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.,
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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Index No. 100738/2010
IAS Part 57
Justice Marcy S. Friedman

Oral Argument Requested

PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS AND FOR A TRIAL PREFERENCE AND IN SUPPORT OF PETITIONERS' CROSS-MOTION FOR LEAVE TO INTERPOSE AN AMENDED PETITION

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Petitioners respectfully submit this memorandum of law in opposition to Respondent's motion to dismiss, pursuant to CPLR 3211(a) and 7804(f), and for a trial preference pursuant to CPLR 3403, and in support of Petitioners' motion for leave to amend their Petition to assert new facts concerning the Master Closing Documents, including Respondent's Development Agreement, that were not released to the public until *after* the Petition in this actions was filed.

PRELIMINARY STATEMENT

In this hybrid CPLR Article 78/Declaratory Judgment action, Petitioners seek a judgment pursuant to Article 78: (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) 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), such that the 2006 D&F can no longer serve as the predicate for the confiscation of Petitioners' homes and businesses.

The Petition also seeks "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 Petitioners' properties." Petition ¶ 86.

Rather than interpose a verified answer addressing the detailed factual allegations in Petitioners' verified pleading – many that Respondent would be forced to admit under oath – Respondent has chosen to move to dismiss under CPLR 3211 and 7804(f), and sought leave to "interpose an Answer," in "the event that the Court denies" the motion to dismiss. Affirmation of Philip E. Karmel in Support of Motion to Dismiss, Feb. 10, 2010 ("Karmel Aff.") ¶ 39.

As explained in Petitioners' Memorandum of Law in Support of Petition Pursuant to Article 78 of the CPLR, this action, and the relief it seeks, flows from a fundamental, non-controversial proposition: 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 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*.

This case presents the question of where – on the continuum from *no changes* to the factual basis 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.

Respondent does not contest the legal proposition that material changes to the factual underpinning of an EDPL § 204 determination would warrant the relief Petitioners seek. Instead, Respondent contests the facts. According to Respondent, the only real change in the Project from December 2006 until today was the decision to confiscate the properties coveted by

Bruce Ratner and various corporate entities he owns or controls, including Forest City Ratner Companies, LLC, (collectively "Ratner") in two stages instead of one.

First, Respondent is wrong on the facts. Indeed, on January 27, 2010 – after the Petition in this case was filed – Respondent released Master Closing Documents that revealed for the first time that the negotiated minimum square footage for the project was nearly half of what had been presented to the public in 2006 (reduced from 7.96 million square feet in 2006, to 5.15 million in 2009, to 4.47 million as revealed in 2010) and that there are no serious penalties for substantial delays in the project, both of which further eviscerate any aspirations of public benefits in the form of blight remediation, jobs or tax revenues.

Second, Respondent's motion contests the well pleaded allegations in Petitioners' verified pleading, and relies on its own self-serving characterization of selected documents and an attorney's affirmation. This is not the stuff of which motions to dismiss as a matter of law are made.

Respondent's motion to dismiss should be denied. Petitioners' cross-motion for leave to interpose an amended pleading which will include facts related to Respondent's release of the December 2009 Master Closing Documents (which were not released until January 27, 2010, *after* the pleading in this action was filed) should be granted. Respondent will then be required to do that which it has thus far avoided – interpose a verified answer responding, paragraph by paragraph, to Petitioners' serious factual allegations.

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).[1]

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.)

[1] 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). The Court of Appeals 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 15, 2009, Respondent commenced a special proceeding to acquire title to Petitioners'[2] 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.

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.)

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[2] 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.

Among other things, Respondent released a proposed Modified General Project Plan ("2009 MGPP") (attached as Ex. B to Petition),[3] and a 63 page "Technical Memorandum" (attached as Ex. D),[4] detailing some, but not all, of the material changes sought and obtained by the Ratner and contained in the proposed 2009 MGPP. (Petition ¶ 33.)

As Respondent acknowledges, the Technical Memorandum made clear that Respondent had decided to condemn the properties for the Project in two stages, instead of all at once as originally contemplated.

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.[5]

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

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

[4] 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).

[5] 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.

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
>
> (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);[6]

(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

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

> 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) 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 Will Be Added to the Proposed Amended Pleading

On or about January 27, 2010 – 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,[7] who then enlisted the aid of his old law school friend,

[7] Perhaps because the project has always been the realization of Ratner's desire to forcibly acquire and develop property owned by others, Ratner has flatly refused to provide information about the project. Indeed, when Ratner was asked by a reporter 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).

then Governor George Pataki, to wield the power of eminent domain on his behalf[8] – Respondent UDC made available the Master Closing documents, which had been executed more than a month earlier, in December 2009.

Although the documents are voluminous and complex, they reveal that the deadlines "imposed" by Respondent on Ratner and the Project as currently contemplated, bears almost no relationship to the 2009 MGPP, much less the superceded 2006 MGPP upon which Respondent's 2006 D&F is based, providing instead, among other things and without limitation, as follows:

1. Ratner is afforded 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, and a total of twelve years to build Phase 1 (which can be much smaller than officially promised);
2. Ratner is afforded 15 years to start construction of the platform over the railyard, but may back out;
3. Ratner is afforded 25 years to finish the project (which can be much smaller than officially promised);
4. The closing documents contain *de minimis* financial penalties for substantial delays of this multibillion dollar project (less than $10

[8] *See* "*For Brooklyn, a Celebration or a Curse*?", WASHINGTON POST, Jan. 26, 2004, at A1 ("Ratner is [a] top political contributor and law school friend of Pataki.").

million for an arena that is three years late, and $5 million for each of three late buildings in Phase 1);

5. A provision in the Development Agreement that allows for an even greater reduction in project size (from 7,961,000 square feet as projected in the 2006 MGPP, to a 5,145,000 square foot minimum, as revealed in the Mullen Memo provided to the board before the adoption of the 2009 MGPP, to an even further reduced minimum to 4,470,000 square feet in the just released Development Agreement), this constitutes a reduction of 44%, which in turn means that every projected notional benefit has been eviscerated because those projections are based on (i) a ten year build out and (ii) an 8 million square foot project, both of which are now a proven fantasy.

ARGUMENT

Respondent's motion to dismiss for failure to state a claim, CPLR 3211(a)(7), and based on documentary evidence, CPLR 3211(a)(1), contests the facts set forth above by selectively parsing the significant changes to the project in an attorneys' affirmation in support of its motion to dismiss. Respondent misconstrues the nature of a motion to dismiss under CPLR 3211(a)(1) and (7).

"In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction." *Goshen v. Mutual Life Ins. of New York*, 98 N.Y.2d 314, 326 (2002). Indeed, the allegations must be accepted as true and Petitioners must be accorded "the benefit of every possible favorable inference." *Id.* (citations omitted).

A motion to dismiss pursuant to CPLR 3211(a)(1) "on the ground that the action is barred by documentary evidence, . . . may be appropriately granted *only* where the documentary evidence *utterly refutes* [the] factual allegations, [thus] conclusively establishing a defense as a matter of law." *Id.* (emphasis supplied, citation omitted).

Analyzed under the proper standard, Respondent's motion to dismiss makes no sense. Respondent does not accept Petitioners' well pleaded facts, it contests them. And, insofar as it moves to dismiss based on documentary evidence, that *evidence* does not come close to *utterly refuting* Petitioners' factual allegations and establishing a defense as a matter of law. Respondent's motion should be denied. Respondent should be required to file a responsive pleading.

I. *LEICHTER* DOES NOT HELP RESPONDENT

Respondent's motion to dismiss relies exclusively on *Leichter v. N.Y. State Urban Dev. Corp.*, 154 A.D.2d 258 (1st Dep't 1989). *Leichter* is inapposite for two reasons.

First, the project alterations challenged by the petitioners in *Leichter* were limited to: (1) "the proposed use of a site originally designated as a wholesale facility mart . . . to encompass a commercial office tower"; and (2) a change from simultaneous to sequential site acquisitions. *Id.* at 258-259. Here, of course, the breadth and scope of the changes set forth above and in the verified pleading, is substantial and materially effects Respondent's 2006 findings of public use, benefit and purpose pursuant to EDPL § 204(B).

Here, Respondent cannot dispute that the upgraded rail yard with increased capacity, which is expressly referenced as a public benefit in the 2006 D&F, has since been downgraded with capacity reduced below pre-project levels.

Here, Respondent cannot meaningfully dispute that the projected ten year build out, upon which the entire 2006 D&F is premised, is now a fantasy with 25 years being the true build out period, and with no guarantee that phase two will *ever* be built. This, in turn, means that the site it found to be "characterized" by blight in 2006 may not be remediated for more than 25 years, if ever. It also means that the projected economic benefits, *i.e.*, jobs and tax revenues, must be correspondingly reduced to zero.

Here, Respondent cannot dispute that the promised affordable housing listed in the 2006 D&F as a public benefit is utterly contingent upon the availability of further state subsidies which cannot be guaranteed, and, if used, will constitute a net affordable housing loss.[9]

Here, each and every aspect of Respondent's 2006 findings of public use, benefit and purpose have been materially undermined. Staged acquisitions, the only change Respondent does not contest, is the tip of the iceberg.

Leichter stands for the modest proposition that the change from simultaneous to staged acquisitions *standing alone* requires a public hearing where the impact on prior public use, benefit or purpose findings are considered, but not necessarily new or amended EDPL § 204(B) findings. *Leichter* does not, however, as Respondent would have it, hold that EDPL §

[9] The reason that any affordable housing will be a net loss is because (1) the finite amount of affordable government housing subsidies will create the same amount of affordable housing whether applied to this Project, or elsewhere, (2) in order to pave the way for the Project, scores of rent regulated apartments are being deregulated through the fiction of Respondent's "friendly" condemnation of Ratner's own apartment buildings, thus removing them from rent regulation so the occupants can be evicted and the buildings demolished, and (3) more at-risk (low income) households are in jeopardy of indirect displacement by the Project than the purported number of affordable units that would be constructed even under the best of circumstances.

204(B) findings are inviolate and can be used as the predicate for property seizures irrespective of whether the perceived public benefits have been utterly gutted.

Second, in *Leichter*, the petitioners challenged Respondent's change from simultaneous to staged property condemnations on the ground that it violated EDPL § 205 which provides for alterations "only in the event that further study of field conditions warrant." *Id.* at 259. The court in *Leichter* held that the alteration from simultaneous to staged property condemnations required that the agency "hold a hearing, limited to consideration of the amendments to the plan, during which the [public use, purpose and benefit] factors enumerated in EDPL § 204(B) are open to discussion." *Id.* at 260.

The problem here is that Respondent held a hearing about the alteration from simultaneous to staged acquisitions, but never told the public that it was holding the hearing so that impact of the alterations on Respondent's prior public use, benefit and purpose finding pursuant to EDPL § 204(B) could be discussed. *See* Notice of Public Hearing, attached as Ex. A to Affirmation of Matthew D. Brinckerhoff ("Brinck. Aff") (no mention of public use, benefit or purpose, or the EDPL generally, much less EDPL § 204(B)).

Thus, even by Respondent's lights – and based on the only factual allegation in Petitioners' pleading that Respondent does not contest – this Court must, at minimum, direct Respondent to hold a hearing where notice is given that the *purpose* of the hearing is to consider and discuss the impact of proposed amendments upon the initial 2006 EDPL § 204(B) findings of public use, benefit and purpose. Absent notice that the hearing is being held to consider the "factors enumerated in EDPL § 204(B)," Respondent cannot claim it has met its obligation under

Leichter. Accordingly, at minimum, Respondent should be directed to hold a hearing with proper, meaningful notice pursuant to *Leichter*.

II. WHATEVER LEGITIMACY CAN BE ASCRIBED TO RESPONDENT'S 2006 DETERMINATION OF PUBLIC USE, BENEFIT AND PURPOSE, HAS BEEN WHOLLY EVISCERATED BY SUBSEQUENT EVENTS

As set forth above, this case presents the question of where – on the continuum from *no changes* to the factual basis 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.

Previously, in their memorandum of law in support of their Article 78 Petition, Petitioners hypothesized that had Forest City Ratner Companies been indicted for bribing public officials[10] and then became insolvent, thus forcing Respondent to abandon the Project entirely,

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[10] Respondent takes issue with a prior assertion by Petitioner's counsel that former Yonkers City Council Member Sandy Annabi was indicted and charged "with having accepted a bribe from FCRC in connection with the Ridge Hill Development in Yonkers," claiming that "the indictment makes no such allegation." Karmel Aff. ¶ 36. Attorneys for FCRC went even further charging that the statement was "false." *See* Letter from Jeffrey L. Braun, dated February 12, 2010, and resulting correspondence attached as Ex. B to Brinck. Aff. Rather than quibbling over the meaning of the indictment, Petitioner is content to rely on the indictment itself. *See* Indictment, attached as Ex. C to Brinck. Aff.

Count One of the indictment charges Sandy Annabi, her cousin, Zehy Jereis, and Anthony Mangone with "Conspiracy To Accept Corrupt Payments," and alleges (in ¶¶ 12, 27-42, 44(c, d, g, p-x (Overt Acts))): including (1) that "representatives of" FCRC attended at least two meetings with Jereis and Annabi in June 2006, (¶¶ 36-37); (2) that, for at least a year prior to those meetings, Annabi had been a forceful public opponent of FCRC's Ridge Hill Project, had provided the crucial third vote against the zoning change required for the project to be realized, and had even sued to prevent the project from going forward (¶¶ 27-34); (3) that "[a]t or near the end of" the first meeting amongst Annabi, Jereis and representatives of FCRC, "Jereis asked one of [FCRC's] representatives for a consulting job," (¶ 36); (4) that "after a second meeting . . . [Annabi] reversed her opposition to [FCRC's] Ridge Hill Project and agreed to support it," (¶ 37); (5) that the "next day, on or about June 15, 2006, [Annabi] issued a press release – actually

(continued...)

the 2006 D&F would become a legal nullity, even though it had thus far withstood legal

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[10] (...continued)
drafted by representatives of [FCRC] and [Jereis] – informing the public that she was now going to support [FCRC's] Ridge Hill Project," (¶ 38); (6) that the next day, Jereis "sent an e-mail to a representative of [FCRC] attaching his resume and a cover letter," and over the course of the next week sent two more "e-mails to a representative of [FCRC] about his request for a job," (¶ 44(s-u)); (7) that "on or about June 28, 2006, [Jereis] and representatives of [FCRC] reached an agreement in principle in which [FCRC] agreed to give [Jereis] a job sometime after [Annabi] formally voted in favor of the Ridge Hill Project," (¶ 39); (8) that at "a special City Council meeting on or about July 11, 2006, [Annabi] voted in favor of the zoning change for [FCRC's] Ridge Hill Project," thus "provid[ing] the fifth vote need to secure a super majority of the Yonkers City Council members," (¶ 40); (9) that in "or about October 2006, [Jereis] signed a consulting contract with [FCRC] whereby [FCRC] agreed to pay [Jereis] $60,000, or $5,000 per month for 12 months, to serve as a 'real estate consultant,'" even though Jereis "was not a licensed real estate broker and had little or no relevant experience in real estate development," which was "backdated to August 1, 2006," such that Jereis began receiving his monthly payments retroactively starting with the August 2006 payment," (¶ 41); (10) that "[a]lthough his consulting agreement with [FCRC] required him to submit monthly reports detailing the work he had actually done for [FCRC], [Jereis] failed to submit any monthly reports until on or about March 12, 2007 – after new reports about federal subpoenas pertaining to a federal investigation surfaced," (¶ 42); and (11) that Jereis "and others" on "numerous occasions during calendar" years 2006 and 2007 "gave [Annabi] financial benefits totaling at least" $55,298, including mortgage and maintenance payments on one of Annabi's homes, (¶¶ 12, 44(c-d)).

Count Seven of the indictment charges Sandy Annabi and Zehy Jereis with "Travel And Use Of Interstate Facilities To Confer Illegal Benefit On A Public Servant" and alleges (in ¶¶ 27-42, 44, 56-58) that Annabi and Jereis engaged in "unlawful activity, namely, bribery, in that [Annabi] solicited, accepted and agreed to accept benefits that were conferred, and offered and agreed to be conferred by [Jereis] upon an agreement and understanding that [Annabi's] vote, opinion, judgment, action, decision or exercise of discretion as a Yonkers City Councilwoman would thereby be influenced contrary to NY Penal Law Sections 200.00 and 200.10 [bribery]," and specifically adverting to the allegations concerning FCRC in Count One, (¶¶ 57-58).

The indictment speaks for itself. Presumably, Respondent's board of unelected stewards of the public fisc, and their partners in New York City government, long ago, when the investigation was first revealed, thoroughly investigated the facts set forth in the indictment, and independently and affirmatively concluded that FCRC's alleged conduct posed no concern over its status as a "responsible" government partner, nor obstacle to FCRC continuing to receive hundreds of millions of taxpayer dollars. *See generally Hellenic American Neighborhood Action Committee v. City of New York*, 101 F.3d 877 (2d Cir. 1996) (rejecting challenge to City's decision to automatically cease all contracting with entity under investigation by U.S. Attorney's office in order to protect public fisc).

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. Petitioners argued that there was no doubt that, under this hypothetical scenario (however, prescient it may prove to be), that 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 basis for Respondent's 2006 EDPL § 204(B) findings of public use, benefit or purpose has been substantially and materially undermined by subsequent events. The 2006 D&F can no longer serve as a predicate for the seizure of Petitioners' homes and businesses.

Respondent does not contest the legal and logical force of this analysis. Indeed, Respondent ignores it altogether. It remains. As set forth above and in Petitioners' verified pleading, Respondent's initial 2006 findings have been eviscerated in a manner comparable to the hypothetical. 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.

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.

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.

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.

III. RESPONDENT'S INVOCATION OF LACHES IS FRIVOLOUS

Respondent accuses Petitioners of pursuing a "litigation strategy of bringing one baseless lawsuit after another in the hope that the Project will be delayed to its death." Respondent's Br. at 11. While the Project richly deserves an ill fate, Petitioners' "strategy" has always been, and remains, the vindication of their rights as home and business owners who have suffered the misfortune of owning property coveted by a powerful and influential real estate developer. This is the *second* case filed by Petitioners. While Respondent labels the *first* case –

a constitutional challenge to the 2006 D&F – as "baseless," that opinion is not shared by at least one Justice of Supreme Court of the United States, and one of the Judges of the New York Court of Appeals. Moreover, the New York Court of Appeals accepted Petitioners' appeal because it presented a *substantial* constitutional question. That Petitioners lost, does not make their case "baseless."

The irony here is that Respondent is lying in a bed of its own creation. Had Respondent chosen to defend Petitioners' initial action in federal court *on the merits* in 2006, instead of seeking to dismiss Petitioner's state law claims on jurisdictional grounds, a final judgment would have rendered long ago and this action would be barred by the doctrine of *res judicata.* Thereafter, in 2008, had Respondent chosen to allow Petitioners to litigate over post-2006 events in the re-filed action in state court, instead of successfully precluding Petitioners from raising such factual developments, the judgment of the Court of Appeals would be final and this action would likewise be barred.

This basis for this action did not accrue, at the earliest, until the Court of Appeals issued its ruling on November 24, 2009. Less than two months later (instead of the four allowed under Article 78 of the CPLR), this action was commenced. Even if accrual is measured from the passage of the 2009 MGPP as Respondent urges, this action is timely, and even under a four month statute of limitations under Article 78. Timely actions are not barred by laches especially where, as here, the delay is entirely attributable to Respondent's own litigation decisions.

IV. INSOFAR AS A "TRIAL" PREFERENCE IS APPROPRIATE AT THE MOTION TO DISMISS STAGE IN A COMBINED ARTICLE 78 AND DECLARATORY JUDGMENT ACTION, PETITIONERS DO NOT OBJECT TO SUCH A PREFERENCE

Petitioners have no interest in delay. Insofar as the Court were to conclude that a trial preference is appropriate, Petitioners do not object to such a preference.

CONCLUSION

Petitioners respectfully request that the Court deny Respondent's motion to dismiss in its entirety and grant Petitioners's cross-motion for leave to interpose an amended pleading setting forth the various facts that undermine even further Respondent's initial 2006 EDPL § 204(B) findings as revealed by the Master Closing Documents released by Respondent on January 27, 2010, *after* the Petition in this action was filed.

Dated: February 22, 2010
New York, New York

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