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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF AVELLA,

Appellant,

-against-

No. 54

CITY OF NEW YORK,

Respondent.

Westchester County Courthouse
111 Dr. Martin Luther King Jr. Boulevard
White Plains, New York
April 25, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

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1 CHIEF JUDGE DIFIORE: The next matter on this
2 afternoon's calendar is appeal number 54, Matter of Avella
3 v. the City of New York.

4 Good afternoon, counsel.

5 MS. HALLIGAN: Chief Judge DiFiore, and may it
6 please the court; Caitlin Halligan on behalf of Queens
7 Development Group. I'd like to reserve two minutes for
8 rebuttal, please.

9 CHIEF JUDGE DIFIORE: You may.

10 MS. HALLIGAN: And I would like to focus my time
11 on the public trust doctrine. The City, the State, and my
12 clients all stand before you today because the stakes of
13 this case are high.

14 JUDGE RIVERA: Counsel, can you explain to me how
15 Section 18-118 titled "Renting of Stadium Flushing Meadow
16 Park; Exemption from Down Payment Requirements," that how
17 does that square with your argument about the plain
18 language and the intent giving this - - - having allowed
19 alienation of parkland for broad uses that are unrelated to
20 the stadium?

21 MS. HALLIGAN: Let me, if I can, Your Honor,
22 first address your question about the title and then walk
23 through the statute to explain why it accomplishes what we
24 believe it does. With respect to the title, the immediate
25 plan that motivated passage of this statute was absolutely,

1 we agree, to allow for construction of Shea Stadium, but
2 that was not the only goal that the legislature had. And
3 so this court has held repeatedly that the title can't
4 override the words of the statute itself. With respect to
5 the statute itself - - -

6 JUDGE RIVERA: The title's not irrelevant.

7 MS. HALLIGAN: It's not - - -

8 JUDGE RIVERA: The title doesn't say
9 construction. It says renting.

10 MS. HALLIGAN: The title is not - - -

11 JUDGE RIVERA: It is about use.

12 MS. HALLIGAN: The title - - - well, use of - - -
13 of the property itself. And - - -

14 JUDGE RIVERA: Well, renting of stadium.

15 MS. HALLIGAN: Your Honor, this court has held
16 repeatedly that it's the words of the statute that control
17 and I'd like to walk through those, if I can.

18 JUDGE STEIN: Well, bef - - - before you do that.

19 MS. HALLIGAN: Yes.

20 JUDGE STEIN: Because we're - - - we're pretty
21 familiar with the statute. But given your position that
22 the - - - the purposes were, obviously, very, very broad,
23 can you give me some examples of what would not be
24 permitted?

25 MS. HALLIGAN: Absolutely. You mean with respect

1 to subsection (b)(1)?

2 JUDGE STEIN: With respect - - -

3 MS. HALLIGAN: Subsection (b)(1) requires that
4 whatever the activity is be done for the benefit of the
5 people of the city.

6 JUDGE STEIN: I understand that. Can you give me
7 some examples of what would not be for the benefit of the
8 people?

9 MS. HALLIGAN: Yes. So something that was only
10 serving a private purpose, for example, a private club for
11 - - - for instance, might be a facility that was not
12 something that was within the broad purposes - - -

13 JUDGE STEIN: So then why wouldn't the statute
14 say that it could be used for any - - - why - - - why give
15 all these examples? Why not just say it could be used for
16 any purpose except for a purely private purpose that
17 excluded the public? Wouldn't that take care of it?

18 MS. HALLIGAN: I think that if - - - if the
19 legislature had wanted to write a statute that simply
20 authorized the use of a stadium, we know it would have done
21 so but it would have done so differently. I would urge the
22 court to look at the Yankee Stadium Statute. Section 2 of
23 that statute provides for the use of attractive land for
24 development a professional baseball stadium and related
25 facilities. That's how the legislature drafts language

1 that it means to be used only for that sort of a specific
2 purpose. What it did here was very different. I think
3 it's also important to look at the context of the - - -

4 JUDGE RIVERA: Well - - - well, let's go with
5 your argument and your description of what wouldn't be
6 covered. I'm not - - - I'm not clear why a mall doesn't
7 fit into what wouldn't be covered.

8 MS. HALLIGAN: For several reasons. It
9 undoubtedly serves the public purposes set forth in
10 subsection (b). I would argue - - -

11 JUDGE RIVERA: What - - - what's that? I'm
12 sorry. What's that purpose? What's the purpose?

13 MS. HALLIGAN: Far more than - - - than a stadium
14 would, Your Honor.

15 JUDGE RIVERA: No. But what is the purpose?

16 MS. HALLIGAN: First of all, it is the catalyst,
17 the economic engine for remediating Willets Point. The
18 other projects that were proposed here required prohibitive
19 public subsidies. If you look at page A-580 on the CD ROM,
20 the other proposals required between 250 - - -

21 JUDGE RIVERA: Oh, okay. So let me get that
22 argument. So you're saying in '61 the legislature
23 alienated parkland to be used for any purpose that allows
24 the City to clean up an area. Is that your argument?

25 MS. HALLIGAN: My argument is that it alienated

1 it for any purpose set for the in (b). That does include -
2 - -

3 JUDGE RIVERA: Because I - - - I think you're
4 back to then nothing is excluded because wouldn't anything
5 on that property bring some benefit to the city? Maybe
6 it's cleaning up the area, maybe it's taxes.

7 MS. HALLIGAN: The - - - I don't - - -

8 JUDGE RIVERA: Maybe it's something else.

9 MS. HALLIGAN: The legislature is certainly
10 allowed to write in very broad terms when it alienates
11 parkland. There is nothing in the public trust doctrine
12 that suggests that it cannot do that. And this court, as
13 it did in Bates v. Holbrook, as it did in Brooklyn Park,
14 the only two cases looking at parkland that actually
15 involve a statute that alienates land simply analyzed the
16 terms of the statute itself and that's what - - -

17 JUDGE WILSON: Let me - - - let me ask you this -
18 - -

19 MS. HALLIGAN: - - - we would urge you to do
20 here.

21 JUDGE WILSON: Counselor, is there a reasonable
22 interpretation of what the legislature did in which the
23 legislature didn't alienate parkland at all but simply
24 declared that the stadium and appurtenant uses were a park
25 use, so there's no alienation here?

1 MS. HALLIGAN: I - - - I don't believe so for two
2 reasons. First of all, Your Honor, if you look at page A-
3 638 of the bill jacket, what the House memorandum provides
4 is for the "establishment and maintenance of facilities,"
5 not just a stadium, which provide for recreation and
6 entertainment. So it's clear that there was an
7 anticipation that the City would have the authority down
8 the road to decide how to use the rest of the land.

9 The second piece is the context of the statute.
10 If you look at subsection (c), there are seventy-seven
11 acres that are alienated there. Shea Stadium took up about
12 fifteen of those acres. The legislature drafted (a), which
13 allows for the City to enter into an agreement with any
14 person for a wide range of uses to serve the wide public
15 purposes set forth in (b) because it understood that a
16 large part of that tract that was alienated had not yet
17 been - - - the use of that of that had not yet been
18 determined, and it allowed the City to take care of that
19 going forward.

20 JUDGE STEIN: How - - - how do you explain
21 (b)(2)? Because subdivision (b)(2) talks about business
22 and/or commercial purposes. How - - - but it requires that
23 they be related to the financing - - -

24 MS. HALLIGAN: Yes, Your Honor.

25 JUDGE STEIN: - - - of the stadium. So what is

1 the difference between this retail shopping center that you
2 say falls under (b)(1) and something used for business or
3 commercial purposes that are only allowed under (b)(2) if
4 they're related to the financing of the stadium?

5 MS. HALLIGAN: Yeah.

6 JUDGE STEIN: Doesn't - - - doesn't your
7 interpretation make (b)(2) completely superfluous.

8 MS. HALLIGAN: No. And let me first explain why
9 the Willets West Retail and Entertainment Center does serve
10 the purposes in (b)(1) and then address (b)(2), if I can.
11 Willets West will not only enable, finally, after almost a
12 hundred years, the remediation of this land, but it also
13 will serve public purposes onto itself.

14 JUDGE STEIN: Okay. That - - - that assumes that
15 it doesn't have to be appurtenant to the stadium, right?

16 MS. HALLIGAN: Well, I believe that there is no
17 question that it has been exceedingly difficult to reach
18 any agreement to remediate this land. And the fact that
19 this allows that to go forward is a public benefit. A
20 distinct question from whether it's authorized by the
21 statute, yes.

22 JUDGE STEIN: Okay.

23 MS. HALLIGAN: But - - - but it is - - -

24 JUDGE STEIN: Fair enough.

25 MS. HALLIGAN: - - - a tremendous public benefit.

1 Willets West alone, as well, provides substantial public
2 benefits. Not only in terms of jobs and in terms of tax
3 revenue - - -

4 JUDGE RIVERA: Counsel, no one is debating it
5 might be a great idea. That's not the point.

6 MS. HALLIGAN: Public - - -

7 JUDGE RIVERA: The point is whether or not you
8 can do it in the park. Because of course - - - of course
9 those developers could find private land and pay for it and
10 put up their hotel. That's not the question. The question
11 is whether or not they can try and do that in the park.

12 MS. HALLIGAN: Well, to be clear, it's a parking
13 lot right now. It's not green parkland. The question, I
14 agree, is whether - - -

15 JUDGE RIVERA: The - - - but it - - -

16 MS. HALLIGAN: - - - it falls within - - - within
17 the framework of the statute.

18 JUDGE FAHEY: Can - - - can we turn, just for a
19 second? Because it seems, in my mind, this turns - - -
20 it's purely a question of statutory interpretation.

21 MS. HALLIGAN: Yes, Your Honor.

22 JUDGE FAHEY: And I - - - I'd like to narrow it
23 down to whether or not you think we should be applying the
24 principle of ejusdem generis, you know, phrases are known
25 by the company - - -

1 MS. HALLIGAN: Yes.

2 JUDGE FAHEY: - - - by the company they keep, for
3 those of us who haven't taken Latin in high school. And -
4 - - and on top of it, if so, if - - - if we're applying
5 that principle then in this context, is there any part of
6 the statute that wouldn't relate to the interpretation of
7 the phrase - - - or the general public benefit phrase.
8 Because there's some argument about whether or not you read
9 the types of activities that are outlined either before or
10 after the key phrase in the - - - in the statute. So - - -

11 MS. HALLIGAN: Yes, Your Honor. So what the
12 legislature did here, as you suggest, is to identify a
13 number of broad purposes, then it used the word "including"
14 which this court has held does not limit what comes before
15 it but suggests that what follows will be illustrative
16 examples. And that is what follows, and it's unsurprising
17 that those examples - - -

18 JUDGE STEIN: But how does - - - how is a retail
19 park shopping center anywhere similar to any of those items
20 that are listed, other than, as you say, it's for public
21 benefit?

22 MS. HALLIGAN: My point, Your Honor, is that - -
23 - is that they - - - it need not be and here is why,
24 because those examples are illustrative of the types of
25 activities that can fulfill those purposes. It's not

1 surprising - - -

2 JUDGE STEIN: But again why - - - why give any
3 examples at all - - -

4 MS. HALLIGAN: - - - because - - -

5 JUDGE STEIN: - - - if all - - - if all that
6 matters is that it's for a public purpose?

7 MS. HALLIGAN: Again, because what was the
8 immediate plan was to build the stadium so it's
9 unsurprising that the legislature would have given examples
10 which - - - which themselves are extraordinarily broad.
11 They encompass any activity I could possibly contemplate
12 taking place in a stadium. But because that was the only
13 immediate decision that had been made and the determination
14 about how to use the rest of the land had been deferred,
15 those were the only examples that they could have provided.
16 Again, the Yankee Stadium Statute - - -

17 JUDGE FAHEY: Well, they - - - they could have
18 given different examples, though - - - just to follow up on
19 Judge Stein, they - - - they could certainly have given
20 examples that leaned towards more improvement of trade and
21 commerce, which is the phrase that you're relying on, and
22 they don't seem to do that.

23 MS. HALLIGAN: Well, I think some of them - - -
24 some of them do, meetings, assemblages, that sort of thing.
25 But in any event, the Appellate Division said that the

1 first part of (b)(1), the broad purposes, was as, it put
2 it, "unquestionably wide." That is right. And what you
3 would do if you allowed the list of examples to control the
4 meaning of those broad purposes is, first of all, you would
5 really run afoul of this court's canon of interpretation
6 about what the word including means. But more importantly,
7 you would write those broad purposes out of the statute.
8 And I think that it's - - - it's important to make the
9 point that there's nothing about the public trust doctrine
10 that ties the legislature's hands that way.

11 JUDGE FAHEY: I suppose the question really is,
12 then, is - - - is whether we're writing those broad public
13 purposes out or limiting those public purposes by the
14 examples.

15 MS. HALLIGAN: And - - - and again, Your Honor,
16 I'd - - - I'd urge you to look at the Yankee Stadium
17 Statute where it says for a professional baseball stadium.

18 JUDGE FAHEY: All right. Thank you.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.
20 Counsel.

21 MR. DEARING: May it please the court, Richard
22 Dearing for the City. Just to piggyback on this - - - this
23 ejusdem generis or noscitur a sociis point - - - and maybe
24 - - - maybe expand upon it a little bit, is if you really
25 look at this phrase that begins with "including" and then

1 lists a series of events happening, et cetera, and that - -
2 - that phrase itself ends with a catch-all "and other
3 events of civic, community, or general public interest."
4 And I think this really shows why Ms. Halligan's point is
5 powerful. That phrase would stand - - - you know, if - - -
6 if you read that phrase as limiting of the broad purposes,
7 that phrase could stand entirely on its own, and you really
8 should take a pen and strike out the forty-six words that
9 precede from the - - - from the - - - right after the word
10 "for" on the - - -

11 JUDGE RIVERA: It says an event. It doesn't say
12 a mall.

13 MR. DEARING: But - - - but the point being - - -

14 JUDGE RIVERA: How is an event - - - how is an
15 event a store?

16 MR. DEARING: Well, an event is not a store. But
17 - - - but - - -

18 JUDGE RIVERA: Okay.

19 MR. DEARING: But a mall fits within several of
20 the broad purposes that precede this including phrase.
21 Just - - - I do want to try to wrap up on that phrase. If
22 you - - - if you struck the stat - - - the language of the
23 statute beginning with the word "for" on the second line of
24 respondent's appendix 1077 all the way through the word
25 "including," you would substitute this list of events

1 ending with "and other events" as the controlling language
2 of the statute. That's forty-six words you would cut out
3 of that statute, and we know - - - whatever - - - whatever
4 these canons means, they don't mean that you're supposed to
5 write out forty-six words that the legislature chose to put
6 there. And so now returning to what those broad purposes
7 say - - -

8 JUDGE RIVERA: I'm sorry. How - - - how are you
9 suggesting to read this? What is it you're saying can - -
10 - can be ignored, or am I misunderstanding your point?

11 MR. DEARING: No. Not to ignore it.

12 JUDGE RIVERA: Okay.

13 MR. DEARING: I mean obviously things that fall
14 within that including phrase are within the scope of the
15 statute but that doesn't mean those broad purposes that
16 precede that including phrase should be ignored. And - - -
17 and just - - -

18 JUDGE RIVERA: Well, this strikes me as though
19 everything after that comma, everything after including is
20 events of some sort.

21 MR. DEARING: Exactly my point. And if - - -

22 JUDGE RIVERA: Right. Again, it's not a
23 structure like a mall.

24 MR. DEARING: Not that phrase, and that's where
25 the Appellate Division really went wrong. It focused on

1 that phrase to the exclusion of the broad list of purposes
2 that preceded it. And that's really treating the statute
3 as if the legislature in (b)(1) had just listed those
4 events - - -

5 JUDGE STEIN: But - - -

6 MR. DEARING: - - - rather than including those
7 broad purposes for it.

8 JUDGE STEIN: But given this language here which
9 - - - which you say is very, very broad, don't we have to
10 interpret it in the - - - in a narrow sense, interpret the
11 broad language narrowly when we're referring to the public
12 - - -

13 MR. DEARING: No. We - - -

14 JUDGE STEIN: - - - interest doctrine?

15 MR. DEARING: The - - - the statute should be
16 interpreted, as - - - as one of Your Honors said, to - - -
17 it's a straight question of statutory interpretation. We
18 should effectuate the legislative intent.

19 JUDGE STEIN: Well, but we're talking about the
20 public interest doctrine.

21 MR. DEARING: But there's no - - - but the public
22 - - -

23 JUDGE STEIN: It's not just any statute. It's -
24 - -

25 MR. DEARING: Sure. But - - -

1 JUDGE STEIN: It's the statute - - -

2 MR. DEARING: But the court cases have never - -

3 -

4 JUDGE STEIN: - - - pursuant to that doctrine.

5 MR. DEARING: Under - - - understood. The
6 court's cases have - - - have never focused on a case that
7 - - - the situation where you're trying to interpret the
8 scope of what is admitted by everyone to be an alienation
9 statute directed as a specific parcel. So - - - so really,
10 the question direct and specific is satisfied here.
11 There's no question it's directed alienation. I mean the -
12 - - a lease is authorized. The question is which lease is.
13 And there's no question it's directed at this specific
14 parcel. It's direct and specific. Once you have the
15 legislature having called its mind to that question, the
16 words they chose to use should be interpreted like any
17 other statute. And just to - - - just to kind of elaborate
18 on - - -

19 JUDGE RIVERA: Could you move the - - - could you
20 move the Mayor's residence to this parcel?

21 MR. DEARING: No. I think a private residence -
22 - -

23 JUDGE RIVERA: Why not?

24 MR. DEARING: - - - is an excellent example. A
25 private residence, even of a public official, is an

1 excellent example of something that wouldn't fall within
2 the scope of (b)(1). And - - - and it's important not to -
3 - -

4 JUDGE RIVERA: Could you move the Department of
5 Motor Vehicles to this property?

6 MR. DEARING: I - - - I doubt that you could.
7 And I - - - and I - - -

8 JUDGE RIVERA: Why not? Isn't that for the
9 public benefit? I mean some people might disagree about
10 the DMV, but let's assume so.

11 MR. DEARING: But that - - - Your Honor, it
12 doesn't stop at public benefit. And let's just - - - just
13 to go through it, "recreation, entertainment, amusement,
14 education, cultural development or betterment, and
15 improvement of trade or commerce." What we have here - - -

16 JUDGE RIVERA: Well, let's say you open up the
17 mayor's residence for tours. Could you - - - could you put
18 it on this property?

19 MR. DEARING: Doubtful. But this is quite far
20 from that.

21 JUDGE RIVERA: But why? This is what I'm asking.
22 Why.

23 MR. DEARING: Because this - - - this development
24 resonates with several of these purposes. Entertainment,
25 amusement - - -

1 JUDGE RIVERA: But if - - - but if you what you
2 wanted to do only resonated with one, wouldn't it satisfy
3 the statute? Does it have to do multiple purposes?

4 MR. DEARING: Perhaps. But - - - but - - - well,
5 let's sort of - - - for this purpose, let's skate over the
6 language a little bit and identify some points of
7 similarity that I think are - - - have been overlooked by
8 petitioners here. The - - - the retail center sitting
9 right next to this stadium, both of these are public
10 spaces, both of them are public attractions, both of them
11 are public destinations. The public will visit at - - -
12 stop at the 7 Train right there, the LIRR, and visit both
13 of these things. It's not hard to imagine, as we pointed
14 out, somebody before or after a game going to this retail
15 center, some - - - someone in a family or group of friends
16 who decides I want to go to the game or maybe the game gets
17 out of hand early, decides we're going to go spend time
18 there. There is symbiosis and complement within these two
19 uses.

20 JUDGE FAHEY: Oh, I - - - we can clearly see the
21 economic viability of the project, but that's - - - that's
22 not really our question here. Our question is really, in
23 some ways, broader than that. Does your reading of the
24 statute create a situation where parkland that is alienated
25 for a specific purpose becomes free to be used for any

1 purpose?

2 MR. DEARING: No. That will be within the - - -

3 JUDGE FAHEY: But - - - slow down.

4 MR. DEARING: Sorry.

5 JUDGE FAHEY: But that's the question that we
6 confront. And I think that's - - - that's where the
7 questions that go to the heart of what the public interest
8 is here can't be ignored. That's why we get back to what
9 was the statute about? What was it aiming to do? It was
10 aiming to provide a home for the Mets.

11 MR. DEARING: Sure.

12 JUDGE FAHEY: That's what we're aiming to do
13 here. Now how far eschew can you go in that pursuit of the
14 home for the Mets that's - - - and when does it become
15 private interest and not public interest? And that's why
16 this list becomes very important to our interpretation.

17 MR. DEARING: Understood. And I think it's
18 important - - - important in that vein that that this be -
19 - - it's understood that this is a place that the public
20 comes to and uses. They use it for a movie theater - - -

21 JUDGE FAHEY: But you see the distinction. The
22 public comes to many private activities perfectly
23 appropriately and this - - - I mean no doubt that this
24 would be a good thing for the neighborhood. But that's not
25 the same as saying that it shouldn't be treated as

1 alienation of parkland with limitations on it.

2 JUDGE STEIN: And that brings me back to the
3 question that I had asked earlier about given your
4 interpretation, what is the need for and significance of
5 (b)(2)?

6 MR. DEARING: (b)(2), it could - - - it could - -
7 - it refers to purely commercial activity - - -

8 JUDGE STEIN: But how - - -

9 MR. DEARING: - - - that does not - - -

10 JUDGE STEIN: How is this not that?

11 MR. DEARING: Because, well, this - - - this
12 touches on several of the purposes, including at the end,
13 just to go to right at the heart of it, improvement of
14 trade or commerce which is a - - - which is a term of art
15 that is synonymous - - -

16 JUDGE GARCIA: Wouldn't every business, I think
17 is Judge Stein's point, satisfy that?

18 MR. DEARING: I don't think so. And - - - and in
19 that vein, the Sun Co. case the, the Kaufmann Carousel
20 case, both cited by the petitioners, that talk about major
21 retail development projects as sort of a game changer in
22 the area. That's improvement of trade or commerce. That -
23 - - that is not the same as just garden variety trade or
24 commerce. The two terms are not - - -

25 JUDGE GARCIA: So one store coming in here would

1 not be improving - - -

2 MR. DEARING: No. And I think - - -

3 JUDGE GARCIA: - - - trade or commerce?

4 MR. DEARING: - - - that's a good example. Just
5 a - - - a simple retail use, garden variety retail, does
6 not rise to the level of improvement of trade or - - -

7 JUDGE STEIN: So (b)(2) allows that one store,
8 but - - - but (b)(1) doesn't? Is that - - - is that what
9 you're saying?

10 MR. DEARING: (b)(2) could allow a simple
11 commercial use that doesn't rise to the level of
12 improvement or trade - - - of trade and commerce as long as
13 the - - - as long as the money is used to finance - - -

14 JUDGE GARCIA: But what's your definition, then,
15 of improving trade or commerce? How would we apply for the
16 next business that comes?

17 MR. DEARING: There's case law - - - well, we're
18 - - - we're talking about this statute, and it's really
19 only this statute that we're talking about right now.

20 JUDGE GARCIA: Under the - - -

21 MR. DEARING: But there are cases - - -

22 JUDGE GARCIA: - - - statute how would you define
23 improving trade or commerce?

24 MR. DEARING: There's cases, and I would go - - -
25 I would follow what the Fourth Department did in those two

1 cases I just cited, which are about - - - they're in a
2 slightly different legal context but still relevant.
3 They're about use of eminent domain authority, what is a
4 public purpose. And they ackno - - - they understand that
5 certain types of - - - certain types of retail developments
6 that - - - that are for economic redevelopment truly, for
7 economic development, revitalize an area. Those rise to
8 the level of improvement of trade or commerce. And things
9 that don't - - - this case is easily on that side of the
10 line. Others pure retail or commerce, straight advertising
11 billboards, things like that that don't rise to that level
12 I would say do not fall within (b)(1). And if they're
13 going to be - - - if they try to - - - were - - - tried to
14 be brought in under (b)(2), they could be - - - that could
15 be done only if the - - -

16 JUDGE RIVERA: Then like ten little stores
17 without the roof in one building that's connected and - - -

18 MR. DEARING: No. That - - -

19 JUDGE RIVERA: - - - you know, people are not
20 going to get rained on when they're walking around?

21 MR. DEARING: I - - - I think that's an easy
22 case. It doesn't get there, and that's not - - -

23 JUDGE RIVERA: No, no. But what does that mean,
24 it's an easy case? Does it fit under (b)(2) or not?

25 MR. DEARING: If the money - - - it could be

1 brought under (b)(2) if the money from that - - - those
2 operations were funneled back into the - - - the operation,
3 the - - - the construction or financing of the operation of
4 the stadium. And that's what the terms of the (b)(2) say.
5 But (b)(1) and (b)(2) are independent grants of
6 authorization, and this case is clearly within (b)(1).

7 JUDGE GARCIA: But couldn't one business, and
8 we've seen this in other context, one superstore, come in
9 and make the same claim that it's a redevelopment project?
10 We're going to lift the neighborhood because we're going to
11 employ X thousand employees at minimum wage here, and
12 this is good for everyone, it's an improvement of trade or
13 commerce, we're too big for you to not let us fall under
14 this provision?

15 MR. DEARING: They might. I - - - I think it
16 would be within the judgment of the city officials who
17 administer this lease whether that standard is met, but - -
18 - and the court, obviously, to review that. But - - - but
19 I want to just return to a key distinction, and this is a
20 distinction that gives the court a narrower path to resolve
21 this case, it doesn't require it to go that far, which is -
22 - - which is - - - these are - - - this is a public
23 attraction. This is not just - - - this is not just the
24 DMV, it's not just a private residence, it's not just some
25 office building. It is a public attraction. It's a large

1 public space. There's public programming there. There's -
2 - -

3 JUDGE STEIN: What happens - - - what happens
4 when all these online companies put all these supermalls
5 out of business? Then what - - - then what happens? Then
6 we're going to be - - - then we're going to be dealing with
7 another empty structure on - - - on this parkland; is that
8 it?

9 MR. DEARING: Let's hope not. I mean we'll - - -
10 folks will have to - - - will have to adjust if it comes to
11 that. That's certainly - - -

12 CHIEF JUDGE DIFIORE: Counsel, if we were to
13 reverse on statutory interpretation - - -

14 MR. DEARING: Sure.

15 CHIEF JUDGE DIFIORE: - - - what becomes of the
16 remaining land use issues? Do they get remitted back?

17 MR. DEARING: The relating - - - no. The
18 relating land use issues are not before the court, and
19 they've been waived jurisdictionally because no cross
20 appeal was taken. And let me - - - let me - - - thank you
21 for bringing me to that point because I want to try to
22 unpack a little bit why that's so. And the first key
23 question is - - - is were the - - - were the petitioners
24 here aggrieved such that they were required to cross
25 appeal. The test of aggrievement under their own - - -

1 under their own case, the Parochial Bus Systems case, did
2 the petitioners get all the relief they sought?

3 Now the simplest way to understand that they
4 didn't is to go here to the relief set forth in the
5 petition, that's A-56 to 57 of the - - - of the appendix
6 where the petitioner set forth distinct - - - highly
7 specific and distinct relief under four different
8 subparagraphs for each of their causes of action. And the
9 - - - the Appellate Division here almost verbatim, not
10 quite, but almost verbatim copied the first subparagraph
11 and granted the petition to the extent, in their expressed
12 words, of affording the relief on the first cause of
13 action. But the petitioners here sought three distinct and
14 separate declarations, three distinct and separate types of
15 injunction, and they only got one of those three. And that
16 meant they are, in fact, aggrieved. They did not get all
17 the relief they sought, and - - - and they needed a cross
18 appeal to raise those claims.

19 And just to - - - a thought experiment to put a
20 finer point on is if the - - - if the Appellate Division's
21 decision had become final, if there had been no further
22 proceedings and after that decision had been entered, a new
23 statute - - - it's not required, as we've argued, but - - -
24 but just hypothetically, a new statute had been passed by
25 the legislature explicitly saying we authorize Willets

1 West, the petitioners would be out of luck on their
2 argument that they needed a ULURP, they needed a rezoning,
3 they needed further action at the local level. They didn't
4 get that relief, and they would be stuck. None of those
5 steps would be lawfully - - - legally required to be taken.
6 They had - - - they had not obtained that relief, and
7 that's the easiest way to see that to raise those claims,
8 to continue pressing them, they needed to cross appeal.
9 They didn't do it. The claims aren't in the case anymore.

10 CHIEF JUDGE DIFIORE: Thank you, counselor.

11 MR. DEARING: Thank you very much.

12 MS. DASGUPTA: Thank you, Your Honors; Anisha
13 Dasgupta the State of New York. I'd like to start by
14 addressing some of the statutory interpretation questions
15 here. I think we're rightly focused on the purposes that
16 are set forth in subdivision (b)(1). Now the State very
17 firmly believe that the legislature has to provide direct
18 and specific approval plainly conferred to use parkland for
19 non-park purposes. But it's the State view - - - State's
20 view that that authorization has been provided by the
21 statute. And if I may, I'd like to walk the court through
22 why that is, looking specifically to the provisions of (b)
23 clause (1). I think we all agree that that's the clause
24 that governs this case.

25 Now the first reason why this is a public purpose

1 has to do with the nature of the contemplated project.
2 We've all been referring to it in shorthand as a retail
3 shopping mall, but it's not the State's interest here to
4 come and promote a retail shopping mall. The Office of
5 Parks has determined that part of the reason why this
6 development is consistent with the public trust doctrine
7 and authorized by the statute is that it's going to provide
8 recreational opportunities and open space to people in this
9 community. So the complex that's going to be developed at
10 Willets West, in addition to what we've been discussing
11 with a retail store and a movie theater also - - -

12 JUDGE GARCIA: I'm sorry. I don't - - - I just
13 don't understand that point. So as long as it's providing
14 open space, it can be any use? Or how do we read the
15 public use doctrine through that filter? I mean would that
16 apply to the Adirondacks or the - - - you could build a
17 shopping mall but there's going to be a lot of space? I -
18 - - I don't understand that argument.

19 MS. DASGUPTA: Well, what was I was going to say,
20 Your Honor, it's the other components of this redevelopment
21 project. So this project is going to provide public
22 program space, an outdoor plaza that's going to be
23 available to the public to accommodate unscheduled
24 gatherings - - -

25 JUDGE GARCIA: The primary - - -

1 MS. DASGUPTA: - - - and scheduled events that
2 are going to include museum exhibitions.

3 JUDGE GARCIA: The primary thing here is a retail
4 space. That - - -

5 MS. DASGUPTA: Excuse me, Your Honor?

6 JUDGE GARCIA: That's the primary purpose of what
7 you want to build here, what's - - - what they intend to
8 build, right? It's a retail space.

9 MS. DASGUPTA: The - - - the proposal - - -

10 JUDGE GARCIA: They're not building a public
11 performance space here.

12 MS. DASGUPTA: Well, the proposal that the City
13 put out for developers to come up with a plan on wasn't
14 simply a shopping mall. It was a space that provided
15 different kinds of places for public engagements. We have
16 this outdoor plaza space, where according to the - - -

17 JUDGE STEIN: But - - -

18 MS. DASGUPTA: - - - permitting documents, there
19 are going to be museum exhibitions.

20 JUDGE STEIN: But the proposal wasn't to build an
21 outdoor space and then have a few stores around it. The
22 proposal was to build this retail shopping mall. That - -
23 -

24 MS. DASGUPTA: That's true, Your Honor, but it's
25 going to have, for example, a rooftop farm and greenhouse

1 that's going to be open to school groups and community
2 organizations free of charge. People are going to have the
3 opportunity to go there and to - - - to learn about
4 gardening.

5 JUDGE FAHEY: But it - - -

6 MS. DASGUPTA: So when we look at the purposes -
7 - -

8 JUDGE FAHEY: Isn't this really - - - shouldn't
9 we be really looking and say what's the primary purpose of
10 this activity? And the primary purpose of this activity is
11 not - - - is not to - - - it may, in an ancillary way, you
12 know, provide some kind of - - - you know, tell you what
13 food to buy, what's the right thing to buy, all this
14 perfectly legitimate public purposes. The primary purpose
15 of the activity is a private purpose. It's to lease space,
16 to set up a shopping mall so people will spend money in the
17 context of coming to other sporting events. Those are
18 primary legitimate profit-making motives. The primary
19 purpose is not anything else. And ultimately, if we look
20 to the heart of it, aren't - - - aren't we restrained by
21 that analysis to require that this - - - that this
22 particular development be approved by the legislature?

23 MS. DASGUPTA: Again, this statute does approve
24 the project because, for example, the language of (b)(1),
25 Your Honor, Your Honor, is talking about primary purposes.

1 (b)(1) doesn't use the word primary. It uses the word
2 purposes. And the different functions that this space will
3 serve will serve a number of - - -

4 JUDGE FAHEY: So - - - so that's your response.

5 MS. DASGUPTA: - - - purposes that are in (b)(1).

6 JUDGE FAHEY: We shouldn't - - - we shouldn't
7 look at the underlying purpose of the statute. We - - -
8 we're restricted then to the word purpose not primary
9 purpose?

10 MS. DASGUPTA: Well, the court should look at the
11 text of the statute, and the - - - and the statutory text
12 uses the word purpose - - -

13 JUDGE RIVERA: Yeah. But it says "Any purpose or
14 purposes which is of such nature," so there is some limit.
15 You can't really just say purpose, purpose, purpose, right?

16 MS. DASGUPTA: Yeah. That's exactly right, Your
17 Honor. There are important limits. The appellants and the
18 City have already discussed some of the limits. I think
19 one important distinction - - -

20 JUDGE RIVERA: But don't - - - and don't we have
21 to contextual those limits with respect to the point, the
22 whole reason that the State allowed the City to use this
23 land? It was to build that stadium, appurtenant lands and
24 these facilities and the parking space? And that's the way
25 you look at the statute in the context of what the State

1 was looking at, what the City wanted to do which was build
2 this stadium?

3 MS. DASGUPTA: Well, I'd like to respond to that
4 in two ways, Your Honor. First is that - - -

5 JUDGE RIVERA: You're not really arguing that - -
6 - that the legislature anticipated building a mall - - -

7 MS. DASGUPTA: It's - - -

8 JUDGE RIVERA: - - - next to Shea?

9 MS. DASGUPTA: It doesn't have to do with the
10 mall. What it has to do - - - the question really for this
11 court is did the legislature contemplate only the
12 construction of a stadium or did it intend the land to be
13 used for some purposes that were potentially broader? Now
14 that's not every purpose because as the court has pointed
15 out today, there are things - - -

16 JUDGE RIVERA: Well, really, that's a compelling
17 argument that it's not only the stadium because, of course,
18 it's referring to appurtenant grounds and facilities
19 agreed.

20 MS. DASGUPTA: Well, the words, Your Honor - - -

21 JUDGE RIVERA: The question is what - - - what
22 can you use that for given the language of the statute and
23 given, again, that the point of the alienation was to build
24 this stadium, to draw people into the stadium.

25 MS. DASGUPTA: Well, again, two points, Your

1 Honor. First, that the legislative history of this statute
2 is - - - is broader than that and in contrast with other
3 Stadium Statutes. So, for example, the bill jacket here,
4 the memorandum supporting the assembly bill, and this is at
5 Appendix page 628, when it's referring to what the
6 legislature contemplates in terms of public purpose it
7 says, "It's served by government action designed to affect
8 the establishment and maintenance of facilities that
9 provide entertainment and recreation for the public,
10 promote public health, afford meeting places for
11 gatherings, furthering the enlightenment and education of
12 the public." So the - - -

13 JUDGE STEIN: But - - - but everything that's
14 listed in the including phrase refers to things that would
15 generally take place in a stadium or connected to a
16 stadium, and - - - and to me, that is the overriding theme
17 of this legislation in the first place. And - - - and so I
18 - - - it seems to me that going to a retail shopping mall
19 is a real leap. It's - - - it's not just a plain reading
20 of the statute as - - - as you suggest.

21 MS. DASGUPTA: But - - -

22 JUDGE RIVERA: And if I may add, the operative
23 word here is events, and what you describe still sounds
24 like a bunch of events. Now they may be - - - have longer
25 periods of time that they exist. You may have a cultural

1 series of performances, but they all still sound like
2 events, not a big mall where people can go and shop.

3 MS. DASGUPTA: Again, the State resists the
4 characterization of this project as exclusively a mall
5 because it - - - it's the conclusion of the Department of
6 Parks that it is going to provide some valuable public
7 spaces. But to Judge Stein's question, you know, yes. As
8 the First Department noted, all of the purposes here could
9 be seen as things that would be served by a stadium. But
10 they need not to be, and the legislature knows how to write
11 that stadium limitation. The - - - the Yankee Stadium
12 Statute is a particularly illustrative example of this.
13 And in the Yankee Stadium Statute, the legislature talks
14 about Yankee Stadium and other facilities. But every time
15 it talks about those other facilities it uses a relational
16 terms like related, associated with. Here, we only have a
17 relational term once, that's the word "appurtenant" in the
18 first sentence of subdivision (a) which refers to initial
19 agreements. The second sentence of subdivision (a) talked
20 about - - -

21 JUDGE GARCIA: But your argument would be - - -

22 MS. DASGUPTA: - - - subsequent - - -

23 JUDGE GARCIA: - - - a lot better if the statutes
24 were flipped, right? If the Yankee Stadium one came first
25 and they didn't include that in here. But as - - - what

1 year is the Yankee Stadium Statute?

2 MS. DASGUPTA: 2005, Your Honor.

3 JUDGE GARCIA: Right. So by that time there was
4 a lot more of an understanding people were going to do this
5 kind of thing at all. So I - - - I think it's hard to make
6 that argument with the statute that you have in the early
7 '60s and then one that's made in 2005. But going back to
8 your interpretation of the public trust doctrine, it really
9 seems that the State's view here is that if it's worthy,
10 then it's in - - - within, you know, that kind of overrides
11 the public trust because while this is primarily a retail
12 facility, it has some good things in it?

13 MS. DASGUPTA: Not so, Your Honor. If this - - -
14 if the other functions of this project did not serve the
15 purposes that were set forth in (b)(1), the State would not
16 be here today because, of course, the State is a custodian
17 of parkland, and it's the State's interest to make sure
18 that parkland isn't being used for non-park purposes that
19 haven't been authorized by the legislature. So we wouldn't
20 be here today.

21 But to return to - - - to one small point about
22 the Yankee Stadium and then Your Honor's question about the
23 chronology, so the Yankee Stadium Statute, when it sets out
24 purposes, talks about these as being things that stadium
25 quote "will provide." So in the Yankee Stadium Statute,

1 the purposes are expressly linked to a stadium in a way
2 that they are not in the language of the statute. Now, of
3 course, the Yankee Stadium Statute is 2005. This statute
4 is 1961. But we do have an example of a statute that's not
5 too far removed from this statute in time, that's the Erie
6 County Stadium Statute. That was enacted in 1968, so
7 roughly at the same time as this statute. And again, the
8 language of that is instructive because that statute, like
9 this statute, talks about broad purposes in ways that are
10 associated with a stadium but not necessarily purely served
11 by it.

12 So in the Erie County Stadium Statute, the
13 legislature refers not just to the stadium but to the site
14 of the stadium. Now that is analogous to what's happening
15 here where the - - - the legislature refers not just to the
16 stadium itself but it refers to the parking areas, other
17 facilities, other grounds. Now the - - - we have these
18 statutes on one side. To the other side we have the Yankee
19 Stadium Statute and the U.S. Tennis Association Statutes.
20 The State thinks that those are very good examples of how
21 the legislature can very clearly express its intention to
22 limit particular purposes only to stadium purposes. So the
23 Yankee Stadium Statute, again, not only includes those
24 relational terms but its statement of purpose is all about
25 the stadium. It's all related to the stadium. In the U.S.

1 Tennis Association Statute, when they talk about purposes
2 other than - - - than stadium and tennis purposes, they
3 limit those purposes to one year in duration. They say if
4 you're going to use this for non-tennis purposes, your
5 lease is limited to a year and can't be renewed.

6 Now this 1961 statute that we're construing here
7 today doesn't have any of those hallmarks at all, and I
8 think the - - - the message of this is that the legislature
9 sometimes speaks in broad terms and sometimes in targeted
10 terms. But those distinctions have meaning, and it's the
11 task of this court to give effect to the meaning. The - -
12 - the State has been advised that this is - - - this is
13 going to serve the purposes in (b)(1), not just through the
14 development of the Willets West site, but also through the
15 cleanup of Willets Point.

16 JUDGE GARCIA: But even assuming your reading is
17 correct and it - - - about the stadium and Yankee Stadium
18 differences and all, Erie, it still, even under your
19 interpretation, would have to fall within one of the
20 purposes of (b)(1)?

21 MS. DASGUPTA: That's right, Your Honor.

22 JUDGE GARCIA: And in your view, that - - - the
23 purpose that most closely aligns with this is to the
24 improvement of trade and commerce. And do you agree with
25 the statement that these are game-changing type commercial

1 facilities?

2 MS. DASGUPTA: I - - - improvement of trade of
3 commerce would be served because of the - - - the spillover
4 from this commercial facility. But that's not the only
5 purpose. That's - - -

6 JUDGE GARCIA: That kind of cuts - - - a little
7 ways cuts against your parkland and the thing on the roof
8 argument, right? Because, really, the improvement part of
9 this is the nature of the commercial space.

10 MS. DASGUPTA: But that's not the sole purpose.
11 So here, the - - - the purposes in (b)(1) include
12 recreation, entertainment, amusement, education, cultural
13 development, and the improvement of trade and commerce.
14 And as this project has been described in the permitting
15 document, the - - - the different components of the project
16 will satisfy those different spaces. So, of course, the -
17 - - the retail, movie theater, and entertainment venue
18 aspects are going to provide recreation and entertainment
19 and amusement. There's the public plaza space, which is
20 going to provide gathering space; the rooftop garden, which
21 is going to be used for educational purposes; and then the
22 - - - the retail complex as a whole, which is expected to
23 improve trade and commerce in the area by bringing jobs. I
24 mean certainly, this would be a far closer case if the only
25 purpose we were talking about was improvement of trade of

1 commerce, although, the - - - those words are in the
2 statute. I mean it - - - I think it is important to - - -

3 JUDGE RIVERA: But if they didn't have those
4 other things but just had the movie theater, does it
5 satisfy your definition, just the movie theater?

6 MS. DASGUPTA: If they were just building a movie
7 theater on the space?

8 JUDGE RIVERA: Got a bunch of stores and a huge
9 movie theater. Does it satisfy your definition?

10 MS. DASGUPTA: That would seem to be something
11 that would provide recreation, entertainment, and
12 amusement.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 MR. LOW-BEER: May it please the court, my name
15 is John Low-Beer. I represent, excuse me, petitioners-
16 respondents, many of whom I believe are here today. I
17 would submit that the focus of the discussion so far has
18 been a little bit off the mark. And that the real - - -
19 the structure, if you look at the overall structure of this
20 statute, you really need to look at section - - -
21 subsection (a), not subsection (b).

22 Subsection (b) is really a parenthetical to
23 subsection(a). Subsection (b) has nothing to do with what
24 can be constructed on the site. And this whole discussion
25 about noscitur a sociis or ejusdem generis or what - - -

1 what these purposes actually are is it's important because
2 that is just further evidence that this subsection (b) has
3 nothing to do with construction. The only reason that
4 subsection (b) is in this statute, is to make sure that
5 this stadium would satisf - - - would not violate the State
6 Constitution Article VIII (1). And - - -

7 JUDGE RIVERA: The argument is you can't build
8 anything on the lot? Is that what you're trying to say?

9 MR. LOW-BEER: Well, nothing other than a stadium
10 and appurtenant facilities. Yes.

11 JUDGE RIVERA: Um-hum.

12 MR. LOW-BEER: And if I may, I - - - I'd like to
13 just - - -

14 JUDGE RIVERA: So - - - so if they wanted to
15 build a dance theater, could they do that?

16 MR. LOW-BEER: No. They could not.

17 JUDGE RIVERA: Even though it serves the purposes
18 of amusement and whatever - - -

19 MR. LOW-BEER: I - - - I would submit that those
20 purposes have nothing - - - again, have nothing to do with
21 what can be constructed there. They only have to do with
22 the manner in which the stadium and its appurtenant
23 facilities can be used. And in fact, the - - - even the
24 phrase itself, it says that the lessor - - - I'm sorry, the
25 lessee may occupy or carry - - - may "use, occupy, or carry

1 on activities in the stadium." And my adversaries
2 repeatedly, over and over and over again, they cite this
3 list of purposes and then they say that these purposes are
4 for the use of the - - - the site or Willets West or the
5 land or the subject property or the parkland, anything to
6 avoid the use of the dread word "stadium" which is in the
7 one that's in the statute.

8 What the statute says is that these are purposes
9 for which the stadium and its appurtenant facilities can be
10 used. It doesn't say that these are purposes for which the
11 property or the site or Willets West can be used. I mean
12 under their interpretation, you could demolish the stadium
13 or perhaps even never have built it in the first place.
14 But anyway, why not demolish it and use the site for
15 something else?

16 JUDGE WILSON: So there are stores there selling
17 Mets merchandise, right? Are those - - -

18 MR. LOW-BEER: Sorry?

19 JUDGE WILSON: There are stores there now selling
20 Mets merchandise. Are those appurtenant uses?

21 MR. LOW-BEER: Well, the - - - some of those
22 stores, presumably, are appurt - - - I'm not sure what
23 stores there are, but - - - but under Section (b)(2),
24 certain comm - - - commercial activities are allowed in
25 support of the operation of the stadium. So if they sell

1 Mets paraphernalia, yes. That's - - -

2 JUDGE WILSON: But my question, I guess, really,
3 is do we have to look to see what the retail stores are
4 selling to determine whether they're an appurtenant use?
5 Or can it just be a shopping mall that maybe sells some
6 Mets merchandise and some other stuff?

7 MR. LOW-BEER: No. I - - - I don't believe a
8 shopping mall can be considered appurtenant to a stad - - -
9 a stadium. Appurtenant to means that it's necessary - - -
10 necessarily related to it, it serves the stadium. It
11 doesn't mean a wholly separate thing which, even though the
12 City has argued that - - -

13 JUDGE FAHEY: Let - - - let me just take a step
14 back here - - -

15 MR. LOW-BEER: Yeah.

16 JUDGE FAHEY: - - - on your analysis because what
17 - - - what you're saying is the way I read the statute is
18 Section - - - or subdivision (a) is the enabling
19 legislation, subdivision (b) sets out the purposes. And
20 that after it's enabled, the purposes are - - - are
21 illustrated in subdivision (b), but they're still
22 restricted by the language in the enabling legislation. So
23 what - - - whatever is in (b), is - - - is this your
24 argument, it doesn't matter because (a) has already limited
25 them?

1 MR. LOW-BEER: Yes. (a) has - - - (a) has said
2 that what you can construct - - -

3 JUDGE FAHEY: Which goes back to what Judge
4 Wilson was saying, in essence, that this - - - that the
5 proposed activities by the City are not appurtenant to the
6 stadium development.

7 MR. LOW-BEER: These propo - - - no, they are
8 certainly not.

9 JUDGE FAHEY: So back to your point, so that
10 whatever is in (b) is necessarily limited by the
11 appurtenant language in (a)?

12 MR. LOW-BEER: Yes.

13 JUDGE FAHEY: Do I have that I correct? Okay.

14 MR. LOW-BEER: Yes.

15 JUDGE FAHEY: All right.

16 MR. LOW-BEER: And if - - - if I may, I'd just
17 like to read (a) - - - it's - - - I've omitted nothing of
18 any relevance, I don't think. In a nutshell, here's what
19 it says, and I think it's very clear. "The City is
20 authorized to enter into leases with any persons whereby
21 such persons are granted the right" for any purposes
22 referred to in - - - "for any purpose referred to
23 subsection (b) to use, occupy, or carry on activities in a
24 stadium with appurtenant facilities to be constructed by
25 the City in Flushing Meadows Park." So in other words, the

1 City will construct the stadium. It can lease that
2 stadium. And then the lessee can use that stadium for any
3 of the purposes described in subsection (b), the stadium,
4 obviously, and its appurtenant facilities.

5 JUDGE RIVERA: Well, it says "appurtenant
6 grounds."

7 MR. LOW-BEER: Sorry?

8 JUDGE RIVERA: It says "appurtenant grounds," so
9 wouldn't that be all the lands that leads up to the
10 stadium?

11 MR. LOW-BEER: Well, grounds - - -

12 JUDGE RIVERA: Then we're back to why - - - why
13 is it they can't construct on something on that - - - those
14 grounds that satisfies the purposes of (b)(1)?

15 MR. LOW-BEER: Well, they - - - they cannot
16 because the term use, occu - - - because construction is -
17 - - occurs four times in this statute, always with
18 reference to the stadium and the appurtenant parking areas,
19 grounds, and other facilities. Grounds refers to
20 landscaping, things of that nature. I don't think it
21 refers to a shopping mall. I mean the notion that the word
22 grounds - - -

23 JUDGE STEIN: But what does "improvement of trade
24 or commerce" mean? What does that mean?

25 MR. LOW-BEER: What does that mean?

1 JUDGE STEIN: Yeah.

2 MR. LOW-BEER: Well, I - - - I have argued in - -
3 - in our briefs, we - - - we argue that "improvement of
4 trade and commerce" is a term of art that denotes a public
5 purpose of - - - for example, it would include trade fairs,
6 exhibitions. In *Bordeleau v. the State of New York*, this
7 court held that promotional - - - sort of an advertising
8 campaign, I believe for the wine industry for the state as
9 a whole, constituted improvement of trade and commerce and
10 therefore, it was a public purpose that could be
11 legitimately funded by the State within the parameters of
12 the constitutional limitations but it wouldn't include
13 building a private shopping mall.

14 JUDGE STEIN: Did - - - did you argue anything
15 about Article VIII (1) of the State Constitution in - - -
16 in the courts below?

17 MR. LOW-BEER: Yes. It's been a - - - it was
18 argued both in the - - - extensively in the Supreme Court -
19 - -

20 JUDGE STEIN: It - - - it doesn't seem to be
21 focused on very much in - - - in the briefs here.

22 MR. LOW-BEER: Well, I - - - I do have a section
23 on that, and I - - - I believe it's the key to this
24 statute, actually. And if I may spend a moment explaining
25 why, I'm happy to do that. I believe that this statute, if

1 you - - - this statute was drafted to meet the requirements
2 of two overarching laws. One is the public trust doctrine,
3 which, as the State stated in its brief in Capruso,
4 requires that the legislature directly authorize the
5 specific project in question. I think the State was
6 absolutely right there, and I - - - I think, you know, that
7 could be the end of this case right here. Because I don't
8 think you can say that this statute specifically authorizes
9 the project in question.

10 But at - - - in addition, the Gifts and Loans
11 provision of the Constitution is really the key to this
12 case. I would direct the court to the - - - you know, this
13 statute was - - - was passed on a home rule message from
14 the City of New York. And there is a memorandum in the
15 bill jacket which extensively discusses the - - - the
16 question of whether city financing for a construction of a
17 stadium is a public purpose or not. And it concludes that
18 if the uses of the stadium are limited to certain public
19 purposes, then it would pass constitutional muster. And
20 this is the reason why, just this statute, but also the
21 Yankee Stadium Statute, the Tennis Stadium Statute, and the
22 Erie County Stadium Statute all have similar, if not in the
23 tennis - - - tennis stadium case, virtually identical,
24 word-for-word, purposes provisions.

25 If you interpret this provision to mean they can

1 build a shopping mall, then why can't they build a shopping
2 mall in - - - a second shopping mall in Flushing Meadows
3 Park where - - - where the tennis stadium is? And - - - if
4 it doesn't - - - if that's - - - I mean under my
5 adversary's theory of the case, why - - - why are these
6 purposes provisions put in in the first place? What are
7 they doing there? They don't really have any reason why
8 the legislature, in enacting of these stadiums statutes,
9 would have included a list of public purposes. The reason
10 is that they were looking to the Constitution Article VIII
11 (1) and they said, well, in order to avoid a constitutional
12 challenge, we need to include this provision. And there is
13 extensive case law around the country on whether public
14 financing for stadiums is constitutionally permitted under
15 the Gifts and Loans provisions that virtually every - - -
16 are present in the constitutions of virtually every state.

17 And there's another way, too, in which the Gifts
18 and Loans provision of the Constitution guided the
19 structure of this statute. This stadium - - - sorry, Shea
20 Stadium, was to be constructed with city financing. So - -
21 - so again, Section - - - Article VIII (1) required that it
22 be - - - that the construction be done by the City. And
23 that's why it specifies any time it talks about
24 construction in those four places, it's clear that the
25 construction is to be by the City. Not by the lessee. The

1 lessee can use the - - - what is to be constructed by the
2 City, but at that time, vehicles like the Economic
3 Development Corporation or the - - - the Urban Development
4 Corporation which - - - which exists to circumvent the - -
5 - the strictures of Article VIII (1) didn't exist. So now
6 - - - I mean we're not arguing that this provision is
7 unconstitutional. But we're - - - because it's being - - -
8 it doesn't involve city financing, and anyway, it's being
9 done through EDC, but the State, even today, cannot itself
10 directly finance the - - - the construction of a structure
11 for private use. So anyway, I'm sorry. I - - -

12 CHIEF JUDGE DIFIORE: Thank you, counsel. Quite
13 all right.

14 MR. LOW-BEER: I ran over my - - - my time a
15 little bit.

16 CHIEF JUDGE DIFIORE: Thank you.

17 MR. LOW-BEER: Thank you very much. No more - -
18 - if - - - no. Okay.

19 CHIEF JUDGE DIFIORE: Thank you, sir.

20 Is the Gifts and Loans provision of the
21 Constitution the key to the case?

22 MS. HALLIGAN: Absolutely not, Your Honor.
23 First, as Mr. Low-Beer himself acknowledged, there is not a
24 Gifts and Loans challenge that is brought here. It
25 couldn't be for the reasons we laid forth in our brief

1 under Bordeleau. One of the purposes here in enacting this
2 statute was likely to ensure there were no Gifts and Loans
3 concerns, but it was only one of the purposes. Alienating
4 this land was the other reason, and you need to look at the
5 text of the statute.

6 I'd like to make three other brief points, if I
7 can. First of all, Judge Fahey, you said your obligation
8 is to protect the public trust doctrine. We understand and
9 we agree. First of all this statute is sui generis. And
10 so there's no concern about spillover to other statutes.
11 And secondly, we are not arguing that you don't need
12 legislative approval to use a park for non-park purposes.
13 We are saying that the 1961 statute provides that.

14 Secondly, Judge Fahey, you also said this is a
15 question of statutory interpretation, and we agree with
16 that. The only coherent construction, if you look at the
17 full seventy-seven acres alienated in subsection (c), is
18 that the City was given discretion to decide what to do
19 with the other sixty acres after Shea was built on sixteen
20 of them. And Mr. Low-Beer's construction of the statute
21 would deny the city that leeway.

22 Third, the construction of (a), first of all, Mr.
23 Low-Beer in his brief and in his argument has entirely
24 ignored the second sentence of (a), which begins with
25 "Prior to." It does not tether the authority of the City

1 to enter into agreements for the purposes in (b) at all to
2 the stadium, appurtenant grounds, parking areas, or other
3 facilities. So that sentence standing alone would allow
4 the City to enter into the agreement, and we ask the court
5 to look closely at that. Additionally, the terms - - -

6 JUDGE GARCIA: Counsel, before you get to the
7 additionally, on your sui generis point, isn't part of
8 Judge Fahey's point, I think, that we're applying a
9 doctrine here, and, yes, it's to a specific statute but
10 it's the approach we're going to take in applying that
11 doctrine and how narrowly we read the words that's going to
12 be cited back to us later? So, yes, this is its own thing,
13 its own statute, and its own interpretation, but really
14 what we're talking about is the public trust doctrine and
15 how do we interpret that doctrine. So that's what's going
16 to have precedential value.

17 MS. HALLIGAN: Two - - - two responses to that.
18 My - - - my point about it being sui generis was simply
19 that I think that - - - that Mr. Low-Beer suggests that if
20 you rule in our favor that automatically consequences will
21 follow. Other statutes are not written in the same way
22 because, as the lawyer for the State explained, they
23 constrained the uses very carefully.

24 With respect to your point about how to approach
25 the public trust doctrine, there is no support in the

1 precedence in this court to expand the public trust
2 doctrine in the manner that Mr. Low-Beer suggests. He
3 indicates that there is some sort of a clear statement rule
4 you should derive. This court has, instead, simply looked
5 at the statutes to effectuate the intent of the legislature
6 and not by - - -

7 JUDGE GARCIA: What about the plainly conferred
8 language of those cases?

9 MS. HALLIGAN: What that means is that there must
10 be an explicit alienation as opposed to simply using a park
11 for non-park purposes. So for example, when this court - -
12 -

13 JUDGE GARCIA: I'm not sure I follow that. I'm
14 sorry.

15 MS. HALLIGAN: So in Van Cortlandt Park, for
16 example, which is a case that Mr. Low-Beer heavily relies
17 on that does use this language, the question there was
18 whether or not a temporary underground use of a park was
19 sufficient to still - - - sufficiently intrusive to still
20 require some legislative approval. And the court said yes,
21 it must be plainly conferred. The phrase has its origins
22 in Williams v. Gallatin, which is a case from about a
23 hundred years ago, where Judge Pound said if you're going
24 to put a museum on a park, you need legislative approval.
25 It has to be directly and plainly conferred. There are no

1 cases from this court suggesting the kind of canon that he
2 would propose.

3 Just to - - - to finish my point about subsection
4 (a) if I can, the activities that are authorized by the
5 plain words of this statute are much farther than
6 construction. They are to use, carry - - - "to use,
7 occupy, or carry on activities." Additionally, the kinds
8 of agreements which the City can enter into plainly
9 contemplate a wide range of uses not just construction,
10 contracts, leases, rental agreements, licenses, permits, et
11 cetera. So that narrow construction simply is belied by
12 the statute itself.

13 JUDGE RIVERA: Well, they all talk about events,
14 right. Does that somehow suggest that perhaps it's not
15 about the construction of a permanent edifice that ends up
16 being a retail space?

17 MS. HALLIGAN: No, Your Honor. I think - - - I
18 think not both because that language is so broad because it
19 doesn't account for subsection (b), which has no
20 restrictions and because this - - -

21 JUDGE RIVERA: Yeah. Well, (b), it does say
22 events. That's what I'm talking about.

23 MS. HALLIGAN: This - - - the second sentence.

24 JUDGE RIVERA: Oh, okay.

25 MS. HALLIGAN: Pardon me, Your Honor. The second

1 sentence of - - - of subsection (a) is - - - is what I
2 meant to refer you to.

3 JUDGE RIVERA: Oh, okay.

4 MS. HALLIGAN: And finally, it would account only
5 for sixteen of the seventy-seven acres that was alienated
6 here, all of which had been a parking lot. Finally, with
7 respect to his reliance on - - - on the phrase appurtenant,
8 again, it doesn't appear - - -

9 JUDGE RIVERA: I'm sorry. I didn't follow that.
10 What is - - - what does the number of - - - what does the
11 acreage have to do with it?

12 MS. HALLIGAN: If you look at subsection (c) - -
13 -

14 JUDGE RIVERA: Okay.

15 MS. HALLIGAN: Right, that subsection alienates
16 seventy-seven acres of land.

17 JUDGE RIVERA: Yes.

18 MS. HALLIGAN: Shea Stadium took up sixteen
19 acres. And so the only coherent way to understand the
20 statute is that the legislature had in mind that most
21 immediately Shea Stadium would go on sixteen of those
22 seventy-seven acres and that the City would have the
23 discretion in the future to decide on how the remain sixty-
24 odd acres would be used in a way that was consistent with
25 the broad purposes set forth in (b). Purposes which are -

1 - -

2 JUDGE STEIN: Whether or not it had anything to
3 do with the stadium? Is that - - - is that what you're
4 saying?

5 MS. HALLIGAN: Absolutely, Your Honor. And
6 that's again where the Yankee Stadium Statute stands apart
7 and where the second sentence in subsection (a) stands
8 apart because it doesn't - - -

9 JUDGE STEIN: Then why - - - then why would it
10 have - - - why would have it have conferred that property,
11 all of that property, if it - - - if it wasn't meant to be
12 related to the stadium?

13 MS. HALLIGAN: The best - - - the best answer, I
14 think, from the record is the historical context. The
15 entire swath had been operating as a parking lot. And so
16 rather than take sixteen of those seventy-seven acres and
17 say okay, we'll put Shea stadium here and we'll alienate
18 that, they alienated the entire swath of land, presumably
19 because they believed that the City could identify
20 productive uses down the road.

21 JUDGE STEIN: So there's nothing in the
22 legislative history that tells us? We're - - - we're
23 inferring that?

24 MS. HALLIGAN: The best - - - the best signal is
25 the one that my colleague from the State identified for you

1 which says that the purpose is for the establishment and
2 maintenance of facilities for recreation, entertainment, et
3 cetera. Not just a stadium, so even the bill jacket itself
4 does reflect that.

5 JUDGE GARCIA: I just - - - I'm sorry, Chief.
6 May I?

7 CHIEF JUDGE DIFIORE: Yes.

8 JUDGE GARCIA: Just to go back to public trust
9 doctrine - - -

10 MS. HALLIGAN: Yes.

11 JUDGE GARCIA: - - - for a minute because I think
12 it is really what will be - - - what will move forward from
13 this case, what people will look at. And it seems you're -
14 - - you're framing this as two very different approaches to
15 the public trust doctrine. Under what I understand your
16 approach is based on the case of Gallatin and the others is
17 you - - - is you look plain - - - look at plainly conferred
18 in the initial sense of did you plainly confer this land to
19 build this stadium. But in terms of the language of how
20 far that goes in terms of what you can use the land for in
21 addition to the stadium is purely statutory construction.

22 MS. HALLIGAN: Well, I think that's what your own
23 cases in Bates and Brooklyn Park suggest. But I think that
24 your point gets to an additional question which is is there
25 any problem when the legislature alienates land for non-

1 park uses in devoting it to a broad range of purposes as
2 opposed to a very narrow one. And - - -

3 JUDGE GARCIA: Different question. My question
4 really is do we apply the public trust doctrine in what I
5 would consider a heightened scrutiny or looking at it in
6 terms of this plainly conferred meaning we're not going to
7 expand the language only with respect to the purpose for
8 which it was conferred or do we look at it in terms of this
9 language? So do - - - your view, as I understand it, is we
10 don't apply the plainly conferred standard to this
11 provision because plainly conferred only applies to Shea
12 Stadium.

13 MS. HALLIGAN: Well - - - well, I think that even
14 if you apply the clear statement rule that Mr. Low-Beer is
15 proposing, that it is satisfied here. But I would also say
16 this. What the court would do if it announced a rule like
17 that, which is that it will - - - I'm not even sure exactly
18 what the canon is, but as best I can understand it, there's
19 a strong presumption against doing anything. And the
20 legislature not only must identify the tract of land, which
21 it's done here, must identify the intent to use it for non-
22 park purposes - - -

23 JUDGE GARCIA: I think it would be if you're
24 going to alienate it for non-park purposes, you're going to
25 read narrowly the non-park purposes that has been

1 alienated.

2 MS. HALLIGAN: And that would tie the
3 legislature's hands in a way that has no relationship - - -

4 JUDGE GARCIA: But they're the legislature. They
5 can make whatever statute they want. How could it tie
6 their hands?

7 MS. HALLIGAN: They can but it would deprive them
8 of the ability to do exactly what they did here, which is
9 to take a large tract of land, that while designated
10 parkland, is functioning as a parking lot. And - - -

11 JUDGE GARCIA: But I don't - - - why couldn't
12 they have said and that you can use it for any commercial
13 purpose?

14 MS. HALLIGAN: Well, because they wanted - - -

15 JUDGE GARCIA: I mean what would prevent them
16 from doing that?

17 MS. HALLIGAN: They wanted it to be used and
18 (b)(1) insists that it be used for broad purposes but
19 purposes that benefit the public. And our point is that we
20 - - -

21 JUDGE STEIN: Then it - - - does it speak to that
22 that some of the petitioners here are, in fact,
23 legislators? I mean - - -

24 MS. HALLIGAN: Well, obviously, they're free to -
25 - - to take whatever position they have. The question

1 before this - - -

2 JUDGE STEIN: I mean if you're saying that - - -
3 that, you know, we shouldn't do this because it will tie
4 the legislature's hands - - -

5 MS. HALLIGAN: Yes.

6 JUDGE STEIN: - - - it just seems to me that the
7 fact that - - -

8 MS. HALLIGAN: Well, the question before - - -

9 JUDGE STEIN: - - - some of the petitioners are
10 legislators might be an indication that that's not their
11 concern here.

12 MS. HALLIGAN: Well, I - - - I would disagree
13 with that in two respects, Your Honor. First of all, the
14 fact that there may be a few legislators who have joined
15 any litigation I don't think is probative of the
16 legislature's intent as a whole. But secondly, the only
17 question before this court - - -

18 JUDGE STEIN: I guess what I'm suggesting is that
19 aren't we really speculating about that? Isn't - - - I
20 mean there's - - - I don't see that there's any indication
21 from the legislature that that is - - - that is the
22 concern, that it - - - that is a concern here.

23 MS. HALLIGAN: Well, what I'm looking at - - -
24 what I'm - - - I guess I'm - - -

25 JUDGE RIVERA: Well, if we disagree with you,

1 there's nothing - - - that would not foreclose the City
2 from going back to the well, correct?

3 MS. HALLIGAN: It wouldn't. But, Your Honor,
4 that's exactly the concern here. We obviously believe we
5 do have legislative approval, but there have been efforts
6 by folks no less formidable than Robert Moses for a hundred
7 years to remediate Willets Point. In 2008, the City put
8 out a proposal to do that. There were no takers.

9 JUDGE STEIN: So if the legislature - - -

10 MS. HALLIGAN: This is the last - - -

11 JUDGE STEIN: - - - thinks that that is - - -
12 that's important and this is the way to do it, then if - -
13 - if we disagree with you, again - - -

14 MS. HALLIGAN: And - - - and - - -

15 JUDGE STEIN: - - - piggybacking on what Judge
16 Rivera is saying, then they can - - - they can do it and
17 make it even more clear.

18 MS. HALLIGAN: And, Your Honor, what 2008 shows
19 is that a proposal that looked viable in 2008 when it was
20 issued became completely infeasible a couple of months
21 later when the economy tanked. And so there is an
22 agreement on the table - - -

23 JUDGE RIVERA: But that's also true about a mall.

24 MS. HALLIGAN: Pardon me?

25 JUDGE RIVERA: That's also true about a mall. I

1 mean - - -

2 MS. HALLIGAN: Your Honor, it - - -

3 JUDGE RIVERA: - - - the hopes of what will come
4 with this are not certain, either.

5 MS. HALLIGAN: I would just close by saying this
6 if I can.

7 JUDGE RIVERA: Okay.

8 MS. HALLIGAN: This project is important, not
9 just to the City but to my clients because Willets Point,
10 as contaminated as it is, is on the front door of the Mets
11 Stadium, and so they have every intent of moving forward
12 with this project as soon as they can. Thank you.

13 CHIEF JUDGE DIFIORE: Thank you.

14 (Court is adjourned)

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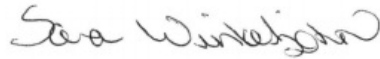
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Avella v. City of New York, No. 54 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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