

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

PENN COMMUNITY DEFENSE FUND, 251 WEST
30TH STREET RESIDENTIAL TENANTS
ASSOCIATION, CITY CLUB OF NEW YORK, and
RETHINKNYC,

Petitioners-Plaintiffs,

- against -

NEW YORK STATE URBAN DEVELOPMENT
CORPORATION d/b/a EMPIRE STATE
DEVELOPMENT, and NEW YORK STATE PUBLIC
AUTHORITIES CONTROL BOARD,

Respondents-Defendants.

Index No. 159154/2022
IAS Part

**PETITIONERS-PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF VERIFIED PETITION AND COMPLAINT**

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PRELIMINARY STATEMENT

This is a hybrid Article 78 proceeding/declaratory judgment action challenging the decision of the New York State Urban Development Corporation (“UDC”), doing business as Empire State Development (“ESD”), to approve a general project plan (“GPP”) overriding New York City’s zoning laws and granting more than 18 million square feet of development rights to the private owners of eight parcels surrounding Penn Station.

The GPP is one component of a “Master Plan” for Penn Station: (1) reconstructing the existing station (“Penn Reconstruction”); (2) potentially expanding the station south across 31st Street (“Penn Expansion”); and (3) implementing related transit and public realm improvements. Ex. A at 1.¹ No one questions that the station—grim, squalid, and dangerous—is in desperate need of an overhaul. But ESD’s plan is a slipshod effort, indifferent to the real impacts it would have on both the neighborhood and the City as a whole, and certain to fail in its stated objectives.

According to ESD, the primary purpose of the GPP is to support and generate “essential revenue” to help fund the Master Plan. Yet ESD refused to answer, or provide factual support to answer, *any* of the questions that could establish that the project would actually serve its funding purpose:

1. How much would the Master Plan cost?
2. How much would ESD’s partners contribute?
3. How much revenue would the GPP generate?
4. When would the GPP generate the revenue?

¹ References to “Ex.” are to the exhibits attached to the October 27, 2022 Affirmation of Charles Weinstock.

Moreover, by deliberately severing consideration of the GPP from consideration of the Master Plan as a whole—in the language of environmental law, by “segmenting” the review of the larger project—ESD hid the ball, hoping to conceal the necessity of evaluating those questions.

Nowhere in either of the Plan’s enabling documents—the GPP and the Final Environmental Impact Statement (“FEIS”)—did ESD even consider revenue. Indeed, it expressly dismissed its relevance:

Purely economic considerations—such as those related to the potential availability of public capital funds, financing, and the funding streams made available through a Payments In Lieu of Taxes (PILOT) mechanism—are outside the scope of the DEIS studies, and therefore no assessment of financial feasibility, revenue projections, alternative funding mechanisms, or other financing considerations is required.

Ex. B at A-14.

In other words, ESD (1) defined the GPP’s purpose and then (2) refused to demonstrate how the GPP would serve that purpose. This was arbitrary and capricious and a violation of both the State Environmental Quality Review Act (“SEQRA”), N.Y. Env’tl. Conserv. Law § 8-0101 *et seq.*, and the Urban Development Corporation Act (“UDCA”), N.Y. Unconsol. Law § 6252 *et seq.*

What is certainly clear is that the GPP would provide a windfall for the City’s largest commercial landlord, Vornado Realty Trust (“Vornado”). Vornado owns or controls four of the eight parcels (and part of a fifth) covered by the GPP. The company’s chair, his family, and his associates are major contributors to the campaigns of both Governor Hochul and her predecessor, Governor Cuomo.

Vornado had previously lobbied, unsuccessfully, for changes to the City’s Zoning Resolution to increase the development potential of its properties around Penn Station. After the City rejected their entreaties, Vornado ditched City Hall for Albany, where it proposed a new idea to Governor Cuomo: the GPP.

The documents ESD has thus far produced under the Freedom of Information Law reveal the extent of the collaboration between ESD and Vornado.² This was not governmental action; it was a joint venture between a state agency and the chosen private company that would benefit—extravagantly—from the plan.

The terms of the GPP were so favorable to Vornado that Holly Leicht, ESD’s Executive Vice President for Real Estate Development and Planning at the time, began to worry that the plan would not withstand public scrutiny. In an email to ESD staff and senior Vornado executives in advance of a public meeting, Ms. Leicht wrote: “We need to coordinate and script this meeting to ensure we’re cohesive and have a good story to tell about why we landed on these [tower] densities” Ex. F-6 at 621.

Richard Ravitch, the former Lieutenant Governor and chair of both UDC and the Metropolitan Transportation Authority (“MTA”), called the GPP “a trumped-up real estate scheme that could leave taxpayers on a very sharp hook for generations to come.” Ex. D.

Recognizing the weakness of its argument that the GPP is necessary to fund the Master Plan, ESD attempted to manufacture a second justification—that the GPP Project Area (“Project Area”) is “blighted” and therefore the GPP qualifies as a Land Use

² The petitioner in a related case, *Weinstock v. Urban Development Corporation*, Index No. 157448/2022 (Sup. Ct. N.Y. Co. 2022) (Billings, J.), challenged ESD’s refusal to produce additional documents relating to, among other issues, Vornado’s involvement in the development of the GPP.

Improvement Project eligible for ESD-sponsored demolition and redevelopment. But according to the final draft of ESD's own Neighborhood Conditions Study, just eight of the Project Area's 61 lots are in "poor" or "critical" condition. And the *only* building deemed to be in "critical" condition, the Penn Station Service Building, is owned by one of ESD's partners on this project, the National Railroad Passenger Corporation ("Amtrak"). Ex. J, Fig. E-3.

Petitioners-Plaintiffs ("Petitioners")—civic organizations and the residential tenants of a building that would be demolished under the GPP—now ask the Court to find that: (1) ESD's approval of the GPP and FEIS was arbitrary and capricious, an abuse of discretion, and in violation of the applicable laws; (2) ESD violated SEQRA by segmenting its review of the Master Plan; and (3) the GPP fails to qualify under any of the UDCA project categories eligible for ESD assistance.

Petitioners also ask the Court to find that the resolution issued by the Public Authorities Control Board ("PACB"), the state panel charged with overseeing ESD's capital projects, permitting ESD to enter into a revenue-sharing agreement with the City, was arbitrary and capricious and in violation of the Public Authorities Law.

PARTIES

Petitioners

Petitioner Penn Community Defense Fund is an organization whose members support challenges to the GPP and are committed to finding a better way to fund the rehabilitation of Penn Station. One member lives in a building that would be demolished under the GPP.

Petitioner 251 West 30th Street Residential Tenants Association represents the tenants living at 251 West 30th Street, a 16-story mixed-use building that would be demolished under the GPP. The Association was one of eight organizations that filed Comments and

Objections opposing the Draft General Project Plan and Draft Environmental Impact Statement earlier this year (“Comments and Objections”). *See* Exs. K, L.

Petitioner City Club of New York is a 130-year-old organization dedicated to the promotion of thoughtful urban planning that responds to the needs of all New Yorkers. The City Club was a signatory to the Comments and Objections.

Petitioner ReThinkNYC is a civic organization that promotes innovative thinking about the future of transportation, infrastructure, land use, and governance in the City and the surrounding region. ReThinkNYC was also a signatory to the Comments and Objections.

Respondents

Respondent New York State Urban Development Corporation, doing business as Empire State Development, is a public benefit corporation promoting economic development in the State of New York. UDC has the authority to issue bonds, grant loans and tax exemptions, acquire private property, exercise eminent domain, and override local laws in order to support its projects. ESD is the umbrella organization for UDC and New York’s other principal economic development financing entity, the Department of Economic Development.

Respondent New York State Public Authorities Control Board is a state panel overseeing twelve public benefit corporations, including UDC, and must approve all financing and construction projects by those corporations. Under Public Authorities Law § 51, it may not approve them unless it finds that “there are commitments of funds sufficient to finance the acquisition and construction of such project.” Although the Governor appoints all five members, four are based on recommendations from the majority and minority leaders of the State Assembly and Senate.

FACTS

A. Penn Station

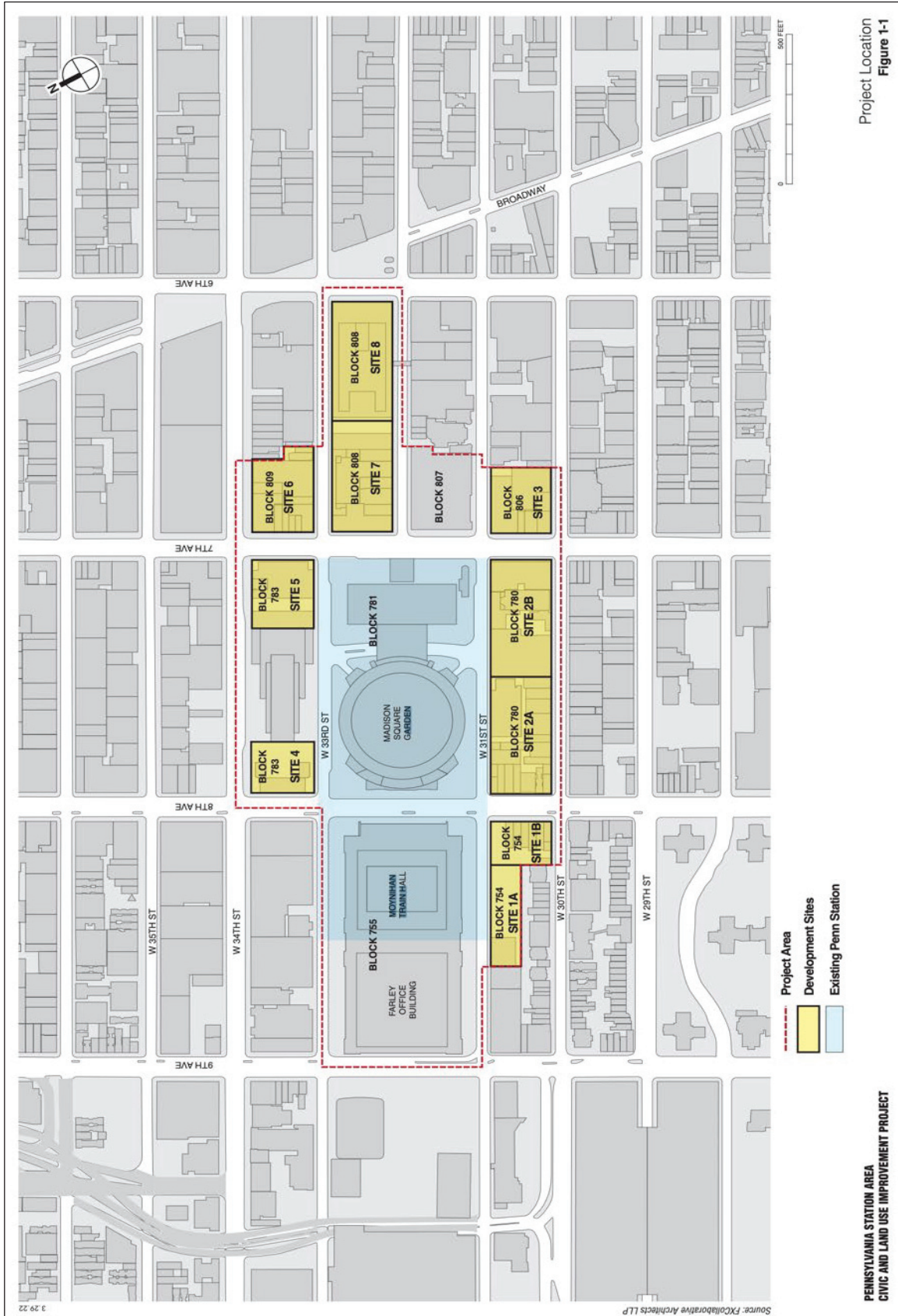
Penn Station is the busiest transportation hub in North America, serving Amtrak, the New Jersey Transit Corporation (“NJ Transit”), and the MTA’s Long Island Rail Road. It will also serve the New Haven line of the MTA’s Metro-North Railroad once the Penn Station Access Project is completed. (Amtrak, NJ Transit, and the MTA are collectively referred to as the “Railroads”).

Penn Station is part of a larger transportation complex that includes Moynihan Train Hall, three adjoining subway stations, the PATH train, and a web of transit entrances and corridors. Currently, the station has 21 tracks and 11 platforms. Amtrak owns the land below ground, and leases space to NJ Transit and the MTA. Madison Square Garden (“MSG”) owns the property above street level. Ex. C-2 at S-5, S-6; Ex. A at 17.

B. The Project Area

The GPP Project Area is bounded at its widest point east-west by Sixth and Ninth Avenues, and at its widest point north-south by West 30th and 34th Streets. In addition to Penn Station, Moynihan Train Hall, and MSG, the area includes the historic Farley Building and Equitable Life Assurance Company Building (“Equitable Building”), and Vornado’s two commercial towers, Penn 1 and Penn 2. The remainder of the Project Area is the eight sites that would be governed by the GPP (“Development Sites”). Ex. A at 2.

The dotted red line in the following FEIS site plan defines the Project Area. Moynihan Train Hall, Penn Station, Penn 2, and MSG are in blue. The Farley Building, the Equitable Building, and Penn 1 are in gray. The eight Development Sites are in yellow:



Project Location
Figure 1-1

PENNSYLVANIA STATION AREA
CIVIC AND LAND USE IMPROVEMENT PROJECT

No one stands to gain more from the GPP than Vornado. In fact, it is possible that Vornado will be the *only* developer to gain from the GPP. According to the GPP, Vornado owns or controls the property designated on the site plan as Sites 4, 5, 7, and 8. It also controls six of the eleven lots on Site 6 and holds a master lease on a seventh lot on Site 6. Ex. J at 44.

C. The Project Plan

The GPP is “a comprehensive mixed-use redevelopment initiative” that would allow approximately 18.3 million gross square feet of building floor area. It would consist primarily of Class A commercial space, but would also include some retail, community facility, hotel, and residential space. Ex. A at 1. Under the maximum permitted commercial development scenario, over 78 percent of the new square footage would be office space. Oct. 24, 2022 Affidavit of George M. Janes (“Janes Aff.”) ¶ 4.

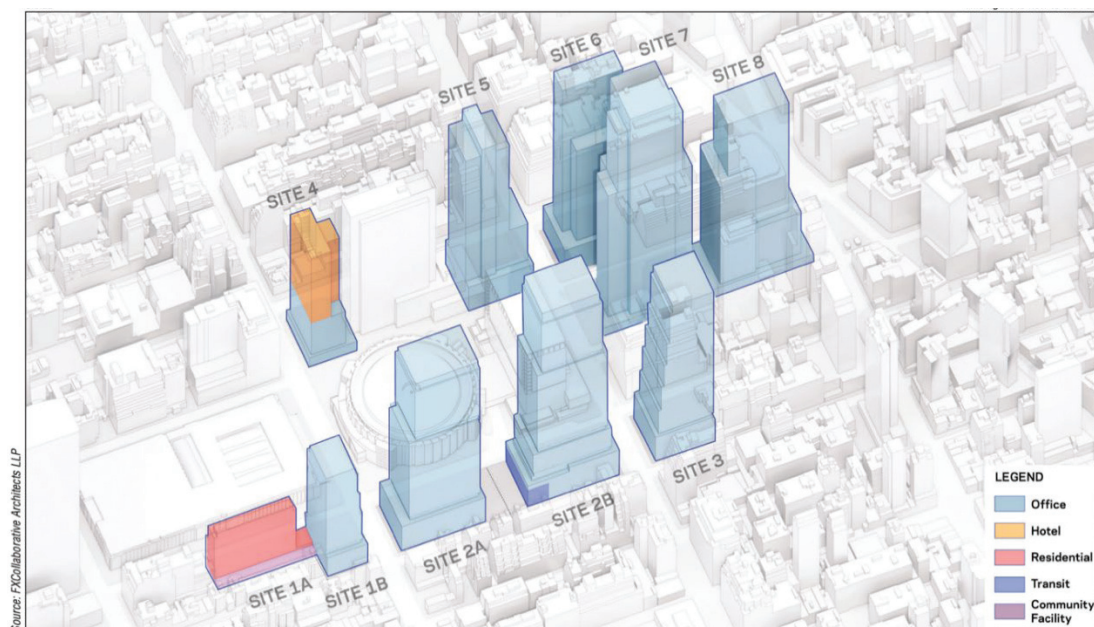
ESD would acquire Sites 4-8 by negotiated transaction or eminent domain. It would then lease Sites 4, 5, 7, and 8 back to Vornado, and it expects to lease Site 6 to Vornado as well. The GPP contemplates that, at some point in the future, Vornado would demolish the buildings on those sites and build the towers represented in the “illustrative massings” *infra*.

If Penn Station is expanded to the south, ESD and/or the Railroads would acquire Sites 1-3 by negotiated purchase or eminent domain; demolish the existing buildings to permit construction of the underground Penn Expansion, which would add up to 12 tracks; and lease the sites to one or more developers to build the towers represented in the same illustrative massings.

The City’s zoning laws would be replaced by use, bulk, and density rules set out in the GPP’s Design Guidelines. *See* Ex. M at 17-20. They would increase the permitted gross floor area on the eight sites by 133 percent. Janes Aff. ¶ 4.

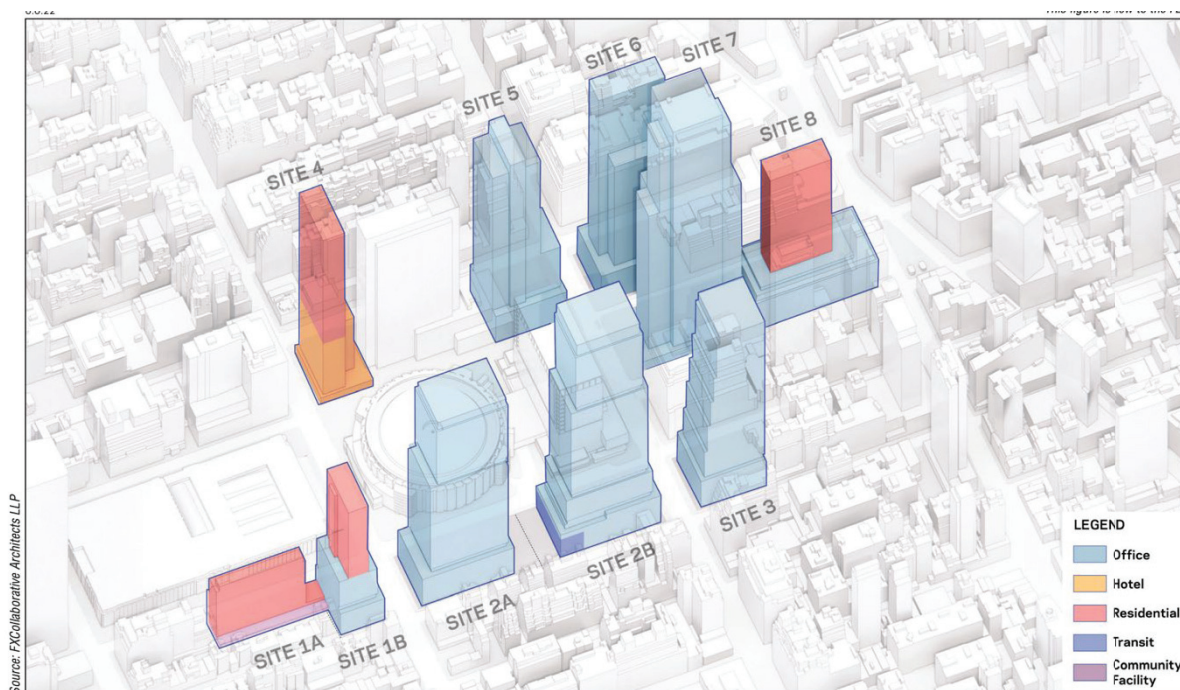
The illustrative massings from the FEIS, reproduced below, show the maximum permitted development under two scenarios set out in the Design Guidelines—“Commercial” and “Residential.” In both, six of the towers—on Sites 2A, 2B, 3, 5, 6, and 7—would be over 900 feet tall (as would the Site 4 tower under the Residential Scenario and the Site 8 tower under the Commercial Scenario). Because the Design Guidelines do not impose height limits (except for the midblock portion of Site 1), the buildings could be taller and thinner than those shown in the massings. Ex. C-2 at S-18.

The first figure below represents the maximum permitted development under the Commercial Scenario, which would include a community facility (purple) on Site 1A; a hotel (orange) on Vornado’s Site 4; a new station entrance (dark blue) on the first floor of the tower on Site 2B; and 542 residential units on Site 1A, of which 163 would have to be affordable (red). The rest—light blue—would be office space:



The key difference between the Commercial and Residential Scenarios is that the latter would allow—but not require—an additional 439 residential units (132 affordable) on Site 1B, and an additional 1,256 residential units (377 affordable) on two of the Vornado Sites, 4 and 8 (in red again).

The following figure represents the Residential Scenario with the maximum residential development:



The GPP also contemplates transit improvements to existing subway stations; new entrances on the Development Sites to both subway stations and Penn Station; and below-grade pedestrian corridors. In addition, the GPP would provide public realm improvements on the eight sites, including wider sidewalks and new public spaces. Plans for the sidewalks and public spaces are currently being developed by ESD in consultation with a Public Realm Task Force. *See* Ex. A at 2-3.

These illustrative massings assume that the Penn Expansion will go forward but, in fact, this is contingent on a preliminary determination by the U.S. Department of

Transportation (“USDOT”) that the site is the “preferred location” for an expanded station. Ex. C-2 at S-30, S-31. In addition, any expansion would have to go through federal administrative review processes, including an environmental review by USDOT under the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. § 4331 *et seq.*

A proper NEPA review would have to consider alternatives to the Penn Expansion—including “through-running,” a plan to create a unified regional transit network that would convert Penn Station from a terminus to a through-station. Ex. DD at 20. With trains continuing on from the station rather than parking in the rail yards, the plan could free up the existing tracks, and perhaps eliminate the need for the Expansion—and with it, the need to demolish all the buildings on Sites 1-3 and displace everyone living and working in them. (“Through-running” would also reduce the cost of the project by an estimated \$13 billion.)

Id.

As for the redevelopment of Penn Station, ESD has no architectural plans at this time, only “illustrative renderings” of the Penn Reconstruction commissioned by the MTA, which have not been approved by either Amtrak or NJ Transit. As the following rendering illustrates, the main entrance would be squeezed between Madison Square Garden and Penn 2, alongside a crowded loading dock for MSG trucks:



Ex. WW at 2. ESD did not present even renderings of the Penn Expansion.

By excluding the Penn Reconstruction and Expansion from the GPP and FEIS, ESD denied the public an opportunity to assess the MTA design, or to consider alternative designs. A proper SEQRA review of the plan to redevelop the existing station would have required a comparison of the impacts—including financial impacts—of at least the following alternatives: (1) a new station on Seventh Avenue, replacing Penn 2 or, more modestly, reconceiving its lower floors to create a new station entrance; (2) a central station above the expansion site, south of 31st Street; and (3) the array of highly-praised designs for an above-ground station to replace Madison Square Garden (and perhaps Penn 2 as well). *See* Exs. O, P.³ Vishaan Chakrabarti, for example, the founder of the firm Practice for Architecture and

³ Petitioners do not express an opinion on the relative merits of any of the proposed designs for a new Penn Station, but the MTA should certainly be guided by the criteria that the then-chair of the City Planning Commission set out in her letter to ESD's then-President and CEO: "[T]he new terminal should be a facility of enduring quality and superior design that inspires a sense of civic pride in the new transportation station." Ex. CC at 3.

Urbanism and the former dean of UC Berkeley's College of Environmental Design, proposed retaining the steel superstructure of the Garden to create a modern glass pavilion:



Petitioner ReThinkNYC proposed a variation on the original Neoclassical station by McKim, Mead & White, demolished in 1963, which would match the architectural style of the Moynihan Train Hall across the street:



ESD also failed to consider alternative designs for the Penn Reconstruction.

D. Funding the Station

The GPP stated that its primary purpose was to provide “essential revenue” for the improvement and potential expansion of Penn Station. Ex. A at 2. But it steadfastly refused to say just how much revenue was “essential,” or how much the GPP would generate, and when. From the very beginning of the review process, ESD drew a line in the sand: “Project financing is not part of the [F]EIS scope.” Ex. C-2 at S-28.

1. The Cost of the Station

Nowhere in either the GPP or the FEIS did ESD attempt to estimate the cost of reconstructing Penn Station—a disqualifying fact (though not a surprising one, since there were no actual plans for those improvements). The FEIS conceded that plans were still a blur:

The details concerning the interior design of a reconstructed and potentially expanded Penn Station were not available at the time the [Draft Environmental Impact Statement] and FEIS were prepared. Accordingly, the EIS does not assess the potential environmental impacts of the operational plan for the reconstructed/expanded facility, and leaves the consideration of such impacts to the federal environmental review process.

Ex. C-9 at 26-28. The FEIS was frank about what that meant for financing: “At this point, because it is still very early in the project planning, the Railroads have developed only preliminary estimates and *large cost ranges* for the Penn Station reconstruction and potential Penn Station expansion.” Ex. C-9 at 26-14 (emphasis added).

Regarding the transit and public realm improvements, the GPP and FEIS were equally vague. The list of transit improvements was only “under consideration,” and the majority of the public realm improvements remained only “potential” improvements. Ex. C-2 at S-15–18.

It was not until July 24, 2022—three days *after* ESD had voted to approve the GPP, and three days before a PACB vote that ESD was increasingly worried about—that ESD released a table with three numbers: \$7 billion for the Penn Reconstruction, \$13 billion for the Penn Expansion, and \$2 billion for the transit and public realm improvements, or a total of \$22 billion. Ex. R at 1. That was it. ESD made no attempt to further explain or break down the numbers. Given the embryonic state of the planning, how could it be otherwise? ESD’s own admission—that there were still “large cost ranges”—eviscerates the \$22 billion cost estimate.⁴

2. Other Revenue Sources

The GPP also failed to estimate the amount that ESD’s partners—the MTA, NJ Transit, Amtrak, and most significantly, USDOT—had committed to contribute financially to the redevelopment and expansion of Penn Station. ESD modeled the split on the Gateway Tunnel program: 50 percent would come from USDOT (including Amtrak’s contribution), and 25 percent each would come from New York and New Jersey. Ex. C-9 at 26-12. But the GPP and FEIS recognized that there was still uncertainty about the split. Regarding the Penn Expansion, for example, the GPP stated:

Decisions about which public entity or entities will be responsible for the property acquisitions for the potential Penn Station southward expansion; how ownership, use and occupancy of the sites would be allocated; and the allocation of responsibilities for the costs of acquisition, construction, operation, maintenance, and upkeep of the new station facilities, would be subject to

⁴ The MTA’s East Side Access project, which will add a stop on the Long Island Rail Road at Grand Central Station, illustrates the perils of careless estimation. The project is more than a decade behind schedule, and its current budget—\$11.6 billion exclusive of borrowing costs—is more than four times the original budget. The project’s former chief executive, William Stead, told the *Daily News* that the project had *three* sets of books, and was “the most poorly managed project in the history of public works.” Ex. VV at 2. The MTA would oversee the Penn Reconstruction.

selection of Sites 1, 2 and 3 as the location for the preferred alternative in the forthcoming federal review and approval process concerning the potential Penn Station expansion, and further collaboration with the involved Railroads.

Ex. A at 26.

As described below, the federal grant programs are far from a done deal. Federal grants are competitive, and USDOT could well deny the application. Ex. S at 6. To receive even a dime, an applicant must demonstrate that it has firm financial commitments to pay its own share of project costs. *See* 49 U.S.C. § 24911(d)(1)(B)(ii). The GPP offered no such commitment.

Another scenario not considered by ESD is that USDOT could offer *more* than 50 percent of the redevelopment and expansion costs. It certainly has that authority, and the effect would be to reduce New York's share below 25 percent. The federal grant program that USDOT appears most likely to use—the Federal Railroad Administration's new Federal-State Partnership for Intercity Passenger Rail program in this year's Infrastructure Investment and Jobs Act—authorizes the agency to issue grants for as much as 80 percent of the project budget. *Id.* § 24911(f)(2). At its board meeting on March 30, 2022, the MTA said that it would “pursue” all 80 percent.⁵

Were the MTA to succeed, the amount owed by New York and New Jersey would go down to just 10 percent each, reducing New York's obligation to \$2.2 billion. The New York Legislature has already appropriated \$1.3 billion, authorizing ESD and the New York State Dormitory Authority to issue bonds in that amount. UDCA § 57. That leaves a

⁵ Metropolitan Transportation Authority, Board Meeting (Mar. 30, 2022), www.youtube.com/watch?v=1y6Fn8qxQgM, timecode 1:38.

shortfall of just \$900 million—hardly an adequate justification for gutting New York City’s zoning authority and granting Vornado and other developers the 18.3 million square feet of development rights authorized by the GPP.⁶

Even today, New York State has not filed the federal funding application, nor disclosed when it intends to. More broadly, it continues to withhold all information about its communications with USDOT. Here too its position is absolute: “Details of federal funding are outside the scope of this SEQRA review.” Ex. C-9 at 26-100.⁷

3. The GPP Revenue

The third omission from the GPP is the amount of revenue the GPP itself would generate. Neither the GPP nor the FEIS provided any revenue estimates. Over the course of two years, all the way through the final GPP vote in July, the only number ESD ever proffered—\$2 billion—was a *best-case* scenario (and then only for the likely revenue up to 2030). Ex. S at 19.

But the foundational principle of environmental review under SEQRA is that the lead agency must assess the *worst* impacts that a plan might cause. In the language of the regulations, it must assess the “Reasonable Worst Case Development Scenario.”⁸ ESD did not do so.

⁶ Another federal program under consideration, the Federal Transit Administration’s Capital Investment Grants (“CIG”) Program, could provide up to 60 percent for projects in the ‘New Starts’ category, which this would be. 49 U.S.C § 5309(l)(1)(B)(ii).

⁷ To the extent that ESD has more information about which federal program(s) USDOT would most likely use, how big the grant(s) would most likely be, and any other information relating to the federal contribution, it needs to disclose that now.

⁸ Office of Environmental Coordination, *CEQR Technical Manual* (Dec. 2021), www1.nyc.gov/site/oec/environmental-quality-review/technical-manual.page, at 2-3, 2-7.

Moreover, the \$2 billion figure was gutted in the public comments on the DEIS, and ESD quickly withdrew it:

ESD developed estimates of near-term revenues (*i.e.*, by 2030) that could be generated by the Proposed Project for the purposes of discussion with the CACWG [Community Advisory Committee Working Group], but these estimates were preliminary and are not concrete at this time. ESD acknowledges that the revenue estimates represent a best-case scenario for revenue that could be generated by 2030.

Ex. C-9 at 26-13.

Regarding the mechanisms for raising revenue, ESD had no actual plan, only a list of five “categories of revenues that *could* be used”:

1. Land Value Payments—by the developers of Sites 1-3, based on the total value of the properties;
2. Additional Development Rights Payments—by Vornado and the other owners of Sites 4-8, based on the increased value of the properties resulting from the increased density permitted by the GPP;
3. Payments in Lieu of Taxes (“PILOT”)—recurring payments by all developers to replace local property taxes;
4. Payments in Lieu of Mortgage Recording Taxes (“PILOMRT”)—one-time payments by all developers to replace the tax on mortgage recording; and
5. Payments in Lieu of Sales Taxes (“PILOST”)—one-time payments by all developers to replace the tax on construction materials.

Id. (emphasis added); *see also* Ex. C-2 at S-28.

ESD supplied no estimates for any of the five categories. It claimed that “it is premature to project potential PILOT, PILOMRT, or PILOST revenue.” Ex. C-9 at 26-64.

And yet three days *before* ESD voted to approve the GPP, on July 18, 2022, ESD and the

City signed a non-binding “Letter of Mutual Agreement” (“PILOT Letter”) outlining the terms of a potential PILOT agreement. Ex. T at 2.⁹

The PILOT Letter raised more questions than answers, and included provisions that clearly did not favor the GPP:

1. The amount of PILOT revenue that could be used to defray Penn Reconstruction and Expansion costs was capped at 12.5 percent of those costs.
2. PILOT abatements could rise as high as those at Hudson Yards, the recent redevelopment west of the Project Area, although the justification for the abatements in that case was to provide an incentive for development in a then-desolate area. By contrast, as ESD said repeatedly, the Development Sites are ideally situated for “transit-oriented” development.
3. The State made an open-ended commitment to make the City whole for lost property taxes.
4. The payments to make the City whole would have priority over any amount used for the redevelopment and potential expansion of Penn Station.

After these contingencies and debt service, it is speculation whether any revenues would be left for the improvement or expansion of Penn Station.¹⁰

The only revenue figures that ESD produced came in a one-page table distributed *after* it had voted to approve the FEIS and DEIS. The table projected (1) roughly \$3.4 billion

⁹ This was not a final agreement: “It is expressly agreed that this Letter does not create or give rise to any contractual or other legally enforceable rights, obligations or liabilities of any kind on the part of any Party; it being the intent of the Parties that only subsequently formalized definitive agreements, if executed and delivered, shall obligate all Parties on the matters set forth herein, it being understood that execution and delivery of said definitive agreements is subject to all applicable governmental reviews and approvals.” Ex. T at 6.

¹⁰ Regarding the PILOMRT and PILOST revenue—at best, a small fraction of GPP revenue—why was it too early for estimates? Hudson Yards certainly offered a reasonable model. Nor was there a good excuse for ESD’s failure to provide estimates regarding land value and additional development rights payments. An appraiser could have prepared estimates in a short period of time.

in PILOT revenue and (2) roughly \$2.5 billion in “other development-generated revenue,” i.e., PILOMRT, PILOST, and land value and additional development payments. Ex. Q at 2. But the table failed to say whether these numbers were net of the required payments to New York City. If they were, they would fall far short of matching the cost numbers in the table.

Nor did ESD break down the catch-all category of “other development-generated revenue.” The effect was to make it even more difficult to find and evaluate the assumptions of ESD’s estimates for each source. (ESD conceded that together those sources would provide only \$158 million for the Reconstruction.) *Id.* Worse, the numbers were premised on a complete build-out of the sites—once again, a *best-case* scenario. The document was no more than a frantic, last-ditch effort to persuade PACB to approve the GPP, after one member of the PACB had already openly expressed their skepticism about its funding. Ex. Q at 2.

4. The Timing of the GPP Revenue

When the GPP revenue would be available is as significant a question as *how much*. According to the FEIS, the Penn Reconstruction and Expansion would be completed by 2033. But only three of the new buildings would be completed by then, and the remainder would not be finished until 2044¹¹:

[ESD and the MTA] recognize that such revenues will not be generated soon enough to meet the construction timeline for the potential Penn Station expansion. To cover this funding gap, New York State would likely rely on financing programs and/or State appropriations to fund the Penn Station reconstruction or potential expansion. New York State may borrow against the future revenues generated by the Proposed Project after the

¹¹ The new service building for Penn Station would also be completed by 2033, but it would not produce any revenue for the Reconstruction and Expansion.

completion of the Penn Station expansion to obtain funds for its construction.

Ex. C-9 at 26-15-26-16; *see* C-4 at 2-10.

As provided in greater detail in Point I(C) *infra*, there would be additional and potentially far more significant impediments to tower construction. Critically, the GPP set no deadline for the owners to build. According to the FEIS, they would begin only “*after the developer is satisfied* that sufficient demand exists for a substantial portion of the new building’s office space.” Ex. C-9 at 26-11; *see* Ex. C-2 at S-34. In other words, Vornado and the other owners, not ESD, would dictate when the revenue came in.

Moreover, evolving changes in the modern workplace—work from home, in particular—and an increasing oversupply of midtown commercial office space could delay construction for decades, which would in turn delay revenue for decades. PILOT money—the largest revenue source—would not be available until the buildings were completed. PILOMRT would not be available until the developer secured financing, and PILOST would not be available until the start of construction. In any event, those two sources would provide only a small fraction of the needed revenue. Finally, the land value payments for Sites 1-3 and payments for additional development rights for Sites 4-8 would be due, *at the earliest*, when the development agreements were signed.¹²

E. A Spurious Urgency

In the end, ESD was reduced to arguing that, however deficient the GPP was, there was no time to come up with a better plan. The reason, ESD argued, was that the

¹² Rising interest rates will increase the developers’ borrowing costs, further dampening their enthusiasm to build.

competition for federal grants was strong, and the money would be gone before ESD and its partners could draw up a comprehensive plan for Penn Station:

[E]ven with the new funding from the 2021 Infrastructure Investment and Jobs Act, the need across the U.S. far outstrips the amount of funding available. The demand for federal funding for transit projects in just the Northeast Corridor is at nearly \$80 billion.

Ex. C-9 at 26-100–26-101.

The error in ESD’s argument is the assumption that approving the GPP would accelerate its ability to secure the federal grant. Under the Federal-State Partnership program, New York State must demonstrate that it already has a firm commitment, not just an expectation, that it can pay its share of the station’s costs.¹³

ESD asserted that the GPP itself qualified as a firm commitment, despite its myriad contingencies:

[D]emonstrating to the federal agencies—namely, the Federal Railroad Administration (FRA) and/or the Federal Transit Administration (FTA), both of which are agencies within the United States Department of Transportation (USDOT)—the source of New York’s cost share is critical for project sponsors to successfully navigate the federal funding process. Thus, in addition to achieving the objectives outlined above, the Proposed Project will serve the critical purpose of establishing a funding source for the “local match,” which is required under federal funding programs.

Ex. C-9 at 26-7.

¹³ Federal-State Partnership for Intercity Passenger Rail, 49 U.S.C. § 24911(d)(1)(B)(ii). The FRA has not issued final regulations for the program, but the preliminary “Notice of Proposed Approach” issued this summer states that the applicant will be required to demonstrate a “commitment of the financial resources through the completion of the project.” Ex. U at IV(B). The other federal grant candidate, the CIG program, also requires a “local financial commitment.” 49 U.S.C. § 5309(f)(1). The applicant must demonstrate that “each proposed local source of capital and operating financing is stable, reliable, and available within the proposed project timetable,” and that includes a “reasonable” contingency fund. *Id.* § 5309(f)(1)(A), (B); *see* 49 C.F.R. § 611.205.

This is simply not true. Neither Vornado nor any other property owner has committed to fund any of the Penn Reconstruction or Expansion costs payable by New York State.

Under the terms of the GPP, developers are not required to pay *unless and until* they decide to build new office towers. In other words, the developers have an option, but no obligation, to build the towers, which is the opposite of a commitment. Moreover, New Jersey has not yet committed to fund any of the Reconstruction or Expansion costs.

In addition, without PACB approval, ESD does not have the authority to issue bonds to pay any of these costs, and the New York State Legislature has appropriated only \$1.3 billion to pay the costs—not nearly enough to pay all of the project costs. Until ESD has obtained commitments to fund the obligations of both New York and New Jersey, it has no prospect of meeting the criteria for federal grants or loans—which negates the only justification ESD has offered for hurrying ahead with this flawed plan.

The weakness of ESD's argument raises the million-dollar question: If the need to secure federal funding does not explain ESD's insistence on going forward now, what does? When the agency had so few of the facts necessary to judge whether the GPP was the right way to fund Penn Station, why did it not wait until it *did* have those facts? Why bestow on Vornado and the other owners this bounty of development rights—immediately and dramatically increasing the value of their properties—before conducting a proper review of the Reconstruction and Expansion? It is cause for concern that these developers would be the GPP's *only* certain beneficiaries.

F. PACB and the Current Status of the GPP

The ESD Directors approved the FEIS on June 30, 2022. Ex. A at 32. Three weeks later, on July 21, 2022, they approved the GPP. *Id.* at 1. But under Public Authorities Law

§ 51(3), there was a third hurdle for ESD: a determination by PACB that ESD had “commitments of funds sufficient to finance the acquisition and construction” of the developments which comprised the GPP. Based on the information provided by ESD, PACB could not make that determination.

PACB did, however, issue a resolution on July 27, 2022 authorizing ESD to enter into a revenue-sharing agreement with New York City regarding PILOT revenue, based on the non-binding PILOT Letter. The PACB resolution read:

NOW THEREFORE BE IT RESOLVED, that the PACB approves UDC [ESD] entering into the PILOT Agreement with the City in accordance with section 51 of the Public Authorities Law:

PROJECT IDENTIFICATION

Prior to the development of each Development Site or group of Sites, UDC will, subject to required governmental reviews and approvals, including without limitation approval by the PACB, enter into a development agreement with the designated developer, acquire title to the Development Site(s), and ground lease the Development Site(s) to the developer in order to among other things obligate the developer to make payments to UDC, including payments of PILOT Revenues that will be used by UDC in accordance with the PILOT Agreement, between UDC and the City, summarized above in the PACB Resolution for the Project. At this juncture, UDC only seeks PACB approval of the PILOT Agreement with the City.

Ex. W at 18-19.

On the day the resolution passed, Governor Hochul issued a statement asserting that PACB had approved the GPP, but it had done no such thing. *See* Ex. X at 1.

G. The Shadow of Vornado

The GPP has been tainted from the start by New York State's relationship with Vornado. Again, the backdrop is politics. Vornado's chair Steven Roth (with his family) contributed at least \$384,000 to the political campaigns of former Governor Cuomo. Ex. E at 3.

Even before Governor Cuomo announced the project, he set the terms of ESD's partnership with Vornado. In January 2018, Vornado's senior vice president at the time, Marc Ricks, introduced himself to the heads of ESD and the MTA: "I understand the Governor has *directed* us to sit with you as soon as possible to advance discussions at Penn Station." Ex. F-6 at 321 (emphasis added).

After Governor Cuomo resigned, Vornado officials made substantial contributions to his successor, Governor Hochul. Over the past year, Mr. Roth and two of the company's trustees have each given the maximum \$69,700 to Hochul's reelection campaign. Ex. E at 3.

It is clear from the FOIL documents already produced by ESD that Mr. Roth was directly involved in the development of the GPP. In December 2020, for example, the ESD chair at the time, Steven Cohen, proposed a Zoom call with Mr. Roth and Janno Lieber, then-head of the MTA's Construction and Development Division (and now MTA chair). Mr. Roth's Executive Vice President, Barry Langer, responded: "My Steve [Roth] would prefer to do in person with you." Ex. F-5 at 8. Three weeks later, Mr. Langer wrote to Mr. Cohen: "I understand Janno is taking some much-deserved time off. My Steve nevertheless wants to sit with you again. Can you please share your availability?" *Id.*, F-2 at 663; *see also id.*, F-2 at 667. No doubt a more complete production of documents—the subject of related FOIL

litigation—would disclose more information about Mr. Roth’s role. *See Weinstock v. Urban Development Corporation*, Index No. 157448/2022 (Sup. Ct. N.Y. Co. 2022) (Billing, J.).

Even without a proper FOIL response, it is apparent that Vornado played a dominant role in the development of the GPP. It is telling that, on one occasion, when ESD proposed a change to the GPP’s Design Guidelines, the senior vice president at Vornado who has been most deeply engaged in the process, Judy Kessler, responded: “[I]t is nothing we agreed to as a requirement and is not currently part of the draft design guidelines.” Ex. F-6 at 271. “Agreed to”? Under UDCA, the agency alone has the authority to draw the guidelines. It is a measure of how inappropriate this process has been that Ms. Kessler assumed the *developer* would need to agree to the change.

The FOIL documents produced thus far include more than a thousand emails between senior ESD officials and senior Vornado executives, describing innumerable meetings and calls. Indeed, Vornado executives—including Executive Vice President Langer—were on the invitation list for the agency’s recurring “team” meetings, and also on the list for “bunker sessions” that included ESD’s outside attorneys. Ex. F-2 at 399-450.

Vornado was not there to observe. Ms. Kessler peppered ESD with agendas for the meetings. She attended “dry runs” of ESD presentations to outside groups. She and Mr. Langer gave extensive notes to the architectural firm FX Collaborative, whose fee was paid in part by Vornado, as it prepared a presentation regarding Penn Station. Ex. F-6 at 113, 268, 550-51.

ESD and Vornado were also partners in political outreach. As opposition to the GPP mounted in March 2021, Ms. Kessler wrote to Ms. Leicht:

Our team is gathering intel this morning. The 2 CBs are planning a press conference for Tuesday. [State Senator Brad] Hoylman is

planning to be there—but not [State Assembly Member Richard] Gottfried. Once our team has made the rounds we should share all we've gathered, compare notes and see how best to help coordinate a plan.

Ex. F-6 at 217. When Ms. Leicht needed help with a public presentation about one of Vornado's buildings, Mr. Langer provided it: "I will do the dancing for Holly's narrative." *Id.* at 79.

Vornado also played a role in the development of the DEIS. *See generally* Exs. Y-1 to Y-6. On April 13, 2020, ESD invited three Vornado executives, including Mr. Langer, to attend a private meeting denoted "ESD, DCP [Department of City Planning] and Vornado ONLY," Ex. F-6 at 308, to define the "Reasonable Worst Case Development Scenario," the framework for comparing (1) the likely amount of development if the GPP were approved and (2) the likely amount of development if it were not. This is a critical, and often determinative, assumption in an agency's environmental review under SEQRA—and subject to considerable massaging, depending upon the intentions of the agency (and developer).

In addition, Vornado actually split the payments to ESD's outside advisors. On February 20, 2020, the ESD Directors approved contracts with the following, all to be paid for by ESD and Vornado: (1) the agency's land use attorneys (up to \$950,000); (2) its real estate attorneys (up to \$950,000); (3) the environmental firm that drafted the DEIS and FEIS (up to \$4 million); and (4) FX Collaborative, which developed plans for the design guidelines and public realm improvements (up to \$590,000). Ex. Z. A year and a half later, on July 15, 2021, Vornado and ESD agreed to split the bill for a fifth consultant, ESD's financial advisors, Ernst & Young Infrastructure Advisors—the very firm that would advise

the agency on what Vornado should be required to pay for its additional development rights, and when it should be required to pay. Ex. AA.¹⁴

The financial interests of Vornado and ESD (and by extension, the taxpayers of New York) were in direct conflict: What was better for Vornado was worse for ESD, and vice versa. How could advisors resolve those conflicts in a manner that did not prejudice New York's taxpayers? The decision by ESD to allow the GPP's biggest (and perhaps only) beneficiary to pay for 50 percent of the costs of ESD's key advisors startling. These facts require every decision made by ESD in favor of Vornado to be closely scrutinized and questioned, which requires absolute transparency and candor by ESD. However, ESD has taken the opposite approach.

The darker side of the intimate working relationship between Ms. Leicht and Mr. Langer was a patronizing, us-versus-them attitude toward members of the public who questioned the wisdom of the GPP. When, for example, Vornado received an email from Layla Law-Gisiko, the chair of Community Board 5's Land Use, Housing & Zoning Committee and a critic of the GPP, proposing a meeting with company executives, Mr. Langer immediately forwarded the email to Ms. Leicht at ESD, who responded derisively: "And so it begins." Ex. F-6 at 121.

The best evidence of their unseemly collaboration is the GPP itself. It is worth recalling Ms. Leicht's expression of unease about how generous her agency had been with Vornado, and how necessary it was, she believed, to contrive a narrative of how this had

¹⁴ The contract amended an earlier Ernst contract in order to increase the maximum fee from \$600,000 to \$900,000. In the earlier case too, Mr. Gertler submitted a resolution that the Directors approved, and his memo again identified Vornado as one of the "funding sources." Ex. BB at 1.

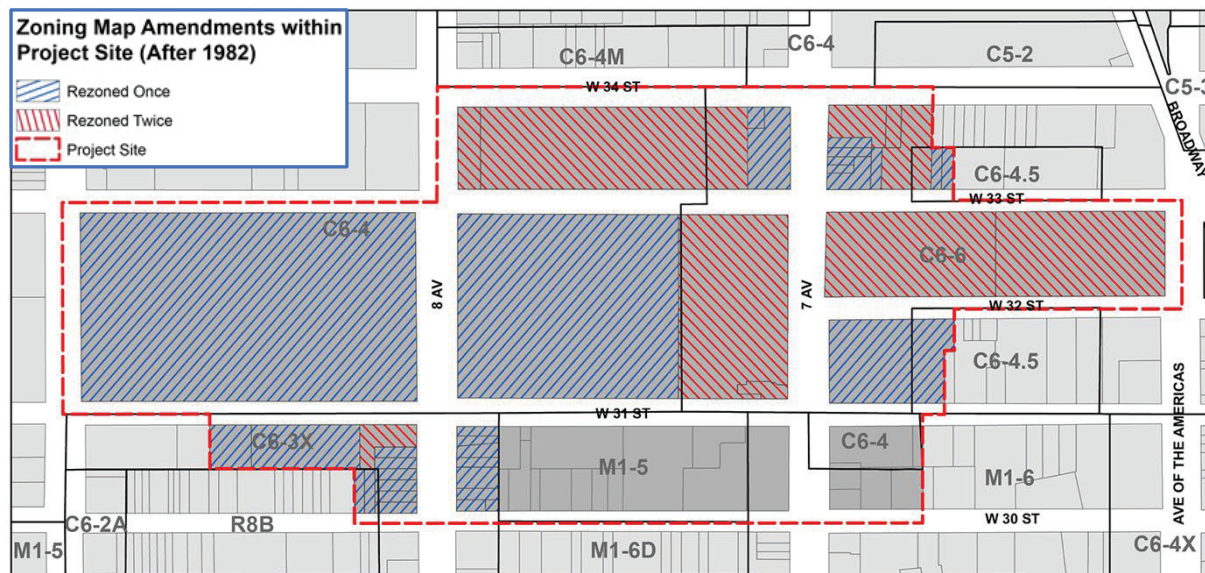
come about: “We need to coordinate and script this meeting to ensure we’re cohesive and have a good story to tell about why we landed on these densities” Ex. F-6 at 621.

H. The Override of the City’s Zoning Authority

The GPP also requires close scrutiny because it trespasses so brazenly on “one of the core powers of local governance”—the power to zone. *Wallach v. Town of Dryden*, 23 N.Y.3d 728, 743 (2014). UDCA allows ESD to override local zoning only if it would not be “feasible or practicable” to comply with the existing local laws. UDCA § 16(3). ESD did not even attempt to demonstrate that it could accomplish its stated objectives under the current laws, or with amendments that were less extreme than the GPP.

This is not a case where the existing City zoning laws are vague or obsolete. Indeed, over the past 40 years, the City has repeatedly rezoned within the Project Area in accordance with the district’s evolving social and economic needs, including text amendments in 1982 (Special Midtown District), 1999 (Chelsea Rezoning), 2001 (Penn Center Subdistrict of Special Midtown District), 2005 (Special Hudson Yards District), and 2010 (Hotel Pennsylvania).

As the following diagram illustrates, nearly every parcel in the Project Area was rezoned either once (blue) or twice (red) since 1982, all through the City’s zoning process:



In addition, New York City has issued numerous special permits in the Project Area, including for Madison Square Garden (1963, 2013), the Hotel Pennsylvania (2010), and Penn 1 (2019).¹⁵

In each of these instances, the proposed zoning amendment or special permit was reviewed under the City’s Uniform Land Use Review Procedure (“ULURP”), with participation from the public, local Community Boards, the Borough President, the City Planning Commission, the City Council, and the Mayor. The Planning Commission also issued a detailed report describing its planning and policy objectives for each of these amendments and permits. Read together, the reports describe an iterative process through which the City has worked—and continues to work—to create a lively, increasingly prosperous neighborhood.

¹⁵ The history of the City’s efforts is described in detail in the affidavit of George M. Janes. *See* Janes Aff. ¶¶ 39-62.

ARGUMENT

I. ESD'S DECISION TO OVERRIDE THE CITY'S ZONING LAW WITHOUT DETERMINING THAT THE OVERRIDE WAS NECESSARY TO FINANCE THE RECONSTRUCTION AND EXPANSION OF PENN STATION WAS ARBITRARY AND CAPRICIOUS

A. ESD Disavowed Its Clear Legal Obligation to Consider Project Financing

As the Court of Appeals has written, judges are “obliged” to reverse an administrative determination if it is “taken without sound basis in reason or regard to the facts.”

Adirondack Wild: Friends of the Forest Preserve v. N.Y.S. Adirondack Park Agency, 34 N.Y.3d 184, 195 (2019). In this case, ESD did not even *attempt* to establish that funding a new Penn Station required the creation of 18.3 million square feet of largely commercial development (much of it going to the Governor’s benefactor Vornado). It is not that ESD erred in its consideration of the relevant facts and law; it is that it refused to consider them at all.

ESD has asserted that the primary purpose of the GPP is “to support and generate essential revenue to help fund the reconstruction and potential expansion of Penn Station.” Ex. A at 1. And yet it expressly declined to discuss whether the GPP would serve that purpose. ESD’s refusal to provide even minimally defensible financial estimates should be the end of the discussion.

A chorus of experts and stakeholders has agreed. On January 27, 2022, in a letter to ESD’s President and CEO, the chair of the City Planning Commission wrote that GPP funding “is a topic that *must* be concretely resolved prior to affirming the GPP.” Ex. CC at 2. Similarly, the City’s Independent Budget Office report concluded that the funding plan “requires *much* further detail in order to be evaluated both in terms of risks and benefits to

the state and the city, as well as weighing it against other ways Penn Station transit improvements might be financed.” Ex. DD at 18 (emphasis added).

The State Comptroller, when urging PACB not to approve the GPP, described the lack of a funding plan as “exceedingly concerning.” Ex. EE at 1.

The sternest judgment came from the former Lieutenant Governor and former UDC and MTA chair, Richard Ravitch: “In my decades of work in public finance, I have never seen a large-scale project where the sponsors supplied so little information about how much money they needed and how much they would be able to raise.” Oct. 19, 2022 Affidavit of Richard Ravitch (“Ravitch Aff.”) ¶ 3. Elsewhere, Ravitch wrote: “That ludicrously low level of transparency is reason enough to postpone this plan.” Ex. D at 1.

Admittedly, the GPP has a second purpose as well—to help create a modern, mixed-use district with office, community facility, retail, hotel, and residential space. Ex. A at 2. But that worthy goal can neither explain nor justify ESD’s decision to override New York City’s zoning on this scale.

Funding the transit and public realm improvements by themselves would hardly be a sufficient reason to go forward with the GPP. ESD’s own estimate of their cost was \$2 billion, one-tenth of the Master Plan’s \$22 billion budget. Since New York would be required to contribute only a quarter of the \$2 billion, its bill would be \$500 million. In the context of a project this big, that is small potatoes, and could not conceivably justify increasing the permitted floor area on these eight sites by 133 percent. Janes Aff. ¶ 4.

Nor could ESD claim *post hoc* that the benefits of the GPP would radiate outward. The FEIS acknowledged that it would not: “Overall, the Proposed Project is not expected to induce additional growth beyond the Project Area.” Ex. C-8 at 24-3.

In short, the only remotely plausible justification for the GPP is the first one—that it would provide funds for the Penn Reconstruction and Penn Expansion.

B. ESD Made No Cost Estimates for the Station’s Rehabilitation and No Revenue Estimates for the GPP

To succeed in that argument, ESD would have needed to answer four questions, none of which it addressed:

1. How much would the Master Plan cost?
2. How much have the other governmental agencies and entities committed to contribute?
3. How much revenue would the GPP itself generate?
4. *When* would the GPP generate the revenue?

The first three questions are discussed here. The remaining question is addressed in Section C below.

1. Master Plan

Neither the GPP nor the FEIS supplied even a rough cost estimate for the Master Plan. Again, ESD’s problem was that it had no idea what the station would look like, so there necessarily were “large cost ranges.” Ex. C-9 at 26-14. Without narrowing those ranges, it was impossible for ESD make an informed judgment about how much revenue the GPP would need to produce, and thus how big the new towers would need to be in order to cover it.

To be sure, an agency cannot be expected to postpone a project until it has drawn up its final plans. But the test that the State Department of Environmental Conservation (“DEC”) set for SEQRA applies equally to UDCA: The plan “should contain enough detail on size, location, and elements of the proposal to allow a reader to understand the proposed

action and the associated impacts, and to determine the effectiveness of any proposed alternatives or mitigation.”¹⁶

ESD’s ninth-inning estimate of \$22 billion for the Master Plan flew in the face of ESD’s own admission about the “large cost ranges” of the Penn Reconstruction and Expansion. Ex. Q at 1. The number was pie-in-the-sky accounting.

2. Other Revenue Sources

ESD failed to cite any financial commitments from any of its partners—in particular, from its most important one, USDOT. Without a federal grant, or with only a small one, the entire Master Plan would fall apart; New York and New Jersey do not have the resources to undertake a capital project of this size.

On the other hand, if USDOT offered a grant up to the maximum—80 percent of project costs—ESD would need to raise only \$900 million (in addition to the \$1.3 billion already appropriated by the New York Legislature). In that event, there would certainly be no need for this massive real estate giveaway. ESD has no idea which of these two scenarios—or others in between—might come to pass. That is precisely why it was too early to approve such generous Design Guidelines.

Nor is there any clarity about whether New Jersey will pay its share. The current hostilities between Governor Hochul and Governor Murphy over congestion pricing could have a materially adverse impact on GPP funding. *See* Ex. GG. Even before that skirmish

¹⁶ Department of Environmental Conservation, *SEQR Handbook* (4th ed. 2020), dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf, Ch. 2(D) at 115 (“SEQR Handbook”). ESD plainly failed that test.

began, ESD expressed uncertainty about the division of financial responsibility, particularly regarding the \$13 billion Penn Expansion. *See supra* at 18.

In declining to vote for ESD’s funding plan, one PACB member, State Senator Leroy Comrie, said that “until we have secured necessary federal approvals and the fair share of funding from the federal government and New Jersey,” he would not support any development. Ex. GG.

3. Revenue from the GPP

Once again, ESD’s most remarkable omission—from both the GPP and the FEIS—was a revenue estimate for the GPP itself. The *only* number it offered before voting to approve the GPP was the \$2 billion best-case scenario. But that figure was quickly debunked and, in the FEIS, ESD withdrew it. *See supra* at 15-16.

In wobbly defense of its failure to supply numbers, the FEIS insisted it was “premature” to hazard estimates for three of the five probable sources—PILOT, PILOMRT, and PILOST revenue. But ESD had signed the PILOT Letter of Agreement with the City *before* the FEIS was approved. And as for estimating PILOMRT and PILOST revenue, Hudson Yards provided a perfectly reasonable model. As for the last two sources—land value and additional development rights payments—ESD did not even try. *See supra* at 18-19.

The figures in ESD’s one-page Hail Mary, distributed after it had approved the GPP, were thin indeed—an unsubstantiated estimate for undefined “early” and “longer term” PILOT revenue, and a single, equally unsubstantiated estimate for all other revenue sources, bunched into the category “other development-generated revenue.” *See* Ex. Q at 2.

Moreover, the numbers were premised on the complete build-out of the eight Development Sites. In other words, another *best-case* scenario.

Even if the numbers were reliable, ESD should not be permitted to cite them now, because they were announced after it had approved the FEIS and GPP. Under New York law, such *post hoc* rationalizations may not be used to justify the earlier decision. As the Court of Appeals wrote, “Review is limited to a consideration of the statement of the factual basis for the determination.” *Montauk Improvement, Inc. v. Proccacino*, 41 N.Y.2d 913, 914 (1977); see *N.Y. State Chapter, Inc., Assoc. General Contractors v. N.Y.S. Thruway Auth.*, 88 N.Y.2d 56, 75 (1996) (rejecting agency’s “[p]ost hoc rationalization” for its administrative determination); *Tessler v. City of New York*, 38 Misc. 3d 215, 228 (Sup. Ct. N.Y. Co. 2012) (agency “may not [] support [its administrative determination] with grounds later considered, but not found in the original administrative record: a *post hoc* rationalization”).

C. ESD’s Estimates of When the GPP Revenue Would Be Available Failed to Consider the Long-Term Effects of Remote Work and the Oversupply of Midtown Office Space

ESD’s failure to provide an accurate construction timetable is an arbitrary and capricious agency determination. The First Department’s decision in *Develop Don’t Destroy (Brooklyn) v. Empire State Development Corporation*, a SEQRA case challenging another ESD project, the Atlantic Yards Land Use Improvement and Civic Project, is instructive. 94 A.D.3d 508 (1st Dep’t 2012). In that case, the project plan was to level 22 acres in Brooklyn to make way for the Barclays Center sports arena and 16 high-rise commercial and residential buildings. *Id.* at 509. In 2006, ESD had issued an FEIS setting a “10-year completion schedule,” with 2016 set as the “build year,” for 11 of the project’s 16 high-rise buildings to become “substantially operational.” *Id.* at 509-10. Two years later, though, the

Great Recession arrived, and the developer prevailed on the agency to issue a modified GPP, giving it until 2035 to substantially complete construction. *Id.* at 509.

ESD refused to prepare a Supplemental EIS reconsidering the project's impacts in light of the revised schedule, and "mere[ly] assert[ed]" without support that the impact of the new 25-year build-out would be similar or less severe than the original 10-year build-out. *Id.* at 509-11. The court held that the agency's use of the obsolete schedule "lack[ed] a rational basis and [was] arbitrary and capricious," and ordered it to prepare an SEIS reconsidering the SEQRA impact categories based on a more accurate timetable. *Id.* at 510.

Develop Don't Destroy is directly on point. Here, as there, the agency knew that the "build year" projections were inaccurate, and yet refused to revise its analysis to reflect the real schedule. Indeed, the facts against ESD are even stronger in the present case. In *Develop Don't Destroy*, the developers at least had a deadline; here, they have none.

ESD recognized the consequences of delays in the present case:

[T]he completion of the Proposed Project at a later date would delay the delivery of some of the project benefits such as revitalization of the Project Area, economic growth and tax revenue through job creation and economic activity, implementation of transit and public realm improvements, and the Proposed Project's support for the reconstruction and potential expansion of Penn Station.

Ex. C-9 at 26-61.

Regarding the proposed transit and public realm improvements, they would be located on the eight parcels, so those improvements too could not be made until the towers were built:

If construction on any of the development sites occurs later than assumed in the EIS (or if construction does not occur) the associated on-site improvements would be delayed (or may not occur). It would not be practicable to require developers to

complete these improvements prior to construction of the new buildings on the development sites. For example, one could not create widened sidewalks without demolishing the existing buildings.

Id.

Finally, the delay would increase the cost of borrowing; the longer the repayment schedule, the greater the interest payments. Moreover, rising interest rates would further increase costs.

How long would the delay be? The FEIS projected that the overhaul of Penn Station would be completed by 2033, and the towers by 2044. Ex. C-4 at 2-9–2-10. But the timetable for the towers would almost certainly be longer—the result of ESD’s questionable decision to impose no deadline for the owners, present and future, to start their work.

Vornado and the other owners would be guided by their own interests:

[T]here is no plan to construct empty office buildings in the hope that demand for commercial leases will materialize after the buildings are in place; the construction of an office building typically occurs *after the developer is satisfied* that sufficient demand exists for a substantial portion of the new building’s office space.

Ex. B, App’x at A-9 (emphasis added).¹⁷ A year later, the FEIS evidenced the same concern:

In general, if demand for office space within the Project Area is *insufficiently robust* to warrant the completion of each of the Proposed Project’s office buildings by the 2044 analysis year, then construction and occupancy of the Proposed Project office buildings would be deferred.

Ex. C-2 at S-34 (emphasis added).

¹⁷ References to “App’x” are to the Appendix at the end of this brief.

We already know that there is a growing oversupply of commercial space in the area, and that demand is “insufficiently robust.” Given this knowledge, it was irresponsible for the FEIS to state that the 2044 analysis year for the completion of the towers “represents a reasonable worst-case scenario.” *Id.*; *see* Ex. C-4 at 2-21.

According to Cushman and Wakefield, the City’s commercial vacancy rate in the second quarter of 2022 was 21.5 percent, up from 21.0 in the first quarter. Ex. I at 8. The analogy of Hudson Yards is particularly discouraging. A study by the real estate firm Avison Young found that nearly 37 percent of all office space in the Hudson Yards neighborhood is available for lease, the highest rate in midtown. Major companies that moved there a few years ago are already trying to unload floors of unused office space. At the same time, the supply of office space in the area continues to grow, promising higher vacancy rates. More than half of all office construction in Manhattan—seven million square feet—is under development at Hudson Yards. Ex. G at 2.

One critical factor in this market is changes in the nature of the workplace. According to a survey by the Partnership for New York City, more than a third of the 188 big New York City employers in the survey expect their office needs to decline over the next five years. “Post-pandemic, remote work is here to stay,” said Kathryn Wylde, president and CEO of the Partnership for New York City, the City’s leading business group. “There is going to be a permanent relook at keeping offices and jobs in New York City.” Ex. II at 1; *see generally* Ex. KK. In an op-ed in *The New York Daily News*, Mr. Ravitch strongly criticized the absence of a financial analysis “done post-COVID and post the work-from-home revolution.” Ex. D at 1.

Over and over, by its own admission, ESD has opted for best-case scenarios, and made decisions based on the assumption that things will go smoothly. In its efforts not to think about just how much could go wrong, it avoided what is perhaps the most significant risk to the Master Plan—funding. The GPP *exists* to underwrite the costs of improving and expanding Penn Station, and it was decidedly arbitrary and capricious for it to refuse even to consider whether, in fact, the GPP would serve that purpose.

II. ESD VIOLATED SEQRA BY CONSIDERING ONLY ONE COMPONENT OF THE MASTER PLAN

SEQRA requires that a state agency proposing an “action” must undertake an environmental review of the potential consequences of the action. The agency is required to consider the *entire* action. With exceptions not relevant here, 6 N.Y.C.R.R. § 617 prohibits an agency from “segmenting” its SEQRA review by conducting separate reviews of individual components of the action.

The SEQRA regulations define “segmentation” as “the division of the environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance.” 6 N.Y.C.R.R. § 617.2(ah). The regulations continue:

Considering only a part or segment of an action is contrary to the intent of SEQR. If a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance, and any subsequent EIS, the supporting reasons and must demonstrate that such review is *clearly no less protective of the environment*. Related actions should be identified and discussed to the fullest extent possible.

Id. § 617.3(g)(1) (emphasis added).

The “action” in this case is indisputably the Master Plan. Last year, in the DEIS, ESD expressly conceded the point, describing the GPP as a “critical component” of the Master

Plan. Ex. Y-1 at S-2. Tellingly—no doubt in response to the many public comments citing this admission—ESD excised the phrase from the FEIS.

ESD tied itself in linguistic knots trying to avoid the charge of segmentation, describing the Master Plan as an “independent but related” project and as “separate but related.” Ex. A at 3, 16. This is double-speak. Try as it may, ESD cannot airbrush the Master Plan out of the photograph.

ESD offered only the most cursory of “supporting reasons” for the segmentation of the Master Plan, and never attempted to explain how its limited review of the GPP could be “clearly no less protective of the environment” than a comprehensive review of the Master Plan. How could it? ESD refused to consider all the potential adverse impacts of the Master Plan’s other components.

This case meets every one of the eight criteria that DEC has set for determining whether actions must be reviewed together: (1) purpose, (2) time, (3) location, (4) impacts, (5) ownership, (6) common plan, (7) utility, and (8) inducement. *See* SEQOR Handbook at 53-54.

Purpose: The two plans have a “common purpose.”

The plans here share the purpose of reconstructing and expanding Penn Station—one funding it, the other building it.

Time: There is a common reason for them to be “completed at or about the same time.”

Until the owners proceed with construction of the buildings, there will be no revenue for Penn Station, and no public realm and transit improvements on the sites. In addition, the final design and alignment of the transit improvements will need to be coordinated with the transit improvements elsewhere.

Location: They have a “common geographic location.”

They are across the street from each other.

Impacts: They share a “common impact” that, when the two projects are considered separately, will not qualify as significantly adverse, but when considered together, may so qualify.

Although not addressed in this case, they share common impacts—to neighborhood character, socioeconomic conditions, transportation, air quality, noise, and water and sewer infrastructure, among others—that would be significantly adverse if the projects were considered together.

Ownership: They are under “common ownership and control.”

ESD is the lead agency for the GPP, and its sister agency, the MTA, would oversee the Penn Reconstruction.

Common Plan: They are “components of an identifiable overall plan.”

ESD itself described the GPP as a "critical component" of the Master Plan.

Utility: They are “functionally dependent.”

The primary function of the GPP is to generate "essential revenue" for the Master Plan. The primary function of that plan is to create a modern Penn Station — which, according to ESD, is necessary to make the redevelopment of the surrounding sites economically viable.

Inducement: Approving one phase of the plan “commits” the agency to approving the other.

Again, if the revenue from rezoning is "essential" to funding Penn Station, and only a new Penn Station will make the redevelopment of the surrounding sites economically viable, then going forward with one requires going forward with the other.

Far from requiring that all of these criteria must apply, DEC states: “If the answer to *one or more* of these questions is yes, an agency should be concerned that segmentation is

taking place.” *Id.* at 1-5 (emphasis added). If the answer to all eight is yes, the conclusion is inescapable: The actions must be reviewed in concert.¹⁸

ESD offered four arguments for why it should nevertheless be excused from considering the Master Plan as a whole. For the following reasons, they should be rejected.

1. Unknowns. ESD claimed that it did not know enough about the Master Plan to properly analyze it:

The details concerning the interior design of a reconstructed and potentially expanded Penn Station were not available at the time the DEIS and FEIS were prepared. Accordingly, the EIS does not assess the potential environmental impacts of the operational plan for the reconstructed/expanded facility, and leaves the consideration of such impacts to the federal environmental review process.

Ex. C-9 at 26-28.

ESD’s logic is upside down. Its ignorance about the real costs and impacts of the Master Plan is precisely *why* the segmented FEIS must be discarded. If ESD did not know the facts necessary to determine whether the GPP would serve its stated purpose, then it needed to wait until it did.

ESD argued that, in any event, it could clean things up later. Thus, for example, in the discussion of the Penn Expansion, the DEIS stated:

To the extent that new information regarding the potential Penn Station expansion (e.g., more specific design information, etc.) becomes available in the future, additional environmental analyses and findings would thereafter be prepared to the extent

¹⁸ SEQRA’s broad definition of “impacts” parallels its rules on segmentation: “[T]he lead agency must consider reasonably related long-term, short-term, direct, indirect and cumulative impacts, including other simultaneous or subsequent actions which are (i) included in any long-range plan of which the action under consideration is a part, (ii) likely to be undertaken as a result thereof, or (iii) dependent thereon.” 6 N.Y.C.R.R. § 617.7(c)(2)(i); *see Save the Pine Bush v. Albany*, 70 N.Y.2d 193, 205-06 (1987); *Chinese Staff & Workers Association v. New York*, 68 N.Y.2d 359, 366-68 (1986). As set forth above, this case satisfies all three criteria.

appropriate by one or more of the governmental sponsors prior to any final action by ESD with respect to such expansion.

Ex. Y-3 at 2-7. But the “additional environmental analyses” would be the NEPA review, which would come *after* ESD had approved the GPP. The issue is whether to approve the GPP in the first place.¹⁹

2. Different Funding Sources. ESD’s second excuse was that the rest of the Master Plan would have different funding sources. Ex. Y-1 at S-27. DEC’s guidance, however, flatly rejects that argument:

It is common in many projects to have a mix of funding sources (for example, local highway construction, affordable housing, or economic development). If the various funding sources support the same project, or a group of projects that are part of the same overall action, then they should be examined in a single environmental review.

Ex. K at 12-13.

3. FEIS and Cumulative Impacts. Next, ESD argued that it *did* properly consider the impacts of the Master Plan as a whole. This is simply not true, as ESD conceded with this caveat:

[T]he cumulative environmental effects of the Penn Station reconstruction and the potential Penn Station expansion were taken into consideration in performing the analyses in the EIS *to the extent feasible in light of available information*.

Ex. C-9 at 26-111 (emphasis added); *see id.* at 26-24–26-29. Again, it was precisely ESD’s lack of “available information” regarding the Master Plan that rendered its consideration of cumulative impacts insufficient.

¹⁹ The FEIS suggested at one point that the Master Plan was already complete: “To create a framework for addressing these problems, the Railroads have prepared a Master Plan for Penn Station, which is expected to be used as the basis for the design of the reconstruction of the existing station.” Ex. C-2 at S-8; *see* Ex. C-4 at 2-9. If there is already a plan for the Penn Reconstruction and Expansion, ESD needs to produce it immediately.

Moreover, missing from the list of the cumulative impacts that ESD claimed to have considered was the *financing* of the station—the essential subject of this brief.

4. Public Authorities Law. Finally, ESD attempted to find support in Public Authorities Law § 1266(11), which permits the MTA to forego SEQRA review for transportation projects under certain circumstances: (1) “upon real property theretofore used for a transportation purpose, or on an insubstantial addition to such property contiguous thereto” or (2) if its actions “require the preparation of a statement under or pursuant to any federal law or regulation as to the environmental impact thereof”—that is, a NEPA EIS. Ex. C-9 at 26-23. The argument founders for three reasons.

First, the exemption applies to the MTA, not the agency that conducted the review here, ESD. Whether the MTA is free to forego its own review of the Reconstruction’s impacts on the Master Plan, ESD was not free to forego reviewing the impacts relating to the GPP.

Second, even if the law did apply to ESD, the GPP fails to qualify under either of the statute’s two tests. Whether or not one portion of the station—the Penn Reconstruction—would be “upon real property theretofore used for a transportation purpose,” the other portion—the Penn Expansion—would not be, and would hardly qualify as an “insubstantial addition” *Id.* Its \$13 billion budget is nearly double the \$7 billion budget for the Reconstruction, and it annexes all of Block 780 and much of the blocks to its east and west. *See Staten Island Rapid Transit Operating Auth. v. Zagata*, 244 A.D.2d 340, 341 (2d Dep’t 1997); *Martin v. Koppelman*, 124 A.D.2d 24 (2d Dep’t 1987).

Third, the GPP cannot meet the second test for avoiding a SEQRA review—that the impacts from the Reconstruction will be considered in a NEPA EIS. An Amtrak

representative disclosed this year that USDOT plans to *exclude* the Penn Reconstruction from its NEPA EIS, based on one of two preposterous arguments—(1) that a preliminary “environmental assessment” would demonstrate that the Reconstruction causes “no significant impact,” or worse, (2) that the Reconstruction would not even require an environmental assessment because it qualifies under one of the statute’s “categorical exclusions” for minor alterations. Ex. LL at 13; *see generally* Exs. MM, NN.

These arguments are particularly absurd when applied to a \$22 billion overhaul of the busiest rail station in North America. But if one were to accept the premise—that the NEPA EIS does not require consideration of the Reconstruction’s impacts—then the MTA must abandon any claim to meeting the second test for the exemption here, i.e., that the Reconstruction will be addressed in a federal EIS. Public Authorities Law § 1266(11). Clearly the purpose of this exemption is to spare New York agencies the burden of conducting *two* EISs—one federal and one state. ESD’s interpretation of the statute would permit it to conduct *none*.

A proper environmental review of the Master Plan as a whole would not in any way slow down the construction of the towers. The review would likely be completed within a couple of years—almost certainly before Vornado and the other owners recovered their optimism about the Midtown commercial market and were ready to begin building. Thus, with or without a proper review, the *revenue* schedule would be the same.

III. ESD FAILED TO ESTABLISH THAT THE GPP QUALIFIES AS EITHER A CIVIC OR LAND USE IMPROVEMENT PROJECT UNDER UDCA

Before ESD can exercise the powers the Legislature conferred on it in UDCA—to acquire, sell, and lease property; take property by eminent domain; and override local laws that conflict with its plans, among other powers—it must demonstrate that the proposal falls

under one of the statute's five categories of projects eligible for ESD's "sale and lease" assistance. UDCA §§ 6-9. ESD argued unconvincingly that the GPP falls under two of them—"Civic Projects" and "Land Use Improvement Projects." Ex. A at 14-19. Neither applies.

A. The GPP Cannot Qualify as a Civic Project Because ESD Failed to Make "Adequate Provision" for Project Costs

The GPP is not a Civic Project. Agreeing to build an "educational, cultural, recreational, community, municipal, public service or other civic facility" is only the first of two requirements for qualifying as one; the second is demonstrating that "adequate provision has been, or will be made for the payment of the cost of acquisition, construction, operation, maintenance and upkeep such project." UDCA § 10(d)(1), (4). As detailed above, ESD failed to supply the cost and revenue estimates necessary to demonstrate that the GPP could make the necessary contribution to the station's construction costs. But UDCA requires that the funds also be sufficient to cover the "operation, maintenance, and upkeep" of the station. ESD did not even *assert* that the GPP could cover those costs as well.²⁰

B. The GPP Cannot Qualify as a Land Use Improvement Project Because the Development Sites Are Not Blighted

1. Substandard and Insanitary Conditions

The GPP cannot qualify as a Land Use Improvement Project because ESD failed to demonstrate that the area 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

²⁰ The GPP also failed to meet two other requirements for qualifying as a Civic Project: (1) the civic facility—Penn Station—must be within "the area in which such project is located"—the Development Sites—and (2) the plan must assure "adequate light [and] air." UDCA § 10(d). If USDOT decided not to go forward with the Penn Expansion, no part of the station would be on the Development Sites.

development of the municipality.” *Id.* § 10(c)(1). The statute defines a “substandard and insanitary area” as “a slum, blighted, deteriorated or deteriorating area, or an area which has a blighting influence on the surrounding area.” *Id.* § 3(12).

Agencies are not free to decree, without support, that a neighborhood is “substandard.” Addressing the issue in a condemnation action, the Court of Appeals wrote:

[C]ourts are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases. The findings of the agency are not self-executing. A determination of public purpose must be made by the courts themselves and they must have a basis on which to do so.

Yonkers Community Development Agency v. Morris, 37 N.Y.2d 478, 485 (1975); *accord Gabe Realty Corp. v. White Plains Urban Renewal Agency*, 195 A.D.3d 1020, 1022 (2d Dep’t 2021).

In this case, it is impossible to square the statutory definition of “blight” with the facts on the ground.²¹ Vornado's own chairman refuted ESD’s claim:

Our assets sit literally on top of Penn Station, the region’s major transportation hub, adjacent to Macy’s and Madison Square Garden. Day and night, the Penn District is teeming with activity. . . . The Penn District is our moonshot, the highest growth opportunity in our portfolio. . . . In the Penn District, we are creating a campus, a city within a city, which will become the beating heart of the NEW New York.

²¹ The FEIS approvingly cited the Legislature’s 2018 New York Pennsylvania Station Public Safety Improvements Act, which found Penn Station to be “[a]ntiquated, substandard, and inadequate to meet current transportation and public safety needs,” and to “present[] an unreasonable safety risk to the public.” Ex. C-9 at 26-42. This misses the point. No one questions that the condition of the station itself is substandard.

Ex. I at 14.²² Daniel Biederman, the co-founder of the 34th Street Partnership and Bryant Park Corporation, echoed that conclusion: “The neighborhood has its problems, but it is not blighted.” Ex. RR at 10.

An architectural survey of the Project Area must begin with Moynihan Train Hall, App’x Fig. A, which *The New York Times* called a “stunning” restoration. Ex. NN at 3. On the commercial side, Vornado's Penn 1 (57 stories) and Penn 2 (31 stories), are premier office towers, whose current tenants include Verizon, AT&T, Direct TV, and Cisco Systems. App’x Fig. B, C. Both are now undergoing extensive renovations and are already extremely valuable. According to the City’s Department of Finance, the 2022-23 market value of Penn 1 was \$786,869,000, with a property tax bill of \$38,082,492—even after a reduced, post-COVID reassessment.²³

The Development Sites include seven historic structures, listed or eligible for listing in the State and National Registers of Historic Places, that would all be demolished:

1. St. John the Baptist Roman Catholic Church on 30th Street, a French Gothic structure built in 1871-72 by the architect Napoleon LeBrun. App’x Fig. E.
2. The Stewart Hotel on Seventh Avenue, a 25-story Italianate hotel built in 1929. It was designed by Murgatroyd & Ogden, the firm that designed the Barbizon Hotel on Lexington Avenue, designated a landmark by the City's Landmarks Preservation Commission. App’x Fig. F.

²² Meanwhile, when it has served his purposes, Roth has endeavored to *create* blight, hoping to buttress the claim that the neighborhood is irredeemable and needs to be overhauled. This was what he did with the historic Hotel Pennsylvania on one of Vornado’s sites here, allowing it to fall into disrepair to prevent its designation as a protected landmark. This is also consistent with his past practices. In a 2010 speech at Columbia’s School of Architecture, Roth boasted that, after buying the Alexander’s department store on Lexington Avenue, he deliberately let it sit vacant for years so it would become more “decrepit.” Indeed, his own mother called to complain about “bums sleeping in the sidewalks of this now closed, decrepit building.” Ex. E at 2. Roth explained: “And what did I do? Nothing. Why did I do nothing? Because I was thinking in my own awkward way, that the more the building was a blight, the more the governments would want this to be redeveloped; the more help they would give us when the time came. And they did.” *Id.*

²³ N.Y.C. Department of Finance, Property Information, a836-pts-access.nyc.gov/care/datalets/datalet.aspx?mode=asmt_fin_2023&sIndex=1&idx=1&LMparent=20.

3. The Penn Terminal Building, also on Seventh Avenue, a 17-story Neoclassical brick office building constructed in 1920. App'x Fig. G.
4. The Penn Station Service Building on 31st Street, a granite McKim, Mead & White structure, the last surviving element of the old Penn Station. App'x Fig. H
5. The Fairmont Building, also on 30th Street, a 6-story Neoclassical structure built in honor of the founder of the Plumber's Trade Journal. App'x Fig. I.
6. The 1925 Gimbel Brothers Skybridge, a three-floor, copper-clad bridge extending across 32nd Street, designed by Shreve and Lamb, who designed the Empire State Building. App'x Fig. J.
7. The 22-story Hotel Pennsylvania on Seventh Avenue, another McKim, Mead & White building within the Project Area. App'x Fig. K. Although the hotel's owner, Vornado, assured the public in 2013 that it would restore the building to its former glory, Vornado is now in the process of demolishing the building, in hopeful anticipation of the GPP. See Ex. OO at 3.

While not listed on the State or Federal Register, another notable structure slated for demolition is the 1929 14-story Art Deco-style Industrious Building at 251 West 30th Street—the current home of the members of Petitioner 251 West 30th Street Residential Tenants Association. App'x Fig. L. Ironically, the owner just completed a multimillion-dollar renovation to create open-floor-plan co-working spaces for start-ups and tech companies. Ex. PP. Also within the Project Area is Vornado's Equitable Life Assurance Company Building (Penn 11) on Seventh Avenue, a 26-story Renaissance Revival commercial structure built in 1923. App'x Fig. D. Although it is not currently slated for demolition, that could change.

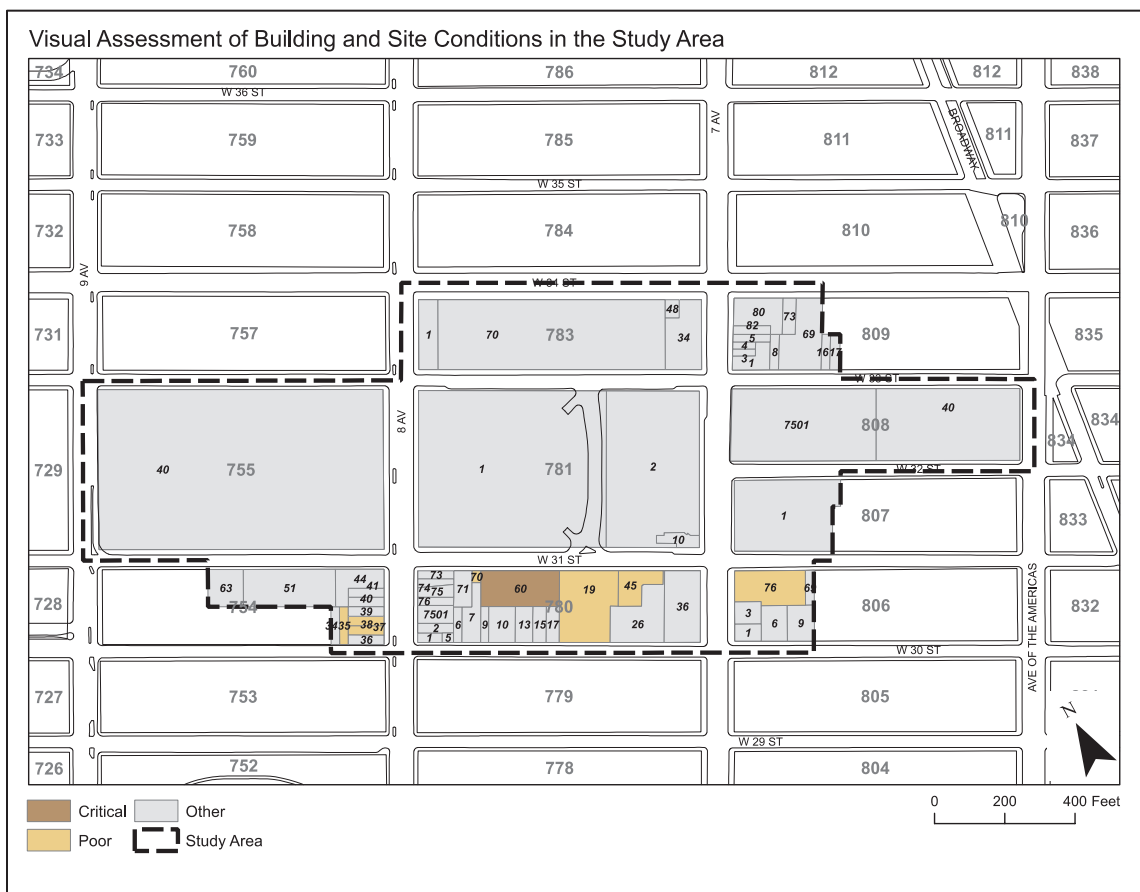
There is also Madison Square Garden. App'x M. Whatever one's view of the arena, it is very much a going concern, an active venue for sports and entertainment. And just outside the Project Area, in Herald Square, is the Hotel Martinique, a Beaux-Arts hotel built in 1898 and meticulously restored by Hilton this year. App'x Fig. N. It is a model for the adaptive reuse of historic structures like those ESD plans to demolish. Ex. QQ.

There is an abundance of thriving retail in the area. In Herald Square is Macy's, one of the world's great department stores and a National Historic Landmark. App'x Fig. O. There are also Gimbels (now known as the Manhattan Mall), an Old Navy, a Crocs, a Target, and a host of other stores not found in blighted areas. Indeed, Old Navy and Target opened branches in the Atlantic Terminal Mall *after* ESD completed a Land Use Improvement Project there. Plain and simple, these are not substandard and insanitary conditions.

To qualify as a Land Use Improvement Project site, the ratio of blighted to non-blighted area must be far higher than it is in the present case. In a decision permitting the inclusion of non-blighted blocks within the Atlantic Yards project area, the court noted that 86 percent of the land in the project area and 70 percent of the parcels—51 of 73 parcels—qualified as blighted. *Develop Don't Destroy (Brooklyn) v. Urban Development Corp.*, 2008 N.Y. Misc. LEXIS 7645 (Sup. Ct. N.Y. Co. 2008), *aff'd*, 59 A.D.2d 312 (1st Dep't 2009); *Goldstein v. Pataki*, 516 F.3d 50, 60 (2d Cir. 2008).

Here, by contrast, ESD's own Neighborhood Conditions Study found that only seven percent of the land in its Study Area ("Study Area")—coterminous with the GPP Project Area—and only eight of the area's 61 lots, were in "poor" or "critical" condition. The *only* building deemed to be in "critical" condition, the Penn Station Service Building, is owned by Amtrak. Ex. J at 48 (Fig. E-3).

The following diagram overlays these lot conditions onto ESD's site plan and demonstrates just how little of the area is in "critical" or "poor" condition:



Moreover, according to the FEIS, conditions have *improved* since the Neighborhood Conditions Study was conducted in February 2021—despite the downward economic pressures of the pandemic. In a July 2022 addendum to the survey, ESD changed two of the lots from “fair” to “good,” and one from “poor” to “good.” Ex. C-9 at 26-40.

The GPP attempted to obscure these numbers with the statement that the Study Area contains a “high prevalence of buildings in either poor or critical condition.” Ex. J at 71. But in no ordinary understanding of English is eight of 61 a “high prevalence.” Moreover, ESD failed to distinguish the sizes of the buildings—between, for example, a 23-foot-wide, two-story shop (234 West 30th Street) and a 412-foot-wide, 57-story office tower (Penn 1). The presence of a few small, empty storefronts in a nine-block Study Area hardly justifies leveling the entire neighborhood.

ESD's only remotely plausible claim is that Penn Station itself is blighted. But the statute requires that the "substandard and insanitary area" be "*the area in which the project is to be located.*" UDCA § 10(c)(1) (emphasis added). ESD's attempt to satisfy that requirement by drawing the Project Area to include Penn Station directly contradicts the agency's entire SEQRA segmentation strategy: to *exclude* Penn Station from the environmental review.

Here, as elsewhere, ESD tries to have it both ways. On the one hand, it needs to claim that Penn Station is *within* the relevant area to meet the blight requirement under UDCA. On the other, it needs to claim that it is *outside* the area to avoid a SEQRA review of the proposed Penn Station. But agencies cannot be given *carte blanche* to define the relevant area without regard to where the project actually lies. If the station is excluded from SEQRA review, it must be excluded from UDCA review. But if it does, the GPP would even more clearly fail to qualify as a Land Use Improvement Project.

2. Economic Stagnation

ESD is not only unable to satisfy the requirement that the condition of the buildings be "substandard and insanitary"; it is also unable to satisfy the requirement that the area's condition "tends to impair or arrest the sound growth and development of the municipality." UDCA § 10(c)(1).

New construction and renovation flatly contradict ESD's stagnation argument. In 2013, the owners of Madison Square Garden completed a billion-dollar renovation of the arena. The owner of the former garment factory loft at 251 West 30th Street recently completed a multimillion-dollar overhaul of the space. And Vornado itself is now in the midst of a \$2.4 billion renovation of Penn 1, Penn 2, and the Farley Building. Ex. I at 14. In November, after MSG signed a 20-year lease at Penn 2, Vornado's chairman announced:

“MSG’s commitment to PENN 2 continues the momentum we are generating in the PENN DISTRICT, where we are creating a one of a kind, next generation work environment at the heart of New York City’s thriving West Side.” Ex. SS at 1. Outside the Project Area, Hilton’s decision to painstakingly restore the 1898 Hotel Martinique reflects the company’s confidence in the future of the neighborhood.

Even if there were no recent construction activity, the premise of ESD’s stagnation argument—that the absence of new Class A construction signals blight—is fundamentally unsound and would render countless New York City neighborhoods “blighted.” Class B and Class C buildings are an integral part of New York’s entrepreneurial infrastructure. ESD simply disregards the important economic development policy of “adaptive reuse.” Pre-war buildings are precisely the spaces that support start-ups and small businesses and now, increasingly, big tech companies. Consider Google’s \$2.1 billion purchase of the St. John’s Terminal campus, a former freight terminal near the Holland Tunnel, or Amazon’s \$1.15 billion purchase of the Lord & Taylor building on Fifth Avenue. *See* Exs. TT, UU. Closer to home, there is Facebook’s lease of 730,000 square feet in the Farley Building. Ex. VV. Indeed, the multimillion-dollar renovations at 251 West 30th Street, now threatened with demolition, were designed precisely to create open space plans for high-tech start-ups. Ex. QQ.

To the extent that there is any stagnation in the Project Area, the Neighborhood Conditions Study provided the best explanation: the condition of Penn Station itself. Ex. J at 26-32. The solution is not to demolish the entire neighborhood in one blunderbuss action, in the manner of the discredited urban renewal projects of the 1960s. Rather, it is to trust that,

when the station is brought back to life, the free market, guided by the hand of city planners, will continue to increase the vitality of the area.

* * *

In the FEIS, ESD disingenuously claimed that current zoning left no room for owners to further develop their properties. It asserted that five of the eight Development Sites—1, 2, 3, 6, and 8—would remain *unchanged* through the end of the study period, 2044, if the City’s zoning laws were left as they are. Ex. C-4 at 2-12. In other words, even with ESD’s hopeful projections about the commercial real estate market, there would be no development at all on those sites for at least the next 22 years.

ESD appears to have relied on a “lot utilization” analysis. Generally, properties that utilize less than half of their development rights are deemed “soft sites,” i.e., sites that are likely to be developed even under the existing zoning. Ex. K at 58. Contrary to the FEIS, Sites 1 and 6 are full of soft sites. Site 1, for example, contains an 8,363-square-foot lot that is currently a surface parking lot. It could be a nine-story building. Site 1 also contains three contiguous lots in common control with a combined lot size of 7,407 square feet. Right now, there are two- and three-story buildings on them, but owners could build structures more than three times that size, and almost certainly would, even without the GPP. Similarly, Site 6 contains a nearly 20,000-square-foot lot, now a three-story Old Navy, and an 11,000-square-foot corner lot, now a three-story Forever 21—also soft sites.²⁴ The bulk on both sites could

²⁴ ESD simply accepted Vornado’s representations about what it would do in the absence of the GPP. According to the FEIS, Vornado “has *indicated* that it would not redevelop the sites absent the density afforded under the GPP.” Ex. C-9 at 26-110 (emphasis added). “Indicated”? Nowhere in the GPP or FEIS is there evidence that it kicked the tires on any such claims.

be quadrupled under existing zoning. The pleas of the owners for more development rights are founded in greed, not economic necessity.²⁵

IV. PACB'S DECISION TO AUTHORIZE ESD TO ENTER INTO A PILOT REVENUE-SHARING AGREEMENT WITH THE CITY WAS ARBITRARY AND CAPRICIOUS AND IN VIOLATION OF THE PUBLIC AUTHORITIES LAW

Public Authorities Law § 51(1) requires ESD to obtain PACB approval “to make any commitment, enter into any agreement or incur any indebtedness for the purpose of acquiring, constructing, or financing any project.” ESD’s application must state the “terms” and “conditions” of the financing, and PACB may not approve the application unless ESD can identify “commitments of funds” sufficient to pay for the project. *Id.* § 51(3).

PACB’s authorization of a PILOT agreement with the City is defective for two reasons. First, ESD’s application failed to state the actual “terms” and “conditions” of the agreement for which it sought PACB approval, as the statute requires. Indeed, there *is* no agreement, only the non-binding PILOT Letter. Second, even if the PILOT Letter were binding, ESD failed to demonstrate that it had secured the “commitments of funds” necessary to proceed with the GPP. It was arbitrary and capricious for PACB to approve an agreement before it did.

By its own terms, the PILOT Letter “does not create or give rise to any contractual or other legally enforceable rights, obligations or liabilities of any kind.” Ex. T at 6. It is a memorandum of understanding, which expressly omits terms that are essential to creating an enforceable contract. Moreover, nothing in either the PILOT Letter itself or the PACB

²⁵ See Janes Aff. ¶¶ 26-38. The sloppiness of ESD’s analysis is reflected in the error-riddled lot utilization table in the Neighborhood Conditions Study. Ex. J, Appendix 2. The table misstates the permitted maximum development for 11 lots and misstates the permitted bonuses for eight lots. Indeed, it lists different rules for lots in the same zoning district, which cannot be.

Resolution prevents ESD from modifying the terms that *are* set out in the letter. In other words, PACB voted to approve an agreement that did not yet exist. That violated the statute.

Even if the PILOT Letter were a binding agreement, it was arbitrary and capricious for PACB to approve it. PACB failed to consider the central question here: Could the agreement *limit or compromise* ESD's ability to provide "commitments of funds" sufficient to pay New York's share of the Penn Reconstruction and Penn Expansion? Public Authorities Law § 51(1). Without the missing cost and revenue analyses, PACB could not possibly answer that question, just as ESD could not.

The PILOT Letter in its present form would, in fact, compromise ESD's ability to secure the necessary commitments. By its terms, only 12.5 percent of PILOT revenue could be used to defray the costs of the Penn Reconstruction and Penn Expansion, and PILOT abatements could be as high as those available at Hudson Yards. Perhaps most worrying, in the event of PILOT revenue shortfalls, the PILOT Letter contemplates that New York State would be responsible for both debt service and ESD's required payments to make the City whole. In the current commercial real estate market, those shortfalls appear likely and could be significant.

ESD failed to supply PACB with close to everything it needed to determine whether ESD had secured the required financial commitments, and whether the terms of the PILOT Letter, if enforceable, would help or hurt in securing them. To put it simply, ESD could not say what it had, and therefore what it needed. PACB's public agenda for the day of the vote is what poker players call the "tell": Of all the items on this agenda, this was the only one in

which the applicant could not even state the amount of the bond it would seek. Instead, the line read: “\$ N/A.” Ex. V at 2.²⁶

CONCLUSION

In the end, the foundational problem with the GPP remains: ESD refused even to try to demonstrate that the GPP would serve its essential purpose—to generate revenue sufficient to pay for the renovation and expansion of Penn Station. For two years, it has forged ahead, willfully ignoring the facts and the law.

SEQRA and UDCA—and the most basic principles of governmental decision-making—require that ESD await a comprehensive review of the Master Plan, including a comprehensive review of that project’s funding. Only at that point would ESD have the information to determine whether this plan—to bulldoze an entire neighborhood and erect out-of-scale and, for the foreseeable future, unnecessary commercial towers—is a rational way to help pay for this City-defining capital project.

²⁶ Although ESD appears to have construed the Public Authorities Law not to require the panel’s approval of the GPP as a whole, the statute defines its authority as the review of “proposed projects.” Public Authorities Law § 51(3). That phrase is more fairly interpreted to refer to the GPP, not its individual components. In the present case, it was the GPP, not any individual tower, that was the subject of the SEQRA environmental review and the public hearings held under both SEQRA and UDCA. And it was the GPP that the ESD Directors voted to approve, and then sought PACB’s authorization to bond. This was an integrated plan for the entire area surrounding the station, not an assemblage of individual developments. Even if it has been Albany’s practice not to require PACB approval of the GPP as a whole, consideration of the entire “proposed project”—an integrated plan for the neighborhood—was required in this instance. *Id.*

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APPENDIX



Figure A (Moynihan Train Hall)



Figure B (Penn 1)



Figure C (Penn 2's nearly completed redesign)



Figure D (Equitable Life Assurance Company Building)



Figure E (St. John the Baptist Roman Catholic Church)



Figure F (Stewart Hotel)



Figure G (Penn Terminal Building)



Figure H (Penn Station Service Building)



Figure I (Fairmont Building)



Figure J (Gimbel Brothers Skybridge)



Figure K (Hotel Pennsylvania)

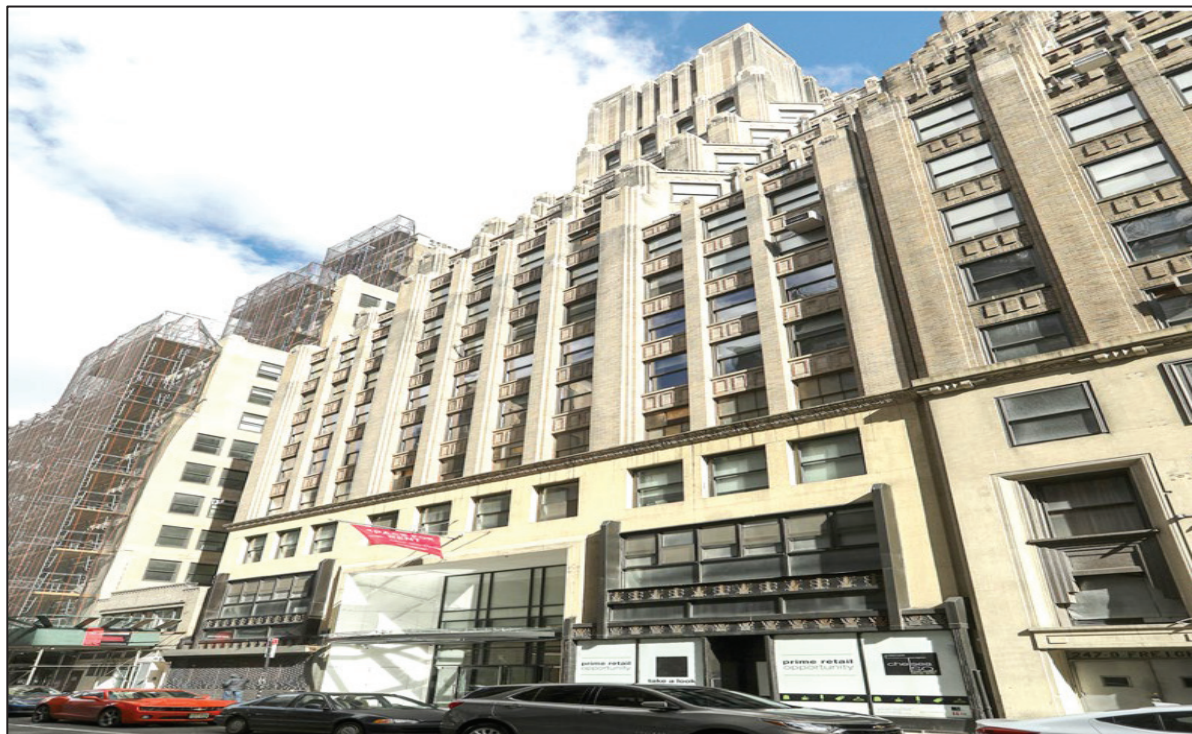


Figure L (Industrious Building)



Figure M (Madison Square Garden)



Figure N (Hotel Martinique)



Figure O (Macy's)