or the fact that the Centennial Park project would be categorically inconsistent with it.

When pressed by members of the public and the City Council for details regarding acquisition and construction costs, as well as sources of funding for

same, the City acknowledged that it had no funding or business plan in place. This is so, City representatives testified, because:

> …the way New York works in terms of commitment of grant funds and other funds that we've been told are available, you first must acquire site control in order to get those grants. You must first line those up. We have spoken with and the Mayor has spoken with a number of authorities and my office has spoken with a number of folks at the federal and state level who have all said this is a great project. And unlike other projects, those that consume a lot of electricity that the state is looking to ban, this is a project that the state wants to support in this community. The state recognizes that supporting the people of Niagara Falls is essential […] right now the plan that's in front of you is based on public support from the state and federal government primarily to move forward. But the first step is land control that you need to lock up to get to that money.

(R. 36-37.)

The City then laid bare its strategy: "you have to have land control to get that pot of money." (R. 40.)

The City's outside counsel admitted to Petitioners and the public that the City could not even determine whether Centennial Park is financially viable until it obtains the Property by way of eminent domain:

> And I certainly don't want to say that they've received grants or anything like that, but the first step to getting a public/private partnership is getting site control. All of those things -- the foundational step always to do these projects is to have skin in the game by having site control. So in terms of -- if you look at the first step, it wouldn't be running a park, it wouldn't be taking on the cost of building a park. It would be looking for grants and other things, city funds, county funds, whatever is available, state funds, to acquire the property. At that point when you're going forward with the plan, that's when you would look

> at what are we proposing and will it have a financial basis that makes sense.

(R. 159-160.)

The City's take-first-assess-economic-viability-later approach could not be more antithetical to its Comprehensive Plan:

> In light of the need to align the City's resources to its current size and population … development in East Falls Redevelopment Area must be clearly justified by a market study fully assessing economic impacts associated with the proposed development. This will ensure that proposed initiatives will not pull investment activity and interest away from existing critical tourism areas and redevelopment initiatives in the downtown.

(R. 788, fn. 6, p. 88.)

The following exchange between Councilmember Donta Myles and one of the City's outside attorneys makes plain that the City has paid no heed to the city planning policy prescriptions in the Comprehensive Plan:

> **Council Member Myles**: And the very last question is as far as revenue, is there a, I guess -- let me see what the word is. Is there like a plan, a business plan of within the next five to ten to twenty years, what would we be looking at of -- because with any -- say a business, say I want to start a business, I want to build something myself. Usually I have to come up with a business plan and I have to come up with a -- you know, what I'm looking to project within the next five, ten years, what it's going to look like. So do we have those numbers available?
>
> **Attorney Spitzer**: I don't believe you have them yet. And part of the reason that you don't have them is part of the question that you just raised. If you focused on more community neighborhood assets, that's going to reduce your likely revenue by bringing in events, because you're not going to have folks coming in from out of town. So part of

the decision for the mayor and the council to make is what do we want this plan to look like.

(R. 164-165.)

4. NFR proposed use for development in the East Falls Redevelopment Area

Also presented at the June public hearing, by NFR and Urbacon representatives, are the detailed plans for the Niagara Digital Campus, which require from the City nothing more than to allow the developer whom the City in 2009 had named its "partner" for long-term (i.e., 5-15 years) projects in the East Falls Redevelopment Area, to invest $1.48 billion, include:

- The campus will be home to more than 600,000 square feet of high security, technologically advanced data-center space, creating state-of-the-art data and IT jobs for area residents;

- During construction, the Niagara Digital Campus is projected to create more than 5,600 high-paying jobs with more than $250 million in wages, with economic spinoff benefits expected to top more than $810 million;

- Total construction and development cost of approximately $1.48 billion for the 135-megawatt (MW) campus is based on a widely accepted industry-wide average of $11 million per MW of power;

- Once operational, the Digital Campus will create more than 550 high-paying permanent jobs, with expected annual wages of nearly $29 million; and

- Total economic benefit from the new facility is expected to exceed $250 million annually, with more than 1,700 permanent jobs created in support of ancillary businesses.

(R. 47-59.)

5. The City Determination and Findings: A day late and at least a dollar short

By notice of public hearing dated June 13, 2022, the City commenced the taking of Petitioners' Property for its potential park and event center. (R. 3-5.) The notice provided that the City planned to acquire the entire 12 acres of Petitioners' property for "the construction of a park and related recreational facilities, which will be host to a multitude of events and activities, including but not limited to sporting events, concerts, indoor and outdoor gatherings, and youth-centered activities, *with potential facilities* including an indoor arena and outdoor amphitheater, a water feature ice skating rink, a multilevel surface parking deck, and/or a wall-climbing adventure course." (R. 5.) (emphasis added). The City did not say then, and cannot say now, what exactly it intends to build. "Potential facilities."

Notably absent from the June notice was any mention of the remediation of "blight" as a basis for the taking or discussion at the public hearing.

A second notice of public hearing was issued August 22, 2022. Like the earlier notice, this notice spoke of the City's intent to condemn the Property for potential development. (R. 148.) A second public hearing was held September 6, 2022 (R. 152-202), during which the City's outside counsel confirmed that the City wanted 12 acres of Petitioners' property for something, but using the rubric of

"flexibility," offered not a single detail regarding construction, funding, or economic viability aspects of the project. (R. 163-164.)

On the 91st and 92nd days following the conclusion of the September 6, 2022 closing of the public hearing, the City published the synopsis of its Determination and Findings in the Niagara Gazette. (R. 810-813.) The EDPL requires that the synopsis be published within 90 days. In its synopsis, the City announced that it was decreasing the size of the proposed condemnation property from 12 acres to 9.8 acres. (R. 811.) Consistent with its take-now-plan-later modus operandi, the City provided no explanation as to why the proposed taking was decreased by 2.2 acres, or what portions of the Property would be left over. (R. 810-811.) After Petitioners commenced this action and were provided a copy of the full Determination and Findings, it became clear that the 9.8-acre taking was not a typographical error, but apparently is what the City thinks it is entitled to take for a use to be defined later. (R. 789.)

Emblematic of the City's bumbling and adding to the confusion as to the size of the City's proposed taking, on the same day the City Council adopted a resolution concerning the form of the Determination and Findings (R. 781-782), the City completed the State Environmental Quality Review environmental assessment form, which (mis)characterized the targeted property as consisting of 10.3 acres. (R. 217.)

But that would not be the end of the City's adjustments to its proposed taking. Just this past month, the City Council, at the urging of Mayor Robert Restaino at a special meeting that did not allow for public comment, adopted a resolution to hold yet another public hearing to discuss this taking–now 9.9 acres–of Petitioner's property.[8] Not only is this a *fourth* parcel size description without explanation, but the City changed the proposed scope of the project as well. Perhaps owing to a closer reading of the Comprehensive Plan, and an eleventh-hour attempt to shoehorn its project into that Plan's framework, the City apparently no longer desires to build "an outdoor Amphitheatre, a water feature ice skating rink." What else will change at the March 13, 2023 public hearing? It truly is anyone's guess.

6. The City's Determination and Findings

The City's Determination and Findings begin at page 783 of the 815-page Record in this matter. As explained above, the City has provided precious little detail as to what Centennial Park will consist of, and of course, that would appear to be changing by the day. Similarly dynamic is the question of just how much land the City truly is trying to take from Petitioners. And of course, the City neither can, nor cares to, provide any information regarding the expected, or even hoped

[8] A copy of the Public Hearing Notice for the March 13, 2023 Public Hearing may be found on City of Niagara Falls' Official Government Website whose accuracy cannot reasonably be questioned.

for, economic viability of its Centennial Park project. But against the backdrop of mystery and glibness, one thing is remarkably clear: the City thinks that it can fashion an articulable and defensible "public use" by cloaking its project under the protective cover of the Comprehensive Plan and other "planning documents authored by the City and other regional planning entities" (R. 788.) To wit:

> These economic development efforts and development plans, which are intended to address underutilization, blight, and underdevelopment at the Subject Property, are unquestionably a public use, benefit, and purpose.

(*Id.*)

Whatever that sentence means, the City is wrong.

7. *The City's Comprehensive Plan*

In 2009, 13 years before the City commenced this eminent domain proceeding, the City adopted a Comprehensive Plan pursuant to New York state law. The New York State Department of State's Division of Local Government Services describes the seminal nature of a Comprehensive Plan as follows:

> The comprehensive plan is the culmination of a planning process that establishes the official land use policy of a community and presents goals and a vision for the future that guides official decision-making. The comprehensive plan invariably includes a thorough analysis of current data showing land development trends and issues, community resources, and public needs for transportation, recreation, and housing.

(NYS Dep't of State, Zoning and the Comprehensive Plan, p. 1.[9])

[9] This NYS Comprehensive Plan resource is posted on the New York State Department of State Official Government Website whose accuracy cannot reasonably be questioned

An outgrowth of the 2004 Strategic Master Plan, which came to be regarded as the "Draft Comprehensive Plan" (R. 788, fn. 5, "Foreword"[10]) and operative "policy framework" between 2004 and 2008, the City's current Comprehensive Plan was adopted in 2009. The stated purpose of the City's Comprehensive Plan is to provide a "comprehensive foundation for revitalizing the City of Niagara Falls, and the long-term renewal of the regional economy." (R. 788, fn. 1, p. 2.) "The Comprehensive Plan creates a framework capable of directing positive change over the long term." (*Id*.) It is meant to "identif[y] a set of planning principles to guide decision making, and recommends general strategies, specific renewal programs, actions, and projects that focus on strengthening the 'Core City.'" (*Id*.) Establishing a "clear vision" and "action strategy," the goal of the Comprehensive Plan "is to reposition Niagara Falls as a more economically and culturally diverse, attractive, and vibrant regional center, possessing, a distinct role within both the Erie/Niagara and the Bi-National Regions." (R. 788, fn. 6, p. 2.)

In short, the City's Comprehensive Plan is the definitive statement of how, when, and by whom City land should be developed for the benefit of the citizens of Niagara Falls.

[10] A link to the 2004 Strategic Master Plan is provided in footnote 5 of the City's Determination and Findings (R. 788.) Any citation to the Comprehensive Plan will, therefore, cite to the page in the record the link appears, followed by the page of the Comprehensive Plan, e.g., (R. 788, fn. 5, p. 93.)

A. The City includes the Property in the East Falls Redevelopment Area established for development in "partnership with NFR."

Petitioners' property sits squarely within the Core City and more specifically within the East Falls Redevelopment Area. (R. 788, fn. 6, pp. 88, Figure 23.) By way of its Comprehensive Plan, the City adopted a land use planning policy framework that included as a strategic redevelopment initiative a "partnership with NFR […] aimed at attracting active or passive participation in the ongoing process of ensuring the success of Niagara Falls." (R. 788, fn. 6, Figure 20.) Referring to the importance of measured and strategic growth in the East Falls Redevelopment Area, the authors of the Comprehensive Plan noted the following:

> The East Falls Redevelopment Area will need to find its development niche in relation to the Casino Precinct that lies between it and the Falls. In light of the need to align the City's resources to its current size and population … development in the East Falls Redevelopment Area must be clearly justified by a market study fully assessing economic impacts associated with the proposed development. This will ensure that proposed initiatives will not pull investment activity and interest away from existing critical tourism areas and redevelopment initiatives in the downtown.

(R. 788, fn. 6, p. 88.)

In other words, the 2009 Comprehensive Plan counseled against exactly what the City is proposing to do by taking Petitioners' property: cannibalizing scarce public resources and redevelopment initiatives in areas such as the Falls and Cultural Districts, Buffalo Avenue and Niagara Street precincts by making ill-considered investments east of John B. Daly Boulevard. The Comprehensive Plan

also made clear that the public is best served by communication and collaboration, not by debt-fueled takings in areas of Niagara Falls such as the East Falls Redevelopment Area, which are "located some distance from the existing major assets, including the State Park, the Falls Precinct, the riverfront, the future Cultural District, and the new conference center." (R. 788, fn. 6, p. 88.)

> As with the Seneca Nation and the development of the compact lands, it is in the best interests of both developer and the City of Niagara Falls to communicate and collaborate in the development of the lands east of John B. Daly Boulevard to ensure maximum return to the City and its residents. Once development proposals come forward, they should be evaluated against the municipality's own development priorities and against a comprehensive market assessment to determine implications to existing businesses, tourism and residential precincts in the Core City.

(R. 788, fn. 6, p. 89.)

B. The City specifies the Cultural District for Centennial Park-type amenities

Even as it urged a deliberate and studied partnership with private developers east of John B. Daly Boulevard, the Comprehensive Plan identified the new Cultural District along the Niagara Gorge as the area of Niagara Falls where amenities such as a skating rink, an amphitheater, and a park—i.e., the Centennial Park amenities the City is proposing to put on Petitioners' property in the East Falls Redevelopment Area—should be located. (R. 788, fn. 6, pp. 43, 156, 163-164.) According to the Comprehensive Plan, the Cultural District is "envisioned as a remarkable destination landscape set on the plateau above the Niagara Gorge that

will contain a range of high-quality and cultural venues and attractions that will dramatically strengthen the tourism offering of the Core City while complementing the State Park lands along the Gorge." (*Id.* at 43.) The City's stated aim for the Cultural District is to create a "regionally significant landscape destination hosting a range of appropriate cultural & heritage attractions [that] may include: Niagara Gorge Discovery Center, Gorge views, trails, recreation & festival areas, expanded aquarium and shared parking facility, performance amphitheater, summer pond/winter skating rink, best practices storm water management, Niagara Experience Center." (*Id.* at 156.)

As for where the Cultural District, featuring all of these family and tourist-friendly activities, should be located, the City explained it this way:

> The cultural district should be established immediately adjacent to the urban fabric to the east of the redesigned Parkway. This particular location would allow the city to re-engage and re-connect with the Niagara River by closely linking the riverfront to Pine Avenue, and Third, Niagara and Main Streets, while providing new economic advantage to the local community. The Cultural District would create long-term value by providing a high-quality context for significant reinvestment, infill and new developments at the downtown edge.
>
> The redesign of the Robert Moses Parkway as a riverfront drive located on the existing Third Street and Main Street would make available a large area of land that would be incorporated into the overall open space framework of the Cultural District. Additional lands should be assembled along the west side of Main Street between Third Street and Cedar Avenue….

(*Id.* at 44.)

With utter disregard for, or at least indifference to, the public policy framework adopted by way of the Comprehensive Plan, the City now proposes to put Centennial Park—a "park and related recreational facilities, which will be host to a multitude of events and activities, including but not limited to sporting events, concerts, indoor and outdoor gatherings, and youth-centered activities, with potential facilities including an indoor arena and outdoor Amphitheatre, a water feature ice skating rink, a multilevel surface parking deck, and/or wall-climbing adventure course" (R. 5)—not in the Cultural District, where the scores of leaders who adopted the Comprehensive Plan determined it should go, but on Petitioners' property in the East Falls Redevelopment Area, which those same leaders had earmarked for a "partnership with NFR."

In short, while the City is correct that the Comprehensive Plan and other strategic planning documents authored by City and regional leaders reflect sound policymaking choices around the beneficial use of City land, it is precisely because that is the case that Centennial Park cannot be built on Petitioners' land in the East Falls Development Area.

C. Petitioners' property was not blighted until the City decided it needed to be

The City proclaims in its Determination and Findings that "acquisition [is] necessary to properly address the blighted condition in the area." (R. 790.) But nowhere in either notice of public hearing was the remedying of underutilization or

blight given as a basis for the proposed taking. (R. 3-15.) As a result, no member of the public, including Petitioners, was afforded due process with regard to the City's true, or at least most recently conceded, purpose for the public taking.

But more to the point, the City has failed to provide any evidentiary basis for its meritless conclusion that the Property is blighted. To the contrary, the Property consists of a well-manicured plot of land. The grass is consistently cut. The taxes are always paid. If simply saying the word "blight" is sufficient to take a private citizen's property, the constitutional and statutory safeguards preventing indiscriminate condemnation will have been rendered meaningless.

D. The City's purported consideration of alternative sites cannot withstand even glancing scrutiny

NFR proposed a good-faith donation to the City of a substantially similar tract of land, approximately 11 acres, just two blocks from the Property, and committed to providing the City $250,000 per year for 10 years in order to maintain the donated park property. (R. 70-72; NYSCEF Doc. No. 19, ¶¶ 46-48, Exhibit J.) Despite NFR's commitment, and notwithstanding the Comprehensive Plan's determination that amenities such as those offered in the Centennial Park plan benefitted the public best if placed in the Cultural District, the City proclaims in its Determination and Findings that "there is no comparable site or location ideally suited for the placement of the Centennial Park project within the City, and placing the project elsewhere would severely limit the utility and benefit to be

realized by the implementation of the Centennial Park project and redevelopment of the Subject Parcel as a whole." (R. 789-790.)

"Placing the project elsewhere" would not only be abundantly cheaper to the citizens of Niagara Falls than taking Petitioners' property, but it would cohere with the carefully imagined and defined statement of public use expressed in the Comprehensive Plan.

ARGUMENT

1. *The City's Attempted Taking Violates the EDPL and Petitioners' Federal and State Constitutional Rights.*

"In simple terms, the government cannot take your land and then decide later what to do with it without running afoul of the Takings Clause of the Fifth Amendment of the United States Constitution, as applied to the states by the Fourteenth Amendment." *Matter of HBC Victor LLC*, NY Slip Op 07313 at *2. Because, as demonstrated above, the City of Niagara Falls has done just that, the Court should annul the Determination and Findings without further inquiry.

But even if the City could articulate with requisite specificity what it planned to do with Petitioners' land—and by the City's own admission, the Mayor and City Council have yet to decide what they "want this plan to look like." (R. 165)—the City is bound by its own Comprehensive Plan not to "construct a park and related recreational facilities" in the East Falls Redevelopment Area. Instead, it is to partner with NFR "in the best interests of both developer and the City of

Niagara Falls to communicate and collaborate in the development of the lands east of John B. Daly Boulevard to ensure maximum return to the City and its residents." (R. 788, fn. 6, p. 89.)

A. There is No Public Use, Benefit, or Purpose to the Project

When an aggrieved landowner challenges a municipality's Determination and Findings under the EDPL, the court must determine whether "a public use, benefit, or purpose will be served by the proposed acquisition." *Bergen Swamp Preservation Society v. Village of Bergen*, 294 A.D.2d 827-828 (4th Dep't 2011); *see also Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417-418 (1986). But it is not sufficient for there to exist a defensible public use in theory. Rather, "the existence of a public use must be determined at the time of the taking since the requirement of public use would otherwise be rendered meaningless by bringing speculative future public benefits which might never be realized within its scope." *Matter of HBC Victor LLC v. Town of Victor*, NY Slip Op 07313, *2 (2022)." This is because "[t]he effect of condemnation of property upon the surrounding community depends on the use to which the property is put, and without knowing the use, a condemning authority cannot reasonably conclude that the taking will serve a public use, benefit, or purpose." *Matter of Gabe Realty Corp. v. City of White Plains Urban Renewal Agency*, 195 A.D.3d 1020, 1023 (2d Dep't 2021) (internal citations and quotations omitted). "A mere potential future

public benefit is not sufficient to satisfy the requirement that property be taken only for public benefit." *Id.*

In this case, the City repeatedly and unabashedly refers to the "potential facilities" it is "considering" constructing on some amount of land it proposes to take from Petitioners. At other times, it offers this generic description: "a multi-faceted year-round event campus downtown capable of hosting a multitude of events, including but not limited to, sporting events, concerts, indoor/outdoor gatherings, multiple youth centered activities for visitors and local residents alike." (R. 20.)

The City has no idea how it will pay for its project—other than the borrowing for acquisition costs from federal block grant moneys—but despite the clear requirements set forth for "alignment" of future projects in the Comprehensive Plan and the corollary development condition of a market study to confirm a project's economic viability, the City simply does not care. The City made this abundantly clear at the June public hearing:

> And I certainly don't want to say that they've received grants or anything like that, but the first step to getting a public/private partnership is getting site control. All of those things -- the foundational step always to do these projects is to have skin in the game by having site control. So in terms of -- if you look at the first step, it wouldn't be running a park, it wouldn't be taking on the cost of building a park. It would be looking for grants and other things, city funds, county funds, whatever is available, state funds, to acquire the property. At that point when you're going forward with the plan, that's when you would look

> at what are we proposing and will it have a financial basis that makes sense.

(R. 159-160.)

And as if the point needed reinforcing, Mayor Restaino did just that in a December interview:

> [i]f you have the site and you don't get the money, you still have the site and then you are looking at development…the first step is getting the property. With the property, we now control a critical corner in the downtown. Obviously, our goal is to create Centennial Park. Aside from that, you have the opportunity to directly impact how the development of that parcel unfolds.

(NYSCEF Doc. No. 19, ¶ 40, Exhibit H.)

This take-now-plan-later gambit is precisely what this Court rejected in *HBC Victor* when it required that the intended and proper use must be known and articulated at the time of the taking, not whenever the "pot of money" shows up.

Because the City has failed to carry its burden in this fundamental regard, the Court should annul and reject the Determination and Findings.

B. Centennial Park is not in accordance with the City's comprehensive plan or urban renewal strategy

"A comprehensive plan has as its underlying purpose the control of land uses for the benefit of the whole community based upon consideration of its problems and applying the enactment or a general policy to obtain a uniform result not enacted in a haphazard or piecemeal fashion." *Kravetz v. Plenge*, 84 A.D.2d 422, 429 (4th Dep't 1982).

As discussed above, the City developed a Comprehensive Plan in 2009 with a purpose to provide a "comprehensive foundation for revitalizing the City of Niagara Falls, and the long-term renewal of the regional economy." (R. 784, fn. 1, p. 2.) The City carefully defined and described how precious development resources were to be deployed in the short term and in the long term. As to the latter, the City designated the East Falls Development Area to be the site of studied, strategic, and economic data-driven collaboration and communication between itself and NFR. This collaboration was to, according to the plan, result within five to 15 years in precisely the sort of project NFR and Urbacon have laid at the City Hall steps. Nearly $1.5 billion of private investment to transform an area of Niagara Falls according to a plan set in motion by City and regional officials at least as early as 2009. That plan is imperiled by Centennial Park.

i. The Comprehensive Plan confirms NFR's Private development of the property is the pre-determined public use, benefit, and purpose.

The City must "articulate how or in what manner the condemnation of [the Property] fosters any benefit to the public which would not be obtained absent the condemnation." *Matter of 49 WB, LLC v. Vil. of Haverstraw*, 44 A.D.3d 226, 240 (2d Dep't 2007). Simply put, a "public purpose must be *furthered* by the exercise of eminent domain." *Id*. (emphasis added). Centennial Park, an illusory concept, sets forth no public purpose beyond what Petitioners already have planned for the Property.

The Comprehensive Plan determined the public use, benefit, and purpose of the Property would be realized through a long-term development "partnership with NFR […] aimed at attracting active or passive participation in the ongoing process of ensuring the success of Niagara Falls." (R. 784, fn. 1, Figure 20.) This is precisely what Petitioners plan to do with their land: execute a comprehensive, well-planned, $1.5 billion development project designed to ensure the success of Niagara Falls.

In short, while the City's Determination and Findings, replete as they are with conclusory "blight" accusations and personal attacks on downstate developers, would have this Court believe that Petitioners' property is "ideal for the revitalization of the downtown area and the placement of Centennial Park," the Comprehensive Plan makes plain that such is not the case. *Cf* (R. 784) to (R. 784, fn. 1, pp. 43-44; 156, 163-164.)

Accordingly, the Court should annul and reject the Determination and Findings as antithetical to the Comprehensive Plan and its unambiguous expression of what is in the best interests of the citizens of Niagara Falls.

ii. The well-manicured, tax-current Property is not substandard or insanitary.

As described in detail above, at some point last fall, the City apparently concluded that its real reason for wanting to take Petitioners' property was to remediate blight in the East Falls Redevelopment Area. Confident in its new

rationale, the City assures the public and the Court in its Determination and Findings that "acquisition [is] necessary to properly address the blighted condition in the area" (R. 790) and that "[t]his location has been selected because it is a blighted, stagnant, underutilized, underdeveloped private property that has become a detriment to the area and surrounding properties." (R. 789.)

Even if the Property were not well kept (which it is), and even if Petitioners were not current on their property taxes (which they are), the City's blight argument would still fail.

"Blight is an elastic concept that does not call for an inflexible, one-size-fits-all definition. Rather, blight or substandard or insanitary areas must be viewed on a case-by-case basis." *Matter of Kaur v. NY State Urban Dev. Corp.*, 15 N.Y.3d 235, 256 (2010) (emphasis added). The Appellate Division should "not act as a mere rubber stamp to approve findings of blight where the condemning authority has failed to provide evidence to support its findings*." Matter of Gabe Realty Corp. v. City of White Plains Urban Renewal Agency*, 195 A.D.3d 1020, 1022 (2d Dep't 2021). "Bare pleading of substandard conditions [does] not satisfy [an] obligation to respond to a challenge to its finding of blight by presenting an adequate basis for its conclusion." *Id*.

In support of its assertion that Petitioners' property "has been selected because it is a blighted, stagnant, underutilized, underdeveloped private property

that has become a detriment to the area and surrounding properties" (R. 789), the City provides no evidence. Not a report, not a study, not an eyewitness account or even a photograph. Nothing more than hollow statements that the Property is "vacant," "underdeveloped," and "underutilized," with some weeds and cracked sidewalks on the perimeter of the parcel (R. 784-786.) Similarly unavailing is the curated handful of complaints by former and current politicians about how NFR has not moved more quickly than the rest of the City to develop long ignored and neglected real estate in Niagara Falls. (*See* R. 785-786.)

The fact is that NFR is poised to do exactly what the Comprehensive Plan envisioned for the East Falls Redevelopment Area within the time frame set forth in that plan, that is, unless the City's unsubstantiated allegations of blight are permitted to derail those efforts.

2. *The City's proposed taking seeks to acquire property in excess of what is necessary to serve a public use, benefit, or purpose.*

"A [municipality] has no right under its eminent domain power to condemn an estate in excess of that which is needed to accomplish the intended public purpose." *Kohl Indus. Park Co. v. County of Rockland*, 710 F.2d 895, 901 (2d Cir. 1983). "The general principle that there is no right to condemn land in excess of the need for public purposes, and that no more may be taken than is required for the particular public purpose, applies not only as to the volume of land to be taken,

but as well to the nature or extent of the estate in the property taken." *Hallock v. State*, 32 N.Y.2d 599, 605 (1973).

Here, because the City has no plan and no funding to ever construct Centennial Park, *any* taking of the Property would be an excess taking. But the fact that the City's machinations would derail NFR's development plans, would reject NFR's 11-acre/$2.5 million proposed donation, and also do grave injury to the City's own Comprehensive Plan, makes the City's overreach all the more egregious.

In the face of NFR's proposed donation and the opportunity to construct a park within a residential neighborhood near Portage and Niagara Roads, the City somehow claims in the Determination and Findings that "there is no comparable site or location ideally suited for the placement of the Centennial Park project within the City, and placing the project elsewhere would severely limit the utility and benefit to be realized by the implementation of the Centennial Park project and redevelopment of the Subject Parcel as a whole." (R. 789-790.) Nowhere in the Determination and Findings does the City discuss Petitioners' proposed alternative site nor explain why it is unwilling to locate Centennial Park in the Cultural District as called for in the Comprehensive Plan.

The City has the benefit of a Comprehensive Plan to guide its current efforts. The City also has in NFR the very developer whom City and regional leaders

identified in 2009 as the ideal "partner" for development in the East Falls Redevelopment Area. And the City has been offered the opportunity for a sizable donation to defray its Centennial Park costs. For the City to eschew all of this to take Petitioners' property for an impermissible purpose would be excessive as a matter of law.

3. The City Failed to Satisfy the Procedural Requirements of EDPL Article 2.

The City must satisfy the requirements of EDPL Article 2 to exercise its eminent domain powers. The "main purpose of [A]rticle 2 of the EDPL is to ensure that an appropriate public purpose underlies any condemnation." *In re City of New York*, 6 N.Y.3d 540, 546 (2006).

A. The City failed to adequately describe the property and scope of the project

Separate and apart from the foregoing substantive reasons for annulment, the City's Determination and Findings should be rejected because the notices of public hearing and the public hearing itself failed to satisfy the EDPL's requirement to adequately describe the property to be taken and the scope of the proposed project.

As set forth in EDPL § 202(A), "the condemnor shall give notice to the public of the purpose, time and location of its hearing setting forth the proposed location of the public project including any proposed alternate locations." At the public hearing, the City was further required to "outline the purpose, proposed location or alternate locations of the public project and any other information it

considers pertinent, including maps and property descriptions of the property to be acquired and adjacent parcels." EDPL § 203. Taken together, EDPL §§ 202(A) and 203 mandate a condemnation notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action," and to provide the "opportunity for [a] hearing appropriate to the nature of the case." *Brody v. Village of Port Chester*, 434 F.3d 121, 127 (2d Cir. 2005) (internal citations and quotations omitted).

The City's notices of public hearing, dated June 14, 2022 (R. 3-5) and August 22, 2022 (R. 147-148), provide for "the acquisition of approximately 12 acres of land located in the City of Niagara Falls, Niagara County, New York." Petitioners' Property at 907 Falls Street (Tax Map No. 159.09-3-3), and John Daly Memorial Parkway (Tax Map No. 159.09-3-2) is 12 acres. The City's intent—at least at first—was to take all of the Property for construction of some potential recreational facilities: "the whole twelve acres," the City's outside counsel confirmed. (R. 164.) A complete taking to build a park in the East Falls Redevelopment Area of Niagara Falls. That is what Petitioners had notice of.

But then, for reasons not remotely clear or explained, the City drafted its Determination and Findings, which revealed a desire to decrease the size of the taking to +/- 9.8 acres. (R. 784.) Petitioners and the public were, and are, left to guess (a dilemma now shared by this Court) as to what portions of the Property

would make up the desired 9.8 acres, as well as what the remaining 2.2 acres would consist of. Petitioners' confusion did not end there. Also dated November 22, 2022, the City's Full Environmental Assessment Form sets forth the "project site" as "10.3 acres in size…." (R. 217.) To complete a triumvirate of misperception subsequent to the public hearing, just two (2) weeks ago (shortly after the City interposed an Answer to this action) the City Counsel, at the urging of Mayor Restaino at a special meeting, passed a resolution to conduct another public hearing on March 13, 2022 at 6:00 p.m. to discuss the acquisition of what would appear now to be 9.9 acres of the Property.

There is not a single mention within the notice of public hearing or the public hearing transcripts of a proposed taking of anything less than Petitioners' entire 12 acres. No mention of the +/- 9.8 acres indicated within the determination and findings, what portions of the Property this would make up, or which portion of the 2.2 acres would be left over to Petitioners. No mention of the +/- 10.3 acres indicated within the SEQR review, what portions of the Property this would make up, or which portion of the 1.7 acres would be left over to Petitioners. No mention of the +/- 9.9 acres indicated within the March 13, 2022 notice of public hearing, what portions of the Property this would make up, or which portion of the 2.1 acres would be left over to Petitioners.

Along with the ever-changing size of the project, the City admits Centennial Park is nothing more than a list of "potential facilities." (R. 5.) Nothing concrete for the City to discuss at the public hearing. Nothing Petitioners had adequate notice of at the public hearing. Just "potential facilities."

The City's outside counsel used the term "flexibility" to disguise the fact there is no plan in place:

> And let me give you an idea of the flexibility that the mayor has built into this plan that does that. We're looking at the main nine-acre parcel, the square parcel, but the proposed taking includes two wings, partially because it's part of the same property. But I could see, for example, what if you had along John B. Daly Boulevard a whole row of basketball courts for the neighborhood, what if you had a soccer field on the other wing? Yes, you could also, if you built a larger event center, use it for parking. It's all possible. But one of the reasons why we're going after the whole twelve acres is to build in exactly the kind of flexibility that you just talked about, so that we could have certainly soccer fields, certainly could have -- it could be a multi-use field, replace a soccer net with some goalposts and go…

(R. 163-164.)

The City's plans are, by its own admission, nothing more than "what ifs." (*Id*). Even the size of the events center, the supposed centerpiece of Centennial Park, was not finalized at the time of the public hearing. (*Id*.) Possibly the best example of the City's amorphous plans is the recent notice of public hearing for March 13, 2023—two weeks after Petitioners' brief is due and two weeks before the City is to file its opposition. It would appear that, even as was the case when they commenced eminent domain, the City believes there is still plenty of time for

"the mayor and city council [to] decide what we want this plan to look like." (R. 165.)

The City's consistently moving goal posts (or soccer net, as the case may be) are insufficient to put Petitioners and the public on notice of the basis for the proposed taking. *See Brody*, 434 F.3d at 127.

For this reason alone, the determination and findings should be annulled and rejected as procedurally defective, and unconstitutional.

B. The publication of the synopsis of determination and findings was Untimely

If for whatever reason, the Court were to find that the City had carried its burden of articulating a legitimate constitutional basis for its proposed taking of Petitioners' property, one that conforms to the Comprehensive Plan, the Court should at very least require the City to go back to square one.

EDPL § 204(A) is unequivocal:

> The condemnor, within 90 days after the conclusion of the public hearings held pursuant to this article, shall make its determination and findings concerning the proposed public project and shall publish a brief synopsis of such determination and findings in at least 2 successive issues of an official newspaper if there is one designated in the locality where the project will be situated….

This requirement is clear and unambiguous. The Court of Appeals in *Matter of National Fuel Gas Supply Corp.* recently affirmed that the law of standard statutory interpretation indeed applies to the EDPL:

> It is well stated that, when presented with a question of statutory interpretation, a court's primary consideration is to ascertain and give effect to the intention of the Legislature. The clearest indicator of the Legislative intent is the statutory text, and the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof. Generally, courts should construe unambiguous language to give effect to its plain meaning.

Matter of National Fuel Gas Supply Corp. v. Schueckler, 35 N.Y.3d 297, 307-308 (2020).

Because publication of the synopsis of Determination and Findings is a condition precedent to further eminent domain proceedings, a condemnor will be enjoined from moving to acquire property until it fully complies with the notice requirements of EDPL § 204(A). *See Green v. Oneida-Madison Elec. Coop., Inc.*, 134 A.D.2d 897, 898 (4th Dep't 1987).

Here, the City failed to publish the synopsis of Determination and Findings within 90 days of the conclusion of the public hearing, and should therefore be enjoined from moving forward within this eminent domain proceeding. The public hearing closed on September 6, 2022 (R. 42-43), which started the 90-day clock to publish the synopsis of determination and findings by the December 5, 2022 deadline. Publication in the Niagara Gazette, however, did not occur until December 6, 2022 and December 7, 2022—the 91st and 92nd days after the conclusion of the public hearing. (R. 810-813.)

The City failed to meet its condition precedent from continuing with this eminent domain proceeding. It should be enjoined from doing so until the requirements of EDPL § 204(A) are strictly followed.

CONCLUSION

Because the City has not, and cannot, defend its proposed taking by articulating a permissible public use for Petitioners' property, and for the reasons set forth herein, Petitioners respectfully request that this Court reject and annul the Determination and Findings, award Petitioners their costs and fees pursuant to EDPL § 702(b), and grant to Petitioners such other and further relief as the Court deems just and proper.

Dated: March 1, 2023
Buffalo, New York

HARTER SECREST & EMERY LLP

By: 

John G. Horn, Esq.
Ryan C. Altieri, Esq.
Attorneys for Petitioners
50 Fountain Plaza, Suite 1000
Buffalo, New York 14202
(716) 853-1616
jhorn@hselaw.com
raltieri@hselaw.com

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I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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HARTER SECREST & EMERY LLP

By: 

John G. Horn, Esq.
Ryan C. Altieri, Esq.
Attorneys for Petitioners
50 Fountain Plaza, Suite 1000
Buffalo, New York 14202
(716) 853-1616
jhorn@hselaw.com
raltieri@hselaw.com