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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF BOWERS DEVELOPMENT,

Respondent,

-against-

NO. 89

ONEIDA COUNTY INDUSTRIAL,

Appellant.

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92 Franklin Street  
Buffalo, New York  
November 14, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 CHIEF JUDGE WILSON: Next matter on the calendar  
2 is Number 89, Matter of Bowers Development v. Oneida County  
3 Industrial Development Association.

4 MR. GOLDMAN: Good afternoon. Paul Goldman for  
5 the respondent, OCIDA. If it pleases the court, I'd like  
6 to reserve three minutes for my rebuttal.

7 CHIEF JUDGE WILSON: Certainly.

8 MR. GOLDMAN: The issue for today is do IDAs have  
9 the power to use eminent domain to acquire property for a  
10 parking lot? IDAs received the unqualified grant of  
11 eminent domain through the words, "necessary for its  
12 corporate purposes." It's not limited to a specific  
13 project. It's necessary for corporate purposes, is the  
14 test. In this case, on this record, the OCIDA satisfied  
15 six different corporate purposes under 858 and 852.

16 JUDGE SINGAS: Counselor, what's our standard of  
17 review here?

18 MR. GOLDMAN: Rational basis. Let me tell you,  
19 that's found directly in 207(b) with the language, same  
20 manner and form, and with the same effect as provided for  
21 appeals in a special proceeding. That word, "special  
22 proceeding," is not an idle directive. It's a direct  
23 reference to CPLR 7804(a). And that is - - - if you read  
24 the concurrence from Justice Read and Goldstein, it's  
25 rational basis.

1 JUDGE HALLIGAN: But aren't we looking at what  
2 the meaning of commercial is and whether or not that  
3 excludes healthcare and health-related facilities? That -  
4 - - that strikes me as a question of statutory  
5 interpretation to which we would not necessarily accord  
6 rational review, even though we otherwise would, in  
7 deciding, for example, if a particular facility was  
8 commercial or not.

9 MR. GOLDMAN: On the commercial issue, it's - - -  
10 it's ambiguous. It's - - - it could have multiple  
11 meanings. So I believe that deference is required under  
12 the O'Brien v. Spitzer case cited. There's a series of  
13 cases and lines of cases in that regard.

14 In terms of the commercial - - -

15 JUDGE RIVERA: Didn't the - - - didn't the  
16 Attorney General's opinions make clear that commercial  
17 doesn't include healthcare facilities, hospitals? And  
18 wouldn't the legislature have understood that that has been  
19 the interpretation the AG has taken?

20 MR. GOLDMAN: I would say, first of all, Your  
21 Honor, we don't have a health-related facility. Health  
22 hyphen related facility is the term in that 1980 AG  
23 opinion. That's a specific reference to an HRF. They  
24 changed - - - the majority failed to pick up on the nuance  
25 and - - -

1 JUDGE RIVERA: I thought the second opinion says  
2 hospital. Did I miss something? I thought at least one of  
3 them refers to hospital.

4 MR. GOLDMAN: One is a - - - related to nursing  
5 homes and HRFs, and the other one is the hospital. We  
6 don't have either. We have a parking lot. Okay. We have  
7 a parking lot - - - a McAdam parking lot.

8 JUDGE RIVERA: So that's what I wanted to ask.  
9 Is that what the case turns on? Because that struck me as  
10 the fault line between the majority and the dissent.

11 MR. GOLDMAN: Absolutely it's - - -

12 JUDGE RIVERA: The majority thinks we're talking  
13 about the hospital in this entire health facilities campus,  
14 and the dissent thinks we're only talking about the parking  
15 lot. Do you agree with that?

16 MR. GOLDMAN: The appeal definitions for what you  
17 notice, you're limited - - -

18 JUDGE RIVERA: But - - - but do you agree that  
19 that appears to be the main difference between the majority  
20 and the dissent?

21 MR. GOLDMAN: I think it's the critical  
22 distinction.

23 JUDGE RIVERA: Okay.

24 MR. GOLDMAN: But the issue is, we don't have  
25 either.

1 JUDGE RIVERA: Okay.

2 MR. GOLDMAN: Okay. We don't have an HRF, we  
3 have no residence, we have no lodging, we have no  
4 healthcare services. An HRF is where we put our parents  
5 when they need care. More importantly, what we're talking  
6 about is a licensed facility. Nursing home has a licensed  
7 operator, hospitals have a licensed operator, and HRFs have  
8 a licensed operator. A medical office building - - - if  
9 we're talking about it being appurtenant to a medical  
10 office building - - - there is no license. You get a  
11 certificate of occupancy for building the building  
12 correctly.

13 CHIEF JUDGE WILSON: Why does - - - why does - -  
14 - why does license bear on commercial?

15 MR. GOLDMAN: Because on the issue - - - okay. I  
16 - - - I believe that - - - I'm trying to draw the  
17 distinction of why it's not an HRF. Okay. And that's - -  
18 -

19 CHIEF JUDGE WILSON: Yeah, but we're - - - but  
20 HRF isn't in the statute, commercial is in the statute.

21 MR. GOLDMAN: Let me tell you why I think we're  
22 right on commercial, which is your - - - your point, Your  
23 Honor. The plain - - - I've given you two cases. I want  
24 to give the PSC case. A parking facility for an eminent  
25 domain by - - - in PSC. The City of Albany IDA condemned a

1 parking facility, so we can certainly utilize our power of  
2 condemnation to create a parking facility.

3 CHIEF JUDGE WILSON: Can I - - - can I just ask  
4 you a couple of questions about the record and then I'll  
5 let you continue? Is it clear from the record that the  
6 parking facility is one for which you would have to pay to  
7 park there?

8 MR. GOLDMAN: Yes. They basically said it would  
9 be available to the public in the evenings, and it's  
10 available for the medical office building. So it's either  
11 a straight parking facility or it's an appurtenance to the  
12 medical office building. It's one of those two choices.  
13 It's not related to the hospital because it's controlled by  
14 the medical office - - -

15 CHIEF JUDGE WILSON: When you say available in  
16 the evening, what do you mean by that?

17 MR. GOLDMAN: I'm sorry?

18 CHIEF JUDGE WILSON: When you said it's available  
19 to the public in the evening, do you mean it would be free  
20 in the evenings?

21 MR. GOLDMAN: It would be available to the public  
22 in the evenings. There's no gate shown at 5511-12, so it  
23 would be available for people to use in the - - -

24 CHIEF JUDGE WILSON: To park free at?

25 MR. GOLDMAN: Correct.



1 CHIEF JUDGE WILSON: So if I lived in Utica and  
2 it was daytime, not the evening, and I wanted to park there  
3 and go to a nearby McDonald's and pay, could I do that? Is  
4 that clear in the record?

5 MR. GOLDMAN: I don't think it's clear in the  
6 record, but they - - - I believe it's right next to the  
7 building, so they're going to have someone policing it and  
8 probably giving out tickets. So it's - - - it's exclusive  
9 for the use - - - use of the MOB, but it's a parking  
10 facility at its core. So - - -

11 JUDGE RIVERA: I thought - - -

12 MR. GOLDMAN: Go ahead.

13 JUDGE RIVERA: - - - I thought that it was in the  
14 record a representation that there would be a fee and that  
15 it would be used to offset the bonds.

16 MR. GOLDMAN: No. Okay. It says available.  
17 There's a page. I've got the record reference here, but it  
18 says it's available for the evenings to the public, and  
19 that it would be - - -

20 JUDGE RIVERA: Well, no - - - yes, it could be  
21 for the public, but they got to pay.

22 MR. GOLDMAN: No. That - - - at night, but - - -  
23 and during the day, it's exclusive to the MOB.

24 JUDGE SINGAS: So doesn't then - - - doesn't it  
25 then become part of the medical facility? Do we have to

1 treat it distinctly? If - - - if people can't use it on  
2 their own for other purposes to attend to other business,  
3 then doesn't it become just part of the entire enter - - -

4 MR. GOLDMAN: It's a public parking lot that's -  
5 - -

6 JUDGE SINGAS: But it's not really a public  
7 parking lot if I can't pay and go there unless I'm going to  
8 a medical office there.

9 MR. GOLDMAN: But again, remember, we have a MOB  
10 where people need to access the facility. They would have  
11 priority, but during the evenings, after business hours,  
12 it's available because there's a parking shortage in that  
13 community.

14 But the point of this is that parking facilities  
15 are clearly commercial. And there's a case that was just  
16 issued a week and a half ago, 61 Crown St., LLC v. the  
17 Ulster County IDA, 2023 WL 7201066.

18 JUDGE CANNATARO: So Counsel - - - I'm sorry - -  
19 - can you just explain to me one more time why this isn't  
20 the situation that Judge Halligan posited before, which is  
21 whether we agree with the agency's interpretation of what a  
22 commercial facility is and whether we owe you some  
23 deference under O'Brien in that regard or we don't.

24 MR. GOLDMAN: I think you owe us deference  
25 because it's ambiguous.



1 JUDGE CANNATARO: I - - - assume I agree with  
2 that proposition. But you seem to push back a little bit  
3 when she suggested that this is really just a question of  
4 whether we agree with the agency's interpretation of what a  
5 commercial enterprise is or whatever the term.

6 MR. GOLDMAN: I think it's an ambiguous term.  
7 I've given you - - - you know, I've given you multiple  
8 reasons as to why it is commercial, either as a parking lot  
9 or as an MOB - - - as it pertains to the MOB.

10 JUDGE CANNATARO: You have. And if we agree, if  
11 we say this is not a hospital and this is not a  
12 medical-related facility, therefore, you know - - -

13 MR. GOLDMAN: It's rational.

14 JUDGE CANNATARO: Yeah.

15 MR. GOLDMAN: Becomes rational.

16 JUDGE CANNATARO: Is that just the end of the  
17 analysis?

18 MR. GOLDMAN: I believe so because they have an  
19 elevated burden under the standard set forth in Powell and  
20 Goldstein, and all the EDP article two cases of showing  
21 that it's irrational. So once I've established any of  
22 those corporate purposes under 858 or 852, I've met my  
23 rational burden, and he can't meet his because it - - -  
24 there's no way to show it's irrational - - -

25 JUDGE HALLIGAN: See - - -

1 MR. GOLDMAN: - - - if it's within the corporate  
2 purposes. I'm sorry, Your Honor. I had - - -

3 JUDGE HALLIGAN: - - - see - - - okay. Is it  
4 you're reading that something that is a healthcare facility  
5 or hospital cannot be commercial, are those mutually  
6 exclusive categories under the statute?

7 MR. GOLDMAN: I think a healthcare facility - - -  
8 okay - - - which is not defined in, you know, 700.2. A  
9 healthcare facility is a medical office building - - - it's  
10 de facto a commercial facility. It's rent paying. I've  
11 given you - - - Your Honor asked the question - - - we're  
12 looking for kind needs - - -

13 JUDGE HALLIGAN: But - - - but the statute does  
14 enumerate some kinds of facilities, and it doesn't include  
15 hospitals or healthcare facilities, right?

16 MR. GOLDMAN: But it doesn't have a definition  
17 for commercial, therefore - - -

18 CHIEF JUDGE WILSON: Aren't - - -

19 JUDGE HALLIGAN: No, but - - - but it does - - -  
20 it does enumerate some - - -

21 MR. GOLDMAN: It does - - -

22 JUDGE HALLIGAN: - - - types of facilities. And  
23 - - - and you know, there's - - - there's a way in which  
24 one could read a statute that has a list like that to say,  
25 anything not included in the list, we assume the

1 legislature didn't mean - - - meant to exclude.

2 MR. GOLDMAN: But commercial is a very broad  
3 term.

4 CHIEF JUDGE WILSON: So let me - - - let me - - -

5 MR. GOLDMAN: And HRF is the term in the AG  
6 opinions. It's not a medical office permit - - - sorry.

7 CHIEF JUDGE WILSON: Let me ask - - - let me ask  
8 you about the term commercial for a moment, because this is  
9 something that struck me as odd about the statute.

10 Commercial is a very broad term, and I would think that  
11 commercial would be big enough to include, for example,  
12 manufacturing or research or renewable energy or railroad  
13 or horse racing or automobile racing. So the legislature  
14 went to the trouble of defining - - - specifically  
15 enumerating a bunch of things that I would ordinarily think  
16 of as commercial, which maybe is an instruction we ought to  
17 read commercial narrowly so as not to include those things.

18 MR. GOLDMAN: I don't - - - I don't think that's  
19 the - - - what the legislature intended, because if you  
20 look at necessary for corporate purposes, and you look at  
21 Bath, Wechsler, and Waldo's, the intersection of that, and  
22 you read Bath, Bath says that if we have a use that is  
23 within our corporate purposes, it satisfies the  
24 jurisdiction and authority test.

25 If you read Wechsler, defining the word



1 "necessary" under the words "necessary for its corporate  
 2 purposes," and we fit directly under Bath, so our language  
 3 is exactly the same. So I believe that language says, if  
 4 we deemed it to be necessary for our corporate purposes,  
 5 then it's appropriate because we're not limited - - -  
 6 remember, under Wechsler it says, the word necessary is to  
 7 achieve legislatively authorized goals, and it says right  
 8 in it, the agency has wide latitude to determine what  
 9 acquisitions are necessary to achieve legislatively  
 10 authorized goals.

11 So it's not limited to a specific project. It's  
 12 limited to achievement of the goals. An IDA can take  
 13 property with a project or without a project, if it's  
 14 needed for the community, if it's deemed within their  
 15 discretion. Because these agencies were formed by the  
 16 legislature, they were enactments of the legislature to  
 17 help economic development in 852, to prevent economic  
 18 deterioration. The blight findings on this record in this  
 19 area are undisputed. If you emasculate that power, then  
 20 what's the purpose of having an IDA and having commercial -  
 21 - -

22 JUDGE RIVERA: And what's the purpose of the  
 23 specific categories in the statute, if it - - - if your  
 24 authority is that broad?

25 MR. GOLDMAN: I believe that with - - - there - - -

1 - there are defined terms for certain categories, but  
 2 they're not for warehousing and for commercial. So you  
 3 have to - - - you can't excise the statute out and  
 4 emasculate it. You have to give it its common meaning.  
 5 And that's how it has - - -

6 JUDGE RIVERA: So let me ask you this, if we  
 7 disagree with your framing, that you say, this is a parking  
 8 lot, that's all that you've decided, right, that that's - -  
 9 - that's the point of the eminent - - - exercise your  
 10 eminent domain power for this parking lot, because I don't  
 11 think there's ambiguity that a parking lot is commercial.  
 12 I think the question is whether or not you view this, as  
 13 the majority and the dissent disagreed, as either about the  
 14 parking lot or about this health-services campus and its  
 15 use and need for a parking lot, which I thought had always  
 16 been represented as integral to that campus.

17 MR. GOLDMAN: That fails. That fails under the -  
 18 - -

19 JUDGE RIVERA: Okay.

20 MR. GOLDMAN: - - - definitions in the EDPL.  
 21 They're limited to the use of the property. That's why you  
 22 give a notice to the record property owner and not to the  
 23 adjoiner. You have to - - - it - - - it - - - it - - - it  
 24 fails right on that nub. You're - - - so I'm saying it's  
 25 either a parking lot, and that's the use for the property -



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JUDGE RIVERA: The only point of the parking lot, as you yourself have said, is to serve something else.

MR. GOLDMAN: You can look at it by itself or is it an appurtenance, but it's a parking lot or it's a parking lot that's appurtenant to a medical-office building.

So under those four cases that I've cited, Ellis, Crouse, St. Francis, and Vassar Brothers, this - - - the three Appellate Divisions have said that that use of a parking lot that's appurtenant to a medical-office building, that is a de facto commercial use and is not reasonably incident to the hospital use. On those four cases, this has to be a commercial use. There is not a basis - - - there is not a basis for the conversion that for purposes of Article 18-A, that exact usage, Your Honor - - -

JUDGE RIVERA: Do you have that exact - - - excuse me. Do you have the hospital without - - - without that parking lot?

MR. GOLDMAN: Yes. There's plenty of sufficient parking, but it's needed for - - -

JUDGE RIVERA: So if we disagree with you - - - if we disagree with you, that project can move forward, correct?

1 MR. GOLDMAN: The project is under construction,  
2 but it needs to have appurtenant parking. But the point of  
3 this is, that if this - - -

4 JUDGE RIVERA: You want more parking?

5 MR. GOLDMAN: You got to have parking right next  
6 to the facility. But my point is - - - and I'm sorry, I  
7 get excited about these - - - these things, and I  
8 apologize. Okay.

9 JUDGE RIVERA: I see that.

10 MR. GOLDMAN: The issue is that those four cases  
11 that say that parking appurtenant to a medical office  
12 building - - - I'm ready to climb over this desk.

13 CHIEF JUDGE WILSON: I do have a lot of criminal  
14 cases that involve people who get very excited about  
15 parking, so let's not go there.

16 MR. GOLDMAN: Okay. I'm not going to do that.  
17 So the point of this is that those four cases rule - - -  
18 unanimously hold that it's that exact identical use, which  
19 is what we have here, is not appurtenant to a hospital use.  
20 It can't be. It can't follow that that use magically or  
21 mystically becomes for purposes of Article 18-A - - - you  
22 know, a hospital use. Real Property Tax Law and the  
23 Article 18-A were enacted together, they have to be  
24 construed together because what we're doing in a IDA  
25 transaction is we're giving out tax benefits.

1 JUDGE RIVERA: But it - - - but if a hospital is  
2 what serves the public, that's the benefit you're talking  
3 about, right?

4 MR. GOLDMAN: Yep, an ancillary benefit of it,  
5 yes.

6 JUDGE RIVERA: And the - - - and the parking lot  
7 has, for some reason, all of a sudden, had nothing to do  
8 with it. Why - - - why are you taking property from  
9 someone else?

10 MR. GOLDMAN: This property was gone anyways. He  
11 sold it. So it's not a question of we're taking someone  
12 out of their business.

13 JUDGE RIVERA: I didn't say you were taking  
14 someone out of their business.

15 MR. GOLDMAN: So throughout the record, this  
16 property was shown as a parking lot. That's undisputed.  
17 So the point of this is that this hospital parking lot  
18 that's appurtenant to an MOB is not a hospital use. So  
19 therefore, under the Real Property Tax Law, four cases from  
20 the Appellate Division, it can't be that it's now  
21 automatically converts to a hospital use.

22 CHIEF JUDGE WILSON: Thank you, Counsel. We have  
23 your argument.

24 MR. GOLDMAN: Thank you. Sorry, Your Honor.

25 MR. FOGEL: Good afternoon, Your Honors. Michael





1 Fogel for respondents. If it may please the court. I  
2 think what's going on here is that the IDA is trying to  
3 recast the whole purpose of the eminent domain proceeding  
4 as really a litigation tactic to avoid the limits on its  
5 authority.

6 If you look at the record, their record that was  
7 developed before the IDA, and you look at the purpose  
8 behind why the parking lot - - - and why the property was  
9 being taken by eminent domain, you've got to look first at  
10 his client - - - or the CUBs application to the IDA, where  
11 it said that this property - - - we need this property.  
12 It's critical for our project.

13 The public notice, which Mr. Goldman mentioned,  
14 in fact says that the property is being taken to be, and I  
15 quote, "additional project land in connection with the CUB  
16 project." It wasn't just referenced as a parking lot. It  
17 was listed as additional park - - - additional project land  
18 for the CUB Project.

19 JUDGE TROUTMAN: Is a parking lot commercial?

20 MR. FOGEL: No, it's - - - it's not, Your Honor,  
21 because you can't just look at the parking lot. It's part  
22 of the overall CUB project.

23 JUDGE HALLIGAN: So it's your view that a  
24 healthcare facility cannot be commercial under the terms of  
25 the statute?

1 MR. FOGEL: Yes, because - - -

2 JUDGE HALLIGAN: And why is that? Can you help  
3 us understand why you read the statute that way, given how  
4 broad commercial - - - how broad a term that is generally  
5 understood to be?

6 MR. FOGEL: Well, I think, first of all, they're  
7 not entitled to any deference because since this is a  
8 statute that's conferring eminent domain authority, it  
9 needs to be strictly - - -

10 JUDGE HALLIGAN: Why would we read it the way you  
11 propose, regardless of the deference question?

12 MR. FOGEL: Well, I think because if you look at  
13 8 - - - General Municipal 858 - - -

14 JUDGE HALLIGAN: Yeah.

15 MR. FOGEL: - - - which grants the powers of the  
16 IDA over certain projects, it specifically - - - and this  
17 is something that they totally ignored in - - - in their  
18 briefings, and I think it's something that Your Honor has  
19 pointed out - - - is that there's - - - there's been - - -  
20 if - - - if commercial is meant to be this all-encompassing  
21 broad term, then the legislature would not have found it  
22 necessary to add very specific additional projects.

23 JUDGE HALLIGAN: Here's what I find hard about  
24 this, is that the list of these specific facilities are  
25 highly specific, right? Industrial pollution control,



1 education or cultural, that's a little broader. Railroad,  
2 horseracing, automobile racing, continuing care.

3 MR. FOGEL: Uh-huh.

4 JUDGE HALLIGAN: It seems to me that - - - that -  
5 - - that to read that as limiting the definition of these  
6 very broad terms, not just commercial but industrial,  
7 manufacturing, et cetera, does - - - doesn't make a lot of  
8 sense given how very narrow they are. Is there anything in  
9 the legislative history you can point us to about why those  
10 terms are in there?

11 MR. FOGEL: Well, I think as part of the  
12 legislative history, if you look at the AG's - - - AG  
13 opinions - - -

14 JUDGE HALLIGAN: Okay.

15 MR. FOGEL: - - - it talks about that. The only  
16 possible category that hospital or healthcare facility  
17 could fall into would be commercial. And there's nothing  
18 in the legislative history suggesting that commercial is  
19 intended to be that broad.

20 JUDGE HALLIGAN: But is there - - - is there any  
21 explanation you can give us as to why the legislature  
22 selected these couple of highly specific - - - like  
23 automobile racing, right - - - you know, types of  
24 facilities that it felt the need to call out. That's what  
25 I'm trying to understand.

1 MR. FOGEL: Right. And I - - - and I think it's  
2 because there was a question as to whether or not those  
3 fell within the definition of commercial.

4 JUDGE CANNATARO: Counsel, that was my  
5 understanding, what you just said. And I - - - and for  
6 that reason, I sort of viewed the list as expanding what a  
7 commercial facility was. We have the - - - the commercial  
8 facility is that ter - - - as that term is generally  
9 understood and used. And then we have these specific  
10 examples of things that people might be doubtful as to  
11 whether or not they qualify as commercial activities, and  
12 this is confirmatory of the fact that they are. So am I  
13 wrong to read that particular section as actually creating  
14 an expansion of what a commercial facility is?

15 MR. FOGEL: I think it - - - I think it's the  
16 opposite, Your Honor, because I think - - -

17 JUDGE CANNATARO: Why?

18 MR. FOGEL: - - - because I think by - - - by  
19 creating these additional uses or projects that the IDA has  
20 authority for, which, you know, could conceivably fall  
21 within commercial, that necessarily means that that term  
22 commercial should be narrowly viewed.

23 JUDGE CANNATARO: So that list defines what is  
24 commercial?

25 MR. FOGEL: Yes.

1 JUDGE CANNATARO: And the things that don't  
2 reside on that li - - - that are outside that list are not  
3 commercial?

4 MR. FOGEL: And I - - - and I think if you read -  
5 - - if you take that view of the statutory construction and  
6 you layer onto that the rule that statutes conferring  
7 eminent domain authority should be strictly construed, you  
8 get - - - you get there as well.

9 JUDGE CANNATARO: So odd that - - -

10 CHIEF JUDGE WILSON: So let me ask you a - - -  
11 let me ask you a hypothetical. Suppose tomorrow the IDA  
12 says, you know what, we're - - - we're building this  
13 hospital. People who are coming to visit patients in the  
14 hospital and other people are going to need to eat, and so  
15 we want to condemn - - - across the street there's some  
16 junkyards and a couple of abandoned buildings. We want to  
17 condemn that and encourage restaurants to open up there.  
18 And that's going to be - - - so people in the hospital and  
19 at the medical office building can have lunch while they're  
20 visiting people who are sick. Is that commercial purpose?

21 MR. FOGEL: I think it - - - I think it's still  
22 part of the hospital - - - well, I also think it depends on  
23 the record that's developed before the IDA, because here -  
24 - - like I said, they're stuck with their record - - -

25 CHIEF JUDGE WILSON: Well, they need to park, and

1           they need to eat. And it's the people who are coming to  
2           the hospital, whether they're patients or they're, you  
3           know, relatives of patients or doctors or nurses or so on.  
4           Commercial or not commercial?

5                       MR. FOGEL: I don't think it's - - -

6                       CHIEF JUDGE WILSON: It's - - - it's a  
7           McDonald's.

8                       MR. FOGEL: - - - I - - - I don't think it's  
9           commercial because, I mean, retail isn't included - - -

10                      JUDGE TROUTMAN: Is it just because they happen  
11           to have gone to the medical facility?

12                      MR. FOGEL: No, I think it's because of the  
13           overall project that the IDA is - - - is using - - -

14                      JUDGE TROUTMAN: It's a restaurant.

15                      MR. FOGEL: - - - eminent domain for.

16                      JUDGE TROUTMAN: Why isn't the restaurant  
17           commercial in that hypothetical?

18                      MR. FOGEL: Because the - - - because the  
19           restaurant is - - - they're taking it for an overall  
20           purpose. I think the issue is - - - and I think this is  
21           the slippery slope that happens in that case - - -

22                      JUDGE TROUTMAN: Why isn't it commercial?

23                      MR. FOGEL: If they're - - -

24                      JUDGE TROUTMAN: They're going to sell food,  
25           they're going to provide jobs.

1 MR. FOGEL: If - - - if they were just taking it  
2 for - - - for that commercial purpose and it wasn't tied  
3 into the hospital, it could potentially be commercial. I  
4 think the issue is, once - - -

5 JUDGE TROUTMAN: So if anybody from the hospital  
6 uses it, it's not commercial.

7 MR. FOGEL: No, I don't think I would - - - I  
8 would - - -

9 CHIEF JUDGE WILSON: So it's just that they built  
10 the record differently. That is, they said, gee, we've  
11 noticed that now, there are a lot of hungry people coming  
12 to this area who didn't used to come here before, and it  
13 would be great to condemn this property so they could eat.  
14 And they never mentioned that the reason the hungry people  
15 are now coming there where they didn't come before is  
16 because you've got this medical complex, it's okay. But  
17 the moment they say medical project, it's not commercial.  
18 That's sort of what I understand you to be saying.

19 MR. FOGEL: Well, I think that the - - - I don't  
20 think I'm saying - - - I think the difference is here is  
21 that they - - - they said that this - - - this property was  
22 - - - was critical, that they couldn't do their project  
23 without it. I think what - - - what you're saying is, hey,  
24 it would be a nice thing to have.

25 JUDGE RIVERA: So are - - -

1 MR. FOGEL: But the difference, I think, is that  
2 this - - -

3 JUDGE RIVERA: - - - are you - - -

4 CHIEF JUDGE WILSON: Is that what makes it  
5 commercial and not commercial, a difference between nice  
6 thing to have and critical?

7 MR. FOGEL: No, I think it's whether the entire  
8 project takes it out of that definition of commercial.  
9 That they're - - - they're taking this property to be part  
10 of this overall project. They stated numerous times that  
11 the centerpiece of the project is the six ambulatory  
12 surgery center, and that that was going to be a joint  
13 venture requiring a certificate need from Department of  
14 Health under Article 28 of Public Health Law, which is  
15 entitled Hospitals. And that the overall project, of which  
16 this property is additional project land, would be used to  
17 facilitate the delivery of healthcare services to the  
18 residents of Oneida County.

19 JUDGE SINGAS: So in your view - - -

20 JUDGE RIVERA: So - - - so are you - - -

21 JUDGE SINGAS: I'm sorry. In your view,  
22 something is commercial or not dependent on the  
23 characteristics of whatever the overall project is?

24 MR. FOGEL: Yes, absolutely, because you - - -  
25 because the IDA has to act within the statutory authority.



1 And here, the overall project, for which this property  
2 being taken from - - - through eminent domain, is  
3 considered additional project land. Then you have to look  
4 at whether or not they have the authority under GML 858 to  
5 use eminent domain for that type of project - - -

6 JUDGE RIVERA: Counsel, then is the analogy - - -

7 JUDGE CANNATARO: So is the idea behind the - - -

8 JUDGE RIVERA: Let me get that thought. So is  
9 the analogy that you're trying to draw with this parking  
10 lot, given the questions about the restaurant, is more akin  
11 to the - - - the dining room in a hospital as opposed to  
12 the restaurant across the street? Is that - - -

13 MR. FOGEL: I - - -

14 JUDGE RIVERA: - - - you're saying it's - - -  
15 it's part of the hospital. Somehow it works in this  
16 integral way with the hospital - - -

17 MR. FOGEL: Yes, I think it does.

18 JUDGE RIVERA: - - - serves a particular purpose  
19 that people may need to get food immediately in the  
20 hospital, not across the street and so forth.

21 MR. FOGEL: Yeah. So I think in this example it  
22 goes even further than it's a - - - it's a component. They  
23 said it's a critical component they couldn't do the project  
24 without. That was the whole basis and the whole source of  
25 the application to the IDA for - - -

1 JUDGE RIVERA: There is - - - there is - - -

2 MR. FOGEL: That was how they sold it.

3 JUDGE RIVERA: - - - there is parking across the  
4 street - - - or off-street parking, yes?

5 MR. FOGEL: Well, one of the biggest issues for  
6 this overall hospital campus has been - - - has been  
7 parking. And I think that's one of the interesting things  
8 here, is that there were other acts of eminent domain that  
9 were undertaken by Oneida County, not the IDA, where they -  
10 - - they took property for parking for the hospital. For  
11 whatever reason here, the IDA proceeded as the - - - the  
12 condemning authority. The problem is they proceeded in  
13 violation of their statutory authority under GML 858.

14 JUDGE HALLIGAN: So if I want to condemn property  
15 to build a new hospital facility, and I need space in front  
16 of the hospital for cars to pull up and drop off patients  
17 or visitors, is that properly subject to 858 even though  
18 it's appurtenant to and necessary for the successful  
19 operation of the hospital?

20 MR. FOGEL: If the IDA is the - - - I think it  
21 depends on the identity of the condemning authority. If  
22 the condemning authority is the Industrial Development  
23 Agency - - -

24 JUDGE HALLIGAN: Same - - - same one. Same one.

25 MR. FOGEL: Then - - - then yes, I think it's

1 part of the overall - - -

2 JUDGE HALLIGAN: But - - - so you couldn't - - -

3 MR. FOGEL: - - - it's part of the overall  
4 hospital?

5 JUDGE HALLIGAN: Then - - -

6 MR. FOGEL: No, they - - - they couldn't.

7 JUDGE HALLIGAN: So - - - so if I then can't  
8 construct the hospital without that, your view is - - - is  
9 anything related to a hospital or healthcare facility is  
10 outside the scope. Is there any alternative authority to  
11 condemn land for purposes of a hospital or healthcare  
12 facility?

13 MR. FOGEL: Well, I think in that case, the IDA  
14 would have to say, you can't come to us. We don't have the  
15 authority to exercise eminent domain over that type of  
16 project.

17 JUDGE HALLIGAN: There's no other statutory  
18 source that you're aware of other than 858 that'd be - - -

19 MR. FOGEL: Not - - - not for an IDA. Now,  
20 another entity with condemning authority, such as, in this  
21 case, Oneida County, who - - - who did act as a condemnor  
22 for - - - for other properties in connection with the  
23 overall hospital project. Or the municipality, the City of  
24 Utica, could. But I think in the example you give, that -  
25 - -

1 JUDGE HALLIGAN: Because their - - - their  
2 statutory authority does not have a similar limit - - -

3 MR. FOGEL: It's not similarly limited. And I -  
4 - - and I think that that's the difference here, is that  
5 the IDA is a creature of statute, and they can only act in  
6 accordance with the authority granted to it by - - - by the  
7 legislature. And I think that's the difference, is that if  
8 you could find a condemning authority that has the  
9 authority, they can - - - they can do the restaurant, they  
10 can do the parking lot out front. But what can't happen is  
11 that the IDA uses its authority of eminent domain outside  
12 of its statutory authority.

13 If there aren't any other questions, I'll - - -  
14 I'll rest.

15 CHIEF JUDGE WILSON: Thank you.

16 MR. FOGEL: Thank you.

17 MR. GOLDMAN: Thank you. I'm going to just be  
18 real brief on the core issue. Medical office building is  
19 not a HRF. Okay. It's - - - there's no beds, there's no  
20 patients, there's no residence. It can't be. A medical  
21 office building is a commercial facility. It's a rent-  
22 paying basis. I've given you the common basis under those  
23 appraisal of real estate. It's a rent-paying facility.  
24 That's the test for commercial.

25 Under the statute, they did add certain

1 categories, but it's as defined that it was one of the  
2 original categories and they've added a few additional. If  
3 there was meant to be a prohibition for medical office  
4 building or ambulatory surgery center, daycare,  
5 proprietarily owned facilities, they would have enacted  
6 similar to 862 where there's a retail prohibition.

7 JUDGE HALLIGAN: If it - - - if we disagreed with  
8 you and thought that it was a healthcare facility, do you  
9 lose, or is there a reading of the statute under which you  
10 could still prevail?

11 MR. GOLDMAN: I think it's clearly commercial. I  
12 don't think under any stretch of the imagination that there  
13 is a basis - - - the only support they have is the - - -

14 JUDGE HALLIGAN: Even - - - even if it is a  
15 health - - - even if we were to conclude - - - I understand  
16 you're taking a different view - - -

17 MR. GOLDMAN: Yeah.

18 JUDGE HALLIGAN: - - - but if we were to conclude  
19 that it was a health-related facility - - - if I have the  
20 terminology right - - - do you - - - is your view that you  
21 lose then, if that's what it turns on?

22 MR. GOLDMAN: I - - - I don't think that they're  
23 correct in that. And I don't think that there's a  
24 limitation on providing that.

25 And the point of this - - - the real well - - -



1 if you look at page 9 of my reply brief, where there's an  
2 ABO opinion dealing with a day surgery center, that's the  
3 quintessential nature of a commercial facility. We go  
4 there, they're run by doctors, not hospitals. They're - -  
5 - they're proprietary. They pay rent. The ASC in this  
6 medical office building occupies only nineteen percent.  
7 How is it possible that a medical office building - - - a  
8 rent-paying commercial building with only nineteen percent  
9 can be mythically converted, that the entirety of that  
10 structure - - -

11 JUDGE RIVERA: Can I just - - -

12 MR. GOLDMAN: - - - is a hospital? There are no  
13 inpatients.

14 JUDGE RIVERA: - - - can just - - - can I'd be  
15 clear on - - - I know what you've said, after day hours - -  
16 - during the daytime, who can park?

17 MR. GOLDMAN: Visitors to the office building - -  
18 -

19 JUDGE RIVERA: If there's - - - if there's a  
20 parking lot on that lot, who can park there?

21 MR. GOLDMAN: Correct. It's my understanding,  
22 under this record, is it's for the medical office building.  
23 Because - - -

24 JUDGE RIVERA: No one else can park there?

25 MR. GOLDMAN: No one - - - no one else can park

1           there.  And that's how it was shown throughout the EIS - -  
2           -

3                         JUDGE RIVERA:  Not a doctor in the hospital?

4                         MR. GOLDMAN:  No.

5                         JUDGE RIVERA:  Not a nurse in the hospital?

6                         MR. GOLDMAN:  It is not an appurtenance to the  
7           hospital.  It's limited to the - - - the user - - - users  
8           of that medical office building.

9                         I would also say, St. Francis shows you that  
10           these are routinely IDA transactions.  I've been involved  
11           in this - - - thirty years.  IDAs finance medical office  
12           buildings to provide tax benefits because we're trying to,  
13           as a community, incentivize the provision of healthcare at  
14           a lower cost for Medicaid and Medicare.

15                        JUDGE RIVERA:  Can the rest of the project run  
16           without the medical office building?

17                        MR. GOLDMAN:  It's running with it - - - it's  
18           being built, but it - - - it will - - - can the rest of the  
19           project?  Absolutely.  It's a hospital.  It's a separate  
20           and distinct project - - -

21                        JUDGE RIVERA:  They're presented as integral that  
22           they're working - - -

23                        MR. GOLDMAN:  The only thing that conflated the  
24           two together was the necessity under SEQRA to look at the  
25           entirety of the IHC.  They are separate and distinct

1 projects. They're separate ownership, separate financing,  
2 they're separate - - - they're separate ownership, separate  
3 leases.

4 JUDGE SINGAS: So in order for us to resolve this  
5 case, do we even have to talk about what the proposed use  
6 of that property is, whether or not it is health - - - and  
7 HRF - - -

8 MR. GOLDMAN: I think that's a misnomer. The  
9 issue is it's a commercial parking lot. I've given to you,  
10 you know, Greater Jamaica, the four Appellate Division  
11 decision cases. It's a commercial use. It can't be that  
12 it's a commercial use for the Real Property Tax Law and  
13 then it morphs into a hospital use. It's a parking lot.

14 CHIEF JUDGE WILSON: Thank you, Counsel.

15 MR. GOLDMAN: Thank you.

16 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Bowers Development v. Oneida County Industrial Development Agency, No. 89 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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