

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of

VELMANETTE MONTGOMERY, JAMES F.
BRENNAN, JOAN L. MILLMAN, LETITIA JAMES,
NEW YORK PUBLIC INTEREST RESEARCH GROUP
STRAPHANGERS CAMPAIGN, and DEVELOP DON'T
DESTROY (BROOKLYN), INC.,

Petitioners,

For a Judgment Pursuant to Article 78

-against-

METROPOLITAN TRANSPORTATION AUTHORITY
and FOREST CITY RATNER COMPANIES, LLC,

Respondents.

Index No.

**PETITIONERS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR VERIFIED PETITION**

BARTON BARTON & PLOTKIN LLP
420 Lexington Avenue, 18th Floor
New York, NY 10170
(212) 687-6262

**YOUNG, SOMMER, WARD, RITZENBERG,
BAKER & MOORE, LLC**
Executive Woods
Five Palisades Drive
Albany, New York 12205
(518) 438-9907

October 13, 2009

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PRELIMINARY STATEMENT

By the instant proceeding pursuant to Article 78 of the New York Civil Procedure Law and Rules (“CPLR”), petitioners seek annulment of the resolution of the Board of respondent Metropolitan Transportation Authority (“MTA”) on June 24, 2009, authorizing the disposition of valuable real property owned by MTA to respondent Forest City Ratner Companies, LLC (“FCR”), on the ground that the disposition violates the New York Public Authorities Law (“Public Authorities Law” or “PAL”) as amended by the Public Authorities Accountability Act of 2005 (“PAAA”).

On June 24, 2009, the Board of MTA approved the sale of property rights to the Vanderbilt Rail Yard (the “Vanderbilt Yard” or “Yard”) – which comprises an eight and one half acre tract of developable land in Prospect Heights, Brooklyn, adjacent to a major transit hub, two major thoroughfares, and a successful shopping and entertainment area – to FCR for the bargain-basement price of \$20 million dollars to be paid upon closing and an additional \$80 million to be effectively financed by MTA over 22 years at a 6.5 percent annual interest rate, and FCR’s promise to build “improved” rail facilities with smaller capacity than the Yard currently has. FCR seeks to acquire the Yard for its planned, publicly subsidized, \$4.9 billion Atlantic Yards Arena and Redevelopment Project (the “Project”), but, under the transaction approved by MTA’s Board, has the option of building only the planned sports arena a single building and then abandoning the rest of the Project and ceasing further payments to MTA.

Although MTA negotiated the transaction with FCR without obtaining any independent appraisal of the Vanderbilt Yard, the most recent appraisal conducted about four years earlier in July 2005 valued the Yard at more than \$271 million, or \$214.5 million after accounting for the costs of the track relocation and platform construction which would be necessary to develop the

property. At that time, FCR had offered MTA \$50 million in cash for the Yard and additional improvements to the rail facilities, and then increased its cash offer to \$100 million in the face of a competing \$150 million cash offer from developer Extell Development Company (“Extell”). Nevertheless, in 2009, MTA not only declined to solicit any better offers for the Vanderbilt Yard from Extell or anyone else, it refused even to consider a competing offer for the Yard from petitioner DDDDB. MTA’s failure to seek to maximize its gain from the sale of the Yard is particularly striking in light of the fare hikes and service cuts it imposed earlier this year, which MTA argued were necessary due to a massive shortfall in its operating budget.

The reason why MTA approved the sale of one of its most valuable tracts of real estate to FCR at a rock-bottom price is that it had already agreed as early as 2004, as part of a deal among officials of New York State and New York City, MTA, and FCR, to convey the Vanderbilt Yard to FCR for the planned Project. The deal was made privately among FCR and various State and City officials, hidden from public view, before any of the statutorily mandated review processes had even begun, before the Brooklyn residents who would be displaced or otherwise directly impacted by the Project, or their elected representatives, had any opportunity to evaluate the Project or to provide input, and without any express consideration of whether the transfer of the Vanderbilt Yard to FCR would actually be fair to MTA and the transit-riding public which it serves.

The PAAA was enacted into law in 2006 for the express purpose of eliminating this kind of backroom deal-making and to “provide the necessary reform to the State’s public authorities to enhance services while increasing the effectiveness, accountability and openness of State government.” Sponsor Memo., 2005 N.Y. S.B. 5927, L. 2005 ch. 766 (hereinafter, “Sponsor

Memo.”).¹ In particular, the PAAA added a new Title 5-A to the Public Authorities Law (“PAL”) to address the disposition of public authority property.

Under the new Title 5-A, MTA still has the authority to sell the Vanderbilt Yard for less than market value, and without public bidding, if the public benefits of the sale so warrant. But, in order to ensure that MTA makes the best transaction it possibly can make for the benefit of its riders, it is required (1) to obtain first an independent appraisal of the Yard’s current market value, (2) to include the appraised value as a reference point in the transaction documents, and (3) to obtain as much competition as feasible to increase the value of the transaction. MTA did none of these three things, and, therefore, the transaction approved by MTA’s Board on June 24, 2009, was unlawful and must be annulled.

The relevant facts are set forth in detail in the accompanying Verified Petition and the documents annexed as exhibits to the accompanying Affidavit, and petitioners respectfully respect the Court thereto for a complete recitation thereof. In the interest of efficiency, petitioners do not repeat all of the relevant facts herein.

LEGAL ARGUMENT

POINT I: MTA’S DISPOSITION OF THE VANDERBILT YARD VIOLATED THE EXPRESS PROCEDURAL REQUIREMENTS OF THE PAAA, AND THEREFORE MUST BE ANNULLED.

In early 2005, then-New York State Governor George Pataki established the New York State Commission on Public Authority Reform and named Ira M. Millstein, a nationally recognized authority on corporate governance, as the Commission’s chairman. Under Mr. Millstein’s direction, the Commission developed a set of Model Governance Principles designed to ensure that the State’s public authorities are held to strict standards of ethics and professional

¹ A true copy of the referenced Sponsor Memo is submitted herewith as Exhibit J to the accompanying Affidavit of Randall L. Rasey (“Rasey Affid.”).

responsibility. Those Principles were codified in the PAAA. *See* N.Y.S. Auth. Budget Office Press Release, “Governor Signs Public Authorities Accountability Act”, dated Jan. 15, 2006 (hereinafter, “ABO Press Release”).²

The PAAA was intended to “improve the oversight, accountability, and transparency at our State public authorities, thereby strengthening public confidence in their important work”, and to “provide the necessary reform to the State’s public authorities to enhance services while increasing the effectiveness, accountability and openness of State government.” (Sponsor Memo.) Upon signing the PAAA into law on January 16, 2006, Governor Pataki stated that the twin goals of reform and strengthening public confidence in the State’s public authorities would be obtained “by ensuring that strong, uniform standards of openness, accountability and professionalism are followed at all times.” (ABO Press Release)

Prior to the enactment of the PAAA, MTA had “broad authority to dispose of real estate ‘whenever it determines that it is in the interest of the authority’ to do so.” *Matter of Madison Square Garden, L.P. v. New York Metro. Transp. Auth.*, 2005 N.Y. Misc. LEXIS 1094, *12, 233 N.Y.L.J. 109 (Sup. Ct. N.Y. Co. Jun. 2, 2005), *aff’d*, 19 A.D.3d 284, 799 N.Y.S2d 186 (1st Dep’t 2005), quoting PAL §§ 1265(7) and 1267(5).

More specifically, MTA had the power “[t]o acquire, hold and dispose of real or personal property in the exercise of its powers”, PAL § 1265(7), and

may, whenever it determines that it is in the interest of the authority, dispose of any real property or property other than real property, which it determines is not necessary, convenient or desirable for its purposes.

PAL § 1267(5).

² A true copy of the referenced press release, as it appears on the New York State Authority Budget Office’s web site at http://www.abo.state.ny.us/archives/PressReleaseforChapter766%20_S5927.pdf, is submitted herewith as Exhibit I to the Rasey Affid.

Within those lax statutory guidelines, MTA was required to ““obtain terms most beneficial to the public”” *Madison Square Garden*, 2005 N.Y. Misc. LEXIS 1094 at *12, quoting *Square Parking Sys. v Metro. Transp. Auth.*, 92 A.D.2d 782, 785, 459 N.Y.S.2d 774 (1st Dept 1983), and, in assessing which terms were most beneficial, could “take into account not only the dollar figure being offered, but the long-term benefit to the MTA and to the public it serves.” *Id.*, citing *Creole Enterprises, Inc. v Giuliani*, 236 A.D.2d 272, 653 N.Y.S.2d 576 (1st Dept 1997). Thus, as long as the Board of MTA could show a rational basis for finding that a transaction to dispose of MTA property would be beneficial to the public, its approval of the transaction could not be disturbed by judicial review. *See id.*

The PAAA did not prohibit MTA from considering the long-term public benefits of a sale of property, but added specific procedural requirements which all public authorities, including MTA, are now required to follow when disposing of authority property. As relevant here, the PAAA added section 2897 to the Public Authorities Law, as part of the new Title 5-A, which provides, in relevant part, that:

any public authority may dispose of property for not less than the fair market value of such property by sale, exchange, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the contracting officer deems proper, and it may execute such documents for the transfer of title or other interest in property and take such other action as it deems necessary or proper to dispose of such property under the provisions of this section. Provided, however, that no disposition of real property, any interest in real property, or any other property which because of its unique nature is not subject to fair market pricing shall be made unless an appraisal of the value of such property has been made by an independent appraiser and included in the record of the transaction.

PAL § 2987(3) (emphasis added).

Further, section 2897 of the PAL requires all public authorities to dispose of property only after publicly advertising for bids pursuant to prescribed procedures, with certain

exceptions. *See* PAL § 2987(6)(a) and (b). As relevant here, a public authority may contract to dispose of property without public bidding, through negotiation with a specific purchaser, and for less than the property’s fair market value, under the following circumstances:

Disposals and contracts for disposal of property may be negotiated or made by public auction without regard to paragraphs a and b of this subdivision but subject to obtaining such competition as is feasible under the circumstances, if: . . .

(v) the disposal is for an amount less than the fair market value of the property, the terms of such disposal are obtained by public auction or negotiation, the disposal of the property is intended to further the public health, safety or welfare or an economic development interest of the state or a political subdivision (to include but not limited to, the prevention or remediation of a substantial threat to public health or safety, the creation or retention of a substantial number of job opportunities, or the creation or retention of a substantial source of revenues, or where the authority’s enabling legislation permits), the purpose and the terms of such disposal are documented in writing and approved by resolution of the board of the public authority[.]

PAL § 2897(6)(c) (emphasis added).

Notably, the amended PAL does not provide any exception to the requirements set forth in PAL § 2987(3) that where the property being disposed of cannot “because of its unique nature” be valued in the open market – such as the Vanderbilt Yard – the authority must first obtain an independent appraisal of the property’s value, and include the appraisal in the record of the transaction. Further, even where the authority is permitted to dispose of property through negotiation and for less than its estimated market value, it still must conduct the transaction “subject to obtaining such competition as is feasible under the circumstances.” PAL § 2897(6)(c).

MTA failed to meet any of these three requirements with respect to the disposition of the Vanderbilt Yard which its Board approved on June 24, 2009. There is no dispute that MTA failed to obtain an independent appraisal to determine the Vanderbilt Yard’s current market

value, even while the Staff Summary of the transaction provided to the Board by MTA's Finance Committee explicitly noted that "as a result of the economic downturn, financial and credit markets have tightened considerably and the Brooklyn real estate market has markedly deteriorated." Verified Petition, ¶62.

Further, MTA's Chief Financial Officer ("CFO") openly acknowledged that the market had changed dramatically since the most recent appraisal in 2005, and implied that the bargain-basement transaction with FCR was the best MTA could do in the current market. *See* Verified Petition, ¶56. MTA's CFO did not explain why MTA failed to obtain an independent appraisal of the Vanderbilt Yard so as to determine the Vanderbilt Yard's value in the current market, and, plainly, MTA's Board had no idea what the current estimated value of the Yard was when it approved the disposition to FCR.

Moreover, even if MTA had intended to rely on the outdated appraisal of the Vanderbilt Yard from 2005, neither that appraisal, nor the \$214.5 million value determined by that appraisal, appeared anywhere in the Staff Summary or anywhere else in the transaction record, as would have been required under PAL § 2987(3). Nor was the outdated appraised value of the Yard discussed either at the MTA Finance Committee meeting on June 22, 2009, or at the MTA Board meeting on June 24, 2009, and there is no indication in the record that the Board even considered the appraised value of the Yard. *See* Verified Petition, ¶¶63-65.

Finally, MTA utterly failed "to obtain[] such competition as is feasible under the circumstances", as it was required to do under PAL § 2897(6)(c). The last time that MTA had solicited bids for the Vanderbilt Yard, in May 2005, it had received a proposal from respected New York City developer Extell Development Company ("Extell") to pay MTA \$100 million more for the Yard than FCR was offering at that time. MTA cannot reasonably argue that the

circumstances existing in June 2009 prevented it from seeking out or entertaining competing offers for the Vanderbilt Yard, given that its CFO conceded that the Board would need to consider an unsolicited offer from Extell. *See* Verified Petition, ¶55. Nevertheless, despite the fact that MTA spent several months negotiating with FCR, it did not solicit a new proposal from Extell, provided no opportunity or procedures for any potential bidder other than FCR to submit a proposal, and refused even to consider DDDDB’s Unity Plan proposal.

Thus, having violated the express procedural requirements of the PAAA, the MTA Board’s resolution was unlawful. This Court should therefore annul the resolution, and order MTA to conduct the disposition of the Vanderbilt Yard in accordance with the express procedural requirements of the Public Authorities Law as amended by the PAAA.

POINT II: PETITIONERS HAVE STANDING TO CHALLENGE MTA’S UNLAWFUL ACTION.

As a general rule, in order to establish standing to challenge an administrative determination in an Article 78 proceeding, “[a] petitioner need only show that the administrative action will in fact have a harmful effect on the petitioner and that the interest asserted is arguably within the zone of interest to be protected by the statute.” *Matter of Dairylea Cooperative, Inc. v Walkley*, 38 N.Y.2d 6, 9, 377 N.Y.S.2d 451, 454 (1975). New York courts endeavor to extend standing wherever necessary “to prevent the erection of an impenetrable barrier to judicial review of unlawful official action.” *Matter of Abrams v. New York City Transit Auth.*, 39 N.Y.2d 990, 991, 387 N.Y.S.2d 235, 236 (1976). *See, e.g., Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 814, 766 N.Y.S.2d 654661 (2003) (“our duty is to open rather than close the door of the courthouse”). “Only when there is a clear legislative intent negating review or lack of injury in fact will standing be denied.” *Id.* at 11, 377 N.Y.S.2d at 455 (internal citations omitted).

Petitioners allege that MTA, through its Board, acted unlawfully by approving the transfer of the Vanderbilt Yard property rights to FCR in violation of the express procedural requirements of the PAAA, and each of petitioners has a palpable stake in MTA's disposal of the Vanderbilt Yard. Under New York courts' "constantly broadening view" of standing to sue for redress of illegal official State action, petitioners have standing to challenge MTA's determination as violating the express procedural requirements of the PAAA. *Abrams*, 39 N.Y.2d at 991, 387 N.Y.S.2d at 235.

More specifically petitioner DDDDB, as a potential bidder for the Vanderbilt Yard, has been directly injured by MTA's violation of the PAAA's procedural requirements, and its interest in having its Unity Plan proposal considered on a competitive basis with FCR's proposal for the Vanderbilt Yard lies well within the zone of interest protected by the PAAA. *See Madison Square Garden*, 2005 N.Y. Misc. LEXIS 1094 at *31 ("Any bidder or potential bidder who was harmed by the procedure or outcome would have standing, as demonstrated by the fact that MSG has standing.") *See, e.g., Matter of District Council No. 9 v. Metro. Transp. Auth.*, 115 Misc. 2d 810, 454 N.Y.S.2d 663 (Sup. Ct. N.Y. Co. 1982) (potential bidder had standing to challenge MTA's award of painting contract in violation of public bidding procedures under PAL § 1209(1)). *Cf. Matter of Transactive Corp. v. N.Y.S. Dep't of Social Services*, 92 N.Y.2d 579, 684 N.Y.S.2d 156 (1998) (petitioner lacked standing under State Fin. L. § 163 because it was not bidder or offerer).

DDDB also has associational, or organizational, standing, which exists where (1) one or more of the association's members has standing to sue; (2) the interests at issue are sufficiently germane to the association's purposes so that it is an appropriate representative of those interests, and (3) the individual members' participation is not required to assert the claim or to afford

complete relief. *See Matter of Aeneas McDonald Police Benevolent Ass'n v. City of Geneva*, 92 N.Y.2d 326, 331, 680 N.Y.S.2d 887, 889 (1998). DDDDB's members live in close proximity to the Yard and would be directly impacted by its unlawful disposal and resulting redevelopment; the interests at issue are plainly germane to DDDDB's mission of advocating for transparency in the MTA's disposal of the Vanderbilt Yard and for the Yard's redevelopment for the benefit of the surrounding communities; and, DDDDB can adequately represent its members' interests without their individual participation in this case.

Although the First Department, in *Matter of Madison Square Garden, L.P. v. New York Metro. Transp. Auth.*, 19 A.D.3d 284, 286, 799 N.Y.S.2d 186, 187-88 (1st Dep't 2005), found the individual petitioners' close proximity to the site at issue insufficient to confer standing, because the environmental impacts they feared were unrelated to the issue before the Court of whether MTA received the highest price for the site, the intervening enactment of the PAAA distinguishes the circumstances of that case from those of the case at bar. Here, petitioners do not complain that MTA failed to obtain the highest possible price for Vanderbilt Yard; to the contrary, petitioners acknowledge that the PAAA did not require MTA to do so. Rather, petitioners assert that MTA blatantly ignored the express procedural requirements of the PAAA in order to carry out a backroom deal made years earlier with FCR and State and City officials, and that petitioners were thereby denied the accountability, transparency, and ethical standards on the part of MTA which the PAAA was intended to ensure. Those interests are well within the zone of interests protected by the PAAA.

Petitioners Straphangers has associational standing by virtue of its purpose of advocating for transparency and accountability on the part of MTA, and, in particular, for the maximization of value to MTA in its disposal of the Vanderbilt Yard, and because the members of the transit-

riding public whom it represents will be adversely affected by MTA's failure to follow the standards of transparency and accountability imposed by the PAAA, and will be directly affected by MTA's unlawful disposition of the Yard. *See, e.g., Matter of New York Public Interest Research Group Straphangers Campaign v. Metro. Transp. Auth.*, 196 Misc. 502, 510, 765 N.Y.S.2d 422, 428 (Sup. Ct. N.Y. Co. 2003), *rev'd on other grounds*, 309 A.D.2d 127, 763 N.Y.S.2d 13 (1st Dep't 2003) (Straphangers had standing to assert that MTA's violated PAL's public hearing notice requirements); *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 324-26 (2d Cir. 2003) (NYPIRG had Article III standing, as environmental advocacy organization, to object to Environmental Protection Agency's decisions under federal Clean Air Act).

Petitioner James represents the City Council District in which the Vanderbilt Yard is located, and therefore she and her constituents have a special interest in the Yard's disposal and will be directly impacted by its redevelopment. Petitioners Montgomery, Brennan, and Millman represent Senate and Assembly districts encompassing, adjacent to and/or in close proximity to the Vanderbilt Yard, and, therefore, like James, they and their constituents have a special interest in the Yard's disposal and will be directly impacted by its redevelopment.

In addition, each of Montgomery, Brennan, and Millman voted as State legislators to pass the PAAA and enact it into law, and are interested in ensuring that their votes are not rendered meaningless by MTA's violation of the PAAA. *See Silver v. Pataki*, 96 N.Y.2d 532, 539, 730 N.Y.S.2d 482, 488 (1989). *See, e.g., Matter of Sullivan v. Siebert*, 70 A.D.2d 975, 417 N.Y.S.2d 129, 130-31 (3d Dep't 1979) (Assemblymember had standing to bring Article 78 proceeding to compel heads of various State departments to provide timely annual reports to Legislature

required under Executive Law § 164).³ Further, Brennan and Millman are members of the Assembly Committee on Corporations, Authorities and Commissions, which oversees MTA, and, therefore, have an additional interest in ensuring that MTA complies with its statutory obligations of accountability, transparency, and procedural compliance in its disposition of the Vanderbilt Yard.

Finally, it is significant that no party other than petitioners is in a position to challenge MTA's unlawful action. Simply put, denial of standing to all of petitioners herein would effectively preclude any judicial review of MTA's unlawful action. *See Abrams*, 39 N.Y.2d at 991, 387 N.Y.S.2d at 236. In such circumstances, "a broader interpretation of the principle of legal standing requires that standing be conferred to a party adversely affected by a decision or regulation of an administrative agency." *McKinney v. Commissioner of New York State Dep't of Health*, 15 Misc. 3d 743, 836 N.Y.S.2d 794 (Sup. Ct. Bronx Co. 2007), *aff'd on other grounds*, 41 A.D.3d 252, 840 N.Y.S.2d 6 (1st Dep't 2007).

This is not a case in which petitioners seek "to substitute judicial oversight for the discretionary management of public business by public officials." *Abrams*, 39 N.Y.2d at 991; 387 N.Y.S.2d at 236. Rather, petitioners seek enforcement of the procedural safeguards which the Legislature has enacted in order to make this State's public authorities accountable to its citizenry, and have standing to assert that MTA violated the PAAA. *See Stein v. Metro. Transp. Auth.*, 110 Misc. 2d 1027, 1029, 443 N.Y.S.2d 340, 342 (Sup. Ct. Nassau Co. 1981).

³ The *Sullivan* court also found that NYPIRG lacked taxpayer standing under Article 7-A of the State Finance Law, but that determination has no relevance in this case, in which NYPIRG/Straphangers does not assert taxpayer standing.

CONCLUSION

For the foregoing reasons, and for the reasons alleged in the Verified Petition, this Court should annul and vacate the June 24, 2009 resolution of the Board of MTA approving the disposition of the Vanderbilt Yard to FCR.

Dated: October 13, 2009

BARTON BARTON & PLOTKIN LLP

By: _____
Randall L. Rasey

420 Lexington Avenue, 18th Floor
New York, NY 10170
(212) 687-6262
rrasey@bartonesq.com
ccolligan@bartonesq.com

**YOUNG, SOMMER, WARD, RITZENBERG,
BAKER & MOORE, LLC**

By: Jeffrey S. Baker
Executive Woods
Five Palisades Drive
Albany, New York 12205
(518) 438-9907
jbaker@youngsommer.com

Attorneys for Petitioners