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Court of Appeals
of the
State of New York
Bonnie Briar Syndicate, Inc.,
Plaintiff-Appellant,

– against –

The Town of Mamaroneck, The Town Board of the Town of Mamaroneck, Elaine Price, Supervisor, Kathy O'Flinn, Paul Ryan, Valerie O'Keeffe, and Barry Weprin, as Members of The Town Board
Defendants-Respondents.

BRIEF OF AMICI CURIAE NATURAL RESOURCES DEFENSE COUNCIL, SCENIC HUDSON, INC. AND SCENIC HUDSON LAND TRUST IN SUPPORT OF DEFENDANTS-RESPONDENTS

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Gazza v. New York State Dep't of Envtl. Conservation, 89 N.Y.2d 603 (1998)

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Hadacheck v. Sebastian, 239 U.S. 394 (1915)

Kaiser Aetna v. United States, 444 U.S. 164 (1979)

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)

Manocherian v. Lenox Hill Hosp. 84 N.Y.2d 385 (1992)

McCray v. New York, 461 U.S. 961 (1983)

McGowan v. Cohalan, 41 N.Y.2d 434 (1977)

McMinn v. Town of Oyster Bay, 66 N.Y.2d 544 (1985)

Nectow v. City of Cambridge, 277 U.S. 183 (1928)

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)

Northern Westchester Prof'l Park Assocs. v. Town of Bedford, 60 N.Y.2d 492 (1983)

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)

People v. Carroll, 3 N.Y.2d 686 (1958)

Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 346 (1980)

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981)

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Town of Islip v. F.E. Simms Coal & Lumber Co., 256 N.Y. 167 (1931).

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Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)

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Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)

Statutes

N.Y. Const. art. I. § 7(a) (McKinney 1998)

N.Y. Const. art. 15 (McKinney 1998)

Other

Timothy Beatley & Kristy Manning, The Ecology of Place 6 (1997).

F. Kaid Benfield et al., Once There Were Greenfields (1999)

Benjamin Cardozo, The Nature of the Judicial Process (1998 ed.)

Gretchen C. Daily, ed. Nature's Services: Societal Dependence on Natural Ecosystems (1997)

Paulette Gabbriellini, Town of Mamaroneck Annual Report 3 (1998)

Andrew Goude, The Human Impact on the Natural Environment 43 (4th ed. 1994)

John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252 (1996)

Kim Heacox, Visions of a Wild America: Pioneers of Preservation 60 (1996)

Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 3 Benjamin R. Cardozo Memorial Lectures 1397 (1987)]

James Howard Kunstler, Home From Nowhere (1996)

Paula B. Lippsett, Mamaroneck Town: A history of the "Gathering Place" 65-68 (1997)

Frank Michelman, *Takings*, 88 Colum. L. Rev. 1600, 1608 (1988)

Dennis D. Murphy*, Challenges to Biological Diversity in Urban Areas*, *in* Biodiversity 72-74 (Edward O. Wilson ed. 1988)

Martha Nussbaum, *Capabilities and Human Rights*, 66 Fordham L. Rev. 273 (1997)

David Pearce & Dominic Moran, The Economic Value of Biodiversity 83-115 (1994)

Clive Ponting, A Green History of the World 348-92 (1991)

David Quammen, The Song of the Dodo 385-93, 421-23 (1996)

Michael Soul_ and Daniiel Simberloff, *What Do Genetics and Ecology Tell Us About the Design of Nature Reserves?*, *in* Environmental Policy and Biodiversity 57 (R. Edward Grumbine ed. 1994)

Michael E. Soul_, *What is Conservation Biology*, *in* Environmental Policy and Biodiversity 48 (1994)

Schwarz, Frederick A.O., *States and Cities as Laboratories of Democracy*, 54 The Record of the Assoc. of the Bar of the City of New York 157 (1999)

Spare America's Wildlands: A Sierra Club Report(1999)

William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (195)

Roger S. Ulrich et al, *Stress Recovery During Exposure to Natural and Urban Environments*, 11 J. Envtl. Psychol. 201-230 (1991))

Donald Worster, *The Wealth of Nature* 203-06 (1993)

STATEMENT OF INTEREST

Amici curiae Natural Resources Defense Council ("NRDC"), Scenic Hudson Inc. ("Scenic Hudson") and Scenic Hudson Land Trust ("SHLT") submit this memorandum of law in support of the constitutionality of Local Law No. 6 of the Town of Mamaroneck. Amici believe that this case presents an opportunity for this Court to clarify the standards applicable to challenges to zoning ordinances, and to reaffirm the importance of zoning to protect open space.

NRDC is a non-profit environmental organization with more than 400,000 members and contributors nationwide, some 40,000 of whom live in New York State. NRDC's purpose is to safeguard the earth: its people, its plants and animals, and the natural systems on which all life depends. Over the past 30 years, NRDC staff members have been actively involved in the property rights debate and have been involved in many cases before state and federal courts, and the United States Supreme Court.

Scenic Hudson is a non-profit organization founded in 1963 to preserve and enhance the scenic, historic, cultural and ecological resources of the Hudson River Valley. Scenic Hudson has approximately 10,000 supporters in New York State and around the nation. For more than 35 years, Scenic Hudson has been intimately involved in the struggle to preserve open space and to promote responsible land use planning. Scenic Hudson's efforts have included community outreach, legislative lobbying and participation in litigations.

SHLT is a non-profit organization that supports the mission and work of Scenic Hudson. To date, SHLT has protected over 14,500 acres of land in the Hudson Valley.

Collectively, the amici have over 100 years of experience in zoning and takings issues.

STATEMENT OF FACTS

Amici adopt the statement of the Town and its Town Board members.

PRELIMINARY STATEMENT

This case presents a question of fundamental importance for the future quality of life in local communities as well as for local planning and preservation efforts generally: whether through carefully designed zoning regulation a town may preserve open space and recreational areas.

Open space and natural environments contain complex ecosystems and wildlife that we have not fully begun to understand. We do know, however, that open space and natural environments provide significant contributions to the quality of life in our communities. We also know that natural resources in the Town--and across the State and Nation--have been disappearing step by leap. State by state, county by county, acre by acre, tract by tract, open space is being paved over, and thus forever lost. This scars our spirit, and harms the life, community, health and beauty of local neighborhoods. (*See* Point I.)

Legislative bodies seeking to preserve and protect their critical and imperiled open space resources deserve deference and significant latitude when they enact regulations aimed at such preservation. As the Supreme Court said in its pioneer zoning opinion:

"[W]hile 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". *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

Although the cumulative harm of encroachments on open space today rises to the level of a "new and different condition" to which local governments must respond, the legitimacy of the state interest in preserving open space has long been recognized in state and federal opinions upholding zoning ordinances. *See, e.g.*, *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville*, 51 N.Y.2d 338, 346 (1980); *Curtiss-Wright Corp. v. Town of East Hampton*, 442 N.Y.S.2d 125 (2d Dep't 1981).

Under the cases, and using any conceivably applicable legal standard, the Town's zoning regulation is constitutional. (*See* Point II.)

Finally, numerous prior opinions on local zoning have used imprecise, inconsistent and unnecessarily confusing language to address the proper resolution of takings challenges to zoning. Though the Appellate Division reached the right result in its opinion below, it did not clarify matters. Confusion spawns unnecessary litigation, and can chill or deter local bodies from carrying out their responsibilities. This Court should make clarity snuff out confusion by seizing this opportunity to instruct courts on the proper manner in which to address, and resolve, takings challenges to zoning and other general land use regulations. (*See* Point III.)

ARGUMENT

I. OPEN SPACE IS OF SUCH FUNDAMENTAL IMPORTANCE, AND UNIQUE CHARACTER, THAT LEGISLATIVE BODIES MUST BE AFFORDED SIGNIFICANT LATITUDE AND DEFERENCE IN ZONING TO PRESERVE OPEN SPACE WITHIN LOCAL COMMUNITIES.

Open space once used is lost. It is not recyclable; it is not transferrable; it will not rise again. The preservation of open space is of such fundamental importance to the quality of life presently, and

to the welfare of future generations, that legislative bodies must be afforded significant latitude and deference in preserving this natural resource within local communities.

Increasingly, undisturbed lands have vanished. Before the *Mayflower* landed in 1620, the land that now makes up the continental United States possessed 170 million hectares of forest. Today, only about 10 million hectares remain. Andrew Goude, The Human Impact on the Natural Environment 43 (4th ed. 1994). Sadly, that rate of development is accelerating, and the country abounds with depressing statistics. *See* Spare America's Wildlands: A Sierra Club Report 3 (1999) ("More than 90 percent of America's native old-growth forests has been logged. . . . More than 90 percent of America's native prairies has been lost to cultivation. More than 99 percent of the tallgrass prairies is gone. More than half of America's wetlands that were here 200 years ago has been drained or developed and the nation continues to lose more than 100,000 acres of wetlands per year. Development and sprawl are consuming 1 million acres of farmland per year.").

The story of development destroying remaining wild or open spaces is altogether too familiar. *See, e.g.*, F. Kaid Benfield et al., Once There Were Greenfields (1999); James Howard Kunstler, Home From Nowhere (1996). With increased development follows more air, water and noise pollution, traffic congestion, and ecological instability. *See* Benfield, *supra*, at 29-86; Clive Ponting, A Green History of the World 348-92 (1991). This pervasive development and destruction has been repeatedly identified as a significant factor in the depreciation of the quality of life of citizens, causing unhappiness, depression and social disfunction. *See, e.g.*, Kunstler, *supra*, at 15-34.

Moreover, current use of land and resources is unsustainable. *See generally*, Timothy Beatley & Kristy Manning, The Ecology of Place 6 (1997). Therefore, the uses to which we place the environment today have serious, if not grave, consequences for the future viability and quality of life.

To deny legislatures the latitude to fashion comprehensive plans to address problems of significant concern prevents legislative bodies from finding the most effective, long-term solutions. It is the difference between proactive management and reactive patchwork. Indeed, it is an unfortunate reality that "[w]hen it comes to environmental policy, America has been a crisis-driven society". Benfield, *supra*, at 89. The luxury of reactive and narrow legislative responses to environmental concerns is a luxury we have spent. Given the magnitude and rate of development, if today we do not accept the value and importance of open space, then too late will have come already.

A. Open space and natural environments provide innumerable benefits to the spirit, life, community, health and beauty of local neighborhoods.

Our belief, developed below, is that open space is uniquely important for spiritual enrichment and necessary for practical, ecological survival. Surely a legislative body is fully entitled, and well within constitutional bounds, to exercise its discretion to enact zoning legislation based on this understanding.

The Spiritual Side. Just knowing that there is open space, natural places and wildlife waters our spirits. It does so when the space is near. It does so even if we never see or set foot in what has been saved.

In our national songs we long for and honor open space. Thus, in singing "America the Beautiful", we start by exalting our "beautiful for spacious skies, For amber waves of grain, For purple mountain majesties, Above the fruited plain". Must our grandchildren be condemned to hear

these words as only frosty relics of a bygone day? (Shall they instead sing the wistful words of Joni Mitchell--"They paved paradise And put up a parking lot"?).

"My County, Tis of Thee", in exalting "thy rocks and rills, thy woods and templed hills", surely did not contemplate all the hills covered with roads and houses, rocks bulldozed and rills diverted.

Our State Constitution is exemplary in having an entire article dedicated to conservation. Article XIV of the State Constitution provides that state land in the Adirondacks "shall be forever kept as wild" and makes conservation of forest, wild life and New York's "scenic beauty" state policy. N.Y. Const. art. XIV (McKinney 1998). All New Yorkers from Montauk to Malone are enriched by the wisdom of our Constitutional framers. And so too in Mamaroneck is everyone enriched by keeping the land covered by Local Law 6 free from development.

Perhaps neither a legislature, nor a court in performing its deferential review of legislative action, can precisely measure the benefits to the human spirit of preserving open space or the harm done by discarding it. But legislators and judges know these things from their life experience. They know them because they are thinking and feeling human beings -- and because judges must gain knowledge "from experience and study and reflection; in brief, from life itself." Benjamin N. Cardozo, The Nature of the Judicial Process 113 (1998 ed.).

The Scientific Side. *First*, open space and natural environments provide necessary services to maintain the habitability of the environment and preserve our existence. Even the smallest open spaces and natural environments provide necessary ecological services, such as water purification and flood control, climate control, maintenance of soil and air quality, composition of the atmosphere, photosynthesis, pollination, pest and disease control, decomposition, and disposal of wastes, to name only a few. *See* Nature's Services: Societal Dependence on Natural Ecosystems (Gretchen C. Daily ed. 1997). These ecological processes operate in subtle, intricate ways and technology cannot supply a complete substitute. *See id.* at 369. And even if technology were a satisfactory alternative, the value of the services nature provides are enormous, *see* David Pearce & Dominic Moran, The Economic Value of Biodiversity 83-115 (1994), so much so that technological substitutes are frequently fiscally irresponsible, as well as less reliable.

Second, open space and natural environments provide a habitat for the wildlife and plants that are inextricably part of our planet and all our communities. Significant destruction of open space is a veritable guarantee of the disappearance of more species locally, in the state, and extinct and endangered species globally. Disturbingly, as of July 31, 1999, the U.S. Fish and Wildlife Service reported that 1,730 species of plants and animals are listed as threatened or endangered, with another 70 proposed to be listed. Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17 (1999). New York currently lists 85 fish and wildlife species as endangered, threatened or of special concern, with another 66 proposed to be listed. 6 N.Y.C.R.R. § 182.6 (Supp. 1999); N.Y.S. Register May 26, 1999. Aldo Leopold, a noted environmentalist, once said, "The last word in ignorance is the man who says of an animal or plant: 'What good is it?' . . . To keep every cog and wheel is the first precaution of intelligent tinkering". Kim Heacox, Visions of a Wild America: Pioneers of Preservation 60 (1996). As a society, however, we have not tinkered intelligently, and we have produced environmentally drastic consequences.

Many of the human transgressions against the environment have been the product of simple ignorance. *See* Donald Worster, The Wealth of Nature 203-06 (1993) (noting that despite technologic advancement, our knowledge is inadequate, and as a consequence ecological problems persist and are increasing in both frequency and severity). In the science of biodiversity, we find several principles instructive. The environment is an interdependent ecosystem, and therefore, for preservation efforts to be successful, as much of the ecosystem that can be saved must be saved. More open space saves more animals and plants. *See* David Quammen, The Song of the Dodo 385-93, 421-23 (1996). The species-area relationship is a revelation that is critically profound, but fairly simple: smaller areas support fewer species. *See id.* at 385. The

more open space lost and the more fragmented the environment becomes, the more species we will lose. The consequences of even one plant or wildlife species lost unnecessarily, and foolishly, are immeasurable.

And, extinctions aside, do we want a world, or a town, where future generations will see and experience nothing wild in their community?

The preservation of open space and natural environments, therefore, is critical. With the reduction and fragmentation of open space we lose the quality necessary to sustain significant levels of environmental life. In the opening pages of his book, David Quammen provides an apt analogy: start by imagining a large, fine Persian carpet and a knife. Cut the carpet into thirty-six equal pieces, and measure the pieces. Not surprisingly, we have the same amount of carpet. "But what does that amount to? Have we got thirty-six nice Persian throw rugs? No. All we're left with is three dozen ragged fragments, each one worthless and commencing to come apart." *Id.* at 11.

Preservation of large tracts of land, although most desirable, is often unrealistic. Therefore preservation of smaller areas of open space, limiting local area development, is all the more necessary. *Cf*. Michael Soul_ & Daniel Simberloff, *What Do Genetics and Ecology Tell Us About the Design of Nature Reserves?*, *in* Environmental Policy and Biodiversity 57 (R. Edward Grumbine ed. 1994). Further, it is necessary to preserve connected patches of habitat--as much so as realistically possible--to form a network of parcels and corridors with an adequate margin to safely ensure the protection of species and ecosystems. *See* Dennis D. Murphy*, Challenges to Biological Diversity in Urban Areas*, *in* Biodiversity 72-74 (Edward O. Wilson ed. 1988) ("Corridors and surrounding habitats are among the most valuable urban natural areas, providing for extensive biological diversity and reducing the isolation of the largest surviving ecosystems, which may be far from urban centers."). These connected parcels require a critical mass of open space to remain effective. Each open space and natural environment in the network is integral to the strategy of preservation.

The equation is simple: if we lose open space and natural environments, we lose wildlife and plant species. And losses are mounting. *See* Quammen, *supra*, at 605-08. The species we take advantage of today, and whose importance we minimalize and marginalize, may be gone tomorrow. Although some species may not disappear from the earth, to lose species in our local and state communities is a local disappearance that is equally distressing. It is senseless policy to wait until species become endangered before we become concerned, as then it may be too late. To attack the preservation of open space because no species is yet endangered, as Appellant argues, (App. Br. at 45), is as utterly nonsensical as to refuse to see a doctor or dentist because one is not yet sick. To attack the preservation of open space because environments are not "pristine", as Appellant argues, *id.*, is comically backward. Precisely because pristine environments have been destroyed, it is necessary to preserve what remains. If you lose eight fingers, the answer is not to cut off the other two. Prevention and preservation are the most effective tools available to maintain the ecosystem we have today.

Third, open space and natural environments provide irreplaceable resources for community interaction--fostering civic-mindedness and unity--individual health and well-being, and recreational enjoyment. Open spaces, in the form of parks, playgrounds, recreation facilities or simply untouched areas, serve as locations for community events, sports games (from little league to golf), and as places where people can meet and socialize--or just be. All this nurtures local identity and invests the people in their own community. *See generally*, Beatley, *supra*, at 178-79, 185-89. Open space makes every community a better place to live. Mamaroneck is no exception.

Moreover, simply reserving space to maintain natural, scenic and open environments improves individual health, disposition and well-being. Hills, streams, woods and fields, all foster a deep, emotional and spiritual connection with the land around us, and a balanced sense of ourselves.

See Beatley, *supra*, at 94. Research provides evidence that human reactions to visual clutter and excessive development include "elevated blood pressure, increased muscle tension, and impacts on mood and work performance". Benfield, *supra*, at 75 (citing Roger S. Ulrich et al, *Stress Recovery During Exposure to Natural and Urban Environments*, 11 J. Envtl. Psychol. 201-230 (1991)). Alternatively, trees, forest and vegetation within local communities have all been documented to help lower heart rate and blood pressure and calm and relax humans. *See* Beatley, *supra*, at 94. Open space is important to good health.

Lastly, but no less important, open spaces are where we play. Independent of community building and mental or physical health, to play--to run, laugh, have fun, be unrestricted and carefree-- is a liberty, so elementary and pure, that every person should have the opportunity to experience and enjoy. *See generally*, Martha Nussbaum, *Capabilities and Human Rights*, 66 Fordham L. Rev. 273 (1997). Preservation of that liberty, that gift to our posterity as well as to ourselves, is commendable. It is surely constitutional.

B. The Bonnie Briar and Winged Foot properties comprise an integral part of communally beneficial interconnected corridors of open space preserved by the Town of Mamaroneck.

The Town of Mamaroneck has a long history of conservation and appreciation for open space and natural environments. *See, e.g.*, Paula B. Lippsett, Mamaroneck Town: A history of the "Gathering Place" 65-68 (1997). Indeed, Mamaroneck has a rich environment to protect, including woodlands, meadows, fields, freshwater and tidal wetlands, marshes, streams and ponds. *See id*. at 65. But like any town only a few miles north of New York City, the Town of Mamaroneck has witnessed a full share of increasing development. Presently, the Town is home to approximately 11,200 residents, all living within the 5.2 square miles that demarcate the town. *See* Paulette Gabbriellini, Town of Mamaroneck Annual Report 3 (1998).

Appellants suggest that because the Town has already allowed so much development it is constitutionally compelled to allow still more. (App. Br. at 43). Again, Appellants have it backwards. Just as the prodigal son merited a feast upon returning home, so too does a Town Board when it seeks to check development and zones to preserve the little open space that is left.

The Town has organized a network of large and small open space areas that together operate to maintain an effective habitat to serve the wildlife and natural environment within the community. The Town has approximately 550 acres classified as open space: 109 acres of Town-owned parks and conservation areas, including the Sheldrake River and Leatherstocking Trails; Hommocks and Premium Conservation Areas; Memorial Park; the Gardens Lake; and the Hommocks Field; the 12.76-acre Larchmont Reservoir Conservation Area, consisting of that portion of the Larchmont Reservoir-James G. Johnson Jr. Conservancy lying within the Town; the Winged Foot and Bonnie Briar properties; and additional undeveloped property within the town. See Lippsett, *supra*, at 65; Gabbriellini, *supra*, at 13. The Bonnie Briar and Winged Foot properties, both with untouched, open land, as well as golf courses, are integral open spaces within the Town network. In fact, Bonnie Briar represents some 20% of the remaining open space in the Town. (R719), and Winged Foot represents an additional 40% (R144).

First, Bonnie Briar and Winged Foot provide wide expanses of relatively undisturbed open space, consisting of varied landscape and topography, and numerous ponds, streams, thickets and groves of trees. (R1032). These properties, by virtue of the vegetation, and natural open space, provide significant ecological benefits to the local community. As an obvious example, destroying the groves of trees and replacing them with asphalt-packed streets, and adding additional automobiles into the local areas, will have significant effects on the temperature and the quality of the air in the community. The numerous other ecological benefits of the open space and natural environments that the two properties help to sustain, not all equally obvious, nor equally direct, will be significantly diminished, if not destroyed, by development.

Second, the Bonnie Briar and Winged Foot properties aid in sustaining a network of open space corridors that link the Larchmont Reserve, the Saxon Woods Park, and the Leatherstocking Trials. (R719; R1031-1035) ("Bonnie Briar Country Club . . . [is] part of a well-defined linkage with other large tracts of land that create a green corridor of vital open space."). The Bonnie Briar property is located barely ten large footsteps away from the Larchmont Reservoir Conservation Area and is directly connected through a passageway under Weaver Street. (R333). Moreover, Bonnie Briar is but several hundred yards from the Leatherstocking Trails, separated by only several residences along the secluded and isolated Roxborough and Highland Roads. (R333).

This network supports a broad array of wildlife and natural environment in the Town of Mamaroneck, and within the larger Westchester County community. In the Reservoir-Sheldrake-Leatherstocking Area, almost 150 species of birds are known to reside, 9 of which are known to be either Endangered, Threatened, Vulnerable or Of Special Concern--the Golden Eagle; the Northern Harrier, Osprey, and Red-Shouldered Hawk; the Hairy Woodpecker, Ruby-Throated Humming Bird and Yellow Warbler; the Common Nighthawk and Wilson's Warbler. (R725-729).

Although only the Green Heron and the Blue-Gray Gnatcatcher are reported to nest on the Bonnie Briar property, (R725; R728), the entire network of which Bonnie Briar is a part serves as a habitat for a range of bird species. In fact, Audubon Society members and residents bird watch on the property. *See* Lipsett, *supra*, at 74. Moreover, the Red Fox, White-Tailed Deer and the Spotted Turtle have been spotted on the property, and numerous species of mammals, reptiles, amphibians, insects, aquatic species, and fish were identified in the area. (R720; R730; R1030-1035). All of this wildlife necessarily relies upon the interconnected corridors of the Town network, including the Bonnie Briar and Winged Foot properties, for survival. Development of these open spaces would significantly disrupt the balance of wildlife and natural environment in the community.

Third, in spite of the private membership of the Bonnie Briar Country Club, the Bonnie Briar property serves as a place for community recreation and aesthetic appreciation. The Club offers the services of the property to the local community, and the community has repeatedly used the property for recreation. (R1008; R1010-13). Local children sled there in the winter. *See* Lipsett, *supra*, at 74.

By simply being there, the open space enhances the life of all residents; further development would hurt all residents. The facts are irrefutable, and the truths they express are self-evident. Surely, their embrace falls within the sound discretion of the Town Board.

C. Because of the critical importance of ecology and environment to local communities, as well as the complexity of ecological and environmental issues, legislatures and local planning boards must be afforded considerable latitude and deference to enact laws for the public good.

Legislatures today face serious ecological crises. *See* Michael E. Soule, *What is Conservation Biology*, *in* Environmental Policy and Biodiversity 48 (1994) ("The current frenzy of environmental degradation is unprecedented . . . . The response, therefore, must also be unprecedented."). Traditional notions of appropriate responses and remedies are inadequate to address the problems of today. Beyond the present controversy, this Court should take this opportunity to expressly recognize the necessary latitude and deference legislatures require to address the environmental condition and quality of life for the public.

In *Euclid*, the United States Supreme Court recognized the need to answer changing times by according flexibility and deference to the legislative judgment. *See Euclid*, 272 U.S. at 386-88. Moreover, the *Euclid* Court observed, "in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in

terms of legislation", and therefore "a reasonable margin, to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity". *See id.* at 388-89. Because environmental preservation -- as well as the science of ecology and biodiversity -- is both so urgent and so complex, as outlined briefly above, legislatures deserve to be accorded the deference contemplated by *Euclid* when they attempt to address the needs of our time by preserving and protecting our natural resources.

In *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), a case involving a First Amendment challenge to Congress' regulation of cable systems, the Supreme Court applied intermediate scrutiny and required the regulation at issue to advance important governmental interests, but nonetheless emphasized the importance of deference to decisions of the legislature:

Our sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence. . . . We owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions. . . .

Id. at 195 (citations omitted). So too when state and local legislative bodies act to preserve open space and natural environments, this Court and lower courts should respect the legislative judgment and expertise. For "[our system of government is one based upon a separation of powers--the Executive, the Legislative, and the Judicial. It is not for us--as a Court--to substitute our judgment for that of the legislature in zoning matters." *Asian Americans for Equality v. Koch*, 514 N.Y.S.2d 939, 951 (1st Dep't 1987) (citation omitted).

As set forth above, it is the unique mandate of the legislature to attend to the most pressing and complex needs of the day , and to make decisions, thus informed, about how best to serve the public good. Therefore, while reviewing legislative attempts to preserve open space and natural environment this Court should expressly recognize, and apply, a standard of significant deference.

II. NO TAKING HAS OCCURRED IN THIS CASE, UNDER ANY TEST, AND THEREFORE THIS COURT SHOULD REJECT ANY SUCH CLAIM.

There is no question, under the guiding state and federal precedents, that the zoning act here at issue is constitutional. The method of analyzing a claim brought under the Takings Clause is straightforward, and leads ineluctably to the conclusion that Local Law No. 6 poses no danger to the Fifth Amendment. Even in light of Appellant's fruitless and inapposite attempts to concoct some basis for imposing heightened scrutiny on the means/ends nexus for the Town's zoning ordinance, the zoning law at issue here clearly furthers the legislative purpose of preserving the environment, and therefore would not rise to the level of a taking even under Appellant's misguided characterization of the governing law.

As an initial matter, the courts have erected a high threshold for any showing that regulation amounts to a taking of property. *First*, a presumption of constitutionality attaches to government regulation. *See, e.g., Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962); *de St. Aubin v. Flacke*, 68 N.Y.2d 66, 76 (1986). *Second*, debatable questions as to the validity of legislative classifications are not properly resolved by the courts, but are within the province of the legislature. *See Euclid*, 272 U.S. at 388; *see also Goldblatt*, 369 U.S. at 595; *Thomas v. Town of Bedford*, 11 N.Y. 428, 433 (1962); *Town of Islip v. F.E. Simms Coal & Lumber Co*., 256 N.Y. 167, 169 (1931).

Leaving aside these preliminary barriers to any regulatory challenge, within the particular context of the Takings Clause, the United States Supreme Court has noted that regulation will rise to the

level of a taking only in "extreme circumstances". *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). Except for those situations involving the literal appropriation or confiscation of property, the Supreme Court has declined to articulate any "set formula" to determine when a taking has occurred, and has relied instead on "essentially ad hoc, factual inquiries". *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (considering the economic impact of the regulation, its interference with distinct reasonable investment-backed expectations and the character of the governmental action). Deciding whether there has been a taking "necessarily requires a weighing of private and public interests", *Agins*, 447 U.S. at 261, and essentially amounts to determining whether regulation has forced individual citizens to bear a burden that "in all fairness and justice, should be borne by the public as a whole", *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Outside this flexible, "*ad hoc*" framework, the Supreme Court has identified only two discrete categories of regulatory action that will automatically amount to compensable takings. *First*, a taking of property occurs when regulation "denies all economically beneficial or productive use of land". *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). *Second*, a taking of property occurs when regulation amounts to a "permanent physical occupation" of property by the government itself or by others. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

Appellant has not claimed -- nor could it claim -- that either of the circumstances described above exist. Rather, Appellant has inappropriately invoked the three-part test set forth in *Penn Central,* in an attempt to prejudice this Court toward accepting an unwarranted heightened means-ends test under the Takings Clause for zoning and other general land use regulation.

Despite Appellant's misuse of *Penn Central*, however, the Takings Clause requires no such heightened scrutiny of the relationship between the legislative ends and means of zoning and other general land use regulation. (*See* Point III). Rather, in virtually every context, it is clearly established that the means and ends of zoning must satisfy only the requirements of Due Process and rational basis review - *i.e.*, zoning must "reasonably relate to" or "substantially advance" legitimate state interests. *Agins*, 447 U.S. at 260-61; *Nectow v. City of Cambridge*, 277 U.S. 183, 187-188 (1928); *McMinn* v. *Town of Oyster Bay*, 66 N.Y.2d 544, 549 (1985); *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 595-96 (1979).

Significantly, in only two narrowly defined circumstances have the Supreme Court and the New York Court of Appeals required heightened review of the relationship between legislative means and ends under the Takings Clause. *See Dolan v. City of Tigard*, 512 U.S. 374, 386, 392 (1994) (requiring an "essential nexus" and "rough proportionality" for dedications or exactions of property required as a condition for permission to develop); *Manocherian v. Lenox Hill Hospital*, 84 N.Y.2d 385, 392 (1992) (stating, in the context of a forced tenancy, that the statute at issue must meet a "close causal nexus" test to a state interest to survive a takings claim).

The Supreme Court this spring expressly limited heightened scrutiny of the type set forth in *Dolan* to the special circumstance where legislatures require a developer to set aside some portion of property as a condition for permission to develop land . *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S.Ct. 1624, 1635 (1999) (holding *Dolan*'s "rough proportionality" test to be inapposite to a case prohibiting land development entirely, and limiting *Dolan* to the "special circumstance" of exactions and dedications). This Court should similarly make clear that *Manocherian* does not apply to zoning, and should expressly limit the heightened standard of review explicated in *Manocherian* to regulations not that do not involve the power of the state to enact zoning laws in order to promote the public good.

Finally, examination of Appellant's argument reveals that the substance, as well as the theory, of its case lacks merit. The Town's zoning ordinance does not create an unfair burden under the *Penn Central* three-part test. (*See* Point II.A). Further, even under the inapposite heightened

scrutiny test, the Town's zoning ordinance would be a legitimate exercise of the police power to protect open space. (*See* Point II.B). No taking has occurred here.

A. Local Law No. 6 does not constitute a regulatory taking of property under the three-part test set forth in *Penn Central*.

The purpose of the Takings Clause is to prevent the 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". *Armstrong*, 364 U.S. at 49 (1960). The Supreme Court has identified three factors that have particular significance in determining when fairness and justice require compensation: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct reasonable investment-backed expectations and (3) the character of the governmental action. *See Penn Central*, 438 U.S. at 124 (1978); *see also Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25 (1986); *Gazza v. New York State Dep't of Envtl. Conservation*, 89 N.Y.2d 603, 617 (1998). No such taking has occurred here.

As stated above, Appellant bears the heavy burden of overcoming the presumption of constitutionality that attaches to the Town's regulation, *see Goldblatt*, 369 U.S. at 595, and must prove every element of its claim beyond a reasonable doubt. *See Flacke*, 68 N.Y.2d at 68; *Northern Westchester Prof'l Park Assocs. v. Town of Bedford*, 60 N.Y.2d 492, 500 (1983). The Appellant cannot, and does not, satisfy this burden.

First, the economic impact of Local Law 6 on the property is not constitutionally significant. Even accepting Appellant's contentions, the value of the property prior to the enactment of Local Law 6 was $15,570,000.00, and two days after its enactment was $9,630,000.00, (R1347, R1291, R1164-1189). The resulting diminution in value of the property, 38%, is but a fraction of the level of depreciation the courts have deemed acceptable in upholding zoning against constitutional challenges. Moreover, mere diminution in the value of property, however serious, by itself is insufficient to demonstrate a taking, *see Penn Central*, 438 U.S. at 131; *see also Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993); *Gazza*, 89 N.Y.2d at 618. As the Appellate Division has noted, the test is "not whether a substantially higher value can be obtained under less restrictive regulations but *whether no reasonable return can be obtained under the existing regulations*". *Curtiss-Wright*, 82 A.D.2d at 554 (emphasis added).

Second, the property at issue had been operated as a recreational facility--a country club and golf course--for approximately 75 years. (R65). Local Law 6 authorizes the property's continued use as country club and golf course. Reasonable investment-backed expectations certainly encompass expectations based upon existing uses--as well as changes under an existing regulatory regime. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Appellant can hardly contend it has been denied any reasonable investment-backed expectations, where the regulation being challenged merely continued a preexisting use. *Cf. Connolly*, 475 U.S. at 227 ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."). *See generally*, *Ruckelshaus*, 467 U.S. at 1005 ("A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'").

Third, and perhaps most critically, Local Law 6 in no way physically invades or permanently appropriates any of the Bonnie Briar property, a factor which courts have regarded as determinative when considering the character of government action. *See Penn Central*, 438 U.S. at 124; *Connolly*, 475 U.S. at 225. Instead, Local Law 6 merely creates a legitimate recreational zone, plus a large area of pristine open space, in furtherance of a "public program adjusting the benefits and burdens of economic life to promote the common good". Under the governing law, this does not constitute a taking requiring government compensation. *Penn Central*, 438 U.S. at 124; *see also Connolly*, 475 U.S. at 225.

In sum, appellants have failed to show the type of "extreme circumstances" necessary to sustain a regulatory takings claim. *Riverside Bayview Homes*, 474 U.S. at 126. The zoning is plainly a "burden borne to secure 'the advantage of living and doing business in a civilized community'". *Andrus v. Allard*, 444 U.S. 51, 67 (1979).

B. Under any conceivable legal standard, Local Law No. 6 is a constitutional exercise of the police power.

As set forth above, the relationship between legislative means and ends of zoning and other general land use regulations is subject to rational basis review. *See Agins*, 447 U.S. at 260-61; *Nectow*, 277 U.S. at 187-188; *McMinn*, 66 N.Y.2d at 549; *French*, 39 N.Y.2d at 595-96. Even if this Court were to apply standards applicable to other types of state regulatory action--the "essential nexus" and "rough proportionality" standard for dedications and exactions of property, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994), or the "close causal nexus" standard for forced tenancy, *Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385 (1992); *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92 (1989) to review the means-ends relationship of the zoning ordinance here at issue, the analysis would produce the same result. Local Law No. 6 is constitutional.

One of the purposes of Local Law 6 is to preserve open space, a purpose long recognized as legitimate, *see Agins*, 447 U.S. 255, 260 (1980) (recognizing as legitimate California's goal of discouraging the "premature and unnecessary conversion of open-space land to urban uses"); *Belle Terre*, 416 U.S. at 8 ("[A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs"); *Kurzius*, 51 N.Y.2d at 345-46 (upholding a "large lot" zoning ordinance intended to preserve open space areas); *Curtiss-Wright*, 82 A.D.2d at 556 (upholding ordinances the purpose of which was "to maintain the natural and rural qualities of the land and control urbanization and to conserve and protect the town's water supply"). By regulating development, Local Law 6 achieves all these long-recognized benefits of preserving open space.

Absent Local Law 6, under the previous zoning guidelines, an aggregate of 402 homes could have been built--279 at Winged Foot and 123 at Bonnie Briar. Appellants sought to build at least 71 residential homes--and under the prior zoning could have built significantly more, (R996)--directly destroying at least 60 acres of open space and natural environment, (R989-990), and disturbing the present quality of life within the community with additional urbanization (R624-657). Addressing almost precisely the same issue, the Supreme Court in *Agins* recognized that "zoning regulations . . . [prevent] the ill effects of urbanization. . . . [which include] air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl", *Agins*, 447 U.S. at 261-62 & n. 8, and on that basis upheld laws which restricted development. Like the law upheld in *Agins*, Local Law No. 6 effectively preserves and prevents further destruction of open space, and therefore bears a direct and logical relationship to furtherance of a legitimate state goal.

Even under the inapposite heightened "essential nexus" and "rough proportionality" standards used in cases of exactions, the requirement amounts to a mandate that the exaction advance the purpose of the stated legitimate state interest, *Nollan*, 483 U.S. at 836-37, and satisfy an individualized determination that the exaction is related both in nature and extent to the impact of the prohibited activity, *Dolan*, 512 U.S. at 391. Here, the Town assessed the impact of additional development on the Town and local resources, determined that significant development would be detrimental, (R624-657), and therefore prevented development through Local Law 6. For the reasons expressed above, Local Law 6 satisfies the heightened scrutiny of *Nollan* and *Dolan*--although that standard is not applicable to zoning cases, as the Supreme Court recognized in *Del Monte Dunes*, 119 S.Ct. at 1635, issued after the decision of the Appellate Division in the instant case. Similarly, for the reasons stated above, Local Law No. 6 also comports with the heightened

"close casual nexus" test, which requires a close connection between an exaction or forced tenancy, on the one hand, and putative purpose of the regulation on the other, *see Manocherian*, 84 N.Y.2d at 397-98; *Seawall*, 74 N.Y.2d at 112.

The Appellate Division properly upheld the law against constitutional challenge, and this Court should affirm the constitutionality of Local Law No. 6.

III. THIS COURT SHOULD CLARIFY THE STANDARD OF REVIEW APPLICABLE TO THE RELATIONSHIP BETWEEN LEGISLATIVE ENDS AND MEANS, AND SHOULD UNEQUIVOCALLY STATE THAT DUE PROCESS, RATIONAL BASIS REVIEW IS THE CORRECT STANDARD FOR ZONING AND OTHER GENERAL LAND USE REGULATION.

A battery of standards creates a battalion of confusion. Last May, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S.Ct. 1624 (1999), the Supreme Court limited the application of the *Nollan* and *Dolan* rough-proportionality standard to the "special case" of exactions of property. *See id.* at 1635. The Supreme Court left unanswered, however, whether recent decisions--arguably muddling the distinction between the Takings Clause and the Due Process Clause standards of review--in fact overruled well-settled and long-standing precedent in zoning cases limiting review of the relationship between legislative ends and means to that of rational basis review under the Due Process Clause.

Strong evidence in the express language, history and tradition of the federal and state Takings Clause, (*See* Point III.A), and the unwavering line of Supreme Court and New York Court of Appeals precedent, (*See* Point III.B), counsel adhering to the traditional rational basis review of the legislative means-ends relationship for zoning and other general land use regulation. The Supreme Court has noted a preference for particular issues to percolate in the lower courts, *see, e.g.,* Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 3 Benjamin R. Cardozo Memorial Lectures 1397, 1409 (1987) ("[S]tate courts have at all times been important contributors to the body of constitutional law"); Frederick A.O. Schwarz, *States and Cities as Laboratories of Democracy*, 54 The Record of the Assoc. of the Bar of the City of New York 157, 161-62 (1999) ("[F]rom the genesis of the Bill of Rights to the ongoing invention of new rights today, state experiments have contributed to the good of the nation"); *McCray v. New York*, 461 U.S. 961, 963 (1983)("[I]t is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court."), and this Court, squarely presented with the issue here, should take the opportunity to assist the Supreme Court and other courts in this nation by clarifying the legal standard that applies to zoning and other general land use regulation. *See* Kaye, *supra*, at 1419 (discussing the role of the state courts in clarifying "mudd[ied]" standards through constitutional interpretation).

Without clear and defined standards, legislative bodies have no guidelines to inform the process of managing and responding to complex social issues with reasoned and legitimate legislation. Without clear and defined standards, lower courts are without sufficient guidance in the performance of their necessary adjudicative function. Without clear and defined standards, unnecessary litigation is multiplied, and vulnerable local zoning boards facing difficult and complex problems may be deterred, by threat of taxing litigation from well-financed developers, from creating effective solutions.

The precedent weighs decidedly in favor of continuing to apply the traditional rational basis standard of review to zoning and other general land use regulation. This Court should affirm its decisions in *McMinn* v. *Town of Oyster Bay*, 66 N.Y.2d 544 (1985), and *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587 (1976), and state unequivocally that the means-ends relationship of zoning and other general land use regulation is subject only traditional rational basis review.

A. The history, tradition, express language and policy of the Federal and State Takings Clauses reject a separate, heightened review of the relationship of the means and ends of zoning and other general land use regulation.

1. Federal Takings Clause.

There is no foundation in the Federal Takings Clause, and Supreme Court precedent has never interpreted the Takings Clause, to hold an uncompensated taking unconstitutional on the basis that a regulation did not substantially advance legitimate state interests. *See generally*, Amicus Brief for the United States, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S.Ct. 1624 (1999) (No. 97-1235); Amicus Brief for the League for Coastal Protection et al., City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S.Ct. 1624 (1999) (No. 97-1235). The sole focus of the Federal Takings Clause is to assess the effect of regulation on property and determine whether that effect is of such a character to require the government to compensate property owners. Beyond that, the only remaining question as to the constitutional legitimacy of zoning and other general land use regulation is rational basis review under the Due Process clause. Given the plain language and history of the Federal Clause, it is clear there is no such inquiry under the Takings Clause of the United States Constitution. It is tortured reasoning to suggest that a "taking" has occurred by applying a means/ends inquiry under the Takings Clause. Throughout time, the emphasis of takings jurisprudence has not fundamentally changed. We would lose all sense of the history and purpose behind the Takings Clause by suggesting that separate means-ends review is appropriate under that Clause.

History and precedent confirm that the Takings Clause inquiry solely focuses upon the effect of regulation on property. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Supreme Court stated that "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." Id. at 1028 n.15; *see also* John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995). It was not until *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), that the Supreme Court partially withdrew from the widely held understanding that "the Taking Clause reached only a direct appropriation of property, or the functional equivalent of a practical ouster of [the owner's] possession", *Lucas*, 505 U.S. at 1014 (internal quotation omitted).

In *Mahon,* Justice Holmes, writing for the Supreme Court, stated as a general rule that "if regulation goes too far it will be recognized as a taking". *Id.* at 415. As noted in *Mahon*, and reaffirmed by subsequent cases, the Supreme Court recognized that regulation could so frustrate an individual's interest in property that in effect the government had "taken" the property. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 185 (1985); *see also Lucas*, 505 U.S. at 1017 ("[T]otal deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."). The focus of the inquiry, however, remained the effect of the regulation on property and whether that effect was of such a drastic character as to require the government to compensate property owners.

More fundamentally, heightened means-ends review under the Federal Clause is irreconcilable with the express language of the Clause. *First*, the word "taken", or more precisely the root "take", expresses physical action: appropriation, assumption, confiscation, capture, seizure, or extraction. The suggestion that the government has "taken" property under the Federal Clause through supposedly irrational legislation is no less inimical to the English language than the suggestion that the government has "search[ed]" or "seiz[ed]" persons under the Fourth Amendment through irrational enforcement policy. *Cf. Whren v. United States*, 517 U.S. 806, 813 (1996) (stating that discriminatory enforcement of the state power to search and seize property is not a violation of the Fourth Amendment, but can only be analyzed as a Fourteenth Amendment Equal Protection claim).

Second, the coordinated use of the word "taken" with the word "compensation" further illustrates the true intent and purpose of the clause. The Federal Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power". *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987). The basic understanding of the Fifth Amendment "makes clear that it is designed not to limit governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking". *Id.* at 315 (emphasis in original).

As a final matter, serious policy considerations weigh against a broad, unconventional interpretation of the Federal Clause to include heightened review of the means-ends relationship of legislation. The Supreme Court has aptly noted, and emphatically repeated, the concern that "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law". *See Mahon*, 260 U.S. at 413. Heightened review of zoning and other general land use regulation under the Federal Clause could potentially result in sweeping liability for state and local legislative bodies. Moreover, even the threat of liability may chill and deter those legislative bodies from enacting effective responses to pressing public concerns.

2. New York State Takings Clause.

The Takings Clause of the New York State Constitution provides that "[p]rivate property shall not be taken for public use without just compensation". N.Y. Const. art. I. § 7(a) (McKinney 1998). The State Clause is virtually identical to its federal counterpart. Therefore, it is an equally taxed effort to derive from the word "taken" the result that the relationship between means and ends is in any way relevant. As this Court stated in *People v. Carroll*, 3 N.Y.2d 686 (1958), "[t]he most compelling criterion in the interpretation of an instrument is, of course, the language itself". *Id.* at 689. As demonstrated above, the language cannot plausibly be read, and has not been read, to encompass heightened means-ends review of zoning and other general land use regulation.

Moreover, the historical and traditional understanding of property rights under the State Clause provides no basis to depart from federal precedent. *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587 (1976), is instructive. In *French*, this Court stated that "many cases have equated an invalid exercise of the regulating zoning power, perhaps only metaphorically, with a 'taking' or a 'confiscation' of property . . . . The metaphor should not be confused with the reality". *Id.* at 594. The reality, as this Court in *French* understood it, was that an invalid exercise of the police power was a violation of Due Process and not the Takings Clause. *Id.* at 593-97. This Court went on to state that "[a]bsent factors of governmental displacement of private ownership, occupation or management, there was no 'taking' within the meaning of constitutional limitations". *Id.* at 595. Although this view also has been broadened to encompass the modern principles of *Mahon*, this Court, like the Supreme Court, has always understood the State Clause to concern the effect of regulation on property and whether that effect is of such a character to require the government to compensate property owners.

This Court should not now depart from the express language, history and tradition of the State Takings Clause. There is no reason to adopt such an unconventional interpretation, and there is ample reason to reject it. This Court, therefore, should adhere to traditional rational basis review for the relationship between legislative ends and means of zoning and other general land use regulation under the Due Process Clause.

B. No Supreme Court precedent, and no New York Court of Appeals precedent, requires a separate, heightened Takings Clause analysis to resolve the constitutional legitimacy of zoning and other general land use regulation, and this Court should decline to do so here.

1. United States Supreme Court.

Although the terminology has varied, the Supreme Court has always considered the question whether zoning and other general land use regulation possessed a "substantial relation to" or "substantially advanced" legitimate state interests a Due Process question. The standard of review for the relationship of legislative ends and means, necessarily, could not be, and has not been, any more searching than rational basis review, and the Supreme Court has unambiguously and repeatedly affirmed rationality as the touchstone of the inquiry. Absent unambiguous direction from the Supreme Court to depart from this rational basis review, the extension of any heightened scrutiny requirement for the relationship between legislative means and ends of zoning and other general land use regulation is error.

Nectow v. City of Cambridge, 277 U.S. 183 (1928), set the modern standard of review for general land use regulation. The Supreme Court plainly stated that legislation will be set aside only if it has "no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare". *Id*. at 187-88. The Supreme Court has never reversed or revised its holding in *Nectow*, but has instead consistently adhered to the position that, to be unconstitutional, general land use regulation must be irrational, arbitrary and unreasonable. *See, e.g.*, *Dolan*, 512 U.S. at 391 n.8 ("[I]n evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights.").

Agins is not to the contrary. In *Agins*, the Supreme Court unambiguously relied upon *Nectow* for the proposition that land use regulation must "substantially advance legitimate state interests". *Agins*, 447 U.S. at 260. The Supreme Court has consistently defined that language to require mere rationality. *See, e.g., Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) ("Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property."). *First*, in *Agins* the Supreme Court did not identified no independent source of takings authority--not the Takings Clause, nor the history or subsequent application of that Clause--but instead relied exclusively on *Nectow*'s definition of the appropriate standard of review. *Second*, the plain language of *Agins* is no different than the *Nectow* rational basis standard. Both facts support the conclusion that the Supreme Court only intended to reinforce its traditional rational basis review.

Nollan and *Dolan* are not to the contrary. This pair of "exactions" cases represents the Supreme Court's extension of the principles announced in *Loretto*, 458 U.S. at 426-28 (holding "a permanent physical occupation" of property by the government itself or by others is a taking). The premise of these cases is simple: an otherwise unconstitutional *per se* taking of property--in the form of an exaction (a required dedication of property) conditioned to the approval of development--will not be held unconstitutional if sufficiently connected to general land use regulation (*i.e.* the prohibition on development). *Nollan* promulgated a distinct and separate takings review of the means-ends relationship for exactions. *Dolan* defined the required *Nollan* review, implementing heightened scrutiny, rough-proportionality, for the exclusive and limited circumstance of exactions.

The Supreme Court developed a more searching review (1) because without the required connection, an actual physical taking would have occurred and (2) because of the belief that a *per se* taking of property presented as an appendage of the general police power was constitutionally suspect. *See Nollan*, 483 U.S. at 841 ("We are inclined to be particularly careful about the adjective [substantial] where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective."). This standard, however, did not alter the traditional rational basis review for the relationship between

legislative means and ends of zoning and other general land use regulation under the Due Process Clause.

Neither the logic nor the language of those cases is applicable to zoning and other general land use regulation. The Supreme Court itself, after the decision of the Appellate Division in this case, rejected the extension of rough-proportionality, heightened scrutiny outside cases of exactions. *See Del Monte*, 119 S.Ct. at 1635 (1999);*see also id.* at 1650 (Souter, J., concurring).

2. New York Court of Appeals.

This Court has remained consistent with Supreme Court precedent. *See McMinn*, 66 N.Y.2d 544 (1985); *French*, 39 N.Y.2d 587 (1976). *Nollan* has only been relied upon in cases of government-sanctioned forced tenancy. *See, e.g, Manocherian*, 84 N.Y.2d 385 (1994). This Court is bound by no precedent, state or federal, to apply heightened scrutiny for the relationship between legislative means and ends of zoning and other general land use regulation. This Court has not done so, and this Court should decline the invitation to do so here.

In *McMinn*, this Court stated "[i]n order for a zoning ordinance to be a valid exercise of the police power it must survive a two-part test: (1) it must have been enacted in furtherance of a legitimate governmental purpose, and (2) there must be a 'reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end'", and that "[i]f the ordinance fails either part of this test, it is unreasonable and constitutes a deprivation of property without due process of law under our State constitution". *McMinn*, 66 N.Y.2d at 548. However variably articulated that standard, it has never been reversed by this Court. Instead this Court has adhered, and should continue to adhere, to rational basis review of the relationship between legislative means and ends of zoning and other general land use regulation.

At best, the *Seawall* and *Manocherian* "close causal nexus" standard parallels *Nollan* and *Dolan*, and the forced tenancy compelled by the government in those circumstances required an essential nexus to legitimate state interests and a rough-proportionality between means and ends--summarily described, in total, as a close causal nexus. Therefore, as with *Nollan* and *Dolan*, the *Seawall* and *Manocherian* close causal nexus standard, arising as it did in the cases of forced tenancy, has no relevance to zoning.

The standard for the relationship between legislative means and ends of zoning is rational basis review under the Due Process Clause. It has not been changed, it has not been altered, and this Court should continue to adhere to the long-standing precedent that affirms rational basis as the appropriate standard of review for the relationship between legislative means and ends of zoning and other general land use regulation.

CONCLUSION

Amici respectfully urge this Court to affirm the holding below, and respectfully suggest that in so doing, this Court (i) reaffirm the importance of preserving open space and natural environments and the deference due to legislatures that have exercised their discretion to do so, and (ii) clarify the standards applicable in considering constitutional challenges to zoning.

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