UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DANIEL GOLDSTEIN, JERRY CAMPBELL, as the putative administrator of the estate of OLIVER ST. CLAIR STEWART and in his individual capacity, THE GELIN GROUP, LLC, CHADDERTON'S BAR AND GRILL INC., d/b/a FREDDY'S BAR AND BACKROOM, MARIA GONZALEZ, YESENIA GONZALEZ, HUDA MUFLEH-ODEH, JAN AKHTAR, and DAVID SHEETS,	:	
Plaintiffs,	:	CV 06 5827 (NGG) (RML)
v.	:	ECF Case
GEORGE E. PATAKI, CHARLES A. GARGANO, NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, BRUCE C. RATNER, JAMES P. STUCKEY, FOREST CITY ENTERPRISES, INC., FOREST CITY RATNER COMPANY, RATNER GROUP, INC., BR FCRF, LLC, ATLANTIC YARDS DEVELOPMENT COMPANY, LLC, MICHAEL BLOOMBERG, DANIEL DOCTOROFF, ANDREW M. ALPER, JOSHUA SIREFMAN, CITY OF NEW YORK and NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,	:	
Defendants.	:	

MEMORANDUM OF LAW OF ESDC DEFENDANTS
IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

Douglas M. Kraus (DK 7497)
Preeta D. Bansal (PB 9452)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000

Attorneys for Defendants Empire State Development Corporation and Charles A. Gargano

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Constitutional Provisions, Statutes & Rules

Other Authorities

This memorandum is submitted on behalf of defendants Charles A. Gargano and the New York State Urban Development Corporation d/b/a Empire State Development Corporation (collectively, the "ESDC Defendants") in support of their motion, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), to dismiss the complaint on grounds that (1) it does not present a ripe controversy; (2) abstention is required; and (3) plaintiffs have failed to state a claim upon which relief may be granted.

PRELIMINARY STATEMENT

Plaintiffs have candidly admitted that their goal in filing this suit is to enjoin state-court proceedings that have yet to commence. (See Transcript of Proceedings, November 21, 2006 ("Tr. of Proc."), at 14:19-22.) Their evident hope is that, by filing suit before any state judicial proceeding actually begins, they will escape operation of otherwise applicable abstention doctrines. Plaintiffs' strategy, however, is misguided.

First, in their effort to launch a preemptive strike, plaintiffs have filed a patently premature action. ESDC published its determination and findings under New York's Eminent Domain Procedure Law ("EDPL"), N.Y. Em. Dom. Proc. Law §§ 101-709 (McKinney 2003 & Supp. 2006), only four days ago (several weeks after plaintiffs filed their complaint), and has yet even to commence the final proceeding to obtain title of condemned property that is envisioned under that law. Not until any such proceeding is completed will ESDC have actually effected a taking of plaintiffs' properties. That date unquestionably is a long way off. The few federal courts that have been faced with anticipatory suits like this have almost uniformly dismissed them for lack of ripeness. This Court should do the same. (See Argument, Point I, infra.)

Second, even if plaintiffs' claims technically are justiciable, the Court should dismiss the complaint under Younger v. Harris, 401 U.S. 37 (1971), and Burford v. Sun Oil Co.,

319 U.S. 315 (1943). Contrary to plaintiffs' apparent understanding, Younger applies with full force here even though no state-court action had been initiated when this suit was commenced; the doctrine's applicability does not depend on a race to the courthouse. By the time the Court rules on this motion, an action under EDPL § 207 attacking ESDC's public use determination almost certainly will have been filed, and the pendency of that action will require the Court to abstain. Moreover, the administrative portion of the state eminent domain proceeding was well underway when this action was filed. That alone is sufficient to trigger Younger abstention. Finally, even if there were no ongoing state proceeding at the time the Court ruled on this motion, the Court would still have to abstain under the Burford doctrine. (See Argument, Point II, infra.)

Questions of justiciability and abstention aside, plaintiffs have failed to state a claim upon which relief may be granted. Their takings claim founders on the fatal combination of extremely deferential judicial review and allegations that, on their face, acknowledge several undeniably legitimate public purposes that have been offered in support of the redevelopment project at issue. The equal protection claim fails for similar reasons. Finally, plaintiffs' due process claim is at once foreclosed by Second Circuit precedent and so ill-pleaded that it cannot survive a motion to dismiss. (See Argument, Point III, infra.)

STATEMENT OF FACTS[1]

A. The Parties

Plaintiffs are all either owners or tenants of property located in the "Takings Area," which is defined below. Plaintiffs Daniel Goldstein, Jerry Campbell, the estate of Oliver St. Clair Stewart, and The Gelin Group LLC own residential properties. Plaintiff Chadderton's

[1] The facts recited in this section are taken from the complaint and documents incorporated by reference or relied upon therein, unless otherwise indicated. See Yak v. Bank Brussels Lambert, 252 F.3d 127, 130 (2d Cir. 2001); In re Merrill Lynch & Co., Inc., 273 F. Supp. 2d 351, 356-57 (S.D.N.Y. 2003).

Bar and Grill Inc. d/b/a Freddy's Bar and Backroom has a lease for operation of a commercial enterprise. Plaintiffs Maria Gonzalez, Jackie Gonzalez, Yesenia Gonzalez, Huda Mufleh-Odeh, Jan Akhtar, and David Sheets are tenants in residential properties. (Compl. ¶¶ 10-17.)

Plaintiffs have named a number of agencies, individuals, and corporate organizations as defendants. These may be divided into four categories: (1) the ESDC Defendants; (2) the "City Defendants" (the City of New York, New York City Economic Development Corporation ("EDC"), Mayor Michael Bloomberg, Deputy Mayor Daniel L. Doctoroff, former EDC president Andrew M. Alper, and acting EDC president Joshua Sirefman); (3) the "FCRC Defendants" (Forest City Ratner Company ("FCRC") and its officers and affiliates); and (4) Governor George Pataki. (Id. ¶¶ 18-39.) All public officials named as defendants have been sued in both their official and individual capacities.

B. ESDC And The Atlantic Yards Project

ESDC, a creature of the New York State Urban Development Corporation Act of 1968 (the "UDC Act"), is one of several entities to which the State Legislature has delegated the sovereign power of eminent domain. See Minnich v. Gargano, No. 00 Civ. 7481, 2001 WL 1111513, at *1 (S.D.N.Y. Sept. 20, 2001) (describing ESDC as "a state public benefit corporation to which the New York legislature has delegated the power to acquire real property pursuant to the provisions of the EDPL"). The agency's "primary mission . . . is to encourage economic investment throughout New York State, and it does so in part by promoting large-scale real estate projects that create and retain jobs and/or reinvigorate distressed areas." Develop Don't Destroy Brooklyn v. Empire State Dev. Corp., 31 A.D.3d 144, 146, 816 N.Y.S.2d 424, 427 (1st Dep't 2006). In carrying out its statutory mission and exercising its powers of eminent domain, ESDC is specifically directed to "encourag[e] maximum participation by the private

sector of the economy." N.Y. Unconsol. Law § 6252; see E. Thirteenth St. Cmty. Ass'n v. New York State Urban Dev. Corp., 189 A.D.2d 352, 358, 595 N.Y.S.2d 961, 964-65 (1st Dep't 1993).

The UDC Act gives ESDC the power to exercise eminent domain to acquire property "necessary or convenient" to the fulfillment of its mission. N.Y. Unconsol. Law § 6263. If the property is sought to be acquired in furtherance of a land use development project, ESDC can condemn it only after determining "[t]hat the area in which the project is to be located is a substandard or insanitary area, or is in danger of becoming a substandard or insanitary area and tends to impair or arrest the sound growth and development of the municipality." Id. § 6260(c)(1). (No such determination is required for a civic project.)

One of the many land use development and civic projects that ESDC has sponsored in recent years is a plan for development of the Atlantic Terminal area of Brooklyn (the "Atlantic Yards Project" or the "Project"), which was first announced in December 2003. (Compl. ¶ 64.) Memoranda of understanding concerning the Project were signed by ESDC, the City, EDC, and FCRC in early 2005. (Id. ¶¶ 66-67; see Exs. A & B.[2]) On September 16, 2005, ESDC issued a notice in which it announced that the Project might have a "significant effect" on the environment and would therefore necessitate preparation of an environmental impact statement under the State Environmental Quality Review Act ("SEQRA"). (See Combined Notice of Proposed Lead Agency Designation, Public Scoping and Intent to Prepare a Draft Environmental Impact Statement (Ex. C)[3].) ESDC also announced that it would act as lead

---

[2] References herein to "Ex. __" are to the exhibits annexed to the accompanying Declaration of Douglas M. Kraus.

[3] The SEQRA notice is part of the public record and is properly the subject of judicial notice. See, e.g., In re MetLife Demutualization Litig., 156 F. Supp. 2d 254, 259 n.1 (E.D.N.Y. 2001).

agency in connection with the process. (Id.)[4] On July 18, 2006, ESDC issued a formal declaration that the Atlantic Yards Project qualified as a land use development and civic project under the UDC Act. (Compl. ¶ 43.)

C. The Project Site

The proposed Project site "has suffered from physical deterioration and relative economic inactivity for at least four decades. Dominated by an approximately 9-acre open rail yard and otherwise generally characterized by dilapidated, vacant, and underutilized properties, the site creates a clear visual and physical barrier between the neighborhoods north and south of Atlantic Avenue" in downtown Brooklyn. (Atlantic Yards Arena and Redevelopment Project Blight Study (the "Blight Study"),[5] attached as Exhibit F to the Atlantic Yards Land Use Improvement & Civic Project General Project Plan ("GPP")[6] (Ex. D), at B-1.) At the heart of the Project site lie portions of the "Atlantic Terminal Urban Renewal Area" or "ATURA," an area that the City first designated as blighted in 1968. (Compl. ¶ 51.) The part of the ATURA that falls within the Project boundaries consists chiefly of a recessed (i.e., below-grade) Metropolitan Transit Authority rail yard and a depot for retired buses. (Id. ¶¶ 42, 51.) All prior plans to remediate the blight caused by this gaping hole in the Brooklyn landscape have fallen through. As late as April 2004, the City reconfirmed, for the tenth consecutive time, the ATURA's blight designation and accompanying renewal plan. (Id. ¶ 53.) Plaintiffs do not contest that the ATURA is, in fact, blighted.

---

[4] After a lengthy procedure in which ESDC considered and responded to comments received from the public at various stages of review, a Final Environmental Impact Statement was certified as complete in November 2006.

[5] The Blight Study was prepared for ESDC by AKRF, Inc., and is referenced at length in the complaint (see Compl. ¶¶ 96-102).

[6] The GPP is incorporated by reference in ¶ 43 of the complaint.

Approximately half of the Project site falls inside the ATURA. (Id. ¶ 51.)[7] The balance is made up of other, privately owned commercial and residential properties. Plaintiffs define the entire non-ATURA portion of the site as the "Takings Area." (Id. ¶¶ 51-52.)

ESDC determined, prior to its declaration under the UDC Act, that the Takings Area's proximity to the rail yards and isolated location have resulted in blight conditions in the Takings Area as well. (Id. ¶ 56; see generally Blight Study.) The Blight Study that ESDC commissioned in early 2006 found that "[t]he gap in the urban landscape that is created by the below-grade rail yard creates an environment that discourages street-level activity, and the inadequate street lighting surrounding the rail yard, in combination with vacant lots and deteriorating structures on the blocks south of the yard, creates a sense of isolation that spans across the project site." (Id. (Ex. D) at ii.) It further concluded that one or more blight characteristics were present on most lots within the Takings Area. (See id. (Ex. D) at C-70-242.) Indeed, five buildings in the Takings Area that had been acquired by FCRC had deteriorated to such an extent that they posed a threat to public safety and had to be demolished immediately. (See Summary Report of the Existing Structural Condition Surveys, prepared for FCRC by LZA Technology in November 2005, App'x A to Blight Study (Ex. D).)[8] See also Develop Don't Destroy Brooklyn, 31 A.D.3d at 148-49, 816 N.Y.S.2d at 428-29 (describing litigation concerning demolition). More generally, the Blight Study showed that "the non-rail yard portion

---

[7] Plaintiffs allege that "[n]early half" of the site falls within the ATURA (id.), but the Blight Study, which is incorporated by reference in the complaint, found that approximately 63% of the square footage of the Project site is located within the ATURA. (See Blight Study (Ex. D) at i.)

[8] It is clear that the major structural deterioration of these buildings was not, as plaintiffs conclusorily assert, "the result of the [Atlantic Yards] Project itself" (Compl. ¶ 56). The Study documents, in both words and photographs, severe damage to the structural support system of all of these buildings, including roofs, floors, and/or walls that had collapsed or were on the verge of collapse, and water and rot damage to the timber floorings and floor joists. (Blight Study (Ex. D), App'x A.) The bad condition of the roof and walls of these buildings left them "permanently exposed to the elements." (Id. at 1, 9, 14, 18, 21, 29.)

of the project site is characterized by unsanitary and substandard conditions including vacant and underutilized buildings, vacant lots, irregularly shaped lots, building facades that are in ill-repair (e.g., crumbling brickwork, graffiti, flaking paint), and structures suffering from serious physical deterioration." (Blight Study (Ex. D) at ii.)

D. The Project

The Atlantic Yards Project would remediate the blighted conditions both in the ATURA itself and in the Takings Area,[9] and would serve a host of other public purposes as well. As presently conceived, the Project plan is for a 22-acre mixed-use development consisting of a sports arena, thousands of new housing units (a large portion of which qualifies as affordable), improvements to mass transit, new office space, eight acres of publicly accessible open space, and new retail space. (Compl. ¶¶ 42, 49 n.2, 104; see also GPP (Ex. D) at 5-6.) Both the individual building plans and the larger development have been designed by the world-renowned architect Frank Gehry, and award-winning landscape architect Laurie Olin is designing the publicly accessible open space. (Id. at 7.) The Project's corporate sponsor, FCRC, has been involved in a number of other developments in downtown Brooklyn, including two major ones in recent years undertaken pursuant to public-private partnerships. (Compl. ¶ 45.) To fully realize the Project's stated goals (which are discussed further below) and to implement the Project's comprehensive plan, ESDC proposes to exercise its delegated power of eminent domain to acquire certain private property located within the Project site. (Id. ¶ 51.)

---

[9] Although plaintiffs assert that the blight in the Takings Area is not as extensive as ESDC determined it was (see Compl. ¶¶ 94-102), they do not dispute that the Atlantic Yards Project will in fact remediate admitted blight in the ATURA and portions of the Takings Area.

E. EDPL Proceedings

On August 23, 2006, ESDC held a duly noticed public hearing concerning the Project, in accordance with sections 202 and 203 of the EDPL. During the hearing, the public was informed of the Project's nature and boundaries, the public use, benefits and purposes to be served by the Project, and the general effect the Project was projected to have on the environment and surrounding neighborhoods. Public comments were solicited; ESDC asked that they be submitted before the close of business on September 29, 2006. On September 12, 2006, and September 18, 2006, ESDC held community forums (at the same location as the public hearing), at which additional testimony and written comments were received. (See 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 ("Determination and Findings") (Ex. E) at 3.)[10]

On December 8, 2006, after reviewing all comments received at the public hearing and community forums, all written comments received during the comment period, and the Final Environmental Impact Statement for the Project, ESDC made its final determination and findings pursuant to EDPL § 204. (See Determination and Findings (Ex. E).) In that document (which was published, as mandated by the EDPL, on December 11 and 12, 2006, in the New York Post and The City Record), ESDC explained its determination that it should exercise its power of eminent domain to implement the Atlantic Yards Project.

---

[10] This document, like the SEQRA notice (see n.3, supra), is properly the subject of judicial notice.

F. Public Purposes

ESDC has identified a number of public purposes that will be served by the Project. (See Compl. ¶ 85; see GPP (Ex. D) at 4-5; Determination and Findings (Ex. E) at 5-6.) Chief among these is the elimination of blighted conditions within the Project site—both in the ATURA and in the Takings Area. (GPP (Ex. D) at 32; Determination and Findings (Ex. E) at 1, 4.) The Project also has the following stated public goals:

> [1] to provide a state-of-the-art Arena to accommodate the long awaited return of a major-league sports franchise to Brooklyn while also providing a first-class athletic facility for the City's colleges and local academic institutions, which currently lack adequate athletic facilities, and a new venue for a variety of musical, entertainment and civic events; [2] to generate additional economic activity and City and State tax revenues . . . by providing a venue for professional basketball and other events within New York City (and specifically Downtown Brooklyn) that otherwise would occur elsewhere and by offering first-class office space, retail space and possibly a hotel to attract new jobs; [3] to supply critically needed affordable and market-rate housing; [4] to provide a state-of-the-art rail storage, cleaning, and inspection facility for the LIRR which will enable it to better accommodate its MU Series Trains and other mass transit improvements; [5] to provide publicly accessible open space; and [6] to cause environmental remediation to be performed on the Project Site.

(GPP (Ex. D) at 32-33; Determination and Findings (Ex. E) at 5-6.)

G. This Action

On October 26, 2006, after the ESDC had held its public hearings pursuant to section 203 of the EDPL but before it had issued its Determination and Findings pursuant to section 204, plaintiffs filed this lawsuit. Invoking 42 U.S.C. § 1983, plaintiffs have asserted three federal constitutional claims: (1) violation of the Takings Clause of the Fifth Amendment (as incorporated by the Fourteenth Amendment); (2) violation of the Equal Protection Clause of the Fourteenth Amendment; and (3) violation of the Due Process Clause of the Fourteenth Amendment.

Significantly (and no doubt recognizing the serious ripeness issue here), when asked by a reporter how plaintiffs could have filed their lawsuit "before eminent domain has been used by the state," plaintiffs' counsel responded, "[W]e need to get discovery, where we get to question people under oath and get documents that will support what we already know . . . ." Patrick Arden, Plotting Offense in Atlantic Yards Fight, N.Y. Metro, Oct. 30, 2006 (Ex. F) (emphasis added). A week later, plaintiffs informed the Court that they wished to move for expedited discovery. That motion was made by letter dated November 27, 2006. All defendants joined in an opposition thereto and in a cross-motion for a stay of discovery. Both discovery motions are still pending before the Court.

Oral argument on defendants' motions to dismiss the complaint is scheduled for January 19, 2007. By that time, there almost certainly will be pending before the Appellate Division of the New York State Supreme Court an action attacking the Atlantic Yards Project and ESDC's exercise of eminent domain on substantially the same grounds raised in the complaint now before this Court. See EDPL § 207 (granting prospective condemnees 30 days from publication of the determination and findings to file a petition for review in the Appellate Division). (See also Tr. of Proc. at 17:6-8 (plaintiffs' counsel's acknowledgement that "there are other people affected by this who will unquestionably be bringing claims of various sorts in state court proceedings," one of which "will be the Appellate Division proceeding").)

ARGUMENT

Litigants normally are free, in § 1983 cases, to select a federal over a state forum for vindication of their federal rights. See Monroe v. Pape, 365 U.S. 167, 183 (1961), overruled on other grounds, Monell v. Dep't of Social Servs. of New York, 436 U.S. 658 (1978). But because takings claims—and especially claims challenging the exercise of eminent domain—

present unique questions of justiciability and comity, they often are not properly pursued, at least in their initial stages, in federal court. The Supreme Court itself acknowledged just two Terms ago that plaintiffs suing under the Takings Clause are obliged to litigate their claims in state court in the first instance much more often than are individuals with other federal constitutional claims. See San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323, 347 (2005) ("[T]here is scant precedent for the litigation in federal district court of claims that a state agency has taken property in violation of the Fifth Amendment's takings clause."); see also Eddystone Equip. & Rental Corp. v. Redevelopment Auth., No. Civ. 87-8246, 1988 WL 52082, at *1 (E.D. Pa. May 17, 1988) ("[F]ederal courts presented with actions of this kind have almost uniformly dismissed them."), aff'd mem., 862 F.2d 307 (3d Cir. 1988). Plaintiffs may view this as a hardship, not least because the state court's ruling on the federal claim could have preclusive effect upon a later federal court (if any) reviewing the claim. See San Remo Hotel, 545 U.S. at 342. But because our federal system presumes—indeed, depends upon the presumption—that state courts are competent to hear and resolve federal constitutional claims, that perceived hardship does not affect a federal court's inquiry into the limits of its own adjudicatory sphere. See id. (rejecting argument that plaintiffs "have a right to vindicate their federal [takings] claims in federal court").

The justiciability and comity concerns that typically attend takings claims appear in full force here. Eminent domain is quintessentially a local concern. See, e.g., Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28-29 (1959); Ahrensfeld v. Stephens, 528 F.2d 193, 198 (7th Cir. 1975); Broadway 41st St. Realty Corp. v. New York State Urban Dev. Corp., 733 F. Supp. 735, 742 (S.D.N.Y. 1990) ("eminent domain has remained a local political issue"). Accordingly, many States, including New York, have established

comprehensive procedures for the exercise of the power of eminent domain and for evaluating challenges—including federal constitutional challenges—thereto. The local character of the problem, coupled with the existence of a comprehensive local administrative and adjudicatory system, usually prompts federal courts to abstain in cases like this. And when, as here, plaintiffs seek to avoid abstention by filing preemptive actions in federal court, before any taking has actually occurred or any state-court condemnation proceeding to obtain title has begun, federal courts recognize the premature character of the actions and dismiss them on those grounds.[11] The same result should obtain here.

I. PLAINTIFFS' CLAIMS MUST BE DISMISSED FOR LACK OF RIPENESS.

Because ESDC has yet to file a proceeding seeking transfer of title to plaintiffs' properties, plaintiffs' claims are not justiciable and must be dismissed. It is axiomatic that a federal claim is not ripe until the impact of the challenged state action is "sufficiently direct and immediate as to render the issue appropriate for judicial review." Abbott Labs. v. Gardner, 387 U.S. 136, 152 (1967). An Article III court simply "cannot entertain a claim which is based upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Thomas v. City of New York, 143 F.3d 31, 34 (2d Cir. 1998) (citation omitted); see also In re Drexel Burnham Lambert Group Inc., 995 F.2d 1138, 1146 (2d Cir.1993) (stating that adjudication is inappropriate when there is "no certainty" that the complained-of action will actually come to pass); Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394, 406-07 (S.D.N.Y. 2002) ("[A] touchstone to guide the probe for sufficient immediacy and reality is

---

[11] The ripeness inquiry must precede the inquiry into whether abstention is appropriate, because ripeness is jurisdictional. Compare Vandor, Inc. v. Militello, 301 F.3d 37, 38-39 (2d Cir. 2002) ("ripeness is jurisdictional"), with Spargo v. New York State Comm'n on Judicial Conduct, 351 F.3d 65, 74 (2d Cir. 2003) ("Younger is not a jurisdictional bar based on Article III requirements, but instead a prudential limitation on the court's exercise of jurisdiction grounded in equitable considerations of comity.").

whether the declaratory relief sought relates to a dispute where the alleged liability has already accrued or the threatened risk occurred, or rather whether the feared legal consequence remains a mere possibility, or even probability of some contingency that may or may not come to pass."), aff'd, 346 F.3d 357 (2d Cir. 2003).

How these general principles apply to a claim brought pursuant to the Public Use Clause of the Fifth Amendment depends on the nature of the claim. A regulatory takings claim is not justiciable until the defendant regulatory agency has made a final determination on the plaintiff's application for a permit or variance, thus completing the alleged interference with property. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1984).[12] For claims of direct, physical interference with property (e.g., noise, smoke, or encroachment upon a driveway), the ripeness test is by definition satisfied because the taking—in the form of physical interference with enjoyment of the property—has already occurred. See, e.g., Montgomery, 226 F.3d at 766. Finally, and as discussed further below, if the assertion is that a proposed physical taking by means of eminent domain will be for private and not public use, the claim is not ripe at least until the condemnor has initiated a proceeding seeking transfer of title. See, e.g., Hemperly v. Crumpton, 708 F. Supp. 1247 (M.D. Ala. 1988); Eddystone Equip., 1988 WL 52082, at *2; Schiessle v. Stephens, 525 F. Supp. 763, 769 n.5 (N.D.

---

[12] For regulatory takings claims brought pursuant to the Just Compensation Clause, Williamson County also requires that the plaintiff have exhausted state-court remedies available for recovering compensation. See id. Whether that requirement carries over to claims under the Public Use Clause is the subject of disagreement among the circuits. Compare Forseth v. Vill. of Sussex, 199 F.3d 363, 370 (7th Cir. 2000) (requiring pursuit of state-court remedies), with Montgomery v. Carter County, 226 F.3d 758, 766 (6th Cir. 2000) (holding that Williamson County's requirement of pursuit of state-court remedies did not apply to a claim that a taking was for private use); and Armendariz v. Penman, 75 F.3d 1311, 1320-21 & n.5 (9th Cir. 1996) (same); and Samaad v. City of Dallas, 940 F.2d 925, 936 (5th Cir. 1991) (same). Because ESDC is not arguing that plaintiffs need seek just compensation in state court before bringing their claim, the Court need not decide whether Williamson County's framework is applicable here. (Cf. Plaintiffs' December 6 Letter at 3-4 & n.4 (accusing ESDC of "mislead[ing] the Court" by suggesting that Williamson County's exhaustion prong applied to Public Use Clause claims).)

Ill. 1981) (Flaum, J.). The latter rule honors the general principle that exercise of federal jurisdiction is prohibited in circumstances where "the feared legal consequence remains a mere possibility, or even probability of some contingency that may or may not come to pass," Dow Jones & Co., 237 F. Supp. 2d at 406-07,[13] because the road to a final taking in eminent domain proceedings generally, and under New York law in particular, is positively fraught with contingencies.

The process authorized by the EDPL is a comprehensive and deliberate one. See Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 417-18 (1986) (observing that the "principal purpose of article 2 of the EDPL . . . is to insure that an agency does not acquire property without having made a reasoned determination that the condemnation will serve a valid public purpose"). Before a condemnor can even apply for transfer of the title to prospective condemnees' properties, it must satisfy a number of procedural requirements. The first step, after selection and notice of the proposed location for the redevelopment project, is for the agency to hold public hearings concerning the project. See EDPL § 203. A record of these proceedings is maintained, and individuals in attendance have a right to be heard and to have their views and objections entered into the record either in writing or orally. Id. Next, the agency is required to publish a determination and findings specifying "(1) the public use, benefit or purpose to be served by the proposed public project; (2) the approximate location for the proposed public project and the reasons for the selection of that location; (3) the general effect of

---

[13] The relevant "feared legal consequence" here is the proposed taking of plaintiffs' properties. Any argument that precondemnation activities somehow rise to the level of a constitutional violation would be foreclosed by the Supreme Court's decision in Agins v. Tiburon, 447 U.S. 255 (1980), which held that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense.'" Id. at 263 n.9 (citation omitted); see also Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 130-31 (2d Cir. 2003), abrogated on other grounds by San Remo Hotel, 545 U.S. 323 (2005).

the proposed project on the environment and residents of the locality." Id. § 204(B). Within thirty days following publication of the agency's determination and findings, any prospective condemnee may bring an action in the Appellate Division of the New York State Supreme Court challenging, inter alia, the constitutionality (under both the state and federal constitutions) of the proposed condemnation and whether it serves a public purpose. See id. § 207. The Appellate Division's decision may then be appealed to the New York Court of Appeals.

After a "final order or judgment" has been rendered in the EDPL § 207 proceeding (if one is filed), the agency has up to three years to file a proceeding in New York Supreme Court under Article 4 of the EDPL seeking transfer of title, id. § 401(A)(3), during which time any number of political or economic developments may require abandonment of the approved plan for the taking. Getting the Article 4 proceeding underway is itself "a somewhat protracted process, requiring both 20 days notice of the return date of a petition seeking title, and a wait of at least a week while the matter is assigned to a judge and set down by the court." Minnich v. Gargano, No. 00 Civ. 7481, 2001 WL 46989, at *3 (S.D.N.Y. Jan. 18, 2001) (citation omitted), vacated on different grounds sub nom. Brody v. Vill. of Port Chester, 261 F.3d 288 (2d Cir. 2001). Once notified, condemnees-to-be are permitted to appear and interpose an answer. See EDPL § 402(B)(4). If the court, upon review of the petition and any answer, determines at the date of the hearing that the procedural requirements of the EDPL have been fully complied with, it then issues an order granting the petition. See id. § 402(B)(5). The "acquisition of the property" finally becomes "complete" when the condemnor files the court's order, along with the acquisition map, with the county clerk or register. Id.

In this case, the above-described process is in its embryonic stages. ESDC has held the public hearings required by EDPL § 203, and, just four days ago, published its

Determination and Findings pursuant to EDPL § 204. The time for filing challenges under EDPL § 207—challenges that plaintiffs acknowledge are inevitable (Tr. of Proc. at 14:19-25, 17:4-10)—has only just begun to run. As explained above, those challenges will take substantial time to resolve. The initiation (let alone conclusion) of any Article 4 proceeding unquestionably is a long way off. Any number of eventualities, foreseeable and not, might arise in the meantime to derail the planned project and dispel plaintiffs' fears that their properties will be taken.[14]

The concerns underlying the rule that a Public Use Clause challenge cannot be ripe until the condemnor at least has initiated proceedings to obtain title to the properties are illustrated by the decision in Port Chester Yacht Club, Inc. v. Iasillo, 614 F. Supp. 318 (S.D.N.Y. 1985), one of the few cases from this Circuit addressing the ripeness issue raised here. The court in Port Chester Yacht Club dismissed a claim of taking for private use even though the condemnor (the Village of Port Chester) had already held public hearings on the proposed condemnation and had adopted a redevelopment plan. Id. at 321-22.[15] "The simple approval of a redevelopment plan," the court explained, "can not [sic] be considered a deprivation of [plaintiff's] constitutional rights." Id. at 321.[16] Although the court acknowledged that the

---

[14] For example, the Public Authorities Control Board ("PACB"), whose three voting members must unanimously approve the Project pursuant to section 51 of the Public Authorities Law, N.Y. Pub. Auth. Law § 51 (McKinney 2004), has yet to vote on the Project. A negative vote by even one member would effectively terminate the Project. Indeed, it has been reported that opponents of the Project are seeking to delay PACB consideration until after Governor-elect Eliot Spitzer's representative replaces Governor Pataki's representative on the Board in the New Year. See Nicholas Confessore, Last-Ditch Maneuvering on Atl. Yards Project, N.Y. Times, Dec. 7, 2006, at B-3 (Ex. G).

[15] Plaintiffs, in their letter to the Court dated December 6, 2006, asserted that Port Chester Yacht Club involved only "procedural due process claims." (December 6 Letter at 3 (their emphasis).) That is incorrect. See 614 F. Supp. at 320 ("The Yacht Club maintains, inter alia, that . . . the Village has no right to exercise its eminent domain power because the redevelopment plan is really a private, not a public use.").

[16] Another judge in the Southern District of New York summarily held, in the same year Port Chester Yacht Club was decided, that a private use takings claim was ripe even though all that had occurred was the publication of findings pursuant to EDPL § 204. See Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp., 605 F. Supp. 612, 615 (S.D.N.Y. 1985) (Motley, J.) ("[C]ondemnation is imminent and so is plaintiffs' alleged loss."). *(cont'd)*

plaintiff would not need to wait until it was actually evicted before bringing suit, it explained that there must be at least "'a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property.'" Id. at 321 n.5 (quoting City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 255, 321 N.Y.S.2d 345, 357 (1971)).

Port Chester Yacht Club holds that the condemnor's mere adoption of a redevelopment plan—a step that in this case occurred only seven days ago—is insufficient to support a justiciable takings claim. While the court in that case did not specify exactly what would qualify as a "legal interference" with the property at issue sufficient to render the claim ripe, other federal courts have filled in that gap. In Hemperly, 708 F. Supp. 1247, for example, the federal district court dismissed a § 1983 challenge to a proposed taking of private land to build a new office building. Id. at 1250-51. Among the plaintiffs' claims was that their property was about to be taken in violation of the Public Use Clause. Defendants, however, had yet to institute proceedings seeking transfer of title. The court held that the takings claim was not ripe: "If, as plaintiffs allege, there is no public purpose that would be served by a taking of their property, plaintiffs can raise that issue if and when defendants actually attempt to take their property." Id. at 1250.[17] See also Woodfield Equities, L.L.C. v. Inc. Vill. of Patchogue, 357 F.

(cont'd from previous page)

The Second Circuit, in affirming dismissal of the claim on the merits, did not endorse the district court's ripeness analysis. See 771 F.2d 44 (1985). Because Second Circuit law before 1998 permitted consideration of the merits without prior resolution of a challenge to the court's subject-matter jurisdiction, cf. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93-94 (1998) (citing Second Circuit case as illustrative of erroneous "hypothetical jurisdiction" approach), the appellate panel's decision to resolve the case on the merits cannot be construed as an implied endorsement of the district court's ripeness analysis. ESDC respectfully submits that Judge Motley's reasoning with respect to ripeness ought not to be followed, as it is against the weight of authority. See, e.g., Eddystone Equip., 1988 WL 52082, at *1 n.3 (specifically declining to follow the district court's decision in Rosenthal); Hemperly, 708 F. Supp. at 1250 (same).

[17] The court in Hemperly, like the courts in many cases of this kind, relied not just on general ripeness principles but also on the Supreme Court's decision in Williamson County as grounds for dismissing the plaintiffs' claims *(cont'd)*

Supp. 2d 622, 632 (E.D.N.Y. 2005) (stating that the mere decision to condemn was "not a final action" for ripeness purposes, and federal statutory challenges to a proposed exercise of eminent domain would not be ripe at least until the Appellate Division of the New York Supreme Court had approved the condemnation under EDPL § 207), aff'd, 156 F. App'x 389 (2d Cir. 2005); Aaron v. Target Corp., 269 F. Supp. 2d 1162, 1176 (E.D. Mo. 2003) (holding that private use takings claim was ripe because the condemnor "made a final decision to take the Properties and initiated suit to do so") (emphasis added), rev'd on other grounds, 357 F.3d 768 (8th Cir. 2004); Schiessle, 525 F. Supp. at 769 n.5 (holding that § 1983 claims arising from exercise of eminent domain were sufficiently ripe at least for application of abstention doctrines because, by the time the court ruled on the motion to dismiss, proceedings for transfer of title had been instituted).

Other cases go even further. In Eddystone Equipment, 1988 WL 52082, for example, a district court in Pennsylvania concluded that a takings claim nearly identical to the one in this case "would not be 'ripe' before the state court rendered final approval of the condemnation." Id. at *2 (emphasis added). And the court in HMK Corp. v. Chesterfield County, 616 F. Supp. 667 (E.D. Va. 1985), dismissed a private use takings claim for lack of ripeness even though title had already vested in the condemnor. Id. at 669-70. Not until title had vested indefeasibly would the claim be ripe, the court said. Id. See also Urban Developers LLC v. City of Jackson, 468 F.3d 281, 294-95 (5th Cir. 2006) (physical takings claim arising out of exercise of eminent domain was not ripe because there had been no "actual government confiscation or physical occupation," and a "mere threat" "to use the City's legal powers" of

---

(cont'd from previous page)

in that case. 708 F. Supp. at 1250. After observing that no taking was imminent because "condemnation proceedings have not even been initiated," id., the court further concluded that the takings claim was not ripe under Williamson County's second prong because plaintiffs had yet to pursue available state-court avenues for asserting their private use claim. See id. As explained above (see n.12, supra) ESDC does not rely on the latter part of the Hemperly court's analysis.

condemnation was insufficient); Residents of the New Ritz Hotel v. City of Chicago, No. 99 C 6826, 2001 WL 58958, at *7 (N.D. Ill. Jan. 22, 2001) (observing, after holding that abstention was appropriate, that "[t]here also may be a question of ripeness in that the state court condemnation proceedings are not final").

These cases make clear that section 1983 challenges to the exercise of eminent domain at a minimum do not ripen until a proceeding to transfer title has been instituted. Here, of course, no such proceeding has been filed pursuant to EDPL Article 4 or will be filed for at least many months. Plaintiffs' claims therefore are not ripe and should be dismissed.

II. EVEN IF THE COMPLAINT IS JUSTICIABLE, THE COURT MUST ABSTAIN.

Plaintiffs, in bringing this federal suit, made the calculated decision to file early in order to avoid application of the abstention doctrines. That gamble failed; not only did it result in the filing of a premature action, but abstention is no less appropriate here than it would have been had plaintiffs waited for their grievances to ripen.

"[T]here are some classes of cases in which the withholding of authorized equitable relief because of undue interference with state proceedings is 'the normal thing to do.'" New Orleans Pub. Serv., Inc. v. Council of New Orleans ("NOPSI"), 491 U.S. 350, 359 (1989) (citation omitted). As explained further below, one such class of case is that involving federal challenges to eminent domain proceedings. See, e.g., Forest Hills Util. Co. v. City of Heath, 539 F.2d 592, 595 (6th Cir. 1976) (noting that "eminent domain cases [are] particularly appropriate for abstention"); Ahrensfeld, 528 F.2d at 198 ("Several federal courts have opined that state eminent domain proceedings should not be interfered with by federal courts because their local nature makes interference unwise."). In such cases, considerations of comity—"includ[ing] 'a proper respect for state functions, a recognition of the fact that the entire country is made up of a

Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways,'" Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431 (1982) (quoting Younger v. Harris, 401 U.S. 37, 44 (1971))—counsel against exercise of federal jurisdiction.

A. Abstention Is Required Under Younger v. Harris.

Not least because plaintiffs have filed this suit with the express purpose of enjoining state condemnation proceedings, abstention under Younger v. Harris, 401 U.S. 37, and its progeny is appropriate. Younger abstention is warranted when (1) there are ongoing state proceedings that (2) implicate important state interests and (3) present the federal plaintiffs with an adequate opportunity to raise their constitutional challenges. See, e.g., Mateo v. Phillips, 361 F. Supp. 2d 328, 330 (S.D.N.Y. 2005); Broadway 41st St. Realty, 733 F. Supp. at 740. Here, all three criteria are met.

1. Ongoing Proceedings

Although Younger itself held that federal courts should abstain from enjoining pending state criminal proceedings, see 401 U.S. at 45, the rule has since been extended to prohibit federal interference with state civil proceedings, including administrative proceedings that are "judicial in nature." Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 627 (1986); see also Christ the King Reg'l High Sch. v. Culvert, 815 F.2d 219, 224 n.5 (2d Cir. 1987) ("[T]he Younger doctrine has been extended to pending state administrative proceedings as long as there is the potential for state court review of the federal litigant's constitutional claims."). Moreover, it matters not whether the state proceeding was initiated before or after the filing of the federal complaint; the critical question is whether the relevant

state proceedings were "initiated 'before any proceedings of substance on the merits have taken place in the federal court.'" Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 238 (1984) (quoting Hicks v. Miranda, 422 U.S. 332, 349 (1975)); see also Franza v. Abrams, 695 F. Supp. 747, 750 (S.D.N.Y. 1988).

Applying these principles, there is no question that plaintiffs' federal suit seeks interference with "ongoing" state proceedings. First, one or more related proceedings in state court are expected to be filed in a matter of days, and any such action will trigger Younger abstention. As all parties here acknowledge, it is highly likely that individuals affected by ESDC's proposed use of eminent domain will, by January 11, 2007, file in the Appellate Division of the New York State Supreme Court a case pursuant to EDPL § 207. That suit will raise the identical issue presented here—viz., whether the project at issue serves a public purpose—and will be brought by plaintiffs whose interests unquestionably are "intertwined" with those of plaintiffs here. See Spargo, 351 F.3d at 81-82.[18] That such proceeding will have

---

[18] Plaintiffs suggested in their letter to the Court of November 20, 2006 that abstention in favor of any EDPL § 207 proceeding would not be appropriate because such a proceeding is a "'state judicial proceeding[] reviewing legislative or executive action.'" (Plaintiffs' November 20 Letter at 3 (quoting NOPSI, 491 U.S. at 368).) Quite apart from the fact that plaintiffs' assertion, if accepted, would require wholesale reversal of every one of the myriad cases in which federal courts have abstained in favor of pending eminent domain proceedings, the assertion rests on a misreading of NOPSI. The question in NOPSI was whether, once administrative proceedings had been completed and an agency had finally promulgated a regulation, a stand-alone proceeding in state court contesting the legality of the regulation was one in the face of which the federal court ought to abstain under Younger. See id. The Court held that it was not because (1) the administrative and judicial proceedings in question were not part of a single "unitary process," and (2) to apply Younger in all cases seeking judicial review of just any administrative action would be to "make a mockery of the rule that only exceptional circumstances" justify abstention. NOPSI, 491 U.S. at 368-70.

Courts applying NOPSI have not hesitated to invoke Younger abstention in deference to proceedings in state court reviewing administrative action, so long as those proceedings independently implicate important state interests. See, e.g., San Remo Hotel v. City & County of San Francisco, 145 F.3d 1095, 1103-04 (9th Cir. 1998) (applying Younger abstention to mandamus action filed in state court); Paul v. New York State Dep't of Motor Vehicles, No. 02 Civ. 8839, 2003 WL 253065, at *1 (S.D.N.Y. Feb. 3, 2003) (abstaining in favor of pending administrative proceeding when plaintiff would have opportunity for judicial review under Article 78). Moreover, NOPSI's admonition plainly does not apply where, as here, the judicial proceeding in question is part of a "unitary process" that begins with the administrative proceedings. Cf. 491 U.S. at 369. The EDPL § 207 proceeding is merely one step in an ongoing process that began with notice of a public hearing and will

(cont'd)

been filed after this federal action was initiated is not legally dispositive; contrary to plaintiffs' evident belief (cf. Tr. of Proc. at 10:24-25), application of Younger does not turn on any rule of first filing. Because the doctrine is instead concerned, at its core, with federal-state comity, the appropriate question is whether the state proceeding was "initiated 'before any proceedings of substance on the merits have taken place in the federal court.'" Midkiff, 467 U.S. at 238 (emphasis added) (quoting Hicks, 422 U.S. at 349); see, e.g., M&A Gabaee v. Cmty. Redevelopment Agency of Los Angeles, 419 F.3d 1036, 1041 (9th Cir. 2005) ("Hicks and Hawaii Housing Authority establish that Younger abstention applies even when the state action is not filed until after the federal action, as long as it is filed before proceedings of substance on the merits occur in federal court."); Aaron, 357 F.3d at 775; Schiessle, 525 F. Supp. at 769 & n.5 (abstaining from federal challenge to exercise of eminent domain even though federal complaint was filed prior to the state court condemnation action); Franza, 695 F. Supp. at 750.

No "proceedings of substance on the merits" have yet occurred before this Court or will have occurred by the time the state-court action is filed and this Court issues its ruling on defendants' motions. Where, as here, the only activity in the federal case is the briefing of motions to dismiss, the later-filed state court proceeding must be deemed "ongoing" for purposes of Younger. See, e.g., Franco v. District of Columbia, 422 F. Supp. 2d 216, 222 (D.D.C. 2006) (holding that Younger abstention was appropriate when defendants had twice moved to dismiss (with an intervening amendment to the complaint) because the "federal action ha[d] not advanced to the merits"); Stein v. Legal Adver. Comm. of Disciplinary Bd., 272 F. Supp. 2d 1260, 1271 (D.N.M. 2003) (holding that there had been no "proceedings of substance on the

---

(cont'd from previous page)

(ESDC hopes) end with ESDC's filing of an acquisition map with the county clerk. Indeed, plaintiffs now acknowledge that an EDPL Article 4 proceeding, which involves judicial review of agency action no less than does the section 207 proceeding, would trigger Younger abstention. (Plaintiffs' December 6 Letter at 3.) There is no principled basis for treating the section 207 proceeding differently.

merits" in the federal action because there had been only limited discovery and no ruling as yet on the merits of pending motions for summary judgment); cf. CECOS Int'l, Inc. v. Jorling, 895 F.2d 66, 69, 72 (2d Cir. 1990) (affirming district court's decision not to abstain under Younger in circumstances where state administrative proceeding was filed after federal court had already received memoranda and evidence on, and had heard oral argument on, a motion for preliminary injunction (which was converted to a summary judgment motion), and had already heard and granted motions to intervene).

In sum, the expected EDPL § 207 case will qualify as an "ongoing" state proceeding for Younger purposes. But the same result would obtain even if no proceeding were pending in state court at the time the Court ruled on this motion. State EDPL proceedings more generally have been "ongoing" since ESDC gave notice pursuant to EDPL § 202 that it would hold public hearings to consider the Atlantic Yards project. See, e.g., Didden v. Vill. of Port Chester, 304 F. Supp. 2d 548, 566 (S.D.N.Y. 2004) (describing EDPL Article 2 "public use" determination by condemnor as "'part' of the ongoing Condemnation Proceedings"). These administrative proceedings, which are "judicial in nature," are no less deserving of comity than are pending state judicial proceedings. Dayton Christian Sch., 477 U.S. at 627; see, e.g., Aaron, 357 F.3d at 775-76 (abstaining under Younger; observing that "condemnation proceeding . . . had been initiated" by passage of an ordinance that authorized condemnation and therefore "had been ongoing for more than five months" prior to filing of federal complaint); JMM Corp. v. District of Columbia, 378 F.3d 1117, 1126-27 (D.C. Cir. 2004) (holding that Younger barred interference with proceedings before zoning authority, even though judicial review of those proceedings in state court was not sought until after federal action was filed); Ebiza, Inc. v. City of Davenport, 434 F. Supp. 2d 710, 721-22 (S.D. Iowa 2006) (holding that Younger barred

interference with City's consideration of plaintiffs' liquor license application); City of Chesapeake v. Sutton Enters., Inc., 138 F.R.D. 468, 473 (E.D. Va. 1990) (holding that a Notice of Violation issued by the City "initiated state and local administrative proceedings, which included hearing and appeal provisions, judicial in nature, and therefore constituted the commencement of state proceedings prior to federal court involvement"). As the Second Circuit has explained, even where the "primary mission" of the administrative proceeding is "fact-finding," the "ability to raise constitutional claims in subsequent 'state-court judicial review of [an underlying] administrative proceeding' is sufficient to provide plaintiffs with a meaningful opportunity to seek effective relief through state proceedings and bar federal courts from taking jurisdiction over the same claims while the state proceeding is pending." Spargo, 351 F.3d at 79-80.

This is not a case, moreover, in which the State has expressly stated that the administrative aspects of its eminent domain proceedings "are not part of, and are not themselves, a judicial proceeding." Midkiff, 467 U.S. at 238;[19] see Dayton Christian Sch., 477 U.S. at 627 n.2 (citing Midkiff for the proposition that "abstention may not be appropriate" "if state law expressly indicates that the administrative proceedings are not even 'judicial in nature'"). Quite to the contrary, the public hearings and determination and findings are absolutely integral to the state courts' adjudication, under both EDPL § 207 and EDPL § 402, of the legality of the proposed taking. Indeed, the EDPL § 203 hearing is the mechanism by which both proponents and opponents of a redevelopment project are supposed to make their record. The EDPL was enacted with the express purpose of creating an "exclusive procedure by which property shall be

---

[19] In Midkiff, abstention in deference to pending state administrative hearings was not warranted because a state statute specifically provided that such hearings "'shall not constitute any part of any action in condemnation or eminent domain.'" 467 U.S. at 238 (quoting Haw. Rev. Stat. § 516-51(b) (1976)).

acquired by exercise of the power of eminent domain in New York state" that would apply "uniformly . . . to any and all" such acquisitions. EDPL §§ 101, 104; see Jackson, 67 N.Y.2d at 417-18, 494 N.E.2d at 436, 503 N.Y.S.2d at 305 (describing integrated procedure). When New York courts speak of "condemnation proceedings" under the EDPL, they mean not just those proceedings that are filed before state courts under EDPL §§ 207 and 402, but also those administrative proceedings that precede judicial participation. See, e.g., J.F. O'Healy Constr. Co. v. Town of Islip, 152 A.D.2d 573, 573, 543 N.Y.S.2d 959, 959 (2d Dep't 1989), Mitchell v. Common Council of Oswego, 80 A.D.2d 722, 722-23, 437 N.Y.S.2d 144, 144 (4th Dep't 1981); see also First Broad. Corp. v. City of Syracuse, 78 A.D.2d 490, 494, 435 N.Y.S.2d 194, 196-97 (4th Dep't 1981) (describing "uniform procedure" under the EDPL and observing that it "is exactly the stuff of procedural due process").[20]

However one looks at it, then, Younger's first criterion is met.

2. Important State Interests

Turning to the second inquiry under Younger, it is beyond cavil that the state proceedings here implicate important state interests. The Supreme Court recognized long ago that the power of eminent domain is "intimately involved with sovereign prerogative," Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959), and courts in the Second Circuit to have considered the issue have concluded that, for that reason, eminent domain

---

[20] Plaintiffs missed the mark when, in their letter to the Court of November 20, 2006, they asserted that the administrative proceedings under the EDPL could not be considered as part of the Younger analysis because those proceedings were "administrative and not judicial in nature." (Plaintiffs' November 20 Letter at 3 (citing NOPSI, 491 U.S. at 367-70).) The question is not whether the proceedings are "administrative" (of course they are), but whether they are more "judicial" in character than they are "legislative." See NOPSI, 491 U.S. at 370-71. Applying that test, and in the absence of an express instruction of state law to the contrary, cf. Midkiff, 467 U.S. at 238, the EDPL proceedings plainly qualify as "judicial in nature" because their purpose is not to create new law but to develop a record in preparation for application of settled law to a distinct set of facts. See NOPSI, 491 U.S. at 370-71.

proceedings qualify as sufficiently implicative of important state interests to trigger Younger abstention. See Mateo, 361 F. Supp. 2d at 330; Didden, 304 F. Supp. 2d at 563; Didden v. Vill. of Port Chester, 322 F. Supp. 2d 385, 388 (S.D.N.Y. 2004), aff'd, 173 F. App'x 931 (2d Cir. 2006); Broadway 41st St. Realty, 733 F. Supp. at 742.

3. Adequacy Of Opportunity To Litigate

Finally, plaintiffs of course will have the opportunity to press their public use takings claim, as well as any other federal constitutional challenge, during the ongoing EDPL proceeding. Section 207 of the EDPL directs that, if so requested, the state court must decide not only whether "the [condemnation] proceeding was in conformity with the federal and state constitutions," § 207(C)(1), but also, more specifically, whether "a public use, benefit or purpose will be served by the proposed acquisition." § 207(C)(4). The Second Circuit, moreover, has confirmed that the availability and scope of the review under section 207 is entirely consistent with due process, particularly as applied to claims that property is being taken for private and not public use. See Brody v. Vill. of Port Chester, 434 F.3d 121, 134 (2d Cir. 2005) ("We believe that the review procedure provided for by the EDPL is appropriate given the narrow role that the courts play in ensuring that the condemnation is for a public use.").[21]

B. Abstention Is Also Required Under Burford v. Sun Oil.

Even if the Court decides that it should not abstain under Younger, it should nonetheless abstain under Burford v. Sun Oil Co., 319 U.S. 315 (1943). The "Burford doctrine," as the Supreme Court has described it, provides that "[w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings

[21] Whether the relevant ongoing proceeding is the administrative proceeding under the EDPL or the section 207 proceeding that is about to be filed makes no difference in analyzing the adequacy of opportunity to raise the federal claims. "[I]t is sufficient . . . that constitutional claims may be raised in state-court judicial review of the administrative proceeding." Dayton Christian Sch., 477 U.S. at 629 (citation omitted).

or orders of state administrative agencies . . . where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" NOPSI, 491 U.S. at 361 (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)). No pending state judicial proceeding is required for Burford abstention to apply.

All the elements of the Burford doctrine are met here. As explained above, New York has made a concerted effort to "establish a coherent policy" governing exercises of the power of eminent domain. The whole point of the EDPL was to rationalize what had become an unmanageable regulatory scheme—"to supplant a mosaic of more than 150 scattered provisions with a uniform procedure." Jackson, 67 N.Y.2d at 417, 494 N.E.2d at 436, 503 N.Y.S.2d at 305. To this end, the EDPL was intended to be the "exclusive" avenue for challenges to exercises of eminent domain. EDPL § 101. And the efforts were not limited to an attempt at procedural coherence; the focus of the law was, more substantively, "to insure that an agency does not acquire property without having made a reasoned determination that the condemnation will serve a valid public purpose." 67 N.Y.2d at 417-18, 494 N.E.2d at 436, 503 N.Y.S.2d at 305; see EDPL § 101 (setting forth, as one of the EDPL's purposes, "to give due regard to the need to acquire property for public use as well as the legitimate interests of private property owners"). That the State's interest in rationalizing and centralizing the eminent domain laws qualifies as a "matter of substantial public concern" cannot, for reasons explained in Point II-A-2, be questioned. Nor can it be doubted that a federal court's interference in pending EDPL

proceedings would frustrate the State's efforts at maintaining an exclusive, efficient, and coherent process for evaluating challenges to eminent domain.[22]

Indeed, this case is in all relevant respects indistinguishable—save for the presence here of ongoing state proceedings—from a similar case from the Eastern District of Pennsylvania in which the court abstained under Burford. See Coles v. City of Philadelphia, 145 F. Supp. 2d 646, 652-53 (E.D. Pa. 2001), aff'd, 38 F. App'x 829 (3d Cir. 2002). There, as here, the claims in the federal action "ar[o]se out of the [condemnor's] decision to exercise its police powers under state law to begin eminent domain proceedings." 145 F. Supp. 2d at 649. Notwithstanding the absence of any pending state court proceeding, the court abstained because "significant state policies and administrative concerns underl[ie] a state's eminent domain proceedings," and Pennsylvania's Eminent Domain Code, like the EDPL, provided "'a complete and exclusive procedure and law to govern all condemnations of property for public purposes and the assessment of damages therefor.'" Id. at 652 (quoting text of Code); see also Grode v. Mut. Fire, Marine & Inland Ins. Co., 8 F.3d 953, 956 (3d Cir. 1993) ("Burford abstention is usually applied to [inter alia] state eminent domain procedures." (citations omitted)); Frempong-Atuahene v. Redevelopment Auth., No. 98-0285, 1999 WL 167726, at *4 (E.D. Pa. Mar. 25, 1999) (dismissing constitutional challenge to eminent domain because Pennsylvania's Eminent Domain Code was comprehensive and the "essentially local character of th[e] dispute and the availability of constitutional remedies in state court argue strongly against federal intervention"), aff'd mem., 211 F.3d 1261 (3d Cir. 2000). The Court should reach the same result here.

---

[22] It bears emphasizing that respect for the State's carefully crafted process does not entail withdrawal of all federal review. A plaintiff who brings a federal claim in state court retains the right to petition the U.S. Supreme Court for certiorari.

III. PLAINTIFFS HAVE FAILED TO STATE ANY CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Wholly apart from lack of ripeness and the need for abstention, the complaint should be dismissed for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6). Of the three constitutional claims asserted here, not one pleads facts sufficient to survive a motion to dismiss.

A. The Takings Claim

The plain language of the Takings Clause makes clear that, provided just compensation is paid, a taking is permissible if it is for a "public use." U.S. Const., Amdt. 5. Here, the Court need look no further than the allegations of plaintiffs' complaint and the contents of the several documents incorporated therein to see that ESDC has identified a number of legally sufficient public purposes that will be served by the Atlantic Yards Project. These include the development of thousands of new affordable housing units, improvements to mass transit, creation of new public open space, and creation of a new sports arena and recreational facilities. See, e.g., Kelo v. City of New London, 125 S. Ct. 2655, 2673 (2005) (O'Connor, J., dissenting) (identifying a "stadium" as a project obviously serving a public use); Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 422-23 (1992) (holding that taking to facilitate Amtrak's rail service did not violate the Public Use Clause); Pennell v. City of San Jose, 485 U.S. 1, 12 (1988) (noting that efforts to relieve housing market pressures were within State's police powers); Southeast Land Dev. Assocs., Ltd. v. District of Columbia, No. Civ.A. 05-1413, 2005 WL 3211458, at *5 (D.D.C. Nov. 1, 2005) (holding that taking to build a baseball stadium did not violate the Public Use Clause); Pastan v. City of Melrose, 601 F. Supp. 201, 202-03 (D. Mass. 1985) (observing that taking for a "park" was "for a clearly public use").

But chief among the Project's aims is the elimination of blight. (Compl. ¶¶ 85, 94-102.) "Nearly half of the Project site's acreage is comprised of a portion of the Atlantic Terminal Urban Renewal Area ("ATURA") designated [as blighted] by New York City in 1968." (Id. ¶ 51.) Moreover, "the ATURA has undergone ten amendments (the most recent approved by the City Council in April 2004)." (Id. ¶ 53.) Although plaintiffs allege that "the City of New York" has never designated what they describe as the "Takings Area" (an area that includes their properties, see id. ¶ 51) as part of the blighted site, they acknowledge that ESDC, pursuant to its statutory authority and obligation, has done so. (Compare id. ¶¶ 54, 95 with id. ¶¶ 96-102.) They even admit that at least part of the Takings Area "could be considered 'blighted.'" (Id. ¶ 100.)

1. Controlling Precedent Requires Dismissal.

The City's and ESDC's blight findings place this case on all fours with two controlling precedents: Berman v. Parker, 348 U.S. 26 (1954), and Rosenthal & Rosenthal Inc. v. New York State Urban Development Corp., 771 F.2d 44 (2d Cir. 1985). In Berman, the Supreme Court was presented with a claim that the taking of private, non-blighted property as part of a broader redevelopment plan targeted at a blighted area in Washington, D.C., violated the Public Use Clause. 348 U.S. at 31. The condemning agency had, pursuant to a broad legislative mandate, designated for redevelopment a site that included a department store in fine condition. See id. The agency's plan was to take the store and transfer it to a private developer. Id. The petitioner, the owner of the store, argued that the condemning agency could not simply take private property "from one businessman for the benefit of another businessman." Id. at 33.

The Court, however, flatly rejected the petitioner's argument. The legislature "and its authorized agencies" had decided that the taking was needed to improve a blighted area,

and that determination was "well-nigh conclusive." Id. at 32-33; see id. at 33 ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."). "The role of the judiciary in determining whether [the power of eminent domain] is being exercised for a public purpose," the Court explained, "is an extremely narrow one." Id. at 32. That the petitioner's property was not actually blighted or even contributing to a condition of blight changed the analysis not at all; the Court refused to interfere with the condemning agency's decision to "attack the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis." Id. at 34. In a passage that has particular resonance here, the Court explained that "[i]t is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." Id. at 35-36.[23]

Thirty years after Berman was decided, the Second Circuit was faced with a claim similar to the one in that (and this) case. See Rosenthal, 771 F.2d at 45. The plaintiffs in Rosenthal were the lessee and owner of a concededly non-blighted building located in an area that the New York State Urban Development Corporation ("UDC") had designated for redevelopment. Id. The "primary goal" of the redevelopment project, as described by UDC, was "the elimination of the physical, social and economic blight that ha[d] afflicted the Times Square area of Manhattan." Id. (citing Nat'l Res. Def. Council, Inc. v. City of New York, 672 F.2d 292,

[23] Although the Berman Court used the term "legislative branch," Congress had in fact delegated its power of eminent domain to the District of Columbia Redevelopment Land Agency. See id. at 29. Hence the Court's admonition, elsewhere in its opinion, that federal courts defer to "Congress and its authorized agencies." Id. at 33, 34.

294 (2d Cir. 1982), in turn citing UDC's final determination and findings). As part of the project, UDC had determined to condemn plaintiffs' property and turn it over to a pre-selected private developer (and alleged close friend and political supporter of Mayor Edward Koch) for construction of new office buildings. See id.; see also Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp., 605 F. Supp. 612, 616 (S.D.N.Y. 1985). Plaintiffs argued that because the redevelopment project was "being enlarged to take in desirable, non-blighted property for the sole purpose of generating additional profit" for the private developer, the taking of their property violated the Public Use Clause. Id. at 616.

Like the Supreme Court before it, the Second Circuit gave short shrift to that argument. "[T]he condemnation of appellants' building to make way for the redevelopment of the blighted area is a classic example of a taking for a public use or purpose within the law of eminent domain," the court explained. Rosenthal, 771 F.2d at 46. That the property was not itself blighted and would "be transferred to private developers" made "no difference" under the Supreme Court's precedents; "the power of eminent domain is merely the means to the end" and "'community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.'" Id. (quoting Berman, 348 U.S. at 35). The taking was permissible, the court held, because it was "'rationally related to a conceivable public purpose.'" Id. (quoting Midkiff, 467 U.S. at 241); see also Didden, 304 F. Supp. 2d at 559-60 (asserted public purpose of "redevelop[ing] the blighted downtown area of Port Chester" could not be transformed into a "private purpose" so long as the taking was "rationally related to the purpose of the overall Redevelopment Project"), aff'd, 173 F. App'x 931.

Applying Berman and Rosenthal, plaintiffs' takings claim simply cannot survive a motion to dismiss. Here, as in those cases, the condemning agency has designated an area within

its jurisdiction for redevelopment based, inter alia, on a determination of blight. Just like in those cases, plaintiffs in this one assert that extension of the redevelopment area to cover their property is impermissible because their own property is not blighted. And, as in those cases, plaintiffs here claim that the taking of their property is really intended to benefit not the public, but a private developer. In light of all these critical parallels, the result should be the same here as it was in Berman and Rosenthal.

2. Kelo Did Not Overrule Berman And Rosenthal.

Judging by the manner in which plaintiffs have framed their complaint, however, they evidently believe that the Supreme Court's recent decision in Kelo, 125 S. Ct. 2655, overruled Berman and Rosenthal and breathed new life into the Public Use Clause. Specifically, plaintiffs appear to think that if they allege that the Atlantic Yards Project was conceived by and designed principally to benefit a private developer, and is of only "incidental benefit" (Compl. ¶ 132) to the public, their complaint states a claim under the Public Use Clause. That belief is unfounded.

Kelo involved a Public Use Clause challenge to the City of New London's attempt to condemn private homes in furtherance of an economic redevelopment project "intended . . . to capitalize on the arrival of" a major pharmaceutical research facility adjacent to the redevelopment area. In place of the homes, the condemning authority planned to build some unspecified structure or lot supportive of the general project. See 125 S. Ct. at 2659-60. The Court took certiorari in Kelo to answer a single, discrete question not presented in Berman, Rosenthal, or this case: "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment.'" 125 S. Ct. at 2661 (emphasis added).

In answering that question in the affirmative, the Court acknowledged a key factual distinction between the case before it and Berman: "Those who govern the City [of New London] were not confronted with the need to remove blight in" the area designated for redevelopment. Id. at 2664-65. The Court also noted plaintiffs' argument that "using eminent domain for economic development impermissibly blurs the boundary between public and private takings." Id. at 2666. Nonetheless, the Court explained, under the broad deferential standards enunciated in Berman and Midkiff, economic development, without more, did indeed qualify as a permissible public use. Id. at 2665. In view of this holding, Kelo has been perceived as sounding the death knell for judicial review under the Public Use Clause. See, e.g., Alberto Lopez, Weighing and Reweighing Eminent Domain's Political Philosophies, 41 Wake Forest L. Rev. 237, 290 (2006) ("Kelo represents the requiem for the impediment created by the public use clause.").

Plaintiffs, however, appear to read Kelo—or at least Justice Kennedy's concurring opinion in the case—as if it extended them a lifeline. Justice Kennedy, after stating that he concurred not just in the judgment of the Court but in its opinion as well, see 125 S. Ct. at 2669, added his own separate thoughts. In his view, "'[w]here the purpose [of a taking] is economic development and that development is to be carried out by private parties or private parties will be benefited, the court must decide if the state public purpose—economic advantage to a city sorely in need of it—is only incidental to the benefits that will be conf[erred] on private parties of a development plan.'" Id. at 2669 (Kennedy, J., concurring) (emphasis added) (quoting lower court's decision). To make this decision a court should, according to Justice Kennedy, review the record to "inquir[e] into 'whether, in fact, the development plan is of primary benefit to . . . the developer,'" the condemnor's "awareness of [the area's] depressed economic condition," and

the type and timing of the private developer's involvement in the project. Id. (again quoting lower court).[24] Picking up on these dicta, plaintiffs have alleged here that "defendants intend to benefit FCRC" (Compl. ¶ 129), that the Project "was wholly conceived by FCRC" (id. ¶ 134(A)), and that the Atlantic Yards Project will have at most only "incidental" benefit to the public (id.¶ 132). They no doubt will argue that these allegations of official motivation, if proven true, support a claim under the Takings Clause.

But any such argument rests on a critical misreading of Kelo, which did not overrule Berman or Rosenthal. Whatever the meaning of Justice Kennedy's concurrence,[25] it has bearing only for those cases, like Kelo itself, in which the sole justification offered for the redevelopment plan is economic development. Justice Kennedy's thoughts about assessing official motivation and the degree of public benefit associated with a project in cases where, as he put it, "'the purpose [of a taking] is economic development and that development is to be carried out by private parties or private parties will be benefited,'" 125 S. Ct. at 2669 (quoting lower court) (alteration in original), do not alter the general rule, reaffirmed by the opinion of the Court that Justice Kennedy joined in full, that "intrusive scrutiny" into legislative motives generally is improper in evaluating claims under the Public Use Clause. See id. at 2662-64.

---

[24] Kelo, like most cases involving Public Use Clause challenges, was decided initially in the state courts. The first involvement of any federal court began when the Supreme Court granted certiorari. See 125 S. Ct. at 2660-61. Under the Connecticut eminent domain laws, in contrast to Article 2 of the EDPL, there is no provision for development of a "record" (or even any statutory provision mandating notice or a public hearing) in advance of judicial participation. See Berne v. Town of Stratford, 583 A.2d 136, 137 (Conn. App. Ct. 1990). Accordingly, the "record" to which Justice Kennedy refers in his concurring opinion is the record compiled before the state court of first instance.

[25] As Justice O'Connor's dissenting opinion in Kelo observed, and as commentators have echoed, the meaning of the concurrence is very difficult indeed to discern. See 125 S. Ct. at 2676 (O'Connor, J., dissenting) ("Whatever the details of Justice Kennedy's as-yet-undisclosed test, it is difficult to envision anyone but the 'stupid staff[er]' failing it."); see also, e.g., James W. Ely, "Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners, 2005 Cato Sup. Ct. Rev. 39, 59 (2004-2005) ("At best, Kennedy's concurrence suggests some narrow and ill-defined role for the federal courts in reviewing 'public use' in particular situations.").

If there were any doubt on this point, the Second Circuit's post-Kelo decision in Brody v. Village of Port Chester, 434 F.3d 121 (2d Cir. 2005), resolves it definitively. The plaintiff in Brody, a property owner who objected to the Village of Port Chester's condemnation of his property "for use in a large-scale municipal redevelopment project," 434 F.3d at 123, argued that the eminent domain procedure of the EDPL violated his federal due process rights in a number of respects. See id. Among his claims was that the state court review of the project's asserted public purpose, afforded under EDPL § 207, was insufficiently robust. 434 F.3d at 123.

The Second Circuit, citing the limited scope of judicial review permitted under the Public Use Clause, rejected that argument. Although it acknowledged that judicial inquiry under section 207 was "limited to the record before the condemnor at the time" of the condemnor's determination and findings, it held that such truncated inquiry was "appropriate given the narrow role that the courts play in ensuring that the condemnation is for a public use." Id. at 134 (citing Midkiff, 467 U.S. at 242-43; Berman, 348 U.S. at 32; and Kelo, 125 S. Ct. at 2664). The review afforded under section 207 satisfied due process, the court explained, because plaintiffs asserting claims under the Public Use Clause simply are not entitled to a "detailed examination of the thought processes of those exercising the legislative prerogative" of eminent domain. Id. at 136.

What Brody, Berman, Rosenthal and even Kelo all make clear is that, at least outside the context of a redevelopment plan justified solely as a means of fostering economic development, the test for public use is an objective one that is satisfied so long as the condemnor's exercise of eminent domain is "'rationally related to a conceivable public purpose.'" Rosenthal, 771 F.2d at 46 (quoting Midkiff, 467 U.S. at 241) (emphasis added). Even assuming the truth of all plaintiffs' allegations, there can be no question but that that test is

satisfied here. Half of the redevelopment area (by plaintiffs' own calculations) has been slated for urban renewal for nearly forty years, and ESDC has determined that the balance of the area also is blighted. ESDC has also determined that numerous other undeniably legitimate public purposes—including the development of thousands of new affordable housing units, improvements to mass transit, creation of new public open space, and creation of a new sports arena and recreational facilities—will be served by the Project. Even if plaintiffs are correct that the Atlantic Yards Project was conceived by (and motivated by a desire to confer a benefit on) a private developer, and that their own properties are not blighted, those "facts" do not affect the analysis under Berman and Rosenthal. Plaintiffs' takings claim must therefore be dismissed under Fed. R. Civ. P. 12(b)(6).

B. Equal Protection And Due Process

Although plaintiffs have conceded that this case is "basically limited" to a claim brought under the Public Use Clause of the Fifth Amendment (Tr. of Proc. at 5:18-21), they have also asserted claims under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Like the takings claim, neither of the latter claims can survive a motion to dismiss.

Plaintiffs do not allege that the proposed taking rests on any suspect classification. Accordingly, their equal protection claim can succeed only if there is no "reasonably conceivable state of facts that could provide a rational basis for" the taking of their properties, as opposed to those of others. FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993). For the reasons given in the preceding section, plaintiffs cannot meet that test here; ESDC has, even by plaintiffs' own account (see, e.g., Compl. ¶ 85), articulated a number of rational bases for its

taking, including the elimination of blight, creation of affordable housing, building of a public arena, and economic development.[26]

Likewise, plaintiffs' due process claim does not withstand even the lightest of scrutiny. Any challenge to the sufficiency of the EDPL process or the degree of participation therein that plaintiffs were afforded is entirely foreclosed by the Second Circuit's decision in Brody. See 434 F.2d at 133 (holding that a takings plaintiff "has no constitutional right to participate in the [condemnor's] initial decision to exercise its power of eminent domain, and [that] the post-determination review procedure set forth in EDPL § 207 is sufficient" under the Due Process Clause).

Even putting Brody aside, plaintiffs' allegations are patently defective. First, the alleged "circumvent[ion]" of zoning and land use laws (Compl. ¶ 160) is specifically authorized by State law. See Waybro Corp. v. Bd. of Estimate, 67 N.Y.2d 349, 352, 502 N.Y.S.2d 707, 708 (1986). Second, plaintiffs offer no facts whatsoever to support the conclusory assertion that the 30-day interval between publication of the Draft Environmental Impact Statement and the August 23, 2006 public hearing was insufficiently lengthy for them to voice their objections to the Statement. Indeed, the complaint gives no indication of whether plaintiffs attended the

---

[26] In their December 6 letter to the Court, plaintiffs cited two Second Circuit cases that they said supported the view that "defendants' subjective motives" are "squarely at issue" under the Equal Protection Clause. (December 6 Letter at 2 n.1 (citing DeMuria v. Hawkes, 328 F.3d 704, 707 n.2 (2d Cir. 2003), and Giordano v. City of New York, 274 F.3d 740, 751 (2d Cir. 2001)).) Neither case is at all on point or even remotely helpful to plaintiffs. Both cases involved claims of "class of one" equal protection violations alleging that defendant(s) maliciously targeted a particular individual. No such claim is made here. The issue in DeMuria and Giordano, moreover, was whether, in addition to alleging a lack of rational basis for the complained-of action, the plaintiff also had to allege animus or ill motive. See DeMuria, 328 F.3d at 707 (stating that plaintiff had, in addition to alleging irrational behavior, also alleged intentional disparate treatment); Giordano, 274 F.3d at 751 (stating that even if no allegation of animus or ill motive is required, a "'class of one' plaintiff alleging an equal protection violation [must] show, not only 'irrational and wholly arbitrary' acts, but also intentional disparate treatment") (citation omitted). Accordingly, even if this were a class-of-one case and therefore properly evaluated under the DeMuria/Giordano framework, plaintiffs' motive allegations plainly would not save their equal protection claim; the claim would still have to be dismissed because there exists a conceivable rational basis for ESDC's exercise of eminent domain.

hearing, had any objections to the Statement, ever attempted to voice such objections, or (if they did) were prevented from doing so after the hearing date. Finally, the bare allegations that plaintiffs were denied a hearing to "meaningfully state their objections" and were otherwise subjected to an "empty, meaningless, process" (Compl. ¶ 160) are entirely unsupported. The most that is said about the hearings is that (1) "[m]any people"—not identified as plaintiffs themselves—"wishing to attend [the first hearing] could not get in and most wishing to speak were not allowed to do so" (id. ¶ 80), and (2) the hearings were scheduled at inconvenient times (id. ¶ 81). Even if Brody had not foreclosed such complaints (and it plainly has), these assertions are far too vague to state a claim under the Due Process Clause.

CONCLUSION

For the foregoing reasons, the ESDC Defendants respectfully request that the Court dismiss the complaint in its entirety pursuant to Fed. R. Civ. P. 12(b)(1) or, in the alternative, Fed. R. Civ. P. 12(b)(6).

DATED: December 15, 2006

Respectfully submitted,

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: _____
Douglas M. Kraus (DK 7497)
Preeta D. Bansal (PB 9452)

Four Times Square
New York, NY 10036
(212) 735-3000

Attorneys for Defendants ESDC and Charles A. Gargano