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 41 (Billings, J.)
Motion No. 001

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 larger "Master Plan" for Penn Station, which also includes: (1) the reconstruction of the existing station (the "Penn Reconstruction"); (2) the potential expansion of the station south of 31st Street (the "Penn Expansion"); and (3) related transit and public realm improvements. Ex. A at 1.[1] No one questions that the station — grim, squalid, unsafe — is in need of an overhaul. But ESD's plan is a slipshod effort, indifferent to the impacts it would have on both the neighborhood and the City as a whole, and almost certain to fail in its stated objectives.

According to ESD, the primary purpose of the GPP is to generate "essential revenue" to help fund the Master Plan. Yet ESD never provided evidence that the GPP will actually serve this purpose. Indeed, in both the GPP and

[1] References to Exhibits A to WW are to exhibits attached to Charles Weinstock's October 27, 2022 affirmation. References to Exhibits XX to DDD are to those attached to his December 14, 2022 affirmation ("Weinstock Aff.").

the Final Environment Impact Statement ("FEIS") required by the State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law § 8-0101 *et seq.,* ESD disavowed any obligation to supply such evidence. This was arbitrary and capricious agency action, an abuse of discretion, and in violation of law under CPLR § 7803(3).

ESD's actions also violated the SEQRA prohibition on "segmentation" — conducting separate environmental reviews of individual elements of an "action" as though they were independent of or unrelated to the others. The "action" in this case is indisputably the Master Plan, and by severing consideration of the GPP from the Master Plan's other elements, ESD illegally segmented its SEQRA review.

Finally, ESD violated the statute that grants it authority to override local zoning laws, the Urban Development Corporation Act ("UDCA"), Unconsolidated Laws § 6252 *et seq.* In order to exercise that authority, ESD was required to demonstrate that the GPP qualifies as either a "Land Use Improvement Project" or a "Civic Project." But it failed to meet the essential requirement of a Land Use Improvement Project — that the GPP's project area (the "Project Area") is "substandard or insanitary," *i.e.*, "blighted." UDCA § 10(c)(1). According to ESD's own Neighborhood Conditions Study, just eight of the Project Area's 61 lots are in "poor" or "critical" condition. 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").

Nor can the GPP qualify as a "Civic Project" because ESD did not make "adequate provision" for payment of "the cost of acquisition, construction, operation, maintenance and upkeep" of the project. UDCA § 10(d)(3). ESD did not even provide adequately for the project's acquisition and construction costs, much less its operation, maintenance, and upkeep costs.

In addition to these violations, the state panel that oversees ESD's capital projects, the Public Authorities Control Board ("PACB"), improperly permitted ESD to enter into a revenue-sharing agreement with the City. Public Authorities Law § 51 expressly limits PACB's jurisdiction to the consideration of one question: the adequacy of financing for the project as a whole. The board has no authority to approve only one of many components of a project's financing.

* * *

The one certain effect of the GPP will be to enrich the owners of the eight parcels covered by the project — in particular, Vornado Realty Trust ("Vornado"), which owns or controls four of the eight parcels (and part of a fifth). Vornado was intimately involved in the development of the GPP, and, over and over, pushed the agency to elevate Vornado's interests above the State's. As the Weinstock Affirmation describes, this was not governmental action; it was an

unlawful joint venture between a state agency and the private company that would benefit — extravagantly — from the plan. Weinstock Aff. ¶¶ 45-58.[2]

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, responding to the needs of all New Yorkers. The City Club was a signatory to the Comments and Objections.

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[2] A related case, *Weinstock v. N.Y.S. Urban Development Corp.,* Index No. 157448/2022 (Sup. Ct. N.Y. Co. 2022) (Billings, J.), challenges ESD's refusal to produce, among other items, more than 200 pages of documents relating to Vornado.

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

Respondents

Respondent UDC, doing business as ESD, is a public benefit corporation promoting economic development in the State of New York.

Respondent PACB is the state panel that oversees twelve public benefit corporations, including UDC, and must approve all financing and construction projects by those corporations.

FACTS

This memorandum incorporates by reference the discussion of facts in the Weinstock Affirmation.

ARGUMENT

I. ESD'S DECISION TO OVERRIDE THE CITY'S ZONING LAWS WITHOUT DETERMINING THAT THE OVERRIDE WAS NECESSARY TO FINANCE THE PENN RECONSTRUCTION AND EXPANSION WAS ARBITRARY AND CAPRICIOUS, AN ABUSE OF DISCRETION, AND IN VIOLATION OF LAW

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).

Here, ESD did not simply err in its consideration of the relevant facts; it refused even to consider them — in particular, whether the GPP could serve its stated purpose of generating "essential revenue" for the Penn Reconstruction and Expansion. Ex. A at 1. ESD's Final Scope of Work states:

> 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.

Experts and stakeholders properly criticized the omission. The chair of the City Planning Commission stated that GPP funding "is a topic that must be concretely resolved prior to affirming the GPP." Ex. CC at 2. The City's Independent Budget Office and the State Comptroller made the same point. Ex. DD at 18; Ex. EE at 1. The sternest judgment came from the former Lieutenant Governor and former UDC and Metropolitan Transportation Authority ("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." Affidavit of Richard Ravitch, sworn to Oct. 19, 2022 ("Ravitch Aff."), ¶ 3.

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 the City's zoning on this scale.

Funding the transit and public realm improvements by themselves would certainly not be a sufficient reason to go forward with the GPP. According to ESD, that would cost only $2 billion. Weinstock Aff. ¶ 19; Ex. Q at 1. Since New York would be required to contribute just a quarter of the $2 billion, its bill would be $500 million. In the context of a project this large, that is small potatoes, and could not conceivably justify increasing the permitted floor area of these eight sites by 133 percent. Affidavit of George M. Janes, sworn to October 24, 2022 ("Janes Aff."), ¶ 4.

The only remotely plausible justification for the GPP is that it will provide essential funding for the Penn Reconstruction and Expansion.

B. ESD Made No Cost Estimates for the Penn Reconstruction and Expansion or Revenue Estimates for the GPP

To succeed in its argument, ESD must answer three questions, none of which it answered:

1. How much will the Master Plan cost?
2. How much have the other governmental agencies and entities committed to contribute?
3. How much revenue will the GPP itself generate, and when?

1. Master Plan

Neither the GPP nor the FEIS supplied even a rough cost estimate for the Master Plan. ESD's problem, of course, was that it had no idea what the

station would finally look like. As a result, ESD wrote, the Railroads could develop "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).

But with such ranges, it is impossible to make an informed judgment about how much revenue the GPP will need to produce, and thus how large the new towers will need to be in order to provide it. ESD's ninth inning estimate of $22 billion for the Master Plan flies in the face of its admission that there are "large cost ranges." Weinstock Aff. ¶¶ 18-19.

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." N.Y.S. Department of Environmental Conservation, *SEQR Handbook* (4th ed. 2020), dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf, Ch. 2(D) at 115. This the GPP did not provide.

2. Other Revenue Sources

ESD has *no* financial commitment from any of its partners. Weinstock Aff. ¶¶ 20-24.

3. Revenue from the GPP

The most remarkable omission, however, is a revenue estimate for the project itself. The *only* number ESD offered before approving the FEIS and GPP was a $2 billion best-case scenario for revenue up through the year 2030. But that figure was quickly debunked and, in the FEIS, ESD withdrew it. Weinstock Aff. ¶¶ 25-27. Mr. Weinstock's affirmation details the errors in ESD's analysis of its potential revenue sources. *Id.* ¶¶ 28-29.

ESD should not be permitted to rely on the half-page table it issued *after* voting to approve the FEIS and GPP (and after the public had an opportunity to comment). First, the numbers were not supported by facts or argument. *Id.* ¶¶ 30-33. Even if they were, it is settled New York law that *post hoc* rationalizations may not be used to justify an agency's earlier decision. 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 Associated General Contractors v. N.Y.S. Thruway Authority*, 88 N.Y.2d 56, 75 (1996); *Tessler v. City of New York*, 38 Misc. 3d 215, 228 (Sup. Ct. N.Y. Co. 2012).

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 not only failed to demonstrate that the GPP will raise sufficient revenue for Penn Station; it also failed to demonstrate that the revenue will arrive

in time to serve its purpose — if indeed it will ever arrive. Weinstock Aff. ¶¶ 34-37.[3]

SEQRA provides that an agency considering a project's impacts must assume a "reasonable *worst-case* development scenario" — one in which things go wrong and the adverse impacts are most substantial. N.Y.C. Mayor's Office of Environmental Coordination, *CEQR Technical Manual* (Dec. 2021), www1.nyc.gov/site/oec/environmental-quality-review/technical-manual.page, Ch. 2(B), § 400. In this case, such a scenario would have to include a reasonable worst-case *schedule*.

Directly on point is *Develop Don't Destroy (Brooklyn) v. Empire State Development Corporation*, 94 A.D.3d 508 (1st Dep't 2012), a SEQRA case challenging ESD's Atlantic Yards redevelopment. The First Department held that the agency's decision to change the projected completion date without preparing a Supplemental EIS to consider the impacts of the change "lack[ed] a rational basis and [was] arbitrary and capricious." *Id.* at 510.

There, as here, the agency knew that an economic downturn had rendered its projections inaccurate and yet refused to revise them. In the present case, the argument against ESD's actions is even stronger. There, the developers

[3] The FEIS projects that the station will be completed by 2033 and the towers by 2044. Ex. C-4 at 2-9 to 2-10, 2-21.

at least had a deadline. Here, indefensibly, ESD empowered Vornado to set its own schedule:

> [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, Appendix at A-9 (emphasis added); *see also* Ex. C-2 at S-34. It is simply disingenuous for ESD to claim, *after delegating the scheduling to Vornado*, that the current timetable represents a reasonable worst-case scenario.

Last month, Vornado's chairman, Steven Roth, made clear that the assumptions underlying ESD's construction schedule were flimsy at best. At a Q3 earnings call, Roth revealed that he has no plans to move ahead with the development of *any* of his sites. When an analyst asked him when he expected to move ahead, even with the first of the proposed towers, he could not give an answer:

> I'm going to duck the question. A couple of things, I did say in my prepared remarks that *the current environment makes ground-up development very difficult*, and I meant it. So that's number one. Number two is in terms of *changing uses* and what have you — that's not something we're going to get into now.

Ex. ZZ at 19 (emphasis added).

The "current environment" is bad indeed. 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. HH 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. Ex. G at 2. Earlier this month, Facebook's parent company, Meta, announced that it will vacate 250,000 square feet of office space at Hudson Yards. Ex. BBB.

At the same time, the supply of office space in the area continues to grow, promising ever 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. And with the very concept of the modern workplace in flux, there are no grounds for optimism, even after the pandemic ends. "[R]emote work is here to stay," said Kathryn Wylde, president and CEO of the Partnership for New York City, the City's leading business group. Ex. II at 1; *see generally* Ex. JJ.

ESD has acknowledged the real consequences of these delays. They would increase borrowing costs, postpone the economic growth that ESD has promised, and above all, likely eliminate the project's ostensible benefits — revenue for Penn Station and the transit and public realm improvements (which would be located *on* the eight sites and would have to await the construction of the new buildings). Ex. C-9 at 26-61.

As such, ESD's actions in adopting the GPP amount to arbitrary and capricious decision-making.

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 *entire* action. With exceptions not relevant here, the agency may not "segment" its SEQRA review by conducting separate reviews of individual components of the action "as though they were independent, unrelated activities, needing individual determinations of significance." 6 N.Y.C.R.R. § 617.2(ah).

Clearly, the "action" in this case is funding the Master Plan. 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 as an admission that it had improperly segmented the review — ESD deleted the phrase from the FEIS.

ESD has 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.

This case meets every one of the eight criteria that DEC has set for determining whether actions must be reviewed together. *SEQR Handbook* at 53-54.

1. 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.

2. 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 in the buildings will need to be coordinated with the transit improvements elsewhere.

3. Location: They have a "common geographic location"

The Penn Expansion will be *on* the Development Sites, and the Penn Reconstruction will be across the street.

4. 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.

5. Ownership: They are under "common ownership and control"

ESD is the lead agency for the GPP, and its sister agency, the MTA, will be lead agency for the Penn Reconstruction and play an as-yet-undefined but significant role in the Penn Expansion.

6. Common Plan: They are "components of an identifiable overall plan"

ESD itself described the GPP as a "critical component" of the Master Plan. Ex. Y-1 at S-2.

7. 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.

8. 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 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 GPP and the Master Plan must be reviewed in concert.

ESD offered three arguments for why it should nevertheless be permitted to segment its review.

1. Unknowns

ESD says that it does 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 does not know the facts necessary to determine whether the GPP will serve its stated purpose, then it needs to wait until it does.

ESD argues that, in any event, it can clean things up later. Thus, for example, in the discussion of the Penn Expansion, the DEIS states:

> 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 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 phrase "additional environmental analyses and findings" refers to USDOT's review of the Master Plan under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4331 *et seq.*, which would come *after* ESD had approved the GPP. Weinstock Aff. ¶ 13. The issue is whether to approve the GPP in the first place, which requires an integrated environmental review of the Master Plan.

2. FEIS and Cumulative Impacts

Next, ESD argues that it *did* properly consider the impacts of the Master Plan as a whole. This is simply not true, as ESD acknowledges 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 is precisely ESD's lack of "available information" regarding the Master Plan that renders its consideration of cumulative impacts insufficient.

Moreover, missing from the list of the cumulative impacts that ESD claims to have considered is the financing of the station — *the essential justification for the GPP*.

3. Public Authorities Law

Finally, ESD attempts 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 (emphasis added). The argument founders for two reasons.

First, the statute expressly limits the exemption to the MTA; it does not apply to ESD. Public Authorities Law § 1266(11).

Second, even if it did apply, the GPP fails to qualify under either of the statute's two tests. Although 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, and would hardly qualify under the exception for "insubstantial additions." *Id.* Its $13 billion budget is nearly double the $7 billion budget for the Reconstruction, and it would annex all of Block 780 and much of the blocks to its east and west. *See Staten Island Rapid Transit Operating Authority v. Zagata*,

244 A.D.2d 340, 341 (2d Dep't 1997); *Martin v. Koppelman,* 124 A.D.2d 24 (2d Dep't 1987).

Nor is there a basis for ESD to assert that it falls under the second exemption from SEQRA review — that the impacts from the Penn Reconstruction will be considered in a NEPA EIS. An Amtrak representative disclosed this year that USDOT expects to prepare separate environmental reviews of the Penn Reconstruction and Expansion — *more* illegal segmentation, albeit under NEPA, not SEQRA — and that it may well decide (absurdly) that the adverse environmental impacts of the Reconstruction will not be significant enough to require an EIS. Ex. KK at 13; *see generally* Exs. LL, MM. If no federal EIS is prepared, however, the exemption that ESD relies on will not apply. The exemption's purpose is to spare the MTA the burden of conducting *two* EISs; under ESD's interpretation of the statute, it does not need to conduct even one.

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

The power to zone is "one of the core powers of local governance," *Wallach v. Town of Dryden*, 23 N.Y.3d 728, 743 (2014). In recognition of that fact, UDCA prohibits ESD from exercising its override authority unless the project meets the requirements for one of five project categories set out in the statute. UDCA §§ 6-9. ESD argues that the GPP here falls under two of the categories — "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 does not qualify as a Civic Project because UDCA requires 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)(3). As described above, ESD failed to supply any of the cost and revenue estimates proving that it can pay its share of the station's construction costs, not to mention the costs of "operation, maintenance, and upkeep."[4]

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 the area is not "a substandard or insanitary area" or "in danger of becoming a substandard or insanitary area and tends to impair or arrest the sound growth and 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).

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[4] The GPP also fails 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)(1), (4). If USDOT decided not to go forward with the Penn Expansion, *no* part of the station would be on the Development Sites.

Agencies are not free to decree, without support, that a neighborhood is "substandard" or "insanitary." Addressing the issue in an eminent domain case, 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. Vornado's own chairman refuted ESD's claim:

> 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.

Ex. I at 14.[5] Daniel Biederman, 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.

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[5] Meanwhile, when it has served his purposes, Roth has endeavored to *create* blight, hoping to buttress the claim that a neighborhood is irredeemable and needs to be overhauled. 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

Mr. Biederman's judgment is confirmed by the architectural survey of the Project Area conducted by the urban planning and zoning consultant George M. Janes, described in his affidavit. Janes Aff. ¶¶ 6-16. The survey begins with Moynihan Train Hall, 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. Both are now undergoing extensive renovations. Janes Aff. ¶¶ 8-9. For 2022-23, the City Department of Finance's assessed value of Penn 1 was $786,869,000; the assessed value of Penn 2 was $495,604,000.[6]

The Development Sites include seven historic structures listed or eligible for listing in the State and National Registers of Historic Places, all of which would be demolished – including St. John the Baptist Roman Catholic Church on 30th Street, a French Gothic structure built in 1871-72 by the architect Napoleon LeBrun. *Id.* ¶¶ 10-11.

There is also Madison Square Garden. 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, Herald Square is a thriving retail center,

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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.*

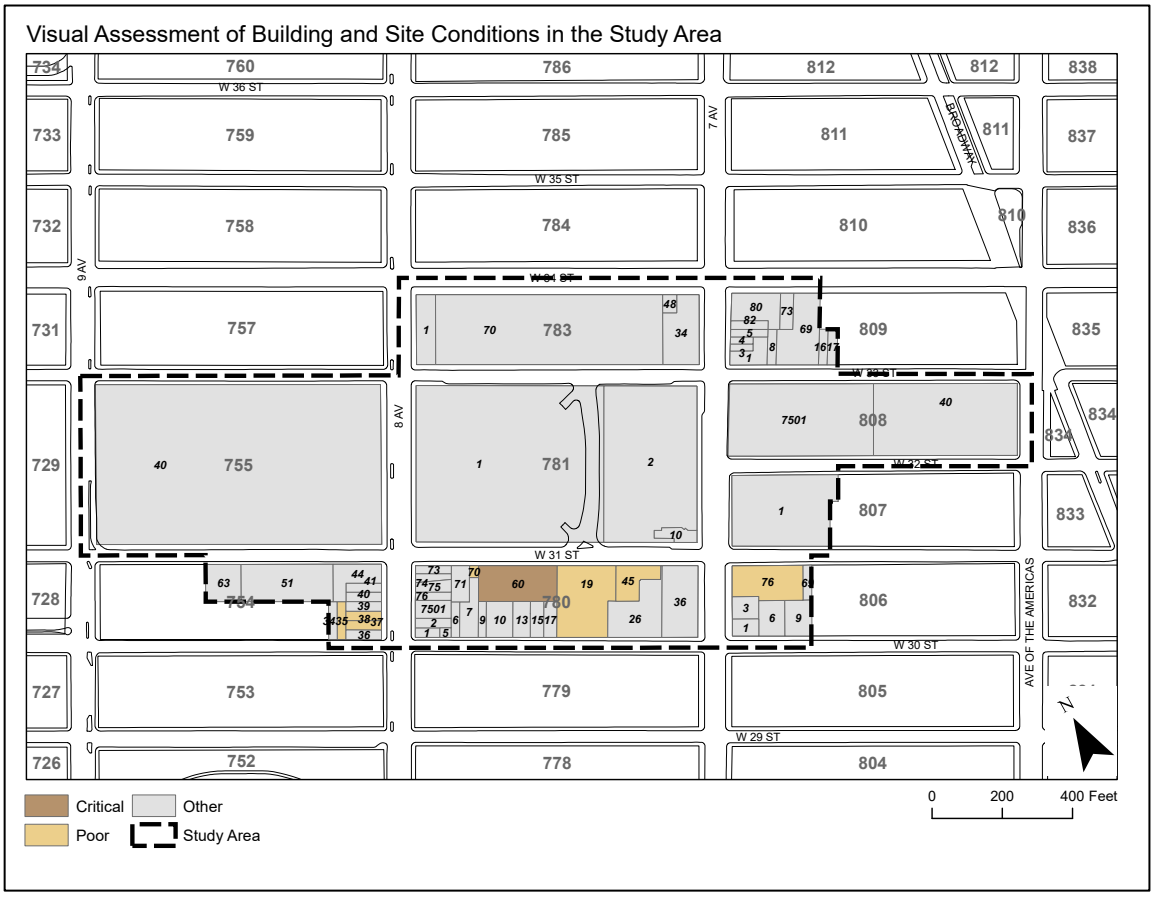
[6] a836-pts-access.nyc.gov/care/datalets/datalet.aspx?mode=asmt_fin_2023&sIndex=2&idx=1&LMparent=20.

anchored by Macy's, one of the world's great department stores and a National Historic Landmark. *Id.* ¶¶ 14-16.

Although a blighted project area may include non-blighted buildings, the blighted/non-blighted ratio 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 Neighborhood Conditions Study found that only seven percent of the land in its "Study Area" — coterminous with the GPP's 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); *see* Janes Aff. ¶¶ 17-18.

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



Janes Aff. ¶ 17.

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; *see* Janes Aff. ¶ 18.

To be sure, Penn Station itself may be 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). Here, the station is not within that area. ESD's attempt to satisfy the 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.

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 should not 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 is, the GPP cannot qualify as a Land Use Improvement Project.

2. Economic Stagnation

Nor does the GPP meet the alternative threshold for qualifying as a Land Use Improvement Project – that the area is at least "in danger of *becoming*" substandard and insanitary. UDCA § 10(c)(1) (emphasis added). To qualify, ESD must also demonstrate that the area "tends to impair or arrest the sound growth and development of the municipality," *i.e.,* that it is economically "stagnant." *Id.*

New construction and renovation in the area flatly contradict the stagnation claim. In 2013, the MSG owners 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. Vornado itself is 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. Just 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. Ex. QQ. So too does Hiwin USA's new 16-story residential building one block south of the Farley Building, which is now nearing completion. Ex. AAA.

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. 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/Meta's lease of 730,000 square feet in the Farley Building. Ex. NN at 4. 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.[7]

IV. PACB VIOLATED THE PUBLIC AUTHORITIES LAW BY AUTHORIZING ESD TO ENTER INTO A PILOT AGREEMENT WITH THE CITY BEFORE APPROVING THE FINANCING OF THE GPP AS A WHOLE

Public Authorities Law § 51(1) requires ESD to obtain PACB approval of the "financing and construction" of all ESD projects. PACB's jurisdiction, however, is strictly circumscribed:

> The legal authority of a member of the [PACB] pursuant to this section is *solely* to determine whether the issuing authority has demonstrated that there is the *commitment of funds sufficient to finance the acquisition and construction of the project* subject to approval.

Id. § 51(6) (emphasis added); *see also id.* ¶ 51(3).

PACB made no such determination in this case, and the determination it *did* make — approving an unenforceable revenue-sharing PILOT agreement between the State and the City — exceeded its statutory authority. PACB's sole function is to review the financing of the "project," *i.e., the GPP as a whole*. Nothing in either the statute or PACB's custom and practice permits it to segment that review, approving individual components of the project.

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[7] In the FEIS, ESD disingenuously claims that current zoning leaves no room for owners to further develop their properties, asserting 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. This is not true. Indeed, the floor area for two of the sites could be quadrupled. Janes Aff. ¶¶ 26-38.

1. Sufficient "Commitments of Funds." ESD has certainly failed to secure funding "commitments" sufficient to underwrite the work on Penn Station. Indeed, it has not secured *any* such commitments. Even the Legislature's $1.3 billion appropriation is contingent; before a bond can be issued, it must be secured by state taxes or other backing, which the Legislature has not done.

Nor have New York's partners — USDOT, New Jersey, and the property owners — made any funding commitments. The MTA has yet to apply for a USDOT grant, and New Jersey has not even *proposed* a contribution to the project, much less committed to one. Weinstock Aff. ¶¶ 20-24.

Vornado and the other owners have made no commitments either. They are not required by the GPP to actually build the towers, and no PILOT revenue would flow until they did. Moreover, if they do build, it may be decades from now, and they may decide to build significantly smaller buildings. The longer the wait, the greater the debt service. The smaller the building, the smaller the PILOT. Again, funding uncertainties. *Id.* ¶¶ 34-37.[8]

Whatever the PILOT amount may be, the PILOT Letter does not commit any percentage of it to the project. It is a memorandum of understanding, not a contract. The letter itself states that it "does not create or

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[8] Recognizing the significance of timing, the Public Authorities Law requires the applicant to present a repayment schedule: "Any application made concerning a project shall include the terms, conditions and dates of the repayment of state appropriations authorized by law pursuant to a repayment agreement." *Id.* ¶ 51(1).

give rise to any contractual or other legally enforceable rights, obligations or liabilities of any kind." Ex. T at 6. Moreover, it would impose substantial restrictions on the use of PILOT revenue — in particular, capping the amount that can be used for the Penn Reconstruction and Expansion at 12.5 percent of costs — which may actually impede ESD in securing commitments later. Weinstock Aff. ¶ 32. Understandably, PACB was not able to make the only determination the statute permitted it to make.

2. Segmentation. Even if the PILOT Letter were a binding agreement, PACB had no authority to approve it. The statute expressly limits the panel's jurisdiction to one task — determining the sufficiency of the financing for the "project." Public Authorities Law § 51(1). It does not give PACB the authority to approve a PILOT agreement alone — one that ESD acknowledges can be only a portion of the project financing.

For the same reason, it does not have the authority to invite ESD to return later for piecemeal approval of individual development agreements. Ex. W at 19. The prohibition on segmentation is a natural corollary of the statute's requirement that the applicant present "commitments" sufficient to finance the project. ESD's justification for a redevelopment plan on this scale is that, in order to fully cover New York's share of the Penn Station work, it is necessary to grant additional development rights to the owners of *all eight sites*. Ex. A at 30. ESD thus implicitly recognizes the insufficiency of approving individual development agreements one by one. Even the most optimistic revenue

projections for a single site — and the amount of the corresponding bond secured by that revenue — would fall short of the commitment of funds necessary to finance the whole project, whatever its final cost may be.[9]

PACB's public agenda for the day of the vote was what poker players call the "tell": Of all the items on the agenda, this was the only one in which the applicant could not provide a number for the project cost or revenue. Instead, the agenda line read simply: "$ N/A." Ex. V at 2.

Last week, the watchdog group Reinvent Albany announced that it had completed a review of the 1,017 applications made to PACB over the last 66 months. It found that only one other application — a modest, $4.5 million plan to build a new home for the National Urban League in Harlem — did not supply a number. The fact that 1,015 out of 1,017 applications — 99.8 percent — did supply the number illustrates just how obvious it was that the statute required it. "$ N/A" is not enough. Ex. DDD at 1-2.

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[9] Public Authorities Law § 2824(8) requires public authorities to establish a "finance committee to review proposals for the issuance of debt by the authority and its subsidiaries and make recommendations." ESD has such a committee, but there is no evidence that (1) ESD drafted a debt proposal, (2) the finance committee reviewed it and made recommendations, or (3) ESD sent either that proposal or a revised one to PACB.

CONCLUSION

For these reasons, the Court should annul the GPP and FEIS.

New York, New York
December 14, 2022

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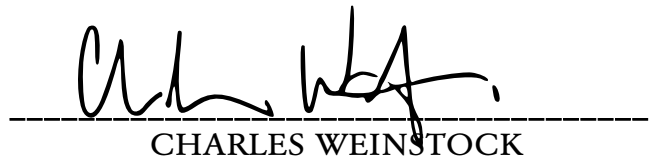
RULE 202.8-b CERTIFICATION

I hereby certify that the total number of words in this memorandum of law — including the point headings and footnotes and excluding the case caption, table of contents, table of authorities, signature block, and this certification — is 6,989 in compliance with Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and County Court.

New York, New York
December 14, 2022



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