

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT**

In the Matter of the Application of

JANICE SERRONE, THE RALPH PATERNO
REVOCABLE TRUST, THE NEW YORK 128
REALTY CORPORATION, MIN JIAN REALTY,
LLC, MARCO NEIRA, BROTHER JESUS AUTO
BODY COMPANY, SPEED MUFFLER AND TIRE
SHOP INC., and GONZALEZ MUFFLER AUTO
MECHANIC REPAIR CORP.

Petitioners,

For a Judgment Pursuant to Article 2 of the Eminent
Domain Procedure Law

—against—

THE CITY OF NEW YORK,

Respondent.

**NOTICE OF MOTION
FOR LEAVE TO
APPEAR AS *AMICUS
CURIAE***

**Appellate
Division No.
2011-05147**

PLEASE TAKE NOTICE that upon the annexed affidavit of Jeremy C. Marwell, dated December 14, 2011, and the papers annexed thereto, the undersigned will move this court, at the courthouse thereof, located at 45 Monroe Place, Brooklyn, New York, 11201, on the 23rd day of December, 2011, at 9:30 o'clock in the forenoon of that date, or as soon thereafter as counsel may be heard, for an order granting leave to appear as *Amicus Curiae* in support of Petitioners and for submission of the enclosed brief and arguments for consideration, and for such other and further relief as to the Court may seem just and equitable.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 2214(b), answering papers, if any, shall be served upon the undersigned counsel at least two (2) days prior to the return date of this motion.

Dated: Washington, DC
December 14, 2011

Respectfully submitted,

THE PROPERTY RIGHTS
FOUNDATION OF AMERICA, INC.

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MECHANIC REPAIR CORP.

Petitioners,

For a Judgment Pursuant to Article 2 of the Eminent
Domain Procedure Law

—against—

THE CITY OF NEW YORK,

Respondent.

**AFFIRMATION OF
JEREMY C. MARWELL
IN SUPPORT OF
MOTION FOR LEAVE
TO APPEAR AS *AMICUS
CURIAE***

**Appellate
Division No.
2011-05147**

JEREMY C. MARWELL, an attorney duly admitted to practice before this Court, hereby affirms, under penalty of perjury pursuant to CPLR 2106, as follows:

1. I am a member of the law firm Vinson & Elkins LLP, co-counsel with Shamberg Marwell & Hollis PC to the Property Rights Foundation of America, Inc. (“PRFA”), proposed *Amicus Curiae*, and am in good standing in the Courts of the State of New York.

2. This affirmation is submitted in support of the motion for an order granting PRFA permission to appear as *Amicus Curiae* in support of Petitioners.

3. Annexed to this affirmation are the following exhibits:

Exhibit A: Determination and Findings of the City of New York Pursuant to EDPL Section 204 To Acquire Certain Property For Phase 1 of the Willets Point Development Plan

Exhibit B: Verified Petition of Petitioners Janice Serrone, The Ralph Paterno Revocable Trust, the New York 128 Realty Corporation, Min Jian Realty, LLC, Marco Neira, Brother Jesus Auto Body Company, Speed Muffler and Tire Shop Inc., and Gonzalez Muffler Auto Mechanic Repair Corp., dated June 1, 2011.

Exhibit C: Proposed *Amicus Curiae* Brief of the Property Rights Foundation of America, Inc., dated December 14, 2011

4. PRFA is a New York-based, volunteer, grassroots nonprofit organization dedicated to providing information and education, and promoting understanding, about the fundamental constitutional rights of America's citizens, especially the right to own and use private property. PRFA has been recognized for its public events, publications, and outreach programs relating to property rights. Since 1994, PRFA President Carol W. LaGrasse has testified on property-rights issues at eight separate hearings at the invitation of the U.S. Senate and U.S. House of Representatives, as well as on eminent domain issues at three hearings before the New York State Legislature. PRFA has regularly submitted *Amicus Curiae* briefs in both New York and federal courts on property rights and eminent domain issues, including briefs at the certiorari and merits stages in the Supreme

Court of the United States in support of the petitioners in *Kelo v. City of New London*, No. 04-108.

5. PRFA has a particular interest in this case because it potentially implicates important questions about the protection of private property rights under the United States and New York Constitutions.

6. This case involves a petition for review of a Determination and Findings by the City of New York pursuant to EDPL Section 204 to acquire certain property for “Phase 1” of the Willets Point redevelopment. Willets Point is a unique and vibrant district home to more than 100 businesses, including numerous enterprises that have operated in Willets Point for generations. The City’s stated purpose in condemning the properties, however, is to transform what the City asserts is an “underutilized site with substandard conditions and substantial environmental degradation” into a “lively, mixed-use, sustainable community and regional destination.”

7. The Petitioners, a group of landowners and leaseholders in Willets Point, seek judicial review of the Determination and Findings pursuant to Section 207 of the EDPL. Petitioners raise five different statutory and constitutional challenges, urging this Court to reject the Determination and Findings and to issue an injunction prohibiting the City’s proposed condemnation of their property.

8. Among their grounds for relief, the Petitioners have asserted that the condemnation violates the Takings Clauses of the U.S. and New York Constitutions because it lacks a valid Public Use. The Petitioners explain that the City is attempting to condemn their property without any specific plan for development of the property (and without having even identified the private developer on whom the City will rely to develop such a plan); that the proposed redevelopment faces truly extraordinary logistical, financial, and legal barriers to completion; and that the City's own conceded and longstanding failure to invest in infrastructure or provide ordinary municipal services is the principal contributing factor to the substandard conditions and asserted "blight" on which the City now relies to justify the taking.

9. In response to the Petitioners' Public Use argument, the City argues, in essence, that this Court has no role to play in adjudicating the Petitioners' Takings Clause claim. Resting on the premise that eradicating blight serves a public purpose, the City concludes categorically that "[c]ourts [] may not judge whether a particular project is likely to succeed." Br. for Respondents 20. The City further argues that the New York and U.S. Constitutions impose "no requirement" that a "developer be selected prior to issuing a determination and findings," a factor the City asserts is categorically "immaterial" to the Constitutional analysis. *Id.* at 19, 26. And the City urges dismissal of the Petition

notwithstanding that the City concededly declined to invest in infrastructure or provide basic municipal services to Willets Point. *Id.* at 16-26 & 66. In short, the City believes a blight determination should “end this court’s inquiry.” *Id.* at 17.

10. PRFA seeks to file this *Amicus Curiae* brief because it emphatically disagrees with the City’s categorical interpretation of the Takings Clause. In PRFA’s view, the City improperly minimizes the judiciary’s necessary constitutional role in articulating and enforcing boundaries on the government’s eminent domain power. Nor, in PRFA’s view, is the City’s position compelled by any precedent of this Court or the Court of Appeals. To the contrary, as PRFA explains in the attached brief, the judiciary has an appropriate role to play in reviewing proposed takings, where the purported public benefits from the redevelopment are speculative, including due to the lack of a specific development plan; where the project faces overwhelming practical, financial, environmental, and legal obstacles; and where the government’s conceded failure to invest in infrastructure and ordinary municipal services is a principal contributing factor to the “blight” on which it relies to justify the taking.

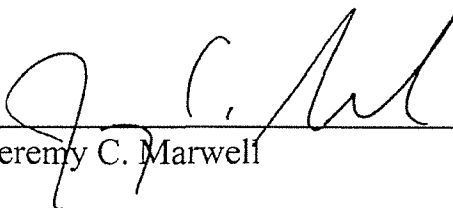
11. Although Petitioners ably support their position that the proposed condemnation is unconstitutional, PRFA believes the enclosed brief will be of special assistance to this Court in at least three ways. First, the brief will help this Court understand how New York law can and should be informed by laws of other

States that protect private property against takings in similar circumstances. Second, the brief helps explain why the Petitioners' Public Use argument is not foreclosed by prior precedents from this Court or the Court of Appeals. And finally, the brief will help this Court understand how this case may affect property owners throughout New York and potentially nationwide.

12. PRFA therefore respectfully requests permission to appear as *Amicus Curiae* and submits, for the Court's consideration, the arguments contained in the enclosed brief.

WHEREFORE, it is respectfully submitted that PRFA be permitted to appear as *Amicus Curiae* in these proceedings and, based upon the arguments contained herein and in the enclosed brief, that this Court reject the Determination and Findings of the City of New York relating to Phase 1 of the Willets Point redevelopment, and grant Petitioners such other relief as this Court may deem just and proper.

Dated: December 14, 2011
Washington, DC



Jeremy C. Marwell