

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

PETER WILLIAMS ENTERPRISES, INC., et
al.,

Petitioners,

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

– against –

NEW YORK STATE URBAN
DEVELOPMENT CORPORATION,

Respondent.

Index No. 100738/2010

**ORAL ARGUMENT
REQUESTED**

**MEMORANDUM OF LAW OF RESPONDENT
NEW YORK STATE URBAN DEVELOPMENT CORPORATION
IN SUPPORT OF ITS MOTION TO DISMISS**

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PRELIMINARY STATEMENT

This memorandum of law is respectfully submitted on behalf of respondent New York State Urban Development Corporation doing business as Empire State Development Corporation (“ESDC”) in support of its motion to dismiss the Petition for failure to state a claim. As explained below, the motion should be granted because the New York Court of Appeals and the U.S. Court of Appeals for the Second Circuit have already upheld ESDC’s determination that the Atlantic Yards Land Use Improvement and Civic Project (the “Project”) serves important public purposes that warrant the exercise of eminent domain to acquire the project site. *See Goldstein v. New York State Urban Dev. Corp.*, 13 N.Y.3d 511 (2009), *motion for reargument pending*; *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008).

Petitioners allege that these definitive rulings should be cast aside on the pretext that ESDC supposedly changed the public purposes of the Project when it affirmed a Modified General Project Plan for the Project on September 17, 2009 (the “2009 MGPP”). According to Petitioners, the 2009 MGPP – which amended ESDC’s earlier General Project Plan (the “2006 MGPP”) – “substantially undermined” the findings of public use, benefit and purpose set out in ESDC’s determination and findings issued under the Eminent Domain Procedure Law (“EDPL”) in December 2006 (the “Determination & Findings”), thereby requiring ESDC to issue a new set of determination and findings under the EDPL.

The Petition fails to state a claim because the 2009 MGPP and 2006 MGPP are virtually identical. Petitioners do not identify what amendments in the 2009 MGPP

supposedly changed the Project purposes, nor could they: nothing in the 2009 MGPP changed the public purposes of the Project upheld by the Court of Appeals and the Second Circuit in Petitioners' prior failed challenges to the Project.

The principal change effected by the 2009 MGPP is that the Project site properties will be acquired in phases, instead of being acquired in their entirety at one time. The phasing of property acquisition, however, does not change the purposes of the Project, and does not resurrect Petitioners' "public use" objections to the Project previously rejected by the Court of Appeals and the Second Circuit. This Court and the Appellate Division for the First Department, in a case involving a different ESDC project, have specifically held that the change from a one-stage acquisition to a phased acquisition does not require the issuance of a new determination and findings under the EDPL. *See Leichter v. New York State Urban Dev. Corp.*, 154 A.D.2d 258 (1st Dep't 1989). Petitioners' contrary allegation fails to state a claim as a matter of law.

Petitioners' new lawsuit must also be seen in the context of their publicly announced strategy of filing serial lawsuits against the Project to delay its construction. Petitioners and allied opponents of the Project have unsuccessfully challenged the December 2006 Project approvals in multiple venues and on multiple grounds, attacking the findings that ESDC made under the EDPL, Urban Development Corporation Act ("UDCA") and State Environmental Quality Review Act ("SEQRA"). All of the challenges have been dismissed with prejudice. Allowing Petitioners to move forward with this suit would validate Petitioners' strategy of delay. Notably, Petitioners filed the instant Verified Petition on January 19, 2010, the last possible day to file an Article 78

challenge to ESDC's September 17, 2009 approval of the 2009 MGPP, and then waited an additional two weeks to serve it on ESDC. In doing so, Petitioners have once again sought to maximize the delay caused to the Project.

The relief that Petitioners request would result in an additional three-year cycle of delay. Were this Court to order ESDC to issue a new determination and findings, Petitioners would undoubtedly challenge them in *seriatim* proceedings brought first in federal court and then in state court, as they did in Goldstein v. Pataki and Goldstein v. New York State Urban Dev. Corp. When those actions fail, Petitioners could then be expected to file additional Article 78 petitions to further delay the Project, claiming that some adjustment made to resolve the delay-induced problems once again requires the issuance of a new determination and findings under the EDPL. It is respectfully submitted that this Court should see the Petition for what it is – an attempt, based on flimsy and unfounded allegations inconsistent with the relevant approval documents – to create an endless loop of litigation. The Petition should be dismissed for failure to state a claim.

FACTUAL STATEMENT

The facts are set forth in the affirmation annexed to ESDC's notice of motion (the "ESDC Affirmation") and are based principally on the documents cited, but inaccurately characterized, in the Petition. The 2006 MGPP and 2009 MGPP are exhibits to the ESDC Affirmation and when read together, make clear that the public purposes of the Project have not changed.

The principal public purpose of the Project is to eliminate the substandard and insanitary conditions on the Project site. *See* ESDC Aff. ¶ 10; Determination & Findings at 4; 2006 MGPP at 4-5. This purpose has not changed. *See* 2009 MGPP at 4-5.

The other major public purpose of the Project is the construction of civic facilities, including a new Arena, a new subway entrance, a new rail yard for the Long Island Rail Road and eight acres of publicly accessible open space. *See* ESDC Aff. ¶¶ 9-10; Determination & Findings at 5-6; 2006 MGPP at 5. This purpose also has not changed. *See* 2009 MGPP at 5-6.

The ESDC Affirmation also addresses the miscellany of other arguments Petitioners put forward for casting aside the definitive "public use" rulings of the Court of Appeals and the Second Circuit. As demonstrated in the Affirmation, Petitioners have failed to make any credible allegation that ESDC has changed the public purpose of the Project. *See* ESDC Aff. ¶¶ 18-36.

ARGUMENT

THE PETITION SHOULD BE DISMISSED BECAUSE ESDC HAS NO OBLIGATION TO ISSUE NEW DETERMINATION AND FINDINGS

The Petition fails to state a claim as a matter of law and should be dismissed. Without citing any legal authority in support of their argument, Petitioners contend that the 2009 MGPP requires ESDC to issue a new determination and findings. Petitioners' argument is baseless, and ignores controlling authority directly on point. In Leichter v. New York State Urban Dev. Corp., 154 A.D.2d 258 (1st Dep't 1989), the Appellate Division held that where the public purpose of a project does not change, modifications to a project plan by a condemning authority do not require the issuance of a new determination and findings.

Leichter was an Article 78 proceeding brought by petitioners challenging ESDC's 42nd Street Redevelopment Project, which the Court of Appeals and Second Circuit had previously upheld in Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400 (1986), and Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp., 771 F.2d 44 (2nd Cir. 1985). In an effort to side step these decisions and create a new round of EDPL challenges to the project, the petitioners in Leichter seized on ESDC's amendments to the general project plan for that project. The amendments at issue in that case (i) changed the proposed use of a site originally designated as a wholesale facility mart to a commercial office building; and (ii) provided for the sequential acquisition of development sites rather than the simultaneous acquisition originally contemplated. ESDC had held a new UDCA hearing on its amendments to the

general project plan. The petitioners in Leichter nevertheless claimed that the modifications to the general project plan required a new EDPL Article 2 hearing and a new determination and findings under the EDPL. The First Department unanimously upheld the Supreme Court's dismissal of the proceeding.

The court in Leichter explained that a condemning authority may make even significant changes to a project plan after the issuance of its determination and findings:

Contrary to the suggestion contained in appellants' brief, the statute [EDPL] does not bar changes, even significant changes, in a plan once the condemning authority has published its findings, and it is significant that appellants cite no statutory or judicial authority which indicates otherwise.

154 A.D.2d at 259.

The First Department proceeded to reject the petitioners' argument that the amendment to the project plan had altered the public purpose of the project, thereby requiring the issuance of new determination and findings: "[s]ince it is not open to question that the plan is designed to achieve a public purpose ... judicial inquiry can proceed no further on this point." Id. (citing Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d at 424).

The First Department next considered the appropriate procedures to be followed by a condemning authority that has modified a project plan after the issuance of its determination and findings, and held "that it is sufficient that the agency hold a hearing, limited to consideration of the amendments in the plan, during which the factors enumerated in EDPL § 204(B) are open to discussion" and that such "procedure is

sufficient to promote the statutory purpose ‘to establish opportunity for public participation in the planning of public projects necessitating the exercise of eminent domain.’” Id. (quoting EDPL § 101).

The instant case mirrors Leichter. As in Leichter, the Court of Appeals and Second Circuit have already upheld ESDC’s determination that the Atlantic Yards Project serves important public purposes that warrant the exercise of eminent domain. *See Goldstein v. New York State Urban Dev. Corp., supra; Goldstein v. Pataki, supra.* And as in Leichter, ESDC modified its general project plan for the Atlantic Yards Project by providing for the phased acquisition of the project site, rather than acquisition of the entire project site prior to the construction of the first project building. Leichter expressly held that this type of modification to a general project plan does not require a new determination and findings under the EDPL.

As in Leichter, the 2009 MGPP is designed to achieve the very same public uses, benefits and purposes set out in the original general project plan and the Determination & Findings. Under the 2009 MGPP, as under the 2006 MGPP and Determination and Findings, the public uses, benefits and purposes of the Project include the elimination of blighted conditions and the construction of civic facilities, including the Arena, new subway entrance, new rail yard and eight acres of open space. *See* ESDC Aff. ¶¶ 9-10; 2006 MGPP at 4-6, 32-33; 2009 MGPP at 4-6, 34; Determination & Findings at 4-7. Petitioners’ “public use” challenges to these public purposes have already been rejected by the Court of Appeals and the Second Circuit. *See Goldstein v. New York State Urban Dev. Corp., supra; Goldstein v. Pataki, supra.*

The 2009 MGPP and 2006 MGPP are in fact virtually identical as they involve the same project site (2006 MGPP at 2, 2006 MGPP at Exh. A-2; 2009 MGPP at 2, 2009 MGPP at Exh. A-2); the same 17 buildings at the same locations (2006 MGPP at Exh. A-1; ESDC Aff. Ex. 3 at Exh. E); the same uses in the 17 buildings (2006 MGPP at 3-16; 2009 MGPP at 3-17); the same eight acres of publicly accessible open space (2006 MGPP at 16-17; 2009 MGPP at 17-18); compliance with the same set of comprehensive Design Guidelines for the 17 Project buildings and eight acres of open space (2006 MGPP at 6-7, 2006 MGPP at Exh. B; 2009 MGPP at 6-7, 2009 MGPP at Exh. B); a new LIRR yard with a new, direct portal to the Atlantic Terminal (2006 MGPP at 12-14; 2009 MGPP at 13-14); a new subway entrance at the southeast corner of Atlantic and Flatbush Avenues on the Arena Block (2006 MGPP at 10-11, 35-37; 2009 MGPP at 10-12, 30, 37-38); and the same private developer (2006 MGPP at 1; 2009 MGPP at 1).

In addition to its unfounded allegations pertaining to the 2009 MGPP, the Petition makes a series of allegations about the modifications to the business arrangements between FCRC and the Metropolitan Transportation Authority (“MTA”) that the MTA Board approved on June 24, 2009. Justice Michael D. Stallman of this Court dismissed the litigation challenges to the MTA Board approval, holding that the new business terms did not change the basic plan for the Project that MTA (and ESDC) had earlier approved in December 2006:

The subject 2009 resolution [*i.e.*, the MTA Board resolution of June 24, 2009] approved modification of various business terms to *essentially the same plan* approved with FCRC on December 13, 2006, when the MTA Board authorized the MTA staff to negotiate

and execute binding agreements with FCRC and adopted SEQRA findings.

Montgomery v. MTA, 25 Misc.3d 1241(A), 2009 WL 4843782, at *1 (Sup. Ct. N.Y. Co. Dec. 15, 2009) (emphasis added).

Justice Stallman's observation is correct: the modified MTA business arrangements do not alter the essential terms of the 2006 MGPP. They merely provide for: (i) the upfront purchase of the MTA air rights over Block 1119; (ii) the phased acquisition of the MTA air rights over Blocks 1120 and 1121, with outside dates that require payment for these air rights by 2030 but allow their earlier acquisition on a schedule consistent with the 2009 MGPP; (iii) a modified design for the permanent LIRR rail yard; and (iv) contractual guarantees, including an \$86 million Letter of Credit that FCRC has already posted, requiring FCRC to construct the permanent LIRR rail yard. ESDC Aff. ¶ 30.

In any event, the MTA business arrangement has no relevance to the validity of the Determination & Findings, because the ESDC's findings relate to the public purposes of the Project, which have not changed. Moreover, FCRC's obligations to ESDC are dictated by the 2009 MGPP and the implementing agreements between ESDC and FCRC, not by the latitude provided by its business arrangements with the MTA. ESDC Aff. ¶ 31.

In this regard, Petitioners' memorandum of law asserts – solely on the basis of a report on an internet “blog” – that the construction deadlines in the Development Agreement between ESDC and FCRC run counter to the 2009 MGPP. *See* Pet. Mem. of

Law at 14-15. This is not true. The Development Agreement expressly provides that the deadlines and periods set forth in Article VIII thereof, which covers Construction Activities, “shall not modify, limit or otherwise impair” FCRC’s obligation under Section 2.2 of the agreement to use commercially reasonable efforts to substantially complete the Project by December 31, 2019, which is in full accord with the MGPP. ESDC Aff. ¶ 32; 2009 MGPP at 9 (“The Project documentation to be negotiated between ESDC and the Project Sponsor will require the Project Sponsors to use commercially reasonable efforts to achieve this schedule and to complete the entire Project by 2019.”). More fundamentally, a delay in the construction schedule for the Project would not change its public purpose. ESDC Aff. ¶ 33.

Petitioners’ claim that there has been a modification in the affordable housing component of the Project is likewise untrue. Petitioners point to language in a document titled “Project Leases and Disposition Abstract,” annexed as Exhibit D to Exhibit 3 to the ESDC Affirmation, which indicates that the provision of affordable housing is subject to governmental authorities making available to FCRC affordable housing subsidies. This condition, however, is consistent with the terms of the 2006 MGPP (at page 16) and the 2009 MGPP (at page 16), both of which contemplate that the Project’s affordable housing units will be constructed using subsidies provided by State or City affordable housing programs. ESDC Aff. ¶ 34. The same Project Leases and Disposition Abstract requires that the Project construction comply with the 2009 MGPP, which includes the 2,250 affordable housing units and milestone requirements to ensure that these units will be constructed. ESDC Aff. Exh. 3, Exh. D, last page.

Accordingly, Leichter dictates dismissal of this proceeding as a matter of law. There is no EDPL requirement that ESDC issue new determination and findings under circumstances where the 2006 MGPP and 2009 MGPP are virtually identical, with each containing the same core Project elements to advance the same public uses, benefits and purposes set out in the Determination & Findings.

Further, it is beyond dispute that ESDC satisfied the same procedures in modifying the MGPP that were upheld in Leichter. As in Leichter, ESDC held a duly noticed UDCA public hearing and received public comments on its proposed amendments to the general project plan before affirming the 2009 MGPP. ESDC Aff. ¶¶ 13, 15.

Finally, allowing Petitioners to proceed with this meritless case would only validate their litigation strategy of bringing one baseless lawsuit after another in the hope that the Project will be delayed to its death.¹ Petitioners' strategy has already caused ESDC an over three-year delay in proceeding with necessary property acquisitions, dating from ESDC's issuance of the Determination & Findings in December 2006 until ESDC recently commenced its acquisition proceeding under Article 4 of the EDPL in December 2009. There is no question that if ESDC were to issue a new determination and findings, Petitioners would commence a new cycle of lawsuits in federal and state courts, playing out their strategy of defeating the Project by endless delay. This is the very danger the First Department warned of in the final paragraph of Leichter:

¹ To reduce the potential for delay, ESDC's Notice of Motion requests that a litigation preference be provided pursuant to CPLR 3403(a)(1), which provides for a preference with respect to suits against state entities such as ESDC.

Our holding is further supported by a consideration of the practicalities surrounding a project of this scale. As appellants point out in their brief, during the time that this project has been delayed due, in no small part, to attendant litigation, “the real estate market in Midtown Manhattan dramatically changed.” In addition, several developers withdrew from the project for financial and other reasons. It is clear to this court that if respondent is required to start the hearing process anew, conditions will very likely have changed again by the time the amended plan emerges from the approval process with the attendant legal challenges, thereby extending the review procedure ad infinitum. *The hearing requirements set forth in the Eminent Domain Procedure Law and the Urban Development Corporation Act are designed to solicit community involvement in the planning process, not to serve as a vehicle by which public development can be effectively foreclosed.*

154 A.D.2d at 260 (emphasis supplied).

The public has already been forced to wait over three years for development of the Project to go forward; it should not have to wait any longer. This case should be dismissed for failure to state a claim. In addition, for the reasons stated in the ESDC Affirmation (¶¶ 37-38), Petitioners’ claims should be barred by laches. *See Schulz v. State*, 81 N.Y.2d 336, 349 (1993).

CONCLUSION

For the foregoing reasons, ESDC's motion to dismiss should be granted and this proceeding should be dismissed with prejudice.

Dated: New York, New York
February 10, 2010

Respectfully submitted,

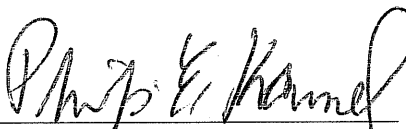
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