UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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BEN BRINKMANN, HANK BRINKMANN, and MATTITUCK 12500 LLC.,

Plaintiffs,

-against-

TOWN OF SOUTHOLD, NEW YORK,

Defendant.

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Civil Action No. 2:21-cv-02468

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

ORAL ARGUMENT REQUESTED

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Introduction

Plaintiffs Ben and Hank Brinkmann, and Mattituck 12500 LLC (the Brinkmanns) request a preliminary injunction to preserve the status quo during the pendency of this constitutional lawsuit. The Town of Southold is attempting to seize, via eminent domain, the Brinkmanns' property—an undeveloped, commercially-zoned parcel, on which the Brinkmanns want to build a hardware store. The Town claims that it is taking the Brinkmanns' land to operate a public park, but that justification is post hoc and pretextual: The Town had no prior plans for a park on this land until the Brinkmanns announced their plans to build there. And even after the Brinkmanns announced their plans, the Town tried a variety of legal gambits to stop them (none of which even suggested a park was being planned for the property) before finally settling on the eminent domain scheme.

A preliminary injunction is necessary because the Town is pressing ahead with a state-court condemnation proceeding—where constitutional defenses cannot be raised—in an effort to moot this lawsuit. The Brinkmanns filed this federal lawsuit challenging the Town's public use determination under the Fifth Amendment. At the time this lawsuit was filed, no condemnation was pending, but just one day after this case was filed, the Town filed a condemnation petition against the property. The Town did not serve the Brinkmanns or their counsel, choosing instead to serve the New York Secretary of State—even though the Town knew the Brinkmanns were represented by counsel. Brinkmann Aff. ¶¶ 29–36. The Brinkmanns did not learn of the pending state condemnation proceeding against them until just two weeks before the original scheduled hearing date on June 17, 2021. The Town agreed to an adjournment of that hearing, with a condemnation hearing now scheduled for July 7, 2021, only after the Brinkmanns discovered that a condemnation had been filed against them by contacting the Town. If Southold is allowed

to take the Brinkmanns' property here, under New York law, property owners cannot raise constitutional defenses in condemnation hearings; therefore, this case is likely the Brinkmanns' only chance to raise their public-use claim.

The Brinkmanns are entitled to a preliminary injunction. They are likely to prevail, as overwhelming precedent establishes that pretextual takings like this one are illegal. They face the impending, irreparable harm of losing their property. And the balance of hardships favors them, since the Town has no actual plans for a park.

Statement of Facts

Brinkmann's Hardware is a small, family-owned-and-operated business on Long Island. Founded in 1976 by Tony and Pat Brinkmann, today Brinkmann's Hardware is owned and managed by their children Mary, Ben, and Hank. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 15–16, 18). Over the years, the business has expanded to four locations across Long Island. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 17).

Brinkmann's Hardware stores are mid-sized neighborhood stores, the kind that have been a staple of American main streets for generations. The Brinkmanns have proven that small hardware stores can still compete with big box stores like Home Depot. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 19–20). To do so, the Brinkmanns prioritize customer service and convenience, but perhaps the most important factor is location. *Id.* The Brinkmanns build stores in downtown areas, and on well-exposed corners whenever possible, so that customers can easily access their knowledgeable staff and competitive prices. *Id.*

The Brinkmanns acquire a commercially-zoned property in Southold and begin planning to build a new hardware store.

Ideal locations for new stores are scarce, but Ben and Hank Brinkmann found one on a main street corner in the Hamlet of Mattituck in Southold. It is 1.7 acres, commercially zoned,

undeveloped, and located at the corner of New Suffolk Avenue and Route 25 in Southold (12500 NYS Route 25 (SCTM# 1000-114.-11-170) the "Property"). Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 22–23). They discovered the vacant lot in 2011 but could not then afford it. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 24). Instead, Bridgehampton National Bank purchased the Property, intending to build a new branch there. But when another building in town became available, the bank moved, and left the lot vacant. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 25, 27). At that time, Southold did not attempt to buy the Property and had no plans for a park on it. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 26).

Five years later, Ben and Hank approached Bridgehampton to purchase the Property and the bank agreed. They contracted to purchase for $700,000 on December 2, 2016. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 28). The Brinkmanns' contract included a long due-diligence period, giving them time to confirm they could build a new hardware store at that location. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 30). At that time, the Town had made no effort to acquire the Property and had no plans for a park on the Property. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 29).

Ben and Hank immediately began planning their new store. They met with Town officials and other stakeholders to begin permitting, zoning review, and then construction. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 31). They also contacted the owner of a local hardware store, Rich Orlowski, to propose buying his business. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 32). The Brinkmanns and Orlowski agreed that when the new Brinkmann's Hardware opened, Orlowski would close his store for the value of his inventory (approximately $350,000) and then work as the manager of the new Brinkmann's Hardware store. *Id.*

Throughout 2017, the Brinkmanns continued moving forward with their project. They engaged a local architect to design a store that would "match the surrounding neighborhood design

aesthetic." Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 33–34). And in May 2017, they met with the Southold Planning Department to inform them of their plans. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 35). Then, in July and September they held two meetings with the Mattituck-Laurel Civic Association, one that was attended by Southold Town Supervisor Scott Russell. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 38–39). To address traffic concerns, Ben and Hank promised the Association they would pay for any intersection improvements the Town found necessary. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 40). Although a traffic study was completed in September 2020, nothing in the study indicates a proposed hardware store would cause traffic problems. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 42).

In all these meetings, a park on the Brinkmanns' Property was never mentioned. During the May 2017 meeting with the Planning Department, Town officials never said that the Town had plans for a park on the Brinkmanns' Property. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 36–37). In the meetings with the Civic Association, neither the Town Supervisor nor anyone else stated that the Brinkmanns' proposed hardware store conflicted with Town plans for a park on the Brinkmanns' Property. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 43–44). After attending one of those meetings, the Town Supervisor wrote about the Brinkmanns' application—making no mention of a park, let alone that the Town had plans for a park on the Brinkmanns' Property. *See* Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 41).

The Brinkmanns continued to work with the Town Planning Department before submitting a formal building-permit application. Their plans went through two revisions before settling on a third version of their site plan. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 45). And in January 2018, the Brinkmanns submitted their first permit application to the Town Building Department. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 46). The Building Department denied this application because no site plan

had been approved by the Planning Department. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 47). In denying the application, the Planning Department did not state the Brinkmanns' proposal conflicted with Town plans to build a park on the Property. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 48–49).

Following the permit denial, Ben and Hank went back to the drawing board and produced a new design. They went through a preliminary meeting with the Planning Department, and then applied for site-plan approval. But in June 2018 the Town notified the Brinkmanns they would need a "Special Exception Permit" because their store was over 6,000 square feet. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 50–52). Later, planning officials also informed the Brinkmanns they needed to complete a "Market and Municipal Impact Study." Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 55). So, the Brinkmanns moved to ensure their design complied with the requirements for a store over 6,000 square feet and they were prepared to modify their plans as needed. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 53–54). Throughout this process, planning officials never notified the Brinkmanns that their proposed hardware store conflicted with a planned park on the Property. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 48–49, 56–57).

Then the Town's pressure on Brinkmann's Hardware escalated. In the summer of 2018, Orlowski changed attorneys, hiring the former Town attorney, Martin Finnegan. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 58). This resulted in Orlowski doubling his asking price, demanding $700,000, to buy out his hardware store. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 59). On July 31, 2018, the Town notified the Brinkmanns that the fee for the required Impact Study would be $30,000. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 60). In requesting this fee, Town officials never informed the Brinkmanns that their plan conflicted with Town plans for a park. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 61–62). Three days later, Mr. Finnegan wrote to the Brinkmanns reducing the demand money for Orlowski's store and stating the Brinkmanns needed to pay up to "eliminate . . . insurmountable

hurdles" that they were facing with permitting because "upgrading your status to the existing local hardware store should shed a favorable light on your application." Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 64). The Brinkmanns rejected both of Mr. Finnegan's offers for more than their original agreement price with Orlowski. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 66).

The Town of Southold attempts to stop the Brinkmanns from building their new store.

In the fall of 2018, the Town took its first steps towards taking the Brinkmanns' Property. First, the Town tried to partner with Suffolk County to buy the Property from the Brinkmanns. Prior to this attempted purchase, the Town had not engaged in any planning for a public park on the Property; had not tasked any Town committee with evaluating the possibility of a new park on the Property; had not tasked any Town planning staff with evaluating the possibility of a new public park on the Property; had not conducted any financial analyses of creating a new park on the Property; had not evaluated any alternative location for a new public park somewhere other than the Property (including, for example, the possibility of purchasing the undeveloped land for sale next to the Property); had not surveyed Town citizens or held stakeholder meetings with citizens about purchasing the Property for a new park; had not conducted any geotechnical survey of the Property to determine its suitability for a public park; had not held any public hearings about creating a new public park on the Property; had not retained any outside consultants to evaluate the Property as a location for a new public park; and had not retained any architects, contractors, traffic engineers, or landscapers to evaluate the Property or design and build a new park on the Property. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 67–74). In short, the Town never had plans for a park on the Brinkmanns' Property and never attempted to purchase the Property until after the Brinkmanns began designing and planning their hardware store on the Property.

When this attempt to buy the Property failed, Southold took a more drastic step—attempting to interfere with the Brinkmanns' purchase contract for the Property. In October 2018,

Southold Town Supervisor Scott Russell called the President of Bridgehampton National Bank, Kevin O'Connor, to pressure him not to sell the Property to the Brinkmanns and sell it to the Town instead. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 75). When O'Connor refused, Russell responded, "I will never allow anything to be built on that property." *Id.* Later, Assistant Town Attorney, Damon Hagan, called the bank's attorney, Vincent Candurra, and similarly pressured him to back out of the sales contract with the Brinkmanns. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 78). On neither call did the Town Supervisor or the town attorney reference that the Town had plans for a park on the Property. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 76, 78).

Undeterred, Ben and Hank closed on the Property on November 20, 2018. At the beginning of the following year, they paid the $30,000 fee for the impact study. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 79, 81). Having paid the permit application and complied with all the zoning requirements, Ben and Hank believed the Town Planning Board would have to approve their application within 120 days, as provided in the Town of Southold City Code § 280-45(B)(10)(b).

But the Town responded by enacting a moratorium on building permits. Just weeks after the Brinkmanns paid the $30,000 fee, the Town enacted a six-month moratorium on any new building permits for a one-mile stretch of road centered on the Brinkmanns' Property. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 83–84). And despite being legally obligated to complete its impact study within 90 days, to date, the Town has taken no action to even begin the impact study. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 85–87).

In addition to centering on the Brinkmanns' Property, Southold's moratorium is legally dubious. The Town has extended it twice, first in August 2019, and then in July 2020. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 89). On each extension, the Town submitted a "local law" referral to the Suffolk County Planning Commission. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 90). Each time the

County requested evidentiary support for extending the moratorium. And each time the Town failed to provide it. On the first extension, the County recommended "disapproval" for lack of evidentiary support, labeling the referral "incomplete." Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 91). The County requested traffic studies and relevant portions of the Town's comprehensive plan, and the Town ignored the request. *Id.* On the second extension, the County produced a report showing Southold had not provided the County with the required evidence to support the first extension. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 92). And once more, the County recommended the second extension be "disapproved." *Id.* But the Town again bucked the County and persisted in enforcing its moratorium against the Brinkmanns.

Not only that, but the Town has also selectively enforced its moratorium. The Town Board meeting minutes reflect that the Board has granted at least three waivers from the moratorium. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 93–94). Because the Brinkmanns knew the moratorium was targeted at them, they never applied for a waiver. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 95). After all, they already had a permit application pending, and the Town was processing other applications during the moratorium, just not the Brinkmanns' application. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 96). But the Brinkmanns have submitted a complete application, paid $30,000 for an impact study, and the Town was required to complete its evaluation of "undue adverse impact" within 90 days from the submission of that fee, and then vote on that determination 30 days after conducting the evaluation. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶ 97); Town of Southold City Code § 280-45(B)(10)(b). In sum, the Town was required to act on the Brinkmanns' application but did not do so, even though it acted on other applications.

Blocked from building their hardware store, the Brinkmanns sued in state court to invalidate the moratorium. This litigation is ongoing, but on June 22, 2020, a New York trial court

denied the Town's motion to dismiss and allowed the Brinkmanns' challenge to proceed. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 88, 99).

Southold moves for eminent domain to take the Brinkmanns' Property.

In response to losing their motion to dismiss, the Town's plan to stop the Brinkmanns proceeded to a new stage: eminent domain. In July 2020, Southold held a public hearing, as required by New York law, to determine whether a park would constitute a public use for purposes of eminent domain. N.Y. Em. Dom. Proc. Law § 203. Two months later, the Town issued its "findings and determinations," concluding that taking the Property for a park would be a public use. Southold then authorized taking the Brinkmanns' Property via eminent domain, ostensibly for a "passive use park"—a park without significant facilities or improvements to the land. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 100–102).

It was widely understood Southold was not taking the Property for a park but merely to stop the Brinkmanns. Southold Town Board member Sarah Nappa confirmed the Town's true motive. Writing in a guest column in the Suffolk Times, Ms. Nappa stated "I can't help but wonder, if this application had been filed by anyone but an outsider, if this business was owned and operated by a member of the 'old boys club,' would the town still be seizing their private property? The use of eminent domain by Southold Town to take private property from an owner because it doesn't like the family or their business model is dangerous precedent to set." Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 103–104).

To defend their Property and business, the Brinkmanns filed this lawsuit. They are challenging the Town's public-use determination as a sham because the Town did not have plans for a park on the Property; instead, a park is a mere pretext for the Town's real motive: stopping the Brinkmanns' lawful business.

Almost a year after the Town's public hearing and authorization to take the Brinkmanns' Property, and just a day after this lawsuit was filed, the Town filed a condemnation action in state court to take the Brinkmanns' Property. The Town's petition states that the public use is "for the purpose of creating a park, 'Village Green' or other community gathering place in a prominent location on Main Road, within the Mattituck Hamlet Center and close to the Love Lane Corridor." Brinkmann Aff. ¶¶ 27–28 (Exhibit M). Because the Property is owned by the Brinkmanns' LLC, Mattituck 12500 LLC, Southold served the New York Secretary of State rather than the Brinkmanns. The Brinkmanns were not served actual notice of the pending condemnation against their Property until June 11, 2021, Brinkmann Aff. ¶¶ 39–40 (Exhibit Q), notwithstanding that the hearing on that condemnation was scheduled for June 17, 2021, in New York state court. Brinkmann Aff. ¶¶ 35–36 (Exhibit O). They only learned about the pending condemnation before June 11 when their lawyers contacted the Town on a separate matter. Brinkmann Aff. ¶ 34. Having discovered this pending condemnation action less than two weeks before the scheduled hearing date, the Brinkmanns quickly requested an adjournment of the state court condemnation hearing, Brinkmann Aff. ¶¶ 37–38 (Exhibit P), which is now scheduled for July 7, 2021, Brinkmann Aff. ¶¶ 41–43 (Exhibits R & S), and filed this motion for a preliminary injunction to halt the taking of their Property until this Court can decide the merits of their Fifth Amendment takings claim.

Argument

The Brinkmanns satisfy all the factors for a preliminary injunction. First, they are likely to succeed on the merits of their claim because overwhelming authority demonstrates that it is unconstitutional to use eminent domain for pretextual "public uses," where the real purpose is to prevent people from making lawful use of their property. Second, they face the imminent condemnation of their real property. This is a per se irreparable harm under Second Circuit

precedent and weighs heavily in favor of granting a preliminary injunction here. *See Carpenter Tech. Corp. v. City of Bridgeport*, 180 F.3d 93, 97 (2d Cir. 1999) (finding irreparable injury when "real property is at issue" and a "claim for injunctive relief to prevent the taking" cannot be raised in the valuation proceeding). Finally, the balance of equities is entirely in the Brinkmanns' favor, as the Town has no concrete plans to do anything with the Brinkmanns' Property.

1. The Brinkmanns are likely to prevail on the merits of their constitutional claim.

The Brinkmanns are seeking a preliminary injunction to preserve, rather than alter, the status quo. As a result, they need only show a likelihood of success on the merits. *A.H. ex rel. Hester v. French*, 985 F.3d 165, 176–77 (2d Cir. 2021); *see also Mastrovincenzo v. City of New York*, 435 F.3d 78, 89 (2d Cir. 2006) (explaining the difference between a "likelihood of success" standard for injunctions preserving the status quo versus a "substantial likelihood of success" standard for injunctions that change the status quo). Given the weight of authorities invalidating pretextual takings, the Brinkmanns are likely to succeed on the merits of their public use claim.

The Supreme Court and courts around the country have repeatedly held that a taking is unconstitutional when the stated public use is a mere pretext for some other, impermissible purpose. One such impermissible purpose is to prevent property owners from making a lawful use of their property, which is all that the Brinkmanns are trying to do. It does not matter that public parks are, in general, a "classic" public use for which eminent domain can often be used. Courts have found that even "classic" public uses like roads and parks are not exempt from the rule that pretextual takings are unconstitutional.

As demonstrated in the attached affidavit, the Brinkmanns want to build a hardware store on commercially-zoned property. Their proposed store complies (or would comply) with all

applicable legal requirements. Yet for some reason, the Town still does not want the Brinkmanns to build their store. Having apparently exhausted every other means to stop the Brinkmanns, the Town has now concocted a plan to seize the Brinkmanns' Property to operate a so-called "passive park" or "village green" on their land. But the Town had never previously considered the Brinkmanns' Property for a park. Indeed, their parcel is not even listed among the 957 parcels that the Town listed on a potential acquisition list in 2016. Nor did the Town, in two years of back-and-forth planning with the Brinkmanns, ever inform them that their plans for a hardware store conflicted with Town plans for a park. That is because the Town never had plans for a park, and when they began to pursue the park as a pretext for stopping the Brinkmanns, in 2018 it was for an "active use park," Brinkmann Aff. ¶ 12–13, in 2020 it was for a "passive use park," *id.* ¶¶ 6–7 (Compl. ¶ 102), and now it is for a "village green," *id.* at ¶¶ 29–30. The Town doesn't know what it wants with the Property—it just doesn't want the Brinkmanns there. The evidence persuasively demonstrates that the Town's proposed park is an unplanned sham and that the Brinkmanns are entitled to a preliminary injunction.

a. The Fifth Amendment prohibits condemnations where the asserted public purpose is a mere pretext for some other impermissible objective.

The constitutionality of a taking does not turn solely on whether the proposed use of the property being taken is a traditionally public one. Although takings for roads, parks, and utilities are frequently constitutional, they are not *per se* constitutional. To the contrary, overwhelming authority demonstrates that courts have a duty to evaluate the motives of the condemning authority to determine whether the asserted public use is the real reason for the taking or just a pretext for some other impermissible objective. Courts have repeatedly rejected takings for even such "classic" public uses as roads and parks—when the property owner makes a sufficient showing of pretext.

The United States Supreme Court's most recent word on the question of public use, in *Kelo v. City of New London*, 545 U.S. 469 (2005), affirmed the unconstitutionality of pretextual takings. Although the decision was a defeat for the property owners—the Court infamously held that the power of eminent domain can be used to transfer private property to other private parties for purposes of "economic development"—the Court nonetheless reaffirmed the longstanding principle that private property cannot be taken "under the mere pretext of a public purpose." *Id.* at 478. While the *Kelo* Court found that the proposed taking at issue in that case was not pretextual, the Court emphasized that its holding was based on the specific facts of the case: There was "no evidence of an illegitimate purpose," and the taking was "executed pursuant to a 'carefully considered' development plan." *Id.*

The *Kelo* Court's holding was neither dicta nor an aberration. Many other courts, before and since *Kelo*, have recognized that pretextual takings are unconstitutional.[1] Although many of

[1] *See Armendariz v. Penman*, 75 F.3d 1311, 1321, 1324 n.9 (9th Cir. 1996) (en banc) (reversing denial of summary judgment on a substantive due process claim and stating it should be brought as a takings claim because the official rationale of blight alleviation was a mere pretext for "a scheme . . . to deprive the plaintiffs of their property . . . so a shopping-center developer could buy [it] at a lower price"); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext."); *99 Cents Only Store v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) ("No judicial deference is required . . . where the ostensible public use is demonstrably pretextual"); *County of Hawaii v. C & J Coupe Fam. Ltd. P'ship*, 198 P.3d 615, 648 (Haw. 2008) ("Thus, even where the government's stated purpose is a 'classic' one," such as the construction of a public road, "where the actual purpose is to 'confer[ ] a private benefit on a particular private party[,] the condemnation is forbidden."); *Franco v. Nat'l Cap. Revitalization Corp.*, 930 A.2d 160, 169 (D.C. 2007) ("*Kelo* recognized that there may be situations where a court should not take at face value what the legislature has said. The government will rarely acknowledge that it is acting for a forbidden reason, so a property owner must in some circumstances be allowed to allege and to demonstrate that the stated public purpose for the condemnation is pretextual."); *R.I. Econ. Dev. Corp. v. The Parking Co., L.P.*, 892 A.2d 87, 107 (R.I. 2006) (rejecting proposed condemnation of an easement in a parking garage as pretextual); *City & County of Denver v. Block 173 Assocs.*, 814 P.2d 824 (Colo. 1991) (holding that if a property owner could prove that the "primary purpose" of a taking was to advance private interests rather than to eliminate blight, the taking

these pretext cases concerned allegations that the government was using eminent domain in order to benefit private parties at the expense of property owners, which is clearly an impermissible objective, that is not the only impermissible government objective. Courts have repeatedly held that a taking is pretextual when it is used, as in the present case, to prevent people from making lawful uses of their property.

For instance, in *Middletown Township v. Lands of Stone*, 939 A.2d 331 (Pa. 2007), the owner of a 175-acre farm was attempting to partition the land and potentially sell it so that housing developers could build a residential subdivision. The Township was opposed to the possibility of development, but it had no authority to prevent it, so the Township attempted to acquire the land by eminent domain. The stated public purpose for the taking was for recreation—in other words, a park. The Pennsylvania Supreme Court acknowledged that recreational uses were unquestionably public uses for which property could be taken. But that did not end the inquiry. The Court held that "[r]ecreational use must be the true purpose behind the taking . . . . This means that the government is not free to give mere lip service to its authorized purpose or to act precipitously and offer retroactive justification." *Id.* at 337–38 (citing *Kelo*). Looking at the record, the Pennsylvania Supreme Court easily concluded that the proposed taking was pretextual. The court noted that the township's long-term plans did not contain any references to future recreational uses on the property. *Id.* at 339 ("The record is

would be unconstitutional); *Casino Reinvestment Dev. Auth. v. Banin*, 320 N.J. Super. 342, 345, 727 A.2d 102, 103 (N.J. Super. Ct. Law Div. 1998) ("Where, however, a condemnation is commenced for an apparently valid public purpose, but the real purpose is otherwise, the condemnation may be set aside."); *Borough of Essex Fells v. Kessler Inst. for Rehab., Inc.*, 289 N.J. Super. 329, 338, 673 A.2d 856, 861 (N.J. Super. Ct. Law Div. 1995) ("public bodies may condemn for an authorized purpose but may not condemn to disguise an ulterior motive") (setting aside condemnation where the asserted purpose was to preserve open space, but the true purpose was to prevent a particular developer from building).

devoid of any suggestion that the Township has considered, let alone created, such a plan.") The court also observed that the timeline of events strongly suggested pretext, in that the township only considered condemnation *after* it became aware that the property might be developed. *Id.*; *see also Pheasant Ridge Assocs. Ltd. P'ship v. Town of Burlington*, 506 N.E.2d 1152, 1157 (Mass. 1987) (invalidating a public use as pretextual when "[t]he manner in which the town dealt with the attempted acquisition of the subject parcel was not in accord with its usual practices.").

The Supreme Judicial Court of Massachusetts decided a remarkably similar case in 1987. The Town of Burlington had proposed condemning a parcel of private property, again, for the ostensible purpose of building a park. *See Pheasant Ridge Assocs. Ltd. P'ship*, 506 N.E.2d at 1154. The court concluded that, on the record, it was clear that the proposed park was a mere pretext. The town's actual objective was to prevent the construction of a proposed low-income housing development. The court pointed out:

> that in recent years the town had studied its needs for parks and recreation and that neither the [site of the proposed taking] nor any parcel in the general vicinity of that site had been considered for acquisition for park or recreational uses. . . . The matter of taking the subject site came forward only when the plaintiffs' proposal became known.

Id. at 1157. Accordingly, the court rejected the proposed taking, notwithstanding that parks are usually considered classic examples of public uses.

The Supreme Court of Georgia held likewise in a 1981 case concerning a proposed taking where the government had planned to build a public park on the land being taken. All parties had agreed "that a public park for recreational purposes is a public purpose." *Earth Mgmt., Inc. v. Heard County*, 283 S.E.2d 455, 459 (Ga. 1981). Nevertheless, the property owner argued that the proposed park "was a mere subterfuge utilized in order to veil the real purpose" of the taking—preventing the property owner from building a waste disposal facility. *Id.* at 460. The court

agreed with the property owner, explaining that the record clearly demonstrated that the condemning authority had no previous interest in building a park, and that it did not even evaluate the suitability of the condemned land for a park before seizing it. *Id.* Accordingly, the court invalidated the taking.

b. The Town of Southold's proposed park is a mere pretext for preventing the Brinkmanns from making a lawful use of their Property.

The present case is, in all relevant respects, identical to *Lands of Stone*, *Pheasant Ridge*, and *Earth Management*. The Town of Southold, like the local governments in those cases, is ostensibly trying to take property for a classic public use—a park. Yet the Town's true objective is simply to stop the Brinkmanns. There is no indication in any public record that the Town of Southold ever previously considered the Brinkmanns' Property for a park. Indeed, the Brinkmanns' Property did not even make the list of 957 properties that the Town had considered for potential acquisition in 2016. The Town made no inquiries about acquiring the Property when it was previously for sale or when it was simply being held, undeveloped, by an owner that had no use for the Property. And for two years the Brinkmanns engaged in planning with the Town Board, the Town's Planning and Building Departments, as well as a local civic group and a neighboring local hardware store, but not once were plans for a park on the Property ever mentioned. If the Town wants a park in the area, an adjacent undeveloped property is presently available, but the Town has not even considered it for a park.

The Town's lack of prior planning for a park is alone sufficient evidence to demonstrate pretext, but there is more. There is the fact that the Town has tried every possible means of preventing the Brinkmanns from building on their Property, including by imposing a selectively-

enforced building moratorium, on a one-mile stretch of road, centered exactly on their Property.[2] There is the fact that the Town's initial opposition was centered on potential traffic implications, but those concerns have never been substantiated by a traffic study. There is also the fact that the Town Supervisor, Scott Russell, tried to induce a breach of contract for the sale of the Property and explicitly promised that he would "never allow anything to be built" there. *Cf. Earth Mgmt.*, 283 S.E.2d at 460 ("Prior to this time, the county commissioner and the county attorney had publicly stated they would do anything within their power to block the hazardous waste disposal facility[.]").

The Town's true purpose is clear. It wants to stop the Brinkmanns, and a "passive-use park" or "village green" is simply a tool to accomplish that objective. But preventing the lawful use of property is not a legitimate public use for eminent domain, whether that lawful use is a hardware store, a residential subdivision, *Lands of Stone*, 939 A.2d at 339, low-income housing, *Pheasant Ridge*, 506 N.E.2d at 1154, or a waste disposal facility, *Earth Mgmt.*, 283 S.E.2d at 461.

2. Plaintiffs will suffer irreparable injury to their real property and constitutional rights without a preliminary injunction.

In the Second Circuit, "a showing that irreparable harm is probable in the absence of a preliminary injunction is 'the single most important prerequisite for the issuance of a preliminary injunction.'" *Saget v. Trump*, 375 F. Supp. 3d 280, 339–40 (E.D.N.Y. 2019) (quoting *Bell & Howell: Mamiya Co. v. Masel Supply Co.*, 719 F.2d 42, 45 (2d Cir. 1983)). Indeed, irreparable harms weigh heavily in the Second Circuit's preliminary-injunction analysis and in constitutional

[2] The Town's counsel in the present case stated that the Brinkmanns have no way of knowing whether a waiver would have been granted to them, had they applied. (ECF No. 16, at 2.) If the Town means to imply that there was, in fact, a chance that a waiver would have been granted, that simply underscores that a park had not been part of the plan for this Property.

cases it is even more pressing: "In cases alleging constitutional injury, a strong showing of a constitutional deprivation that results in noncompensable damages ordinarily warrants a finding of irreparable harm." *A.H. ex rel. Hester*, 985 F.3d at 176; *see also Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.") (internal citations and quotation marks omitted).

In this case, because "real property is at issue and because [the Brinkmanns] cannot raise [a] claim for injunctive relief to prevent the taking of [their] property in the valuation proceeding, [the Brinkmanns] ha[ve] shown a threat of irreparable injury." *See Carpenter Tech. Corp*, 180 F.3d at 97 (reversing district court's denial of a preliminary injunction by plaintiff challenging loss of property via eminent domain). In other words, the Second Circuit has squarely held that a pending condemnation in state court satisfies the irreparable harm prong of the preliminary injunction test.

Indeed, the Brinkmanns' risk of irreparable harm is even greater than the Plaintiffs in *Carpenter* given the litigation history between the parties here. Absent a preliminary injunction the Brinkmanns will lose not only their Property, but also lose any remedy for violations of their constitutional rights in their challenge to the Town's illegal permit moratorium. As explained earlier, before the Town reached for eminent domain it first tried stopping the Brinkmanns' new hardware store by insisting they pay an excessive $30,000 fee during the application process, only to enact a permit moratorium on a short stretch of road centering on the Property after the Brinkmanns paid up. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 60, 81, 83). The state court denied the Town's motion to dismiss the Brinkmanns' lawsuit against the permit moratorium, allowing the Brinkmanns to proceed to discovery and thus reach the merits of their legal claims against the

Town. Brinkmann Aff. ¶¶ 23–27 (Exhibits K & L). The Town only moved for eminent domain and held a public hearing on taking the Property in response to losing its motion to dismiss in state court. Now, nearly a year after being authorized to take the Brinkmanns' Property but just one day after this federal lawsuit was filed, the Town filed a state condemnation action to take the Property before this Court, or the state court, can hear the merits of the Brinkmanns' claims.

Unless preliminary injunctive relief in *this case* preserves the status quo, the Town's planned condemnation to transfer title would undermine the Brinkmanns' state court challenge and threaten this Court's ability to redress the Brinkmanns' injury here. Thus, by engaging in a pretextual taking the Town will succeed in doing what it failed to convince the state court to do: deny the Brinkmanns any legal remedy from the harms caused by the Town's enforcement of an illegal permit moratorium enacted only to derail their new hardware store.

This Court should grant preliminary injunctive relief because it would preserve the status quo and avoid irreparable harm to the Brinkmanns' Property. Granting preliminary relief here avoids the "actual and imminent" harm of losing not only ownership of the Property, but also the ability to remedy injury caused by the Town's earlier attempt at stopping the Brinkmanns' from building a hardware store using an illegal permit moratorium. Without preliminary relief now, these irreparable harms "cannot be remedied" even if the Brinkmanns prevail on the merits in this Court. *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005).

3. The balance of hardships weighs strongly in plaintiffs' favor—not the government—and thus granting an injunction will not disservice the public interest.

The balance of hardships also tips strongly in favor of the Brinkmanns. When the government is a party, the balance of equities and public interest merge as one factor. *Saget*, 375 F. Supp. at 339–40. "A balance of equities tipping in favor of the party requesting a preliminary injunction means a balance of the hardships against the benefits." *Hafez v. City of Schenectady*,

No. 1:17-CV-0219 (GTS/TWD), 2017 WL 6387692, at *3 (N.D.N.Y. Sept. 11, 2017) (internal quotations omitted); *see also Ligon v. City of New York*, 925 F. Supp. 2d 478, 539–40 (S.D.N.Y. 2013) (characterizing the balancing "hardship imposed on one party" and "benefit to the other" as a "balanc[ing] [of] the equities"). It is readily apparent that disrupting the status quo by allowing the Town to condemn and take title to the Brinkmanns' Property imposes hardships on the Brinkmanns, but not on the Town.

On the Brinkmanns' side of the scale are hardships that reflect the time and resources invested over several years to plan a hardware store on their Property. That plan is molded to the land's topology and landscape and it cost the Brinkmanns tens of thousands of dollars in order to fit within the surrounding area's character. Brinkmann Aff. ¶ 8 (Compl. ¶¶ 113–116). If title transfers to the Town, it means the Brinkmanns will endure the hardship of having to re-invest more time and resources redesigning their plans to compensate for, or undo, any changes the Town makes to the Property. And attempting to undo a court-ordered title-transfer presents its own procedural problems. Those hardships are real, they are costly, and will further delay the opening of Brinkmanns' new hardware store in Southold well beyond the years of delay the Town has caused thus far.

On the Town's side of the scale there is nothing. There is no plan. Instead, there is a pretextual public use justification that arose only *after* the Town failed to stop the Brinkmanns using a selectively enforced permit moratorium, the legality of which is being litigated in state court after the Town was unsuccessful in dismissing that case. And as explained earlier, despite the Town identifying 957 properties in 2016 for conservation or possible park spaces, none of those parcels were the Brinkmanns' Property. Brinkmann Aff. ¶¶ 18–19 (Exhibit H). Nor do any of the Town's other planning documents identify the Brinkmanns' Property for a park, let alone

contain any actual planning for a park there. Thus, there can be no benefits flowing from the Town's speculative ideas serving as the pretextual public use for its planned condemnation. Although the town initially claimed it intended to operate a "passive park," which contemplates leaving the land intact as a wooded lot, it has subsequently asserted that it needs a "town green," which seems to reflect a desire to clear out greenspace. Brinkmann Aff. ¶¶ 6–7 (Compl. ¶¶ 101–102) (taking for a "passive use park"); Brinkmann Aff. ¶¶ 29–30 (Exhibit M) (petition for condemnation stating Property taken for a park or "Village Green"). The Town also speculates about needing "park improvements" which it fails to identify, explain, or support with any planning. The Town simply has no plan for any of this on the Brinkmanns' Property, and with no plan there can be no concrete benefits tipping the scales in the Town's favor (nor will it suffer hardships that disserve the public interest).

Moreover, even if the Town had a detailed plan for what to do with the Brinkmanns' Property, there is clearly no *urgent* need for a park; after all, the Town had years to acquire this Property before the Brinkmanns did. The real point of the condemnation action is not to meet the Town's need for a park, but to escape constitutional scrutiny and moot this case. The equities tip strongly in the Brinkmanns' favor and support granting preliminary injunctive relief to preserve the status quo.

Conclusion

To avoid irreparable harm, and because the equities favor the Brinkmanns, who are likely to succeed on the merits of their claim, this Court should grant Plaintiffs a preliminary injunction enjoining the Town of Southold from exercising the power of eminent domain to take title to their Property, until this lawsuit can be decided on the merits.

Dated this 22nd day of June 2021.

Respectfully Submitted,

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