No. 04-108

IN THE
Supreme Court of the United States

SUSETTE KELO, *et al.*,

Petitioners,

v.

CITY OF NEW LONDON and
NEW LONDON DEVELOPMENT CORPORATION,

Respondents.

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

BRIEF OF *AMICI CURIAE* CONNECTICUT CONFERENCE OF MUNICIPALITIES AND THE STATE MUNICIPAL LEAGUES OF ALABAMA; ARKANSAS; CALIFORNIA; COLORADO; FLORIDA; GEORGIA; ILLINOIS; INDIANA; IOWA; KANSAS; KENTUCKY; LOUISIANA; MARYLAND; MASSACHUSETTS; MICHIGAN; MINNESOTA; MISSOURI; NEW HAMPSHIRE; NEW JERSEY; NEW MEXICO; NEW YORK; NORTH CAROLINA; OHIO; OKLAHOMA; PENNSYLVANIA; RHODE ISLAND; SOUTH CAROLINA; SOUTH DAKOTA; TEXAS; WEST VIRGINIA AND WISCONSIN IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The Connecticut Conference of Municipalities ("CCM") is Connecticut's association of cities and towns.[1] Its 142 member municipalities comprise over 91 percent of the state's population, including the City of New London (the "City" or "New London"). CCM's mission is to meet the evolving needs of local governments. CCM represents municipalities at the Connecticut General Assembly, before state agencies, and in the courts. CCM is governed by a board of directors elected by member municipalities, with due consideration to geographical representation, representation of municipalities of different sizes, and a balance of political parties.

The 31 other state municipal leagues identified in the Appendix also join this brief. The amici state municipal leagues have an intimate knowledge of the shared interests of the cities and towns in their respective states, and thus are able to assist the Court in understanding the significance of this case.

SUMMARY OF ARGUMENT

For the past half-century, New London and other Connecticut cities have been declining, and efforts to revive them have struggled due in large part to the scarcity of developable urban land. Recognizing this problem, the State of Connecticut empowered its municipalities to use eminent domain to assemble urban lands into unified parcels situated and sized to foster economic growth, based on a legislative finding that the market itself was incapable of doing so. The source of this power is a state statute that was crafted especially to aid economically distressed municipalities like New London, an ageing city with little developable land that has seen

1. No counsel for a party authored this brief in whole or in part and no person or entity, other than the amici curiae, their members or counsel, made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consents for the filing of amicus briefs with the Clerk of the Court.

its population shrink and its businesses relocate to the suburbs during the past few decades.

New London's experience in this case exemplifies the Connecticut legislature's finding that the assembly of urban lands needed for economic growth "often cannot be accomplished through the ordinary operations of private enterprise." Conn. Gen. Stat. § 8-186. Acting in accordance with Connecticut's statute, the City in 1998 sought to capitalize on the plans of a multinational corporation to build the first major new industrial development in New London in more than a century. Specifically, the City sought to assemble a jigsaw puzzle of 115 properties in a 90-acre, commercial and industrial-zoned area adjacent to the corporate site (the "Fort Trumbull area") in order to attract businesses that would complement the new project and generate sorely needed jobs and property tax revenues for the City. Most of the properties in the Fort Trumbull area were in poor condition, and the lots were far too small individually to accommodate such businesses. Except for petitioners, all the landowners in the area agreed to sell their properties to the City, in accordance with a growth plan that had been aired in duly noticed public hearings and approved by the City's elected officials and state agencies. But the petitioners, who own fifteen unconnected properties that are necessary to develop the Fort Trumbull area, have refused to sell and have thereby prevented the City from completing the land assembly called for by the statutory plan.

The assembly of urban lands for economic growth is a "public use," as it eliminates the accretion of small parcels that has acted to hinder older cities like New London from competing in the market for economic development projects. It advances the same public policies of consolidating lands and correcting market failures that this Court approved in *Hodel v. Irving*, 481 U.S. 704 (1987) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). As such, it plainly falls within the police powers of the State of Connecticut, which has determined that

its municipalities need the power to assemble lands to create developable urban parcels that the market itself has been unable to supply. Mindful of the states' greater familiarity with local land conditions, this Court has been properly loath to disturb such determinations. To the contrary, it has sensibly applied the Public Use Clause in a way that gives broad leash to experimentation in the laboratories of the states, and it should reaffirm that federalist tradition in this case.

Further, this Court should avoid imposing the unsupported and unworkable restrictions on eminent domain that the petitioners offer as an alternative argument. A "reasonable certainty" test is not appropriate in this case, because ongoing state oversight of the development plan and Connecticut's record of carrying out successful development projects provide sufficient assurances that the planned economic development will be implemented. In addition, the petitioners' proposed test fails to take account of the challenges facing cities seeking to attract developers to urban lands and would stifle economic development in the places that need it most.

ARGUMENT

I. The Scarcity of Developable Land Has Stymied the Economic Revival of Connecticut Cities.

The rise and decline of Connecticut cities is a familiar story. Founded by the early colonists on small areas of land, cities like New London grew into booming manufacturing centers and bustling seaports by the middle of the nineteenth century. During the second half of the twentieth century, however, they withered, as people and businesses flocked to the suburbs, leaving behind vacant buildings, poor populations, and crime-ridden streets. This well-worn tale of "old economy" cities has taken an especially cruel twist in Connecticut. For just beyond the borders of these declining cities lie some of the wealthiest suburbs in the nation – towns

with excellent public schools, green space, and developable land that continue to attract new residential and commercial development. In Connecticut a deep gulf spans a short distance between the "haves" and the "have-nots."[2]

Efforts to reverse the past few decades of urban decline have met with mixed success, in part because Connecticut cities suffer from a distinct disadvantage vis-à-vis their wealthier suburban neighbors in the competition to attract economic development: a scarcity of developable land.[3] Designed by the early colonists, Connecticut's cities occupy small land areas that have undergone centuries of development, leaving a collection of small and irregular lots that are ill-suited for corporate campuses, shopping centers, industrial and research parks, convention centers, and other modern development projects. Connecticut's urban redevelopment statute expressly recognizes the checkered pattern left by centuries of urban development; it authorizes redevelopment agencies to condemn not only urban land that is "blighted" but also bordering parcels that, though not blighted, are "essential to complete an adequate unit of development." Conn. Gen. Stat. §§ 8-125, 8-128. In the suburbs, by contrast, lot sizes are larger and undeveloped

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2. Paul Zielbauer, "Poverty in a Land of Plenty: Can Hartford Ever Recover?" The New York Times, August 26, 2002 at A1 ("Connecticut . . . has the nation's highest per capita income but also has a split-level economy of affluent suburbs and almost universally floundering cities.").

3. "Bridgeport Economic Prospects Seen Weak," Connecticut Post, April 6, 2003 (main obstacle to development in Bridgeport is lack of "development-ready land") Comprehensive Plan of Development, New Haven, Connecticut, available at *http://www-.cityofnewhaven.com/govt/gov28.htm#Comprehensive%20Plan* ("[T]he lack of available land will impair economic development. . . ."); Plan for Development City of Hartford, Connecticut, Introduction, available at *http://www.hartford.gov/-housing/temp/planofde.pdf* ("[t]here is a shortage of large assemblage of land for commercial and industrial uses.").

land remains available, making it much easier to find parcels suited to modern development projects.[4]

New London has unfortunately played a starring role in the story of urban decline in Connecticut, and exemplifies the land assembly problem that older cities face as they struggle to capture some of the "new economy" growth that has swirled around them. Few Connecticut cities have suffered a more dramatic reversal of fortune than New London. (Mem. Dec. at 86-88.) Incorporated in 1648, New London grew into the second busiest whaling port in the world by the middle of the nineteenth century.[5] By the 1990s, however, New London had a declining population, the worst unemployment in its region, and dismal building vacancy rates, all of which prompted the State to designate it a "distressed municipality." (J.A. at 239.)

As the second smallest (by area) and sixth most densely populated of Connecticut's 169 cities and towns, New London also has precious little developable land with which to revive its economy.[6] The city sits on 5.79 square miles of land that has been divided and subdivided by successive waves of development and currently hosts over 11,900 housing units.[7] New London's land is spread among a patchwork of residential,

4. The suburbs of New Canaan, Avon, and Stonington occupy 22.5, 23.4, and 39.1 square miles, respectively. Each includes 328, 146, and 97 "barren" acres, 7,784, 2,919, and 4,643 agricultural acres, and 4,447, 9,780, and 14,158 forested acres, respectively. By contrast, New London occupies 5.79 square miles and has 11 "barren" acres, 378 agricultural acres, and 426 forested acres. "Table 5.6 – Connecticut Land Use By Town, 1997" available at *http://www.ct.gov/ecd/cwp/view.asp?a=1106&Q=251002&ecdNav=|*.

5. Tom Condon, "My Kind of Town," The Hartford Courant, Northeast, August 2, 1998; Robert Owen Decker, *The Whaling City* 76 (1976).

6. *See* Mem. Dec. at 87 ("New London is a small city with relatively little open land to develop."); J.A. 93; New London's population density is 4,798 persons per square mile. CT Ofc. of Policy & Mgmt., *Municipal Fiscal Indicators*, 2002.

7. J.A. at 91, 313; Gregory N. Stone, *The Day Paper: The Story of One of America's Last Independent Newspapers* 278-92 (2000).

commercial, and industrial uses and generally consists of small lots not suitable for the kind of economic development that has fueled growth in suburban areas. As of 1997, only 11 of its 3,979 acres were undeveloped.[8] In addition, although local property taxes are the principal source of funding for most Connecticut municipalities, 54 percent of New London's land is tax-exempt. (J.A. 91.) Its effective property tax rate is 3.5 times and 2 times as high, respectively, as that of the adjoining towns of Waterford and Groton. The lack of developable land in New London has hindered its efforts to compete with the suburbs for economic development and has stood in the way of its revival.[9]

The 90-acre Fort Trumbull area bears the imprint of centuries of hybrid urban development in a small city. It consists of 115 parcels of varying sizes devoted to residential, commercial and other uses, including a series of small residential parcels. The residential properties owned by the petitioners, for example, range in size from .04 acres to .29 acres, and are sprinkled throughout Parcels 3 and 4A of the "project area."[10] While the petitioners' properties themselves are in "fine condition," many of the adjacent properties are in "poor shape," suffer from "disinvestment and owner neglect," have high vacancy rates, generate "low" tax revenue, and generally "contribut[e] to a sawtooth visual impression in the various

8. "Table 5.6 – CT Land Use By Town, 1997" available at *http://www.ct.gov/ecd/cwp/view.asp?-a=1106&Q=251002&ecdNav=* (showing eleven acres in New London as "barren"); J.A. 196.

9. Condon, *supra* ("Without much land, and with more than half of it off the grand list for one reason or another, [raising property tax revenue to pay for social services] was increasingly difficult."); Stone, *The Day Paper* 375-76 (describing adverse impact to New London of opening of Crystal Mall in neighboring suburb).

10. *See* map in appendix. The lot sizes of some of the petitioners' properties are as follows: Susette Kelo, 8 East Street: .04 acres; Wilhelmina and Charles Dery, 87 Walbach Street: .29 acres; William Von Winkle, 31 Smith Street: .09 acres; James Guretsky, 19 Smith Street: .15 acres. Available at *http://data.vision-appraisal.com/newlondonct*.

blocks." (Mem. Dec. at 87-88; J.A. at 321-23.) Almost the entire Fort Trumbull area, including all of the area containing the petitioners' properties, has for decades been zoned for commercial and light industrial use. (J.A. 113-16, 288-91.)

II. Connecticut Has Reasonably Determined That Its Cities Need the Power to Assemble Land For Economic Growth.

A. *Connecticut's Legislature Recognized That the Market Cannot Adequately Supply the Cities' Need for Developable Land.*

The General Assembly's concern for the problem of scarce developable urban land is apparent from the text of Chapter 132, which authorized the City's use of eminent domain in this case. Conn. Gen. Stat. §§ 8-186 – 8-200. The statute opens with legislative findings that the "acquisition and improvement" of land needed for economic development "often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost," and that aiding municipalities to acquire "unified land . . . areas" for economic development is a "public use[] and purpose[] for which public moneys may be expended." *Id.* § 8-186. The trial court found that the term "unified land area" is a "word of art" in the planning field, and means "an assemblage of parcels into one land parcel." (Mem. Dec. at 128-29.) As the trial court concluded, "the legislature envisaged under Chapter 132 that whole discrete areas would be developed. . . ." (*Id.*) The concept of unifying or assembling land appears again in the definition of a "development project," i.e., "a project conducted by a municipality for the *assembly*, improvement and disposition of land or buildings or both to be used primarily for industrial or business purposes. . . ." *Id.* § 8-187(4) (emphasis added).

The legislative history further evinces the General Assembly's concern for the scarcity of land suitable for modern economic development in the State's "old economy" urban areas. *See* Legis. Hist. of P.A. 184, April 19, 1974, Rep. Sullivan ("[T]his . . . will enable the state to help in . . . the older urban areas, where we do have . . . a substantial number of older factory buildings that are just not suited for today's manufacturing methods.") The legislative history of Chapter 130, the forerunner to Chapter 132, is also instructive.[11] As one lawmaker noted, "because of the problems of land acquisition, the present tendency for industrial relocation is to move to suburban areas where large parcels of land can be assembled." Legis. Hist. of P.A. 8, April 18, 1958 at 348 (Sen. Castelano).[12]

Chapter 132 makes clear that the legislature wanted especially to aid "distressed municipalities," a term that applies to New London and many other Connecticut cities.[13] Although the statute applies to all municipalities, it makes special provision for "distressed municipalities," including authorizing more favorable planning and development grants, and permitting loans to businesses in such municipalities. Conn. Gen. Stat. §§ 8-186, 8-190, 8-193(b), 8-195; *see also id.* § 8-195(d)

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11. Chapter 132 was adopted in 1967 as a revision to Chapter 130, Connecticut's urban redevelopment statute. *Compare* Conn. Gen. Stat. §§ 8-186 et seq. *with id.* §§ 8-124 et seq.

12. *See also* Peter S. Simmons and Jonathan D. Ford, Dept. of Econ. Dev. Report, Feb. 1, 1992 ("DECD Report"), at IV-1 ("[I]t was deemed necessary and in the public interest [by the legislature] for the State to forge a partnership with municipalities to assemble suitable land resources"; noting that related legislation had failed due in part to "the challenge of land assembly in urban areas").

13. A "distressed municipality" is one that meets sufficient "quantitative physical and economic development distress thresholds" to qualify for funding under the federal Housing and Community Development Act of 1977. Conn. Gen. Stat. § 32-9p(b); *see http://www.ct. gov/ecd /cwp/view*/asp?a=1101&q=249844.)

(state may prioritize funding based on municipalities' relative needs).[14] The Connecticut courts relied on New London's economically distressed status in upholding the statute. (Mem. Dec. at 69 n.10, 71-72); *Kelo v. City of New London*, 843 A.2d 500, 531 (Conn. 2004).

To achieve its goals, the statute authorizes each municipality, "by vote of its legislative body," to designate a "development agency" to exercise the powers granted by the statute, including the power of eminent domain. Conn. Gen. Stat. § 8-188. Before acquiring any property by eminent domain, however, the development agency must (1) prepare a detailed "project plan," including, *inter alia*, land use and zoning descriptions, marketability and land-use studies, a statement of anticipated job growth, and a "plan for relocating project-area occupants;" (2) make various findings, including that "the project will contribute to the economic welfare of the municipality and the state" and that "public action under this chapter is required" to carry out the project; (3) secure approvals of the project plan – following duly noticed public hearings – by the municipal planning commission, the regional planning authority, the municipality's legislative body, and several state agencies; and (4) obtain specific approval by the municipality's legislative body of any proposed condemnations. *Id.* §§ 8-189, 8-191, 8-193; *Kelo*, 843 A.2d at 510 n.8.

B. *Similarly Situated States Have Likewise Found the Need to Empower their Cities to Assemble Urban Lands for Development.*

States legislatures facing conditions of land use maturity similar to those in Connecticut, and Congress in its role as sovereign of the District of Columbia, have likewise recognized the market's inability to assemble land in urban areas and the

14. *See also* DECD Report at II-4 ("75% of the Program funding was applied to projects located in or near the State's major urban centers.").

corresponding need to empower municipalities to exercise this function.

- Massachusetts allows municipalities to use eminent domain for economic development, based on legislative findings that the "unaided efforts of private enterprise have not provided and cannot provide the necessary industrial sites within the urban environment due to problems encountered in the assembly of suitable building sites" and that cities "are frequently at a competitive disadvantage with suburban areas in the process of assembling and developing industrial land resources." Mass. Gen. Laws ch. 121C, §§ 2, 5(l).

- Under the Maryland Constitution, "projects reasonably designed to benefit the general public, by significantly enhancing the economic growth of the State or its subdivisions, are public uses, *at least where the exercise of the power of condemnation provides an impetus which private enterprise cannot provide*." *Prince George's County v. Collington Crossroads, Inc.*, 339 A.2d 278 (Md. 1975) (emphasis added).

- New York's urban renewal statute recognizes that in some cases "the redevelopment of [blighted] areas cannot be accomplished by private enterprise alone without public . . . assistance in the acquisition of land [and . . .] the financing of land assembly" and that in such cases "it is in the public interest to employ the power of eminent domain." N.Y. Mun. Law § 970-b (Consol. 2004). New York has adopted a broad definition of "blight" that effectively permits the use of eminent domain for economic development. *Yonkers Community Dev. Agency v. Morris*, 335 N.E.2d 327, 330, 332 (N.Y. 1975) ("areas eligible for . . . renewal are not limited to 'slums'"; "economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable

as a public purpose"; factors relevant to "blight" determinations include "irregularity of plots" and "diversity of land ownership making assemblage of property difficult. . . .").

- Georgia has declared eminent domain necessary not only for "blighted areas" but also for "areas where the condition of the title, the diverse ownership of the land to be assembled, the street or lot layouts, or other conditions prevent a proper development of the land." Ga. Code Ann. § 8-4-2.

- Although not relating primarily to economic development, the District of Columbia blight-clearance statute upheld by this Court in *Berman v. Parker*, 348 U.S. 26 (1954), contained findings that the elimination of "substandard housing" "cannot be attained 'by the ordinary operations of private enterprise alone without public participation' . . . and that 'the acquisition and assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan . . . is hereby declared to be a public use.'" *Id.* at 29 (quoting 60 Stat. 790, D.C. Code, §§ 5-701 – 5-719 (1951)).

- In 1982, the Pennsylvania Avenue Development Corporation (the "PADC"), an entity Congress created and endowed with eminent domain authority to develop the corridor between the White House and the Capitol, promulgated regulations providing for government intervention to aid private development "through such means as land assemblage. . . ." 86 Stat. 1266 § 2(c), Oct. 27, 1972; 36 C.F.R. § 910.2. The PADC was created not only for blight clearance and historic preservation but also to ensure "suitable development, maintenance, and use" of the area, and it promulgated regulations to provide for "more lively and varied shopping, cultural, entertainment, and residential

opportunities, as well as high quality office uses," and the "[i]ntroduction or expansion of retail uses." 86 Stat. 1266 § 2(c); 36 C.F.R. §§ 910.1, 910.16.

- Congress has authorized public funding for the acquisition of land that is "undeveloped or inappropriately developed from the standpoint of sound community development and growth" – a formulation that encompasses land assembly for economic growth. *See* 42 U.S.C. § 5305(a)(1); *see also* Ohio Const. Art. VIII § 2o (State may issue bonds for "public purpose" of "providing for the . . . productive development and use or reuse of publicly and privately owned lands, including those within urban areas" by using "land acquisition or assembly" to address circumstances that inhibit "economic use or reuse of the property.")

Individual cities have reached similar conclusions about the critical need to assemble lands within their borders.[15]

To be sure, in "newer" municipalities, which occupy large land areas or are less developed, market-driven land assembly may at times be a realistic alternative. Thus, it is not surprising that most instances of "private land assembly" have occurred in newer, less developed cities such as Las Vegas, Nevada, and

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15. Plan for Development, City of Hartford, Connecticut, Introduction ("the major thrust of future development in the City of Hartford should be . . . to assemble land for commercial and industrial uses, along with site preparation, to meet the changing land requirements for the type of commerce and industry that produces jobs for residents.") available at *http://www.hartford.gov/-housing/temp/planofde.pdf*; "City of Philadelphia: Neighborhood Transformation Initiative - Land Assembly" (noting that few vacant properties are "large enough to support significant commercial, industrial or residential development" and that the "ability to assemble land for reuse and redevelopment is critical to stabilizing and rebuilding Philadelphia's neighborhoods.") available at *http://www.phila-.gov/nti/landassembly.htm*.

West Palm Beach, Florida, or previously undeveloped areas, as in Columbia, Maryland. (*See* Br. of Am. Cur. Norquist 5-6.) Because of stark differences in land use maturity, these examples of "private" land assembly are of little value in assessing whether a small, 350-year-old, economically distressed city needs the power of eminent domain to assemble urban lands.[16]

The lone example cited by Amicus Norquist that even approaches the land use maturity of Connecticut cities is the case of Providence, Rhode Island, where a developer apparently assembled 21 parcels of land to construct a shopping mall. (*Id.*) But that case involved some features not mentioned in Norquist's brief. First, the project would never have been completed without the donation of seven acres of state land and the state's adoption of legislation granting $136 million in tax relief to the developer.[17] In addition, the process of assembling the land for

16. Las Vegas and West Palm Beach occupy 84 square miles and 55 square miles, respectively, and each was incorporated within the last 110 years. The West Palm Beach case cited by Norquist actually weighs in favor of broad municipal power: The developers who had assembled the land lost it to foreclosure, and any hope of attracting development would have vanished absent the intervention of the city, which purchased the land assemblage with state funds and issued $55 million in bonds for infrastructure improvements. Johanna Marmon, Urban Renewal-West Palm Beach, South Florida CEO, May 2002, available at *http://www.findarticles.com/p/articles/mi_m0OQD-/is_4_5/ai_100500854*. The case of Columbia, Maryland, is at the opposite end of the land-use maturity spectrum from 350-year-old New London: In the 1960s a developer purchased rural parcels that averaged 10 acres each to build a new, "planned" city in a pristine area of Howard County, Maryland. See "Columbia: Its History and Vision," available at *http://www.columbia-md.com/columbiahistory.html*.

17. R.I. Gen. Laws § 42-63.5-2 (2004) (findings regarding Providence Place Project: "(19) a public investment to help defray those extraordinary expenses [to be incurred by the developer] is required in order to induce the substantial private investment and the myriad public benefits described above."); Darrell West and Marion Orr, "Assessing the Providence Place Mall," Brown Policy Reports, June 2000, available at *http://www.insidepolitics.org/policyreports/mallreport.html*.

the project, which the developer called "one of the lengthiest and most expensive . . . in the history of regional malls," took *fifteen years* – hardly a sign that dying cities can wait for "naturally-occurring economic forces" to assemble their land into developable parcels.[18]

In any event, the short answer to the argument that it is not necessary to empower municipalities to assemble land because the market adequately performs this function is that the State of Connecticut has expressly found otherwise with respect to the assembly of land within its borders: "[S]uch acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise." Conn. Gen. Stat. § 8-186; *see Clark v. Nash*, 198 U.S. 361, 369 (1905) ("[W]hat is a public use may . . . depend upon the facts surrounding the subject"; "the people of a State, as also its courts, must . . . be more familiar with such facts . . . than can any one be who is a stranger to the soil of the State.")

III. The Facts of This Case Vindicate the Connecticut Legislature's Determination that Its Cities Need Eminent Domain to Assemble Land for Economic Development.

In early 1998, Pfizer, Inc., a multinational pharmaceutical company, announced that it planned to build a global research facility on an old industrial site in New London. The announcement was a watershed for New London, where no major new industrial development had occurred for more than a century.[19] In an effort to leverage this rare opportunity, in April 1998 the City, acting pursuant to Chapter 132, authorized the New London Development Corporation (the "NLDC") as

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18. Norquist Br. at 7; David Bodamer, "Providence Place: One Year Later," Shopping Centers Today, October 1, 2000, available at http://www.icsc.org/srch/sct/current/sct1000/07a.html.

19. Stone, *The Day Paper* at 425-26.

its statutorily designated development agency to prepare a development plan for the 90-acre Fort Trumbull area adjacent to the Pfizer site.

The Connecticut Supreme Court found that the City acted at all times in accordance with Chapter 132 in preparing and carrying out the Fort Trumbull Municipal Development Plan (the "Plan"), part of which required condemning the petitioners' properties. The Plan was prepared following neighborhood meetings, public hearings, and consideration of six alternative plans. It was then approved by the NLDC, the elected City Council, the regional planning authority, and several state agencies. According to the trial court's factual findings, the three-year process undertaken by the City pursuant to statute was motivated by a desire to benefit the public, rather than any private entity, and the City did not act unreasonably or in bad faith during the process. (Mem Dec. 91-93, 95.)[20]

In January 2000, the City Council approved the development plan and authorized the NLDC to acquire the properties located in the project area, including by use of eminent domain. 843 A.2d at 510; J.A. 26-29. During the ensuing ten months, the NLDC succeeded in acquiring 100 individual parcels in the project area through voluntary, negotiated transfers. As noted, many of these were small, and most were in poor condition. Only the petitioners, who own a total of 15 parcels, have held out and thereby prevented the City from assembling the entire 90-acre area as called for by the statutory Plan. The Connecticut Supreme Court found that all of the petitioners'

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20. All seven justices of the Connecticut Supreme Court agreed with these findings, 843 A.2d at 542-43, 573-74, 595, although one would never guess that from reading petitioners' brief. Citing selectively from the record, petitioners assert that "[r]espondents clearly intended to benefit Pfizer," which cannot be squared with the trial court's factual finding that "the court cannot conclude that the primary motivation or effect of this development plan as regards parcel 3 and 4a was to benefit [Pfizer.]" (Pet. Br. at 4-5, 14; Mem. Dec. 91.)

properties were "necessary" for implementation of the Plan, and the petitioners have not challenged that finding in this Court.[21]

In November 2000, after months of unsuccessful negotiations with the petitioners, the NLDC initiated condemnation proceedings to acquire their properties. In December, 2000, the petitioners filed this lawsuit, which has effectively placed the condemnations on hold. Thus, after a planning and approval process of almost three years, the case has embroiled the City in another four years of litigation, and stoked a major political controversy in the City.[22] And yet the City perseveres in its efforts to secure the properties to fulfill the statutory Plan – which in and of itself strongly suggests that the City could not rely on market forces to realize the economic development it seeks to accomplish through the Plan.[23]

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21. The trial court found that the petitioners' properties in parcel 3 were "necessary" for the project, and that "development would be more difficult if these residences were allowed to remain," because the developer required access to Parcel 3 to perform grading called for by the Plan. (Mem. Dec. 122, 125-26.) Although the trial court concluded that it lacked sufficient information to decide whether the properties on Parcel 4A were similarly "necessary," the Connecticut Supreme Court reversed this determination, due to the deference owed to legislative determinations of necessity in the Takings context. 843 A.2d at 548-49. The dissenting justices did not reach the necessity issue, except to agree that legislative determinations of necessity warrant deference, *id.* at 559-60 (Zarella, J., dissenting), a position that reflects this Court's treatment of the "necessity" issue in Takings cases. *See Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 709 (1923).

22. "Eminent Domain Foes Buy Space on Billboards," The New London Day, June 30, 2001.

23. *See* Thomas W. Merrill, "The Economics of Public Use," 72 Cornell L. Rev. 61, 109 (1986) ("The basic model also posits that beyond assuring proper procedures and just compensation, courts need not intervene to limit the exercise of eminent domain, because the higher administrative costs associated with eminent domain render it essentially self-regulating.").

The land use patterns of Connecticut cities and the Fort Trumbull area in particular, the findings of the Connecticut legislature and similarly situated state and federal governments, and the facts of this case all make clear that cities like New London need the power to assemble urban lands in a way that the market cannot. Absent this power, these cities cannot realistically compete with their less developed suburban neighbors for economic development projects, and have little hope of reversing the decline of the past half-century.

IV. Recognizing Land Assembly For Economic Development As A "Public Use" Accords With This Court's Precedents And Its Federalist Tradition of Deference to State Land Use Determinations.

A. *Land Assembly for Economic Development Is A Public Use.*

This Court has made clear that the Public Use Clause of the Fifth Amendment sweeps as broadly as the police powers, and that the legislature's determination that a particular application of the eminent domain power is for a "public use" warrants great deference. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."); *Berman*, 348 U.S. at 32 ("[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . . The role of the judiciary in determining whether [the eminent domain] power is being exercised for a public purpose is an extremely narrow one.") Judicial review under the Public Use Clause is thus limited to determining whether "the exercise of the eminent domain power is rationally related to a conceivable public purpose." *Midkiff*, 467 U.S. at 241; *see also Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992) (same).

The pursuit of economic development is within the police powers, as even the petitioners appear to concede.

(Pet. Br. at 11.) Indeed, any argument to the contrary would place a constitutional cloud over several federal statutes.[24] Moreover, economic development is a legitimate end of government even when it operates by favoring one industry or region over another. Thus, in *Fitzgerald v. Racing Ass'n*, 539 U.S. 103 (2003), this Court unanimously rejected an Equal Protection Clause challenge to an Iowa statute imposing a higher tax rate on revenues from racetrack slot machines than on those from riverboat slot machines; applying rational basis scrutiny, the Court upheld the statute on the ground that the legislature may have wanted to further any one of several "rational" objectives, including promoting "economic development of river communities" and "help[ing] the riverboat industry." *Id.* at 109-10; *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485-86 (1987) (rejecting Takings Clause and Contracts Clause challenges to Pennsylvania statute aimed at minimizing subsidence from coal mining, in part because statute served "important public interests," including "enhance[ing] the value of . . . lands for taxation"); *id.* at 513 ("economic development" was "central purpose[]" of statute (Rehnquist, C.J., dissenting)).

The petitioners are thus left to argue that, although government may pursue the objective of economic development, it may not do so by means of the eminent domain power. This proposition, however, cannot survive *Berman*: "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end." 348 U.S. at

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24. *See, e.g.*, 7 U.S.C. § 940c(b)(2)(B) (authorizing grants "for the purpose of promoting . . . economic development" in rural areas); 42 U.S.C. § 5318 (authorizing "grants to cities and urban counties which are experiencing severe economic distress to help stimulate economic development activity needed to aid in economic recovery."); 42 U.S.C. § 2991b-1(a)(1)(A) (authorizing grants to enable Hawaii to make loans to native Hawaiians "for the purpose of promoting economic development" in Hawaii).

33; *see also Midkiff*, 467 U.S. at 240. It also conflicts with long-standing precedents permitting eminent domain for infrastructure improvements – such as bridges, harbors, and railroads – undertaken for the purpose of promoting economic development.[25]

The petitioners seek an exemption from these well-established principles, arguing that economic development calls for special treatment because "the public benefits occur . . . as a result of third-party activities." (Pet. Br. at 27.) But this does not avail them either, for it is equally well-established that government may pursue its legitimate ends through the agency of private parties. *See Berman*, 348 U.S. at 33-34 ("The public end may be as well or better served through an agency of private enterprise than through a department of government – or so the Congress might conclude."); *Nat'l R.R. Passenger Corp*., 503 U.S. at 422 ("In both Midkiff and Berman, as in the present case, condemnation resulted in the transfer of ownership from one private party to another, with the basic use of the property by the government remaining unchanged."). This principle is not new; *see Olcott v. Supervisors*, 83 U.S. (16 Wall.) 678, 695 (1873) ("Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. . . . Though the *ownership* is private the *use* is public." (emphases added)); and it is not limited to the land

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25. *See, e.g.*, *Luxton v. North River Bridge Co.*, 153 U.S. 525, 529-30 (1894) (upholding statute authorizing condemnation of land for construction of bridge "to facilitate interstate commerce": "whenever it becomes necessary, for the accomplishment of any object within the authority of Congress, to exercise the right of eminent domain …, Congress may do this. . . ."); *Converse v. Fort Scott*, 92 U.S. 503, 506 (1876) (state statute authorized condemnation for railroad right-of-way "for the promotion of trade and commerce."); *Marchant v. Baltimore*, 126 A. 884 (Md. 1924) ("The development of the harbor of Baltimore according to a comprehensive plan, by which the commerce of the port will be most advantageously served, and its future growth encouraged, is a project of distinctively public interest and purpose.")

use context, as governments rely increasingly on the private sector to achieve a broad range of traditionally public objectives, such as educating children and punishing the guilty. *See, e.g.*, 20 U.S.C. § 6316(b)(8)(B)(iii) (allowing local school authorities to contract with private companies to operate public schools that fail to meet standards); *Richardson v. McKnight*, 521 U.S. 399, 414 (1997) (Scalia, J., dissenting) ("employees of private prison management firms . . . exercise the most palpable form of state police power").[26]

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26. The petitioners contrive to squeeze into three "categories" cases finding public uses where the condemned property was transferred to another private party. But this Court has never suggested that the principle that "[t]he public end may be as well or better served through an agency of private enterprise," *Berman*, 348 U.S. at 33-34, applies only in the three cases posited by petitioners – a telling omission given the number of times it has applied this principle in Takings cases. The source for petitioners' "three categories" is *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), in which the Michigan Supreme Court attempted to categorize *Michigan's* case law, expressly grounded its decision on a Michigan constitutional provision, and eschewed any analysis of this Court's decisions. *See Hathcock*, 684 N.W.2d at 770, 785 & n. 81. The categories themselves are artificial and vague – at least when applied to this Court's cases. For example, what exactly is a "fact[] of independent significance"? According to petitioners, this open-ended term means the condemnation is for a "public reason . . . independent of the use to which the condemned property will eventually be put." (Pet. Br. at 24.) If so, however, it surely embraces the over-division of land in New London just as much as the over-concentration of land ownership in Hawaii. (*See* Pet. Br. at 25.) And into which of the petitioners' three categories does *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) fall? That case held that mandated data sharing among applicants for pesticide licenses was a "public use," even though the most "direct" beneficiaries were subsequent applicants who could support their applications with data submitted by earlier applicants. *See* 467 U.S. at 1014 ("This Court . . . has rejected the notion that a use is a public use only if the property taken is put to use for the general public.") The petitioners do not say how *Ruckelshaus* – one of this Court's most recent "public use" cases – fits into their conjured framework.

Accordingly, even when broadly defined as the promotion of economic growth through the agency of private parties, the City's objective in this case fits easily within accepted notions of "public use." The "public" character of these condemnations becomes even clearer, however, when the legislative findings and the relevant facts are considered. As shown, older cities like New London face what amounts to a barrier to entry to the market for attracting economic development projects, i.e., a lack of developable parcels resulting from centuries of development and over-division of land. Further, Connecticut and similarly situated states have found that government–driven land assembly is necessary to correct this market imperfection, because the market has proven inadequate to the task of assembling small urban parcels into land units suitable for modern economic development. The plight of New London, the land use situation of the Fort Trumbull area, and the City's land assembly efforts in this case all bear out this finding.

The market-correction rationale for the takings in this case – which is articulated in the statute that authorized the City's actions – is similar to the rationale for the Hawaii statute upheld by this Court in *Midkiff*. The Hawaii legislature had found that excessively concentrated land ownership was skewing the State's residential real estate market and inflating land prices, and adopted legislation providing for the condemnation and subsequent transfer of land to existing lessees. The Court had "no trouble" endorsing Hawaii's purpose of removing "artificial deterrents to the normal functioning of the State's residential land market" and "correcting the land oligopoly problem," because "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers." *Midkiff*, 467 U.S. at 241-42.

Both the Hawaii statute in *Midkiff* and the Connecticut statute at issue here were aimed at correcting market imperfections, and both were necessary because the market had failed to make these corrections itself – a situation in which this

Court has repeatedly upheld government intervention. *See, e.g.*, *Ruckelshaus*, 467 U.S. at 1015 (finding "public use" where federal statute "would eliminate a significant barrier to entry into the pesticide market."); *Fisher v. Berkeley*, 475 U.S. 260, 264 (1986) (upholding municipal rent control ordinance against antitrust challenge: "the function of government may often be to tamper with free markets, correcting their failures. . . ."); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 121 (1978) (rejecting constitutional challenges to Maryland statute that was "designed to correct … inequities in the distribution and pricing of gasoline"). While the Hawaii statute sought to correct the over-concentration of land ownership that stemmed from Hawaii's feudal past, the Connecticut statute seeks to correct the over-division of land caused by centuries of development in cities whose borders were fixed during the colonial era. *Compare Hodel v. Irving*, 481 U.S. 704, 712, 718 (1987) (in Takings case, noting that "the extreme fractionation of Indian lands [i.e., the accumulation of many undivided interests in a single parcel] is a serious public problem" and that "encouraging the consolidation of Indian lands is a public purpose of high order.")

B. *A Broad Definition of "Public Use" Accords with this Court's Federalist Tradition.*

This Court has taken pains to guard "the States' traditional and primary power over land and water use" from the encroachment of federal authority. *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *see also ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 502-03 (1988) (noting Congress's efforts to preserve state control over land use in Flood Control Act of 1944 because of "federalism concerns").

Reaffirming this Court's broad, purposive construction of the Public Use Clause would accord due respect to the state and local land use determinations in this case. Those determinations were made by the City's elected officials in

accordance with a statute adopted by the Connecticut legislature; they were upheld by the Connecticut Supreme Court; and they were consistent with the will of Connecticut's citizens, who in a statewide referendum in 1965 expressly rejected a proposed constitutional amendment to restrict the Takings Clause of the state constitution.[27] As this Court held eighty years ago in dismissing another "public use" challenge, "the determination of this question [whether a use is "public or private"] is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State." *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 705-06 (1923); *see also Clark v. Nash*, 198 U.S. 361 (1905) (same).

A broad construction of the Public Use Clause would also preserve the mosaic of approaches the states have taken toward the use of eminent domain for economic development based on the "diversity" of local conditions confronting them. To take just a few examples, Connecticut, Massachusetts, and New Jersey all permit the use of eminent domain for economic development; states such as Michigan and Colorado do not; in New York, Florida, and Georgia, blight-clearance laws allow takings for economic development via broad definitions of "blight;" but in Illinois, even takings for blight clearance are tightly regulated with restrictive conditions.[28]

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27. Secretary of the State of Connecticut, "Vote on the Proposals of the Constitutional Convention," December 14, 1965, 1966 *Register and Manual* 664-65 (rejecting addition of sentence providing that, "no property shall be taken for public use unless the taking be necessary for such use").

28. *See* Conn. Gen. Stat. § 8-193; Mass. Gen. Laws ch. 121C, § 5(l); N.J. Stat. §§ 40:54D-18-21 (2004) (allowing use of eminent domain by "Tourism Authority" "if it is necessary or useful to . . .

(Cont'd)

Such state-law variations stem from differences in local conditions that the individual states are "exceptionally familiar with." *Clark*, 198 U.S. at 368. They are also products of the state experimentation that this Court has sought to foster. *See Smith v. Robbins*, 528 U.S. 259, 275 (2000) ("We will not cavalierly impede the States' ability to serve as laboratories for testing solutions to novel legal problems." (internal quotation marks and citation omitted)); *see also* Merrill, *supra* note 29, at 115-16 ("De-federalizing public use would allow us to take advantage of the twin virtues of federalism: experimentation and competition among states.")

V. Petitioners' Proposed Restrictions on the Use of Eminent Domain Are Unsupported, Unnecessary, and Unworkable.

A. Neither Precedent nor Logic nor the Facts Call for A "Reasonable Certainty" Requirement.

The petitioners argue in the alternative that even if economic development is a "public use," this Court should throw up an additional hurdle to block condemnations for economic development unless "the government can show that there is reasonable certainty that the project will proceed and yield the public benefits that are used to justify the condemnation." (Pet. Br. at 36.) The petitioners cite no case law of this or any other federal court that would support this restriction.[29] Nor do

(Cont'd)
economic development"); *County of Wayne v. Hathcock*, 684 N.W.2d at 765; C.R.S. § 31-25-107 (requiring finding that "principal purpose" of urban renewal plan is elimination of "physically blighted or slum areas" where plan seeks to condemn property for transfer to private party); *Yonkers Cmty. Dev. Agency*, 335 N.E.2d at 327; Ga. Code Ann. § 8-4-2; *Panama City Beach Cmty. Redev. Agency v. State*, 831 So.2d 662 (Fla. 2002) (undeveloped land may be considered "blighted," and thus condemned, under Florida redevelopment statute); 65 Ill. Comp. Stat. 5/11-74.4-3(a) (2004).

29. In *Cincinnati v. Vester*, 281 U.S. 439 (1930), the Court did not reach the constitutional issue, holding that a city ordinance that failed to
(Cont'd)

they offer any cogent reason for applying such a restriction to this case. They argue that "any public benefit from economic development condemnations flows from the actions of a third party, rather than the condemnor." (Pet. Br. at 32.) But before any private developer could break ground in the Fort Trumbull area, the City had to assemble its collection of small parcels. As shown above, government assembly of land in older urban environments is itself a public good because it eliminates conditions that act as barriers to entry to the market for modern development projects. *See Midkiff*, 467 U.S. at 229; *Hodel*, 481 U.S. at 704. Thus, this is not a case in which the public benefits will be achieved "only through the success of private parties." (Pet. Br. at 14.)

Even if it were such a case, however, it is not clear why that would make the achievement of those benefits any less likely, or, stated differently, why enlisting government entities to do the work would make the public benefits more "certain." Success in generating public benefits is rarely guaranteed for any use of eminent domain – even for a "public use" as traditional as a canal built by the Army Corps of Engineers.[30] Moreover, condemnations for blight clearance cannot be said to "succeed," if the land, once cleared, remains vacant and ultimately attracts dumping, prostitution, or drug dealing. Yet this Court has never suggested that a showing of "reasonable certainty" was required for these or any other applications of eminent domain authority that it has upheld. *See Ruckelshaus*,

(Cont'd)
specify the purpose for which the property was to be taken violated an Ohio statute.

30. *See United States v. 2997.06 Acres of Land*, 471 F.2d 320 (5th Cir. 1972) (upholding condemnation for Cross-Florida Barge Canal even after canal construction was stopped by Presidential Order); Craig Pittman, "Digging Ourselves into A Hole," St. Petersburg Times, October 31, 1999 ("Built in the wrong century for the wrong reasons with the wrong numbers to justify it, the Cross Florida Barge Canal will forever stand as one of the biggest blunders in Florida history").

467 U.S. at 1015 n.18 ("The proper inquiry before this Court is not whether the provisions in fact will accomplish their stated objectives."). Indeed, as shown in Respondents' brief, the notion that courts should second-guess whether any condemnation is "reasonably certain" to achieve its purpose would break with this Court's jurisprudence properly confining unelected judges to a deferential review of the "rationality" of economic and social regulation. (Resp. Br. at 38-41, 18-27.)

Moreover, while no one can guarantee the success of the Fort Trumbull project or any other application of eminent domain authority, the State and the City have taken reasonable steps to ensure that the Plan will be carried out. As the Connecticut court found, the requirements of Chapter 132 and related contractual provisions provide "definitive assurances" that the private sector participants will adhere to the Plan. *Kelo*, 843 A.2d at 545. As the City's statutorily designated "development agency," the NLDC remains subject to its control and may not sell or lease any parcels within the project area without the approval of the City Council. Conn. Gen. Stat. § 8-193(a). In addition, every single such sale or lease will have to be approved by the State, which will scrutinize each conveyance and may inspect the premises of the buyer "to determine if [its] business satisfies the land use requirements" of the Plan. (*Id.*; DECD Report at IV-12.) The State will also have to approve construction contracts and business plans before the NLDC may lease any property to the developer.[31] Such oversight stems from the State's control over the funding for this project, "without which nothing goes forward" and which it will condition upon compliance with an "assistance agreement" between itself and the NLDC. (Mem. Dec. at 104; DECD Rep. at IV-10.)

31. Development Agreement Between New London Development Corp. and Corcoran Jennison Co., Inc., October 3, 2001, §§ 2.04, 3.03. This Agreement was admitted at trial for identification purposes. *See* Appendix.

Even after the NLDC has transferred the properties, the developer remains contractually bound to complete the project in accordance with the Plan. In addition, "the terms of the development plan providing parcel-specific land uses, to which private developers participating in the project must adhere, provide significant control over the destiny of the parcels." 843 A.2d at 545 & n.64.

Perhaps because of such ongoing State oversight, Connecticut has compiled a record of successful economic development projects under Chapter 132 and its sister statute, the 1990 Manufacturers Assistance Act, Conn. Gen. Stat. §§ 32-220 *et seq*., which also authorizes eminent domain for economic development. According to the most recent available data, by 1991, these statutory programs had generated 62 projects, hosting 667 businesses that employed a total of 32,000 persons and, in 1991 alone, yielded over $22 million in municipal tax revenues before consideration of abatements.[32] The following are some noteworthy projects that required the use of eminent domain:

- **West End Municipal Development Project, Bridgeport, CT**. This Chapter 132 plan was adopted in July 1994, and sought to retain businesses in the 124-acre West End project area, which had lost some major employers. The Plan notes that surrounding suburbs were better able "to provide build-to-suit sites" and had "suitable available land."[33] According to Bridgeport officials, the West End project has resulted in seven private investments in new business

32. DECD Report, "Executive Summary." None of these projects has been abandoned, and petitioners are wrong to suggest that the City may abandon the Fort Trumbull MDP after three years if it fails to succeed. (Pet. Br. at 45.) A municipality may not abandon an MDP where, as here, it has received State funding. (Conn. Gen. Stat. § 8-200(b).)

33. West End Industrial Area Dev't Plan, July 1994, Introduction 1, available from City of Bridgeport, CT.

facilities on land acquired by eminent domain and voluntary acquisitions; has created or retained 200 jobs; and has enhanced the assessed taxable property base in the area by more than $10 million.

- **North Colony Street Industrial Park, Meriden, CT**. This Chapter 132 project involved the reclamation of 15.4 acres in an industrial "brownfield" in the City of Meriden. The project resulted in new construction and almost doubled the number of jobs in Meriden at a major employer, TI Automotive. It received the Environmental Protection Agency's 2001 Phoenix award, which recognizes successful transformations of industrial areas into productive new uses.[34]

- **The Lacey Project, Bridgeport, CT**. In 1993, the City of Bridgeport kept the Lacey Manufacturing Company, a medical supply manufacturer, from relocating to the suburbs by using eminent domain to assemble 18 parcels in a three-acre area that surrounded the company's Bridgeport facility. The land assembly enabled the company, which employs over 300 workers, to undertake a growth-driven expansion.[35]

B. *The Petitioners' Proposal Would Stifle Economic Development in Cities.*

In an urban environment, where attracting modern development projects requires the assembly and re-use of small parcels, a requirement that courts hold up condemnations until "there are contractual obligations ensuring that the intended public benefits actually occur"

34. DECD, "North Colony Street Industrial Park in Meriden Wins National Development Award," News Release, August 7, 2001.

35. "Lacey Manufacturing, Bridgeport Officials Pursue Expansion," Fairfield County Business Journal, October 18, 1993.

could create a "first mover" problem. (See Pet. Br. at 43.) What if each developer to whom the city markets a "project area" consisting of multiple parcels – including, for example, an abandoned brass foundry or an old oil-tank farm – wants some assurance *before it signs a contract* that the adjacent land will be put to compatible uses? Or what if a business considering locating downtown wants to be sure there will be unused space available for the long-term growth potential of its plant? These are not hypothetical dilemmas for Connecticut cities. Given their shortage of developable land, cities cannot provide such assurances regarding neighboring parcels until they have acquired those parcels, if necessary by eminent domain.

Take River Street, an ongoing Chapter 132 project in New Haven, Connecticut, which involves the conversion of 25 acres of junk yards and oil tank farms along the Quinnipiac River to a mix of light industrial, commercial and residential space. Three years ago, the City of New Haven approved the River Street Plan and voted to use eminent domain to acquire the necessary property.[36] To date, the City has acquired five of the eleven parcels comprising the 25-acre area, and is negotiating for the remaining properties; the process has been slowed by environmental issues, a common feature of urban "brownfields" that complicates the transfer of real estate. Until these issues are resolved and the entire area acquired by the City, however, there will be little prospect of converting the 25-acre area to the commercial and residential uses envisioned by the plan. What developer would commit to building luxury housing next to land that was still operating as a junkyard and that the City could not acquire until it could prove that the future use was "reasonably certain"? In short, the petitioners' restrictions would stifle economic development in the places that need it most.

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36. "Downtown New Haven in Middle of a Boom," New Haven Register, March 31, 2002.

CONCLUSION

What makes this case salient is not the parsing of this Court's Public Use doctrine or its application to the facts of this case. As shown, both are straightforward, and both support the decision reached by the Connecticut Supreme Court. Rather, it is the fact that the exercise of eminent domain will result in taking some of the petitioners' homes, even though for just compensation. This is undeniably a genuine cost of realizing the City's goal of improving the economic well-being of its citizens, but it is one that the State of Connecticut authorized and that both the State and the City decided to incur after careful deliberation conducted in an open, democratic process.

This Court should resist the petitioners' invitation to interfere with the State's and the City's policy choices by contorting the Public Use Clause. Rather, to the extent that the courts should step in to help property owners in cases such as this, it should be to ensure that they receive just compensation. *See* Merrill, *supra*, at 108 ("it is less clear that courts are concerned with uncompensated subjective loss"). In other words, if circumstances like those in this case call for judicial innovation, it should be in construing the Just Compensation Clause to take account of the real cost of losing one's home, not in constricting the Public Use Clause to stifle economic growth in the cities.

The Fifth Amendment does not prohibit the State of Connecticut from empowering a distressed municipality to use eminent domain to assemble small urban parcels into a unified package suitable for modern economic development. New London has done no more than exercise this State-conferred power to address its severe needs for economic revival. Accordingly, this Court should affirm the judgment of the Connecticut Supreme Court.

Respectfully submitted,

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APPENDIX A — LIST OF 31 OTHER STATE MUNICIPAL LEAGUES JOINING CCM BRIEF AS *AMICI CURIAE*

ALABAMA LEAGUE OF MUNICIPALITIES

ARKANSAS MUNICIPAL LEAGUE

LEAGUE OF CALIFORNIA CITIES

COLORADO MUNICIPAL LEAGUE

FLORIDA LEAGUE OF CITIES, INC.

GEORGIA MUNICIPAL ASSOCIATION

ILLINOIS MUNICIPAL LEAGUE

INDIANA ASSOCIATION OF CITIES AND TOWNS

IOWA LEAGUE OF CITIES

LEAGUE OF KANSAS MUNICIPALITIES

KENTUCKY LEAGUE OF CITIES, INC.

LOUISIANA MUNICIPAL ASSOCIATION

MARYLAND MUNICIPAL LEAGUE

MASSACHUSETTS MUNICIPAL ASSOCIATION

MICHIGAN MUNICIPAL LEAGUE

LEAGUE OF MINNESOTA CITIES

MISSOURI MUNICIPAL LEAGUE

NEW HAMPSHIRE LOCAL GOVERNMENT CENTER

NEW JERSEY STATE LEAGUE OF MUNICIPALITIES

NEW MEXICO MUNICIPAL LEAGUE

NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS

Appendix A

NORTH CAROLINA LEAGUE OF MUNICIPALITIES

OHIO MUNICIPAL LEAGUE

OKLAHOMA MUNICIPAL LEAGUE, INC.

PENNSYLVANIA LEAGUE OF CITIES AND MUNICIPALITIES

RHODE ISLAND LEAGUE OF CITIES AND TOWNS

MUNICIPAL ASSOCIATION OF SOUTH CAROLINA

SOUTH DAKOTA MUNICIPAL LEAGUE

TEXAS MUNICIPAL LEAGUE

WEST VIRGINIA MUNICIPAL LEAGUE

LEAGUE OF WISCONSIN MUNCIPALITIES

APPENDIX B — EXCERPTS FROM 1991 REPORT BY CONNECTICUT DEPARTMENT OF ECONOMIC DEVELOPMENT

CONNECTICUT INDUSTRIAL PARK PROGRAM 1967 – 1991

A special report on the history and development of Connecticut's Industrial Parks Program since its inception in 1967 with statistical data on employment, dollar investment and community economic development assistance.

Prepared by Peter S. Simmons and Jonathan D. Ford
Community & Business Finance Division

Connecticut Department of Economic Development
865 Brook Street, Rocky Hill, Connecticut 06067

Lowell P. Weicker Jr., Governor
Joseph J. McGee, Commissioner
A. Searle Field, Deputy Commissioner

February 1, 1992

EXECUTIVE SUMMARY:

The Industrial Park Program was enacted through legislation in 1967. Since then, the program has gone through numerous modifications, the most significant being in 1990 with the enactment of the Economic Development and Manufacturing Assistance Act. Under this Act, the Industrial Park Program

was consolidated with other economic development programs of the Department of Economic Development and additional flexibility was added in order to address the challenges of the 1990's.

Nevertheless, the primary goal of the program has been and remains the planning and development of properly located real estate to facilitate the private investment and job creation of the state's manufacturers and other economic base industries.

Major highlights of the program are:

There are a total of 62 projects that have been developed; these projects have been located throughout all regions of the state with a greater concentration in urban areas.

These 62 projects involved approximately 4,350 acres of land, resulting in over 3,500 acres of developable lots ready for private investment.

There are 667 businesses located in the park projects, employing over 32,000 persons.

Approximately 19.5 million square feet of building has been developed in the parks; real and personal property taxes received by the host municipality in 1991 were, with only 86% of the projects reporting, in excess of $22 million. This number does not include any property taxes that were abated in that year under municipality or state programs.

Appendix B

At the present time, there are over 2,800 acres that have been sold/leased, and 670 acres that are fully developed and available for sale or lease. In addition, there are about 470 acres currently in planning for which development is anticipated by the end of 1992, and about 600 acres of land for which planning projects will be initiated during this same time frame.

To date, the state has authorized and is spending approximately $ 114,260,560 of bond funds in support of the program. It is projected that an additional $13 million will be requested in 1992 for additional projects.

Location of Projects

The accompanying map and table identifies the municipalities of Connecticut with which the Department of Economic Development formerly reviewed a project proposal. As of December 1991, the Department has examined 141 proposals in 77 cities and towns. Of these proposals over 62 projects have been completed or are currently in development: 11 additional projects are in the planning stage.

Figures 4, 5 and 6 present the distribution of project and grant awards by the 9 major geographic/economic regions of the state (a description of these regions can be found in the Exhibits section). Projects have been developed in every region of the state, as shown on figure 5, *Grant Approvals*.

Figure 6, *Grant Apportionment* compares the degree of development activity which has occurred within the regions

on a percentage basis. The regions dominated by the state's largest urban centers (New Haven, Waterbury, Hartford, and Bridgeport) have received the greatest amount of financial assistance for economic development projects. 75% of the Program funding was applied to projects located in or near the State's major urban centers. The least amount of development activity has occurred in the Midstate region, predominately Middlesex County. 5 proposals were reviewed by this Department, however, due to site concerns and a lack of sewer and water utilities preempted further action. One project, the Middlesex Mutual Assurance Company Redevelopment Project, was successfully implemented and completed.

Statewide a total of 169 grants were administered under the Industrial Park Program. This breaks down as 63 Planning, 75 Development, and 31 Special Development grants.

Grant and Project Award

Figure 9, *IBD Grant Activity,* presents the Planning and Development Grant awards in 3-year increments from 1967 to 1991 with a $13 to $16 million in funding projected for 1992. The early years of the Program experienced greater activity in Project Planning, while the development phases lagged behind until the 1979 to 1981 period when a significant increase in development activity occurred.

It is noted that many of the early planning grants were awarded for projects which did not proceed into development due primarily to site constraints.

Appendix B

LEGISLATIVE HISTORY

In 1965 the General Assembly passed Public Act 449 which found and declared that the continued growth of industry, research and business enterprise in the State was essential to maintain Connecticut's competitive position among the states of the nation. The Legislature recognized the increasing difficulty of business and industry to acquire and improve land for their needs in accordance with local, regional and state planning objectives. In order to insure the State's tax base, public services, and manufacturing employment opportunities, it was deemed necessary and in the public interest for the State to forge a partnership with municipalities to assemble suitable land resources and equip them with the necessary utilities, streets, and other public services.

In the 1970's a number of Public Acts extended the scope of the Industrial and Business Development (IBD) Program – water areas; acquisition, improvement and demolition of vacated commercial plants; and the mini-industrial park program were new considerations of the program. The decade's legislation also outlined State grant utilization and municipal financial responsibilities, including increased state participation for distressed municipalities.

Changes in the program made in the 1980's were even more expansive. P.A. 81-98 required a municipality's legislative body to approve a project before the Project Development Plan could be accepted by the Commissioner of Economic Development. A more flexible definition of a vacant commercial plant was defined. The types of non-

occupancy situations for industrial buildings eligible for special planning grants was increased along with the types of industries eligible for Chapter 132 loans in distressed municipalities. P.A. 85-50 authorized distressed municipalities to loan funds to businesses and industries renovating or operating within the industrial park.

The Industrial Park Program provides assistance to construct on-site improvements for a project with limitations on state financial participation in off-site improvements. In 1985 the Infrastructure Development Economic Assistance (IDEA) Program was enacted. This program provided assistance for off-site roadway and infrastructure improvements to serve a specific manufacturing site. I.D.E.A. was expected to speed the overall process by avoiding the delays associated with the Industrial Park Program. In practice however, I.D.E.A. revealed its own problems, largely due to stringent associated terms and the challenge of land assembly in urban areas. Hence, no projects were undertaken under the I.D.E.A. Program.

In the late 1960's and 1970's the Municipal Development Projects program was given life and structure. In the 1980's the program grew and was shaped, primarily to attract and sustain small businesses.

Development Phase

As with the Planning Phase, the engineering contract is executed between the agency and the consultant. The plans and specifications for project construction activities are available to all interested construction contractors by the

agency. The construction contract is also executed between the agency and the general contractor. During the construction phase, the development agency has direct control over the construction of the project improvements with full coordination and review by the Department.

Fiscal Management

The Assistance Agreement (contract) between the state and the agency details the administrative and financial obligations for the project.

In administering project funds, the agency approves and charges all eligible expenditures from the project account. To meet state reporting requirements, the agency must submit to the Department Quarterly Financial Reports accompanied by a Balance Sheet, Monthly Meeting Minutes of the agency's ruling body, and Monthly Progress Reports. Additionally, biannual audits are conducted on all Planning and Development Grants Accounts and submitted to the Department for review and approval.

Payment from State Grant funds occurs on an allotment basis. The agency typically submits to the Department payment requisition, based on a 6-month cost projection, requesting a drawdown from the state grant. Following the allotment and allocation process, the funds are then placed in the agency's project accounts.

Most Industrial Park Projects, at this time have been

converted to the Tax Exempt Proceeds Funds Accounts.

Bonds

Frequently, state and local financing of these projects, are obtained by the sale of long-term bonds. Municipalities have had two types of bonding packages at their disposal to conduct an industrial park project; 1) General Obligation Municipal Bonds, and less frequently, 2) Tax Increment Financing, in which the taxes anticipated from the parcel sales are pledged to reduce bonding costs.

Role of Other Divisions within DED

Prior to completion of project construction, private and public sector marketing forces are used to attract industries. The services of private commercial real estate brokers and the municipal development agencies are encouraged to recruit businesses into the project.

The Division of Business and Regional Services in the Department of Economic Development takes a proactive role in marketing the industrial parks. The division maintains the largest computer database of available industrial and commercial properties in the state. This listing is available to the brokers actively working with a client company, and the public, and use by the Department of Economic Development. Regional Field Agents of this division, using this database and other tools available to them, have been instrumental in relocating a significant number of both

in-state and out-of-state companies to many of these parks.

Role of Other State Agencies

State Agencies are involved with the development process of the industrial park program from the early planning stages through to the construction of improvements.

As previously outlined under Process and Overview, the Department of Economic Development circulates all project proposals to state agencies through the Office of Policy and Management in a preliminary review. The agencies are encouraged to comment on the proposed development, and provide any history of state agency actions within the project area, and possible impacts and concerns which must be mitigated prior to development. This review establishes the groundwork for coordination of planning and development activities for the duration of the project.

State agency involvement continues with the final review process which includes the circulation and review of the CEPA documentation, if required, and the Project Development Plan. Both of these documents must satisfy each state agency's planning objectives prior to the commitment of state funding.

Industrial Park Projects must comply with applicable local, state, federal permits and regulations. Coordination of

the application process for these various permits is closely monitored by the Department of Economic Development.

Land Disposition

The main goal of this Program, is to create and retain quality jobs for the citizens of Connecticut. An equally significant goal of the program is the creation of fully equipped industrial property served with full utility infrastructure. Performance standards are established for the park which encourage architectural quality in the building construction and landscaping to produce an aesthetically pleasing and environmentally sound park – a showcase in industrial development for the tenant companies and the community.

Once the construction activities have begun, the project is then ready for the market. Frequently, marketing can begin prior to construction to meet the schedule of prospective businesses. The Project Budget assists in funding the municipality's marketing and administrative program for the park. Prior to a land sale by the municipality to an industry, an approval of this sale, as required by statute, must be obtained by the Commissioner. This review and approval is to ensure that the use is appropriate for the park, and the sale price is based on the fair market value of the land.

To facilitate approval for land sales, a standard package of material is required to be submitted to the Department for review. This package includes; 1) the land sale contract, 2) the A-2 Class boundary survey of the parcel being sold, 3) the Metes and Bounds Description of the parcel being sold,

and 4) a Departmental parcel/company data form. This material will supply all the information to the Department necessary to approve a typical land sale. Occasionally, a visit by a Department staff member to the proposed occupant is necessary to determine if the business satisfies the land use requirements of the park.

Land sale approvals are typically processed by the Department within 3 to 5 working days.

Performance Standards

Performance Standards and permitted land use controls are adopted in the Project Development Plan and filed in the Municipal records as Land Use Covenants. All site plans and building construction must comply with the standards set forth in the covenants. Performance standards adopted for the parks are generally more restrictive then the applicable municipal zoning regulations.

Enforcement of these regulations is the responsibility of the municipal zoning and the local economic development office who accomplish this through normal zoning board and site plan approvals and through regular inspections of the project. The Department staff also conducts spot inspections of projects to monitor the maintenance of the project roadways and ensure that the businesses keep their properties in good repair and neat and orderly condition.

Permitted uses for the projects are designed to attract those industries which are manufacturers or wealth generating businesses. Professional office space uses, retail trades and

other services sector industries that are not considered priority economic base business generally are not permitted in state sponsored projects.

Manufacturing companies are defined as having a Standard Industrial Classification (SIC) Codes assigned by the Federal Labor Department between the 2000 and 3999. Warehouse and distribution operations with an SIC in the range of 5100 are also allowable business activity within an IBD project. Most recently, approved state funded industrial parks limit the number of distributions activities allowed in the project.

Additionally, any business operation which directly supports manufacturing, such as research and development, or is wealth generating, such as a bank, insurance company or lending institution's headquarters or capital processing centers are considered an economic base industry, and is an eligible use for awarded by the State to Valley Cities and Towns amounting to $34,472,698. From this total, 20 projects were completed to provide employment opportunities for this region.

Urban Projects

Although not a formal initiative, the needs of the state's

cities has been at the forefront of the Department of Economic Development's strategies to foster the state's economic health. Again, the Industrial Park Program is used to help address these needs.

The Program's first projects were undertaken in the major urban centers of the state. During the first years of the Program, projects were begun in the cities of Hartford; the North Meadows Project and the Colt Park South Planning Project*, Ansonia; Downtown Revitalization Project, Norwich; the Norwich Industrial Park, and the Waterbury Captain Neville Drive Industrial Park. Projects developed under the Industrial Park Program still remain major centers of employment and taxes for the cities.

A total number of 20 IBD Project have been undertaken in the State's 5 major distressed urban areas; Hartford, New Haven, Bridgeport, New Britain, and Waterbury. This represents 34% of the IBD Program Development Projects. Additionally, 75% of the total projects undertaken by this program located within the Economic Development Regions of these Connecticut cities. These industrial projects have created 14,000 jobs and furnished 6.5 million square feet of manufacturing space.

As part of this continuing initiative, planning projects in the Cities of Meriden, New London, New Haven, Bristol, and Danbury have being initiated during the Fiscal Year of 1991-92.

* The Hartford Colt Park South was subsequently developed using the Chapter 130 Urban Renewal Program.

APPENDIX C — EXCERPTS FROM DEVELOPMENT AGREEMENT BETWEEN NEW LONDON DEVELOPMENT CORPORATION AND CORCORAN JENNSION CO.

DEVELOPMENT AGREEMENT BETWEEN NEW LONDON DEVELOPMENT CORPORATION AND CORCORAN JENNISON COMPANY, INC. DATED: OCTOBER 3, 2001

Article II

INTRODUCTION AND BASIC TERMS

2.01. *Introduction.* This Agreement will govern the relationship of NLDC and the Developer with respect to the development of the Project.

2.02. *Project Area.* The Project Area will consist of approximately 27.5 acres of real property, more particularly shown as constituting three (3) parcels designated as MDP Parcels 1, 2 and 3 on *Exhibit C*, as more fully described on *Exhibit C-1* attached hereto (the "Project Area").

2.03. *NLDC's Obligations.* NLDC hereby agrees to undertake and complete the NLDC work, all as more fully set forth in Articles III and IV and further terms and provisions set forth herein. NLDC further agrees to convey the Project Parcels to the Developer by Ground Lease,

substantially in the form attached hereto as *Schedule A*, and, in the case of the NUWC Property, the Sublease, all as more fully set forth in Article III.

2.04. *Developer's Obligations.* Developer hereby agrees to undertake and complete the Project (excluding the NLDC Work) in accordance with the Plans and Specifications, the terms of the MDP, the EIE, the NUWC-EA, and all Legal Requirements, including any and all environmental land use restrictions required by DEP, at its sole cost and expense (utilizing, to the extent limited by Section 6.01(a), third-party equity and debt financing secured by Developer), as more fully set forth in Article V hereof and in accordance with the further terms and provisions hereof.

2.05. *The Project*. The Project shall consist of construction of Phase A (Hotel, Conference Center and Marina), Phase B (Housing), Phase C (Building 2 Renovation), Phase D (New Commercial #1), and Phase E (New Commercial #2) as shown and described on the Site Plan attached hereto as *Exhibit D* and as described on *Exhibit E*, as the same may be from time to time amended in accordance with the terms of this Agreement. The public rights of way shown on *Exhibit C-3* will be conveyed to and maintained by the City of New London, except as provided in Sections 4.06 (b) and 4.07. The Project shall be named the Fort Trumbull Peninsula Redevelopment Project, or such other name as may be approved by NLDC.

2.06. *Term*. This Agreement shall be effective from and after the date hereof, and shall terminate with respect to each Phase upon the issuance of a Certificate of Completion for

such phase, except with respect to obligations and liabilities which expressly survive the termination hereof as set forth herein, or as otherwise set forth in the Certificate of Completion.

2.07. *Acknowledgement of Role of State.* NLDC and the Developer agree and acknowledge that: (i) the State, acting by and through DECD, has entered into, or will enter into, the various financial assistance agreements, including the Assistance Agreement, which will provide substantial financial assistance for the development of the Thames Peninsula Area and in association with NLDC has assisted with the preparation of the MDP pursuant to Chapters 130, 132 and 5881 of the Connecticut General Statutes, as amended, (ii) without such financial assistance from the State the Project would not be developed and completed as contemplated

(ii) the NLDC Work to be completed prior to commencement of the Phase as described on *Exhibit G* has been completed;

(iii) NLDC has secured such approvals as are its responsibility as set forth on *Exhibit O*, and as may be required to convey the Project Parcel;

(iv) the Developer has satisfied the "Conditions Precedent to Lease", as set forth below in Section 3.03.

The Developer shall have the right to waive conditions 3.02(a) (i) through (iii); NLDC, with the prior written

approval of DECD, shall have the right to waive condition 3.02(a)(iv). Execution of a Ground Lease by the Developer for a Phase shall constitute Developer's agreement that NLDC has satisfied conditions (i), (ii), and (iii) with respect to such Phase, except as otherwise expressly set forth in the Ground Lease or in a separate agreement executed in connection therewith expressly referencing this Section 3.02(a).

(b) A Ground Lease or Sublease, with respect to the NUWC Property (except as set forth in Section 3.05(b) below) shall be entered into with respect to a Project Parcel at the time when all conditions precedent to lease such Project Parcel are satisfied or waived.

3.03. *Conditions Precedent to Lease.* NLDC shall not be obligated to enter into a Ground Lease or Sublease with the Developer unless and until the Developer has delivered to NLDC and DECD for approval evidence, in form and substance reasonably satisfactory to NLDC and DECD, that it is prepared to commence construction of a Phase on the Project Parcel to be conveyed including, without limitation, the following:

(a) Permits and Approvals. All governmental permits and approvals required to construct the Phase have been issued, remain validly outstanding, and have been complied with in all respects;

(b) Design and Construction Contracts. The Developer has entered into such construction contracts, as

shall be necessary to complete construction in compliance with the Plans and Specifications and the terms hereof;

(c) Insurance Requirements. The Developer has obtained the insurance coverage required pursuant to the Ground Lease;

(d) Evidence of Financial Feasibility. Evidence that sufficient funds are available to complete the Phase on the Project Parcel to be conveyed, including, without limitation, loan and equity commitments containing customary and reasonably attainable contingencies and conditions providing sufficient funds to cover the cost of any construction, renovations, architects, engineers and other professional fees, debt service, taxes, insurance, legal fees, loan fees, operating expenses, and all other reasonable needs of the Phase. The evidence shall be consistent with information provided in the Business Plan, as amended, as described in Section 5.03;

(e) Guarantees and Payment and Performance Bonds. Corcoran Jennison Company, Inc. shall have executed the Performance and Completion Guarantee in substantially the form set forth in Schedule D, and Developer shall have delivered the payment and performance bonds as described in Section 5.08; and

(f) Developer shall have complied with the requirements set forth in Section 5.03 below, NLDC and DECD shall have approved the Business Plan for the subject Phase pursuant to Section 5.03 and Developer shall have certified that there has been no material change in the

information included in the Business Plan for the subject Phase since it was approved by NLDC and DECD.

3.04. *Permitted Encumbrances.*

(a) Developer shall take the Leased Premises (as defined in the Ground Lease) subject to the Permitted Encumbrances, as described in Article III, and to such other easements and rights of way as shall have been granted or reserved by NLDC in connection with the Project, subject to the reasonable prior approval of the Developer. Anticipated easements and rights of way are shown on *Exhibit C-3*, *provided*, *however*, the parties recognize and agree that other easements and/or rights of way may be necessary or desirable for the Project. Such Encumbrances shall include public access easements to the Riverwalk and the so-called "Green".

(b) The parties acknowledge and agree that subject to compliance with the standard requirements of the City of New London, the City shall, upon completion, accept the public streets constructed and to be constructed within the Project. The parties agree that Project Parcels may be conveyed subject to easements for completion of said streets and that upon completion of the streets, the parties shall cooperate in offering the streets to the City to be held and maintained as public streets.

3.05. *Acquisition Closing Schedules.*

(a) Time shall be of the essence with respect to Developer's obligation to enter into the Ground Lease for a

Phase (or a Sublease for Phases A, B, C and/or E) on or before the Default Milestone specified for a given Phase.

(b) In the event that fee title to the NUWC Property has not been transferred to NLDC and, as a result, the Developer is unable to satisfy the requirements of Section 3.03 (d) with respect to Phases A, B, C and/or E by the Default Milestone for execution of a Ground Lease, and provided the Developer has exercised reasonable efforts to secure such financing on reasonable commercial terms, then (i) the Developer shall not be required to enter into the Sublease, and (ii) the Default Milestones for Phases A, B, C and E, as applicable, shall be extended by a period equal to the time between the Default Milestone and the date on which fee title to the NUWC Property is conveyed to NLDC.

Article V

THE PROJECT DEVELOPMENT DEVELOPER'S OBLIGATIONS

5.01. *Developer Obligations.*

(a) With the exception of the NLDC Work, the Developer shall, at its sole cost and expense (utilizing third-party debt and equity financing secured by the Developer), subject to the terms of this Agreement, complete construction of all Phases of the Project in accordance with the Plans and Specifications and the Default Milestones. In particular, the Developer further agrees to undertake and perform, for each Phase, the activity listed in the "event" column of *Exhibit F* on or before each applicable Default Milestone. The Developer

recognizes and agrees that the NLDC Work shall be limited to the work authorized and approved by DECD pursuant to the terms of this Agreement and the Assistance Agreement. The Developer shall design each Phase, obtain the necessary permits and approvals and construct, or cause to be constructed, each Phase.

(b) Each Phase shall comply with all Legal Requirements (including specifically, but without limitation, all Environmental Laws, the MDP, the EIE, the NUWC-EA, and the terms of this Agreement, the Sublease, and the Ground Lease).

5.02. *Design Review.*

(a) The Developer shall submit for the review and approval of NLDC and DECD all design and engineering work for each Phase, including specifically, the Site Plan and the Plans and Specifications. Such Plans and Specifications shall be submitted and reviewed in accordance with the procedures detailed on *Exhibit L.*

(b) The Developer and NLDC shall meet as outlined on *Exhibit L* during the design planning of each Project, from concept to final design. No site plan or design-related approval or other approval by a local, State or federal agency shall be sought by the Developer without prior written notice to NLDC and DECD.

Appendix C

5.03. *Due Diligence Review.*

(a) With respect to each Phase, NLDC and DECD shall undertake a due diligence review and approval process. Not later than ninety (90) days after approval of design development for each Phase pursuant to *Exhibit L*, Developer will submit a business plan for the subject Phase for NLDC and DECD review (herein, the "Business Plan"). NLDC and DECD shall respond within 30 days of submission of a complete Business Plan by the Developer. If the Business Plan does not include sufficient information for NLDC and DECD to provide approval, DECD and/or NLDC may request additional information. Any material change in the Business Plan occurring prior to the execution of the Ground Lease for the subject Phase shall be submitted for review and considered for approval in the same manner as the original Business Plan.

APPENDIX D — MAP

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