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

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PETER WILLIAMS ENTERPRISES, INC.,
535 CARLTON AVE. REALTY CORP.,
PACIFIC CARLTON DEVELOPMENT CORP., Index No. 100738/2010
DANIEL GOLDSTEIN, THE GELIN GROUP, LLC,
CHADDERTON'S BAR AND GRILL INC., d/b/a
FREDDY'S BAR AND BACKROOM,

Petitioners,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

NEW YORK STATE URBAN DEVELOPMENT
CORPORATION,

Respondent.

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PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF PETITION PURSUANT TO ARTICLE 78 OF THE CPLR

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Attorneys for Petitioners

Petitioners submit this memorandum of law in support of their Petition for relief pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") and N.Y. Em. Dom. Proc. Law ("EDPL") § 204.

Petitioners seek a judgment: (a) compelling Respondent to consider the "public use to be served" by the proposed Atlantic Yards Land Use Improvement and Civic Project as it exists now – in the year *2010* (rather than 2006) – and issue a new, supplemental, or amended "determination and findings" as required by N.Y. Em. Dom. Proc. Law ("EDPL") § 204(B), and (b) vacating and/or nullifying Respondent's December 2006 Determination and Findings (the "2006 D&F," attached as Ex. A to Petition)[1] on the ground that (i) the factual basis for the 2006 D&F has been materially and substantially undermined by subsequent events, and/or (ii) because Respondent itself materially vitiated those findings when it approved a new Modified General Project Plan on September 17, 2009 ("2009 MGPP," attached as Ex. B to Petition),[2] such that the 2006 D&F can no longer serve as the predicate for the confiscation of Petitioners' homes and businesses.

PRELIMINARY STATEMENT

This action, and the relief it seeks, flows from a fundamental, non-controversial proposition, upon which even Respondent would presumably agree: A determination and finding of public use benefit and purpose, pursuant to EDPL § 204, even if legitimate when made, can no longer be viable or valid, if the factual basis for the determination is later proven, based on new information, to be undeniably false. Were this not so, Respondent, and other similarly

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[1] Available at: http://esd.ny.gov/Subsidiaries_Projects/Data/AtlanticYards/AdditionalResources/EDPLDeterminationandFindings.pdf

[2] Available at: http://esd.ny.gov/Subsidiaries_Projects/Data/AtlanticYards/ModifiedGPP2009.pdf

situated quasi-governmental bodies with the power to forcibly seize private property for transfer to an influential real estate developer, would have *carte blanche* to confiscate properties based on *nothing*.

So, by way of example, if Forest City Ratner Companies had been indicted for bribing public officials[3] and then became insolvent, and Respondent was thus forced to abandon the Project entirely, the 2006 D&F would become a legal nullity, even though it has thus far withstood legal challenges limited to the record as it existed in 2006, and even if Respondent were to now claim that it intends to use Petitioners' properties to build a public park – an undeniable public use. There is not doubt that, under this hypothetical scenario (however, prescient it may prove to be), Respondent would be required to issue a new or amended public use, benefit and purpose determination and finding under EDPL § 204, before it could attempt to seize Petitioners' properties.

This is essentially what has happened here. The factual bases for Respondent's 2006 D&F have been substantially and materially undermined by recent events, including Respondent's own amendment of the plan for the Project in September 2009. The 2006 D&F can no longer serve as a predicate for the seizure of Petitioners' homes and businesses. The Petition should be granted.

[3] This is, of course, not a stretch given the recent federal indictments of former Yonkers City Council Member Sandy Annabi and her associates for, *inter alia*, accepting a bribe from Ratner in exchange for changing her vote from no to yes, in favor of a Ratner development project in Yonkers. *See* Indictment (available http://www.lohud.com/assets/pdf/BH14955916.PDF).

FACTS

Background

On or about December 8, 2006, Respondent, 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") (attached as Ex. A to Petition).

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") (attached as Ex. C to Petition).[4]

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. A at 4.)

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.)

[4] Removed from Respondent's website on February 1, 2010, *after* the Petition in this action was filed.

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.)

The 2006 D&F did not provide for the condemnation of Petitioners' properties in stages. All properties were to be acquired at the same time. (Petition ¶ 23.)

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. (*Id.* ¶ 24.)

On January 5, 2007, Petitioners 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.).

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).

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).

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").

On August 1, 2008, Petitioners re-filed their EDPL § 207 claim in the Appellate Division, Second Department. (Petition ¶ 29.)

In opposing Petitioners' EDPL § 207 claim before the Appellate Division, Respondent argued that the court was legally precluded from considering 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). (Petition ¶ 30.)

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).

Thereafter, in the Court of Appeals, Petitioners asked the Court to consider the materially significant events that transpired after the 2006 Determination and Findings, particularly Respondent's adoption of the 2009 Modified General Project Plan on September 17, 2009, and information known to Respondent prior to its adoption, which fatally undermine 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).

In response, Respondent argued vehemently – 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 Respondent UDC adopted its 2006 D&F, including the adoption of the 2009 MGPP which had by that time superceded the 2006 MGPP, upon which the 2006 D&F was premised. *See* Brief for Respondent-Respondent, 2009 WL 3810844, at 36-41 (Sep. 8, 2009).

On November 24, 2009, the Court of Appeals affirmed the denial of Petitioners' EDPL § 207 claim. *Goldstein v. N.Y. State Urban Dev. Corp.*, 13 N.Y.3d 511, 2009 WL 4030939 (Nov. 24, 2009), *motion to reargue pending.* While that ruling is not final, the Court of Appeals made it clear that it had rejected Petitioners' 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 Respondent 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.

On or about December 11, 2009, Petitioners filed a timely Motion to Reargue Appeal and/or Hold Motion in Abeyance Pending Hearing and Determination of Related Appeal, which was submitted on December 21, 2009. 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.

On or about December 15, 2009, Respondent commenced a special proceeding to acquire title to Petitioners'[5] properties pursuant to Article 4 of the EDPL in Supreme Court for the County of Kings (Index No. 32741/09), which was made returnable on January 29, 2010.

Thereafter, Petitioners answered Respondent's EDPL Article 4 Petition, asserted counterclaims and moved for dismissal, and Respondent filed a reply. On January 29, 2010, the court heard argument and reserved decision on the relief sought by the Petition and the motion to dismiss.

[5] Because the property owned by Petitioner, the Gelin Group, is not in the first stage of the new, two-stage acquisition plan, it is not a Respondent in the EDPL Article 4 Proceeding.

Material Changes to the Project

A. Modified General Project Plan

In June 2009, after the Second Department ruling, and believing that all litigation hurdles to the Project had been cleared, Respondent 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. (Petition ¶ 32.)

Among other things, Respondent released a proposed Modified General Project Plan ("2009 MGPP") (attached as Ex. B to Petition),[6] and a 63 page "Technical Memorandum" (attached as Ex. D),[7] 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. (Petition ¶ 33.)

The Technical Memorandum does, however, make clear that Respondent had reversed course and decided to condemn the properties for the Project in two stages, instead of all at once as originally contemplated. The change in acquisition plans is described 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.

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[6] Available at: http://esd.ny.gov/Subsidiaries_Projects/Data/AtlanticYards/ModifiedGPP2009.pdf

[7] Available at http://esd.ny.gov/Subsidiaries_Projects/Data/AtlanticYards/AdditionalResources/Technical_Memo_text.pdf (but without sixteen figures and renderings that were removed from Respondent's website on February 1, 2010, *after* the Petition in this action was filed.

(Petition Ex. D at 3-4.)

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.[8]

Among other things, the three board members knew, or should have known, the following at the time they adopted the 2009 MGPP:

> **(1)** a memorandum, dated September 17, 2009, from Dennis Mullen ("Mullen Memo") (attached as Ex. E to Petition), 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 Ratner for purposes (such as soft costs and demolition) previously disallowed in earlier funding agreements signed in 2007;
>
> **(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" (attached as Ex. E to Petition), 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

[8] Webcast of September 17, 2009 meeting of Respondent's Board of Directors available at: http://streaming.expeditevcs.com/starbak/view/eventListing.jhtml?eventid=3886&c=369.

(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 (attached as Ex. F to Petition);[9]

(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."

(Petition ¶ 40.)

The 2009 MGPP also provided that Respondent's "acquisition of all such properties [by condemnation] will not occur until such time as [Respondent] receives commitments, guaranties and other evidence satisfactory to [Respondent] that [Ratner] will (i)

[9] Available at http://www.mta.info/mta/pdf/ay_summary.pdf.

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 [Respondent])." Petition Ex. B at 23.

B. Vanderbilt Rail Yards and the MTA Deal

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. (Petition ¶ 41.)

Indeed, the alleged benefit to the public engendered by the 2005 deal between the MTA and Ratner, which had always been dubious, was utterly gutted by the new deal in 2009. (*Id.* ¶ 42.)

For example, 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. 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. Thereafter, Ratner must make further payments of $2 Million on June 1, 2013, 2014 and 2015. Commencing on June 1, 2016 the annual payments to the MTA increase to $11 Million per year and continue for 15 years until 2030. (*Id.* ¶¶ 43-46.)

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. (*Id.* ¶ 47.)

The new agreement provides that the MTA 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. 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. (*Id.* ¶¶ 48-49.)

The result of the new MTA agreement directly effects the timing of the completion of Phase II and whether it will be completed at all. 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. (*Id.* ¶¶ 50-51.)

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. Ratner can decide as early as June 1, 2012 to abandon Phase II and avoid the first additional payment of $2 Million. Ratner can keep the 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. (*Id.* ¶¶ 52-54.)

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. (*Id.* ¶ 55.)

Moreover, 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. And, 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. (*Id.* ¶¶ 56-57.)

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. (Petition Ex. A at 4.)

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. (Petition ¶ 59.)

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. (*Id.* ¶ 60.)

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. (*Id.* ¶ 61.)

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. (*Id.* ¶ 62.)

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. (*Id.* ¶ 63.)

C. Affordable Housing

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. (*Id.* ¶ 64.)

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. (Ex. D annexed to Petition Ex. E.)

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.

(*Id.*)

D. New Revelations Contained in Master Closing Documents Which Were Made Public Nine Days Ago

Just nine days ago – after the Petition in this case was filed, and consistent with the disturbing lack of transparency that has marked this "Public Project" from the moment it was first conceived by Ratner,[10] 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 – Respondent UDC made available the Master Closing documents, which were executed in December 2009.

Although the documents are voluminous and complex, a review by Mr. Norman Oder – an award winning freelance journalist – who has reviewed some of the byzantine materials, has put the lie to Respondent's prior assurances that the project will by completed in 10 years or less. *See* Atlantic Yards Report, Despite Promise of Ten-Year AY Buildout, ESDC Deadlines Allow 12 Years for Phase 1, 15 Years to Start Platform, 25 Years for Full Project, Jan. 27, 2010.[11] The newly disclosed documents reveal that the deadlines "imposed" by Respondent

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[10] 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).

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

on Ratner bear almost no relationship to the 2009 MGPP, much less the superceded 2006 MGPP upon which Respondent's 2006 D&F is based, and allow instead for:

- six years to build the arena
- 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.

Id.

ARGUMENT

I. Whatever Legitimacy Can Be Ascribed To Respondent's 2006 Determination Of Public Use, Benefit And Purpose, Has Been Wholly Eviscerated By Subsequent Events

This case presents the question of where – on the continuum from *no changes* to the factual bases for an EDPL § 204 determination to *profound material changes* – a case must fall before those changes merit an order compelling a condemning authority to supplement, amend or renew its determination. Here, because there have been profound material changes, this Court should grant the Petition.

As set forth in the Petition, Respondent's 2006 D&F claimed 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." *See* Petition Ex. A at 4 (emphasis supplied). There is no question that this *principal* finding no longer obtains because recent events have established that the Project as envisioned in 2006 may never be built at all, or, even if built, will not be completed in ten years as envisioned, but rather twenty-five years. Accordingly, instead of eliminating the alleged blight and blighted influence of the below-grade rail yard, the Project will unquestionably extend and exacerbate those conditions. *See* above at 7-15.

The 2006 D&F alleged that the Project, as reflected in the 2006 MGPP, would also provide other "public uses, benefits and purposes," including, 2,250 units of affordable housing. We now know that this claim is false, insofar as it is contingent upon the availability of government subsidies, and insofar as it will therefore represent a net affordable housing gain of

zero because those subsidized units will be built whether the Project is ever realized or not. *See* above at 13-14.

The 2006 D&F alleged that the Project, as reflected in the 2006 MGPP, would result in 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." Petition Ex. A at 5. We now know that this claim is false. *See* above at 7-12.

The 2006 D&F alleged that the Project would provide certain economic benefits, including, among other things, "net tax revenues in excess of the public contribution to the Project." Petition Ex A at 6. We now know that this is false because, *inter alia*, the gross square footage of the Project has been cut nearly in half and the time-frame for building it has been extended by a factor of 2.5, with no meaningful guarantees of any kind. *See* above at 9, 14-15.

* * *

As set forth in detail above and in the Petition, the factual bases for Respondent's 2006 D&F have been substantially and materially undermined by recent events, including without limitation, Respondent's own amendment of the plan for the Project in September 2009. The 2006 D&F can no longer serve as a predicate for the seizure of Petitioners' homes and businesses. The Petition should be granted.

CONCLUSION

Petitioners respectfully request that the Court grant their Petition.

Dated: February 3, 2010
New York, New York

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