SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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In the Matter of the Application of the New York State Urban Development Corporation d/b/a Empire State Development Corporation to acquire title in fee simple absolute to certain real property, required for the

ATLANTIC YARDS LAND USE IMPROVEMENT AND CIVIC PROJECT- PHASE 1

BLOCK 1118, LOTS 1,5, 6, 21-25 AND 27; BLOCK 1119, LOTS 1 and 64; BLOCK 1120, LOT 35; BLOCK 1121, LOTS 42 and 47; BLOCK 1127, LOTS 1, 10-13, 18-22, 27, 29, 30, 33, 35, 43, 45-48, 50, 51 and 54-56; BLOCK 1129, LOTS 1, 3-6, 13, 21, 25, 39, 43-46, 49, 50, 54, 62, 76 and 81; Pacific Street between Carlton and Vanderbilt Avenues; Pacific Street between Flatbush and Sixth Avenues; Fifth Avenue between Atlantic and Flatbush Avenues including traffic island at Fifth Avenue and Pacific Street (FEE),

as said property is shown on the current Tax Map of the Borough of Brooklyn, City and State of New York

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Index No. 32741/09

VERIFIED ANSWER, DEFENSES, AFFIRMATIVE DEFENSES, OBJECTIONS IN POINT OF LAW AND COUNTERCLAIMS

Respondents, Peter Williams Enterprises, Inc. (Block 1127, Lot 35 and Lot 48), 535 Carlton Ave. Realty Corp. (Block 1129, Lot 4, Lot 5 and Lot 6), Pacific Carlton Development Corp. (Block 1129, Lot 13), Daniel Goldstein (Block 1127, Lot 27), and Chadderton's Bar and Grill, Inc., d/b/a Freddy's Bar and Backroom (Block 1127 Lot 43), by their attorneys, Emery Celli Brinckerhoff & Abady LLP, answer the Verified Petition in this special proceeding, pursuant to N.Y. Civ. Prac. L. & R. ("CPLR") 402, 403(b) & 404, and N.Y. Em. Dom. Proc. Law ("EDPL") § 402(B)(4), as follows:

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 1.

2. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 3.

4. Deny the allegations set forth in paragraph 4.

5. Deny the allegations set forth in paragraph 5, except deny knowledge or information sufficient to form a belief as to the truth of the allegation that the "ESDC's Modified General Project Plan, calls for the development . . . to be developed in two or more phases," because the Petition does not identify whether it is referring the Modified General Project Plan, adopted by Petitioner on December 8, 2006 (concurrently with Petitioner's Determination and Findings pursuant to EDPL § 204 (an incomplete copy of which is attached as Ex. C to the Petition)) which provides for the condemnation of *all* properties simultaneously, or the Modified General Project Plan dated June 23, 2009, adopted by Petitioner on September 17, 2009, which provides for the condemnation of targeted properties in two stages.

6. Admit the allegation in paragraph 6 of the Petition insofar as it identifies the properties Petitioner seeks to acquire, except deny that these are the same properties that were listed for acquisition in Petitioner's Determination and Findings pursuant to EDPL § 204 (a copy of which is attached as Ex. C to the Petition, with the property list tellingly omitted). A copy of the omitted property list, which was part of the Petitioners' predicate Determination and Findings under EDPL § 204 is attached as Ex. A. It is also readily available from Petitioner's own website, *see* http://www.empire.state.ny.us/pdf/AtlanticYards/Determination%20and%20Findings.pdf.

7. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7, except assert that Petitioner did not serve a complete, true and accurate copy of the Verified Petition upon Respondents, and instead appears to have excised large portions of Ex. A, before service.

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 8.

9. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 9.

10. Deny the allegations contained in paragraph 10, except admit that Petitioner issued Determination and Findings on December 8, 2006, and deny that Petition Ex. C is a true, complete and accurate "copy of the Determination and Findings," and deny knowledge or information sufficient to form a belief as to the truth of the allegation that the Determination and Findings were "published on December 11 and 12, 2006."

11. Deny the allegations contained in paragraph 11, except admit that challenges to the December 6, 2006 Determination and Findings asserting claims "under EDPL § 207 were brought in federal and state court," but deny that they were all dismissed because, although Petitioner claims that the "last such challenge was upheld by the Court of Appeals in a November 24, 2009 decision," Respondents filed a timely Motion to Reargue Appeal and/or Hold Motion in Abeyance Pending Hearing and Determination of Related Appeal (attached as Ex. B), which was submitted on December 21, 2009, and that motion has thus far not been acted on by the Court of Appeals, which issued decisions on motions on January 12, January 14, and

January 19. The earliest the Court of Appeals could rule on Respondents' motion would be February 9, when the next Court session resumes.

12. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12, and note that Petitioner has not submitted any proof that it has filed a Notice of Pendency as required by EDPL § 402(B)(1).

13. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13.

DEFENSES AND OBJECTIONS IN POINT OF LAW

14. The defenses, affirmative defenses and objection in point of law presented in this Answer are limited to procedural defects and/or defenses based on events that transpired or were revealed for the first time *after* the self-serving record compiled by Petitioner to support its predetermined findings under EDPL § 204 was closed, *i.e.,* during the more than three years that have passed since Petitioner issued its Determination and Findings on December 8, 2006. While some of the factual bases for these defenses became known, and were thus raised, during the pendency of Respondents' EDPL § 207 proceeding, Petitioner uniformly – and successfully – argued that the courts hearing Respondents' EDPL § 207 challenge could not consider *any* material outside of that record, even where that material was created after the 2006 Determination and Findings, and even where the material was itself created by Petitioner, such as when it adopted a new Modified General Project Plan in September 2009.

15. For example, in opposing Respondents' EDPL § 207 claim before the Appellate Division, Petitioner argued that the court should ignore the factual allegations concerning events that occurred *after* the 2006 Determination and Findings because none "of

these materials formed any part of the administrative record before the ESDC when it rendered its [2006 Determination and Findings], and they should not be considered by the Court." Brief of Respondent, *Goldstein v. N.Y. State Urban Dev. Corp.*, at 3, n.1 (Dec. 19, 2008).

16. In the Court of Appeals, Respondents argued extensively that materially significant events that transpired after the 2006 Determination and Findings, particularly Petitioner's adoption of the 2009 Modified General Project Plan on September 17, 2009, and information known to Petitioner prior to its adoption, fatally undermined the public use finding contained in the old and stale 2006 Determination and Findings. *See* Brief for Petitioners-Appellants, 2009 WL 3810843 at 21-33 (Jul. 31, 2009); Reply Brief for Petitioners-Appellants, 2009 WL 3810849 at 77-79 (Sep. 25, 2009).

17. Petitioner, for its part, argued strenuously – devoting six full pages of its brief to the topic – that the Court of Appeals should not consider anything that transpired after December 8, 2006, the date Petitioner UDC adopted its 2006 Determination and Findings, including the adoption of the 2009 Modified General Project Plan which superceded the 2006 Modified General Project Plan, upon which the 2006 Determination and Findings was premised. *See* Brief for Respondent-Respondent, 2009 WL 3810844, at 36-41 (Sep. 8, 2009).

18. On November 24, 2009, the Court of Appeals affirmed the denial of Respondents' EDPL § 207 claim. *Goldstein v. N.Y. State Urban Dev. Corp.*, No. 178, 2009 WL 4030939 (Nov. 24, 2009), *motion to reargue or hold motion in abeyance pending.* While that ruling is not final, the Court of Appeals made it clear that it had rejected Respondents' plea to consider the many respects in which the public use findings had been materially undermined during the nearly three years that had passed since Petitioner issued its 2006 Determination and

Findings. It explained that it was reviewing only "the record upon which the [UDC] determination was based and by which we are bound." *Id.* at 2.

19. Having been rebuffed in their attempt to have any court, including the Court of Appeals, consider the material changes to the facts undergirding the 2006 Determination and Findings as part of their pending EDPL § 207 challenge, Respondents should not now be precluded from raising these issues based on the specious argument – that Petitioner will surely make – that Respondents should have raised these issues in that same EDPL § 207 proceeding.

First Defense, Affirmative Defense or Objection in Point of Law
(Lack of Personal Jurisdiction)

20. A complete and accurate copy of the Petition was not served upon Respondents. The Petition that was served upon Respondents is not complete, indeed it materially differs from the Petition in the Court file as the version that was served, or attempted to be served, does not contain a complete and accurate set of acquisition maps, attached as Ex. A to the Petition. While EDPL § 402(B)(2) allows for notice which contains only those portions of the acquisition map affecting the owners property, it does not absolve Petitioner of its responsibility to serve true, accurate and complete copies of the Petition upon all Respondent/Condemnees. The Petition must therefore be dismissed for lack of personal jurisdiction.

Second Defense, Affirmative Defense or Objection in Point of Law
(Ripeness, Procedural Defect, Failure to State a Claim,
Lack of Subject Matter Jurisdiction)

21. This is a special proceeding brought pursuant to EDPL Article 4 and CPLR Article 4. The requirements contained in EDPL Article 4 must be strictly construed and

scrupulously followed in order for the statute to confer subject matter jurisdiction upon the Court, thus permitting it to summarily grant the extraordinary relief set forth in the EDPL. Because the Petition does not comport with the requirements of Article 4, it is procedurally defective, and it does not adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

22. Specifically, the Petition does not comply with EDPL § 401(A)(3), which allows for the commencement of proceedings under EDPL Article 4 "after . . . (3) entry of the final order or judgment on judicial review pursuant to section two hundred seven of this chapter," because no final order or judgment has been entered as Respondents filed a timely Motion to Reargue Appeal and/or Hold Motion in Abeyance Pending Hearing and Determination of Related Appeal (attached as Ex. B), which was submitted on December 21, 2009, and that motion has thus far not been acted on by the Court of Appeals, which issued decisions on motions on January 12, January 14, and January 19. The earliest the Court of Appeals could rule on Respondents' motion would be February 9, when the next Court session resumes. Accordingly, the Petition should be dismissed because it does not comport with the requirements of Article 4, is procedurally defective, and does not adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

Third Defense, Affirmative Defense or Objection in Point of Law
(Statute of Limitations, Procedural Defect, Failure to State a Claim, Lack of Subject Matter Jurisdiction)

23. As set forth above in Respondents' Second Defense, Affirmative Defense or Objection In Point Of Law, this special proceeding is premature because, insofar as it purports

to be premised upon EDPL § 401(A)(3) (judicial review pursuant to EDPL § 207), that review is not final.

24. Alternatively, insofar as the Petition may conceivably be understood to be proceeding instead under EDPL § 401(A)(1) which allows for the commencement of proceedings under EDPL Article 4 "up to three years after the conclusion of the later of: (1) publication of its determination and findings pursuant to section two hundred four of this chapter," this proceeding is untimely because it was commenced on December 23, 2009, which is more than three years after publication of Petitioner's determination and findings which occurred on December 11 and 12, 2006, according to paragraph 10 of the Petition in this action. Accordingly, this action should be dismissed as untimely and barred by the applicable three year statute of limitations pursuant to EDPL § 401(A)(1).

Fourth Defense, Affirmative Defense or Objection in Point of Law
(Procedural Defect, Failure to State a Claim, Lack of Subject Matter Jurisdiction)

25. This is a special proceeding brought pursuant to EDPL Article 4 and CPLR Article 4. The requirements contained in CPLR Article 4 and EDPL Article 4 must be strictly construed and scrupulously followed in order for the statutes to confer subject matter jurisdiction upon the Court, thus permitting it to summarily grant the extraordinary relief set forth in the EDPL. Because the Petition does not comport with the requirements of CPLR Article 4, it is procedurally defective and it does not adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

26. Specifically, the Petition does not comply with CPLR 401, which requires that the "party commencing a special proceeding shall be styled the petitioner and any adverse party the respondent." Here, Petitioner violated CPLR 401 because, while it accurately describes

itself as the petitioner, it does not designate the proposed condemnees as adverse party respondents. Accordingly, the Petition should be dismissed because it does not comport with the requirements of CPLR 401, is procedurally defective, and does not adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

Fifth Defense, Affirmative Defense or Objection in Point of Law
(Procedural Defect, Failure to State a Claim, Lack of Subject Matter Jurisdiction)

27. This is a special proceeding brought pursuant to EDPL Article 4 and CPLR Article 4. The requirements contained in EDPL Article 4 must be strictly construed and scrupulously followed in order for the statute to confer subject matter jurisdiction upon the Court, thus permitting it to summarily grant the extraordinary relief set forth in the EDPL. Because the Petition does not comport with the requirements of EDPL Article 4, it is procedurally defective, and it does not adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

28. Specifically, the Petition does not comply with EDPL § 402(B)(3), which mandates that the petition shall set forth "(a) a statement providing . . . the compliance with the requirements of article two of this law." As set forth above, article two has not been followed because Respondents' EDPL § 207 proceeding is not yet final. Accordingly, the Petition should be dismissed because it does not comport with the requirements of Article 4, is procedurally defective, and does not adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

Sixth Defense, Affirmative Defense or Objection in Point of Law
(Procedural Defect, Failure to State a Claim, Lack of Subject Matter Jurisdiction)

29. This is a special proceeding brought pursuant to EDPL Article 4 and CPLR Article 4. The requirements contained in EDPL Article 4 must be strictly construed and scrupulously followed in order for the statute to confer subject matter jurisdiction upon the Court, thus permitting it to summarily grant the extraordinary relief set forth in the EDPL. Because the Petition does not comport with the requirements of EDPL Article 4, it is procedurally defective, and it does not adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

30. Specifically, the Petition does not comply with EDPL § 402(B)(3), which mandates that the petition shall set forth "(d) the public use, benefit or purpose for which the property is required." The Petition simply does not set forth this critical information. The Petition does not even make the allegation in a conclusory or cursory fashion. Indeed, the terms "public use," "public benefit," and/or "public purpose," are nowhere found in the Petition. This requirement is fundamental. Petitioner's failure to comply with it is fatal.

31. Petitioner's failure to comply with EDPL § 402(B)(3)(d) is not inadvertent. Had Petitioner attempted to comply with EDPL § 402(B)(3)(d) by setting forth its allegations of public use, benefit or purpose as it did in its December 2006 Determination and Findings, it would have been forced to materially misrepresent a host of claimed public uses, benefits or purposes that have since proven ephemeral, thus mandating dismissal of the Petition for being materially false.

32. Had Petitioner instead attempted to comply with EDPL § 402(B)(3)(d) by setting forth its allegations of public use, benefit or purpose as they existed at the time the

Petition was verified on December 15, 2009, it would have faced certain dismissal because any truthful allegations of public use, benefit or purpose as of that date materially undermine the December 2006 Determination and Findings. Apparently unhappy with either unpalatable option, Petitioner chose instead to simply ignore the express command of EDPL § 402(B)(3)(d).

33. Accordingly, the Petition should be dismissed because it does not comport with the requirements of Article 4, is procedurally defective, and does not adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

Seventh Defense, Affirmative Defense or Objection in Point of Law
(Procedural Defect, Failure to State a Claim, Lack of Subject Matter Jurisdiction)

34. This is a special proceeding brought pursuant to EDPL Article 4 and CPLR Article 4. The requirements contained in EDPL Article 4 must be strictly construed and scrupulously followed in order for the statute to confer subject matter jurisdiction upon the Court, thus permitting it to summarily grant the extraordinary relief set forth in the EDPL. Because the Petition does not comport with the requirements of EDPL Article 4, it is procedurally defective, and it does not adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

35. Specifically, the Petition does not comply with EDPL § 402(B)(3), which mandates that the petition shall set forth "(d) the public use, benefit or purpose for which the property is required." As set forth above, the Petition simply does not set forth this critical information. Insofar as the incomplete Determination and Findings attached as Ex. C to the Petition can be construed as a crude attempt to comply with EDPL § 402(B)(3)(d), it fails because the public use, benefit or purpose described therein has changed materially from what was described on December 8, 2006. Accordingly, insofar as Petitioner relies upon the

incomplete Determination and Findings attached as Ex. C to the Petition, it should be dismissed because it does not comport with the requirements of Article 4, is procedurally defective, and does not adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

Eighth Defense, Affirmative Defense or Objection in Point of Law
(Procedural Defect, Failure to State a Claim, Lack of Subject Matter Jurisdiction)

36. This is a special proceeding brought pursuant to EDPL Article 4 and CPLR Article 4. The requirements contained in EDPL Article 4 must be strictly construed and scrupulously followed in order for the statute to confer subject matter jurisdiction upon the Court, thus permitting it to summarily grant the extraordinary relief set forth in the EDPL. Because the Petition does not comport with the requirements of EDPL Article 4, it is procedurally defective, and it does not adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

37. Specifically, the Petition does not comply with EDPL § 402(B)(3), which mandates that the petition shall set forth "(d) the public use, benefit or purpose for which the property is required." As explained above, the Petition simply does not set forth this critical information. Insofar as the Petition could be construed as alleging only those public uses, benefits or purposes from the original December 2006 Determination and Findings – if any – that could arguably survive after excising all that has proven to be false over time, the Petition would still be defective and subject to dismissal because this special proceeding is premised upon the December 2006 Determination and Findings, which Petitioner has chosen not to amend, supplement or reissue. Now that that Determination has been vitiated by subsequent events, including without limitation, Petitioner's own adoption of a new Modified General Project Plan

in September 2009, it can no longer serve as the predicate for an action under EDPL Article 4. Accordingly, insofar as the Petition could be construed as silently attempting to rely upon whatever portions of the 2006 Determination and Findings that remain viable – if any – it should be dismissed because it does not comport with the requirements of Article 4, is procedurally defective, and does not adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

Ninth Defense, Affirmative Defense or Objection in Point of Law
(Procedural Defect, Failure to State a Claim, Lack of Subject Matter Jurisdiction)

38. This is a special proceeding brought pursuant to EDPL Article 4 and CPLR Article 4. The requirements contained in EDPL Article 4 must be strictly construed and scrupulously followed in order for the statute to confer subject matter jurisdiction upon the Court, thus permitting it to summarily grant the extraordinary relief set forth in the EDPL. Because the Petition does not comport with the requirements of EDPL Article 4, it is procedurally defective, and it does not adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

39. Specifically, the Petition does not comply with EDPL § 402(B)(3), which mandates that the petition shall set forth "(a) a statement providing . . . the compliance with the requirements of article two of this law" and/or EDPL § 401(C), which provides that whereas property sought to be "acquired for a public project," can be condemned in stages it must be proposed as a staged acquisition at the public hearing stage. Petitioner violated EDPL § 402(B)(3) and/or EDPL § 401(C), because the 2006 Determination and Findings (an incomplete copy of which is attached as Ex. C to the Petition) contemplated and provided for the acquisition of *all* properties sought to be condemned in one stage, whereas that provision was changed to

provide for two stages of acquisitions when Petitioner adopted the new Modified General Project Plan on September 17, 2009, but yet did not update, modify or amend the 2006 Determination and Findings. The change in acquisition plans is described in a Technical Memorandum published by Petitioner in advance of the adoption of the new Modified General Project Plan in September 2007 as follows:

> A modification to the GPP is proposed to allow for the acquisition of property in two phases, rather than one phase as detailed in the FEIS. The first round of acquisition would occur towards the end of 2009 and would encompass the arena block including the streetbeds to be closed, Block 1129, Pacific Street between Vanderbilt and Carlton Avenues, Lots 42 and 47 on Block 1121, and, if necessary for the construction and operation of the LIRR rail yard, easements or other property interests in Lot 35 on Block 1120 and possibly a small number of additional lots included in the project site. The second round would occur towards the end of 2011 and would encompass the remainder of the project site.

Technical Memorandum, Atlantic Yards Arena and Redevelopment Project, dated June 2009, at 3-4 (available at http://www.empire.state.ny.us/pdf/AtlanticYards/Technical_Memo_text.pdf).

40. Accordingly, the Petition should be dismissed because it does not comport with the requirements of Article 4, is procedurally defective, and does not adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

Tenth Defense, Affirmative Defense or Objection in Point of Law
(Procedural Defect, Failure to State a Claim, Lack of Subject Matter Jurisdiction)

41. This is a special proceeding brought pursuant to EDPL Article 4 and CPLR Article 4. The requirements contained in EDPL Article 4 must be strictly construed and scrupulously followed in order for the statute to confer subject matter jurisdiction upon the Court, thus permitting it to summarily grant the extraordinary relief set forth in the EDPL. Because the Petition does not comport with the requirements of EDPL Article 4, it is

procedurally defective, and it does not adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

42. Specifically, the Petition does not comply with EDPL § 402(B)(3), which mandates that the petition shall set forth "(a) a statement providing . . . the compliance with the requirements of article two of this law" and/or "(d) the public use, benefit or purpose for which the property is required." Petitioner violated EDPL § 402(B)(3)(a) and/or EDPL § 402(B)(3)(d), by failing to attach a true and correct copy of the 2006 Determination and Findings, which intentionally omitted materially adverse information from the complete 2006 Determination and Findings, *e.g.,* the initial list of properties targeted for acquisition in single stage. Had Petitioner attached a complete and accurate copy of the 2006 Determination and Findings, it would have immediately revealed the material change from a one stage acquisition plan to two stage acquisition plan, thus jeopardizing Petitioner's attempt to obtain a quick order from the court granting its petition, notwithstanding this material – intentionally concealed – defect.

43. Accordingly, the Petition should be dismissed because it does not comport with the requirements of Article 4, is procedurally defective, and does not adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

Eleventh Defense, Affirmative Defense or Objection in Point of Law
(Procedural Defect, Failure to State a Claim, Lack of Subject Matter Jurisdiction)

44. This is a special proceeding brought pursuant to EDPL Article 4 and CPLR Article 4. The requirements contained in EDPL Article 4 must be strictly construed and scrupulously followed in order for the statute to confer subject matter jurisdiction upon the Court, thus permitting it to summarily grant the extraordinary relief set forth in the EDPL. Because the Petition does not comport with the requirements of EDPL Article 4, it is

procedurally defective, and it does not adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

45. Specifically, the Petition does not comply with EDPL Article 4 because it seeks relief that is inconsistent with the relief sought in the Notice of Petition. Paragraph 6 of the relief sought by the Notice of Petition seeks an order "directing that each condemnee shall have a period of one hundred twenty (120) days . . . to file a written claim for damages." Paragraph e) of the Wherefore Clause in the Petition seeks an order "directing that each condemnee shall have a period of ninety (90) days . . . to file a written claim for damages."

46. Accordingly, the Petition should be dismissed because it does not comport with the requirements of Article 4, is procedurally defective, and does not adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

Twelfth Defense, Affirmative Defense or Objection in Point of Law (Condition Precedent, Procedural Defect, Failure to State a Claim, Lack of Subject Matter Jurisdiction)

47. The 2009 MGPP provides that Petitioner's "acquisition of all such properties [by condemnation] will not occur until such time as [Petitioner] receives commitments, guaranties and other evidence satisfactory to [Petitioner] that [Ratner] will (i) promptly commence construction of the Arena, and all of the infrastructure necessary for the Arena (together with the Arena, the "Initial Development"), (ii) complete such construction within agreed-upon time periods and (iii) commence and complete construction of the Upgraded Yard in accordance with and subject to the schedule agreed to with the MTA (and acceptable to [Petitioner])." 2009 MGPP at 23.

48. Notwithstanding Petitioner's public commitment, as set forth in the new 2009 MGPP, that it will not seek to acquire Respondents' homes and businesses until it receives satisfactory evidence that the professional basketball arena and downgraded rail yard will actually be completed (but not the alleged affordable housing, publicly accessible private space or anything else but acres of parking lots), it commenced this action (dated December 15, 2009) on December 23, 2009, at almost precisely the same time that aspects of the arena tax exempt bond offering were revealed as follows:

> As one of the Vacant Possession Release Conditions, and as required under the Arena Lease Agreement, ArenaCo will be obligated to pay or cause to be paid the Additional Rent Amount (presently anticipated to be $324.8 million, which amount may ultimately be reduced to reflect prior expenditures made for the Arena Project and included in the budget for the Arena Project on and after November 1, 2009) to the Issuer (for deposit with the PILOT Bond Trustee). . . . At the time of the issuance of the Series 2009 PILOT Bonds, ArenaCo will not have funds sufficient to pay the Additional Rent Amount, but ArenaCo expects to raise sufficient funds prior to the Arena Project Effective Date . . . Although ArenaCo expects that the necessary funds will be timely raised, there can be no assurance that the funds will be raised or that the amount of such funds will be sufficient to make the full payment of the Completion Cost. In the event that the Issuer has not received the Additional Rent Amount from ArenaCo for deposit with the PILOT Bond Trustee at or prior to the Outside Commencement Date, or if such receipt does not occur within five (5) Business Days of Vacant Possession having been achieved, proceeds of the Series 2009 PILOT Bonds will not be applied to the construction of the Arena, and the Issuer will be required to redeem the Series 2009 PILOT Bonds at 101%.

See Bond Offering Statement (available at http://www.scribd.com/doc/24623475/Official-Statement-Posted-12-21-2009-8-8-MB).

49. As is made clear from the Bond Offering Statement, Ratner needs an additional $324.8 million and cannot provide any "assurance that the funds will be raised," and if he fails, the Project will unquestionably be scotched, yet Petitioner claims to have received satisfactory evidence that Ratner will complete the arena for his basketball team and the new

downgraded rail yard, such that it has decided to proceed with seeking an order from this Court seeking to vest title.

50. Because a condition precedent to the relief Petitioner seeks has not been met, the Petition should be dismissed and Petitioner should be prohibited from seeking to confiscate Respondents' homes and businesses until it provides compelling evidence that the basketball arena, downgraded rail yard and acres of parking lots will actually be built as is required by the 2009 MGPP.

51. Accordingly, the Petition should be dismissed because it does not comport with the requirements of Article 4, is procedurally defective, and does not adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

Thirteenth Defense, Affirmative Defense or Objection in Point of Law

52. Petitioner's action is barred, in whole or in part, by the doctrine of unclean hands.

Fourteenth Defense, Affirmative Defense or Objection in Point of Law

53. The relief sought by Petitioner is barred because it will unjustly enrich Bruce Ratner and the various Forest City Ratner entities he owns or controls.

COUNTERCLAIMS

54. Respondents repeat and reallege the allegations set forth in the preceding paragraphs.

Factual Background

55. On or about December 8, 2006, Petitioner, the New York State Urban Development Corporation ("UDC") issued its "Determination and Findings by the New York

State Urban Development Corporation d/b/a Empire State Development Corporation Pursuant to EDPL Section 204 with Respect to the Atlantic Yards Land Use Improvement and Civic Project" ("2006 D&F") (an incomplete copy of which is attached as Ex. C to the Petition). The missing property list is attached as Ex. A. It is also readily available from Petitioner's own website, *see* http://www.empire.state.ny.us/pdf/AtlanticYards/Determination%20and%20Findings.pdf.

56. The 2006 D&F was premised upon the "Atlantic Yards Land Use Improvement and Civic Project Modified General Project Plan" dated and approved the same day, December 8, 2006 (the "2006 MGPP") (available at http://www.empire.state.ny.us/AtlanticYards/General_Project_Plan.asp).

57. The 2006 D&F averred that the "principal public use, benefit and purpose of the Project" was "to eliminate the blighted conditions on the Project Site and the blighting influence of the below-grade rail yard." Petition Ex. C at 4.

58. The 2006 D&F alleged that the Project, as reflected in the 2006 MGPP, would also provide other "public uses, benefits and purposes," including, *inter alia*, 2,250 units of affordable housing and a "a state-of-the-art rail storage, cleaning and inspection facility for the LIRR that would enable it to better accommodate simultaneously its new fleet of multiple-unit series electric propulsion cars operated by LIRR which are compliant with the American [sic] with Disabilities Act." *Id.* at 5.

59. The 2006 D&F claimed that the Project would provide certain economic benefits, including, among other things, "net tax revenues in excess of the public contribution to the Project." *Id.* at 6.

60. The 2006 D&F did not provide for the condemnation of Respondents' properties in stages. All properties were to be acquired at the same time.

61. All, or nearly all, of the "findings" of public use, benefit or purpose contained in the 2006 D&F were based upon the facts presented in the 2006 MGPP. Indeed, they were both adopted on the same day by the UDC.

62. On January 5, 2007, Respondents timely challenged the 2006 D&F pursuant to EDPL § 207 in an amended complaint filed in federal district court. *See Goldstein v. Pataki*, 2007 WL 575830 (Jan. 5, 2007 E.D.N.Y.).

63. On June 6, 2007, the district court dismissed Petitioner's EDPL § 207 claim "without prejudice to its being re-filed in state court," *Goldstein v. Pataki*, 488 F.Supp.2d 254, 291 (E.D.N.Y. 2007).

64. On February 1, 2008, the Court of Appeals for the Second Circuit affirmed "the judgment of the district court dismissing . . . the state claim without prejudice." *Goldstein v. Pataki*, 516 F.3d 50, 56 (2d Cir. 2008).

65. On June 23, 2008, the Supreme Court of the United States denied certiorari. *Goldstein v. Pataki,* 128 S. Ct. 2964 (June 23, 2008) ("Justice Alito would grant the petition for a writ of certiorari").

66. On August 1, 2008, Respondents re-filed their EDPL § 207 claim in the Appellate Division, Second Department.

67. On May 12, 2009, the Appellate Division, Second Department, denied the Petition. *Goldstein v. N.Y. State Urban Dev. Corp.*, 59 A.D.3d 312 (2d Dep't 2009).

68. In June 2009, after it believed that all litigation hurdles to the Project had been cleared, Petitioner revealed for the first time its long-standing intention to materially modify the 2006 MGPP, the plan on which the 2006 D&F was premised.

69. Among other things, Petitioner released a proposed Modified General Project Plan ("2009 MGPP") (available at: http://www.empire.state.ny.us/pdf/AtlanticYards /MODGPP2009.pdf) and a 63 page "Technical Memorandum" (available at http://www.empire.state.ny.us/pdf/AtlanticYards/Technical_Memo_text.pdf), detailing some, but not all, of the material changes sought and obtained by the Project developer, Bruce Ratner, and various entities, he owns or controls (hereafter "Ratner"), and contained in the proposed 2009 MGPP.

Amended Modified General Project Plan

On September 17, 2009, four members of the UDC's obscure, unelected, eight-member Board met, and three of them (with one recusal/abstention) voted to adopt the 2009 MGPP. *See* UDC Webcast of September 17, 2009 Meeting (available at http://www.empire.state.ny.us/webcasts/default.asp.).

70. Among other things, the three board members were aware, or should have been aware, of the following at the time they adopted the 2009 MGPP:

> **(1)** a memorandum, dated September 17, 2009, from Dennis Mullen ("Mullen Memo"), the then-designated, but not confirmed, Chairman of the UDC Board, requesting that the Board adopt the 2009 MGPP, and provide authorization to (a) "Amend Funding Agreements," (b) "Enter into Leases," (c) "Convey Real Property," (d) "Enter into other Project Documents," and (e) "Take Related Actions," including without limitation the approval of the amendment of UDC's funding agreement with Ratner so as to accelerate the State's last cash payment of $25 million (for a total of $100 million) to the Ratner for purposes (such as soft costs and

demolition) previously disallowed in earlier funding agreements signed in 2007, *see* September 17, 2009 Memorandum from Dennis Mullen to Directors of the Board, *available at* http://www.scribd.com/doc/19857899/Ay-Mgpp-Board-Memo62309 ("Mullen Memo");

(2) the September 10, 2009, Report of the New York City Independent Budget Office entitled "The Proposed Arena at Atlantic Yards: An Analysis of City Fiscal Gains and Losses," (available at: http://www.ibo.nyc.ny.us/iboreports/AtlanticYards091009.pdf) which concluded that,

> (a) the Project/Arena will *cost* the City a minimum of $39.5 million (a figure that balloons to $220 million when opportunity costs are considered),
>
> (b) the State will gain $25 million in new tax revenues (only $9 million when opportunity costs are considered),
>
> (c) the MTA will gain $6 million (but will lose $16 million when opportunity costs are considered), and
>
> (d) Ratner, the private developer, will receive $726 million in government subsidies and benefits for the arena alone;

(3) that the deal between Ranter and the MTA had been materially altered (i) to provide for an the initial cash payment of only $20 million (instead of $100 million), (ii) to restructure and extend the full acquisition of the balance of the MTA property beyond 2030, (iii) to allow Ratner to abandon the planned further acquisition at any time, in its sole discretion, with virtually no penalty, (iv) to extend the payments for the acquisition of the MTA air rights on Blocks 1120 and 1121 to the year 2030, and (v) to reduce the size of the replacement yard from nine tracks with a 76 car capacity to seven tracks with a 56 car capacity, *see, e.g.,* MTA Staff Summary, (available at http://www.mta.info/mta/pdf/ay_summary.pdf);

(4) that the City had or would agree to amend its funding agreement with Ratner to accelerate its scheduled payment to Ratner of $15 million (for a total of $205 million plus unquantifiable past and future payments for "extraordinary infrastructure costs");

> **(5)** that the Technical Memorandum issued by the UDC in June 2009 anticipated that the Project (under the residential plan) would total 7,961,000 square feet, yet the Project had since been reduced to include only 5,145,000 square feet, a reduction of approximately 35%; and
>
> **(6)** that although the 2009 MGPP anticipates the *possibility* that as many as 2,250 affordable housing units will be built over the next 30 years, the development agreement between UDC and Ratner provided that every unit of affordable housing would be *contingent* upon "governmental authorities making available to [Ratner] affordable housing subsidies."

Vanderbilt Rail Yards and the MTA Deal

71. As explained above, at the time of the UDC Board meeting on September 17, 2009, members of the voting troika of UDC Board members knew or should have known that the MTA Deal had been radically restructured.

72. Indeed, the alleged benefit to the public engendered by the 2005 deal between the MTA and Ratner, which had always been dubious, had been utterly gutted by the new deal in 2009.

73. Under the terms of the new deal, Ratner is only required to pay $20 Million for the rights to the MTA's property on Block 1119 required for the construction of Phase I.

74. Ratner is not required to make any additional payments to the MTA until June 2012 at which time it must make an additional payment of $2 Million.

75. Thereafter, Ratner must make further payments of $2 Million on June 1, 2013, 2014 and 2015.

76. Commencing on June 1, 2016 the annual payments to the MTA increase to $11 Million per year and continue for 15 years until 2030.

77. The MTA agreed to a redesigned and reduced scope of the replacement yard for the LIRR and required that construction of the replacement yard commence by June 30, 2012 and be completed by September 1, 2016.

78. The new agreement with the MTA provides that it will convey the parcel necessary for the construction of the arena upon the payment of the initial $20 Million. The conveyance of the MTA air rights for parcels on Blocks 1120 and 1121 will only occur upon the payment of the subsequent amounts associated with each parcel.

79. If Ratner fails to construct the yard, it loses the rights to the air space on Blocks 1120 and 1121 and MTA can draw on the letter of credit.

80. The result of the new MTA agreement has two direct impacts on the timing of the completion of Phase II and the potential that it will be completed at all.

81. The structure of the deal assures that the final payment for the air rights over the Yards will not be made until June 2030. Until that payment is made, the rights to that parcel will not be conveyed to Ratner, thus precluding Ratner from beginning construction of the last towers.

82. The deal is also structured so that Ratner can decide to abandon the project at virtually any time and mitigate its potential financial loss and limit its up front investment.

83. Ratner can decide as early as June 1, 2012 to abandon Phase II and avoid the first additional payment of $2 Million.

84. Ratner could decide to keep its option on the air rights parcel and simply pay $2 Million per year to maintain that option and still abandon Phase II by June 1, 2016 before the annual payments significantly increase to $11 Million.

85. If Ratner decides to abandon Phase II at any of those points, it can also walk away from the obligation to complete the permanent replacement rail yard and simply forfeit the $86 Million letter of credit that is far less than the estimated cost of $147 Million to complete the downgraded rail yard.

86. If Ratner decides not to build Phase II – failing to cover the rail yard with a platform – then the blight that supposedly dominates the project area, particularly the below grade yards on Blocks 1120 and 1121, will continue without any plan for redevelopment.

87. Even if Ratner proceeds with the Project consistent with the time frame in the MTA agreement, construction for the completion of Phase II will not commence until after 2030.

88. According to the 2006 D&F, the "primary" public benefit to be realized by the Project is the elimination of blight that allegedly exists and will likely continue due to the presence of Vanderbilt Yards.

89. The new agreement between Ratner and the MTA reduces, if not eliminates, the likelihood that Vanderbilt Yards will be redeveloped in a timely manner, if at all. Thus, instead of eliminating the alleged blight, the Project will make the alleged blighting conditions and influence of Vanderbilt Yards a permanent feature.

90. Both the 2006 MGPP and the 2006 D&F, contemplated that the Project would be completed in 2016 and that it would alleviate the existing blight and blighting influence of Vanderbilt Yards with the completion of Phase II including the construction of the platform over the Vanderbilt Yards and construction of all of the high-rise towers.

91. The vast majority of the purported benefits of the Project are derived in Phase II including the majority of the housing and the majority of the affordable housing, all of the privately owned, publicly accessible open space, the majority of the community facilities and the majority of the economic benefits associated with construction jobs, tax revenue and permanent employment.

92. As part of its 2006 Blight Study, which supported the approval of the 2006 MGPP and the 2006 D&F, the UDC determined that underutilized lots, including lots used for surface parking lots, were evidence of blight and had a blighting influence on surrounding properties hindering their sound redevelopment.

93. Even if Ratner were to eventually complete the project, the agreement with the MTA permits the commencement of the final portions of Phase II to be postponed until 2030.

Affordable Housing

94. Like the 2006 D&F, the 2009 MGPP states that the Project will generate at least 2,250 units of affordable housing and that not more than 50% of the Phase II units will be completed without the completion of 50% of the Phase II affordable housing units.

95. The Mullen Memo recommending adoption of the 2009 MGPP, however, made it clear, for the first time, that the affordable housing is wholly contingent on the availability of government subsidies. Because such subsidies cannot be guaranteed, and because, in any event, utilizing finite government subsidies does absolutely nothing to increase the overall number of available affordable housing units in the City of New York, the claim of affordable housing was wholly eviscerated by the Mullen Memo.

96. Specifically, an attachment to the Mullen Memo provides that:

> no less than Two Thousand Two Hundred Fifty (2,250) affordable housing units, subject to governmental authorities making available to [Ratner] or its applicable successor or assign, after good faith review by the applicable administering agency, affordable housing subsidies consistent with then applicable program rules and standards then generally available to developers of affordable housing units.

New Revelations Contained in Master Closing Documents Which Were Made Public Two Days Ago

97. *Just two days ago* – and consistent with the disturbing lack of transparency that has marked this "Public Project" from the moment it was first conceived by Ratner,[1] who then enlisted the aid of his old law school friend, then Governor George Pataki, and fellow multi-millionaire Mayor Michael Bloomberg, to wield the power of eminent domain on his behalf – Petitioner UDC made available the Master Closing documents, which were executed more than a month ago.

98. Although the documents are voluminous and complex, a quick review by Norman Oder has put the lie to Petitioner's revealed that the deadlines "imposed" by Petitioner on Ratner bear almost no relationship to either of Petitioner's Modified General Project Plans and allow instead for:

- six years to build the arena

[1] Perhaps because the project has always been the realization of Ratner's desire to forcibly acquire and develop property owned by others, and contrary to the entire EDPL upon which this special proceeding is premised, Ratner has flatly refused to provide information about the project. Indeed, when Ratner was asked by a reporter recently to share plans for the project, he demanded: "Why should people get to see plans? This isn't a public project." *See* Crain's, TENACIOUS B; Bruce Ratner must clear yet more do-or-die hurdles at Atlantic Yards, Nov. 9, 2009 (available at http://www.crainsnewyork.com/article/20091108/FREE/311089987, although the title of the article was subsequently changed (the rapper reference was removed) to "Ratner Faces Atlantic Yards Hurdles).

- three or four years to start construction of the first tower
- five or six years to start construction of the second tower
- ten years to start construction of the third tower
- 12 years to build Phase 1 (which can be much smaller than officially promised)
- 15 years to start construction of the platform over the railyard
- 25 years to finish the project (which can be much smaller than officially promised)

> The damages Forest City Ratner faces in most cases – less than $10 million for an arena that's up to three years late, $5 million for each of three buildings if they're late – don't represent a lot of money, especially given that the developer just got a cash flow boost of $31 million to buy land.

See Atlantic Yards Report, Despite Promise of Ten-Year AY Buildout, ESDC Dealines Allow 12 Years for Phase 1, 15 Years to Start Platform, 25 Years for Full Project, Jan. 27, 2010 (available at: http://atlanticyardsreport.blogspot.com/2010/01/despite-promise-of-ten-year-ay-buildout.html).

99. At minimum, any resolution of this Petition should be postponed until Respondents have had the opportunity to review the many volumes of crucial documents, conduct discovery pursuant to CPLR 408, and then, conduct a trial to resolve disputed issues of fact pursuant to CPLR 410.

First Counterclaim
(Nullification of 2006 EDPL § 204 Determination and Findings)

100. The public use, purpose and benefits claimed by the 2006 D&F have been materially undermined since the determination and findings were made by Petitioner UDC in 2006.

101. The public use, purpose and benefits claimed by the 2006 D&F were premised upon the 2006 MGPP, which was approved in tandem with the 2006 D&F by Petitioner UDC.

102. The 2006 MGPP was replaced and superceded by the 2009 MGPP on September 17, 2009.

103. Notwithstanding the fact that 2006 MGPP has been replaced and superceded by the 2009 MGPP, Petitioner UDC has not replaced, superceded, amended or modified the 2006 D&F.

104. Petitioner UDC has an independent legal obligation to issue new or amended determination and findings pursuant to EDPL § 204, whenever the initial findings have been materially undermined to the point that the findings of public use, purpose or benefits are in substantial doubt.

105. Petitioner's findings of public use, purpose or benefit were materially and substantially undermined by no later than September 17, 2009, at which time it should have issued new or amended findings pursuant to EDPL § 204, but failed to do so.

106. Respondents attempted to raise the material alterations to the grounds cited as creating a public use, benefit or purpose in the 2006 D&F, including the effect of the new 2009 MGPP, in their EDPL § 207 challenge to the 2006 D&F, but were rebuffed, at Petitioner UDC's urging, each time, including by the Court of Appeals.

107. Because the underpinning of the 2006 D&F has been vitiated by, *inter alia*, Petitioner's own decision to amend and supercede the 2006 MGPP with the 2009 MGPP,

the 2006 D&F is a nullity and can no longer serve as the basis for the condemnation of Respondents' properties.

108. Respondents are entitled to a judgment denying this Petition, along with an order nullifying and setting aside Petitioner UDC's 2006 Determination and Findings as legally deficient.

Second Counterclaim
(Declaratory Judgment)

109. Respondents repeat and reallege the allegations contained in the preceding paragraphs.

110. The public use, purpose and benefits claimed by the 2006 D&F have been materially undermined since the determination and findings were made by Petitioner UDC in 2006.

111. The public use, purpose and benefits claimed by the 2006 D&F were premised upon the 2006 MGPP, which was approved in tandem with the 2006 D&F by Petitioner UDC.

112. The 2006 MGPP was replaced and superceded by the 2009 MGPP on September 17, 2009.

113. Notwithstanding the fact that 2006 MGPP has been replaced and superceded by the 2009 MGPP, Petitioner UDC has not replaced, superceded, amended or modified the 2006 D&F.

114. Petitioner UDC has an independent legal obligation to issue a new or amended determination and findings pursuant to EDPL § 204, whenever the initial findings have

been materially undermined to the point that the findings of public use, purpose or benefits are in substantial doubt.

115. Petitioner's findings of public use, purpose or benefit were materially and substantially undermined by no later than September 17, 2009, at which time it should have issued new or amended findings pursuant to EDPL § 204, but failed to do so.

116. Respondents attempted to raise the material alterations to the bases for the 2006 D&F, including the effect of the new 2009 MGPP, in their EDPL § 207 challenge to the 2006 D&F, but were rebuffed, at Petitioner UDC's urging, by the Court of Appeals.

117. Because the underpinning of the 2006 D&F has been vitiated by, *inter alia*, Petitioner's own decision to amend and supercede the 2006 MGPP with the 2009 MGPP, the 2006 D&F has been *de facto* nullified and can no longer serve as the basis for the condemnation of Respondents' properties.

118. Respondents are entitled to a judgment, pursuant to CPLR 3001, declaring that the legal viability of the 2006 D&F have been vitiated by subsequent events and thus may no longer serve as the predicate for the condemnation of Respondents' properties.

Third Counterclaim
(Declaratory Judgment)

119. Respondents repeat and reallege the allegations contained in the preceding paragraphs.

120. The 2009 MGPP provides that Petitioner's "acquisition of all such properties [by condemnation] will not occur until such time as [Petitioner] receives commitments, guaranties and other evidence satisfactory to [Petitioner] that [Ratner] will (i) promptly commence construction of the Arena, and all of the infrastructure necessary for the

Arena (together with the Arena, the "Initial Development"), (ii) complete such construction within agreed-upon time periods and (iii) commence and complete construction of the Upgraded Yard in accordance with and subject to the schedule agreed to with the MTA (and acceptable to [Petitioner])." 2009 MGPP at 23.

121. Notwithstanding Petitioner's public commitment, as set forth above, it commenced this action (dated December 15, 2009) on December 23, 2009, at almost precisely the same time that aspects of the arena tax exempt bond offering first revealed that Ratner needs an additional $324.8 million just to build the professional basketball arena and acres of parking lots, but cannot provide any "assurance that the funds will be raised," and if he fails, the Project will unquestionably be scotched.

122. By pursuing the relief sought in this special proceeding, Petitioner impliedly claims to have received satisfactory evidence that Ratner will complete the arena for his basketball team and the new downgraded rail yard, yet there is not a shred of evidence to support such a claim.

123. Because a condition precedent to the relief Petitioner seeks has not been met, Respondents are entitled to a judgment dismissing the Petition and declaring, pursuant to CPLR 3001, that Petitioner is prohibited from seeking to confiscate Respondents' homes and businesses until it provides compelling evidence that the basketball arena, downgraded rail yard and acres of parking lots will actually be built as is required by the 2009 MGPP.

WHEREFORE, Respondents respectfully request that a judgment be entered against Petitioner as follows:

1. Dismissing the Petition;
2. Granting discovery pursuant to CPLR 408;
3. Conducting a trial pursuant to CPLR 410;
4. Denying the Petition;
5. Nullifying and setting aside Petitioner's 2006 EDPL § 204 Determination and Findings and enjoining Petitioner from all further attempts to confiscate Respondents' homes and businesses;

4. Declaring, pursuant to CPLR 3001, that Petitioner's 2006 EDPL § 204 Determination and Findings can no longer serve as the predicate for the seizure of Respondents' homes and businesses.

5. Declaring, pursuant to CPLR 3001, that Petitioner is prohibited from seeking to confiscate Respondents' homes and businesses until it provides compelling evidence that the basketball arena, downgraded rail yard and acres of parking lots will actually be built as is required by the 2009 MGPP; and

6. Granting such other and further relief as this Court may find just and proper, including without limitation, attorneys' fees and costs.

Dated: January 27, 2010
New York, New York

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By: _____
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V E R I F I C A T I O N

Matthew D. Brinckerhoff, an attorney duly licensed to practice law in the Courts of the State of New York, affirms under penalties of perjury, pursuant to CPLR 2106, as follows:

1. I am a member of the law firm of Emery Celli Brinckerhoff & Abady LLP, attorneys for Respondents in the foregoing action. I have read the contents of the foregoing Answer and know the contents thereof; and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true.

2. This verification is made by me, pursuant to CPLR 3020, because Respondents reside in a county other than the one in which my firm maintains an office. Moreover, the sources of my information and belief are from materials provided to me by Respondents and other individuals, as well as memoranda, documents, reports and other related records in my firm's files.

Dated: January 27, 2010
New York, New York

_____
Matthew D. Brinckerhoff