

State of New York
Supreme Court Appellate Division
Third Judicial Department

LEE BORDELEAU, et al.

Appellants,

-v-

STATE OF NEW YORK, et al.,

Respondents.

Albany County Index No. 2008-6582

BRIEF OF APPELLANTS

Case # _____

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QUESTIONS PRESENTED

1. Does the state constitution ban cash grants to private firms for economic development?

Answer of the court below: No.

2. Can the state avoid the ban on cash grants to private firms by laundering the money through a public corporation?

Answer of the court below: Yes.

3. Are the state budget's economic development appropriations specific enough to comply with the state constitution?

Answer of the court below: Yes.

PROCEDURAL HISTORY

The plaintiffs filed a verified complaint in Supreme Court, Albany County, on August 4, 2008. [25]¹ The defendants filed motions to dismiss on or about September 29, 2008. [47 et seq.] Justice Michael C. Lynch dismissed the complaint on February 27, 2009. [13] The plaintiffs filed a notice of appeal to the Court of Appeals on April 6, 2009. [5] On June 30, 2009, the Court of Appeals transferred the appeal to the Appellate Division, Third Department. [12]

STATEMENT OF FACTS

Prior to 1846, the State of New York provided large loans and grants to private business allegedly for economic development. When many of these projects failed, state taxpayers were left with a fiscally unstable state government and much higher taxes to pay off loan guarantees. To remedy this problem, the state constitution was amended in 1846 to ban loans to private firms. The voters approved the amendment, 221,528 to 92,436. In 1874, the provision was expanded to include a ban on giving the money of the state to private firms. [31]

That provision, with slight modifications over the years, became what is now Article VII, § 8, paragraph 1 which states:

“The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking, but the foregoing provisions shall not apply to any fund or property now held or which may hereafter be held by the state for educational, mental health or mental retardation purposes.” [31]

Paragraphs 1, 2 and 3 of § 8 set forth various exceptions to the general rule banning gifts of state funds to private organizations.

¹ All citations are to the record on appeal unless otherwise noted.

In 1967, a Constitutional Convention whose delegates included eminent legal scholars recommended approval of a new constitution with this substantial revision of the above provision:

“The state . . . may grant to any person, association or private corporation in any year or periodically by contract, or loan its money for economic and community development purposes. . . the legislature may enact general or special laws for economic and community development purposes.” Proposed Constitution, Article X, §12(b), (c).

The voters defeated the proposed constitution 3,487,513 to 1,327,999. [32]

The state budget which became law on or about April 9, 2008, lists the following unlawful appropriations:

- American Axle—Tonawanda Forge--\$1,000,000
- Delphi Harrison--\$25,000,000
- Excell Partners--\$750,000
- “an international computer chip research and development center”—
- \$300,000,000 (on information and belief, the intended beneficiary of this grant is Advanced Micro Devices Inc.).
- Rochester Rhinos Soccer Stadium--\$5,000,000
- New York state apple growers association--\$750,000
- New York wine and grape foundation---\$980,000
- Long Island Wine Council--\$25,000
- Bronx Business Alliance--\$153,000.
- Peconic River Sportsman’s Club, Inc.--\$3,000. [32-33]

There are well over 100 grants to chambers of commerce, groups that supposedly espouse the principles of free private enterprise. On information and belief, recently a candidate for state

legislature in Upstate New York approached a chamber of commerce official for support and was told the group could not support him as they were getting state money from the incumbent. This anecdote illustrates the corrupting influence of corporate welfare in our extraordinarily non-competitive political system. [33]

It has also been reported that the Hyatt Hotel in Buffalo (WEST GENESEE HOTEL ASSOCIATES) and INTERNATIONAL BUSINESS MACHINES CORPORATION (IBM) will be receiving large grants from the state budget or from state funds. Though we cannot find such grants in the current state budget and two freedom of information requests to state agencies were ignored, these grants are apparently in that category of grants that are not disclosed in the state budget. [33]

For many years, BASS PRO OUTDOOR WORLD, LLC has been seeking state aid to construct a sporting goods store in downtown Buffalo. Prior deals fell through but clearly contemplated millions in dollars of state aid. A state agency, the ERIE CANAL HARBOR DEVELOPMENT CORPORATION has repeatedly and recently announced its intent to aid Bass Pro in building a new store on the site of the abandoned Memorial Auditorium once the building is demolished. [33-34]

The EMPIRE STATE DEVELOPMENT CORPORATION announced the following grants to private firms in the four months prior to the filing of this lawsuit:

- Frederick Goldman, Inc.-- \$150,000
- Unifrax I LLC--\$1,500,000
- \$230,000 - Jamaica Chamber of Commerce
- \$150,000 - Business Outreach Center Network, Inc.
- \$100,000 - The Chamber of Commerce in the Borough of Queens

- Revonate Manufacturing LLC--\$125,000
- Breton Industries--\$200,000
- Dunkirk Specialty Steel--\$500,000.
- Reserve Supply of Central New York, Inc.--\$100,000
- Marathon Boat Group--\$90,000
- BSD, LLC--\$97,500
- Panattoni Development Corporation of New Jersey----\$97,500
- Klein Steel Service Inc.-- \$100,000
- Nationwide Precision Products--\$80,000
- 3 Kids Corp of Middletown - \$187,500 (Middletown)
- County Draperies, Inc - \$150,000 (Middletown)
- Hannay Reels, Inc. - \$525,000 (Westerlo)
- American Packaging Corporation--\$150,000
- Pall Corporation--\$500,000
- Stella D'oro--\$175,000
- Starline USA, Inc.--\$275,000
- \$437,500 to the Bank of New York Mellon Corporation (Onondaga County)
- \$1.5 million to Sitel (Steuben County)
- \$325,000 to Kirtas Technologies (Ontario County)
- Knowlton Technologies, Jefferson County – \$425,000
- Marietta Corporation, Cortland County – \$575,000
- \$50,000 to CASP LLC. of Penn Yan (Yates County)
- \$25,000 to Viking Cives Corporation of Harrisville (Lewis County) [34-35]

These grants are merely illustrative of many more provided in recent years and many others in the process of being considered for approval, all such grants totaling many hundreds of millions of dollars. [35]

A perusal of the State Board of Elections website reveals that recipients of state grants tend to be heavy political contributors. For example, a Delphi PAC, on information and belief, related to the defendant DELPHI HARRISON, made numerous of donations to candidates in recent years.

Paul L. Snyder, on information and belief, the managing partner of WEST GENESEE HOTEL ASSOCIATES, made these donations in recent years:

- 500.00 16-JUN-08 CITIZENS FOR SAM HOYT
- 250.00 27-APR-07 CITIZENS FOR SCHIMMINGER
- 5,000.00 14-FEB-08 COLLINS FOR OUR FUTURE
- 200.00 20-JUL-06 COMMITTEE TO ELECT MAZIARZ STATE SENATE
- 150.00 08-AUG-06 FRIENDS OF MARK SCHROEDER
- 150.00 24-MAY-07 FRIENDS OF MARY LOU RATH
- 500.00 18-JUN-06 MARC A. COPPOLA FOR STATE SENATE
- 500.00 29-NOV-07 NYS SENATE REPUBLICAN CAMPAIGN COMMITTEE
- 1,000.00 23-JUN-08 PATERSON FOR GOVERNOR, INC.
- 1,000.00 11-JUL-08 SENATOR VOLKER CAMPAIGN COMMITTEE
- 600.00 10-AUG-06 SENATOR VOLKER CAMPAIGN COMMITTEE
- 500.00 04-OCT-06 SENATOR VOLKER CAMPAIGN COMMITTEE
- 1,000.00 22-JAN-08 SENATOR VOLKER CAMPAIGN COMMITTEE [36-37]

Governor Paterson stated in 2008: “In the beginning of May, our budget director projected our New York State deficit over the next three years at \$21.5 billion – that was a record. But things have changed. That number has now erupted to \$26.2 billion – a staggering 22 percent increase in less than 90 days.” [37]

IMPROPER APPROPRIATION OF FUNDS

Article VII, § 7 of the constitution requires that funds paid out of the state treasury be limited to those authorized by “appropriation by law” that “distinctly specif[ies] the sum appropriated, and the object or purpose to which it is to be applied.. . .” However, at numerous places in the state budget, language is used to the effect that the money appropriated will be spent according to some future agreement by the Governor, Speaker and Majority Leader or other officials. [37]

This language appears at page 751 of the TRANSPORTATION, ECONOMIC DEVELOPMENT AND ENVIRONMENTAL CONSERVATION BUDGET:

“The funds made available through this appropriation shall be utilized for the payment of the costs of eligible projects in accordance with a memorandum of understanding entered into between the governor, the majority leader of the senate and the speaker of the assembly, or their designees.” [38]

The same or similar language appears over twenty times in that volume of the budget alone (pp. 234, 235, 745, 765-768, 770-71, 777, 798, 803-4, 806, 823, 831, 839, 841 (3), 842-844, and 846). In certain places in the budget where such language is used, the Majority Leader is replaced by the Temporary President of the Senate. [38]

ARGUMENT

I. THE CONSTITUTION BANS CASH GRANTS TO PRIVATE FIRMS FOR ECONOMIC DEVELOPMENT.

The state constitution states at Article VII, § 8, paragraph 1:

“The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking, but the foregoing provisions shall not apply to any fund or property now held or which may hereafter be held by the state for educational, mental health or mental retardation purposes.”

Paragraphs 1, 2 and 3 of § 8 set forth various exceptions to the general rule banning gifts of state funds to private organizations. None of those exceptions authorizes the gift of state funds for “economic development,” whether those gifts are made directly by the state or through intermediaries.

Even though an attempt to amend the constitution to allow corporate subsidies failed, state officials have acted as though the 1967 amendment had become law. For some time, it has been the practice of the State to openly, notoriously and proudly give away state funds for “economic development” and other unauthorized purposes such as promotion of agriculture.

Surely, if this practice is so widespread and longstanding, it must be legal. To such an argument, the late Judge Matthew Jasen replied: “The very magnitude of the illegality cannot serve as its shield.”² It should not be a surprise that challenges to this practice have been extremely rare. The research for this lawsuit took much of four months. There are few attorneys with expertise in litigation willing to spend that much time preparing a case, or clients willing to pay them, and even fewer attorneys willing to sue virtually the entire state government.

² *Wein v. State of New York*, 39 NY2d 136, 159 (1976).

We can find no reported appellate case that squarely holds that such cash grants pass constitutional muster. There is one trial level case that holds that grants to non-profit corporations are permissible. *Schulz v. State*, 160 Misc. 2d 741 (Sup. Ct. Albany Co. 1994). For reasons specified below, we strongly disagree with that case and of course it is not binding on this Court.

In the absence of clear appellate authority interpreting Article VII, § 8, paragraph 1, its clear and plain language and clear and plain legislative history should be dispositive here. A report to the State Constitutional Convention of 1938, stated that the period—

“from 1816 to 1846 . . . involved very extensive and highly speculative subsidizing by the State which eventually caused highly speculative embarrassment to the State and was responsible for the incorporation in the State Constitution eventually of strict prohibitions against the lending of State credit and giving of State money to private enterprise. . .”³

In his *Constitutional History of New York*, Charles Z. Lincoln writes about the Convention of 1846:

“. . . the state had already gone too far in its policy of granting aid to private enterprise. It was now clear that the state, as a political agent, organized for purposes of government, should not engage in private business, nor assume the financial responsibility of corporations by affording them aid from the public treasury....”⁴

A Constitutional Commission report published in 1873 stated:

“There is another ground of objection to this mode of distribution, in this, that the moneys are given to private corporations not owned or controlled by the State, which cannot superintend the expenditure of the money, or even control it, so far as to compel its use for the purposes for which it was appropriated. * * * *the amendment proposed by the Commission cuts off all gifts of money and all loaning of the credit of the State to all other associations, corporations, etc., but they are all subject to the same objection, and appropriations to them of the money of the State are liable to the same abuses. They must all stand or fall*

³ “Problems Relating to Taxation and Finance,” New York State Constitutional Convention Committee (1938), Volume X, page 107.

⁴ Volume II, page 179 (1906).

together.” Journal of the Constitutional Commission, P. 452 (1873) (emphasis added).

The historical underpinnings of the ban on aid to private firms are clear, unambiguous and readily acknowledged by the Court of Appeals. *Wein v. State*, 39 NY2d 136, 142-143 (1976). In *People v. Westchester County Bank*, 231 NY 465, 483 (1921), Judge Cardozo (dissenting) stated:

“the purpose of the prohibition is revealed in its history (2 Lincoln, Constitutional History of New York, p. 87). The purpose was to put an end to the use of the credit of the state in fostering the growth of private enterprise and business.”

So, we have the plain language of the Constitution and the undisputed historical background that the State had gotten into severe financial problems by subsidizing private firms. In this context, it is critical to point out the first rule of interpretation. *When the language is neither vague nor ambiguous, there is nothing to interpret.* There is simply the matter of applying the law to the facts. See, *Anderson v. Regan*, 53 NY2d 356, 361-2 (1981).

Nevertheless, an examination of the few Court of Appeals cases that deal with these clauses provides no cause for straying from their straight-forward application.

In *Alfred E. Smith v. Smythe*, 197 NY 457 (1910), the Court of Appeals held that a village may not spend public funds for the benefit of a privately-owned section of the village. The village was creative in proffering rationales for this expense. The court responded by drawing a critical distinction between the “public interest” and “governmental purpose”:

“Undoubtedly the well being and prosperity of every individual member of the community is of interest to the whole community, for the community is but the aggregation of its individual members. But the political corporation that represents the community, such as a city or village, represents only the corporate and governmental aspect of the community. . . . There is . . . a clear distinction between what may be called ‘public interests’ in the broadest sense of that term and the corporate interest of the municipality, and it is a corporate or governmental purpose alone . . . which is a city or public purpose within the meaning of the Constitution.” *Id.* at 463.

The Court then aptly applied this distinction in striking down the program as a subsidy to some taxpayers at the expense of others:

“A village purpose within the meaning of the Constitution must be for a public use; that is, *it must be for the benefit and advantage of all of the public and in which all have a right to share*. . . . The effect of the statute is to transfer this burden, which rested on the corporation or individuals, to the village and authorized an expenditure of village money to discharge the same. This is a gift of village money in aid of private purposes.” (emphasis added)

Similarly, when the state taxes us to give grants to a small number of companies (based on rather murky and unspecified criteria), this represents a net transfer of wealth from the many to the few. To add insult to constitutional injury, it represents a transfer of state funds from the poor, the working class, the middle class, and from unsubsidized wealthy persons to arbitrarily selected wealthy persons and firms. This is precisely the type of corrupt and economically senseless subsidy banned by the plain language of the Constitution.

In *People v. Westchester County Bank, supra*, the Court of Appeals struck down the issuance of \$45,000,000 in bonds for the benefit of soldiers and sailors from World War I. In his trenchant and frankly, brilliant opinion, Judge Andrews wrote about the ban on gifts to private entities:

“They . . . represent the triumph of efforts to prevent improvidence, to make useless any pressure from special interests, to safeguard the credit of the state, and the interests of the people as a whole. *They are not to be brushed aside. They are to be fairly construed to obtain the object for which they were intended*. As in 1846 so to-day, economy, public and private, is one of our pressing needs. Upon it depends the prosperity of the state and its inhabitants. The crushing load of taxation—national, state and municipal—now as then threatens our future--the future of him who pays no direct taxes as well as the future of him who does. . . . Conscious of . . . human weakness, to guard against public bankruptcy the people thought it wise to limit the legislative power. *The courts must see to it that their intentions are not frustrated or evaded.*” *Id.* at 474-475.

Judge Andrews went on to say that the Constitution “is not be amended informally,” by judicial fiat. *Id.* at 475. Then, he made a point that goes to the heart of this lawsuit:

“Whether the purpose is a public one, therefore, is no longer the sole test as to the proper use of the state’s credit. Such a purpose may not be served in one particular way. *However, important, however useful the objects designed by the legislature, they may not be accomplished by a gift or a loan of credit to an individual or to a corporation. . . . To do so would make meaningless the provision adopted by the convention of 1846.* Gifts of credit to railroads served an important public purpose. That purpose was distinctly before the legislatures that made them. Yet they were still gifts and so were prohibited.” *Id.* at 475 (emphasis added).

Judge Andrews’ assertion that a public purpose will not justify a clearly prohibited gift to a private firm is not at all contradicted by *Murphy v. Erie County*, 28 NY2d 80 (1971). That case upheld a lease of a domed stadium against a claim that the lease was in illegal gift. The lease called for rental payments of as much as 63.75 million dollars over forty years and of course imposed on the firm the obligation of managing a large and complex facility for the duration of the lease. *Murphy* stands for the proposition that a county may lease land so long as there is a public purpose. It does *not* stand for the proposition that a county may give its money to a private firm so long as it is for a public purpose. So holding would render the clause meaningless. A lease is not a gift is the point of *Murphy*.

Thus, that cash grants to private business firms are banned is clear from the text of the constitution, its history and case law from the state’s highest court.

II. THE COURT ERRED IN HOLDING THAT THE STATE CAN AVOID THE BAN ON CASH GRANTS TO PRIVATE FIRMS BY LAUNDERING THE MONEY THROUGH A PUBLIC CORPORATION.

The trial court's central contention is that the state may use a public corporation as a middle man to dole out grants that the state itself could not. [15-16] There is no appellate case that says so and this tactic runs afoul of the principle that the Constitution may not be evaded by indirect means. See, *Wein v. State of New York*, 39 NY2d 136, 145 (1976). It also ignores key language in the Constitution itself. The Constitution states that "The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking. . . . " Article VII, § 8, paragraph 1 (emphasis added). The words "in aid of" foreclose the tactic of giving money to a public corporation for the benefit of private firms.

The State should not be allowed to create entities so that constitutional mandates can be avoided. For example, the State should not be allowed to create a public corporation to run court operations so that the Bill of Rights need not be respected.

Advance Micro Devices, Inc. argued in the trial court that the activities of the UDC in this context are justified by Article XVIII of the Constitution. That Article, however pertains only to low-income housing and nursing homes and it states:

"nothing in this article contained shall be deemed to authorize or empower the state, or any city, town, village or public corporation to engage in any private business or enterprise other than the building and operation of low rent dwelling houses for persons of low income as defined by law, or the loaning of money to owners of existing multiple dwellings as herein provided." (Section § 10).

Finally, the defendant's argument is refuted by Article VII, § 8, paragraph 3 which allows the legislature to loan the money of the state to a "public corporation" to make loans to

private firms for economic development. Clearly, the drafters and ratifiers of this provision believed that the state's use of a public corporation middle man for economic development loans *had previously been illegal*. Obviously, the Constitution has never been amended to allow for *cash grants* to public corporation middlemen though pro-corporate welfare forces did try to do so in 1967.

These conclusions can be drawn from a review of the defendants' submissions below and the decision of the trial court:

1. There is no appellate case that holds that cash grants to private firms for economic development are constitutional.
2. Neither the court nor the defendants have *anything* to say about the legislative history of the ban on giving state funds to private firms.
3. The defendants told the trial court what the Constitution doesn't ban but did not tell the court what the Constitution does ban.
4. The defendants apparently think this is a condemnation case.
5. The defendants cannot explain why eminent legal scholars thought it necessary to amend the Constitution in 1967 to legalize cash grants to private firms for economic development.

Since there is no binding case law, this Court should base its ruling on the plain language of the Constitution and its undisputed historical background. There is no denying the fact that Article VII, § 8, paragraph 1 was prompted by the disastrous consequences of state subsidies to private firms for economic development in the early part of the 19th Century. Ignoring that evidence, the defendants boldly asked the trial court to ignore that constitutional history.

The defendants also asked the trial court to ignore the plain language of the Constitution. They spent little time parsing that language. Rather, they simply pretended it doesn't exist. There is an analogy between this case and *District of Columbia v. Heller*, 554 U.S. ____ (2008). I had told my college-level constitutional law class in the fall of 2007 that the Supreme Court would uphold an individual right to bear arms because no court would so blatantly disregard the plain language of the Constitution. The Supreme Court would not say that the "right of the people to bear arms" means that the people do not have the right to bear arms. Similarly, this Court should not sign an order that says, in effect, that the words "The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking" *really mean* that the money of the state may be given to private undertakings.

If, based on no clear appellate holding, the defendants asked the trial court to ignore the plain language and plain history of the Constitution, what authority do they cite? Eminent domain cases. *Yonkers Community Dev. Agency v. Morris*, 37 NY 2d 478, 483 (1975); *NYS Urban Development Corporation v. Vanderlex*, 98 Misc. 2d 264, 269, 272-274 (Sup Ct NY Co1979); *Waldo's v. Village of Johnson City*, 74 NY 2d 718 (1989). Obviously, this case is not about condemnation of private property. There are explicit constitutional provisions that govern litigation over eminent domain. Both the state and federal constitutions require that the courts find a "public use" before allowing a taking of private property. U. S. Constitution, 5th and 14th Amendments; N. Y. Constitution, Article 1, § 7, (a). Thus, it is no surprise that in condemnation cases, courts determine whether a public purpose exists. They must do so by explicit constitutional direction!

Here, the opposite condition prevails. Not only is there no constitutional mandate to find a public use or purpose, *but the provision in question omits such a requirement*. By omission,

the Constitution implicitly forbids the superimposition of such a requirement as that would constitute amendment of the constitution by judicial fiat. *People v. Westchester County Bank, supra* at 474-475 (1921).

Only one defendant addressed our point about the 1967 Constitutional Convention and that defendant, International Business Machines, missed the point. It doesn't matter why the voters rejected the proposed amendment allowing for cash grants to private firms for economic development. What matters is they did reject it. And what matters even more is that eminent legal scholars of the time believed it was necessary to amend the Constitution to allow for such subsidies that had been previously and clearly banned by the Constitution of 1846 and subsequent amendments.

In addition to the failed amendment of 1967, there is other persuasive circumstantial evidence that grants are illegal under New York law. First, the general rule against grants is subject to an exception directly related to economic development. Article VII, Section 8(3) allows the state to loan money for economic development under certain circumstances. If there was not a general prohibition on corporate subsidies under paragraph 1, there would have been no need to carve out an exception for certain types of loans.

Also, several cases or formal opinions have held that *federal funds* may be given to private firms. *Kradjian v. City of Binghamton*, 104 AD2d 16 (3rd Dept. 1984); *Tri-County Taxpayers Association, Inc. v. Town of Bolton*, 165 AD2d 451 (3rd Dept. 1991); Opinion of the State Comptroller No. 76-18 (1976); Opinion of the State Comptroller No. 88-79 (1988). Again, this exception reinforces the main rule that bars the use of *state funds* for corporate subsidies.

III. THE BAN ON GIVING THE MONEY OF THE STATE SHOULD NOT BE NARROWLY CONSTRUED.

The defendants argued for a narrow interpretation of the term “give” such that only actual common law gifts are banned. However, the text of the constitution uses the term “give,” not “gift,” which has a narrower definition. The use of the phrase “in aid of” also requires a broad interpretation of this clause. Even if there was slight and contrived consideration for a grant of millions of dollars to a private firm, such grant would nevertheless be “in aid of” such firm and therefore barred. The essence of improper giving is the “subsidization” of private undertakings. *Schulz v. McCall*, 86 NY2d 225, 233 (1995). The fact that “loans” are also barred demonstrates that the constitutional ban is broadly intended to end state subsidies to private business, whether or not there is a token of “consideration” under contract law. See, *People v. Westchester County Bank*, *supra* at 483 (1921), Judge Cardozo (dissenting) (“The purpose was to put an end to the use of the credit of the state in fostering the growth of private enterprise and business.”)

Likewise, the mere fact that grant recipients sign contracts that impose certain obligations on them does not rescue such grants from the constitutional prohibition. For example, in *Schulz v. McCall*, *supra*, the mere fact that a partisan newsletter contained some valuable and nonpartisan information for voters—the “consideration”—did not save that expenditure from being deemed unlawful under Article VII, Section 8 (1).

Neither does the history of the clause support the defendants’ interpretation. Surely, the loans that the State gave to private firms in the 1830’s and 1840’s that led to economic chaos and to the enactment of the initial ban on the use of the state’s credit for private purposes, were governed by written contracts that featured consideration such that they would not be deemed to be “gifts.” See, “Problems Relating to Taxation and Finance,” New York State Constitutional

Convention Committee (1938), Volume X, page 107. Like the present grants, those transactions contemplated the improvement of the economy by developing railroads and canals and other infrastructure. Thus, the defendants urged upon the trial court a meaning of the clause that ignores its original purpose and negates its meaning.

None of the three cases cited by the trial court supports its holding that the state can launder money through a public corporation to do an end-run around the constitution. None involves cash grants to private firms for economic development.

Comerski v. City of Elmira, 308 NY 248, 252 (1955) involved a contract with a public corporation to provide parking facilities. *Wein v. State*, 39 NY2d 136 (1976) involved state assistance to a financially struggling municipality, New York City. That case cites with approval *Westchester Bank*, heavily relied on by the appellants here at Points I and II above. *Id.* At 145. Finally, *Schulz v. State*, 84 NY2d 231 (1994) involves the funding of public works projects, not private firms.

If the trial court's view is upheld, the constitutional ban on subsidizing private firms will be effectively repealed by court decision. Under that view, the state can set up a public corporation called, *End-Run Around the 1846 Constitution, Inc.*, to serve as a pass-through for all the cash grants that the state could not give directly to private entities. For example, while the state cannot give appellant's attorney one million dollars for a lavish cruise around the world, it could give the money to *End-Run* which could then give it to me and off I go!

IV. THE DEFENDANTS FAILED TO DEMONSTRATE THAT CASH GRANTS TO PRIVATE FIRMS SERVE A PUBLIC PURPOSE.

The defendants asked the Court to find that economic development grants serve a public purpose. However, they failed to provide any expert testimony to that effect. Their primary proposed witness was Douglas G. Wehrle, an employee of Empire State Development Corporation. [120] He failed to state his qualifications to opine on economics. The trial court should have totally disregarded his vague and unsupported opinions as to the beneficial effects of economic development grants.

The plaintiffs, in contrast, retained Professor William L. Anderson, a professor of economics as an expert witness. [243]

V. THERE IS AN ISSUE OF FACT WHETHER CASH GRANTS TO PRIVATE FIRMS SERVE A PUBLIC PURPOSE.

If the Court holds that the defendants have provided sufficient evidence of a public purpose, we contend that there is an issue of fact in that regard calling for an evidentiary hearing. We would request a trial to present that evidence and other evidence that will show there is no public purpose here, simply a transfer of wealth from taxpayers to private firms that leaves the economy in worse condition. See, *Denihan Enterprises, Inc. v. O'Dwyer*, 302 NY 451, 459-460 (1951); affidavit of W. Anderson [243, et seq.].

VI. THE COURT ERRED IN HOLDING THAT THE STATE'S UTTERLY VAGUE ECONOMIC DEVELOPMENT APPROPRIATIONS WERE SPECIFIC ENOUGH TO COMPLY WITH THE CONSTITUTION.

It is bad enough that the State and its various agencies illegally distribute cash grants to favored corporations and thereby worsen the economic health of both the state and its taxpayers. However, this error is compounded by the disregard of yet another constitutional mandate. Article VII, § 7 of the constitution requires that funds paid out of the state treasury be limited to those authorized by “appropriation by law” that “distinctly specif[ies] the sum appropriated, and the object or purpose to which it is to be applied. . . .” However, at numerous places in the state budget, often where illegal cash grants are made, language is used to the effect that the money appropriated will be spent according to some future agreement by the Governor, Speaker and Majority Leader or other officials. Such provisions not only violate the Constitution but also promote secrecy, concentrate enormous financial power into the hands of a few, and reduce public accountability for appropriations such as cash grants for wealthy corporations.

This language appears, for example, at page 751 of the Transportation, Economic Development and Environmental Conservation Budget:

“The funds made available through this appropriation shall be utilized for the payment of the costs of eligible projects in accordance with a memorandum of understanding entered into between the governor, the majority leader of the senate and the speaker of the assembly, or their designees.” [38]

The same or similar language appears over twenty times in that volume of the budget alone (pp. 234, 235, 745, 765-768, 770-71, 777, 798, 803-4, 806, 823, 831, 839, 841 (3), 842-844,

and 846). In certain places in the budget where such language is used, the Majority Leader is replaced by the Temporary President of the Senate. [38]

All such provisions violate Article VII, § 7 and improperly delegate legislative power away from the Senate and Assembly.

Complaints about state politics being dominated by “Three Men in a Room,” the Governor, Speaker and Majority Leader, are legion. What makes this corrupt regime possible is the flagrant disregard of the Constitution, both in appropriating grants to favored corporations and in allowing those three officials to secretly choose the recipients of the illegal largesse. As pointed out in the complaint, many recipients of grants return the favor by making campaign contributions to influential legislators. This further increases their power over the rank and file legislators who need this money at election time.

As with Point I, this issue involves application of the plain language of the Constitution in an area of law where little if any relevant case law exists. We cannot find case law applying Article VII, § 7 to the kind of language used in this year’s budget. What case law that does exist illuminates the background and purpose of this clause, buttressing our present claim. In *Anderson v. Regan*, 53 NY2d 356, 363-4 (1981), the court wrote:

Initially adopted in 1846. . . the appropriations rule was part of an effort to stabilize the management of the State and to superimpose a measure of legislative control over the then unbridled power of the executive branch to spend. . . The prohibition against the expenditure of funds in the treasury without specific legislative appropriation . . . would, it was hoped, ‘compel every new Legislature to see what money went for *this*, and for *that* object, and the people, by reading the statutes, could then get some idea of how the money went, where it went, and how much was paid annually to carry on the government.’ * * * The absence of accountability in this sector of government is, manifestly, an unacceptable state of affairs in light of the framers’ intention that *all* of the expenditures of government be subjected to legislative scrutiny.” (emphasis in original, citation omitted)

In *Saratoga Harness racing Association, Inc. v. Agriculture and New York State Horse Breeding Development Fund*, 22 NY2d 119, 124 (1968), the court stated:

“The history of section 7 of article VII indicates that it was motivated by a concern that, absent legislative control over expenditures, it was possible for the State to incur obligations in excess of its actual income and thus ‘leave burthens for the future, and severe taxation or repudiation, the meanest of all things.’” (citation omitted).

As with the violation of the rule against cash grants to private business, the violation of the appropriation clause has led to the very same evils it was designed to prevent: severe taxation, lack of accountability and the diminution of the role of the legislature as a whole, replaced as it has been, in effect, by three men in a room.

The defendants argued, based on *Saxton v. Carey*, 44 NY2d 545 (1978), that the courts may not inquire into the degree of itemization in a budget. However, the same court states that the budgetary process is not always beyond the realm of judicial consideration. This is such a case as what we complain of here is the wholesale delegation of the power to appropriate billions of dollars to three state officials or their designees that results in *zero itemization*! This is the extreme case, the reduction to the absurd that, if not remedied, essentially erases the constitutional clause at issue, Article VII, § 7: appropriations should be limited to those authorized by “appropriation by law” that “distinctly specif[ies] the sum appropriated, and the object or purpose to which it is to be applied. . . .”

We invite the Court to carefully review the affidavit of Mr. Wehrle [120 et seq.] and especially its exhibits to see the full measure of shenanigans that the present practice leads to.

One example should suffice here. There is a memo from some fellow named Craig J. Miller from Senator Dale Volker’s office to Jeffrey Lovell of “Senate Finance” asking *him* or Senator Bruno to inform the Empire State Development Corporation that “the State Senate

agrees to commit \$1.7 million for the renovations of the Hyatt Regency Hotel in Buffalo...”
That is simply incredible. Here is an unelected man unknown to the public directing the expenditure of state funds on behalf of an entity, the State Senate, that has no constitutional authority to make appropriations!

This is the extreme case where the courts must step in to halt this unconstitutional practice.

CONCLUSION

By ignoring clear constitutional mandates, state officials have dragged New York State back to the dire circumstances of the mid-1840's when the unwise practice of subsidizing private firms threatened the State's solvency and economy.

This Court has the authority under the New York State Constitution, CPLR 3001 and State Finance Law § 123-b to grant an injunction against the defendants to bar them from distributing or receiving state funds in violation of the New York State Constitution, and to issue an appropriate declaration of the rights of the parties.

So doing will not only revive the State Constitution but will be an important first step to curing what ails New York State: excessive spending and taxation, domination of the state government by special interest groups, political corruption, economic stagnation, and widespread public cynicism and despair.

The Court should grant the following relief:

1. an order and permanent injunction barring the state defendants from giving state funds to the private defendants or any other private corporation or undertaking similarly situated;
2. an order directing the return of funds previously transferred to the private defendants pursuant to the current state budget or pursuant to action of any public respondent in violation of the state constitution, together with interest;
3. a declaration that it is illegal for any state defendant to transfer state monies to private corporations or firms unless explicitly authorized by one of the three exceptions specified in Article VII;

4. an injunction against any spending resulting from the improper delegation of the legislative power of appropriation to other officials;
5. an injunction against any spending in violation of Article VII, § 7;
6. costs, disbursements and reasonable attorney's fees; and,
7. for such further relief as to the Court may seem just and proper.

Dated: Buffalo, New York
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