Supreme Court of the State of New York
Appellate Division: Second Judicial Department

PARVIZ NOGHREY,
Plaintiff-Respondent-Appellant,

-against-

Appellate Division Docket No.
2006-05365

THE TOWN OF BROOKHAVEN and
THE PLANNING BOARD OF THE TOWN OF BROOKHAVEN
Defendants-Appellants-Respondents.

BRIEF AMICUS CURIAE

Submitted by:
The Association of Towns for the State of New York,
The American Planning Association, &
The New York Metro Chapter of the American Planning Association

Michael E. Kenneally, Jr.
The Association of Towns
of the State of New York
150 State Street
Albany, NY 12207
(518) 465-7933

John D. Echeverria
Georgetown Environmental Law &
Policy Institute
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20002
(202) 662-9859

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITES

STATEMENT OF INTEREST OF THE AMICI CURIAE

The Association of Towns, the American Planning Association ("APA"), and the New York Metro Chapter of the APA respectfully submit this brief amicus curiae urging the Court to vacate the jury verdict and direct that judgment be entered for the Town of Brookhaven. The interest of each amicus is laid out in detail in the motion seeking permission to file this brief.

The Association of Towns is a not-for-profit voluntary membership association that provides ongoing education, information, and training to town officials in all aspects of the land use regulatory process, including the enactment and enforcement of zoning laws.

The APA is a nonprofit public interest and research organization, founded to advance the art and science of planning – physical, economic and social – at the local, regional, state, and national levels. APA has over 41,000 members nationally and over 2,000 members in New York State. APA has filed amicus briefs in other important regulatory takings cases in New York, including Smith v. Town of Mendon, 4 N.Y.3d 1 (2004), and Bonnie Briar Syndicate v. Town of Mamaroneck, 94 N.Y.2d 96 (1999).

The New York Metro Chapter of the APA is a regional chapter of the APA and has over 1,200 members.

This case is of concern to the amici because the liability standard for regulatory takings applied by the trial court is contrary to well established precedent, including this Court's recent decision in Putnam County National Bank v. City of New York, 829 N.Y.S.2d. 661 (2d Dept. 2007), and, if upheld, would impair the ability of local governments to engage in responsible land use planning and regulation. Faced with the risk of financial liability whenever a comprehensive zoning change results in the "substantial" or "significant" reduction in property values, municipalities could not enact or amend their zoning codes to address emerging local problems.

SUMMARY OF ARGUMENT

This $7.3 million "compensation" award puts at risk the ability of New York cities, towns, and villages to continue to carry out their essential land use planning and zoning functions. Under the standard applied by the trial court, local governments face potentially enormous financial liability whenever an amendment to their zoning regulations has a "significant" or "substantial" negative effect on property values. This standard is so expansive and unpredictable that it would have a major chilling effect on local officials attempting to review and update zoning regulations, leading to the ossification of zoning in New York, and undermining a vital legal protection for communities and property owners.

Contrary to the assumption of the trial court, regulatory takings doctrine applies only in extreme circumstances, when regulations are so burdensome that they are the "functional equivalent" of direct appropriations or, to use terminology used by this Court, when an owner retains only a "bare residue" of value. This interpretation (1) is supported by the original understanding of the Takings Clause; (2) protects local democratic decision making; and (3) makes economic sense.

The trial court erred by instructing the jury that it could find that a taking had occurred if Brookhaven's zoning amendment had a "significant" or "substantial" negative effect on the values of plaintiff's two parcels. This liability standard is inconsistent with the functional equivalence standard and, as plaintiff's counsel forthrightly explained to the jury, is so open-ended that it would support liability for any burden that is "not peanuts." This error was compounded by the trial court's incorrect suggestion that adverse economic impact, standing alone, can be sufficient to establish a Penn Central taking.

Finally, the judgment must be reversed because plaintiff failed to establish that the multi-factor Penn Central analysis supports a finding of a taking. Application of the Penn Central factors involves a legal issue that this Court reviews de novo on appeal. As to the economic impact factor, the evidence at trial was contradictory, and the jury made no specific finding of fact. Furthermore, the remaining Penn Central factors, the character of the government action and the

degree of interference with reasonable, investment-backed expectations, both weigh heavily against a finding of a taking.

STATEMENT OF THE CASE

The Town has provided a comprehensive Statement of the Case that amici adopt in full. This supplement (1) highlights the fact that this case arose from a comprehensive zoning amendment adopted in response to serious development pressures, and (2) describes and explains the complex evidentiary record related to the alleged economic burden imposed by the rezoning.

1. In the 1980s, Brookhaven, like other communities on the outer fringe of the New York metropolitan area, lay in the path of a development boom. See Thomas J. Lueck, New Ring of Suburbs Springs Up Around City, N.Y. Times, Apr. 29, 1986, at A1. Between 1959 and 1989, the Town's population had increased from 90,000 to more than 400,000 persons; by 1989, Brookhaven was the fastest growing town on Long Island. Shawn G. Kennedy, L.I. Town Acts to Curb Retail Boom, N.Y. Times, Jan. 25, 1989, at D24; see also JR. 132.

The Town's zoning regulations, and in particular those governing commercial development, were inadequate to deal with this intense development pressure. JR. 1166. Virtually all property along the major east-west roadways through Brookhaven was zoned for commercial use, id., an amount that "was greatly in excess of any possible need." JR. 1261. By the end of the 1980s,

developers had already outstripped the demand for commercial development, resulting in 1,500 stores in Brookhaven closing or failing to open. William B. Falk, The Boom Years in Brookhaven; Town Coming to Terms with Growth in Population, Development, Newsday, Dec. 31, 1989, at pg. 1 (Brookhaven ed.).

In addition, the existing commercial zoning threatened to produce a physically unattractive and economically inefficient pattern of development with "one strip center after another." JR. 1166. Previous strip development in parts of western Long Island had "created a situation of congestion," and "not a pleasant viewscape," JR. 748, an outcome the citizens and political leaders of Brookhaven understandably sought to avoid. JR. 727, 1192-93.

The Town engaged the firm of Raymond Parish Pine and Weiner ("RPPW") to assist in developing new growth-management policies. The planning team was led by Ms. Edith Litt, an experienced and distinguished land use planner. JR. 1248-49. After extensive study and numerous meetings with citizens and community groups, JR. 1258-59, RPPW recommended that the Town rezone vacant commercial properties "before [] the road[s] became unduly congested, before [] signs proliferated, . . . so that there would be a chance for . . . a more rational kind of development." JR. 1262. This zoning amendment was intended to channel commercial development into "cluster[s]" to create "hamlets" and

"identifiable communit[ies]," where residents could "walk from the cleaner to the drug store, to the supermarket, without having to get in [their] car." JR. 1263-64.

Based on these recommendations, Brookhaven rezoned more than 250 properties and over twelve hundred acres, including those owned by Mr. Noghrey, from a commercial to a residential designation. JR. 689. This revised zoning plan is helping to ensure that future development in Brookhaven will produce less traffic congestion, less environmental degradation, and a more livable and attractive community.

2. The record contains extensive – and highly contradictory – evidence about the economic impact of the rezoning on the market value of Mr. Noghrey's two parcels. Four different estimates of the value of each property, zoned for either commercial or residential use, were presented to the jury. Significantly, the jury's compensation awards do not line up with any of the appraisals.

Plaintiff's appraiser, Elinor Brunswick, provided two estimates of the value of the first parcel, subject to commercial zoning: $1,600,000 with a site plan filed, and $1,450,000 without a site plan filed. JR. 160-61. These estimates were based on the sale prices of several allegedly "comparable" properties and were supposedly corroborated by a contract Mr. Noghrey negotiated for the sale of the property for $1,600,000, contingent upon site plan approval for a strip shopping

center development. JR. 260-61, 1628.[1] Defendant's appraiser, Mr. George Veitch, also provided two estimates of parcel one's value subject to commercial zoning, $919,000 in a 2003 appraisal, JR. 935-36, and $766,500 in a 1990 appraisal. JR. 1106. Ms. Brunswick estimated that parcel one was worth only $8,000 subject to residential zoning. JR. 159.[2] Mr. Veitch provided three estimates of parcel one's value under residential zoning, either $166,000 or $130,000, depending on the number of lots that could be created, in his 2003 appraisal, JR. 946-47, and $171,000 in his 1990 appraisal. JR. 1106. Altogether, these appraisals suggest that parcel one was worth between $1,600,000 and $766,500 subject to commercial zoning and between $171,000 and $8,000 subject to residential zoning.

Similar appraisals were offered for the second parcel, suggesting that it had a value of between $1,990,000 and $958,500 subject to commercial zoning, JR. 160-62, 936, 1106, and between $228,000 and $10,000 subject to residential zoning. JR 160, 946-47, 1106.

[1] Testimony offered by another of plaintiff's witnesses, Mr. Eliud Custodio, suggests that the evidence relating to this sales contract undermines, rather than corroborates, Ms. Brunswick valuation. Mr. Custodio testified that property value can more than double when site plan approval is granted. JR. 325. This suggests that the value of a property with site plan approval should greatly exceed its value when a site plan has merely been filed. Ms. Brunswick's testimony regarding the second parcel is infected by the same discrepancy. JR. 260, 1637.

[2] This estimate was not based on evidence from actual sales but calculated by taking the property's 2002 sale price of $185,000, discounted to 1989 dollars, and subtracting all taxes and insurance expenses paid. JR. 155-57.

The jury made compensation awards of $757,000 for parcel one and $890,000 for parcel two. JR. 1601, 1603. Because the trial court rejected the Town's request that the jury be instructed to make specific findings on the "before" and "after" value of the properties, DB. 27, and because the jury evidently declined to accept in toto the testimony of any of the expert appraisers, it is impossible, as plaintiff acknowledges, to determine "what the jury found the property values to be prior to, or after the rezoning." PB. 34. As the Town has explained, DB. 35, if the jury accepted the plaintiff's highest "before" value, the verdict reflects a factual determination that parcel one was reduced in value by 47% and parcel two by 44%. In sum, the verdict leaves open the possibilities that the jury concluded that parcel one lost between 47% and 98% of its value and that parcel two lost between 44% and 92% of its value.

ARGUMENT

I. THE TAKINGS STANDARD APPLIED BY THE TRIAL COURT WOULD SERIOUSLY UNDERMINE THE ZONING POWERS OF NEW YORK CITIES, TOWNS, AND VILLAGES

This takings award, unless reversed, will seriously undermine the ability of cities, towns, and villages to carry out their traditional and vitally important planning and zoning responsibilities. The trial court instructed the jury that it could find that a zoning amendment effects a regulatory taking whenever it has a "significant" or "substantial" negative effect on property values. JR. 1546. As a

result, the jury found a taking based on the Town's entirely conventional action of shifting certain lands from a commercial zone to a residential zone. This liability standard is so expansive and unpredictable in application that it would deter local officials from reviewing and updating local zoning regulations, threatening to significantly erode the local zoning power in New York.

Local land use regulation has long been recognized as an important governmental function. As the U.S. Supreme Court stated in Dolan v. City of Tigard, 512 U.S. 374, 396 (1994), "[c]ities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization." Accordingly, "[t]he right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land use restrictions." Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001).

In the landmark case of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Supreme Court rejected a constitutional challenge to a zoning ordinance that, like the zoning in this case, barred commercial development in certain portions of a community. Id. at 390. The Court stated:

> Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been

> rejected as arbitrary and oppressive. . . . And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise.

Id. at 386-87. Despite allegations that the plaintiff's property had lost 75% of its value, the Court upheld the constitutionality of the ordinance.

In the wake of Euclid, which has never been questioned by the U.S. Supreme Court, federal and state courts across the country have repeatedly rejected takings claims based on zoning amendments restricting permitted uses or intensity of development. See, e.g., Briarcliff Assocs., Inc. v. Town of Cortlandt, 272 A.D.2d 488 (2d Dept. 2000) (finding no taking when property limited to residential use); Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660 (Tx. 2004) (finding no taking when development density restricted); Animas Valley Sand & Gravel, Inc., v. Bd. of County Comm'rs, 38 P.3d 59 (Colo. 2001) (finding no taking when industrial uses restricted); Zealy v. City of Waukesha, 548 N.W.2d 528 (Wis. 1996) (finding no taking when residential uses restricted). Indeed, we are not aware of any court that has found a taking based on circumstances similar to this case.[3]

[3] Plaintiff cites Resolution Trust Corp. v. Town of Highland Beach, 18 F.3d 1536 (11th Cir. 1994), as an example. However, that decision was vacated by the U.S. Court of Appeals for the Eleventh Circuit sitting en banc. 42 F.3d 626 (11th Cir. 1994).

Holding local governments liable for routine zoning decisions "would transform government regulation into a luxury few governments could afford." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 324 (2002); see also Penn. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").[4] Expansive takings liability would have a particularly dramatic chilling effect because it is difficult if not impossible for local governments to obtain insurance against these claims. Furthermore, in the case of smaller communities, large compensation awards could devastate modest municipal budgets. See Christopher Sierkin, Big Differences for Small Governments: Local Governments and the Takings Clause, 81 N.Y.U. L. Rev. 1624, 1666-70 (2006) (explaining that local government budget constraints make local officials risk averse in the face of takings claims); see also Eastern Enters. v. Apfel, 524 U.S. 498, 542 (1998) (Kennedy, J. concurring and dissenting) (noting that expansive takings liability could "subject[] States and municipalities to the potential of new and unforeseen claims in vast amounts").

[4] Significantly, as a result First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), local governments cannot avoid financial liability simply by rescinding a regulation held to be a taking.

The liability standard imposed by the trial court would create daunting challenges for municipalities in New York. Over 77% of New York State's 1,544 cities, towns, and villages exercise zoning authority. N.Y. State Legislative Commission on Rural Resources, Land Use Planning and Regulations, 2, 13-14 (2004). Moreover, the takings compensation award in this single case exceeded the 2005 expenditures of over 85% of New York towns. N.Y. State Comptroller, Financial Data for Local Governments (2005), available at http://www.osc.state.ny.us/localgov/datanstat/findata/index_choice.htm.

It is noteworthy that Judge Eugene Nickerson of the U.S. District Court for the Eastern District of New York previously rejected an essentially identical takings claim based on this same rezoning. Elias v. Town of Brookhaven, 783 F.Supp. 758 (E.D.N.Y. 1992). Rejecting the argument that rezoning commercially zoned land to residential use constituted a taking, Judge Nickerson observed that: "The Fifth Amendment . . . does not guarantee to an investor in land that the existing zoning regulation will remain unchanged. . . . . To hold otherwise would be to draw into question the effective power of a locality to plan for the future needs of its residents." Id. at 761. The expansive liability standard applied by the trial court flies in the face of Judge Nickerson's cautionary words.

II. REGULATORY TAKINGS DOCTRINE IS PROPERLY RESERVED FOR "EXTREME CIRCUMSTANCES"

A. The Takings Clause Only Applies to Regulations That Are the "Functional Equivalent" of Direct Appropriations

The touchstone of regulatory takings analysis is an effort to identify regulations that are "functionally equivalent to the classic taking in which government directly appropriates private property." Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005); see also Consumer Union of U.S., Inc. v. State, 5 N.Y.3d 327 (2005). As a result, regulatory takings doctrine is reserved for truly "extreme circumstances." United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985).

Under the umbrella of "functional equivalence," the U.S. Supreme Court has articulated two distinct standards for evaluating regulatory takings claims. First, the Court has established a virtually automatic liability rule for regulations that eliminate "all economically viable use." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028 (1992). Recently, the Court has emphasized that this rule only applies to regulations that effect "the complete elimination of a property's value." Lingle, 544 U.S. at 539; see also Tahoe-Sierra, 535 U.S. at 330. Courts have consistently rejected takings claims under Lucas when a regulation does not literally destroy all value. See, e.g., Cooley v. United States, 324 F.3d 1297 (Fed. Cir. 2003) (finding no Lucas claim when property lost 98.8% of value); Friedenburg v. N.Y. Dept. of

Envtl. Conservation, 3 A.D.3d 86 (2d Dept. 2000) (finding no Lucas claim when property lost 95% of value).

Second, the Supreme Court has adopted the Penn Central analysis for regulations that stop one step short of destroying all value. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978). Penn Central calls for an "ad hoc" analysis focused on three factors: (1) the economic impact of the government action, (2) the degree to which the action interferes with reasonable, investment-backed expectations, and (3) the character of the government action. Id. at 124. The Supreme Court has indicated that liability under Penn Central is reserved for truly onerous regulations and it has insisted that severe diminution in value, standing alone, is never sufficient to establish a taking. Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602, 645 (1993). In other words, evaluation of a regulatory takings claim under Penn Central calls for an examination of all three factors.

While there is no precise minimum level of economic impact necessary to support a taking under Penn Central, courts have repeatedly rejected claims involving diminutions in value approaching 90% and above. See, e.g., Putnam County Nat'l Bank, supra, (80%); Appolo Fuels, Inc. v. United States, 381 F.3d 1338 (Fed. Cir. 2004) (78% and 92% diminution); William C. Haas & Co. v. City & County of San Francisco, 605 F.2d 1117 (9th Cir. 1979) (95% diminution);

McGowan v. Cohalan, 41 N.Y.2d 434 (1977) (79% diminution); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (92.5% diminution). The U.S. Court of Federal Claims has observed that it "has generally relied on diminutions well in excess of 85 percent before finding a regulatory taking." Brace v. United States, 72 Fed.Cl. 337, 357 (2006), appeal docketed, No. 07-5002 (Fed. Cir. Oct. 3, 2006).

The New York Court of Appeals has applied this extreme economic loss requirement by limiting liability under Penn Central to situations where "the economic value, or all but a bare residue of the economic value, . . . [has] been destroyed by the regulation at issue." de St. Aubin v. Flacke, 68 N.Y.2d 66, 77 (1986); Spears v. Bearle, 48 N.Y.2d 254, 262 (1979) (also describing requirement as "economic destruction"); cf. Rochester Gas & Elec. Corp. v. Pub. Serv. Com'n, 71 N.Y.2d 313, 324 (1988) (requiring that plaintiff lose "all or most of its interest in the property"). This Department has frequently invoked the "bare residue" standard. See, e.g., Friedenburg, 3 A.D.3d 86; Briarcliff, 272 A.D.2d at 490.[5]

B. The Narrowness of Regulatory Takings Doctrine is Supported by Constitutional History, Respect for Democratic Governance, and Sound Economic Analysis

The courts' traditional understanding that most regulatory activity is not a taking has a strong legal, historical, and policy foundation.

[5] Courts in other states have used the same or similar language. See, e g., City of Tucson v. Grezaffi, 23 P.3d 675 (Ariz. Ct. App. 2001) (invoking the New York's "bare residue" formulation); Animas Valley, 38 P.3d at 65 (stating that Penn Central only "provide[s] an avenue of redress for a landowner whose property retains value that is slightly greater than de minimis") (emphasis added).

Language and Original Understanding. First, a narrow doctrine of regulatory taking is supported by the language of the Takings Clause and the drafters' original intent. The word "take" implies an actual physical appropriation of private property. The Supreme Court has confirmed that "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." Lucas, 505 U.S at 1028 n.15. As explained by William Michael Treanor, Dean of the Fordham Law School: "The original understanding of the Takings Clause of the Fifth Amendment was clear on two points. The clause required compensation when the federal government physically took private property, but not when government regulations limited the ways in which property could be used." William M. Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782, 782 (1995). Beginning in the early twentieth century, the Supreme Court held that the Takings Clause could be extended to regulations, see Mahon, supra, but only when they impose burdens that are the "functional equivalent" of a classical taking. Lingle, 544 U.S. at 539.

Avoiding Judicial Intrusion into the Democratic Process. A narrow regulatory takings doctrine also supports our democratic system of government by discouraging judicial intervention into complex land use issues best resolved through the political process. The Court of Appeals has repeatedly affirmed the importance of limiting such judicial intrusion. See, e.g., Bonnie Briar Syndicate,

94 N.Y.2d at 108 ("[I]t is not this Court's place to substitute its own judgment for that of the Zoning Board . . . ."); Spears, 48 N.Y.2d at 262 ("[I]t is important to recognize the breadth of the State's police power and the means by which that power may be exercised.").

Economic Fairness. Finally, a narrow doctrine of regulatory takings is consistent with economic fairness. In Armstrong v. United States, 364 U.S. 40, 49 (1960), the Supreme Court observed that the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Awarding financial compensation to land owners subject to modest regulatory restrictions would violate this principle by conferring windfalls at considerable taxpayer expense. On the other hand, a narrow liability rule limits compensation to those actually singled out to bear unfair burdens.

A takings claimant often views a regulatory restriction as a purely negative impairment of her private property value, ignoring the fact that comprehensive regulatory programs simultaneously protect the owner and the value of her property. In other words, in the Supreme Court's words, regulation creates a "reciprocity of advantage" in which each owner is simultaneously burdened and benefited. Tahoe-Sierra, 535 U.S. at 341. As the Court explained in Keystone Bituminous Coal Ass'n v. DeBendictis, 480 U.S. 470, 491 (1987), "[w]hile each of

us is burdened somewhat by [use] restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."

Regulations also can benefit property owners by limiting development opportunities, thereby increasing the market value of those that remain. For example, a landowner may feel burdened by a regulation limiting the number of houses he can construct on a parcel of property. But if the same regulation applies to other parcels in the community, the effect will also be to increase, perhaps substantially, the value of each individual building lot.

Takings claimants typically rely on appraisers' estimates of the value of their property "before" (without the regulation) and "after" (with the regulation) to measure their ostensible losses. But, in light of the considerations discussed above, this approach seriously overstates the actual economic effect of a regulatory program. This happens because this approach asks how much the claimant's property would increase in value if the restriction were lifted as to that property but all other properties remained regulated. In other words, it allows a takings claimant to continue to reap the economic benefits of the application of the regulation to others in the community while he, and he alone, is relieved of the obligation to comply with it. An accurate measurement of the actual net effect of a regulatory restriction on property value would require calculating what the

value of the property would be if the regulation applied to no one. That calculation, of course, is quite impossible to perform in the real world.

The upshot is that an estimate, using the "before" and "after" approach, that a regulation reduced the value of a property by 50%, for example, does not reveal whether an owner has suffered any actual net economic loss. Accordingly, in order to achieve the goal of fairness articulated in Armstrong, and avoid costly taxpayer-funded windfalls, the Supreme Court has repeatedly insisted that compensation be reserved for those cases where, using the inherently misleading before and after technique, the owner has been deprived of all or virtually all value. See, e.g., Agins v. City of Tiburon, 447 U.S. 255, 262 (1980) (affirming rejection of a taking claim, observing that "[t]here is no indication that the appellants' 5-acre tract is the only property affected by the ordinance," and they "therefore will share with other owners the benefits and burdens of the city's exercise of its police power").[6]

[6] Plaintiff argues that economic impact can also be demonstrated by proof that a regulation deprives a property owner of an "economically reasonable return." PB. 22. While APA questions whether this is a stand-alone measure of economic impact for the purpose of takings analysis, the argument is irrelevant in this case because plaintiff has offered no evidence to support a claim under this theory.

III. THE COURT'S INSTRUCTIONS WERE LEGALLY ERRONEOUS AND THE JUDGMENT MUST BE VACATED

A. The Jury Charge Improperly Permitted Liability Based on a Showing that the Economic Impact of the Zoning Change Was "Not Peanuts"

The trial court instructed the jury that it could find a Penn Central taking if the rezoning of plaintiff's properties resulted in a "substantial" or "significant" reduction in property value. JR. 1546. In his closing argument to the jury, counsel for plaintiff emphasized the expansiveness of this test, asking rhetorically, "is that significant? Is that substantial? You bet . . . . That's not peanuts." JR. 1504. While counsel's remark was entirely consistent with the jury charge, a finding that economic impact is "significant," "substantial," or "not peanuts," is insufficient, as a matter of law, to support a finding of a taking. As this court recently noted, "[a] reasonable land use regulation . . . is not rendered unconstitutional merely because it causes the property's value to be substantially reduced." Putnam County Nat'l Bank, 829 N.Y.S.2d. at 663.

On appeal, a judgment based on an erroneous jury instruction must be reversed if the appellant might have prevailed had the jury been properly instructed. Marine Midland Bank v. John E. Russo Produce Co., 50 N.Y.2d 31, 43 (1980). Here, given the absence of specific jury findings and the conflicting evidence on economic impact, it is plain that reversal is appropriate.

The "substantial" or "significant" regulatory takings test has no support in the case law discussed above and plaintiff makes virtually no attempt to defend its validity. Rather, Plaintiff simply asserts that "the Penn Central charge to the jury is nearly identical to the language from Lingle v. Chevron." PB. 36. In fact, Lingle contains no shred of support for this test. Plaintiff devotes most of its energy to challenging the validity of the "bare residue" test, upon which the Town relies. But, as discussed above, that test, articulated by the Court of Appeals and repeatedly applied by this Department, cannot reasonably be disputed.[7]

The terms "significant" and "substantial" are totally inconsistent with precedent demonstrating that a reduction in value of close to 90% and above, using the before and after approach, is necessary to support a finding of a taking. Webster's Dictionary defines "substantial" as "considerable in quantity" or "significantly great," and "significant" as "of a noticeably or measurably large amount." Merriam-Webster's Collegiate Dictionary 1159, 1245 (11th Ed. 2003). Under these definitions, "considerable" or "large" diminutions could trigger liability without representing the kind of near total destruction of property value necessary to establish a taking.

[7] Plaintiff's argument that the "bare residue" standard triggers a Lucas, per se taking, PB. 32, is meritless. As noted above, Lucas applies only where property has lost all value. Lingle, 544 U.S. at 539

This conclusion is reinforced by various court decisions applying the terms "significant" or "substantial" in other contexts. In Cross v. Cross, 128 A.D.2d 987, 988 (3d Dept. 1987), the Third Department described a husband's income as having been "significantly reduced" when it fell from an annual rate of $34,000 to $23,400, a reduction of 31%. See also, In re Marriage of Bidwell, 12 P.3d 76, 79 (Or. Ct. App. 2000) (describing 17% reduction in value of marital property award as "significant"). In In re Delavan, 52 Misc.2d 315, 316 (Onondaga Cty. Ct. 1966), a New York county court described a 20% diminution in property value as a "substantial decrease." See also Brown v. United States, 73 F.3d 1100, 1105 (Fed. Cir. 1996) (describing 50% reduction as "substantial decrease"). These decisions plainly show that the terms "significant" and "substantial" did not adequately cabin the jury's deliberations in this case. See K & K Const., Inc. v. Dept. of Envtl. Quality, 705 N.W.2d 365, 381 (Mich. App. 2005) (observing that a 24-33% diminution in value "is significant . . . [but] most certainly does not weigh in favor of a finding . . . [of] a compensable regulatory taking").

The trial court purported to rely on this Court's decision in Friedenburg in preparing its jury charge, JR. 1333-34, but that decision does not justify the instructions. To be sure, the Friedenburg Court characterized the 95% reduction in value in that case as both a "near total or substantial decrease," and a "significant reduction." 3 A.D.3d at 96, 97. However, the Court did not suggest that this

relatively vague terminology could be used as the legal test to determine when regulatory burdens rise to the level of a taking. To the contrary, the Court emphasized that, in order to establish takings liability, a plaintiff must carry the burden of demonstrating that "all but a bare residue of the economic value of the property" has been destroyed, id. at 98, and, using slightly different terminology, that the regulation "has caused an almost total loss of the value of the property." Id. at 99. Thus, Friedenberg reiterates the established tests.

B. The Court's Error Was Compounded by Its Suggestion that Adverse Economic Impact Could Alone Support a Finding of a Taking Under Penn Central

The trial court's error in charging the jury on economic impact was compounded by the erroneous suggestion that the jury could rely on only one Penn Central factor to conclude that a taking had occurred. The trial court instructed the jury that, "either alone or together [the Penn Central factors] can be enough for you to conclude that a taking has occurred." JR. 1545; see also JR. 1549. This aspect of the jury instructions was incorrect as a matter of law.

The Supreme Court has stated that economic impact is insufficient to establish a Penn Central taking and that a proper analysis requires consideration of all three factors. Thus, the "mere diminution in the value of property, however serious," cannot establish a Penn Central taking. Concrete Pipe, 508 U.S. at 645; see also Briarcliff Assocs., 272 A.D.2d at 490. Accordingly, to establish a taking

under Penn Central, the other factors must be considered. See Tahoe Sierra, 535 U.S. at 322 ("Our regulatory takings jurisprudence . . .[is] designed to allow careful examination and weighing of all the relevant circumstances.") (emphasis added); Palazzolo, 533 U.S. at 636 (O'Connor, J., concurring) ("The court . . . must consider . . . the array of relevant factors under Penn Central."). This error was critical because, as we discuss below, the other Penn Central factors weigh heavily against a finding of a taking in this case.

IV. PLAINTIFF CANNOT CARRY ITS BURDEN OF DEMONSTRATING A TAKING UNDER PENN CENTRAL

A. This Court Should Determine De Novo Whether Plaintiff Has Established a Taking Under Penn Central

On appeal from the Trial Division, the Appellate Division exercises all of the authority and jurisdiction of the Supreme Court. Merritt Hill Vineyards Inc. v. Windy Heights Vineyard, Inc., 61 N.Y.2d 106, 111 (1984). Thus, even following a jury verdict, the Appellate Division reviews questions of law de novo. See Eiseman v. State, 70 N.Y.2d 175, 187 (1987).

The courts of New York have consistently recognized that the ultimate question of taking liability under Penn Central is just such a legal question to be resolved de novo on appeal. Thus, in Smith, 4 N.Y.3d 1, the Court of Appeals affirmed the lower court's rejection of a takings claim after making its own independent analysis of the Penn Central factors. Similarly, in Birnbaum v. State,

73 N.Y.2d 638 (1989), the Court of Appeals, reversing the lower court, ruled that a state requirement that a nursing home remain open until reasonable alternative arrangements could be made for residents did not effect a taking, again based on the Court's independent analysis and weighing of the Penn Central factors. The courts of other states follow suit, treating liability under Penn Central as a legal issue to be resolved de novo on appeal. See, e.g., Zealy, 548 N.W.2d at 531; Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 932-33 (Tex. 1998).

B. The Penn Central Factors Weigh Heavily Against a Finding of a Taking

This Court should conclude based on its own independent evaluation of the Penn Central factors and, in particular, the reasonable, investment-backed expectations and character of the government action factors, that Brookhaven's zoning amendment did not constitute a regulatory taking as a matter of law.

Economic Impact. The first Penn Central factor provides, at best, only modest support for plaintiff's takings claim, which, as discussed, requires a large apparent reduction in property value. See, e.g., de St. Aubin, 68 N.Y.2d at 77. Amici recognize that in principle an appellee is entitled to the most favorable reading of the evidence. Koopersmith v. Gen. Motors Corp., 63 A.D.2d 1013, 1014 (2d Dept. 1978). But here, the jury rendered no specific findings about the "before" or "after" value of the properties, there is no basis to intuit these findings, see PB. 34, and the evidentiary record is ambiguous on whether plaintiff suffered a

sufficiently severe economic loss. In any event, under Penn Central, economic impact, no matter how severe, is insufficient to establish a taking. See, e g., Concrete Pipe, 508 U.S. at 645.

Reasonable, Investment-Backed Expectations. The expectations factor weighs heavily against plaintiff's claim. The fact that plaintiff acquired the properties before the zoning amendment occurred does not establish interference with reasonable, investment-backed expectations. As the Supreme Court explained in Lucas, a "property owner necessarily expects the uses of his property to be restricted . . . by various measures newly enacted by the State in the legitimate exercise of its police power." 505 U.S. at 1027. Instead, this factor requires a more searching inquiry into whether plaintiff is seeking to protect investment-backed expectations and whether those expectations are reasonable.

Here, plaintiff is seeking to reap a windfall at public expense. Plaintiff purchased the properties in 1985 for $300,000 and $350,000. JR. 244. Yet, plaintiff claims that, just a few years later, the Town deprived him of properties ostensibly worth as much as $1,600,000 and $1,990,000. Awarding compensation in these circumstances would hardly comport with the objectives of "fairness and justice." See Gazza v. New York Dept. of Envtl. Conservation, 89 N.Y.2d 603 (1997) (denying recovery to owner who paid $100,000 for designated wetland allegedly worth $396,000 if unregulated).

Moreover, plaintiff could not reasonably presume that the zoning of his properties would remain unchanged, especially in view of the development pressures facing the Town and plaintiff's active involvement in development in the community. Cf. Elias, 783 F.Supp. at 761 (noting that someone purchasing land in 1986 "hardly required a crystal ball to anticipate that the rational use of land in [Brookhaven] would require further comprehensive planning and consequent zoning changes"). The Supreme Court has recognized that "[t]hose who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." Concrete Pipe, 508 U.S. at 645 (quoting FHA v. The Darlington, Inc., 358 U.S. 84, 91 (1958)). This principle is fully applicable to those involved in the heavily regulated field of real estate development. See, e.g., Dist. Intown Props. Ltd. P'ship v. District of Columbia, 198 F.3d 874, 884 (D.C. Cir. 1999); Good v. United States, 39 Fed.Cl. 81, 109-119 (1997), aff'd, 189 F.3d 1355, 1361-63 (Fed. Cir. 1999); cf. Ellentuck v. Klein, 570 F.2d 414, 429 (2d Cir. 1978) ("Under New York law, . . . a landowner has no vested interest in the existing classification of his property.").

In Elias, Judge Nickerson observed that the claimant had no reasonable expectations.

> The expectation must be reasonable in that it is one that the law will recognize. In the context of this case, the question is whether a landowner has as a matter of law an assurance that the zoning regulation will never change. . . . The question almost answers itself.

> Nothing in the town's zoning laws or in any New York State law suggests that such an assurance has been made either explicitly or implicitly.

783 F.Supp at 761. The same conclusion applies a fortiori to Mr. Noghrey, a sophisticated developer with significant experience in Brookhaven. See JR. 773, 792-93.

In response, plaintiff merely contends that he purchased the property with a desire to engage in commercial development and that the zoning change thwarted this plan. But, as noted above, every landowner must recognize that regulatory restrictions may change from time to time. Moreover, this Court has already specifically rejected plaintiff's argument that he had a vested right to commercially develop these properties. Noghrey v. Town of Brookhaven, 21 A.D.3d 1016, 1019 (2005). In the end, plaintiff is simply claiming that he is entitled to do what he wanted to do with his property; but "a mere unilateral expectation or an abstract need is not a property interest entitled to protection." Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980).

Character of the Government Action. Finally, both primary meanings of the character factor support rejection of this takings claim.

First, in the Penn Central case itself, the Supreme Court indicated that the character inquiry should focus on whether the government action "can be characterized as a physical invasion" of private property. 438 U.S. at 124. The

zoning of real property plainly constitutes a regulatory use restriction, rather than a physical invasion. See Tahoe-Sierra, 535 U.S. at 323-24.

Second, more recently, the Supreme Court has defined the character factor in terms of whether a regulation has broad applicability or instead singles out one or a few owners for special treatment. See Agins, 447 U.S. at 262; Tahoe-Sierra, 535 U.S. at 341; see also K & K Const., 705 N.W.2d at 384. This version of the character factor also weighs in favor of the Town because the rezoning was the product of a community-wide comprehensive planning effort and affected several hundred properties in addition to the two owned by plaintiff. See Elias, 783 F.Supp. at 760 (emphasizing that the rezoning did not constitute "spot zoning").

In response, plaintiff asserts that "the character of the government action was such that it placed unreasonable burdens upon Plaintiff's properties and that the character of the government action further contributed to Plaintiff's inability to own, use or develop his parcels." PB. 50. These assertions have no recognizable relationship to any accepted definition of the character factor. The assertion that the regulation created "unreasonable burdens" appears to simply restate the argument that the rezoning was economically burdensome. The second assertion appears to be based on the premise that a property owner has an unlimited right to own, use, or develop private property. That is not the law in this state.

CONCLUSION

For the foregoing reasons, amici urge the Court to vacate the jury verdict and direct that judgment be entered for the Town of Brookhaven.

Respectfully submitted,

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Michael E. Kenneally, Jr.,
Association of Towns
of the State of New York
150 State Street
Albany, NY 12207
(518) 465-7933

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John D. Echeverria
Georgetown Environmental Law & Policy
Institute
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20002
(202) 662-9859

CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR § 670.10.3(f)

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